
The Defence of Others — Criminal Law and the Good Samaritan

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The consequences of acting as a good samaritan, coming to the aid of a third person in a moment of distress or peril, are often such as would subject the good samaritan to criminal liability. Both the common law and statutory law have therefore developed various defences for the benefit of a good samaritan charged with an offence in Canada. Drawing extensively on the case law, the author develops current common law and statutory defences for coming to the aid of another. In the author's view, both sets of defences are presently available to an accused, the common law defences supplementing the defences available under the *Criminal Code*. However, because of the considerable differences in scope and content of the common law and statutory defences, problems inevitably arise in the application of the defences to a particular set of facts. This is especially evident, the author points out, in the application of the doctrine of mistake of fact, where a good samaritan has been mistaken as to the need to intervene or the amount of force required to effectively assist the person in peril. The author concludes with a survey of suggested reforms, including the relevant provisions of the Draft Criminal Code prepared by the Law Reform Commission of Canada, and with proposals to sanction criminally the failure to render assistance or to provide notification where another person is in serious physical danger.

Les conséquences de l'intervention du bon samaritain — qui consiste à venir en aide à une personne en danger — sont telles qu'elles pourront souvent entraîner sa responsabilité en droit pénal. Le droit commun et la législation au Canada ont donc développé divers moyens de défense en faveur du bon samaritain faisant face à des accusations. Suite à une étude extensive de la jurisprudence sur le sujet, l'auteur décrit les différents moyens de défense en vigueur. Selon lui, les deux types de moyens de défense peuvent présentement être invoqués par le bon samaritain faisant face à des accusations suite à son intervention, les moyens de défense de droit commun complétant ceux offerts par le *Code criminel*. Toutefois, en raison de distinctions importantes tant au point de vue du contenu que de la portée des moyens de défense légaux et de ceux de droit commun, des difficultés ne manquent pas de se présenter dans certaines situations. L'auteur souligne que de telles difficultés sont particulièrement évidentes dans le cas d'une erreur de fait, alors que le bon samaritain s'est mépris quant au besoin d'intervenir ou encore à la force nécessaire pour venir en aide à la personne en danger. L'auteur conclut par une présentation de divers projets de réformes sur la question, parmi lesquels le projet de Code criminel élaboré par la Commission de réforme du droit du Canada, ainsi que les propositions formulées dans le but de punir le défaut d'intervenir afin de venir en aide à une personne en péril ou d'aviser les autorités d'une telle situation.

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Introduction

The purpose of this work is to examine the potential criminal responsibility of the good samaritan. In Canada today there are both common law and statutory bases for the "defence of others" or "defence of third persons", as it is sometimes called. The two major issues in the defence of others are the question of availability, that is, who can raise the defence, and the application of the doctrine of mistake of fact to the defence. These issues are treated quite differently under the common law and statutory provisions. Accordingly, the interaction between the common law and statute has caused considerable confusion. This article will examine and illustrate the differences between the common law and statutory bases for the defence of others. It then explores, through an analysis of case law, the attempt to synthesize the competing approaches with particular reference to the problem of mistaken defence of another. Following an examination of various proposals for reform, the imposition of a criminally sanctioned general duty to render aid to those in need of assistance will be advocated.

I. The Common Law Bases for the Defence of Others

Pursuant to subsection 7(3) of the *Criminal Code*,¹ the common law defences are available for the benefit of an accused charged with an offence in Canada. This portion of the paper will examine the origins and evolution of one such defence, the defence of others. The common law defence of necessity, as a possible aid to the good samaritan, will also be examined.

The right to act in defence of another grew from the feudal obligation of mutual aid and protection between lord and liege. Gradually mediaeval law recognized a master's privilege to defend members of the household, including both family and servants, against personal attack.² Similarly, servants were justified in coming to the defence of their master,³ and ultimately the courts recognized that the privilege existed between members of the same family.⁴ Some courts subsequently interpreted these decisions as precluding the defence of another beyond these specified relationships. For example, in *Leward v. Basely*, when a wife intervened to protect her husband from an alleged assault, the Court ruled that her action was justified "for

¹Sub-section 7(3) of the *Criminal Code*, R.S.C. 1970, c. C-34 reads as follows:

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

²J. Fleming, *The Law of Torts*, 6th ed. (Sydney: Law Book, 1983) at 79. See *Seaman v. Cuppledick* (c. 1610) Owen 150 cited in Fleming at 79 n. 26. For an excellent historical sketch of the emergence and evolution of the concept of self-defence in criminal law, see B. Brown, "Self-Defence in Homicide from Strict Liability to Complete Exculpation" [1958] *Crim. L. Rev.* 583. At 586 the author notes that it was not until the 14th century that self defence was firmly established as a justification but "aberrations continued, and it was not until 1532, when a statute was passed for the express purpose of eliminating doubt as to the justifiable nature of such acts that all 'question and ambiguity' disappeared."

One of America's foremost criminal law scholars, Rollin Perkins, has argued that the defence of others need not be viewed as an extension of the law of self-defence. Rather, the privilege of using force in defence of others, as a separate privilege, developed partly by accident and had its roots in the law of property. See R. Perkins, *Criminal Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1969) at 1018-19. See also R. Walston, "Justification for the Use of Force in Criminal Law" (1961) 13 *Stanford L. Rev.* 566 at 573; *American Jurisprudence*, vol. 40, 2d ed. (Rochester, N.Y.: Lawyers Co-operative Publishing, 1968) at 456ff., § 170ff.; The American Law Institute, *Model Penal Code, Tentative Draft No. 8* (Philadelphia: American Law Institute, 1958) at 31, s. 3.05; W. LaFare & A. Scott, *Handbook on Criminal Law* (St. Paul, Minn.: West Publishing, 1972) at 397; W. Keeton, ed., *Prosser and Keeton on Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984) at 129-30; P. Robinson, *Criminal Law Defences* (St. Paul, Minn.: West Publishing, 1984) at 88-89; American Law Institute, *Restatement of the Law of Torts Second*, vol. 1 (St. Paul, Minn.: American Law Institute Publishers, 1965) at 131-32.

³*Barfoot v. Reynolds* (1734), 2 *Stra.* 953, cited in Fleming, *ibid.* at 79 n. 27.

⁴*Leward v. Basely* (1695), 1 *Ld. Raym* 62, 91 *E.R.* 937 [hereinafter cited to *E.R.*], cited in Fleming, *ibid.* at 79 n. 28.

the wife may lawfully make an assault, to keep her husband from harm"⁵ Although periodically cited as authority for limiting the defence of others, there is no clear language in the decision to suggest such intention.⁶

Glanville Williams has argued that morally and rationally the right to use force should extend to the protection of strangers; he calls this the "sensible view".⁷ The decision of *Handcock v. Baker*⁸ provides a good example. A group of men intervened to prevent a man from killing his wife. Rooke J. recognized the right to act in defence of a total stranger and held that the conduct of the men was justified. He added: "It is highly important that bystanders should know when they are authorized to interfere."⁹ This appears to have been such a case because, according to the facts, "there was reasonable cause to presume that the wife's life could not have been otherwise preserved than by immediately breaking open the door and entering the said dwelling-house"¹⁰

In *Goss v. Nicholas*¹¹, Crawford J. cited *Clerk and Lindsell on Torts* and *Street on Torts* for the proposition that one may use greater force in

⁵*Leward v. Basely, ibid.* at 937.

⁶"The idea that the privilege is limited to the defence of relatives, servants, or at least close associates, apparently was derived from some loose language in *Leward v. Basely*": *Prosser and Keeton on Torts, supra*, note 2 at 130. See also the American Law Institute, *Restatement of the Law of Torts Second*, Appendix, vol. 1, *supra*, note 2 at 90.

⁷G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983) at 501. He cites several authorities for the proposition that the right to defend others is not limited by family relationships: *Walter v. Jones* (1634), 2 Rolle's Abridgement 526 (C) 3; *Tooley* (1709), 88 E.R. 1015 (Q.B.); *Prince* (1875), 2 C.C.R. 178; *Spartels*, [1953] V.L.R. 194; *People v. Keatley*, [1954] I.R. 12 (C.Cr.A.); *People v. Williams*, 205 N.E.2d 749 (1965) (A.C.III.); Sir W.O. Russell, *Russell on Crime*, vol. 1, 12th ed. by J.W. Cecil Turner (London: Stevens, 1964) at 680-81. In their text, *Criminal Law* (London: Butterworths, 1965) at 235 [hereinafter Smith & Hogan, *Criminal Law*], J.C. Smith and B. Hogan stated: "It would seem that, at the present day, no special relationship need be shown. It will be noted that . . . Stephen justified a killing necessary to defend himself 'or any other person'; and Foster [*Crown Law*, 374] and Kenny [*Outlines* (5th ed. 104)] too thought the defence should be generally available. This must surely be the law." The authors also cite East, 1 P.C. 290 which supports a stranger's right to kill in order to prevent a felony. See also J.C. Smith & B. Hogan, *Criminal Law*, 5th ed. (London: Butterworths, 1983) at 325-28 [hereinafter Smith & Hogan]; R. Heuston, ed., *Salmond on the Law of Torts*, 17th ed. (London: Sweet & Maxwell, 1977) at 128.

In the United States nearly every jurisdiction now recognizes a justification for the defence of other persons. However, some states continue to insist on the requirement of a family relationship. See Robinson, *supra*, note 2 at 101.

⁸*Handcock v. Baker* (1800), 126 E.R. 1270.

⁹*Ibid.* at 1273, Rooke J.

¹⁰*Ibid.* at 1270.

¹¹*Goss v. Nicholas*, [1960] T. St. R. 133 (Tas. S.C.).

defence of a relative than in the defence of a stranger.¹² There is no clear support for this position. The decision cited in the eleventh edition of *Clerk and Lindsell on Torts, Blades v. Higgs*¹³, is certainly not such an authority. In the more recent edition of the text,¹⁴ this discussion is omitted altogether and replaced by reference to *R. v. Duffy*,¹⁵ the decision most frequently cited as representing the current state of English common law on the defence of others. The accused had gone to the aid of her sister who was embroiled in a brawl with a man. In summing up, the trial judge instructed the jury that self-defence was not available to the accused as the relationship of sisters was not one to which a plea of self-defence extended. In the Court of Criminal Appeal, Edmund Davies J. found, incorrectly, that there were no reported cases which allowed the defence of another in cases other than those involving master and servant, parent and child, or husband and wife. In any event, the Court did not feel itself so limited:

Quite apart from any special relations between the person attacked and his rescuer, there is a general liberty even as between strangers to prevent a felony. That is not to say, of course, that a newcomer may lawfully join in a fight just for the sake of fighting. Such conduct is wholly different in law from that of a person who in circumstances of necessity intervenes with the sole object of restoring the peace by rescuing a person being attacked.¹⁶

Although frequently cited as authority for a general defence of third persons, there is a strong argument that the decision in *Duffy* simply restates the defence of prevention of crime rather than creating an extension to the law of self-defence.¹⁷ The right to act in the prevention of crime has existed at

¹²*Ibid.* at 139, 143 respectively. Crawford J. held that the *Handcock* decision, *supra*, note 8, was based on the right of a stranger to intervene to prevent a felony. At 136, in discussing the case, he states: "There is nothing in the judgments to show that the right to interfere is extended beyond the prevention of a felony . . ." Support for this argument is found in the judgments of Heath J. (at 1272) and Chambre J. (at 1273) in the *Handcock* decision itself.

¹³*Blades v. Higgs* (1861), 10 C.B. (N.S.) 713 cited in J. Burke & P. Allsop, eds, *Clerk & Lindsell on Torts*, 11th ed. (London: Sweet & Maxwell, 1954) at 217 n. (d).

¹⁴R.W.M. Dias, ed., *Clerk and Lindsell on Torts*, 15th ed. (London: Sweet & Maxwell, 1982) at 295.

¹⁵*R. v. Duffy*, [1967] 1 Q.B. 63, [1966] 2 W.L.R. 299, [1966] 1 All E.R. 62 (C.C.A.) [hereinafter *Duffy* cited to Q.B.].

