Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

the general part —

liability and defences

Working Paper 29

Canada

THE GENERAL PART:

LIABILITY AND DEFENCES

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Catalogue No. J32-1/29-1982
ISBN 0-662-51429-7
Reprinted 1983

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Notice

This Working Paper represents a first attempt of the Commission to present a significant portion of the General Part of a revised Canadian *Criminal Code*. In this document the Commission attempts to express those fundamental principles of criminal liability and defences which are here considered, in a highly comprehensive draft with explanatory commentaries. In presenting such a draft which reaches to the full logical extent of those fundamental principles, the Commission seeks responses from all members of the judiciary, legal profession, legislative bodies and the public at large who would care to comment on it. In this instance, as with the remaining portions of the General Part, the Commission will formulate its Report to Parliament at a later date, after taking into account public response, and after having reviewed a number of the substantive offences and procedural elements of Canadian criminal law.

The Commission would be grateful, therefore, to receive comments addressed in writing to:

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Numerous people have helped to contribute to this Working Paper. There were numerous discussions and meetings with the Advisory Panel on Criminal Law, who carefully considered with us the paper in its entirety. The Commission gratefully acknowledges all these contributions. We also acknowledge the special contribution made by the late Sir Rupert Cross who discussed many aspects of the paper with us. In addition, we thank the following:

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Foreword

This Working Paper on the criminal law's *General Part: Liability and Defences* is the result of a considerable investment of work and time on the part of successive Commissioners, our advisers, research staff and, to a lesser but still important extent, many outside consultants. Accordingly, the proposals expressed in this paper have been finely sifted by the present Commissioners as well as by former Commissioners whose terms ended during the course of this major study. Constant, innovative and intelligent have been the labours of our project co-ordinators, Professors Patrick Fitzgerald and Jacques Fortin, in the development of this project.

Because this project has been so finely sifted by a succession of Commissioners and outside consultants, it is inevitable that not every proposal expressed in this Working Paper engages the full and complete assent of every Commissioner. What does engage our unanimous assent is the utility and desirability of according codified expression to the liabilities and defences inherent in Canadian criminal law. A thorough review of Canadian criminal law has been proposed by this Commission and has been emphatically accepted by the federal and provincial governments of Canada — an acceptance echoed by the judiciary, the law faculties, the public and the communications media. This Working Paper constitutes an important part of that thorough review.

Reasonably, we anticipate that the important and innovative proposals expressed in this document will not all generate unanimous public and professional agreement. These proposals deserve an objectively critical reading because they proceed from a serious and major study of liabilities and defences in Canadian criminal law. In a large, if not literal, sense the fruits

of this study and of the whole review process can better ripen into marked improvements — that is, reform — of Canadian criminal law, through the expression of our readers' thoughtfully considered responses to, and opinions on, the proposals published in this Working Paper.

The subject is so large and complex that we cannot present a whole and discrete package of unanimous tentative recommendations which could be the complete subject of one whole reform statute. We have decided not to go behind closed doors and close off all consultation for five years, and then to disgorge a Criminal Code wholly and hopefully unanimously of our own sole making. Rather, we have to produce a sequence of parts of the reviewed and prospectively reformed criminal law for public and professional response from time to time. This is a big part, and the Commission's final recommendations to Parliament on liabilities and defences will have to be made to fit with the other parts of the sequence of studies, reviews and recommendations.

This Working Paper is presented in the spirit and under the exigencies above mentioned. We now need the best cerebral efforts of our readers in critical response, based on their knowledge, logic and experience. We need, too, the general public's perceptions of how near to, or far from, the mark these proposals come in relation to public expectations of a clearer, simpler, more effective pronouncement of Canadian criminal law.

Introduction

This is the Commission's first Working Paper on the General Part of criminal law. As such, it deals with the most central topic of that area of criminal law: criminal liability and general defences.

Traditionally, however, the General Part covers many other topics in addition. On the one hand it contains rules about jurisdiction, interpretation and limitation of time. On the other hand it includes provisions concerning criminal participation and inchoate offences (attempt, incitement and conspiracy). In short the General Part of criminal law provides those general rules and principles relating to the scope and applicability of the detailed criminal laws found in the Special Part.

Function of the General Part

Clearly the General Part has a threefold function to perform: to organize, rationalize and illuminate the criminal law. It organizes by providing general rules which obviate the need for endless repetition in the definitions of offences — the Special Part. It rationalizes by setting out these rules logically and systematically so as to bring order and coherence to the criminal law. It illuminates by articulating basic moral attitudes which underline the law and give it overall direction.

Of all the areas of the General Part the one most clearly fulfilling this function is the chapter on criminal liability and defences. The rules on criminal liability — the basic requirements for responsibility — save the Special Part from repetitiveness and manifest the moral underpinnings of the criminal law. They do so by articulating the proposition that there can

be no criminal liability without some act, omission or other conduct and without some measure of fault or culpability — the proposition enshrined in the maxim *actus non facit reum nisi mens sit rea*. "There must", said Laskin C.J. in *R. v. Prue and Baril*,[1] "be a substantive non-geographical basis for federal legislation, and where criminal law is concerned, and especially where an offence is included in the *Criminal Code*, it is generally found in a requirement of proof of *mens rea*."

Likewise, the rules concerning general defences are central to the criminal law. These defences are impliedly included in the definitions of offences in the Special Part and so have a vital bearing on the drafting of that part. As well, they form a core of knowledge essential for the reader of the *Code* — no one can remember every criminal law prohibition but each judge and lawyer ought to have the general defences at his fingertips. Finally, they show the moral limits of the criminal law — the limits beyond which an individual may not legitimately be held criminally liable.

This chapter of the General Part, therefore, on liability and defences, has three functions to perform — to organize, rationalize and clarify the criminal law.

The General Part in the *Criminal Code*

These functions our Canadian *Criminal Code* fails to perform because its General Part lacks completeness, generality and orderly arrangement.

First, our current General Part does not achieve completeness. It leaves many matters of general relevance to the special part — e.g. recklessness is dealt with specifically under subsection 386(1) on mischief. It leaves others to common law — e.g. necessity and intoxication. Finally, by virtue of subsection 7(3), it must be supplemented by the common law.

Second, the present General Part lacks sufficient generality to obviate repetitiveness in the Special Part. It has for example

no general provision relating to *mens rea*, while at the same time *mens rea* words like "fraudulently", "intentionally", "knowingly" and "wilfully" occur in no less than two hundred and fifty sections in the Special Part. In addition there are numerous provisions in the Special Part concerning defences — e.g. subsections 253(2), 260(3), 267(3) and 378(2) on mistake, subsection 150(3) on duress and section 198 and subsection 221(2) on necessity.

Third, the General Part lacks orderly arrangement. Rules belonging to the General Part of criminal law are found in three different places — in the General Part of the *Code*, in the Special Part of the *Code* and in the common law. This scattering of the rules precludes systematic presentation and causes problems over the interrelation of certain General Part and Special Part provisions.

An Improved General Part

An improved General Part should in our view be structured on the following pattern:

Chapter I Objects and Principles

Chapter II Application and Jurisdiction

(1) classification of offences

(2) interpretation

(3) provisions concerning time

(4) jurisdiction

(5) principle of legality

Chapter III Liability and Defences

(1) liability

(2) defences

(3) corporate liability

Chapter IV Participation

Chapter V Inchoate Offences

(1) attempt

(2) incitement

(3) conspiracy.

The above topics, among others, clearly merit inclusion in a well-structured General Part patterned in the common-law tradition. At the outset it should enunciate the objects of the *Code* together with its underlying principles. Next it should contain rules governing its application and interpretation. Thirdly, it should set out rules concerning liability and general defences. Fourthly, it should determine, as a corollary of liability, the conditions allowing extension of liability to accomplices and other parties. Lastly, albeit paradoxically, it has to deal with certain offences, i.e. attempt, incitement and conspiracy, which are traditionally, by reason of their generality, excluded from the Special Part.

Liability and Defences

This Working Paper confines itself to liability and defences. It deals primarily with general defences — immaturity, mental disorder, intoxication, automatism, physical compulsion and impossibility, mistake of fact, mistake of law, duress, necessity, self-defence, protection of property and advancement of justice. It also deals, though not in the traditional language, with the requirements of *actus reus* and *mens rea*.

Admittedly, the above catalogue of defences is incomplete, and for three reasons. First, there are defences of special application, e.g. provocation, which find their natural place under the rubric of the relevant offences. Second there are defences like alibi which deny one or more elements in the charge and require no special treatment. Third there are defences like *autrefois acquit*, which raise procedural hurdles and

are more conveniently dealt with elsewhere. This chapter of the General Part, therefore, can be reserved for defences which, like mental disorder or mistake of fact, exclude liability on the ground of lack of fault.

Admittedly also, the recommended structure of the General Part reflects traditional approaches to criminal liability. Such approaches view liability in terms of positive ingredients of fault (*actus reus* and *mens rea*) and negativing factors warranting exculpation (general defences). Yet why should a General Part contain both types of rules? Could it not deal with liability and defences simply in terms of positive requirements of conduct and culpability — surely a more elegant approach viewed simply from the standpoint of abstract codification principles? Alternatively, could it not deal with the matter solely in terms of general defences, expounding liability through negative criteria as did Hale and other early writers on the common law?

Our answer is that both types of rules are necessary. Rules on defences are what practitioners primarily work with. Rules on liability are intimately related to the definitions in the Special Part, which in effect they serve to interpret. Naturally, however, because the Special Part is yet to be drafted, this Working Paper puts its primary stress on defences and gives rules on liability a necessary provisional status.

The Proposed Draft

This paper, then, focuses on the rules governing criminal liability and general defences. It presents them with sufficient generality to obviate the need for further provisions in the Special Part. At the same time it remains faithful in substance to the tradition and thrust of our present law. In other words, the proposed Draft is more a codification than a reform of the present law.

After all, the shortcomings of our present General Part relate less to substance than to form. In substance the rules are

well understood, fundamentally accepted and based on general moral propositions. In form, however, they are articulated without sufficient clarity, scattered in a variety of sources and to a large extent left entirely to the common law.

Accordingly, the changes in this paper relate mainly to form, style and arrangement. The proposed Draft attempts to be clearer, simpler and more comprehensive than our present *Code*. Sections, for instance like those on self-defence (*Cr.C.* ss. 34-35) and on defence of property (*Cr.C.* ss. 38-42) are restated more simply and more understandably. Sections on acts done with lawful authority, e.g. effecting lawful arrest, are stated broadly, leaving specifics to more appropriate chapters of the *Code* dealing with police powers. Defences like necessity and duress have been included so as to avoid the need for constant reference back to common law.

Questions of substance, however, did present themselves. Some of the general defences currently raise considerable controversy. Mental disorder and intoxication are prime examples. On these our consultations revealed such lack of consensus that in order to get further feedback we put forward alternative formulations representing in essence the different approaches currently adopted.

Limitations of the Draft

Inevitably the Draft has limitations. First, like all Working Papers, it is only tentative, and this is particularly so when final decisions can be taken only after the Special Part has been redrafted. Second, it deals only with substantive rules and not with those of procedure or evidence, though its proposals have been formulated on the understanding that the burden of proof would continue to be the same as under present law. Third, it treats only of general defences, leaving special matters, e.g. consent to death or violence, to be treated by the relevant sections of the Special Part. Fourth, it regards the proposed rules on liability as tentative until the Special Part has been redrafted. Finally, it omits reference to jurisdiction,

classification of offences and other important matters which must find their place in a complete and comprehensive General Part but which deserve separate treatment in their own right.

Given these limitations, however, the Draft in our view deserves scrutiny and comment concerning what it sets out to do. It tries to set out complex and sophisticated concepts in plain language appropriate for general understanding. At the same time it seeks to remain true to the traditions of our law, in touch with present practice and open to judicial creativity as required by a society undergoing constant change.

Criminality: Three Questions

Three questions arise regarding criminality. One is whether an individual should be criminally liable only for conduct already defined by law as an offence. Another is what, for this purpose, should count as conduct? The third is how far should an individual be criminally liable for things he did not mean to do?

The first question is here dealt with under the heading of the Principle of Legality. The second, traditionally considered as the problem of *actus reus*, and the third, traditionally seen as the problem of *mens rea*, are here dealt with together under the Principles of Criminal Liability.

I

Principle of Legality

What should be done about behaviour too novel to have attracted criminal prohibition but too wrongfully injurious to be left unpunished? Should courts or legislatures move in to prohibit such behaviour retrospectively? Or should the individual responsible for such behaviour escape because of gaps and incompleteness in the criminal law?

Something can be said in favour of a degree of retrospective lawmaking. First, the individual in question is clearly guilty of wrongdoing and in justice merits punishment. Second, to outlaw such behaviour for the future only could produce injustice — future offenders would be punished while the present offender would be the lucky beneficiary of inadequacies in the law. As observed by Viscount Simmonds in *Shaw v. D.P.P.*:[2]

> . . . When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the custos morum of the people and had the superintendency of offences contra bonos mores, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance to which my noble and learned friend, Lord Tucker, refers. Let it be supposed that, at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that, if the common law is

> powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them . . .

Compelling arguments, however, can be advanced for the opposite point of view. First, it is also unjust to penalize a person for acts legally innocent at the time of their commission. Second, it is inimical to liberty to subject the citizen to arbitrary government rather than to regulation by laws that are certain. Third, it goes against a principle enshrined in the maxim *nullum crimen sine lege, nulla poena sine lege*, adopted by many civil-law and other jurisdictions, relating to the rule of law and finally accepted by the *Cr.C.* s. 8, which provides that no one shall be convicted of an offence at common law.

In our view the principle of legality is now accepted in Canada. Indeed the principle that no one should be criminally liable except for an offence already defined by the law is the keystone of our criminal law. Accordingly in a reformulated *Code* this principle should form the starting-point as follows:

DRAFT LEGISLATION

Principle of legality

1. No one is criminally liable except for an offence defined by law.

ANNOTATION TO DRAFT LEGISLATION

The Draft begins with an explicit formulation of the principle of legality. This principle is already recognized in *Cr.C.* s. 8. Its explicit formulation in the Draft is not designed to change the substance of the law but is included in the interest of completeness.

In this regard, however, Draft section 1 is not meant to be exhaustive. Corollaries of the principle of legality remain to be defined and drafted, e.g. the application of law in space and time, the rule against non-retroactivity of criminal legislation, etc. These will find their place in sections of the General Part which will be drafted at a later date.

II

Principles of Criminal Liability

In criminal-law tradition, criminal liability involves a distinction between the physical element (*actus reus*) and the mental requirement (*mens rea*) necessary for the commission of an offence. The first requirement is dealt with in the Draft by sections 1 and 2, the second by section 3.

1. Conduct

As to the physical element, section 1 gives rise to two questions: one concerns the meaning of "conduct", the other concerns the meaning of "forbidden by law" — what is meant by *actus* and what is meant by *reus*. This second question, being the simpler of the two, is here considered first.

(1) Forbidden by Law

To incur criminal liability, clearly a defendant's conduct has to contravene the criminal law. In other words, the starting point of any inquiry into criminal guilt must be the definition of the offence with which he is charged. This fact is obviously signified by the word *reus* in the term *actus reus*. It is also intimately connected with, and for the most part covered by, the principle of legality.

This being so, a Code could logically go straight from that principle to the general defences. The principle of legality

states that no one is criminally liable except for an offence defined by law. What constitutes an offence will be laid down by the Special Part. What counts as a general defence will be laid down in the General Part. In a sense, then, there is no need to deal with *actus reus* or *mens rea*.

As argued below, however, the general principles of *actus* and *mens* merit inclusion. The need for both conduct and a particular state of mind is so fundamental that articulation of these two elements is necessary to illuminate the entire *Code*. For that reason, sections on both these principles have been included.

(2) The Need for Conduct

Some conduct on the part of the accused is rightly made a requirement for the imposition of criminal liability. Morally, people cannot be blamed except for things they do or fail to do — they cannot be blamed for things which simply happen and which they cannot help. Likewise in law they ought not to be, and are not in principle, held criminally liable except for their own actions and omissions. There has to be an *actus* on their part.

The Law

In law this need for an *actus* manifests itself in two ways. First, within the Special Part of the criminal law the various offences are invariably defined in terms of concrete verbs, e.g. every one who "kills", "takes", "defrauds", "declares", "causes", "is in possession of" and so on. Such verbs denote specific ways of acting, omitting or being.

Second, within the General Part of criminal law there evolved a general principle that there must be an *actus reus*. This principle excludes from criminal liability all occurrences not qualifying as acts on the part of an accused. Such occurrences include natural occurrences, acts of others, mere inactivity and involuntary behaviour.

Natural occurrences cause little problem in this context. No question arises of holding a defendant criminally responsible for acts of God, inevitable accidents or other events in nature. For such events no one is liable unless he caused them.

Acts of others too are relatively unproblematical. In general no one can be criminally liable for acts done by someone else. To this, however, there are three exceptions. He can incur criminal liability for the actions of another person if by force, persuasion or some other means he caused that person to perform them, if he participated in their performance or if the law specifically provides that he can be vicariously liable for them. These three exceptions are dealt with under special provisions relating to incitement, parties and vicarious liability.

Mere inactivity also in general, forms no ground for criminal liability. In criminal law, as in tort law, "not doing is no trespass". This general rule too, however, admits of exceptions in that where such inactivity amounts to an omission, there may be liability. In this context "omission" means a failure to do what is required by law. Such a requirement may arise in three ways. The law may specifically provide that it is an offence to fail to do a certain act, e.g. to stop and identify oneself after a motor accident (*Cr.C.* subs. 233(2)). It may make a more general provision, e.g. that every one undertaking to perform an act must do it if its omission would endanger life (*Cr.C.* ss. 199 and 202). Or it may, like common sense, regard a wrongful omission as a way of committing a wrongful act, e.g. in *Fagan v. Commissioner of Metropolitan Police*[3] failure to remove a motor car from a police officer's foot when so requested was regarded as a positive act of keeping the car on the policeman — an act amounting to assault.

Finally, involuntary behaviour also rules out liability in principle. Such behaviour falls into three categories. One consists of behaviour in no way qualifying as action in the ordinary sense, e.g. spasms, twitches and other reflexes. Another consists of behaviour resembling action but in fact resulting from automatism, i.e. a state of clouded consciousness due to

somnambulism, hypnosis, concussion or other such factor. The last category comprises actions done under the compulsion of another person.

These different categories of involuntary behaviour are dealt with by the law in different ways. Spasms, twitches and other reflexes raise little problem in practice. In the first place there are few, if any, prosecutions relating to them. Second, it is extremely difficult to see how such behaviour could ever come four-square within the terms of the concrete verbs used in definitions of specific offences.

Behaviour resulting from automatism has created much more difficulty. Two different approaches have been adopted to avoid imposing liability in such cases for behaviour outside the control of the accused. One is to rely on the doctrinal requirement of an *actus reus* and to so define this concept as to restrict it to acts done with volition. The other is to call in aid a special defence of automatism (see under Defences).

Similarly with actions done under compulsion there have been two approaches. One is to hold that such an act does not qualify as an *actus reus* — if *A* takes *B*'s hand and makes it strike *C*, it has been said, the striking is not the act of *B* but of *A*. The other approach is to bring in a special defence of compulsion (see under Defences).

In criminal law, then, whether liability results from Special Part provisions, from general defences or from the doctrine of *actus reus*, it requires in general some action on the part of the defendant.

Problems with the Law

Two problems arise regarding present law. The first concerns the analysis of *actus reus*. The second concerns the interrelation between the *actus reus* doctrine and certain general defences.