¹⁶*Ibid.* at 67-68, Edmund Davies J.

¹⁷At 64 Edmund Davies J. stated: "The source of error in this case, as it appears to this court is, as we have said, that everyone, including counsel at the trial and again before us, seems to have overlooked that in reality and in law *the case of the appellant was not trammelled by any technical limitations on the application of the plea of self-defence, and this court is not here concerned to consider what those limitations are.*" (Emphasis added)

See Smith & Hogan, *supra*, note 7 at 327. See also B. Strachan, "The Art of Self Defence" (1975) 119 Sol. J. 91. In Williams, *Textbook of Criminal Law, supra*, note 7 at 501, the author states: "[J]udges have evaded the issue by saying that, whether or not one can defend a stranger, one can prevent the commission of a crime against a stranger — which comes to much the same thing."

least since the time of Blackstone and has long been the preferred approach in England.¹⁸ In addition, many of the early decisions relied on the right of an individual to suppress riots or prevent a breach of the peace.¹⁹ At common law, an individual also has the power to arrest for an apprehended breach of the peace.²⁰ This can prove interesting since the exact meaning of "breach of the peace" has never been made clear.²¹

Although there is considerable confusion as to the basis on which intervention may be undertaken, there is general agreement that, at common law, a private person may intervene in defence of another, including total strangers. Many of the early cases also dealt with the situation where there was a mistake made regarding the need to intervene and the amount of force required for intervention. For example, in *R. v. Rose*²² the accused was charged with the murder of his father. Lopes J. instructed the jury that the killing was justified only if "at the time he fired that shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life"²³ One writer called this in-

¹⁸Blackstone [*Commentaries* IV, 180] said that killing was justifiable to prevent the commission of any 'forcible or atrocious crime.'" Smith & Hogan, *Criminal Law, supra*, note 7 at 232. See also East, 1 P.C. 273 cited in Smith & Hogan at 232 n. 5.

¹⁹According to East [1 P.C. 304], peace officers and their assistants, and according to Hawkins [1 P.C., c. 10 § 14], private persons as well, are justified in intervening in a riot or riotous assembly and 'in proceeding to the last extremity in case the riot cannot otherwise be suppressed'. This was so both under the common law and under the Riot Act 1714." Smith & Hogan, *ibid.* at 231.

In *Timothy v. Simpson* (1835), 1 Cr. M. & R. 757 at 762 Parke B. stated:

It is unquestionable that any by-stander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it until the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable.

²⁰See *Trebeck v. Croudace*, [1918] 1 K.B. 158 (C.A.); *Goss v. Nicholas, supra*, note 11; *R. v. Howell*, [1982] Q.B. 416, [1981] 3 W.L.R. 501, [1981] 3 All E.R. 383 (C.C.A.) [hereinafter cited to Q.B.]; G. Williams, "Arrest for Breach of the Peace" [1954] Crim. L. Rev. 578.

²¹Williams, *ibid.* at 579 notes that while there is "a surprising lack of authoritative definition" of the concept of "breach of the peace", it is clear that a fight between two or more persons is a breach of the peace. In *Howell, ibid.* at 427 Watkins L.J., for the Court, stated: "We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance." See below, text accompanying notes 83-104.

²²*R. v. Rose* (1884), 15 Cox C.C. 540.

²³*Ibid.* at 541, Lopes J.

struction a misdirection;²⁴ another described this doctrine as "indefensibly savage", "preposterous and offensive".²⁵

Despite these protestations, until recently the prevailing view held that a *bona fide* belief based on unreasonable grounds will afford no defence. This was the position taken in *Duffy*²⁶ and the earlier decision of *R. v.*

²⁴"[T]he case would at most be manslaughter. Happily, Rose was acquitted, and it would probably be hard to find an instance of a person being convicted even of manslaughter where he acted in the honest belief that circumstances of justification existed. Even if an apparent instance were found, the case would probably need some study to decide whether the true ground of conviction was not the jury's incredulity that the alleged belief was entertained.": G. Williams, *Criminal Law: The General Part*, 2d ed. (London: Stevens & Sons, 1961) at 208 n.6. In his *Textbook of Criminal Law*, *supra*, note 7 at 504, Glanville Williams states: "The requirement of reasonableness is unhappy."

²⁵Smith & Hogan, *supra*, note 7 at 330. The authors add: "If D intended to kill only because he believed it was necessary to prevent the murder of his mother, his *intention* was to do what the law permitted, and possibly required him to do. [A child may owe a duty to take reasonable steps to protect his parent.] . . . His fault, if any, was an unreasonable misjudgment of the situation. . . . If D is to be convicted of anything, it should be manslaughter because that is an offence which may be committed by gross negligence."

²⁶*Duffy*, *supra*, note 15 at 64, Edmund Davies J.:

The necessity for intervening at all and the reasonableness or otherwise of the manner of intervention were matters for the jury. It should have been left to them to say whether, in view of the appellant's proved conduct, such a defence could possibly be true, they being directed that the intervener is permitted to do only what is necessary and reasonable in all the circumstances for the purpose of rescue."

See also *Goss v. Nicholas*, *supra*, note 11; *Saler v. Klingbiel*, [1945] S.A. St. R. 171 (S.C.); *R. v. Wheeler*, [1967] 1 W.L.R. 1531 [1967] All E.R. 829 (C.A.).

There is, of course, a considerable difference between finding that conduct was, in fact, necessary and finding that the accused reasonably believed it to be necessary. The language in some of the decisions such as *Duffy* suggests adoption of the "alter ego" rule found in some American decisions. Under the "alter ego" rule, the right of one person to defend another is co-extensive with the right of the other to defend himself. In other words, the party who intervenes in a struggle "stands in the shoes of the one defended." *Thompson v. State*, 70 So.2d 282 at 284 (C.A. Ala. 1954), Price J. This rule precludes even the use of a reasonable mistake. See *People v. Young*, 183 N.E.2d 318 (C.A. N.Y. 1962). The "alter ego" rule and its approach to the question of mistake has been almost universally condemned. See J. Wilks, "Criminal Culpability for Defence of Third Persons" (1963), 20 Wash. & Lee L. Rev. 98 at 103. The author cites 1 Bishop on Criminal Law, 9th ed., § 303: "What is absolute truth no man ordinarily knows. All act from what appears, not from what is. If persons were to delay their steps until made sure, beyond every possibility of mistake, that they were right, earthly affairs would cease to move; and stagnation, death, and universal decay would follow. All therefore, must, and constantly do, perform what else they would not, through mistake of facts."

See also Note, "Criminal Law and Procedure — Mistake of Fact in Defence of Others" (1962) 12 De Paul L. Rev. 155; Note, "Criminal Law — Assault — Mistaken Although Reasonable Belief that Another is Being Assaulted is not a Defence to an Assault" (1962) 22 Maryland L. Rev. 359; G.M. Chaney, "Criminal Law — Assault and Battery — Defence of Another Is Not Available as a Defence When Intervening and Assaulting Police Officers in Act of Arrest" [1962] South Tex. L.J. 282; Note, "Criminal Law — Assault in Third Degree — Intent — Good Faith Intervention" (1963) 27 Albany L. Rev. 123; Perkins, *supra*, note 2 at

Chisam.²⁷ In *Chisam*, the accused had complained about loud noise from the radio of a group of passers-by, including three young men. They were abusive to him, but moved away. When they were approximately eighty yards away, Chisam got a rifle and fired two shots which hit members of the party. The three men returned to the accused's house and broke in. During the ensuing melee, Chisam impaled the deceased, one Tait, on a sword. His defence was that he was afraid he and the members of his family might suffer serious injury. Interestingly, the Court did not choose to differentiate his case on the basis that he had instigated the incident. Rather, the Court rejected an appeal from conviction and sentence by the accused on the ground that he had no real fear for his own safety or that of his family. However, in reaching its decision the Court made it abundantly clear that a simple honest belief in the need for defensive measures was not sufficient to found a defence. Such belief had to be based on reasonable grounds.²⁸

There has been intense debate in recent years about whether the *Criminal Law Act 1967*²⁹ has altered or perhaps even eliminated the common law of self-defence in England, a debate which may well foreshadow events in Canada.³⁰ Section 3 of the Act states:

3.(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrests of offenders or of persons unlawfully at large.

1020-21; LaFave & Scott, *supra*, note 2 at 398-99.

In his text, *Criminal Law: The General Part*, *supra*, note 24 at 207, Glanville Williams has attacked the "alter ego" rule: "A man should be judged according to his own intent, and not according to the intent of another, even though that other is his brother. Nor is the fact that the unhappy victim of the contest is without fault a sufficient reason for punishing one who acted in good faith."

²⁷*R. v. Chisam* (1963), 47 Cr. App. R. 130 (C.C.A.).

²⁸*Ibid.* at 135, Parker L.C.J. At 133 the Court adopted Lord Simonds, ed., *Halsbury's Laws of England*, vol. 10, 3d ed. (London: Butterworths, 1955) at 721, para. 1382 as a correct statement of the law of England: "Where a forcible and violent felony is attempted upon the person of another, the party assaulted, or his servant, or any other person present, is entitled to repel force by force, and, if necessary, to kill the aggressor. There must be a reasonable necessity for the killing, or at least an honest belief upon reasonable grounds that there is such a necessity."

In terms of the amount of force that can be used in defence of another, Lord Hailsham of St. Marylebone, ed., *Halsbury's Laws of England*, vol. 11, 4th ed. (London: Butterworths, 1976) at 630, para. 1179 states that the force used must be reasonable in the circumstances and further that "[i]n determining whether the force used was reasonable the court will take into account all the circumstances of the case, including the nature and degree of force used, the seriousness of the evil to be prevented and the possibility of preventing it by other means." See also *R. v. Fennell*, [1971] 1 Q.B. 428, [1970] 3 W.L.R. 513, [1970] 3 All E.R. 215 (C.A.) [hereinafter cited to Q.B.].

²⁹(U.K.), 1967, c. 58.

³⁰See below, text accompanying notes 184-200.

(2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

Smith and Hogan argue that this provision has "clarified the common law" and that where there is a conflict between section 3 and the common law rules, section 3 will prevail.³¹ Under this approach the concept of mistake of fact may become unnecessary and the test will be simply whether or not the force used was, in fact, reasonable.³² Some writers have gone so

³¹Smith & Hogan, *supra*, note 7 at 326-27. At 326, the authors point out that their position is based, to a large degree, on the similar nature of defence of others and the prevention of crime:

The Criminal Law Act 1967 made no reference to the right of private defence — the right to use force in defence of oneself or another against an unjustifiable attack. The right of private defence still exists at common law; but if, and insofar as, it differed in effect from s. 3 of the 1967 Act, it has probably been modified by that section. Private defence and the prevention of crime are sometimes indistinguishable. If D goes to the defence of E whom P is trying to murder, he is exercising the right of private defence but he is also seeking to prevent the commission of a crime. It would be absurd to ask D whether he was acting in defence of E or to prevent murder being committed and preposterous that the law should differ according to his answer. He was doing both. The law cannot have two sets of criteria governing the same situation and it is submitted that s. 3 of the Criminal Law Act is applicable.

³²*Halsbury's Laws of England*, 4th ed., *supra*, note 28 at 630, para. 1179:

At common law the rules relating to the use of force in such circumstances were not altogether clear and appear to have varied according to the situation in which the force was used. [No examples or authority are provided.] Under the present law the same requirement, namely that the force used should be reasonable in the circumstances, is applicable to all cases where force used in the prevention of crime and the common law rules are to that extent superceded . . .

At 630, para. 1180:

A person acting in self-defence is normally acting to prevent the commission of a crime, as is a person acting in defence of another. The test to be applied in such cases is now established to be the same as for cases of prevention of crime, that is the force used in self-defence or in defence of another must be reasonable in the circumstances.

At the same time, the authors, at 630, para. 1179, actually manage to argue in favour of a subjective test: "The ordinary rules relating to mistake of fact are applicable so that where the force used is reasonable having regard to the facts as the defendant supposed them to have been, the defendant commits no offence although the force used is excessive having regard to the facts as they were." Contrast this approach with the following comment from R. Cross & P.A. Jones, *Introduction to Criminal Law*, 10th ed. by R. Card (London: Butterworths, 1984) at 440: "Related to the question of mistake is the situation where it is necessary for the accused (or he reasonably believes it is) to use force to prevent crime, or to effect an arrest, or to defend himself, another or property but he uses an excessive degree of force (ie force which is unreasonable in the circumstances) in order to do so. In such a case, he has no defence." The reasonable mistake of fact defence in regard to the need to intervene seems somewhat pointless if the extent of force used must in fact be reasonable. It is difficult to imagine a situation where your use of force would not be viewed as excessive given the fact that there was in reality no need for the use of any force at all.

far as to suggest that the case law prior to the enactment of the legislation has become largely irrelevant.³³ Others take strong exception and find it “unthinkable that Parliament should inadvertently have swept aside the ancient privilege of self-defence.”³⁴ Carol Harlow, one of the strongest proponents of the need to retain the common law option, presents an interesting problem for consideration:

Although public and private defence normally overlap, this is not an invariable rule. In *Morris v. Marsden* an assault was committed by a dangerous psychopath later found unfit to plead. If, on these facts, P were to defend himself against the assault, it is problematic as to whether section 3 would be available to him. If an objective test is used to decide whether he was “preventing a crime” then the answer must be negative, and P’s right to defend himself has unbelievably disappeared. If D’s defence depends on his own honest belief in the existence of a crime then section 3 is still available. If, however, he knows D to be a psychopath, then he has no honest belief, and his defence again disappears.³⁵

³³S. Mitchell & P.J. Richardson, ed., *Archbold Criminal Pleading Evidence and Practice*, 42d ed. (London: Sweet & Maxwell, 1982) at 1615, para. 20-24:

There are a number of authorities on the right to use such force as is reasonably necessary to defend relatives or dependants, and to prevent a felony It is submitted that it is unnecessary to refer to such authorities in view of the provisions of section 3 of the *Criminal Law Act 1967* An assault is a crime, anyone going to the rescue of someone being assaulted, be it a relative or a stranger, is using force in the prevention of crime, and if he uses such force as is reasonable in the circumstances he is acting lawfully.

It is submitted that the same considerations apply to such a situation as to the issue of self-defence, and that the authorities prior to the enactment of the *Criminal Law Act 1967* are now only of historical interest.

³⁴C. Harlow, “Self-Defence: Public Right or Private Privilege” [1974] *Crim. L. Rev.* 528 at 537.

³⁵*Ibid.* at 531. The author notes that for the defence of “preventing a crime” it can be argued that there was a crime, but a bar existed to the prosecution of the criminal. Harlow also recognizes that under the common law the mistaken belief must probably be a reasonable one.

Support for Harlow’s position can be found in *Clerk and Lindsell on Torts, supra*, note 14 at 295; G. Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1978) at 455 n. 19; Cross & Jones, *supra*, note 32 at 437. Smith & Hogan, *supra*, note 7 at 328 provide the following response:

In a very few cases the attacker may not be committing a crime because, for example, he is a child under ten, insane, in a state of automatism or under a material mistake of fact. If D is unaware of the circumstances which exempt the attacker, then s. 3 of the *Criminal Law Act* will still, indirectly, afford him a defence to any criminal charge which may be brought, provided he is acting reasonably in the light of the circumstances as they reasonably appear to him; for he intends to use force in the prevention of crime, as that section allows, and therefore has no *mens rea*. Where D does know of the circumstances in question, then s. 3 is entirely inapplicable, but it is submitted that the question should be decided on similar principles. A person should be allowed to use reasonable force in defending himself or another against an unjustifiable attack, even if the attacker is not criminally responsible.

Surely the most sensible approach would allow section 3 and private defence, including defence of others, to co-exist. In the event of conflict, the statutory provisions would prevail. Cross and Jones state that while a person acting in defence of himself or another is invariably engaged in the prevention of crime, section 3 has not been directly applied in cases of self-defence since the Act of 1967 came into force.³⁶ The authors also note that in *R. v. Cousins*,³⁷ "the Court of Appeal was clearly of the opinion that a person who used force to repel an attack could avail himself of the common law defence of self-defence *and* of the defence under s3 (1) of preventing the commission of the crime which such an attack would have involved, provided in both cases that the force used was reasonable in the circumstances. In such a case then (and presumably in the case of defence of others and defence of property), the common law defence survives alongside the statutory one."³⁸

Although the test for mistake of fact was generally described as an objective test some courts continued to direct juries to consider what the accused himself thought. This fusion of objective and subjective elements has been described as a "somewhat illogical concept".³⁹ Proposed reforms in England did little to alleviate the confusion since they also combined subjective and objective tests:

In its Fourteenth Report: Offences against the Person, published in 1980, the Criminal Law Revision Committee has recommended that the common law relating to self-defence, defence of another or defence of property should be replaced by a statutory definition. This would set out the principle that a person may use such force as is reasonable in the circumstances *as he believes them to be* in the defence of himself or another, or in defence of his or another's

³⁶Cross & Jones, *supra*, note 32 at 437.

³⁷*R. v. Cousins*, [1982] Q.B. 526, [1982] 2 W.L.R. 621, [1982] Crim. L. Rev. 444.

³⁸Cross & Jones, *supra*, note 32 at 437.

³⁹*Archbold Criminal Pleading Evidence and Practice*, *supra*, note 33 at 1614, para. 20-21. The decision of *R. v. Shannon* (1980), 71 Cr. App. R. 192 (C.A.) is cited. Cross & Jones, *ibid.* at 440 offered the following summary:

If evidence is adduced of reasonable grounds for the belief [that intervention is required] and is not disproved, he is judged on the facts as he mistakenly believed them to be (ie he must be acquitted of the offence charged unless the prosecution prove that the force used was not reasonable in the circumstances as he reasonably believed them to be). On the other hand, if evidence of reasonable grounds for the belief is not adduced (or if it is not disproved), his mistake affords him no defence.

It should be noted that in England, where death results from the excessive use of force in the prevention of crime, self-defence or defence of another, and the accused intended to kill or do grievous bodily harm (the *mens rea* for murder), the offence will not be reduced to manslaughter. In *Palmer v. R.*, [1971] A.C. 814 at 832, [1971] 2 W.L.R. 831, [1971] 1 All E.R. 1077 (P.C.), Lord Morris stated for the Court: "The defence of self-defence either succeeds so as to result in an acquittal or is disproved in which case as a defence it is rejected." See also Cross & Jones, *ibid.* at 441.

property. The defence would be confined to cases where the accused feared an imminent attack on himself or another, or on property.

These provisions would be separate from s3 of the *Criminal Law Act 1967*, which, it recommended, should be amended so that, as regards criminal proceedings only, there should be (as in the proposal concerning self-defence) a subjective test as to whether the accused believed that force was necessary in the prevention of crime or in effecting or assisting in a lawful arrest; although whether the force used was reasonable should continue to be governed by an objective test.

In relation to the use of excessive force in self-defence or the like by a person charged with murder, the Committee has recommended that, where an accused kills in circumstances where it is reasonable for some force to be used in defence of himself or another, or of property, or in the prevention of crime, he should be liable to be convicted of manslaughter, and not murder if (at the time of the act) he honestly believed that the force was reasonable in the circumstances.⁴⁰

Recent decisions in England suggest a strong movement toward subjective evaluation. The best known of these cases is that of *Gladstone Williams*.⁴¹ A man named Mason saw a youth seize a woman's handbag. He caught the youth and was struggling with him when Williams appeared on the scene. When Mason could not satisfy Williams that he was performing a lawful arrest, Williams and Mason began to struggle. Mason suffered injuries to his face as a result of which Williams found himself charged with and convicted of assault occasioning actual bodily harm. Williams had argued that he honestly believed Mason was unlawfully assaulting the youth. The trial judge directed the jury that if they found that Mason's actions were lawful, Williams could rely on his mistaken belief that they were unlawful if that belief was based on reasonable grounds. Williams successfully appealed to the Court of Appeal on the ground of misdirection. The Lord Chief Justice held that the prosecution had the burden of proving the unlawfulness of the appellant's actions, that is, it was for the prosecution to eliminate the possibility that the appellant was acting under a genuine mistake of fact. The appellant was to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view, reasonable. The reasonableness of the appellant's belief was material to the question whether the belief was in fact held. If the belief was held, its reasonableness was irrelevant on the question of guilt or innocence.⁴²

⁴⁰Cross & Jones, *ibid.* at 442.

⁴¹*R. v. Williams* (1984), 78 Cr. App. R. 276, [1984] Crim. L. Rev. 163 (C.A.) [hereinafter *Gladstone Williams* cited to Cr. App. R.]. See also *R. v. Jackson* (1983), [1984] Crim. L. Rev. 674 (C.A.); *R. v. Bird*, [1985] Crim. L. Rev. 388 (C.A.); *R. v. Asbury* (1985), [1986] Crim. L. Rev. 258 (C.A.); *R. v. Fisher* (1986), [1987] Crim. L. Rev. 334 (C.A.).

⁴²*Gladstone Williams*, *ibid.* at 279-81, Lord Lane C.J.

Professor J.C. Smith describes *Gladstone Williams* as an important decision because it appears to overrule a long line of *dicta* asserting that a mistake of fact cannot found a defence of self-defence unless it is based on reasonable grounds. However, he is also quick to recognize the limits of the decision: "It is concerned only with mistakes of fact. The defendant is to be judged on the facts as he believed them to be. The question whether, in the circumstances which the defendant believed to exist, it was justifiable to use the degree of force in fact used, or to use any force, still depends on whether it was reasonable to do so."⁴³ In other words, in a situation where the belief in the need to intervene and the belief in the amount of force required for such intervention are both honestly held, the defence of mistake will not be available in regard to the latter belief if it is found to be unreasonable. Apart from the seemingly endless debate on the pros and cons of objective and subjective tests and simply in terms of providing an intelligible direction to a jury the use of one test or the other would be preferable.⁴⁴

⁴³J.C. Smith, Commentary: *R. v. Williams (Gladstone)* [1984] Crim. L. Rev. 163. At 164 the author offers the recommendation of U.K., Criminal Law Revision Committee, "Fourteenth Report (Offences Against the Person)", Cmnd 7844 (1980), para. 238:

The defendant should be judged on the facts as he believed them to be but subject to that it should be for the jury or magistrates to decide whether in their opinion the defendant's reaction to the threat, actual or imagined, was a reasonable one.

Smith also adds: "Judges will no doubt remind juries that, in deciding whether a reaction was a reasonable one, the circumstances must be borne in mind . . ."

⁴⁴In Commentary: *R. v. Bird* [1985] Crim. L. Rev. 389 at 390, Professor Smith notes that in regard to the force used, the test is reasonable mistake rather than a simple factual evaluation as to whether or not the force was indeed necessary: "It seems clearly right and in accordance with the general principle underlying the statement of the law in *Gladstone Williams* that the test of reasonableness should be applied to the force that the defendant was aware that he was using rather than (in the rare case where there is a difference) the force actually used." In Commentary: *R. v. Asbury* [1986] Crim. L. Rev. 259 at 259-60, Professor Smith suggests that the debate over subjective and objective tests is far from over:

The remarks in question in *Gladstone Williams* have been generally treated by academic writers (who regard them with approval, perhaps coupled with surprise) as *ratio decidendi*; but the present court clearly thought they were *obiter* as, indeed, does one member of the court in *Williams*. In that case the court held that there had been a material misdirection on the burden of proof: "It was something at the very foundation of the case and that on its own would have been enough to require this Court to allow the appeal and quash the conviction." . . . [T]hey went on to consider the question of the reasonableness of the defendant's belief A case may have more than one *ratio decidendi* That seems to be clearly applicable to *Gladstone Williams*

. . .