(a) Analysis of *actus reus*

As mentioned above, in order to rationalize the exclusion of involuntary behaviour from criminal liability, attempts have been made by theorists to define *actus reus* so as to restrict it to voluntary behaviour. This has led to various theories concerning the nature of an act, the best known to lawyers being Holmes's theory that an act is a willed muscular contraction.[4] Such theories have invariably raised more problems than they have solved. In what way are these muscular contractions willed? Is a muscular contraction really what is ordinarily meant by an act? And how does the theory deal with omissions, where there is nothing to be willed at all?

By contrast, lawmakers and judges for the most part took a more practical course. Avoiding getting ensnared in abstract theory, they provided concrete defences for involuntary behaviour, e.g. automatism and compulsion. This course had twofold merit. It proved much easier to develop a rule about exceptions to the norm (involuntariness) than to produce a definition of the norm itself (voluntariness). It also allowed courts to cope pragmatically with such exceptions on a case-by-case basis.

In our view this is clearly the course which ought to be adopted in a Code. For that reason we leave involuntary behaviour to be governed by the defences of automatism and compulsion contained respectively in sections 7 and 8 of the Draft. This being so, no need arises to provide definitions of "act" in order to restrict that term to voluntary behaviour. Regarding the need for an *actus*, it is sufficient to note that no one is criminally liable except for conduct coming within the legal definition of an offence. As to the different kinds of conduct — acts, omissions and states of being — these can be dealt with under the section concerning *mens rea* (see below).

(b) The interrelation between *actus reus* and general defences

With *actus reus*, as with *mens rea*, there is some overlap with certain of the general defences. To say that someone has

a defence of automatism is to say he did no *actus reus*. Likewise, to say he has a defence of mistake of fact is to say that he did not have *mens rea*. Clearly, then, there is no need to provide at one and the same time elaborate definitions of *actus reus* and *mens rea* and elaborate provisions concerning such defences. Indeed, to do so could cause confusion and in some cases inconsistency.

This being so, there are two choices. One would be to provide elaborate definitions of *actus reus* and *mens rea* and to omit general defence provisions. Such elaborate definitions would deal with all defences negativing *actus reus* and *mens rea*. These would include, as already pointed out, automatism, compulsion and mistake of fact. (They would not of course include excuses like duress or justifications like self-defence, which operate more by way of confession and avoidance.)

The alternative choice would be to omit elaborate definitions of *actus reus* and *mens rea*, and leave all matters negativing liability to be taken care of by general defences. This too would be a logical approach, and it would evince other merits also. First, earlier common-law authorities dealt with liability through general defences — Hale, for instance, never defined *actus reus* or *mens rea*. Second, it is through general defences that lawyers and judges generally seek to determine criminal liability in practice. Third, to emphasize defences rather than *actus* and *mens* would highlight what Hart[4a] has called the defeasible nature of criminal liability: it is not so much that an accused is not liable for what he did unless certain conditions are fulfilled — rather he will be liable unless it comes to light that there was some excuse, justification or other exonerating factor. Fourth, as Stephen[5] pointed out, there is no such thing as *mens rea*; there are only different *mentes reae* — and this holds true for *actus reus* also. Finally, satisfactory analysis of *actus reus* and *mens rea* is notoriously hard to achieve.

In our view neither alternative is wholly satisfactory. On the one hand a full array of general defences is desirable and any elaborate definition of *actus* and *mens* should be avoided. On the other, the requirement for *actus reus* and *mens rea*

constitutes such a basic principle within our criminal law that it must form, if only in most general terms, the starting-point of any rational exposition of that law.

Accordingly, we recommend that, after an initial section on the principle of legality, the *Code* should continue with two sections on *actus reus* and *mens rea*. These, however, should be couched in modern terms. The first section should simply state that conduct is a requirement for criminal liability but that, given such conduct, liability may be negated by some exemption, excuse or justification. The second, dealing with *mens rea*, is discussed below.

DRAFT LEGISLATION

Criminal liability

2. (1) No one is criminally liable for an offence unless he commits it or is a party to it.

(2) No one commits an offence except by conduct coming within the definition of that offence.

(3) Notwithstanding that a person's conduct may come within the definition of an offence, he is not criminally liable for that offence if he has an exemption, excuse or justification allowed by law.

ANNOTATION TO DRAFT LEGISLATION

This section sets out three basic principles of criminal law.

First, criminal liability can be incurred only by one who commits an offence or is a party to it. As drafted, however, subsection (1) is not exhaustive. It will have to be interpreted

in the light of the rules governing criminal participation and vicarious liability, which rules have not been drafted yet.

Second, criminal liability requires an *actus reus*. Subsection (2) expresses this common-law principle in more modern terms by setting out as a requirement for criminal liability the commission of conduct coming within the definition of an offence.

Third, as discussed above, criminal liability is a defeasible concept. Subsection (3) recognizes this by stating that, given a prohibited conduct on his part, a person is still not criminally liable if he has an exemption, excuse or justification allowed by law.

2. Mental Requirements

This question concerns the concept known in criminal-law tradition as *mens rea*. As criminal law grew more sophisticated, there emerged the principle *actus non facit reum nisi mens sit rea*. In order to be guilty it was not sufficient to do a wrongful act. The accused also had to do it with a wrongful state of mind.

This principle is clearly in accordance with our ordinary notions of morality. A person who does something wrong will not usually be held to blame unless he means to do it, knows what he is doing or at least should know what he is doing. Wrongdoing has what can be called an internal, as well as an external aspect: not only the act itself but also the motive, intent and reason for it are relevant from the moral point of view.

The Law

In law the doctrine of *mens rea* only forms a starting-point. It tells us that some wrongful state of mind is necessary for criminal guilt. It does not tell us what that wrongful state of

mind consists of. For that we have to look elsewhere — to definitions of offences, to rules relating to defences and to theoretical analysis.

First, definitions of offences. In these such terms as "maliciously", "fraudulently" and so on were so commonly used, first by judges creating the common law and later by the legislature, that it became clear, as Stephen J. observed, that the definition of every crime expressly or by implication imports some reference to a state of mind. What that state consists in is something to be ascertained by looking at such definitions.

Meanwhile the courts also worked out rules concerning general defences. One such — mistake of fact — has an intimate bearing on *mens rea*. A person labouring under mistake of fact is not guilty because he lacks *mens rea*. Accordingly, *mens rea* begins to look like absence of mistake of fact.

Theoretical analysis, however, has produced different definitions some of which have gained judicial recognition. These were expressed in terms of intent and recklessness. Alternatively they were articulated in terms of desire and foresight of consequences.

Problems with the Law

Judicially recognized though they have been, such definitions are less than wholly satisfactory. For one thing, they try to cover with one *mens rea* formula, which often turns out to be apt only for the offence of murder, a whole number of *mentes reae* varying from offence to offence. For another, they try to describe the whole concept of liability in terms of what is in fact only one aspect of it. A further problem relates to the difficulty of elucidating even the central minimum mental element denoted by *mens rea*. Finally there is the question whether a Code should duplicate provisions by including not only a *mens rea* principle but also rules relating to defences.

(a) *Mens rea* and *mentes reae*

Many of the suggested definitions of *mens rea*, though highly appropriate to murder, are inappropriate to other crimes like theft, fraud and offences of corruption. As Stephen J. observed, though the definition of every crime involves a reference to a state of mind, there is no such thing as *mens rea* but rather, different *mentes reae*. (See Appendix E: The Role of the General Part, p. 143.) In fact the mental element of an offence splits into two: (1) the general minimum requirement enshrined in the *mens rea* doctrine, and (2) the definition of each offence in question, consisting of dishonesty, of absence of lawful excuse or of some specific intent and only fully understandable by reference to the value imperilled by the offence in question. *Mens rea* relates not only to psychological but also to moral factors, and no general definition can capture the gravamen of all offences.

(b) Two aspects of liability

As to the second point, *mens rea* can be understood in two different ways. It can refer to mental facts — intent, recklessness or knowledge. In this sense, it has a purely descriptive meaning, with criminal liability involving three things: (1) an *actus reus*, (2) a *mens rea*, and (3) lack of a defence, so that there may be *actus reus* and *mens rea* without liability on account of some defence. Alternatively *mens rea* has a normative connotation. In this sense to say that someone had *mens rea* is to say that he is at fault in that he did the prohibited act with the required state of mind and had no excuse or justification for doing it. In other words *mens rea* means guilt or blame.

(c) The central meaning of *mens rea*

Even if *mens rea* is restricted to the general minimum mental element, as opposed to specific requirements in the different definitions, it has not proved easy to elucidate its central meaning. This meaning cannot consist in intention, for many crimes may be committed without intent. Nor can it consist in recklessness, for some crimes can only be committed

with deliberate intent. No definition of *mens rea*, then, seems wholly adequate.

(d) *Mens rea* and defences

This point has already been dealt with above under "The interrelation between *actus reus* and general defences".

In our view the problem of *mens rea* admits of a possible solution. First, for the reasons given earlier we think that although a Code should provide explicitly for the defence of mistake of fact, it should also articulate the principle of *mens rea* in modern terms. Second, since any specific mental element required for any particular offence will be contained expressly in its definition, there is no need in the General Part to do more than formulate the minimum mental requirement. Third, that minimum element, it can be seen, consists in knowledge.

According to the case law, the hallmark of crimes as opposed to quasi-crimes, is intent and recklessness as distinct from negligence. The difference between those distinct states of mind, however, lies in knowledge. Without knowledge there can be neither intent nor recklessness. Clearly, then, the minimum requirement for liability is knowledge.

Knowledge, however, may be actual or constructive. Actual knowledge is that which a person has or would have if he did not wilfully shut his eyes to an obvious means of knowledge. Constructive knowledge means knowledge he would have if he did not neglect to make such inquiries as a reasonable and prudent person would make. Only the former, actual knowledge is sufficient for crimes. Constructive knowledge, a kind of negligence, is relevant to offences other than crimes, that is, regulatory offences for which strict or absolute liability may be imposed.

Knowledge, then, is the necessary condition for criminal liability. It is not, however, a sufficient condition for several reasons. First, the definition of the offence in question may require some special purpose on the part of the accused.

Second, the offence may be one which can be committed only with some motive connected with the value infringed by that offence, e.g. without lawful excuse, fraudulently, corruptly, etc. Third, an accused may act knowingly but still not be liable because of the operation of some general defence, e.g. duress, necessity or self-defence. In all these situations knowledge alone will not entail liability but lack of knowledge precludes guilt. Knowledge, then, remains the *sine qua non* of liability for crimes.

Finally, attention should be paid to the precise import of the doctrine of *mens rea*. This was, as Stephen J. put it, that the definition of every crime *involves a reference* to a state of mind. In other words it was a rule of construction for courts interpreting common-law and statutory definitions of crimes. Seen in this light, the doctrine can now be better reformulated explicitly as a guide to the interpretation of the definitions in the Special Part.[6] This is the approach adopted in the Draft.

DRAFT LEGISLATION

Mental requirements in definitions of offences

3. Definitions of offences shall be so interpreted that, unless otherwise provided, no one commits an offence,

[Acts: Knowledge]

(*a*) by reason of an act unless in doing it he knows the circumstances specified in the definition of that offence,

[Omissions: Knowledge]

(*b*) by reason of an omission unless he fails to perform a duty imposed by law and knows the circumstances giving rise to such a duty,

[Other situations]

(*c*) by reason of any other situation (including possession) specified in

the definition of that offence unless he knows the circumstances specified in that definition,

[Consequences: Foresight]

(*d*) by reason of a consequence specified or implied in the definition of that offence unless he knows that he might cause that consequence, or

[Purposes]

(*e*) by reason of a purpose specified in the definition of that offence unless in fact he has that purpose.

ANNOTATION TO DRAFT LEGISLATION

This section sets out rules of interpretation governing the offence-creating sections in the Special Part. The words "unless otherwise provided" allow for such exceptions to these rules as Parliament may determine.

Existing case law recognizes three different regimes of criminal liability: *mens rea*, strict liability and absolute liability. In principle real crimes require *mens rea*, i.e. intention or recklessness, knowledge, or its equivalent, wilful blindness, while regulatory offences are offences of strict or absolute liability. In general they are offences of strict liability, i.e. liability is based on negligence. Exceptionally they may be offences of absolute liability which rules out a defence of mistake of fact however reasonable (*R. v. Sault Ste. Marie*).[7]

This case-law position is substantially retained by the Draft. The basic regime of liability, requiring knowledge or its equivalent "wilful blindness", is governed by section 3. The other form of liability, e.g. negligence — in regulatory offences or even elsewhere if the lawmaker so provides — is governed by subsection 9(1) on mistake of fact (see below: p. 74).

Unlike the case law, however, Draft subsection 9(4) speaks in terms of *Criminal Code* offences and other offences. For the distinction between real crimes and regulatory offences, although sound in principle, lacks precision and predictability. The Draft substitutes a more mechanical criterion — the legislative location of the offence in question. In doing so it assumes that all crimes belong to the *Criminal Code* and all remaining offences are defined elsewhere.

In making this assumption the Commission does so only as a starting-point. Naturally it has to bear in mind four different factors. The first relates to the role of Parliament, the second to its jurisdiction, the third to questions of administering criminal justice and the fourth to classification in the criminal law.

As to the role of Parliament, it must be borne in mind that in the final analysis the question whether to locate the prohibition of an act within the *Code* or elsewhere is a matter for Parliament. Reformers recommend. Only Parliament decides.

Next, the matter of jurisdiction. In making any such prohibition Parliament is subject to certain constraints. Apart from exceptional cases falling under other provisions of *B.N.A. Act* section 91 (weights and measures, customs and excise, or peace, order and good government) acts can in general only be prohibited by Parliament pursuant to its criminal law-making authority contained in subsection 91(27). This being so, such prohibitions (even when concerning contraventions rather than "real crimes") tend to be placed in the *Criminal Code*.

Third, there is the question of administration. By virtue of *B.N.A. Act* subsection 92(14) the administration of justice in the province falls under provincial jurisdiction. This being so, in order to keep enforcement in federal hands regarding certain areas, some prohibitions (even when concerning "real crimes" rather than "contraventions") tend to be placed outside the *Code*.

Lastly, classification. Although the line between "real crimes" and "contraventions", or "regulatory offences", may

be blurred, there is a distinction, and the *Criminal Code* would generally be expected to relate only to "real crimes". As Laskin C.J. said in *R. v. Prue and Baril*,[8] "the *Criminal Code* is a code of outright prohibitions, distinguishable from regulatory offences created by other kinds of federal legislation".

Ideally, then, or as a starting-point, one would envisage all prohibitions of "real crimes" and only these as falling within the *Code*. And where such prohibitions must be buttressed by ancillary regulatory provisions (as with the prohibition of unlawful possession of firearms under *Cr.C.* ss. 89-106.9), only the prohibitions themselves need to be contained within the *Code*, and the regulatory provisions could be located in appended schedules. In that case such offences could be regarded as not governed wholly by the *Code* (i.e. by its text) but partly by the *Code* and partly by a regulatory schedule. If that were so, there could be under Draft paragraph 10(3)(*c*) (see below at p. 82) a defence of ignorance or mistake of law regarding the regulations if it arose from reasonable reliance on administrative authority.

In addition the Draft brings clarity to a particularly difficult aspect of the criminal law. Whereas existing case law treats *mens rea* in terms of abstract concepts like intention and recklessness, the Draft defines mental requirements of liability more concretely, spelling out their application to acts, omissions and so on in words more understandable to jurors.

A further result of this approach is legislative simplicity. Legislative definitions of offences need no longer to refer to the general mental requirements provided by the interpretative rules of Draft section 3. Instead they need to refer only to any additional requirements necessary for the offence in question.

"*Acts*"

The commonest type of conduct will of course consist of acts since most verbs used in definitions of offences are verbs of action. Accordingly, wherever an offence is defined wholly or partly in terms of an act, the rule in paragraph 3(*a*) applies.

Under this rule an accused will not commit that offence unless in doing the act he knows the circumstances specified in that definition. So, he will not commit the crime of assault if he is unaware that his victim did not consent or would not have consented to the force applied. Likewise he will not commit theft if he is unaware that the property belongs to another. As always, of course, knowledge would include wilful blindness.

"*Omissions*"

Another common type of conduct consists of omissions. The definitions of many offences use words like "failing", "neglecting" or "omitting". Such words denote more than just "not doing"; they denote "not doing what one ought to do", i.e. the failure to perform a duty imposed by law. The word "law" is not defined in the Draft. In the case law on criminal negligence it has acquired a broad meaning including common law and legislation adopted by competent authority for the governing of life in society (*St-Germain c. R.*).[9] Though this seems inconsistent with the notion that crimes are violations of criminal law and not of any other law, it should be borne in mind that failure to perform a legal duty is not in itself criminal but only so where criminal law so specifies. When it does so specify, Draft paragraph 3(*b*) requires, in accordance with present law, that the duty in question must be a legal, not a mere moral, obligation.

The words "know the circumstances giving rise to such a duty" relate to the factual circumstances giving rise to it and not to the law imposing it. In the case of the offence of failing to stop after an accident the circumstance in question is the accident. This is what gives rise to the duty, and an accused unaware that there has been an accident cannot commit the offence. (*Harding v. Price*.[10] See also *Hill v. R.*[11])

"*Any other situation (including possession)*"

Some offences consist neither in acts nor omissions but in states of affairs or situations. Such is the case, for example,

with offences of being at large, of being in unlawful possession, and so on. Such offences are covered by Draft paragraph 3(*c*), which specifies that to commit such an offence an accused must know the circumstances under which the situation, e.g. his being in possession, is prohibited — he will not be guilty unless he is aware of the facts making his possession unlawful.

"*Consequences*"

Many offences are defined directly or indirectly in terms of consequences. Such offences raise a problem as to what state of mind is necessary if an accused is to be held responsible for a consequence.

To this question Draft paragraph 3(*d*) provides an answer. The rule provides that to be responsible for a consequence an accused must at the least have known it to be a likely outcome of his conduct. This state of mind, usually called recklessness, may be contrasted with intention. A person who intends a consequence and who therefore falls under Draft paragraph 3(*e*), pursues it, while a person who does not intend it but is merely reckless simply foresees it as a probable result of a risk which he takes consciously.

Whether recklessness should be defined subjectively (the accused actually foresaw) or objectively (he ought to have foreseen) is still unsettled in the case law. Draft section 3 adopts a subjective approach because in principle *mens rea* refers to actual states of mind — to actual, not constructive, intention, knowledge and foresight. Under the Draft, then, guilt turns on the accused's actual state of mind. Of course his actual state of mind can be inferred from the surrounding facts — would any ordinary reasonable person have foreseen this consequence and can we therefore infer that the accused also foresaw it? This is a question for the trier of fact.

The words "that he might do so" indicate an area between certainty and mere possibility. The risk must be evaluated in

each case with regard to all the circumstances. This too is a question for the trier of fact.

Draft paragraph 3(*d*) is clearly incompatible as it stands with the case law on criminal negligence and manslaughter. In criminal negligence courts adopt an objective approach to recklessness and define it in terms of deviation from the standard of the reasonable man (*Leblanc v. The Queen*,[12] *Arthurs v. The Queen*,[13] *R. v. Coyne*[14]). In manslaughter it is settled law that an accused who causes death by means of an unlawful act is guilty even though not conscious of the risk of death (*Smithers v. R.*).[15] For this reason section 3 will be reviewed in depth when the Commission's work on these offences is complete.

"*Purposes*"

Many crimes are so defined as to require some specific intent on the part of the accused. The definitions use words like "with intent to", "for the purpose of" and so on. These offences are governed by Draft paragraph 3(*e*).

In such offences "purpose" and "consequence" may intersect: the result aimed at may or may not come to fruition and a consequence may or may not be on purpose. Where the definition of the offence requires there be a purposive result, both rules apply — both the rule as to purposes and the rule as to consequences.