It is true that *Chisam* and *Fennell* were not discussed in *Gladstone Williams* but that was because the court held that it was not necessary for them to consider "the large volume of historical precedent with which [counsel for the the Crown] threatened us." That large body of authority had been rendered irrelevant by the decision of the House of Lords in *Morgan* [(1975), 61 Cr. App. 136].

Use of the common law defence of necessity as a basis for authorization to act in defence of others also creates certain difficulties. Glanville Williams has stated that the use of defensive force can be regarded as an instance of necessity. Although it is sometimes thought that the difference between self-defence and necessity is that the former presupposes a wrong while the latter does not, Williams concludes that "the line is pretty thin and there is hardly any legal need to draw it. Self-defence can be regarded as a part of necessity that has attained relatively fixed rules."⁴⁵

However, recent decisions of the Supreme Court of Canada, and in particular *Perka v. R.*,⁴⁶ demonstrate an apparent intention to restrict severely the potential application of the necessity defence. In a detailed analysis of the decision, Professor Colvin notes that although necessity is now clearly recognized in Canada as a common law defence the Court has imposed several limiting conditions.⁴⁷ There must be a situation of clear and imminent peril such that "normal human instincts cry out for action and make a counsel of patience unreasonable"; there must be no "reasonable legal alternative to disobeying the law" and "the harm inflicted must be less than the harm sought to be avoided."⁴⁸ Although each of these limitations could have important potential application to a situation involving the defence of others, perhaps more important for present purposes was the Court's holding that necessity is an excuse rather than a justification.⁴⁹ As Colvin

⁴⁵Williams, *Criminal Law: The General Part*, *supra*, note 24 at 733. The author states: "On this view, defence against a savage dog, or against a plague of locusts or the onrush of flood-water, is not self-defence but necessity."

⁴⁶*Perka v. R.*, [1984] 2 S.C.R. 232, 13 D.L.R. (4th) 1, 42 C.R. (3d) 113 [hereinafter cited to S.C.R.].

⁴⁷E. Colvin, *Principles of Criminal Law* (Toronto: Carswell, 1986) at 195-205. See also D. Stuart, Annotation: *Perka v. R.* (1984) 42 C.R. (3d) 115; D. Galloway, "Necessity as a Justification: A Critique of *Perka*" (1986) 10 Dalhousie L.J. 158.

⁴⁸*Perka*, *supra*, note 46 at 250-53 and 259, Dickson J., Colvin, *ibid.* at 202 adds: "The fourth limitation which *Perka* established for the necessity defence is that it is not available where the peril should clearly have been foreseen and avoided at an earlier time."

⁴⁹*Perka*, *ibid.* at 259, Dickson J.. At 246-47 Dickson J. explains the distinction:

Criminal theory recognizes a distinction between "justification" and "excuses". A "justification" challenges the wrongfulness of an action which technically constitutes a crime. The police officer who shoots the hostage-taker, the innocent object of an assault who uses force to defend himself against his assailant, the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital, these are all actors whose actions we consider *rightful*, not wrongful. For such actions people are often praised, as motivated by some great or noble object. The concept of punishment often seems incompatible with the social approach bestowed on the doer.

In contrast, an "excuse" concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor. The perpetrator who is incapable, owing to a disease of the mind, of appreciating the nature and consequences of his acts, the person who labours under

points out, there was no discussion of mistakes in *Perka*. He adds: "The general principle for justifying defences is that a mistake must be reasonable. There is, however, no equivalent principle for excusing defences. Moreover, the analogy of duress suggests that these defences may be grounded upon mistakes of fact whether or not they are reasonable."⁵⁰ It is not surprising that many authorities continue to call for an end to what they view as the troublesome and unnecessary distinction between justifications and excuses.⁵¹ It is also interesting to note that in the proposed new Code, defences are not rigidly separated into justifications and excuses.⁵²

II. The Statutory Bases for the Defence of Others

In his foreword to *Digest of the Criminal Law of Canada* by G.W. Burbidge, the Honourable Mr Justice Fred Kaufman has summarized early attempts to provide a comprehensive statement on Canada's criminal law prior to the enactment of our first Criminal Code in 1892.⁵³ Samuel Robinson Clarke laid the foundation for this process with his *Treatise on Criminal Law*⁵⁴ in 1872. Two years later, Mr Justice H.E. Taschereau published the first edition of his *Criminal Law Consolidation and Amendment Acts*.⁵⁵

a mistake of fact, the drunkard, the sleepwalker: these are all actors of whose "criminal" actions we disapprove intensely, but whom, in appropriate circumstances, our law will not punish.

On the other hand, Wilson J., at 268-79, although accepting the distinction between justification and excuse, prefers the view that an act of necessity is sometimes justified and sometimes excused. She would characterize necessity as a justification in cases where an actor is faced with conflicting legal duties and breaks one law in pursuit of the higher duty. At 276 she states that

on the existing state of the law the defence of necessity as justification would not be available to the person who rescues a stranger since the absence of a legal duty to rescue strangers reduces such a case to a conflict of a legal with a purely ethical duty. Such an act of rescue may be one deserving of no punishment and, indeed, deserving of praise, but it is nevertheless a culpable act if the law is violated in the process of the rescue.

⁵⁰Colvin, *supra*, note 47 at 199.

⁵¹For an excellent discussion of this debate, see D. Stuart, *Canadian Criminal Law: A Treatise*, 2d ed. (Toronto: Carswell, 1987) at 388-91; Annotation: *Perka v. R.*, *supra*, note 47; Galloway, *supra*, note 47; Colvin, *ibid.*, at 166-69 and the authorities cited therein.

⁵²Law Reform Commission of Canada, *Recodifying Criminal Law* (Report No. 30), vol. 1 (Ottawa: Law Reform Commission of Canada, 1986) at 39. See also Law Reform Commission of Canada, *Criminal Law: The General Part — Liability and Defences* (Working Paper No. 29) (Ottawa: Supply and Services Canada, 1982) at 91-97.

⁵³"Foreword" in G.W. Burbidge, *Digest of the Criminal Law of Canada* (Toronto: Carswell, 1980), originally published in 1890.

⁵⁴*A Treatise on Criminal Law as Applicable to the Dominion of Canada* (Toronto: R. Carswell, 1872).

⁵⁵H.-E. Taschereau, *The Criminal Law Consolidation and Amendment Acts of 1869*, 2 vols (Montreal: Lovell, 1874).

This was followed by Dandurand and Lanctôt's *Traité théorique et pratique de droit criminel*⁵⁶ and the work of Burbidge.⁵⁷

Burbidge drew heavily on Stephen's *Digest of the Criminal Law*⁵⁸ of England in creating his own digest which was "intended to be a statement of that part of the Criminal Law of Canada which relates to the definition of crimes and of punishments prescribed therefor, as it stood on September 1st, 1889."⁵⁹ In a chapter entitled "Cases In Which Infliction of Bodily Injury is Not Criminal", in addition to articles dealing with the suppression of riots and prevention of the commission of crime, Burbidge's *Digest* contains an article entitled "Private Defence". This article, which like the others noted above is taken directly from Stephen's work, states that "the intentional infliction of death or bodily harm is not a crime when it is inflicted by any person in order to defend himself or any other person from unlawful violence."⁶⁰

⁵⁶R. Dandurand & C. Lanctôt, *Traité théorique et pratique de droit criminel* (Montreal: A. Périard, 1890).

⁵⁷For a detailed examination of the evolution of Canadian criminal law prior to codification, see J.C. Martin, *The Criminal Code of Canada* (Toronto: Cartwright & Sons, 1955) at 1-15. At 2 the author notes that "while it is true that the English Draft Code of 1878 is the specific basis of the Canadian Code, much of the substance of both was to be found in Peel's Acts [1826-1828] and in the [United Kingdom] Acts of 1861." See also M. Friedland, *A Century of Criminal Justice: Perspectives on the Development of Canadian Law* (Toronto: Carswell, 1984).

⁵⁸J.F. Stephen, *A Digest of the Criminal Law*, 3d ed. (London: MacMillan & Co., 1883).

⁵⁹"Preface" in Burbidge, *supra*, note 53.

⁶⁰Burbidge, *supra*, note 53, art. 256 (Private Defence, Stephen's *Digest*, *supra*, note 58, art. 200) reads as follows:

The intentional infliction of death or bodily harm is not a crime when it is inflicted by any person in order to defend himself or any other person from unlawful violence, provided that the person inflicting it observes the following rules as to avoiding its infliction and inflicts no greater injury in any case than he in good faith, and on reasonable grounds, believes to be necessary when he inflicts it: —

(a.) If a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself on the spot, and may kill or wound the person by whom he is assaulted;

(b.) If a person is unlawfully assaulted,

(i.) in his own house;

(ii.) in the execution of a duty imposed upon him by law;

(iii.) by way of resistance to the exercise of force which he has by law a right to employ against the person of another;

he may defend himself on the spot, and may use a degree of force for that purpose proportioned to the violence of the assault, and sufficient (in case iii.) to enable him not only to repel the attack made upon him, but to effect his original purpose; but a person using force in the execution of a duty imposed upon him by law, or in order to effect a purpose which he may by law effect in that manner, and not being assaulted, is not entitled to strike or hurt the person against whom he employs such force, merely because he is unable otherwise to execute such duty or fulfil such

After publication of his *Digest*, Stephen received permission from Earl Cairns, then Lord Chancellor, to draft a Criminal Code. The Code was drafted and introduced as a bill into the English Parliament in the session of 1878. A Commission consisting of Stephen, Lord Blackburn, Mr Justice Barry and Lord Justice Lush was appointed to report upon this Draft Code. Their report was issued in 1879, containing by way of appendix the Draft Code as revised by the Commissioners.⁶¹ This Draft Code, which formed the basis of our original Code, did not receive approval from the English Parliament. The chief opponent of the Draft Code was Chief Justice Sir Alexander Cockburn who argued that codification would put the law in a strait jacket, losing in the process the elasticity of the common law.⁶²

The Draft Code of 1879 contained several deviations from Stephen's *Digest* including a substantial revision of the concept of private defence which Burbidge considered to be the law of Canada as late as 1889. The Draft Code, unlike the *Digest*, did not contain the phrase "in order to defend himself or any other person from unlawful violence" but instead spoke of "using force in defence of his own person or that of any one under his protection"⁶³ This change in language from the earlier work of Stephen

purpose, except in the cases provided for in Article 255.

(c.) If a person is unlawfully assaulted by another [without any fault of his own, and otherwise than in the cases provided for in clauses (a.) and (b.), but with a deadly weapon, it is his duty to abstain from the intentional infliction of death or grievous bodily harm on the person assaulting, until he (the person assaulted) has retreated as far as he can with safety to himself.

But any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm, and if the assault upon him is notwithstanding continued, he is in the position of a person assaulted in the employment of lawful force against the person of another.

(d.) If two persons quarrel and fight neither is regarded as defending himself against the other until he has in good faith fled from the fight as far as he can, but if either party does in good faith flee from the fight as far as he can, and if, when he is prevented, either by a natural obstacle or any other cause of the same nature, from flying farther, the other party to the fight follows and again assaults him, the person who has so fled may defend himself, and may use a degree of violence for that purpose proportioned to the violence employed against him.

⁶¹"Preface" in Stephen, *supra*, note 58.

⁶²Martin, *supra*, note 57 at 2.

⁶³U.K., H.C., "Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code embodying the Suggestions of the Commissioners" (1879) [hereinafter the Draft Code].

The self-defence provisions of the Draft Code read as follows:

Section 55.

Self-Defence Against Unprovoked Assault

Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; and

does not appear to be the result of any intentional change of direction or philosophy by the Commissioners. Rather, several alterations were made in the interest of clarity⁶⁴ and the end product was, for the most part, a restatement of existing principles of common law.⁶⁵ The change from “any other person” to “any one under his protection” was, at the time, probably not viewed as significant because in the late 1800s the right to defend another

every one so assaulted is justified though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose and if he believes on reasonable grounds that he cannot otherwise preserve himself from death or grievous bodily harm.

Section 56.

Self-Defence Against Provoked Assault

Every one who has without justification assaulted another, or has provoked an assault from that other, may nevertheless justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked, and in the belief on reasonable grounds that it is necessary for his own preservation from death or grievous bodily harm: Provided that he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided also, that before such necessity arose he declined further conflict, and quitted or retreated from it as far as was practicable.

Provocation within the meaning of this and the last preceding section may be given by blows words or gestures.

Section 57.

Prevention of Insult

Every one is justified in using force in defence of his own person or that of any one under his protection from an assault accompanied with insult: Provided that he uses no more force than is necessary to prevent such assault, or the repetition of it: Provided also, that this section shall not justify the wilful infliction of any hurt or mischief disproportionate to the insult which it was intended to prevent.

The Draft Code also contained provisions dealing with the suppression of breaches of the peace, suppression of riots and the authority to prevent the commission of certain offences.

⁶⁴*Ibid.* at 13-14:

The Draft is founded on the Bill throughout, but the language of the Bill is altered in nearly every section; considerable parts of it are altogether redrawn, and in some parts of the Draft Code a different arrangement has been adopted. In a large proportion of cases the differences between the two are differences of style, the matter expressed being substantially the same. Many alterations made were in the direction of expanding the provisions of the Bill, which, with a view to brevity, were framed in more general terms than was ultimately thought desirable. Single sections were thus in many instances divided into two or more, and the language was frequently elaborated in order to prevent possible misconceptions of the meaning.

⁶⁵*Ibid.* at 11, 18:

We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary;

may well have been limited to rendering assistance to persons under one's protection such as family members and employees.⁶⁶

Before enactment, Canada's first Criminal Code was examined and revised by legal experts selected from and forming a Joint Committee of both Houses of Parliament; it was also considered in each House by a Committee of the whole.⁶⁷ *An Act Respecting the Criminal Law* was given Royal assent on 9 July 1892 and came into force on 1 July 1893.⁶⁸ This Code, which was drafted by Mr Justice Burbidge, the former Deputy Minister of Justice, and Mr Sedgewick, then Deputy Minister of Justice, was taken, in large part, from the revised Draft Code rejected by the English Parliament.⁶⁹ In particular, the provisions dealing with self-defence were taken verbatim from the work of the Royal Commission. These provisions, which have not been substantially altered since first enacted,⁷⁰ received very little attention during the debates of the House of Commons. Most of the discussion focused on

that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent

...

Sections 25 to 66, both inclusive, contain a series of provisions as to the circumstances which justify the application of force to the person of another against his will We believe that in the main these provisions embody the common law, though on some points they lay down a definite rule where the law is at present doubtful, and in others correct what appear to be defects in the existing law.

Curiously, s. 57 of the Draft Code carries a marginal note which states: "This perhaps extends the law, but it appears reasonable" without further elaboration. The *Criminal Code*, S.C. 1953-54, c. 51, s. 37 omitted the words "accompanied with insult" found in section 57 of the Draft Code of 1879 and subsequent versions of Canada's *Criminal Code*: see the *Criminal Code*, S.C. 1892, c. 29, s. 47; R.S.C. 1906, c. 146, s. 55; R.S.C. 1927, c. 36, s. 55. For a comment on this change, see Martin, *supra*, note 57 at 114.

⁶⁶Martin, *supra*, note 57 at 111 cites the following comment from 1 Hawk P.C. c. 28, para. 23: "Also there are some actual assaults on the person which do not amount to a forfeiture of such a recognizance (*viz.*, of surety of the peace) . . . if a man beat, or as some say, wound or maim one who makes an assault upon his person, or that of his wife, parent, child or master, especially if it appears that he did all he could to avoid fighting before he gave the wound." See above, text accompanying notes 2-21.

⁶⁷"Introduction" in J. Crankshaw, *The Criminal Code of Canada and the Canada Evidence Act*, 3d ed. (Toronto: Carswell, 1910) at xxxvii.

⁶⁸Crankshaw's *Criminal Code*, 8th ed. (Toronto: Carswell, 1979) at 1-1, 1-2.

⁶⁹*Ibid.* at 1-1. See also H.E. Taschereau, *The Criminal Code of the Dominion of Canada* (Toronto: Carswell, 1893), reprinted as *The Criminal Code of Canada* (Toronto: Carswell, 1980).

⁷⁰See *Criminal Code*, S.C. 1892, c. 29, ss 45-47; R.S.C. 1906, c. 146, ss 53-55; R.S.C. 1927, c. 36, ss 53-55; R.S. 1953-54, c. 51, ss 27, 30, 32; R.S.C. 1970, c. C-34, ss 34, 35, 37. These *Codes* also contained provisions dealing with the suppression of breaches of the peace, suppression of riots and the authority to prevent the commission of certain offences. See *Criminal Code*, S.C. 1892, c. 29, ss 38, 42, 44; R.S. 1906, c. 146, ss 46, 50, 52; R.S. 1927, c. 36, ss 46, 50, 52; R.S. 1953-54, c. 55, ss 27, 30, 32; R.S.C. 1970, c. C-34, ss 27, 30, 32.

the concept of "codification" itself, discontinuing the use of the word "malice" and the role of the grand jury in criminal proceedings.⁷¹

In Canada today, there is no statutory provision which specifically authorizes the defence of strangers. There are, however, a number of sections in the *Criminal Code* which may serve the same purpose. Relevant statutory provisions provide for arrest in certain circumstances,⁷² prevention of riots⁷³ and breaches of the peace,⁷⁴ and the prevention of crime.⁷⁵ One section of the *Code* allows one to protect a person "under his protection".⁷⁶

A private citizen can arrest anyone he "finds committing an indictable offence".⁷⁷ The *Code* provision would allow an individual to act in defence of others in most situations since the various types of assault are all indictable offences.⁷⁸ However, the requirement that the intervenor arrest only when he "finds" someone committing an indictable offence could create difficulties in cases of mistake. If a private citizen undertakes an arrest without a warrant, he takes the risk that if the person arrested is innocent and the arrest therefore unlawful, he will be held liable for damages for false imprisonment. However, several decisions, including *Roberge v. R.*,⁷⁹ a recent decision of the Supreme Court of Canada, have used section 25 of the *Criminal Code* in holding that a person may be justified in making an arrest, and therefore be immune from civil or criminal liability, where an offence is "apparently committed".⁸⁰ Thus, although still subject to considerable debate, it can be argued that where a private citizen intervenes under a reasonable but mistaken belief that the person he is seeking to protect is being subjected to the commission of an indictable offence, the reasonable mistake of fact will provide an effective defence.⁸¹

⁷¹See Canada, *Debates of the House of Commons*, vol. 34 at 1312-20 (12 April 1892), and vol. 35 at 2789-90 (18 May 1892).

⁷²*Criminal Code*, *supra*, note 1, s. 449.

⁷³*Criminal Code*, *ibid.*, s. 32.

⁷⁴*Criminal Code*, *ibid.*, ss 30-31.

⁷⁵*Criminal Code*, *ibid.*, s. 27.

⁷⁶*Criminal Code*, *ibid.*, s. 37.

⁷⁷*Criminal Code*, *ibid.*, s. 449.

⁷⁸See *Criminal Code*, *ibid.*, ss 244-246.3. Although several of the assault provisions in the *Code* are "hybrid offences", pursuant to para. 27(1)(a) of the *Interpretation Act*, R.S.C. 1970, c. I-23, they may be treated as indictable offences.

⁷⁹[1983] 1 S.C.R. 312, 147 D.L.R. (3d) 493, 4 C.C.C. (3d) 304 [hereinafter cited to S.C.R.].

⁸⁰*Criminal Code*, *supra*, note 1, sub-s. 25(1). See also Law Reform Commission of Canada, *Arrest* (Working Paper No. 41) (Ottawa: Supply and Services Canada, 1985) at 46.

⁸¹See R.E. Salhaney, *Canadian Criminal Procedure*, 4th ed. (Toronto: Canada Law Book, 1984) at 44-46; E. Ewaschuk, *Criminal Pleadings and Practice in Canada* (Toronto: Canada Law Book, 1983) at 105; B. Archibald, "The Law of Arrest" in V. Del Buono, ed., *Criminal Procedure in Canada: Studies* (Toronto: Butterworths, 1982) 125 at 145.

The section dealing with prevention of riots is not particularly helpful since most situations calling for the defence of another would probably not fit within the definition of "riot".⁸² Trying to determine what constitutes a "breach of the peace" also causes some difficulty. In 1950, in *Frey v. Fredoruk*,⁸³ the Supreme Court of Canada stated that although it was difficult to provide an exhaustive definition,

[a] breach of the peace takes place when either an actual assault is committed on an individual or public alarm and excitement is caused. Mere annoyance or insult to an individual stopping short of actual personal violence, is not a breach of the peace. Thus a householder — apart from special police legislation — cannot give a man into custody for violently and persistently ringing his door-bell.⁸⁴

Thus, while a boisterous late night party may violate local noise by-laws it does not constitute a breach of the peace.⁸⁵ On the other hand, if matters escalate to the point where bottles are thrown and property is damaged the police will be entitled to arrest pursuant to section 31 of the *Code*.⁸⁶ It is extremely important to remember that in Canada, "breach of the peace" is not an offence. The common law offence of breach of the peace has not been incorporated into the *Criminal Code* and section 8 of the *Code* does not allow conviction of an offence at common law.⁸⁷ Nevertheless, section 30 of the *Code* allows everyone who witnesses a breach of the peace to intervene for the purpose of preventing the continuance or renewal of the breach and section 31 of the *Code* allows a peace officer to arrest any person he finds committing a breach of the peace. In *R. v. Lefebvre*⁸⁸ the Court held that an arrest for breach of the peace is an adjunct to the criminal law and is a form of preventive rather than retributive justice. The Court further noted that the arrest does not result in a conviction, but is a preventive

⁸²See *Hébert v. Martin* (1930), [1931] S.C.R. 145, [1931] 2 D.L.R. 484, 54 C.C.C. 257; *St-Pierre v. Boisseau*, [1952] B.R. 292.

⁸³[1950] S.C.R. 517, [1950] 3 D.L.R. 513, [1950] 10 C.R. 26 [hereinafter cited to S.C.R.].

⁸⁴*Ibid.* at 519, Kerwin J. quoting H. Potter, ed., *Clerk and Lindsell on Torts*, 10th ed. (London: Sweet & Maxwell, 1947) at 298. See also *Ex parte Kane* (1915), 26 C.C.C. 156 (N.B.S.C.); *R. v. Loo Manson* (1925), 43 C.C.C. 30 (Alta. S.C.); *Pedersen v. Hansen* [1963] 2 C.C.C. 348 (B.C.S.C.).

⁸⁵*R. v. Atkinson* (1981), 27 A.R. 47, 121 D.L.R. (3d) 363 (Q.B.).

⁸⁶*R. v. Lykkemark* (1982), 18 Alta L.R. (2d) 48 (Prov. Ct.).

⁸⁷Sub-section 8(a) of the *Criminal Code*, *supra*, note 1, reads as follows:

8. Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 662.1

(a) of an offence at common law.