The term "purpose" replaces the more usual word "intent" because of the difficulties surrounding this concept. Those difficulties stem from the blurring of the distinction in the case law between intention and recklessness. When intention is to be clearly differentiated from recklessness, lawyers employ the term "specific intent". By contrast, "general intent" seems little different from recklessness and foresight of consequences. As a result much time may need to be devoted in the courts, especially in cases of intoxication, to trying to determine whether an offence is one of general or specific intent. To obviate such difficulties the Draft substitutes the

common-sense term "purpose", which can refer either to the accused's ultimate objective or to an intermediate objective constituting a means adopted by him to achieve that ultimate objective (*R. v. Buzzanga and Durocher*).[16]

General Note on Terminology

Under the Draft, it will be noted, the rules concerning *mens rea*, usually explained in terms of "intention" and "recklessness", are here expressed without explicit mention of either of these concepts. "Intention", as explained above and for the reasons given there, has been replaced by "purpose". "Recklessness" has been omitted as unnecessary.

Given the rules in Draft paragraph 3(*d*) concerning consequences and knowledge and in Draft subsection 9(5) (p. 75), wilful blindness, no special rule regarding recklessness is needed. Where an offence is defined in terms of a consequence, e.g. causing death, to bring about that consequence through recklessness is to engage in conduct which one knows may have that consequence — this falls directly under paragraph 3(*d*). Where an offence is defined in terms of an act, e.g. importing counterfeit money, to do it recklessly is to behave with reckless disregard of the possibility that there may be circumstances rendering that act criminal, i.e. with wilful blindness. But Draft subsection 9(5) provides that mistake or ignorance of fact is no defence when due to wilful blindness. Hence no special provision is required under Draft section 3.

Finally there are some general offences, like assault, which may apparently be committed recklessly, e.g. an accused lashes out dangerously, swings a club and hits a bystander in circumstances where it was almost impossible to avoid hitting someone. Clearly this kind of case cannot be covered by the rule on wilful blindness, for the problem has nothing to do with knowledge or ignorance of the circumstances. Nor at first sight does it fit happily under the rule on consequences, for, in contrast to homicides, assaults seem to roll together acts,

circumstances and consequences into one unifying action, and certainly such offences are not defined explicitly in terms of consequences. In fact, however, what happens in such a case is that the offender disregards the risk of harm involved in his behaviour — he acts although he knows his act may bring about this consequence. For this reason, to cover such a case, Draft paragraph 3(*d*) refers to consequences specified or implied in the definitions of offences. This makes the subsection wide enough to cover this type of case.

III

Defences

Basically a defence is any answer which defeats a criminal charge. Some of these, e.g. alibi, operate to defeat it by denying one important element, e.g. the link between the offence and the accused. Others, e.g. *autrefois acquit*, defeat the charge by raising procedural bars to the proceedings. Yet others, e.g. duress, defeat the charge by adducing circumstances which exonerate the accused. Defences in the first category, being simple denials of charges, are built into the definitions of offences and operate without any special mention by the law. Defences in the second category owe their existence to countervailing principles recognized by law, and should find their place within procedural chapters. It is defences in the third category, exonerations, which concern us here.

One difficulty concerning such defences is that they have to do with motive. Acts done under duress, out of necessity or in self-defence are acts done for particular motives. Yet motives, it is said traditionally, are irrelevant in criminal law: it is sufficient for criminal liability to have acted knowingly, intentionally and so on, regardless of one's motive.[17]

This at best is a misleading generalization. Motive can be relevant. It can be relevant to an offence itself if that offence by definition requires the absence of good motive, e.g. lawful or reasonable excuse. It can be relevant to a defence, e.g. the special defences of provocation in murder or of good faith in sedition, and the general defences of duress, necessity and self-defence. Here criminal law itself may pick out certain motives

as sufficient for exoneration and allow an accused who acted knowingly, etc. to defend himself by reference to one of them.

Traditionally, the common law divided such defences into justifications and excuses, as can be seen from early law concerning justifiable and excusable homicide. The draft retains this division, but adds another category — exemptions.

Exemptions operate to remove a person from the criminal process. This removal may be based on grounds of expediency or grounds of principle. On grounds of expediency the law exempts foreign diplomats and gives them immunity. On grounds of principle it exempts infants and mentally disordered persons on the footing that their abnormality (lack of capacity to behave as responsible persons) makes them unfit to be subject to the criminal law. Only this latter type of exemption falls within the criminal liability chapter.

Excuses operate to exonerate from liability. As such they qualify criminal prohibitions by reference to principles concerning what cannot fairly be demanded of the ordinary person. For example, people held up at gun-point cannot be treated as though capable of exercising complete free choice. Excuses, then, negate culpability for wrongful acts.

Justifications by contrast render right and lawful, acts which would otherwise be criminal. A person acting under a justification, therefore, cannot be convicted since he only did what he was entitled to do. Thus, someone acting in the interest of law enforcement (e.g. effecting lawful arrest) commits no crime. To say, then, that someone is justified is to say that what he did was right. In common law it means in general that his act incurs no criminal liability.

A. EXEMPTIONS

Two exemptions have proved natural candidates for inclusion in any system of criminal law. One relates to children. The other relates to mentally disordered people.

1. Immaturity

Very young children who have not yet learned the difference between right and wrong cannot be fairly blamed for what they do because they lack the necessary maturity to appreciate the requirements of morality and law. Accordingly some special rule is needed to exempt from criminal liability those below the age of maturity.

Exactly when they will attain that age varies from child to child. To avoid a separate investigation in each case, however, we require some general rule. Such a rule was at hand in the traditional Christian teaching that the age of reason, as it was called, was attained at seven. This became the age adopted by the common law, which held accordingly that children under seven could incur no criminal liability.

This however, did not completely solve the problem. On the one hand some children under seven know full well the difference between right and wrong. On the other, some children over seven do not. In addition, some children may know the difference between right and wrong but be less able to resist temptation than can adults.

The Common Law

For this the common-law solution was as follows. In the interest of simplicity and efficiency, it exempted all children alike who were under seven, but in the interest of fairness, it also exempted children between seven and fourteen unless there was evidence that they knew that what they were doing was seriously wrong.[18]

Our Present Law

Based on common law, our present law rules on this topic are contained in *Cr.C.* ss. 12 and 13. Section 12 exempts a child under seven from criminal liability absolutely. Section 13

exempts a child between seven and fourteen conditionally: he is exempt unless he was "competent to know the nature and consequences of his conduct and to appreciate that it was wrong".

Problems with Our Present Law

Our present law presents at this point three problems: (1) what should be the minimum age of criminal responsibility, (2) what should the legal criterion be for such responsibility and, finally (3) where should the rules be found, in the *Criminal Code*, or in the *Juvenile Delinquents Act*?

(1) The Minimum Age of Criminal Responsibility

It is universally agreed that the current minimum age of seven years for criminal responsibility is too low and should be raised. There is no universal agreement however on what the new minimum age should be. Ten? Twelve? Fourteen? The question has been officially put in issue for many years and now awaits Parliamentary decision.

In terms of policy, the age of twelve seems to have attracted a wider support both in terms of research conducted and the number of persons consulted by the various agencies involved in the revision of the *Juvenile Delinquents Act*. The Draft therefore sets the minimum age at twelve.

(2) The Criterion of Responsibility

This second problem is of a more conceptual nature. Under present law a child between seven and fourteen can be convicted if he was competent (a) to know the nature and consequences of his conduct and (b) to appreciate that it was wrong. The raising of the minimum age from seven to twelve years, puts in question the need for this rule. Alternative (1) would abolish it and leave the determination of the mental competence of any person over twelve to the rule governing

mental disorder. Alternative (2) retains a special test for determining the conditions of criminal responsibility regarding children over twelve but under fourteen years of age. While present law provides a purely cognitive test, it is arguable that children under fourteen who know what they are doing and know that it is wrong may still be unable to resist temptation to the same degree as adults. For this reason, the test put forward here is not only cognitive but also conative. On this the Commission, having as yet reached no firm conclusion, would welcome responsive commentaries.

(3) The Location of the Rules

The third question raises a point of principle. Although the *Juvenile Delinquents Act* sets out rules governing the criminal liability of children under sixteen, seventeen or eighteen years of age, as the case may be, in each Province, the *Criminal Code* should include basic rules of criminal liability of children for the following reasons. The *Juvenile Delinquents Act* is a particular statute concerning the criminal law, the general rules of criminal law have application to such a statute, and these general rules should be found in the General Part of the *Criminal Code*.

DRAFT LEGISLATION

Immaturity
Alternative (1)

4. Every one under 12 years of age is exempt from criminal liability for his conduct.

Immaturity
Alternative (2)

4. (1) Every one under 12 years of age is exempt from criminal liability for his conduct.

(2) Every one over 12 and under 14 years of age is exempt from criminal liability for his conduct unless he appreciates the nature, consequences and moral wrongfulness of such conduct and has substantial capacity to conform to the requirements of the law.

ANNOTATION TO DRAFT LEGISLATION

For reasons given above, the Draft raises the age of criminal liability to twelve. In this regard the two alternatives on this defence are identical. They differ as regards the liability of children between twelve and fourteen.

Draft section 4, then, replaces *Cr.C.* s. 12. The title given to the section, i.e. "Immaturity", is meant to bring out the principle underlying this defence. The words "act or omission" are replaced by the more comprehensive term "conduct".

Alternative (1)

This alternative abolishes the presumption contained in *Cr.C.* s. 13. Under that section a child over seven and under fourteen incurs no liability unless he is shown to be competent to know the nature and consequences of his conduct and to appreciate that it was wrong. That presumption is abolished on the ground that a child over twelve and under fourteen is unlikely to lack that competence unless he suffers from such disease or defect of the mind as would bring him under the mental disorder rule. On this view no special rule on the lines of that contained in *Cr.C.* s. 13 would be needed.

Alternative (2)

This alternative is the counterpart of *Cr.C.* s. 13. It makes special provision for children older than the age of twelve who have not attained fourteen years of age. The test which it provides, however, differs in two respects from that provided by *Cr.C.* s. 13. First, it allows exemption for the child's inability to appreciate the moral wrongfulness of his or her act. This is in line with case law on section 13: *R. v. B.C.*[19] Second, it allows exemption for inability to conform to the requirement of the law. This is done in order to harmonize this immaturity defence with the second alternative of mental disorder (see Draft section 5), to base both defences on the same moral principles, and to align the law with modern thinking which regards such principles as relating not only to the incapable person's understanding but also to his ability to control his behaviour. This is more fully discussed under Draft section 5.

2. Mental Disorder

Those suffering from mental illness, no less than children, pose an obvious problem for the criminal law. On the one hand, morality and law have always regarded people not in their right mind as not responsible for their actions and not in fairness blamable for them. On the other hand, protection of the public interest demands that where such lack of responsibility results in danger to others, such people should not be left at large.

The common-law solution has been as follows. Such persons were exempt from criminal liability, conviction and punishment. They were not, however, exempt from the intervention of the law, but on the contrary were liable to be confined "during Her Majesty's pleasure", i.e. until the relevant authorities were satisfied that the mentally-ill offenders were sufficiently recovered to be released. In short, the common law recognized a special defence and a special verdict of insanity.

Whether the law should recognize insanity as a special defence has frequently been questioned. First, it is contended, there is no real difference between the sane and the insane, since all behaviour is a response to environment and terms like "normal" and "abnormal" are mere value-laden labels for behaviour regarded as appropriate and inappropriate in the circumstances.[20] Second, even if there were a real difference between the sane and the insane, an important and necessary part of therapy for mental illness consists in holding those suffering from it responsible for their actions. Third, to replace a verdict of "guilty" and a prison sentence by a verdict of "not guilty by reason of insanity" and custody during the pleasure of the Lieutenant Governor is at best self-contradiction and at worst hypocrisy.

There are, however, several counter-arguments. First, the insanity defence is rooted in tradition, authority and experience. Second, it has been universally accepted in Western countries. Third, whatever the position adopted by the law, psychiatry will still bring forward evidence with which the courts will have to deal. Fourth, and most important, the defence of insanity rests on the fundamental moral view that insane persons are not responsible for their actions and are not therefore fit subjects for punishment.

In our view a sufficiently strong case has not as yet been made for rejecting the notion of an insanity defence.

The Common Law

The common law on this matter was formulated in the M'Naghten Rules.[21] These rules laid down the test for qualifying an accused as not guilty by reason of insanity. First, such a person had to be suffering, at the time he committed the offence, from a disease of the mind. Second, he must as a result have been labouring under a defect of reason. Third, he must in consequence have not known the nature and quality of his act or else have not known that it was wrong. This test,

often referred to as the "right and wrong" test, became the basis of Canadian law.

Our Present Law

Our present law on this matter is contained in *Cr.C.* s. 16. This section provides four things. It provides (1) that no one shall be convicted for something he did while insane; (2) that a person is insane for this purpose if "he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong"; (3) that a person suffering from specific delusions but otherwise sane shall not be acquitted unless the imagined state of affairs would have justified or excused his conduct; and (4) that everyone shall be presumed sane until the contrary is proved.

Problems with Our Present Law

Based on the rules formulated nearly a hundred and fifty years ago, our present law poses several problems. These relate to the shifting role of *Cr.C.* s. 16, to the issue of irresistible impulse and to questions of terminology.

(1) Shifting Role of *Cr.C.* s. 16

Originally *Cr.C.* s. 16 was judicially construed as a comprehensive statement of the law on criminal insanity. Unless an accused's mental disorder came within that section, it was — apart from the rare situation of infanticide[22] — irrelevant to liability.[23] No question could arise as to diminished responsibility.

Recently, however, courts changed their view, and came to recognize that diminished responsibility, though not in itself a defence, might serve to negative *mens rea*. In the context of capital murder, on the issue whether the killing was planned

and deliberate, they have allowed diminished responsibility to reduce capital to non-capital murder.[24] In cases of murder, generally, both capital and non-capital, they have, despite Supreme Court of Canada assertions that diminished responsibility forms no part of our law,[25] allowed it to negative intent to kill and so to reduce murder to manslaughter.[26] More recently they have allowed it to operate to negative any specific intent required by the definition of an offence.[27] In this way a defence once thought to be clearly excluded by section 16 has now crept in by virtue of the case law.

(2) Irresistible Impulse

Originally it was quite clear that a defence of insanity could not be based on irresistible impulse.[28] The M'Naghten Rules required the accused to suffer from a defect of reason so as not to know the nature of his act or not to know that it was wrong. Likewise, section 16 requires him to be incapable of appreciating the nature and quality of an act or omission or of knowing that it is wrong. Clearly the test adopted was a 19th-century "intellectual" criterion relating to impairment of the accused's understanding and leaving no room for impairment of his will.

Over the years, however, it was realized that the mind cannot be compartmentalized in such simplistic fashion. For this reason specific provision for impairment of will was made in the case of infanticide.[29] For this reason too some jurisdictions recognized a defence of diminished responsibility.[30] Meanwhile in Canada, according to the case law, irresistible impulse, while in itself no defence, may be symptomatic of disease of mind which impairs understanding and brings the accused under section 16.[31]

Clearly, then, due to change in interpretation, section 16 no longer means exactly what it says. Strictly it extends only to defects of understanding. By case law it has come at times to cover defects of will.

The matter of defect of will, however, is no easy one for criminal law. In theory there is general agreement that the

definition of mental disorder should address itself to the whole human personality. In practice, though, there may be problems, and a large body of informed opinion is opposed to catering to impaired volition. One reason for such opposition is the risk that psychopaths may be too easily acquitted. Another is the fear that psychiatric evidence may gain undue weight and confuse the jury. Yet another is the feeling that the present interpretation of section 16, which does not wholly exclude the situation of the psychopath, is as far as the law should go.

On this, before presenting our final view, we need further considered responses. Accordingly, we put forward alternative models for consideration.

(3) Questions of Terminology

Various terms used in *Cr.C.* s. 16 are problematical. These are "natural imbecility", "disease of mind", "wrong" and "delusion".

(a) Natural imbecility

Section 16 restricts the insanity defence to cases of "natural imbecility" or "disease of the mind". Neither of these terms, however, may cover cases of mental malfunction due to mental retardation.[32] Though these cases may in fact rarely proceed beyond the "fitness to plead" stage, fairness suggests that they too should be given the benefit of the insanity exemption. This could be done by substituting for "natural imbecility" the words "defect of the mind".

(b) Disease of mind

"Disease of mind" is not a medical but a legal term. As such it caused no problem before comparatively recent developments relating to the defence of automatism.

Automatism was already known as a defence at the time of *M'Naghten* but concerned only certain quite clear cases such as somnambulism.[33] In recent years, however, with medical knowledge growing more sophisticated, automatism has

been pleaded in less obvious situations. It has been raised for instance in cases of brain tumours,[34] arteriosclerosis[35] and epilepsy.[36]

Accordingly the need arose to distinguish more clearly between automatism and insanity. The notion of sane automatism is that of some condition which is accidental and so not a continual source of danger. The notion of insane automatism due to disease of mind is that of a condition resulting from some factor inherent in the accused, likely to recur and liable therefore to cause danger.

This led to a re-interpretation of "disease of mind". Traditionally it had been thought that criminal insanity was a subspecies of medical insanity and that "disease of mind" meant medical insanity. In the English case of *R. v. Kemp*[37] however, that term was extended to cover any disease, mental or physical, affecting the mind.

In our view this was a useful and necessary development. Though it may run counter to ordinary language to categorize as insane a person suffering from epilepsy or arteriosclerosis, the wide definition of "disease of mind" can be supported on several grounds. First, it enables a clear line to be drawn between sane and insane automatism. Second, it entails that defendants suffering from insane automatism fall under insanity and become subject to investigation and, as far as necessary, detention. Third, it emphasizes that in law the question of insanity is ultimately one not for doctors and psychiatrists but for judges and juries.

"Disease of mind", then, is the term used in the Draft, which leaves it undefined. It does so for two reasons. First, the term is now well known, completely explained in the case law and thoroughly understood by the profession.[38] Second, the impossibility of foreseeing all the developments and future directions of scientific expertise on this topic cautions against putting the concept in a strait-jacket but rather suggests a need for adaptation through the cases.

(c) Wrong

Neither *Cr.C.* s. 16 nor *M'Naghten* specify what is meant by "wrong". Recently, however, in both England and Canada the term has been decided to mean legally wrong.[39] Accordingly, a mentally disordered person unable to understand that murder is morally wrong but aware that it is forbidden by the *Criminal Code* may not avail himself of the insanity defence.

One argument for this interpretation of "wrong" as "legally wrong" is as follows. A test framed in terms of knowing that an act is morally wrong is only workable as long as there are clear notions of right and wrong agreed upon by all. Without such general agreement, however, which cannot necessarily be taken for granted today in Canada, as witness the division of opinion over abortion, such a test may land us in a quicksand of subjectivity where a defendant could plead that according to his morality his act was right. This quicksand can be avoided by a more objective test based on knowing that an act is "legally wrong".

As against this, however, there are the following arguments. First, common-law tradition, it seems, saw "wrong" as meaning "morally wrong" and contrary interpretations are of recent vintage.[40] Second, the term "wrong" in the analogous rule about children — that children between seven and fourteen cannot be convicted unless they appreciate that their conduct was wrong — has generally been taken to refer to moral wrongfulness. Third, while it may be undesirable to acquit someone aware that his act was illegal but reckoning it justifiable on his own view of morality, it would be equally undesirable to acquit someone aware that his act was morally wrong but unaware, due to disease of mind, that it was illegal.