⁸⁸*R. v. Lefebvre* (1982), 1 C.C.C. (3d) 241 (B.C. Co. Ct.).

remedy in that a person may be held for up to twenty-four hours or required to post a peace bond at common law.⁸⁹

One of the most interesting aspects of this area of discussion is whether an individual, or a peace officer for that matter, is entitled to act in anticipation of a breach of the peace. This question was addressed in *Reid v. De Groot*,⁹⁰ a 1963 decision of the Nova Scotia Supreme Court. This case involved an appeal brought by the plaintiff from the dismissal by the trial judge of his action for damages for false arrest and imprisonment against two members of the R.C.M.P. The Court concluded that the respondents were justified under subsection 25(1) of the *Code* in arresting without warrant and imprisoning the appellant for what the Court considered to be a disturbance of the peace. The trial judge had given another ground for finding in favour of the respondents, namely, that the immediate arrest was necessary in order to prevent disorder or injury to the person arrested or others. The trial judge had cited authority to the effect that an arrest may be made if a breach of the peace is apprehended. Ilsley C.J. stated that it was doubtful whether one could arrest for an attempted offence or on suspicion of a breach of the peace which had not already occurred. In his view, the arrest powers under sections 30 and 31 of the *Code* seemed to be confined to breaches of the peace which had actually taken place.⁹¹

This decision is very much in line with a recent decision of the British Columbia Court of Appeal, *Hayes v. Thompson*.⁹² In that case two police officers arrested the plaintiff when she attempted to re-enter a pub from which she had been asked to leave because the officers feared that her re-entry would create a disturbance. The trial judge directed the jury that they should find that the officers had not witnessed a breach of the peace and had not found the plaintiff committing a breach of the peace. At trial, the plaintiff was successful and was awarded \$2,000 damages. On appeal, the officers argued for the first time that their power of arrest was not limited to section 31 of the *Code*. Hutcheon J.A. held that the power of arrest for a breach of the peace in section 31 is confined to breaches of the peace which have actually taken place. In other words, the statutory arrest power

⁸⁹*Ibid.* at 244, Wetmore J.. The Court cites ss 453 and 454 of the *Code* and the decision of *Re Compton and R.* (1978), 42 C.C.C. (2d) 163, 3 C.R. (3d) S-7, [1978] 5 W.W.R. 473 (B.C.S.C.), as authority for the twenty-four hour detention and the peace bond at common law respectively. See also *R. v. Biron* (1975), [1976] 2 S.C.R. 56, 30 C.R.N.S. 109, 23 C.C.C. (2d) 513. In *Lefebvre, ibid.* at 245, the Court adopted the definition of "breach of the peace" found in *Howell, supra*, note 20.

⁹⁰*Reid v. DeGroot* (1963), 49 M.P.R. 246, 42 C.R. 252 (N.S.S.C.) [hereinafter cited to M.P.R.].

⁹¹*Ibid.* at 259, Ilsley C.J. He cites, as authority, H. Street, *The Law of Torts*, 2d ed. (London: Butterworths, 1959) at 88.

⁹²(1985), 44 C.R. (3d) 316, 32 C.C.C. (3d) 134, 60 B.C.L.R. 252 (C.A.) [hereinafter cited to C.R.].

would not extend to apprehended breaches of the peace.⁹³ However, the Court then went on to find that there is a common law power to arrest for an apprehended breach of the peace. Hutcheon J.A. held that this power is derived from the statutory obligation of the police to prevent offences.⁹⁴

In an annotation to the decision, Bruce Archibald has provided an interesting response. Glanville Williams has written that in England a number of activities such as riots and assaults have been analyzed as "breaches of the peace" for purposes of the common law breach of peace arrest powers.⁹⁵ However, Professor Archibald notes that in Canada peace officers may arrest not only where a person has engaged in such activities but also where, on reasonable and probable grounds, they believe he has committed or is about to commit such offence.⁹⁶ He concludes that the prospective arrest powers contained in the *Criminal Code* for indictable offences preclude the necessity for any reference to "breach of the peace" arrest powers:

Indeed, where Parliament has carefully defined both powers of arrest and prohibited conduct, any attempt to justify arrest in terms of pre-existing and overlapping common law authority for breaches of the peace would be contrary to basic notions of the supremacy of Parliament and standard canons of statutory interpretation.⁹⁷

In England, the common law arrest powers arose at a time when there was no comprehensive legislative scheme in place setting out those powers. It is not surprising that judicial controversy concerning the ambit of common law arrest powers, and in particular "arrest for apprehended breach of the peace", continues to this day.⁹⁸ On the contrary, Archibald argues that Parliament should be seen to have ended the debate in this country with the enactment of section 31 of the *Criminal Code*. That section does not authorize the arrest of a person about to commit a breach of the peace or where an apprehended breach of the peace is thought to exist unless the person is about to join or renew a pre-existing breach of the peace. Given the inclusion of the phrase "about to commit" in paragraph 450(1)(a) of the *Code* in relation to indictable offences, and given its omission from paragraph 450(1)(b) which authorizes arrests for summary conviction of

⁹³*Ibid.* at 323-24, Hutcheon J.A.

⁹⁴*Ibid.* at 324-31, Hutcheon J.A.

⁹⁵Williams, "Arrest for Breach of the Peace", *supra*, note 20.

⁹⁶Paragraph 450(1)(a) of the *Criminal Code*, *supra*, note 1 reads as follows:

450.(1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence.

⁹⁷B. Archibald, Annotation: *Hayes v. Thompson* (1985) 44 C.R. (3d) 316 at 317.

⁹⁸Archibald, *ibid.*, cites the decisions of *R. v. Podger*, [1979] Crim. L. Rev. 524 and *Howell*, *supra*, note 20.

fences, Archibald submits that the absence of an arrest power for "apprehended breaches of the peace" in section 31 should not be viewed as accidental.⁹⁹ In conclusion, he finds it "not only odd, but unfortunate, that the British Columbia Court of Appeal chose to resurrect the controversial common law power to arrest for apprehended breach of the peace by relying on English authority ... in a Canadian legislative context which neither supports nor warrants such an approach."¹⁰⁰

Where a mistake is made pursuant to the common law power to arrest for apprehended breach of the peace, the mistake must be reasonable, that is, the person making the arrest must honestly and reasonably believe that a breach of the peace would be committed in the immediate future.¹⁰¹ Glanville Williams would limit the requirement for reasonable belief to actions in tort. He argues that even an unreasonable belief should be a defence to a criminal prosecution for wrongful arrest.¹⁰² In any event, while there have been repeated calls for revision to the existing statutory provisions in Canada,¹⁰³ it seems far more likely that sections 30 and 31 of the *Criminal Code* will be repealed and that any supplementary common law rules in relation to arrest for breach of the peace, or apprehended breach of the peace, will be abrogated by statute.¹⁰⁴

Section 27 of the *Code*, which authorizes the use of force to prevent the commission of an offence, creates another possible statutory basis for

⁹⁹Archibald, *ibid.* at 318.

¹⁰⁰*Ibid.*

¹⁰¹*Hayes v. Thompson, supra*, note 92 at 324-25, Hutcheon J.A. The Court approved the decision of *Howell, supra*, note 20 and cited the following statement from H. Street, *The Law of Torts*, 7th ed. (London: Butterworths, 1983) at 82: "Anyone is empowered to arrest without a warrant a person who is committing a breach of the peace, or who, having committed such a breach, is reasonably believed to be about to review it, or where an imminent breach is reasonably apprehended." In *Lykkemark, supra*, note 86 at 54, Cioni J. cited, with approval, the following passage from *Piddington v. Bates*, [1960] 3 All E.R. 660 at 663 (Q.B.), Lord Parker C.J.:

It seems to me that the law is reasonably plain. First, the mere statement by a constable that he did anticipate that there might be a breach of the peace is clearly not enough. There must exist proved facts from which a constable could reasonably have anticipated such a breach. Secondly, it is not enough that his contemplation is that there is a remote possibility but there must be a real possibility of a breach of the peace. Accordingly, in every case it becomes a question whether, on the particular facts, there were reasonable grounds on which a constable charged with this duty reasonably anticipated that a breach of the peace might occur.

¹⁰²Williams, "Arrest for Breach of the Peace", *supra*, note 20 at 584.

¹⁰³See *Criminal Law: The General Part — Liability and Defences, supra*, note 52 at 116; Archibald, *supra*, note 97 at 319.

¹⁰⁴See Law Reform Commission of Canada, *Arrest* (Working Paper No. 41) (Ottawa: Supply and Services Canada, 1985) at 88-89 and Law Reform Commission of Canada, *Arrest* (Report No. 29) (Ottawa: Law Reform Commission of Canada, 1986) at 47-48.

the defence of others. Unfortunately, there is virtually no case law in the area. One of the few decisions to examine the section has identified some of its shortcomings. In *R. v. McGregor*,¹⁰⁵ the accused were charged under paragraph 381(1)(g) of the *Code* with wrongfully obstructing a highway. The accused were obstructing the road as a protest against the possible contamination of the local water supply by the uranium exploration which was occurring in the area. The accused's primary defence was that their actions were justified under sections 27 and 30 of the *Code* in that they had grounds to believe that the exploration company was about to commit a common nuisance. Ultimately, the accused were found guilty and given absolute discharges. In addition to finding that the activities of the company did not constitute a nuisance, the Court rejected the defences advanced by the accused. Without offering any discussion, Josephson J. simply stated that the accused had not witnessed a breach of the peace.¹⁰⁶ In regard to section 27 the Court ruled there was no evidence that an offence mentioned in paragraph 27(a)(i) had been committed, and, in any case, the Court held that in the circumstances, this mistaken belief could not be regarded as a reasonable and probable one. Further, the Court found that although the evidence had established an increased risk of serious injury, it did not establish a risk of "immediate" and serious injury as required under paragraph 27(a)(ii).¹⁰⁷

Professor Colvin has noted that although the defence of prevention of crime in Canada places no restrictions on whose person can be defended, unlike the other defences, its justification is limited to the prevention of serious offences.¹⁰⁸ He has also identified several other areas of concern:

The defence is ... subject to its own special limitations. The most important of these is that the offence is likely to cause immediate and serious injury. The other limitation, that the offence which is sought to be prevented be one for which there can be arrest without warrant, is of no practical importance for offences against the person. There is power to arrest without warrant for any assault. Whether or not section 27 can justify force in defence of the person merely depends on the immediacy and seriousness of the threatened harm.

There are two major difficulties with s. 27. First, like s. 37, its wording appears to make the defence available in situations of self-defence. It is again submitted that courts should avoid the absurdity by making ss. 34 and 35 exclusively applicable for assaults upon one's own person. Second, like s. 34(1) and s. 37, but unlike s. 34(2) and s. 35, the wording of s. 27 does not expressly provide for the defence to be grounded upon a reasonable mistake about the degree of

¹⁰⁵*R. v. McGregor*, [1979] 3 W.W.R. 651 (B.C. Prov. Ct).

¹⁰⁶*Ibid.* at 658, Josephson J.

¹⁰⁷*Ibid.* at 658, Josephson J.

¹⁰⁸Colvin, *supra*, note 47 at 172. The author suggests that intervention by third parties "is presumably limited to guard against minor disputes becoming major conflagrations."

force which is necessary. It is submitted that an extended justification should be read into the section, as it has been for s. 34(1), and should also be for s. 37.

Unlike the other defences, s. 27(b) does expressly provide for the defence to be grounded on a reasonable mistake about the existence of an assault. In addition, by using the term "reasonably necessary" to identify the degree of force which is justified, it gives statutory recognition to the idea that drawing fine lines is inappropriate. In these respects the draftsmanship of s. 27 is superior to that of the other defences. Nevertheless, the points of difference show again how the statutory provisions relating to defence of the person are riddled with inconsistencies.¹⁰⁹

Not surprisingly, he concludes that "[t]he law of justified force in defence of the person is a mess."¹¹⁰

Pursuant to section 37 of the *Criminal Code* everyone is justified in using force to defend himself or "any one under his protection". Mewett and Manning have stated that coming to the rescue of a stranger is not justifiable under this section.¹¹¹ Professor Colvin argues that while there is no established case law on the range of persons who fall within this provision it would be sensible to interpret the phrase "under his protection" as meaning the persons to whom the common law recognizes a general duty of care, with potential liability for omitting to act in breach of this duty. This would include members of the immediate family and helpless persons to whom a relationship of care has been assumed.¹¹² This approach could support a position which argues that once an individual undertakes to act in defence of another, even a total stranger, that person has come "under his protection". At least one Canadian decision appears to have inadvertently stumbled upon that possibility.¹¹³

¹⁰⁹*Ibid.* at 178.