Finally, and most important, the key point to remember is that in such situations the accused suffers from disease of mind. This being so, to inquire how far he knew the law makes little sense. What matters are his motives and his overall perception of the permissibility of his action. "The question for the jury is whether mental illness so obstructed the thought processes of the accused as to make him incapable of knowing

that his acts were morally wrong. The argument is sometimes advanced that a moral test favours the amoral offender and that the most favoured will be he who had rid himself of all moral compunction. This argument overlooks the factor of disease of the mind. If, as a result of disease of the mind, the offender has lost completely the ability to make moral distinctions and acts under an insane delusion, it can well be said that he should not be criminally accountable".[41]

This question, however, generates passionate debate. The Supreme Court of Canada itself was divided five to four in *Schwartz*.[42] In order, therefore, to get further clarification, we present alternative drafting on this issue.

(d) Delusion

The traditional rule on such delusions, as formulated by the *Code*, is that a person suffering from specific delusions cannot be acquitted on the ground of insanity "unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission".[43] This rule has been much criticized and rarely applied.[44] Medical opinion rejects the idea of partial insanity and legal scholarship stresses the injustice and illogicality of applying to the mentally abnormal a rule requiring normal reactions within their abnormality: a paranoiac killing his persecutor will be acquitted only if the imagined persecution would have justified the killing by way of self-defence — the law requires him to be sane in his insanity. For this reason it is suggested that the rule on insane delusion should be abandoned.

(e) Note on burden of proof

Present subsection 16(4) states that "Every one shall, until the contrary is proved, be presumed to be and to have been sane": this is based on the M'Naghten Rules, and has been recognized as an exception to the reasonable doubt doctrine.[45] When an accused raises the issue of insanity at the time of the offence, he must rebut the presumption of sanity by proving by a preponderance of evidence that he was insane.[46] Thus the

accused bears not only an evidentiary burden but also a persuasive burden regarding the issue of insanity.

This runs counter to the basic principle of criminal law on burden of proof. According to that principle the prosecution must prove beyond reasonable doubt that the accused is guilty by proving that the accused did the prohibited act and disprove any defence raised by the evidence. Here, by contrast, the prosecution must prove beyond reasonable doubt only that the accused did the prohibited act, while the accused, who raises insanity, must establish that defence on a balance of probability. With the recognition of automatism as a defence, however, courts faced situations where the prosecution raised the issue of insanity in answer to a plea of automatism.[47] In allowing that practice they imposed the same standard of proof on the prosecution. Thus insanity is no longer a simple matter of defence. It has become an issue of public interest which can be raised by all parties involved in the case and even by the Court itself.[48]

This in itself, however, does not justify the shifting of the persuasive burden. The evidential burden could be placed on the party raising the issue and the benefit of reasonable doubt could still be given to the accused. Given the presumption of sanity, the prosecution could retain the burden, once sufficient evidence of insanity is raised, of disproving insanity beyond reasonable doubt.

The justification for shifting the persuasive burden relates to a different factor. Insanity unlike other defences does not result in a complete acquittal. It results in a special verdict and an order to detain the accused until he is fit to be released.[49] Quite rightly therefore, if the prosecution seeks to detain as mentally disordered, an accused seeking acquittal on the ground of automatism, the prosecution should have the onus of proving mental disorder. Quite rightly also, where the accused is asking to be detained as mentally disordered rather than simply convicted, he too should have the onus of proving mental disorder. In short because what is being sought by either side is a special detention, there must be positive proof from that particular side of mental disorder justifying that detention.

This part of the *Criminal Code* does not in general deal with questions of proof and evidence. In this context, however, since there is a clear exception to the general principle, the draft explicitly incorporates the present position in our law regarding burden of proof.

DRAFT LEGISLATION

Mental disorder

Alternative (1)

5. Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he was incapable of appreciating the nature, consequences or unlawfulness of such conduct.

Mental disorder

Alternative (2)

5. Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he lacked substantial capacity either to appreciate the nature, consequences or moral wrongfulness of such conduct or to conform to the requirements of the law.

ANNOTATION TO DRAFT LEGISLATION

The Draft alternatives on mental disorder replace *Cr.C.* s. 16. In substance they reproduce subsections 16(1), (2) and (4), replacing subsection (1) by the words "every one is exempt from criminal liability" and replacing subsection (4) by the

words "it is proved". For reasons given above, subsection 16(3) on specific delusions is omitted.

Alternative (1)

This alternative retains the substance of *Cr.C.* subs. 16(2). That subsection focuses on the effect of disease of mind on an accused's capacity to appreciate the nature and quality of his act or omission and to know that it is wrong. This capacity test is reproduced by alternative (1).

The words "nature, consequences", embody case-law interpretation of the words "nature and quality" in *Cr.C.* subs. 16(2): *R. v. Barnier*.[50]

The term "unlawfulness" means "legally wrong". This is in line with case-law interpretation of the word "wrong" in *Cr.C.* subs. 16(2): *Schwartz v. R.*[51]

The words "act or omission" are replaced by the term "conduct". (See note above on Immaturity.) The word "appreciate" is used in the Draft both with regard to the nature and consequences and with regard to the unlawfulness of the accused's conduct. *Cr.C.* subs. 16(2), however, restricts its application to the nature and quality of the act or omission and uses "know" with regard to its wrongfulness. According to recent case law "know" merely requires basic awareness, while "appreciate" involves a further step of analysis, of knowledge or experience: *R. v. Barnier*[52]; "the word 'appreciates', imports a requirement to mere knowledge of the physical quality of the act" and requires a capacity to apprehend the nature of the act and its consequences: *Cooper v. R.*[53] By using the single verb "appreciate" the Draft unifies the test.

Under the Draft, it should be noted, as under present law, irresistible impulse and personality disorders are not covered by the incapacity test. This is because they relate to impairments of will. As mentioned earlier, however, they may be evidence of disease of mind rendering an accused incapable of

appreciating his conduct. This is as true under the Draft as under existing law.

The law's aversion to a defence of irresistible impulse stems from the difficulty of distinguishing impulses which are irresistible from those which are merely unresisted. Sometimes, however, evidence of an unresisted impulse is accompanied by evidence of disease of the mind, and here the law must grasp the nettle and determine blame. This issue, avoided by insistence on cognitive criteria of responsibility, would be squarely faced by a recognition, as in alternative (2), of the moral dimension of criminal guilt.

The same considerations apply, as discussed earlier, to diminished responsibility. Under present law mental disorder can affect criminal liability in two different ways. First, it may warrant a defence of insanity where the conditions of *Cr.C.* subs. 16(2) are met. Second, even without rendering an accused incapable of appreciating, etc. as required by mental disorder, it may still constitute a valid defence to a specific intent offence if it prevents the accused from having that specific intent.[54] This position is retained by alternative (1).

Alternative (2)

This alternative would widen existing law. Under existing law, based as it is on 19th-century "intellectualist" notions of free will, insanity is restricted to impairment of understanding. This alternative, which takes account of modern insights into human behaviour, would extend the defence to impairment of self-control.

This extension can be supported by several reasons. First since the days when the M'Naghten tests were formulated, there has been growing recognition of the fact that mental disorder has not only a cognitive but also a conative aspect. Second, because of this, various jurisdictions have made provision for diminished responsibility (see the *English Homicide Act 1957*, s. 2). Third, there is the analogy with provocation

— why should liability be reduced by provocation but not by diminished responsibility when both consist in impairment of capacity for self-control? Finally, there is the actual practice of our courts: while diminished responsibility has been repeatedly excluded by the Supreme Court of Canada, it has been indirectly recognized by Appeal Courts as being a factor relevant to *mens rea* and distinct from insanity. The Draft's approach, therefore, is in line with modern psychological thought, recent developments elsewhere and actual Canadian court practice.

Present practice in this regard, however, is less than wholly satisfactory. While lack of understanding leads to full acquittal subject to a special verdict and committal under *Cr.C.* s. 16 and s. 542, impaired control at the most leads only to a reduction of the charge. So, a person suffering from impaired understanding may be completely acquitted of a charge of murder, whereas a person suffering from impaired control may at best be acquitted of murder but convicted of manslaughter or some lesser offence on the ground that his impairment only prevented him from having the requisite *mens rea* for the full offence.

Such practice is unsatisfactory in at least two respects. First, it puts less emphasis on the moral grounds for criminal responsibility than on the legal definition of the offence alleged. Second, it means convicting, albeit for lesser crimes, those suffering from mental disorder and needing treatment rather than punishment.

For this reason this alternative brings so-called diminished responsibility under the umbrella of mental disorder. Defendants suffering from impairment of control will be dealt with on the same footing as those suffering from impaired understanding. Instead of being convicted of a lesser offence they will be formally acquitted, subject to a special verdict and committal under *Cr.C.* s. 542.

Under alternative (2), it should be noted, the psychopath (or sociopath) presents no greater and no lesser problem than under present law. Examination of forensic evidence suggests

that psychopaths can roughly be divided into three categories. Those merely lacking feelings of guilt, remorse or concern for others do not receive special treatment either in present law or under this alternative. Those suffering from mental disorder resulting in lack of control may under present law lack *mens rea*, as described above, and may under this alternative be acquitted by reason of mental disorder. Those suffering from mental disorder leading to lack of understanding may, under present law and under this alternative, be acquitted by reason of mental disorder.

The addition of the words "substantial capacity to conform to the requirements of the law" has several effects. First, it extends the defence of mental disorder to cases of lack of capacity for self-control. Second, it stresses that the question is ultimately a normative one, to be determined by the jury. Third, it emphasizes that standards set by criminal law are not to be applied to people whose mental abnormality deprives them of understanding or self-control. Finally, it is nevertheless not meant to render irresistible impulse (see above) a defence in itself any more than it is under present law but only to render it a factor to be taken into account as symptomatic of disease of mind impairing capacity to conform to law.

B. EXCUSES

Eight excuses are of such generality as to warrant inclusion in the General Part. These are intoxication, automatism, physical compulsion and impossibility, mistake of fact, mistake of law, duress and necessity.

1. Intoxication

Intoxication is clearly a problem for the criminal law. In this regard it should be noted that though "drunkenness" is the term usually employed by common law, "intoxication" is to

be preferred as being a wider notion, not restricted to alcohol and more in line with current case law.

Intoxication poses a problem in criminal law for several reasons. First, alcohol consumption and to a lesser extent, drug consumption is clearly a prevalent ingredient of much criminal behaviour. Second, it is something about which society is to some degree ambivalent: drinking, and to a much lesser extent drug abuse, is accepted as a social practice but condemned for its consequences. Third, intoxication may diminish an offender's awareness, self-control and culpability while at the same time augmenting his dangerousness and his need for social control.

The Common Law

Common law sought to reconcile these two last factors as follows. It drew a distinction between two kinds of intoxication. One, involuntary intoxication, was drunkenness arising through no fault on the part of the defendant — e.g. he was forced to drink, was tricked into drinking, was unaware that he was drinking alcohol — and this was always a good defence. The other, voluntary intoxication, was self-induced, quite clearly the defendant's fault and therefore there was no defence.[55]

Over the years, however, common law retreated from this strict approach to voluntary intoxication. It did so by making special provision for two exceptional situations. The first was where alcohol consumption produced a condition of insanity so that the defendant suffered from a defect of reason due to disease of the mind.[56] The second was where intoxication deprived the defendant of the purpose or intent required by the definition of the crime with which he was charged.[57]

Today the common law on intoxication — our law on this topic in Canada has not yet been codified — can be summed up in the following propositions: (1) involuntary intoxication is an excuse; (2) voluntary intoxication is in general no excuse; (3) disease of the mind resulting from alcohol consumption is

treated on the same footing as that resulting from any other cause; and (4) failure to form the purpose required to commit an offence, although arising from intoxication, negates criminal liability for that offence.[58]

Problems with the Law

Three problems arise with present law. One relates to the difference between intoxication and mental disorder. Another concerns the nature of involuntary intoxication. A third has to do with the effect of voluntary intoxication in cases of specific intent offences.

(1) Intoxication and Mental Disorder

The rule on disease of mind due to intoxication has often been misunderstood. It has been taken to allow an insanity verdict whenever the defendant's intoxication prevented him from knowing the nature of his act.[59] In *Davis*[60] however, which was relied on in *Beard*[61] the verdict was reached, not on account of intoxication because in fact the accused was not drunk, but on account of his disease of mind resulting from consumption of alcohol. The proposition established by that case was that, whatever its cause, insanity is a defence. In practice, however, since few such cases arise, there is little need to make extensive provision for them. Under the present law and under our proposed Drafts all cases of insanity, however arising, could come only under the insanity provision itself.

(2) Involuntary Intoxication

Involuntary intoxication is a complete defence if it deprives the accused of *mens rea*.[62] Less settled is whether such intoxication is a defence in its own right or is to be seen rather as a species of automatism.[63] This cannot yet be regarded as clear from the case law.

(3) Voluntary Intoxication

Under existing law voluntary intoxication is or is not a defence depending on the circumstances. It may result in an acquittal of a crime of specific intent but a conviction for a lesser crime of general intent.[64] A person charged with robbery must, if lacking through intoxication an intent to steal, be acquitted of robbery but can, though lacking through such intoxication full awareness of what he is doing, be convicted of the lesser offence of assault. For while robbery is a crime of specific intent, assault is one of general intent, and lack of intent due to intoxication is a defence only to a crime of specific intent.[65]

The logic of a rule based on a distinction between general and specific intent is questionable. In the above example the accused's drunkenness may have prevented him from intending either to rob or to assault his victim. Logically, then, it could be argued that there should be either a conviction or an acquittal for both offences.

In principle, however, the rule can be supported. The distinction between general and specific intent just mirrors ordinary common sense. According to our ordinary notions, acts which are morally indifferent can become wrong when done with wrongful purpose, and acts which are already wrong (e.g. assaults) can become still more wrong when done with additional wrongful purpose (e.g. to kill). Similarly the law measures the gravity of a crime partly by reference to the defendant's purpose. In this way it distinguishes lesser offences like assault from graver offences like robbery, i.e. assault with intent to steal.

In practice, though, the rule is open to objection in the context of intoxication. It focuses inquiry not on the defendant's personal fault but rather on the statutory language of the offence charged. It entangles courts in protracted analysis of such language and in inquiry whether specific intent is required explicitly or by implication. Finally, it imputes to a defendant convicted of a general intent offence a state of mind he did not

have. As observed by Dickson J. dissenting in *Leary*,[66] "there seems little reason for retaining in the criminal law — which should be characterized by clarity, simplicity and certainty — a concept as difficult of comprehension and application as 'specific intention' ".

These objections notwithstanding, the present rule attempts to serve the public interest in protection from harm. Whatever the defendant's intent, no one who allows himself to be a source of danger to others should be let off scot-free. Accordingly, as observed by Lord Salmon in *Majewski*[67] the "benevolent part of the rule [acquitting of specific intent crimes] removes undue harshness without imperilling safety and the stricter part of the rule [conviction of general intent crimes] works without imperilling justice".

One solution to this conflict between logic and justice would be to follow existing law: subordinate logic to public safety and allow intoxication to excuse in crimes of specific intent but not in those of general intent. Alternatively the law could provide that in any offences intoxicated offenders should be acquitted if they lack the requisite intent, whether specific or general, and instead should be convicted of that for which they are really to blame — getting so intoxicated as to be dangerous to others. This alternative, which in Dickson J.'s words would avoid "the adoption of a legal fiction which cuts across fundamental criminal law precepts and has the effect of making law both uncertain and inconstant",[68] would involve creating a new offence of criminal intoxication. And this new scheme could apply to real crimes only or it could apply across the board.

In order to obtain the assistance of considered commentaries, we put forward two alternatives. First, the law could be left as it is, in which case the offences in the Special Part would need to be defined more tightly to make clear when a specific intent is and is not required. Second, the defence could apply to all offences subject to liability for the new included offence of criminal intoxication in the case of voluntary intoxication.

DRAFT LEGISLATION

Intoxication

Alternative (1)

6. (1) Every one is excused from criminal liability for an offence committed by reason of intoxication by alcohol or other drugs, unless such intoxication was self-induced.

(2) Where the intoxication is self-induced no one shall be excused from criminal liability for an offence unless such an offence requires a purpose on his part and he [proves that] he lacked such purpose.

Intoxication

Alternative (2)

6. (1) Unless otherwise provided, every one is excused from criminal liability by reason of intoxication by alcohol or other drugs.

(2) Every one excused under subsection (1) of this section shall be convicted of Criminal Intoxication under Part . . . of this *Code* unless he proves that his intoxication was due to fraud, duress, physical compulsion or reasonable mistake.

ANNOTATION TO DRAFT LEGISLATION

Alternative (1)

This alternative codifies the present law. Subsection (1) renders involuntary intoxication an excuse for any offence

committed by reason thereof. Subsection (2) makes self-induced intoxication no defence except for offences requiring a specific purpose where by reason of his intoxication an accused lacks such purpose. So, where the offence charged requires a specific purpose but an included offence requires no such specific purpose, an accused may be not criminally liable for the former but liable for the latter. Under this alternative, therefore, as under present law, the extent to which self-induced intoxication is a defence depends primarily not on the degree or extent of the intoxication but on the nature of the offence.

Alternative (2)

This alternative makes intoxication a complete defence regardless of the nature of the offence. No distinction is drawn between voluntary and involuntary intoxication, both of which result in an acquittal. Voluntary intoxication, however, may result in a conviction for the new offence of Criminal Intoxication. The words "unless otherwise provided" are added to provide for offences (including the new offence of Criminal Intoxication) where intoxication is an element of the offence.

Intoxication, it should be noted, may arise in connection with other defences, viz. mental disorder, automatism and mistake. Where intoxication results in disease of the mind, the accused is under mental disorder (Draft section 5). Where, however, it results in unconscious or involuntary behaviour, automatism (Draft section 7) will not apply because disturbances of mind due to intoxication are explicitly excluded from that defence. Where it leads to a mistake of fact, that defence (Draft section 9) may apply but the accused may be charged, if the intoxication is self-induced, with Criminal Intoxication.

The words "offence committed by reason of intoxication" are used in order to avoid the old distinctions between general and specific intent. The link between the offence and intoxication being purely causal, as soon as an accused explains that the crime resulted from his being intoxicated, he can avail himself of the defence but by the same token may be liable to conviction for Criminal Intoxication.

The Included Offence of Criminal Intoxication in Alternative (2)

It is proposed to include among inchoate offences a new offence of Criminal Intoxication similar to that proposed in 1975 in England by the *Committee on Mentally Abnormal Offenders* (Cmnd-6244). This new offence would be defined as follows:

> Any one committing what would, but for his intoxication, constitute an offence is guilty of Criminal Intoxication unless he proves that his impairment was due to fraud, duress, physical compulsion or reasonable mistake.

This proposed offence would cover intoxicated persons who under present law would be acquitted of "specific intent" crimes but convicted of "general intent" crimes. They would be acquitted of any offence committed by reason of intoxication but would be guilty of the new offence of Criminal Intoxication unless they could show that their intoxication was involuntary.

To show this, an accused would have to show that he was tricked into ingesting the alcohol, was forced to do so or was reasonably mistaken as to the nature of the drink or as to its likely effect. So, for example, he could escape conviction by proving that he drank vodka by mistake for water or that he had no reason to foresee that, combined with the medication prescribed by his doctor, it would intoxicate him. Whether this could be reasonably foreseen would depend on the circumstances — did his doctor warn him, had he had some similar previous experience, is it now common knowledge that alcohol and this medicament do not go well together?

What if an accused argues as follows: "I have drunk one litre of whisky every Saturday night for years without it having any effect on me. Last Saturday, however, it made me so drunk that I killed a man. But I had no reason to foresee that it would do this to me. I made a reasonable mistake." Should such a person be acquitted? Would he be acquitted under this alternative?

First, should he be acquitted? The instant reaction is surely: "No". Every one knows that that amount of alcohol can intoxicate, that people should not rely unduly on previous lucky experience and that those who drink must do so at their peril. On the other hand, suppose that it was not a litre of whisky but a small glass of wine which the accused takes every Saturday and which on the night in question results in intoxication. Here the instant reaction is surely: "Yes, he should be acquitted". Though every one knows alcohol intoxicates, common experience is that one small glass of wine will do no harm and no one can fairly be expected to foresee the unexpected. The only reasonable answer to the question, therefore, is: "It depends on the circumstances".

Next, would he be acquitted of Criminal Intoxication under alternative (2)? Not necessarily. This would depend on whether his mistake as to the effect of the one litre was reasonable. This would have to be determined on the evidence. Part of that evidence of course is the teaching of common experience that the greater the quantity of alcohol imbibed, the greater the risk of intoxication. This being so, in such a case an accused would have a difficult job establishing that his mistake was reasonable.

In strict logic perhaps the offence of Criminal Intoxication should consist in allowing oneself to become so intoxicated as to be likely to commit an offence. But the requirement that an accused should actually commit what would otherwise be an offence is based on three reasons. First, as a matter of evidence it would often be difficult to assess such a likelihood, whereas actual commission can constitute conclusive evidence of it. Second, in the interest of economy of resources it is useful to restrict prosecution to cases where intoxication results in an offence. Third, in the interest of civil liberties it may be desirable to limit prosecution to cases where the accused causes actual harm.

Finally, it should be noted, Criminal Intoxication would be an included offence. (This will be dealt with later in a separate

paper on evidence and procedure.) So, given evidence of intoxication, three verdicts are possible: guilty; not guilty; or not guilty, but guilty of Criminal Intoxication. Thus, in a case of causing bodily harm with intent to wound, contrary to *Cr.C.* s. 228, the judge would have to direct the jury as follows: (1) if they have no reasonable doubt that the accused committed the offence and was not seriously affected by intoxication, they must convict of the offence charged; (2) if they are not sure beyond reasonable doubt that he committed the offence, they must acquit; and (3) if they are sure beyond reasonable doubt that he caused that harm but are not sure beyond reasonable doubt that he was not seriously affected by self-induced intoxication, they must acquit of the offence charged and convict of Criminal Intoxication.

The provisions in subsections (1) and (2) of alternative (2), it should be noted, would not be restricted to *Criminal Code* offences but would apply across the board. The reason here is twofold, despite the possible inappropriateness of convicting of a real crime a person charged with a regulatory offence. First, to restrict the scheme of alternative (2) to *Code* offences would still leave the courts with the logical difficulties concerning the distinction between "general intent" and "specific intent" offences when it comes to regulatory offences. Second, in practice intoxication will rarely be raised in the context of such offences.

2. Automatism

The term "automatism" comes from the word "automaton" which denotes a body acting without a directing mind. In principle a body so acting is not fit for criminal responsibility since it cannot help what it does. This condition of automatism has been defined in terms of unconsciousness, involuntariness or a combination of the two.[69]

The difficulty faced by law in this regard is that of defining automatism with sufficient narrowness. For it must be carefully distinguished from three other situations: mental disorder,

intoxication and mere loss of temper. While automatism leads to an acquittal, none of the above situations should necessarily do so. Unconscious behaviour resulting from mental disorder is, as argued earlier, symptomatic of a dangerous condition and should obviously be governed by the insanity defence. Unconscious conduct resulting from voluntary intoxication is the accused's own fault and should clearly fall under the rules relating to intoxication. And unconscious or involuntary acts resulting from mere loss of temper should not be free from liability since tempers must be kept.[70] On the other hand, unconscious actions due to such accidental causes as blows on the head are rightly recognized as fit subjects for an automatism rule calling for a full acquittal.[71]

The Common Law

For these reasons common law allowed only a restricted defence of automatism. At present, the defence serves to exclude from criminal liability two kinds of occurrence. One consists of twitches, spasms and other reflexes, which for the most part, because of sensible exercise of prosecutorial discretion, never come before the courts. The other consists of acts committed in some state of clouded consciousness for which the accused is not to blame.

The defence of automatism, however, is restricted in four ways. First, it does not cover insane automatism — involuntary behaviour resulting from disease of the mind falls to be dealt with under the insanity provisions.[72] Second, it does not cover automatism due to voluntary intoxication — this likewise falls under the more appropriate rubric of intoxication.[73] Third, it does not cover involuntary behaviour resulting from the accused's own fault or negligence — where the accused deliberately or negligently allows himself to get into a condition of automatism (e.g. he knows his condition and fails to take his prescribed medication).[74]

The fourth restriction relates to loss of temper. Understandable though it might be to lose one's self-control and fly

into a rage, our law has never recognized it as a basis for a real defence.[75] At most it has by way of concession allowed loss of temper as a mitigating factor to be taken into account under the rubric of provocation in sentencing. Even in murder, where it seems to constitute a true defence, the law allows it only to reduce to manslaughter what would otherwise incur a fixed penalty.[76] In short, as far as liability is concerned, common law here disregards the defendant's personal equation and insists that he keep his temper.

Problems with Common Law

Three main problems arise with present law. They concern the definition of automatism, its relation to insanity and its connection with blameworthiness.

(1) Definition

The main problem with the common law in this regard — and here as yet our law in Canada has not been codified — is one of definition. Automatism being a relatively recent addition to common-law defences, the law has proceeded chiefly on a case-by-case basis allowing the defence in certain circumstances but rejecting it in others. The law has not yet arrived at a more general rule to make clear which kinds of circumstances do and do not justify a defence of automatism.

(2) Automatism and Insanity

The second problem relates to the line between insanity and automatism. Common sense would allot involuntary acts arising from mental disease to insanity and those from other causes, e.g. physical disease, to automatism. Case law however, has extended "disease of mind" in the insanity rule to cover such physical diseases as arteriosclerosis and has narrowed automatism to involuntariness due to external causes, e.g. concussion. This raises two further problems. First, does "disease of mind" also extend to epilepsy and somnambulism? Second, could the insanity defence be available to an accused

who, because of "disease of mind", acts without volition but with knowledge of what he does?

As indicated above, we have not reached a firm conclusion as to whether automatism should be statutorily defined. If it were so defined, then one solution to the first question would be to restrict automatism to cases arising from external factors and to leave all other cases to fall under insanity. This solution would have the merit that cases of epileptic and similar automatism would render the defendant liable to investigation followed by detention if his condition were to be assessed as dangerous.

Meanwhile, the solution to the second question depends on the formulation of the insanity rule. If this rule were extended to cover cases of inability to conform with the requirements of the law, then it could apply to defendants who, by reason of insanity, act without volition but with awareness. If it were not so extended, it should not in principle apply to such defendants. It may well be, however, that as some medical evidence suggests, the mind is not so compartmentalized, that insane loss of self-control is always accompanied by loss of awareness and therefore that defendants of the type mentioned form a non-existent class.

(3) Automatism and Blameworthiness

Clearly the principle behind allowing a defence of automatism is that an accused cannot be blamed for things which are not his fault. Involuntary behaviour is typically not the actor's fault. Involuntary behaviour, however, due to self-induced intoxication, negligence (e.g. the diabetic who delays taking his insulin) or loss of temper can be said to be his fault. Here the defence should obviously be excluded, and to this end the Draft specifically excludes involuntary conduct arising from such causes as intoxication and provocation and restricts automatism to accidental or unforeseeable disturbances of mind. At the same time whether automatism due to psychological trauma

should be allowed (e.g. loss of control due to seeing one's family annihilated), is a matter on which we have reached no final conclusion.

DRAFT LEGISLATION

Automatism

7. (1) Every one is excused from criminal liability for unconscious conduct due to temporary and unforeseeable disturbance of the mind resulting from external factors sufficient to affect an ordinary person similarly.

(2) This section does not apply to conduct due to mental disorder, intoxication or provocation.

ANNOTATION TO DRAFT LEGISLATION

Draft section 7 follows the approach of present law. It defines automatism in terms of conduct rather than of psychological condition. In so defining it, subsection (1) restricts it to unconscious conduct resulting from external factors. Subsection (2) excludes from the application of the defence conduct resulting from mental disorder, intoxication and provocation.

The words "unconscious conduct" codify the present law. Behaviour which at first sight looks voluntary but which on further inspection turns out to be involuntary is excluded from criminal liability. "Non-acts" of course, like twitches and spasms, are not conduct at all and are therefore excluded from criminal liability. Acts which are not "non-acts" in that sense, but are done without consciousness, come under this subsection.

The words "due to temporary and unforeseeable disturbance of the mind resulting from external factors" are used in order to distinguish automatism from mental disorder. In fact

mental disorder and automatism relate to two quite different types of defendants. The first consists of those whose abnormal conduct results from some pathological impairment rendering them potential sources of danger. These fall under the mental disorder rule in Draft section 5 and would be dealt with by a special verdict and committal under provisions similar to those of *Cr.C.* s. 542. The second type consists of those whose abnormal conduct results from some accidental occurrence, e.g. concussion, temporarily impairing their faculties but not rendering them dangerous in the long term. These fall under the rule relating to automatism.

The Draft differentiates between those two types in three ways. First, by using "disease of the mind" in Draft section 5 it impliedly allots the first type of case to mental disorder and the second type to automatism. Second, by defining automatism in terms of "temporary disturbance resulting from external factors" it expressly restricts automatism to cases of the second type. Third, in subsection 7(2), it expressly excludes cases of mental disorder from automatism.

This leaves the problem of persons whose minds are temporarily disturbed by physical, i.e. non-mental, diseases, e.g. arteriosclerosis. Logic militates against allotting them to the mental disorder category, as is done by present case law. Policy, however, supports the case law, for though the disease in question may not be medically speaking a mental one, the sufferer is still a potential source of danger, so that outright acquittal would be unwise. By using the term "disease of the mind" in Draft section 5 and "mental disorder" in subsection 7(2) the Draft in this regard retains the present law.

The term "unforeseeable" is used to restrict the defence to cases where the accused is free of fault. If he could have foreseen the disturbance of mind, he is not free from fault and cannot avail himself of the defence of automatism. A diabetic in a state of automatism would be at fault if that automatism resulted from his failure to take the insulin prescribed. A motorist driving dangerously in a state of automatism would be at fault if that automatism resulted from voluntary consumption of alcohol and drugs which was foreseeably likely to produce

such a state. "The necessary fault is to be found in the consumption of alcohol and drugs under circumstances in which he knew or ought to have known that his ability might be impaired" — per Martin J.A. in *R. v. McDowell*.[77]

The words "external factors" build on the distinction drawn by the case law between sane and insane automatism. To be within the defence of automatism the unconscious conduct must result from some external cause. If it results from some internal factor, it is excluded from automatism and resides, if anywhere, under mental disorder.

A clear case of sane automatism arises where unconscious acts result from a concussion. Here the requirement in subsection (2) of an external factor is met squarely. Less clear are cases where acute emotional stress, fugues, fits and so on are caused by a combination of an external situation (e.g. a love disappointment) and a psychological weakness peculiar to the accused. Here the further requirement that the external factor be sufficient similarly to affect an ordinary person excludes such cases on the ground that normal individuals must be required to live up to the general standards of the criminal law, while abnormal individuals should be dealt with in the context of mental disorder.

3. Physical Compulsion and Impossibility

Physical compulsion and impossibility are analogous to automatism. Automatism relates to conduct which is not consciously directed by the mind, as defined in Draft section 7. It relates to "mental" involuntariness, e.g. acts done by unconscious persons. Compulsion and impossibility relate to physical conduct which cannot be consciously avoided, or "bodily" involuntariness, e.g. acts done by means of a physically overpowered person.

Accordingly, these concepts raise a problem similar to that discussed in the previous section. Principle dictates that no one be punished either for acts or omissions which may be unavoid-

able. Policy militates against acquittals for acts or omissions which may be avoidable. The problem, then, is one of drawing the line between the two.

The Common Law

Common law, which on this topic has not yet been codified in Canada, recognizes the principle involved but guards against opening the door to spurious excuses. It recognizes that if one person physically overbears another by superior force and compels him to commit some forbidden act, guilt is to be imputed to the former not the latter — in doctrinal terms there is no *actus reus* in the latter for there is no *actus*.[78] It also recognizes that people are not to be expected to do the impossible — in the words of the maxim, *lex non cogit ad impossibilia*.[79] In both cases the person subject to compulsion or impossibility has a good defence.

No such defence, however, applies in either of the following situations: (1) It does not apply in cases falling short of compulsion or impossibility where the act required is not impossible but merely very inconvenient or undesirable.[80] (2) Nor does it apply where the defendant is responsible for his own predicament.[81]

Problems with Present Law

In our view present law presents no problems, works well and is appropriate for codification.

DRAFT LEGISLATION

Physical compulsion and impossibility

8. Every one is excused from criminal liability for acts due to physical compulsion or omissions due to physical impossibility.

As discussed above, this excuse refers to situations where the person has no choice at all — a factor emphasized by the word "physical". It would apply to all offences, whether requiring *mens rea* or not. "Compulsion" in the Draft section applies to acts, "impossibility" to omissions.

4. Mistake or Ignorance of Fact

Logically the main problem here is whether there is any need to provide a separate defence of mistake of fact. Strictly speaking such a provision might seem unnecessary since mistake of fact entails a lack of that knowledge which is required for *mens rea*. Mistake of fact seems nothing more than an absence of something which the prosecution has to prove.

In most cases the prosecution will have little difficulty. The natural inference from a person's conduct will be that he has full knowledge of the relevant circumstances. The natural inference, for example, from being found with heroin in one's pocket is that one knows the nature of the substance carried.

Occasionally this inference may be misleading. It may be in the above example that the possessor is mistaken as to the substance — he may think that it is powdered milk. This will not come to light, however, unless there is evidence of his mistake. Normally in such cases, the accused has the evidentiary burden of answering the prosecution's *prima facie* case against him. To do this, he may raise a plea of mistake of fact which the prosecution must then disprove. For this reason mistake of fact has been traditionally regarded as a defence.

The Common Law

Common law, which on this topic is not yet codified in Canada, arguably required mistake of fact to be honest, reason-

able and innocent.[82] An honest mistake is one actually made by the accused — his actual state of mind was the crucial factor and liability was subjective. A reasonable mistake is one which would be made by a reasonable person in the accused's position — here liability was objective and measured by the standard of the reasonable man. An innocent mistake is one which leads the accused to believe that he is not committing a wrongful act.

In Canada the position is as follows. In the case of serious crimes the defendant's mistake must be honest but does not need to be reasonable, for reasonableness is merely a factor relevant to the assessment of that honesty. The test is subjective and the crucial factor is the defendant's actual state of mind. Unless he actually knew the circumstances he has a good defence: *Beaver v. R.*[83] In the case of other offences the mistake must be both honest and reasonable. Here then the test is partly objective.[84] In both cases, however, the mistake must also be innocent.

Problems with Present Law

One problem with present law centres around the meaning of the term "innocent". At common law it is unclear how far liability is excluded by a mistake leading an accused to think he is doing a non-criminal act. In particular it is unclear how far it is excluded if he realizes that his non-criminal conduct is nevertheless a tort or an immoral act. On this our view is that a person who is nevertheless labouring under a mistake of fact should not be guilty of the criminal offence charged merely because he knows or suspects that he is contravening civil law or ordinary morality. In short, "innocent" should mean "such that on the facts as he supposed them he was committing no offence".

A further problem concerns the effect of non-innocent mistake. The problem arises where the mistake leads an accused to think he is committing an offence different in gravity or type from the offence charged. Where the "imagined"

offence is of lesser gravity than that charged but not an included offence (e.g. *X* is charged with selling LSD but thinks he is selling mescaline, a lesser offence), he may be found guilty of the offence charged although strictly speaking he lacks *mens rea* for it.[85] But where the imagined offence is totally different from that charged (e.g. *Y* is charged with possession of narcotics but thinks he possesses counterfeit bills), he must on principle either be convicted of an offence for which he totally lacks *mens rea* or else be acquitted despite his guilty state of mind. Conviction here would be supported by the majority in *Kundeus* but rejected by the dissent of Chief Justice Laskin who said: "I am unable to agree that where *mens rea* is an element of an offence . . . it can be satisfied by proof of its existence in relation to another offence unless, of course, the situation involves an included offence . . ."[86] In both these situations case law has departed from the principle that no one should be convicted of an offence unless he has the *mens rea* required for that offence. It has done so for reasons of policy and out of "regret on the part of a court to free a person who appears to be guilty of an offence with which he has not been charged".[87]

In our view principle and logic can be reconciled. This can be done by a two-step provision. First, the law could provide that where the mistake leads an accused to lack the required knowledge or intent for the crime charged, he shall be acquitted of that crime. Second, it could provide that where he believes he is committing some other offence, he shall be convicted of an attempt to commit that other offence. This would avoid both the injustice of letting go scot-free an accused who meant to commit a crime and the illogicality of convicting him of a crime for which he lacked the requisite *mens rea*.

In certain serious offences, though, e.g. illegal importation of narcotics, such a provision might prove counter-productive. In regard to such offences, triers of fact, though normally prepared to reject false defences, may tend to seize on them as a means of avoiding convicting defendants of crimes carrying severe minimum penalties, may convict such defendants of "lesser attempt" offences by way of compromise and may thereby encourage them to advance such false defences as a

matter of course. Whether this is so and whether special provision may prove necessary to prevent it, is obviously a matter for prediction on the evidence now available. On this important question in which logic may well conflict with practicality, the Commission invites commentary.

DRAFT LEGISLATION

Mistake or ignorance of fact

General rule

9. (1) Subject to the provisions of this section every one charged with an offence is excused from criminal liability for that offence if acting under such mistake or ignorance of fact that on the facts as he perceived them his conduct would not have constituted that offence or he would have had a justification, excuse or other defence allowed by law.

Alternative offences —

Offence under same section

(2) Where on the facts as he perceived them, an accused would have committed an offence created by the same section as the offence charged, he shall be convicted of the offence charged.

Included offence

(3) Where on the facts as he perceived them, an accused would have committed not the offence charged but an included offence, he shall be excused from criminal liability for the offence charged and convicted of that included offence.

Offence under different section

(4) Where on the facts as he perceived them, an accused would have committed an offence which, not being an included offence, is created by a section other than that of the offence charged, he shall be excused from criminal liability for the offence charged and convicted of an attempt to commit that other offence.

Wilful blindness

(5) Where an accused suspects that certain facts exist but abstains from ascertaining them, any resulting mistake or ignorance of fact is no excuse.

Requirement of reasonableness in non-*Code* offences

(6) Unless otherwise provided, in respect of offences other than those in the *Criminal Code*, mistake or ignorance of fact is no excuse unless the accused proves that he was labouring under such mistake or ignorance and that he took reasonable care to avoid it.

ANNOTATION TO DRAFT LEGISLATION

Draft subsection 9(1) builds on the basic case-law doctrine on this subject. This is that an accused must be judged on the facts as he perceived them. If on those facts no offence would have been committed, he must be acquitted, for he has a defence of mistake of fact. Likewise, if on those facts he would have had a defence, he must be acquitted. This is so in general even though that mistake arose from negligence, provided it was genuine.

The terms "mistake" and "ignorance" are left undefined. The difference between them is that a mistake of fact consists in thinking that the facts are other than they actually are while ignorance of fact consists in simply not knowing the facts. Mistake is a positive and ignorance a negative state of mind. In effect, though, there is no real difference: in both cases the accused does not know the true state of things.