¹¹⁰*Ibid.*

¹¹¹A.W. Mewett & M. Manning, *Criminal Law*, 2d ed. (Toronto: Butterworths, 1985) at 394.

¹¹²Colvin, *supra*, note 47 at 177. For a good discussion of the various bases upon which criminal liability for omissions may be founded see Colvin, *supra* at 51-58, and Stuart, *supra*, note 51 at 72-83.

¹¹³In *R. v. Barkhouse* (1983), 58 N.S.R. (2d) 393 (Prov. Ct) the accused responded to a call for help from a complete stranger. Although the Court preferred to base its decision on the common law defence of others, MacDonald J. at 399 referred to section 37 of the *Code* and stated: "Was Mr. Barkhouse justified in entering into the fray? The express evidence is that Mrs. Dorothy Findlay did call for help. It could well be that the Findlays at that moment came under Mr. Barkhouse's protection." In an annotation to the decision of *R. v. Whynot (Stafford)* (1983) 37 C.R. (3d) 198 at 198, 9 C.C.C. (3d) 449, 61 N.S.R. (2d) 33 [hereinafter cited to C.R.] Professor Stuart appears to support use of the common law defence rather than an expanded meaning of the phrase "under his protection" in s. 37 of the *Code*. At 199 he states: "The court also took it as self-evident that any defence under s. 37 of a person under protection would in the case of the accused be limited to the threats against her son rather than against her neighbour. This might have been the very ancient common law view, but there is now

III. Mistake of Fact and the Defence of Others

As we have seen, the question of which persons may be assisted and the doctrine of mistake are central issues in both common law and statutory bases for the defence of others. In this country the issues have been complicated by the availability of both common law and statutory defences. Early Canadian court decisions were not particularly helpful in defining the parameters of the defence. Some courts, without making reference to the *Code* provisions or the existence of the defence at common law, concluded that a person "must not go beyond the force reasonably necessary" to defend another, invariably a family member.¹¹⁴ Other decisions simply made reference to *Code* provisions such as sections 27 and 37 without elaboration or discussion.¹¹⁵

The first Canadian decision to specifically recognize the right to act in defence of another and also attempt to provide some insight into the operation of the defence was *R. v. Dunham*,¹¹⁶ a 1950 decision of the New Brunswick Court of Appeal. The accused was charged with assaulting a police officer after he intervened in a struggle between the officer, Constable Donner, and another person, a Mr Cusack. At one point the officer threw Cusack to the floor and began to strangle him. Dunham, who believed that the officer was going to cause serious injury to Cusack, told him to desist and when he did not, Dunham struck the officer on the head with a bottle. At trial, the jury was instructed that if there was any danger, even the slightest, of Constable Donner killing or seriously injuring Mr Cusack, then Dunham was justified in attacking Constable Donner. The New Brunswick Court of Appeal disagreed. Hughes J.A. held that the trial judge misdirected the jury by failing to state that there were limits to the right of the defendant to intervene and to the right of the defendant to use the bottle as an instrument of attack. In his opinion, the trial judge left the case to the jury as if the defendant's right to intervene was absolute, when it was not. The jury was left with the impression that the assault was justified no matter

authority that the right to defend others is not limited by family relationships: see Williams, *Textbook of Criminal Law*, 2nd ed. (1983), p. 501." It is interesting to note that pursuant to sub-s. 25(3) of the *Criminal Code*, *supra*, note 1, a person is justified in using force that is intended or likely to cause death or grievous bodily harm if he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or "anyone under his protection" from death or grievous bodily harm. The phrase "anyone under his protection" has not been examined by the courts in the context of this section.

¹¹⁴ See *Slater v. Watts* (1911), 16 West. L.R. 234 at 242, 16 B.C.R. 36 (C.A.), MacDonald, C.J.A.; *R. v. Wiggs*, [1931] 3 W.W.R. 52 at 53 (B.C.C.A.), MacDonald, C.J.B.C. See also *R. v. Drouin* (1909), 15 C.C.C. 205 (Que. K.B.).

¹¹⁵ *R. v. Callahan* (1915), 26 C.C.C. 93 (Alta. S.C.).

¹¹⁶ *R. v. Dunham*, [1950] 9 C.R. 167, 95 C.C.C. 317, [1950] 1 D.L.R. 448 (N.B.C.A.) [hereinafter cited to C.R.].

how severe if the defendant thought there was a danger of Cusack being killed or likely suffering grievous bodily harm. Hughes J.A. held that the trial judge should have pointed out that the force used must not transgress the reasonable limits of the occasion and further, the jury should have been asked to direct its attention to whether other means less severe might have been available and sufficient.¹¹⁷

Richards C.J. stated that there were two questions which had to be answered. First, did Dunham have reasonable grounds for believing that Constable Donner might cause Cusack's death or cause him serious bodily harm? If so, did Dunham use such force as was reasonably necessary to endeavour to avoid such result? The first question, that is, Dunham's belief as to the degree of injury being caused to Cusack, had to be based on reasonable grounds. In this regard, the trial judge had done an adequate job. He had stated:

It is not what the accused thought, it is whether there was from all the circumstances of the case a reasonable apprehension that if Constable Donner was not stopped he would have killed or done grievous bodily harm to Cusack. If there was that reasonable belief that such might have occurred, then I think the accused would be justified in doing what he could to prevent the killing of Cusack or his being seriously injured by Constable Donner.

Thus, the necessity of Dunham's belief on reasonable grounds of injury to Cusack was quite fully presented to the jury. However, the charge did not contain any direction on the second question as to the use of reasonably necessary force. Because there was no limitation as to the degree of force that might be used, Richards C.J. held that the instructions constituted a misdirection. The direction by the trial judge could well be understood to mean that any degree of force would be justified. This was not correct as there had to be reference to such force as might be reasonably necessary.¹¹⁸

Unfortunately, the *Dunham* decision makes no specific reference to any of the *Code* provisions. The decision may well be based on the notion of a common law defence but no authority is cited. In that sense, the decision is very similar to *R. v. Robertson*,¹¹⁹ a 1954 decision of the Ontario Court of Appeal. In this case, on a charge of murder, the Court ruled that the jury could consider, for the purposes of self-defence, whether the accused was acting under fear for his own life or that of his stepfather. The Court made it quite clear that the defence would be available if he feared only for the life of his stepfather.¹²⁰ However, although the Court did recognize that an

¹¹⁷*Ibid.* at 177, Hughes J.

¹¹⁸*Ibid.* at 173-75, Richards C.J.

¹¹⁹*R. v. Robertson*, [1954] 18 C.R. 7, O.W.N. 164, 107 C.C.C. 400 (C.A.) [hereinafter cited to C.R.].

¹²⁰*Ibid.* at 10, Pickup C.J.

accused is entitled to act in defence of another, it is not apparent from the decision whether the discussion pertains to provisions of the *Code* or the defence at common law. Further, there is no indication of the Court's view on the concept of "reasonableness".

This question of "reasonableness" has played a central role in the development of the mistake of fact doctrine and its relationship to the defences. As we have just seen, if a person acts in defence of another the question of mistake may arise in two contexts, that is, a person may mistakenly believe that another individual needs help or there may be a mistake made as to the amount of force required to assist that person. The issue is whether these mistakes should be assessed subjectively or objectively.

The case law in this area, particularly as it began to develop in the 1960s, is very confused. The decision of *R. v. Cadwallader*¹²¹ is illustrative. This case involved the self-defensive act of a fourteen-year old boy. He had shot and killed his father and there was no issue of defence of others. However, after noting that section 37 of the *Code* deals with the extent of justification, Sirois J. did comment on the proper test for mistake:

The test as to the extent of justification is whether the accused used more force than he on reasonable grounds believed necessary. It is not an objective test; the determination must be made according to the accused's state of mind at the time. The question is: did he use more force than he on reasonable grounds believed to be necessary?

To establish the defence there should be evidence — (a) that the facts amount to self-defence, and (b) that the mode of defence used was justifiable under the circumstances.

...

It is clear that he acted in self-defence. On his uncontradicted evidence he used only sufficient force as he reasonably thought necessary under the circumstances to put his assailant out of action. You cannot put a higher test on a 14-year-old boy than that known to our law.¹²²

Although Sirois J. states that the test is not objective, his use of the word "reasonable" is troubling. Although he may be suggesting the "rea-

¹²¹*R. v. Cadwallader*, [1966] 1 C.C.C. 380 (Sask. Q.B.).

¹²²*Ibid.* at 387-88, Sirois J.

sonableness of the evidence" rule as described in *R. v. Beaver*,¹²³ his comments have been interpreted as creating a test based on the perceptions of the "reasonable 14-year-old". Professor Stuart states that this "is surprisingly held to be a *subjective* inquiry."¹²⁴ He prefers the inventive interpretation of Mr Justice Martin in *R. v. Baxter*¹²⁵ where he held that although subsection 34(1) of the *Code*¹²⁶ involved a test of proportionality, it did not involve a purely objective test:

The formulations in *Cadwallader* and in *Baxter* are identical in rejecting a mechanistic and objectively determined test of proportionality but there are significant differences in respect of the treatment of the defender's belief. Mr. Justice Martin's approach is preferable in his forthright acknowledgement of an objective element: the belief must be honest *and* reasonable. This is in contrast to the subjectivity required by the section 17 formulation of duress but consistent with the English common law of self-defence. Our law of self defence has indeed for a long time adopted an objective standard but one that takes some individual factors into account. This was indeed the case and the true characterization of the approach in *Cadwallader*. Mr. Justice Martin also makes it clear, and this is surely preferable to the collapsing of the inquiries in *Cadwallader*, that there is an independent objective inquiry as to whether, given the honest and reasonable belief as to the nature of the attack, the defence was, in all the circumstances, necessary.¹²⁷

Cases specifically involving the defence of others also demonstrate inconsistent approaches to the question of mistake. *Gambriell v. Caparelli*¹²⁸ was a civil action for damages arising out of a dispute between neighbours. The plaintiff, aged fifty, and a young man of twenty-one had been involved

¹²³"[T]he essential question is whether the belief entertained by the accused is an honest one and . . . the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining that essential question." *R. v. Beaver*, [1957] S.C.R. 531 at 538, 26 C.R. 193, Cartwright J.

In the United States, the *Model Penal Code* supports a purely subjective test for mistake. See American Law Institute, *Model Penal Code: Proposed Official Draft* (Philadelphia: American Law Institute, 1962), par. 3.05(1)(b). For a criticism of this approach, see Robinson, *supra*, note 2 at 102. LaFave & Scott, *supra*, note 2 at 406 have expressed a preference for a reasonable belief. See also J. Hall, *General Principles of Criminal Law* (New York: Bobbs-Merrill, 1960) at 366-67; G. Fletcher, *Rethinking Criminal Law* (Boston, Mass.: Little, Brown, 1978) at 696.

¹²⁴Stuart, *supra*, note 51 at 407. At 405, Professor Stuart states: "The defences of person and property in Canadian law are bedevilled by excessively complex and sometimes obtuse Code provisions. It is small wonder that our courts have sometimes ignored Code rules or been inventive in their interpretation of them."

¹²⁵*R. v. Baxter* (1975), 33 C.R.N.S. 22, 27 C.C.C. (2d) 96 (Ont. C.A.).

¹²⁶*Criminal Code*, *supra*, note 1.

¹²⁷Stuart, *supra*, note 51 at 407-408. At 408 the author notes: "Apart from the recognition that strict proportionality is not demanded, there are no automatic rules that the defender cannot strike the first blow — engage in a 'pre-emptive strike' — or cannot succeed in the defence of self-defence if he could have retreated." See also Colvin, *supra*, note 47 at 172-75.

¹²⁸*Gambriell v. Caparelli* (1974), 7 O.R. (2d) 205, 54 D.L.R. (3d) 661 (Co. Ct) [hereinafter cited to O.R.].

in a minor car accident. After a yelling match, the young man was being choked by the plaintiff when his mother arrived. She was fifty-seven years of age. In an effort to help her son she struck the plaintiff several times with a metal three-pronged garden cultivator tool attached to the end of a five-foot-long wooden handle. The Court accepted her evidence that she feared for the safety of her son.