At present the law is not totally clear on how far a person properly charged with an offence is criminally liable for it if in fact he thought he was committing some other offence. Section 9 clarifies the position as follows. Under subsection 9(2) if on the facts as he perceived them the accused was committing an offence different from that charged but created by the same section, he can be convicted of the offence charged. So, an accused who is charged with possession of cocaine contrary to

Narcotic Control Act section 3 but thought he was in possession of morphine, contrary to the same section, could be convicted as charged. Under subsection 9(3) if on the facts as he perceived them he was committing an included offence, he shall be convicted of that included offence. So, an accused charged with assaulting a police officer but thinking him a private citizen could be convicted of assault. Finally, under subsection 9(4) if on the facts as he perceived them an accused was committing an offence created by a different section from that creating the offence charged, he could be convicted of an attempt to commit that different offence. So, an accused who is properly charged with importing narcotics contrary to *Narcotic Control Act* section 5 but evidently thought he was importing counterfeit money contrary to *Cr.C.* s. 408, could be convicted of an attempt to contravene section 408.

Draft subsection 9(5) codifies the common-law rule that wilful blindness does not excuse. (*Roper v. Taylor's Central Garage Ltd.*[88]) It is well established that in offences requiring knowledge, intent or recklessness, *mens rea* is negatived only by such ignorance as is honest and not by mere ignorance accompanied by suspicion that the facts are otherwise. Accordingly, a person who shuts his mind to an obvious source of knowledge and refrains from ascertaining facts that might prove inconvenient cannot plead ignorance in good faith. On the contrary, his deliberate ignorance or wilful blindness is treated on a par with knowledge. This position is retained by subsection 9(5).

Draft subsection 9(6) provides that, unless otherwise provided, in order to excuse from non-*Code* offences mistakes of fact must be not only genuine but also reasonable. In other words mistakes due to negligence will not excuse. This is already the rule regarding regulatory offences (*Sault Ste. Marie*).[89] Subsection 9(6) extends it to all non-*Code* offences on the basis that all serious criminal offences should in principle find their place in the *Code*.

It will be seen, then, that Draft subsection 9(6) takes care of one aspect of the notion of due diligence. This aspect concerns those personally committing regulatory offences,

whose negligence or diligence relates to claims of ignorance or mistake of fact. The other aspect concerns those vicariously liable for such offences, whose negligence or diligence may also relate to claims that they took all reasonable precautions to avoid their occurrence. Whether a separate defence of due diligence is needed for such situations depends on whether vicarious liability should be retained. Accordingly, the question of due diligence in this regard is deferred until the final view is taken on vicarious liability.

5. Mistake or Ignorance of Law

The problem concerning ignorance of law stems from a conflict between principle and policy. In principle it may be unjust to punish someone for breaking a law of which he is entirely ignorant especially if he acts in all good faith and has no chance of finding out the law in question. Policy, however, militates against allowing a defence which might well defeat the purpose of the criminal law.

The dangers of a defence of ignorance of law are sometimes less real than imagined.[90] First, while it is often argued that such a defence would open the door to all manners of spurious excuses, it may be said in answer that spurious excuses can be raised under the heading of any defence and this does not prevent either judges or juries from deciding which are and which are not genuine. Second, while it is sometimes argued that allowing such a defence would make the individual defendant rather than the courts the judge of what the law is, this argument confuses excuse with justification — under the defence of mistake of law the accused would be excused on the ground of error, not on the ground that what he did was right and lawful.

There remain, however, some real objections to the defence. On the one hand, the major rules of criminal law serve to underline moral principles so well known that people can hardly be considered ignorant of them. On the other hand,

given genuine ignorance, it may be arguable that it is time that the offender learned.

The Common Law

The common-law rule is that, in general, ignorance of law is no excuse.[91] This rule, however, is subject to three qualifications. First, it does not extend to ignorance of private law concerning private rights especially where such ignorance gives ground to claims of right made in good faith. So, where an accused takes another's property believing, on account of a mistake as to the relevant property law, that he is entitled to it, he is not deprived of a defence to a theft charge merely because his mistake is one of law.[92] Second, the general rule does not in principle extend to apparent mistakes of law which are in reality mistakes of fact. So, a person accused of bigamy has a good defence if he believes that his wife by his former marriage was under age and therefore that that marriage was invalid.[93] Third, non-publication of a statute may render ignorance of law a good defence.[94]

Present Law in Canada

The common-law rule that ignorance of law is no excuse is codified by section 19 of our *Criminal Code*. At the same time our law in Canada accepts the qualifications mentioned above. Mistakes regarding private rights, mistakes which are in reality mistakes of fact and mistakes arising from non-publication of secondary or subordinate legislation all give rise to a good defence.

Problems with Present Law

In our opinion no injustice is involved in convicting an accused for violating ordinary prohibitions of criminal law despite his ignorance of the law in question. As mentioned

above, such prohibitions serve to underwrite society's basic moral principles. In essence, if not in precise legal detail, these prohibitions are known to every ordinary citizen, and the individual is ignorant of them at his peril.

Problems arise, however, over three matters. One is the meaning of the term "law" in the rule concerning ignorance of law. Another is the extent of the exception relating to non-publication. Yet another is the exclusion of reliance in good faith on authority as a defence.

(1) The Meaning of "Law"

This is a question which so far has not been fully determined. Two propositions are clear. First, mistake concerning the law governing the offence charged is no defence, whether that law is in the *Criminal Code* or in some other statute or regulation.[95] Second, mistake as to private law (contract, property, family rights, etc.) is a defence if private law is relevant, by virtue of the requisite *mens rea*, to the offence charged.[96]

Less certain is the application of the rule to certain other kinds of law. Some criminal offences are defined by reference to duties imposed by provincial statutes, e.g. on doctors, nurses and motorists,[97] or by municipal by-laws, e.g. regarding fire precautions.[98] Does ignorance of the imposition of such duties give rise to a defence? Likewise, some criminal offences are open to a defence of "lawful excuse" specifically allowed by statute.[99] Where an accused's conduct constitutes a tort or other civil wrong, does ignorance of the relevant tort law prevent him raising this defence?

On this two views can be advanced. The traditional view is that a mistake as to such law comprises a mistake of law and so is no defence.[100]

Another view adopted recently, however, is that on a charge under the *Criminal Code*, mistake or ignorance concerning a provincial statute is to be treated as mistake of fact and is therefore a defence. In *R. v. Prue and Baril*[101] the Supreme

Court of Canada decided by a majority that, on a charge of driving while disqualified contrary to *Cr.C.* s. 238, the accused's ignorance of the automatic suspension of his licence by provincial law was a mistake of fact and so a good defence. The *mens rea* required by that *Criminal Code* offence, the Court held, was negatived by ignorance of the provincial law in question.

Arguments can be raised to support both views. In favour of the *Prue* approach there is the following argument: crimes consist of culpable wrongdoing; committing them means breaking laws which, by virtue of their moral content, the offender knows or ought to know; and so ignorance of other laws, i.e. non-criminal law, should be a good defence. Against that view there is the following argument: any laws, federal or provincial, imposing public duties (e.g. on motorists as a class) are laws the citizen can be required to know; breaking them is culpable wrongdoing, and so mistake or ignorance of such laws should be no defence to any criminal charge to which they are relevant. This is the view adopted by the Draft.

(2) Non-Publication

Ignorance of law may qualify as a defence where the defendant's conduct has been made illegal by secondary, or subordinate, legislation and such legislation cannot be located by the defendant.[102] *Regulations Act*[103] section 6 states that no one shall be convicted of an offence consisting of a contravention of a regulation not yet published in the *Canada Gazette* unless two conditions are fulfilled: (1) the regulation has been exempted from this requirement by the Governor General in Council or by the regulation itself, and (2) it is proved that at the date of the contravention reasonable steps had been taken to bring the regulation to the notice of the public or the accused.

A great deal of legislation similar to that contained in regulations may be found also in statutes. As to statutes the *Interpretation Act* provides that an Act comes into force at the

date of Royal Assent or Proclamation or at such other date as the Act provides.[104] Yet given the multiplicity of statutes creating mere regulatory offences, no individual can be expected to be aware of all their provisions prior to publication. In our view, therefore, justice demands an extension of the "non-publication" defence to statutes as well as regulations.

(3) Reliance on Authority

Occasionally ignorance of law may take a different form. The defendant's unawareness of the illegality of his conduct may arise, not from his ignorance of the existence of the relevant law, but rather from mistake as to its meaning. On this the common-law position is that the law bears the meaning given it by the courts and not that attributed to it by the citizen — courts, not citizens, are the final interpreters of legislation.

This rule, however, can sometimes work injustice because courts may differ in interpreting the law. Two courts of equal jurisdiction may take opposite views or an appeal court may overrule a lower court's interpretation. So, a defendant may well think his conduct legitimate because of the meaning already given to the law by a court but may later find that meaning rejected in his case by a different court. Such a defendant should not in our opinion be penalized for failure to "second guess" judicial decisions.[105]

A special problem arises regarding areas of law, like tax laws, laws on weights and measures, etc., which are basically non-criminal law but which create offences. Such laws are regularly explained to citizens by those responsible for the administration of those laws. The commonest guide, then, to the scope and meaning of such laws becomes official pronouncements, rulings and directives. So, where reliance in good faith is placed on such authority, it clearly is unfair to penalize the citizen for failing to predict eventual court interpretation.[106]

DRAFT LEGISLATION

Mistake or ignorance of law

General rule

10. (1) Subject to the provisions of this section no one is excused from criminal liability by mistake or ignorance of law.

Restriction concerning private rights

(2) Every one charged with an offence is excused from criminal liability for that offence by mistake or ignorance of law concerning private rights where knowledge of such rights is relevant to that offence.

Restriction concerning non-publication, etc.

(3) Every one is excused from criminal liability by reasonable mistake or ignorance of law resulting from

(*a*) non-publication of such law,

(*b*) reliance on judicial authority, and

(*c*) except for offences governed wholly by the *Criminal Code*, reliance on administrative authority.

ANNOTATION TO DRAFT LEGISLATION

Draft section 10 retains the general rule of *Cr.C.* s. 19 that ignorance of law is no excuse subject to the two qualifications that unavoidable ignorance of law due to non-publication or concerning private rights is a defence. The section adds two other exceptions. Subsection 10(3) allows a defence (1) where the mistake is made in reliance on judicial authority and (2) where, in the case of non-*Code* offences, it is made in reliance on administrative authority.

Here, as with mistake or ignorance of fact, the terms "mistake" and "ignorance" are left undefined.

In this context the word "law" poses a problem. This stems partly from the difficulty of distinguishing between law and fact and partly from the difficulty of determining what type of law will fall within the rule.

The distinction between mistake of law and mistake of fact is in essence quite straightforward. A mistake of law arises from ignorance or misunderstanding of a rule laid down by legislation or case law. A mistake of fact arises from ignorance, misperception or misjudgment of some state of affairs other than the existence, scope or meaning of a rule of law.

Present law allows two exceptions to the rule that ignorance of law is no excuse. First, ignorance or mistake of private law may result in a claim of right such as to defeat *mens rea* on a charge of theft, fraud or other related offences, and here such ignorance or mistake of law can be a defence. Second, ignorance of law may qualify as a defence where the defendant's conduct has been made illegal by secondary, or subordinate, legislation and such legislation cannot be located by the defendant: *R. v. MacLean*.[107]

Draft subsection 10(2) retains the first exception by specifying that mistake or ignorance concerning claims of right shall be treated in the same way as mistake or ignorance of fact. Under this subsection a mistake as to private rights will be a defence to the extent that it fulfils the requirement of Draft section 9.

Draft paragraph 10(3)(*a*) retains and extends the second exception. It provides that an exception shall be made for reasonable mistake or ignorance of law resulting from non-publication. This is already the law with regard to offences created by regulations. The subsection would extend the rule to all offences.

Draft paragraph 10(3)(*b*) adds a third exception. It provides that even though an accused's act is judicially held to be illegal,

reasonable ignorance of its illegality will be a defence if based on a prior court decision to that effect. This is only logical and fair. The rule concerning ignorance of law finds its ultimate justification in the fact that courts, not citizens, must be the final interpreters of the law. At the same time, a citizen reasonably relying on such interpretation in a judicial precedent should not be jeopardized by a subsequent interpretation to the contrary in his own case. Cases of actual reliance on the part of an accused will admittedly be rare in practice but still raise an important point of principle for a legal system aiming at consistency and fairness.

Draft paragraph 10(3)(*c*) adds a fourth exception. It provides that except for offences governed wholly by the *Criminal Code*, reasonable mistake or ignorance of law made in reliance on administrative authority should be a defence. This too is only logical and fair. Though administrators, like other citizens, are bound to follow judicial interpretation, yet reliance on the guidance provided by their own application of the rules should not be prejudiced by a later change in such application.

6. Duress

Duress poses a conflict between principle and expedience. On principle a person acting under extreme pressure cannot in fairness be expected to conform to the law's requirements — in the words of the maxim, necessity knows no law. At the same time expedience requires that no individual, whatever the pressures, be allowed to set himself above the law — as has been said, no one can be permitted to be wiser than the law.

The Common Law

The common-law defence of duress is in fact a specific application of the doctrine of necessity. According to that doctrine necessity sets aside the law because it would be harsh

and unrealistic for laws framed for those in ordinary situations to be imposed on persons facing instant overwhelming danger. Harsh because of the extraordinary circumstances; unrealistic, because of the natural instinct for self-preservation — the natural tendency to allow the more immediate peril to outweigh the more distant sanction of the law.

Necessity, however, is a concept which may generate confusion. First, it must be distinguished from compulsion and automatism. The distinction concerns choice. Persons acting under physical compulsion or automatism have no choice at all — under physical compulsion they are overpowered by superior force, under automatism by unconsciousness. By contrast, persons acting out of necessity have a choice but one extremely limited and difficult to exercise — the alternative may be exposure to extreme danger.

Second, it must be noted that necessity in fact refers to different types of situations — to duress, self-defence and other justifications, and, for lack of a better word, necessity in a narrower sense. A person acting under duress is threatened by another with harm unless he complies with that other's command. A person acting in self-defence is wrongfully attacked by another and therefore repels force by force. A person acting out of necessity in the narrower sense seeks to avoid harm or danger arising from a situation other than the two just mentioned. In all three situations, however, the person responds to extreme pressure.

Despite this fact duress, self-defence and necessity were traditionally distinguished by the common law because the extreme pressure in question arises from different sources. In self-defence the source is an aggression, repelling which serves to promote a value supported by law. In duress, it is a threat, the avoidance of which involves harm to an innocent third party or contravention of the law, and therefore does not promote a value supported by law. In necessity the source is neither an aggression nor a threat but rather some emergency forcing a choice between two evils.

Each situation, covered by common law, is also covered specifically by the Draft. We begin with duress. At common law this is a well-recognized defence.[108] It was subject, however, to three limitations. First, the defendant had to be in immediate fear of danger. Second, the danger had to consist of death or serious bodily harm. Third, the defence of duress was not available to one accused of murder as a principal.

Our Present Law

Our present law on this topic is contained partly in section 17 of our *Criminal Code*[109] and partly in the common law.[110] Section 17 allows a defence of duress to one committing an offence under threat of immediate death or bodily harm, provided that the following conditions are fulfilled:

(1) the person threatening is present when the offence is committed;

(2) the defendant believes that the threats will be carried out;

(3) he is not a party to a conspiracy or association which made him subject to the compulsion; and

(4) the offence committed is not one of the listed offences detailed in section 17 (high treason, treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson).

Section 17, however, applies only to those actually committing offences and not to parties. By virtue of *Cr.C.* subs. 7(3), which preserves common-law defences, parties may avail themselves of the common-law defence of duress. So, while a person committing murder has by virtue of section 17 no defence of duress, a party to murder has a defence at common law.[111]

Problems with Present Law

Adequate though it is in principle, our law on duress is in detail open to several criticisms. First, *Cr.C.* s. 17 is less than

fully comprehensive: as mentioned above, the rule concerning parties is still governed by common law and differs from the law concerning those actually committing offences. Second, section 17 excludes the defence from very serious crimes by enumerating specific offences without articulating any underlying principle or rationale. Third, the denial of the defence to parties to conspiracies is arguably unnecessary and unjustifiable. Unnecessary if the harm threatened is not immediate since then no defence of duress arises. Unjustifiable if it is immediate since in that case no one can fairly be expected to remain unaffected by such threats. Finally, the requirement that the person threatening must be present has caused problems of interpretation. But this requirement is hardly necessary given that the threats must be threats of immediate harm.[112]

In our view a solution to these problems would be to replace the existing law by one comprehensive section laying down a general rule which would apply both to persons who commit offences and to parties to them. Such a rule would require the defendant's conduct to be a reasonable response to threats of serious and immediate harm and would exclude duress from cases where his conduct manifestly endangers life or bodily integrity.

DRAFT LEGISLATION

Duress

11. Every one is excused from criminal liability for an offence committed by way of reasonable response to threats of serious and immediate bodily harm to himself or those under his protection unless his conduct manifestly endangers life or seriously violates bodily integrity.

The law has been specially cautious with duress in three respects. First, the defence has been excluded by *Cr. C.* s. 17 from offences such as murder, causing bodily harm, arson and assisting in rape. Second, it is excluded if the accused is a party to a conspiracy or association whereby he is subject to compulsion. Third, the defence is available only if the threats are of immediate death or grievous bodily harm by a person who is present when the offence is committed.

Draft section 11 is equally restrictive in two respects. It limits the offences to which duress can apply, and it limits the kind of threats on which the defence can be based.

By using the words "unless his conduct manifestly endangers life or seriously violates bodily integrity", Draft section 11 retains the principle embodied in *Cr.C.* s. 17 that threats, however serious, should not be complied with at the cost of the life or bodily integrity of others. This principle, however, is formulated in the Draft by reference not to offences but to conduct. Instead of fixing, like *Cr.C.* s. 17, on the legal definition of the offence charged by the prosecution, Draft section 11 fastens on the accused's actual reaction to the threats. So, while on a charge of robbery, *Cr.C.* s. 17 excludes duress completely, Draft section 11 allows the trier of fact to decide the question of duress by examining the accused's actual conduct and by determining whether the robbery in fact involved danger to life or bodily integrity or "violence" which was at most technical (e.g. the employment of an imitation weapon). In this way section 11 replaces an *ad hoc* enumeration of offences by a rule of general application.

"Danger to life or bodily integrity" is self-explanatory. "Danger to life" serves to exclude duress from murder and causing bodily harm. "Danger to bodily integrity" excludes it from forcible abduction and robbery with actual violence.

Whether duress is excluded as a defence to piracy or arson depends on the actual circumstances. If *B* threatens to shoot *A*

on the spot unless he sets fire to a building which *A* knows is empty, the duress is a defence to arson or any other charge relating to that conduct. But if *A* knows that the building is likely to be occupied, he has no defence of duress to any such charge.

Whether duress is a defence to treason likewise depends on the actual circumstances. Here, however, the notion of physical danger may be inadequate in view of the seriousness of even those types of treason which involve no violence. If for this reason duress should be excluded from treason, it should be excluded specifically in the provisions governing that offence.

The words "reasonable response to threats of serious and immediate bodily harm" relate not only to the accused's own conduct but also to the nature of the threats. The principle is that to ground a defence of duress there must be threats to which a reasonable man would yield. This principle is expressed in *Cr.C.* s. 17 by the words "threats of immediate death or grievous bodily harm from a person who is present", "if he believes that the threats will be carried out" and "if he is not a party to a conspiracy or association whereby he is subject to compulsion".

Draft section 11 retains this principle in substance by requiring the threatened harm to be immediate, serious and physical. Such harm would include killing, so that the word "death" becomes unnecessary. Likewise, to be immediate, the harm must be threatened by a person actually or constructively present, so that the words "from a person who is present" also become unnecessary. In addition, to be under duress the accused must have been reasonably responding to such threats, so that the words "if he believes . . ." also become unnecessary. Under section 11 there would be no defence unless it were reasonable for the accused to think himself faced with threats of immediate and serious bodily harm and to react to them as he did.

An accused may react to such threats in several different ways. He may resist, seek help, escape from, or yield to the

threats. Usually where duress is pleaded, the accused broke the law to comply with the threatener's demands (e.g. damaging property under threat of stabbing: *R. v. Carker*).[113] Less usually, he may have broken the law in order to escape (e.g. making his getaway by driving dangerously: *R. v. Smith*).[114]

The words "if he is not a party to a conspiracy. . ." are also omitted. The principle behind excluding duress in such cases (which have to do with secret societies) is that public duties must not be overborne by private constraints. In such cases if the harm threatened is not immediate, duress is no defence, but where it is immediate (e.g. a gang leader orders another at gunpoint to commit an offence not involving danger to life), duress should be a defence, for whether or not the accused has previously subjected himself to compulsion, he is now "on the spot". This question, however, will be reviewed later when we examine the offence of conspiracy.

The words "to himself or those under his protection" are inserted because although duress is primarily discussed in terms of threats against the accused himself, *Cr.C.* s. 17 nowhere specifies the person against whom they must be levelled. Nor is there much illumination in the case law. This being so, section 11 extends duress to threats against those under the accused's protection, partly on the ground that those under his protection, e.g. his family, can fairly be regarded as an extension of the accused himself, and partly by analogy with self-defence.

Despite their common fundamental nature, duress, self-defence and necessity are kept separate in the Draft for two reasons. First, they have been traditionally distinguished by common law. Second, the distinction is based on moral differences between the three defences. In self-defence the accused seeks protection against aggression and in so doing promotes a value supported by the law. In duress, he avoids harm wrongfully threatened to him but does so at the expense of an innocent third party or by contravention of the law and therefore does not promote a value supported by the law. In necessity he may sometimes promote a value supported by the law and contravene the letter of the law to secure some greater

good (e.g. an unlicensed motorist drives an emergency case to hospital to save life); at other times he may fail to promote such a value but may avoid harm to himself at the expense of an innocent person or of contravention of the law (e.g. a shipwrecked sailor saves himself by repelling another from a plank sufficient only to carry one).

In addition it should be noted that Draft section 11 provides the same rule for parties as for principals. Under present law the two are treated differently: for instance, though the person actually committing a murder and those participating in it can both be charged with murder *simpliciter*, the former cannot plead duress because of the exclusion in *Cr.C.* s. 17 whereas the latter has a common-law defence: *Paquette*.[115] The justification for this distinction, i.e. that the principal directly causes death whereas the other parties do not, is taken into account by the Draft in a more straightforward way by focusing not on the accused's legal status but on his actual conduct. So for example, if *A* at gunpoint forces *B* and *C* to murder *X*, *B* drives the getaway car to the scene of the crime and *C* does the actual killing, under existing law *B* has a common-law excuse but *C* has no defence. Under Draft section 11, *B* would and *C* would not have a defence since *B*'s conduct does not in itself involve danger to life but *C*'s conduct does.

Finally, the Draft omits the provision laid down in *Cr.C.* s. 18 to the effect that no presumption of compulsion arises in favour of a wife committing an offence in the presence of her husband. Since the old common-law rule has been abolished by that section, there is no need to mention it in a revised and comprehensive Code.

7. Necessity

Clearly any rational system of law must make provision for acts committed under pressures which no ordinary person

can be fairly required to resist or committed with the intention of promoting values accepted by the law itself. Most legal systems, then, will provide specific rules concerning duress on the one hand and self-defence, defence of property and advancement of law on the other. The question is whether alongside these specific rules there is need for a more general residual rule to cover other cases where the defendant acts to further the values promoted by the law. In short, should there be a catch-all necessity provision?

To focus on this question we suggest a hypothetical example. *X* is driving *Y*, a passenger in his car. *Y* has a sudden massive heart attack. *X*, therefore, drives *Y* to the nearest hospital for urgent treatment. Wishing to get there with all possible dispatch, he exceeds the speed limit. On the face of it *X* thereby breaks the law.

To such a case the law could take four possible approaches. It could convict *X*, take no note of the extenuating circumstances and impose a full penalty. No one would favour this approach. It would be unfair to *X*, who was only doing what any good citizen would do in such a situation, it would be counter-productive in that it would discourage conduct which should be allowed if not in fact encouraged, and it would bring the criminal law into disrepute.

Alternatively the law could convict *X* and leave it to the judge to take account of the extenuating circumstances in sentencing. This would allow flexibility — the courts could deal with such situations on a case-by-case basis instead of by following a rigid rule. But there are three objections. First, an element of unfairness would remain — *X* would still be held guilty when morally he is not to blame but rather to be commended. Second, the law would be speaking with two different voices — convicting *X* and then letting him off. Third, and most serious, leaving it to the judicial discretion could undermine the rule of law, for though the infinite variety of circumstances makes sentencing discretion necessary, yet matters of principle should be dealt with by law and not discretion — could we be sure that all courts would show good sense and treat like cases alike?

Thirdly, the law could leave it to prosecutorial discretion. Though this may be what happens in practice, since prosecutors are sensible and refrain from prosecuting people in *X*'s position, it too is open to objections. The law would speak with different voices — there would be a divergence between the law in the *Code* and the law in practice. The rule of law would be undermined and citizens like *X* would have to rely simply on prosecutorial good sense. Finally, no jurisprudence on the issue would be developed.

Fourthly, the law could explicitly provide a defence of necessity. It could do so on a section-by-section basis for specific instances or it could do so by a general rule. Since a section-by-section approach would be too detailed and complicated, a general rule is preferable if it can be devised and based on some clear rationale.

The rationale of necessity, however, is clear. Essentially it involves two factors. One is the avoidance of greater harm or the pursuit of some greater good, the other is the difficulty of compliance with law in emergencies. From these two factors emerge two different but related principles. The first is a utilitarian principle to the effect that, within certain limits, it is justifiable in an emergency to break the letter of the law if breaking the law will avoid a greater harm than obeying it. The second is a humanitarian principle to the effect that, again within limits, it is excusable in an emergency to break the law if compliance would impose an intolerable burden on the accused.

The utilitarian principle operates as follows. As a general principle good must be maximized and evil minimized. As a corollary, if non-compliance with law avoids greater harm than compliance, then non-compliance must be preferred. Indeed, insofar as laws are designed to maximize good and minimize evil, non-compliance with the letter of the law may turn out actually to be compliance with its spirit. So, a disqualified driver who, when no other transport is available, drives a heart attack victim to hospital breaks a law designed to protect human life and safety, but breaks it to save human life more

immediately and so promotes the very value promoted by the law in general and by that law in particular.

The humanitarian principle is that laws designed for ordinary individuals should not ask of them more than can fairly be asked of people of ordinary courage, strength and fortitude. As a corollary it should not require such individuals when faced with overwhelming pressures to comply with laws framed for normal situations devoid of peril. So, a shipwrecked sailor clutching a plank large enough for only one should not be expected to acquiesce and passively allow another to climb on his only hope of safety but should be conceded the privilege of repelling the invader even though this may cost the latter's life. Refusal by the law to make such a concession would be unfair, unrealistic and inconsistent: unfair because it would conflict unduly with the natural instinct of self-preservation, unrealistic because it would be futile to counter the immediate peril with the remoter risk of later legal sanction, and inconsistent because the law already makes this concession, albeit with limits, in duress and self-defence and should not withhold it in equally compelling circumstances.

The Common Law

Common law, which on this topic has not been codified in Canada, recognized a defence of necessity. Admittedly suggestions have been made to the effect that there is no general defence of necessity in common law, but this is contrary to the conventional wisdom.[116] In Canada, however, if there be a defence of necessity, impliedly imported through *Cr.C.* subs. 7(3), it has been accorded scant judicial recognition as a general defence.[117]

Our Present Law

Our present law on necessity has two aspects. As a general defence, necessity could be said to be implicitly accepted

insofar as recognized by common law. As a specific defence to a particular offence, it is explicitly allowed by several sections. These include *Cr.C.* subs. 221(2) which allows the killing of an unborn child in the act of birth to save the mother's life, *Cr.C.* s. 198 which dispenses with the standard of reasonable skill and care in surgical operations and other dangerous acts in cases of necessity, and some sections under which necessity can be pleaded under the guise of lawful or reasonable excuse (e.g. *Cr.C.* subs. 235(2) — failing, without reasonable excuse, to supply a sample of breath to a police officer on demand).[118]

Problems with Present Law

Traditionally courts have been reluctant to acquit defendants on the ground of necessity. In *U.S. v. Holmes*[119] necessity was rejected as a defence to manslaughter. In *R. v. Dudley and Stephens*[120] it was rejected as a defence to murder. In *Morgentaler v. R.*,[121] it was only dubiously recognized in theory, and rejected on the evidence.

This reluctance can be justified on grounds of principle, of policy and of practice. In principle necessity is inconsistent with the basic notion of the criminal law. Necessity gives precedence to private judgment, allows personal assessment of conflicting evils and licenses individual choice between opposing values, while criminal law imposes public standards, sets objective requirements and stresses that value conflicts are to be resolved by Parliament or by the courts. As Dickson J., for the majority of the Court observed in *Morgentaler*, "no system of law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value."[122]

In terms of policy necessity is a dangerous doctrine. For one thing it allows an individual, as judge in his own cause, to put his own before another's good; for another, it opens the door to all manner of self-serving pleas — as Glanville Williams observes, it is invoked equally by despots and by rebels.[123]

Finally, in terms of practice necessity presents difficulties. On the one hand no one can foresee, and so specifically provide for, the infinite variety of circumstances which might give rise to necessity; on the other hand on some situations there is less than absolute consensus — not all approve, for instance, the decisions in *Holmes* [124] and *Dudley and Stephens*. [125]

In our view these problems could be solved by the provision of a clear but carefully restricted defence of necessity. Such a defence could be restricted to acts done for the avoidance of immediate harm to persons and property where the harm to be avoided substantially outweighs the harm resulting from the defendant's own act and where it cannot be avoided by any lesser means. The detailed application of these restrictions could be left to judicial development on a case-by-case basis.

DRAFT LEGISLATION

Necessity

12. Every one is excused from criminal liability for an offence committed out of necessity arising from circumstances other than unlawful threat or attack provided

(*a*) that he acted to avoid immediate harm to persons or property,

(*b*) that such harm substantially outweighed the harm resulting from that offence, and

(*c*) that such harm could not effectively have been avoided by any lesser means.

ANNOTATION TO DRAFT LEGISLATION

While recognizing necessity as a defence, Draft section 12 restricts its application in four ways. First it distinguishes

necessity from duress and self-defence by excluding from necessity situations arising from unlawful threat, in which case the relevant defence will be duress, and from unlawful attack, in which case it will be self-defence. Second, section 12 limits necessity to cases of emergency where the defendant acts to avoid immediate harm. Third, it stipulates that the harm to be avoided must be greater than that caused by the defendant. Fourth, it requires that the accused must have no other effective method of avoiding the harm in question. How far the situation falls within these restrictions would be a question to be determined on the evidence by the triers of fact.

The word "immediate" signifies that the defence of necessity only arises in cases of emergency. Without such emergency time is available for alternative and lawful action.

The words "to persons or property" are inserted to exclude harm of a political, economic or social nature and to close the door to claims to know better than society and its elected lawmakers.

The term "substantially" is added to signify that the question for the court or jury is one of mixed fact and value rather than one of law, and one to be determined not according to fine calculation but by reference to basic common sense.

This proviso in principle rules out necessity in "life for life" cases such as *Dudley*. In such cases the death of one (the accused) does not on principle outweigh that of another (the victim) because the harm avoided does not objectively outweigh that of the offence. This, however, would not preclude prosecutors, courts, juries and cabinets from exercising their discretion and making concessions in appropriate cases on the basis that, in extreme emergency, loss of the accused's own life may well have seemed to him to outweigh the loss of someone else's. The use of such discretion, although derogating from the rule of law, seems to be the most appropriate way of dealing with the most difficult of such rare cases.

The term "any lesser means" rules out necessity where the harm could have been avoided by some less drastic action or by some less illegal action by the defendant.

C. JUSTIFICATIONS

Three justifications are obvious candidates for inclusion in the criminal law. These are self-defence, defence of property and advancement of justice. The principle here is one of consistency: whatever is authorized by law must also be justified and any force needed to do it must be justified as well — otherwise the law speaks with two voices. The present Draft concerns

(1) self-defence,

(2) defence of property, and

(3) advancement of justice (including lawful arrest, execution of process, etc.).

Arguably there should be added to these a more general section authorizing the use of force. Such a section could spell out all the most frequent situations where at common law such use of force was recognized as justifiable. These include lawful arrest, prevention of serious crimes and suppression of riots and other breaches of the peace. Such a provision has not been included here in the Draft. Instead these matters have been dealt with under Draft subsection 16(2) on Law Enforcement.

1. Self-Defence

With self-defence the problem is one of drawing the appropriate line. On the one hand no one can be expected to submit to unlawful attacks, wait for subsequent redress in the courts and meanwhile give up those rights to which the law entitles him. On the other hand aggression must not be allowed to be met by a disproportionate response nor must the right of self-defence be permitted to serve as a cloak for unlawful aggression.

The Common Law

At common law this problem was resolved by the development of a rule allowing persons unlawfully attacked to defend themselves by such force as is reasonable and necessary. There was also a doctrine of retreat, according to which the person attacked could not respond with deadly force unless he had first retreated as far as possible.[126]

Our Present Law

Our present law on self-defence is contained in sections 34-37 and subsection 215(4) of the *Criminal Code*. Section 34 rules out, subject to certain exceptions, force intended to cause death or bodily harm. Section 35 restricts the degree of force permitted in self-defence to one who is himself an aggressor. Section 36 defines the term "provocation" in this context. Section 37 states the general rule that unlawful force can be repelled by force which is necessary and proportionate in the circumstances. Finally, subsection 215(4) restricts the right of self-defence against illegal arrest.

Problems with Present Law

(1) Complexity

The main problem with our present law on self-defence is one of form rather than of substance. The sections mentioned above present the law in an unduly complicated fashion. The general rule that a person is entitled to repel unlawful force by force which is necessary and proportionate, is formulated only in the last section on the topic — section 37. The first section, section 34, provides in fact a restriction together with an exception. Section 35 provides a restriction concerning aggressors. Section 36 annotates "provocation". Finally subsection 215(4) adds a further restriction concerning illegal arrest. The law, then, is set out in five separate sections overlapping one

another and lacking orderly arrangement. In our view, understanding would be increased and the task of directing juries simplified if the law were set out more logically. The general rule should precede and be followed by the different restrictions.

Another reason for complexity is the excess detail which obscures the underlying principle. Sections 34 and 35 contain highly-detailed provisions concerning grievous bodily harm and self-defence by an aggressor. The principle, however, relates to necessity and proportionality, which are to be assessed in the light of all the evidence. Case law reveals that judges in directing juries in fact explain the sections in terms of this principle.[127] In our view this judicial approach should be reflected in the legislation.

(2) Self-Defence and Law Enforcement

A problem arises in principle over the question whether self-defence should be allowed against measures taken by mistake for the purpose of law enforcement, e.g. against illegal arrest. Clearly there cannot be a right of self-defence against lawful arrest; even though the arrestee is innocent of the crime suspected by the arresting officer, the latter must, if acting on reasonable and probable grounds, be protected and the former must submit and wait for vindication in court. Equally clearly there must be a right of self-defence against illegal arrest made knowingly, for this is simply an assault.

Half way between there comes the question of the right of self-defence against process executed in good faith, e.g. where the warrant of arrest is issued without jurisdiction. Though principle might suggest a right in such a case, the countervailing value — the need for peace and order — dictates submission by the person apprehended. Arresting officers should not be required to act as courts of appeal from those issuing warrants. And even where the error is that of the arresting officer, provided that he acts in all good faith, reason suggests a limitation on the right to resist and an exclusion of force known to be likely to cause death.

On this point existing law is as follows. If a process is defective, the enforcement officer is justified in executing it and in using necessary force to do so (*Cr.C.* subs. 25(2)). By implication the person subject to the process loses his right of self-defence. In the interests of clarity, however, this restriction on the right of self-defence should be spelled out explicitly in the self-defence provisions.

As to officers making *bona fide* mistakes of law concerning power of arrest, the right of self-defence against such officers is limited by *Cr.C.* subs. 215(4) which provides that murder is not necessarily reduced to manslaughter simply because the victim tried to arrest the accused illegally. In our view this restriction should be stated more explicitly in the General Part under self-defence and should be expressed more widely so as to rule out the use of force likely to kill or cause serious bodily harm against a person acting in good faith and purporting to effect lawful arrest.

(3) Self-Defence by an Aggressor

Under *Cr.C.* s. 35 an aggressor who "started it" can only use force in self-defence if he believes it absolutely necessary to avoid death or serious bodily harm. Even if he does, he still cannot use force if he attacked originally in order to kill or cause grievous bodily harm, if during the fight he endeavoured to kill or cause grievous bodily harm or if he did not first retreat as far as possible. In our view these provisions are unduly complex and need replacement by a simpler and more general rule. In this regard no special reference needs to be made to the duty to retreat since this is a factor going to the question of the necessity of the force used.

DRAFT LEGISLATION

Self-defence

General rule

13. (1) Subject to the provisions of this section, every one is justified in using no more force than necessary to

protect himself or any one under his protection against unlawful force, provided that the force used is proportionate to the harm apprehended from the unlawful force.

Restriction concerning law enforcement

(2) No one is justified in using force which he knows is likely to cause death or serious bodily harm in defending himself against acts, including illegal arrest, done in good faith for the enforcement or administration of law.

Restriction on self-defence by an aggressor

(3) No one is justified in using force which he knows is likely to cause death or serious bodily harm to repel an attack by a person whom he has unjustifiably attacked or provoked unless he does so under reasonable apprehension of death or serious bodily harm from the attacker and did not attack or provoke him with the purpose of causing him death or serious bodily harm.

ANNOTATION TO DRAFT LEGISLATION

Draft section 13 provides a general rule with two restrictions.

General rule (Subsection 13(1))

The general rule justifies the use of necessary force against unlawful force provided the former is proportionate to the harm apprehended from the latter. This raises three questions: (1) What harm did the accused apprehend? This is a subjective question to be determined on the evidence concerning his appreciation of the situation. (2) Was the use of force necessary? This is an objective question to be determined on the

evidence whether there were other measures short of force which would have sufficed. (3) Was the force used proportionate? This is also an objective question but one to be determined by reference not only to the accused's actual apprehension, but also to general social attitudes concerning the degree of force acceptable in any given situation. Deadly force, for example, is an acceptable response to an attack endangering life but not to a mere trivial assault.

No special rule has been included on excessive force. *Cr.C.* s. 37 provides specifically that excessive force is not justified. According to case law, however, the position is less clear. There is authority for the proposition that if *D* is charged with murder, pleads self-defence but is shown to have used excessive force, he may be convicted of murder — *R. v. Hay*.[128] But there is also authority to the effect that in such a case he may be acquitted of murder but convicted of manslaughter — *R. v. Stanley*, *R. v. Crothers*, *R. v. Ouellette*.[129] The Draft subsumes the rule contained in *Cr.C.* s. 37 under the general rule relating to proportionality. So, if the jury finds that, given the accused's actual apprehension, the force used was disproportionate, he cannot succeed on self-defence. This is in line with *Cr.C.* s. 37 and *R. v. Hay*.[130]

The words "protect himself" extend the right on self-defence against force immediately threatened as well as against force being actually applied to the accused.

The words "any one under his protection" extend the right to acts done in protection of one's spouse, family and others whom one has an obligation to defend.

The term "unlawful force" is more general than "unlawfully assaulted" in *Cr.C.* s. 34. It denotes force other than force used lawfully in enforcement of law, force used in lawful self-defence and force used by those, like infants, incapable of committing crimes. Force of the first two types cannot be justifiably resisted under Draft section 13. Force of the third type can only be resisted under the heading of necessity under Draft section 12.

Restriction concerning law enforcement (Subsection 13(2))

Draft subsection 13(2) is an extension of *Cr.C.* subs. 215(4), which deals only with homicide and illegal arrest. As such subsection 13(2) represents a compromise answer to the question whether one should be entitled to defend oneself against law enforcement measures taken by mistake, e.g. illegal arrest. It allows a privilege of self-defence in such cases but excludes acts causing death or serious bodily harm.

In addition, subsection 13(2) extends this exclusion beyond cases of arrest. It would equally apply to entry, search and seizure and any legal process.

Restriction on self-defence by an aggressor (Subsection 13(3))

This subsection replaces by a general rule the complex provisions of *Cr.C.* s. 35.

Accordingly, subsection 13(3) would operate as follows. *Prima facie*, an aggressor cannot use force in self-defence: once he attacks, his victim has a right to resist, can use lawful force in self-defence and so cannot himself be resisted. If, however, the victim uses excessive force in self-defence, that force is unlawful and may be resisted by the aggressor with such force as is necessary and proportionate to the harm apprehended.

It should be noted that special rules about retreat have been discarded. First, they are not strictly needed, for the question whether the defendant retreated will go to the question whether the force used was necessary. Second, they push courts into artificial dissection of situations that should be looked at in their entirety.

Finally, subsection 13(3) retains the proviso that the accused must not have attacked or provoked his opponent in

order to kill or seriously injure him. The reason is twofold. First, undue licence must not be given to people to assault or provoke others as a pretext for killing them in "self-defence" when responding to the attack. Second, where a person defends himself against an attack or provocation made by another with such a purpose, the law must in fairness favour the person attacked over the attacker.

2. Protection of Property

Clearly the criminal law must provide rules about protection of property. The complexity of property law forms a fertile source of conflicts. Owners are liable to insist on defending their property and without rules on the subject society could end up with a free-for-all. Such rules must primarily protect possession, for the following reasons. First, attacks on possession are particularly liable to lead to breach of the peace. Second, they are analogous to attacks on the person or on a person's private space. Third, possession is the chief sign of ownership. And fourth, security of possession is essential to enable people to make proper use of belongings. For these reasons the right to protect possession comes close to the right of self-defence.

Our Present Law

Our present law is contained in sections 38-42 of the *Criminal Code*. Section 38 allows those in peaceable possession of movable property to defend it against trespassers. Section 39 allows those in peaceable possession of movable property with a claim of right, but not those without such claim of right, to defend it against those entitled by law to its possession. Section 40 deals with dwellings. Section 41 concerns houses or real property. Section 42 relates to assertion of a right to houses or real property.

Problems with Present Law

(1) Complexity

The rules contained in the above sections, though satisfactory in substance, are presented in an overly complex fashion. In our view the law could be more simply set out by articulating a general rule allowing peaceable possessors to defend movables, a restriction forbidding the use of force by possessors without claim of right against persons legally entitled to possession, and a further restriction prohibiting in all cases use of force likely to cause bodily harm. An analogous scheme could be adopted for immovables.

(2) Movable and Real Property

The *Criminal Code* divides property into three categories: movables, dwelling-houses and other real property. This division is open to criticism on two grounds. First, treating dwelling-houses separately adds unnecessary specificity and complexity. Second, the *Code* falls between two stools: between the movable/immovable classification of Civil Law and the real/personal classification of Common Law with its historical anomalies (leases, for instance, being personalty). As to dwelling-houses the only special factor relates to forcible entry, which, being an offence, falls strictly outside the ambit of the General Part. In our view the better approach is to adopt the movable/immovable classification with no special rules concerning dwellings.

(3) Resistance by Trespassers

Cr.C. subsections 38(2), 41(2) and 42(2) provide that trespassers resisting the peaceable possessor are deemed to commit assaults so as to give the latter a right of self-defence. Such provisions are objectionable on two grounds. Insofar as they appear to create offences, they have no place in a General Part

on defences. Insofar as they create fictions — passive resistance is not assault — they run counter to common sense. In our opinion a better approach would be to allow the peaceable possessor to use no more force than necessary and not to use, simply by virtue of his right as a possessor, force likely to cause bodily harm. Where, however, the resistance involves such force as to amount to an assault, there arises automatically a right of self-defence. Accordingly no deeming provisions need to be included.

DRAFT LEGISLATION

Protection of movable property

General rule

14. (1) Subject to the provisions of this section, every one in peaceable possession of movable property is justified in using no more force than necessary to prevent another from taking it or to recover it from another who has taken it.

Restriction concerning use of force against persons entitled by law to possession

(2) No peaceable possessor without a claim of right is justified in using force to defend his possession of movable property against a person entitled as against him by law to its possession.

Restriction on degree of force

(3) No peaceable possessor is justified merely by reason of subsection (1) of this section in using force which he knows is likely to cause serious bodily harm.

Peaceable possessor

(4) For the purpose of this section "peaceable possessor" includes a person endeavouring to recover possession immediately after he has been deprived of it.

ANNOTATION TO DRAFT LEGISLATION

Draft section 14 provides a general rule with two restrictions.

General rule (Subsection 14(1))

The general rule is that any one in peaceable possession of movable property can use necessary force to resist dispossession or to recover it if he is dispossessed. The rule licenses use of force against any one taking the property, i.e. not only against a trespasser but also against a taker with a lawful right to possession (subject to a restriction under subsection 14(2)).

Restriction concerning use of force against persons entitled by law to possession (Subsection 14(2))

Against a taker with lawful right to possession resistance is only permitted to a person in peaceable possession with a claim of right. So, if the original owner of property tries to recover it from a person who has stolen it, the latter cannot lawfully resist. If on the other hand the latter had sold the object to an innocent purchaser that purchaser would have had a claim of right and could therefore have lawfully resisted the original owner.

Restriction on degree of force (Subsection 14(3))

Cr.C. s. 38 provides that a peaceable possessor of movables must not strike or cause bodily harm to a trespasser. The principle is that property has a lower value than bodily safety. This principle is preserved in Draft subsection 14(3).

Draft subsection 14(3) avoids the deeming provisions contained in *Cr.C.* subs. 38(2), 41(2) and 42(2). Instead it provides expressly that the general rule contained in subsection 14(1) does not in itself license the use of force likely to cause bodily harm. By implication, if the taker attacks the possessor or forcibly resists him, such force may become allowable by virtue of some other rule, e.g. the rules contained in Draft section 10 on self-defence.

Peaceable possessor (Subsection 14(4))

"Peaceable possession" is a term of art. It means possession not likely to create a breach of the peace. A thief who snatches an object from its owner does not immediately acquire, and the owner does not immediately lose, peaceable possession, as is underlined by this subsection. An innocent purchaser, however, who buys the object from the thief gets peaceable possession.

A person with peaceable possession may or may not have a claim of right. *X* is the owner in peaceable possession of an object, *Y* steals it from him and *Z* tries to steal it from *Y*. Here *Y* has a claim of right against *Z* but not against *X*. *Z* has no claim of right at all so that *Y* on being dispossessed can immediately use force to recover the object from *Z*.

DRAFT LEGISLATION

Protection of immovable property

General rule

15. (1) Subject to the provisions of this section, every one in peaceable possession of immovable property is justified in using no more force than necessary to prevent another from tres-

passing on it, to remove a trespasser from it or to defend his possession against any other person entering to take possession of it.

Restriction concerning use of force against persons entitled by law to possession

(2) No peaceable possessor without claim of right is justified in using force to defend his possession of immovable property against persons entitled by law to its possession and entering peaceably by day to take possession.

Restriction on degree of force

(3) No peaceable possessor is justified merely by subsection (1) of this section in using force which he knows is likely to cause serious bodily harm.

ANNOTATION TO DRAFT LEGISLATION

Draft section 15 provides a general rule with two restrictions.

General rule (Subsection 15(1))

The general rule justifies necessary force in three cases: to prevent trespass, to remove a trespasser and to defend against a non-trespasser entering to take possession.

"To prevent another from trespassing" covers forcible break-in, forcible entry and any other kind of trespass. No special provision is made for retaking possession of immovable property, as is done by *Cr.C.* subs. 42(1). That section is merely declaratory — peaceable entry is no offence (see *Cr.C.* s. 73) and no provision is needed to this effect. Non-peaceable entry is an offence and should be dealt with in the Special Part.

Restriction concerning use of force against persons entitled by law to possession (Subsection 15(2))

Draft subsection 15(1) also provides that force can be used even against a non-trespasser entering to take possession. Subsection (2), however, excludes the use of force by a peaceable possessor against such a person if he himself has no claim of right, if that other person has a lawful right to possession, and if he enters peaceably by day to take possession. This reproduces *Cr.C.* s. 42. If on the other hand these conditions are not met — the peaceable possessor has a claim of right or the person entitled to possession enters forcibly or by night — the situation falls outside subsection 15(2) and so the right to use force is not lost.

Restriction on degree of force (Subsection 15(3))

Subsection 15(3) is parallel to subsection 14(3).

3. Advancement of Justice

Advancement of justice can also be regarded as overlapping with necessity. One reason why necessity may be a justification is that the accused may have been actually promoting a value recognized by law. In law enforcement the same is true except that here the value or objective is explicit rather than implicit — a person acting under this head is performing a duty expressly imposed by law. The main problem in this context, then, concerns the drawing of the appropriate line between justifiable and unjustifiable use of force.

The Common Law

At common law force could apparently be lawfully used for four purposes. These were: (1) to defend oneself, (2) to prevent atrocious crime or breach of the peace, (3) to effect lawful arrest and (4) in the advancement of justice. The latter purpose included carrying out lawful sentence of execution.[131]

Our Present Law

Our present law is contained in sections 25, 27-33, 449 and 450 of the *Criminal Code*. Section 25 deals with protection of persons acting under authority, section 27 with use of force to prevent commission of offences, sections 28, 29, 31, 449 and 450 with arrest, section 30 with preventing breach of the peace and sections 32 and 33 with suppression of riots.

At the same time by virtue of *Cr.C.* subs. 7(3), common-law rules not inconsistent with the *Code* remain in force. Accordingly, insofar as the common-law rule justifying the use of force on the grounds listed above has not been superseded by the *Code*, it may obtain in Canada, in addition to the *Code* provisions. One reason for uncertainty on this score is the lack of explicit statement in the above enumerated sections to the effect that these are now the sole provisions on the topic.

Problems with Present Law

The main problems with the present law relate first to form and expression. The law in question is more complex than it needs to be and is contained in an undue number of sections. In addition, the sections on powers of arrest are too detailed

and procedural for inclusion in a General Part concerned only with defences. In our view the sections listed above should be replaced by one general section, while details concerning arrest should be incorporated in the chapters on procedure.

Then again, no explicit provision is made by present law for using force to prevent escape from prison or other lawful custody. *Cr.C.* subs. 25(4) deals only with flight to escape arrest. In our view the section on law enforcement should provide an express justification for this purpose.

Finally, it has been urged by some of our consultants that special provision be made in this context for peace officers as opposed to other citizens. Such officers bear the brunt of law enforcement and so, it is argued, stand in need of special protection. Traditionally, however, notwithstanding exceptions like those found in *Cr.C.* subs. 31(1) (arrest for breach of the peace) and 32(1) (suppression of riot), the criminal law is oriented to general public duties and is addressed to the general citizen. This is the approach adopted in the Draft.

DRAFT LEGISLATION

Law enforcement

General rule

16. (1) Subject to the provisions of this section, every one required or authorized by law to do anything in the administration or enforcement of the law is, if acting on reasonable grounds, justified in doing it and in using no more force than necessary for that purpose.

Specific powers

(2) Without restricting the generality of subsection (1), every one is justified in

(*a*) effecting lawful arrest,

(*b*) preventing offences endangering life, bodily integrity, property or state security, and

(*c*) using no more force than necessary for these purposes.

Justification concerning defective process

(3) Every one required or authorized by law to execute a process or carry out a sentence is, if acting in good faith, justified under this section despite defect or lack of jurisdiction concerning such process or sentence.

Restriction on degree of force

(4) No one is justified by this section in using force which he knows is likely to cause serious bodily harm except when necessary

(*a*) to protect himself or those under his protection from death or bodily harm,

(*b*) to prevent the commission of an offence likely to cause immediate and serious injury,

(*c*) to overcome resistance to arrest, or to prevent escape by flight from arrest, for an offence endangering life, bodily integrity or state security, or

(*d*) to prevent the escape of, or to recapture, a person believed to be lawfully detained or imprisoned for an offence endangering life, bodily integrity or state security.

This section covers all acts required or authorized by law, whether done by a private person, a peace officer or a public officer. As such it covers the carrying out of court orders, the execution of legal process, lawful arrest, prevention of crimes, prevention of breaches of the peace and suppression of riots. Detailed provisions relating to such powers and duties, however, are not spelled out either by the section or by any other section in the General Part, but are left for comprehensive treatment in the procedural sections of the remodelled *Code*. It is there in the special areas concerned with duties, powers and procedures rather than in a General Part concerned with general principles that such matters can best be dealt with in full detail.

Draft section 16 provides a general rule, a special extension to it and a restriction on it. The general rule justifies all acts required by law for law enforcement and administration and all necessary and reasonable force required for their performance. The justification is extended to acts done in good faith without jurisdiction. The restriction concerns the degree of force.

General rule (Subsection 16(1))

Subsection (1) justifies both the acts required (e.g. entry on property for lawful search), and such force as is necessary and reasonable to perform such acts.

"*Law*"

The term "law" covers all law — the law in the *Code*, other federal law, provincial law and municipal law. This avoids the self-contradiction which could arise if one and the same act were to be both required and prohibited by law — required for instance by a provincial statute and forbidden by the *Criminal Code*. It also accords with the existing law set out in *Cr.C.* s. 25.

"*Reasonable and probable grounds*"

This relates to a question of fact and not of law. Mistake of law on the part of a police officer for instance, will exclude him from the protection of subsection 16(1), though not in certain circumstances from being covered by subsection 16(2).

"*Necessary and reasonable*"

To decide whether the amount of force used was justifiable, the court or jury has to ask two questions. First, was it necessary or could the lawful objective have been achieved with a lesser degree of force: e.g. did the peace officer have to use a gun to arrest or could he have done so by merely laying hands on the arrestee? Second, was it reasonable to pursue that lawful objective with the amount of force used, even though no lesser amount would have sufficed? E.g. was it reasonable for the peace officer to kill the person resisting lawful arrest when the offence for which he was being arrested was concealing the body of a child contrary to *Cr.C.* s. 227? Such questions can only be answered in the light of all the evidence and also in the light of the prevailing social view about the relative values of the end pursued and the means used for that end. For this reason no attempt is made in the Draft to enunciate detailed rules as to what constitutes excessive force.

Specific powers (Subsection 16(2))

In view of its importance, the fact that force can justifiably be used in effecting lawful arrest merits specific mention. This is the purpose of paragraph 16(2)(*a*).

The purpose of paragraph 16(2)(*b*) is to retain in substance the provisions of *Cr.C.* s. 30 concerning the use of force in preventing "breach of the peace". This term, which is unclear in the existing law (*Frey v. Fedoruk*),[132] is replaced by an enumeration of the types of offences where forcible prevention is allowed.

Justification concerning defective process (Subsection 16(3))

Subsection (3) extends the protection of subsection (1) to certain cases where the agent acts in good faith but has in fact no authority to do the act. He may be carrying out a defective order or one given without jurisdiction. Protection is extended to such cases because persons acting in good faith for the purpose of law enforcement should not be required to "second guess" the validity of court orders or set themselves up as informal courts of appeal.

Restriction on degree of force (Subsection 16(4))

Force known to be likely to cause death or grievous bodily harm is excluded except in three situations set out in paragraphs 16(4)(*a*), (*b*) and (*c*). The first situation, viz., where a person engaged in performing a public duty finds it necessary to protect himself against death or grievous bodily harm, is covered by paragraph 16(4)(*a*) which retains the law contained in *Cr.C.* subs. 25(3).

The second situation, viz., where such a person has to prevent commission of an offence likely to cause immediate and serious injury to any person, is covered by paragraph 16(4)(*b*), which would alter the present rule contained in *Cr.C.* s. 27. That section provides for the use of as much force as is reasonably necessary to prevent the commission of an offence which is likely to cause immediate and serious injury to persons or property and which is arrestable without warrant. Draft paragraph 16(4)(*b*) deletes the reference to property and restricts the use of such force to the prevention of offences dangerous to the person, in accordance with the general legal principle that property takes second place to life. The section also deletes the reference to "arrested without warrant" on the ground that such a qualification is inappropriately technical, unnecessary since offences dangerous to the person are or should be so arrestable, and liable therefore to blur the message of the law.

The third situation, viz., where a person makes a lawful arrest for an offence endangering life, bodily integrity or state security is covered by Draft paragraph 16(4)(*c*). Here again the Draft would change existing law as expressed in *Cr.C.* subs. 25(4), which lays down two conditions for use of deadly force: (1) that the offence for which the arrest is being made needs only to be an offence arrestable without warrant, and (2) that deadly force is permitted only to prevent the offender escaping by flight. Draft paragraph 16(4)(*c*) restricts the use of deadly force to cases of arrest for offences endangering life, bodily integrity or state security, on the ground that the notion that criminals are better dead than at large should only apply to those known to be a source of serious danger. Paragraph 16(4)(*c*) also allows deadly force to be used in such a case to overcome resistance to arrest, on the ground that deadly force should be as permissible to overcome resistance as it is to prevent flight.

The fourth situation, viz., where a person seeks to prevent the escape of, or to recapture, one lawfully detained or imprisoned, is covered by Draft paragraph 16(4)(*d*). Arguably, present law already allows such an exception. *Cr.C.* subs. 25(4) allows a peace officer proceeding lawfully to arrest without warrant to use as much force as necessary to prevent escape by flight. *Cr.C.* s. 450 allows a peace officer to arrest without warrant any one he finds committing a criminal offence. *Cr.C.* subs. 133(1) makes escape from lawful custody and being unlawfully at large indictable offences. Deadly force, then, can apparently under present law be used to recapture escaped prisoners including those imprisoned for non-dangerous and even trivial offences.

But, is this acceptable? Should deadly force be allowable in arresting people for offences which are not themselves dangerous? After all, if the offence committed was not dangerous, is the offender such a danger to society as to warrant killing him in order to arrest him? Is law enforcement of such high value as to take precedence over life itself, even in cases where the law is only being enforced against someone trying to escape arrest for a relatively minor offence? And even with regard to dangerous offences (for which the Draft does allow

deadly force in order to effect arrest), should the law allow deadly force to recapture escaped prisoners? A man who commits a murder and then resists arrest or tries to flee is clearly a present danger. Would he so clearly be a danger when escaping later from prison?

In the light of the questions raised above, paragraph 16(4)(*d*) restricts the use of deadly force as follows. It allows such force in general in order to prevent the escape of, or to recapture, a person lawfully detained or imprisoned, if the user of such force believes the person escaping to be detained or imprisoned for an offence endangering life, bodily integrity or state security.

4. Lawful Assistance

Under the present law the sections dealing with justifications provide separately that any one lawfully assisting a person acting under the section in question shall also enjoy the benefit of the section. To avoid repetition we think that such individual provisions should be replaced by a general rule applying to all the justifications.

DRAFT LEGISLATION

Lawful assistance

17. The justifications provided by sections 13-16 above are available to every one in good faith assisting, or acting under the authority of, persons acting under these sections.

ANNOTATION TO DRAFT LEGISLATION

Draft section 17 replaces by a general formula the separate references in the different sections of the present *Code* relating to "any person who assists him".