In reaching his decision dismissing the action, Carter J. relied on the English decisions of *Duffy*, *Chisam* and *Fennell*.¹²⁹ He cited *Duffy* for the proposition that the necessity of intervention and the reasonableness or otherwise of the manner of intervention are questions of fact and *Chisam* for the proposition that the defence of self-defence would be available if the accused believed on reasonable grounds that the relative or friend was in imminent danger, even though those reasonable grounds were founded on a genuine mistake of fact.¹³⁰ He also cited *Fennell* where the Court stated: "Where a person honestly and reasonably believes that he or his child is in imminent danger of injury it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact."¹³¹ Having determined that these criminal cases were relevant in the civil matter before him Carter J. concluded that "where a person in intervening to rescue another holds an honest though mistaken belief that the other person is in imminent danger of injury, he is justified in using force, provided that such force is reasonable; and the necessity for intervention and the reasonableness of the force employed are questions to be decided by the trier of fact."¹³²

In the result, the Court found that the defendant was justified in intervening because she held an honest belief that her son was in danger. Carter J. also ruled that the degree of violence was justified and not unreasonable in the circumstances.¹³³

Although this case involved a civil matter the decision of the Court is important because of its apparent departure from the English decisions which were cited and the *Cadwallader* decision which was not. Arguably, Carter J. has suggested that the force used must, objectively, be considered reasonable. In other words, it would not be a defence if the alleged wrongdoer honestly, or even honestly and reasonably, believed the force was necessary. The force used must, in fact, be reasonable. On the other hand, his decision could be interpreted to suggest that the belief in the need for forceful in-

¹²⁹*Duffy*, *supra*, note 15; *Chisam*, *supra*, note 27; *Fennell*, *supra*, note 28.

¹³⁰*Gambriell v. Caparelli*, *supra*, note 128 at 209, Carter J.

¹³¹*Ibid.*, citing *Fennell*, *supra*, note 28 at 431, Widgery J.

¹³²*Ibid.* at 210.

¹³³*Ibid.* at 210-11.

tervention need only be an honest belief; it would not have to be reasonable. Under this approach the courts would subjectively evaluate one belief (the need for intervention) but objectively evaluate another belief (the extent of force required).

In *R. v. Stanley*¹³⁴ the British Columbia Court of Appeal took quite a different approach, namely, using the tests established pursuant to section 34 of the *Code* as the basis for the assessment of mistake in defence of others. In this case, a group of individuals described by Branca J.A. as “a bunch of five drunken goons”¹³⁵ went to a private residence seeking a fight with the defendant. The Court stated that Stanley had the right to defend himself and his common law wife who was described as “a person under his protection”,¹³⁶ the wording in section 37 of the *Code*. However, section 34, which makes no reference to third parties, was used as the basis for the discussion in regard to the death of one of the assailants:

Section 34 applied, as here Blosky was committing a deemed unprovoked assault under the provisions of s. 41(2). So it was then justifiable for Stanley both for his self-defence and in the defence of his home to repel force by force, if the force used was not intended to cause death or grievous bodily harm and was no more than was necessary for Stanley's defence of himself and of Debbie, a person under his protection, or to remove Blosky, a trespasser, from his home.

Under subs. (2) of s. 34 Stanley was justified in causing the death of or grievous bodily harm to Blosky by repelling Blosky's assault if the evidence disclosed that Stanley reasonably apprehended that his death might be caused or that he might suffer grievous bodily harm from the violence with which Blosky and the others originated the assault and the method by which Blosky and the others pursued their purpose and if Stanley believed on reasonable and probable grounds, even though he was mistaken in that belief, that he could not otherwise preserve himself or Debbie from death and/or grievous bodily harm.

...

The law of necessity gave Stanley the right to protect himself or Debbie from death or grievous bodily harm, even if Blosky had to be killed.

The law provides favourably for a person such as Stanley who is assaulted if he, in the agony of the occasion, reasonably but mistakenly believes that he must kill in order to save himself from death or grievous bodily harm.

The law does not expect one in such circumstances to weigh with too much nicety the force that might be necessary to repel the attack and, too, the law does not expect one to wait until he is struck before he strikes back. If he

¹³⁴*R. v. Stanley*, [1977] 4 W.W.R. 578, 36 C.C.C. (2d) 216 (B.C.C.A.) [hereinafter cited to W.W.R.].

¹³⁵*Ibid.* at 590, Branca J.A.

¹³⁶*Ibid.* at 594.

does so it may well be that it will be too late for him to retaliate in order to preserve himself.¹³⁷

This decision must be contrasted with the case of *R. v. Basarabas*.¹³⁸ In this case the British Columbia Court of Appeal, the same Court that rendered the *Stanley* decision, was concerned with an appeal from a conviction for second degree murder. The deceased, one Falbo, had been stabbed to death and the accused, Basarabas, argued that she had not intended to murder him but that her action was by way of self-defence either to protect herself or another girl. This other girl was her co-accused, Spek. Their relationship was described as that of a "mother-daughter" or a "big sister".¹³⁹ This necessarily raises the question of how close the relationship must be before the defence of others will operate. Craig J.A. did state that on the facts of this case he had some difficulty with the proposition that each appellant was under the protection of the other.¹⁴⁰ In any event, he went on to state that section 37 applied only to self-defence in a case other than one involving the intentional infliction of death or grievous bodily harm and further, that subsection 34(2) and section 35 have no application to a situation where the accused claims to be defending someone under his protection.¹⁴¹ He adds:

Section 37 applies to self-defence generally. I incline to the view that in a case involving death the issue of self-defence should be determined by reference to ss. 34 and 35, not to s. 37. On the other hand, in *Lowther v. The Queen* (1957), 26 C.R. 150 at p. 163 (Que. Q.B.), Hyde J.A. expressed the view that s. 37 was "an extension" of s. 34. I assume that when he referred to s. 34 he meant s. 34(1) which deals with unintentional death, not s. 34(2) which deals with intentional death, and that when he said "extension" he meant that s. 37 was available to an accused not only in a case in which he was defending himself but also in a case in which he was defending someone under his protection.

...

In telling the jury that Basarabas or Spek was entitled to use force to repel Falbo's assault "and if necessary, kill Falbo", the Judge seems to be telling the jury that s. 37 includes an intentional killing. I doubt that he meant to convey this impression, but if he did he was wrong. An intentional killing can be justified as self-defence only under ss. 34(2) and 35.¹⁴²

Counsel for the appellants argued that based on the *Stanley* decision, subsection 34(2) was available to Basarabas if she was defending Spek. Craig J.A. responded: "Although some of the comments of Branca J.A. ... tend

¹³⁷*Ibid.* at 593-95.

¹³⁸*R. v. Basarabas* (1981), 62 C.C.C. (2d) 13 (B.C.C.A.).

¹³⁹*Ibid.* at 19, Craig J.A.

¹⁴⁰*Ibid.* at 26.

¹⁴¹*Ibid.* at 26.

¹⁴²*Ibid.* at 25, 28.

to support this submission, I think that an examination of the judgment as a whole and the other factors in the case do not justify the conclusion."¹⁴³ He did not elaborate.

The net effect of this judgment is that even where circumstances warrant, persons may intentionally cause death or grievous bodily harm only in defence of themselves and not in defence of others. Such an approach should be viewed as untenable in that it created different categories of "worth" in regard to human life. It should go without saying that the preservation of one life is no more and no less important than the saving of another life. The decision in *Basarabas* does not offer any specific comment on the choice between subjective or objective assessment for mistakes made in situations involving defence of others. Because the decision accepts the comments in *R. v. Lowther*,¹⁴⁴ that is, that section 37 is an "extension" of subsection 34(1), it is probably safe to suggest that the Court favours an objective evaluation of mistake. This certainly appears to be the favoured position in recent cases although there are exceptions.

For example, in *R. v. Shannon*,¹⁴⁵ decided by the British Columbia Court of Appeal four months before *Basarabas* but not cited in the latter decision, the accused appealed his conviction for second degree murder. He testified that he had shot and killed the deceased because he feared for his own life and that of his stepson. He believed that the deceased, Black, had a gun and intended to shoot him. Although there was conflicting evidence, Black may actually have been unarmed at the time of the incident. Citing the Ontario Court of Appeal decisions in *Baxter*¹⁴⁶ and *Bogue*,¹⁴⁷ MacDonald J.A. stated that under subsection 34(1) of the *Code*, if the force used was no more than necessary for the purpose of self-defence then it was justifiable. He added that the test applied under this subsection is not purely objective and that the doctrine of mistake is applicable. MacDonald J.A. also held that under subsection 34(2), there was no specific requirement that the force used by the accused be proportionate to the unlawful assault if the subsection is otherwise satisfied. Here the concept of "reasonable belief" is described as subjective:

Whether the force employed was excessive is judged by the state of mind of the accused at the time. The reasonable apprehension of death or grievous bodily harm in s. 34(2) first must meet an objective standard. Additionally, the subsection introduces a subjective element, namely, the belief of the accused that he cannot otherwise preserve himself from death or grievous bodily harm.

¹⁴³*Ibid.* at 26.

¹⁴⁴*Lowther v. R.*, [1957] Q.B. 519, 26 C.R. 150 at 163, Hyde J.

¹⁴⁵*R. v. Shannon* (1981), 59 C.C.C. (2d) 229 (B.C.C.A.).

¹⁴⁶*Supra*, note 125.

¹⁴⁷*R. v. Bogue* (1976), 13 O.R. (2d) 272, 30 C.C.C. (2d) 403, 70 D.L.R. (3d) 603 (C.A.).

And that belief must be on reasonable and probable grounds. An accused may reasonably believe that he was in imminent danger from an attack, but still be mistaken in that belief.¹⁴⁸

In regard to section 37 of the *Code*, MacDonald J.A. rejected criticisms of the trial judge's instructions on that section. The trial judge had advised the jury that the conduct of the accused would still be culpable homicide if "the force used ... was more than was reasonably necessary under the circumstances...".¹⁴⁹ Suffice it to suggest that while the courts continue to pay lip service to the concept of subjective fault, while the test is not "purely" objective any more than it is "purely" subjective, an objective evaluation is being used. Use of a purely objective evaluation in regard to the amount of force used would create serious problems. For example, if a person was mistaken, even reasonably mistaken, as to the need to intervene, then obviously the amount of force used, no matter how small or great would not, in fact, be necessary. Thus, in order to avail oneself of the defence of third persons under the provisions in the *Code*, there must be an honest and reasonable belief that intervention is required and the force used to achieve that result must be reasonably necessary.¹⁵⁰ A simple honest belief in the necessity of defensive measures or the extent of force required will not be sufficient to found the defence.

These issues were touched upon in the 1983 decision of the Nova Scotia Court of Appeal, *R. v. Whynot (Stafford)*.¹⁵¹ The accused was charged with the first degree murder of her common law husband. The evidence revealed

¹⁴⁸*Shannon, supra*, note 145 at 234, MacDonald J.A.

¹⁴⁹*Ibid.* at 235.

¹⁵⁰See Stuart, *supra*, note 51 at 405-409. Compare G. Garneau, "The Law Reform Commission of Canada and the Defence of Justification" (1983) 26 *Crim. L.Q.* 121 at 126-27. In *Principles of Criminal Law, supra*, note 47 at 174-76, Professor Colvin states:

Under s. 34(1), the force used by a defender must be "no more than is necessary" On a literal reading, s. 34(1) would not even allow for a mistake which is reasonable to ground the defence. Section 34(2) does expressly allow for reasonable mistakes

If s. 34(1) imposes a purely objective test of necessity but s. 34(2) allows for some reasonable mistakes, there is an inconsistency between the two provisions. In *R. v. Baxter* Martin J.A. of the Ontario Court of Appeal suggested that reasonable mistakes should permit a defence under both provisions

It is also submitted that, under both provisions, a reasonable mistake about the existence of an assault should permit a defence. There is no good reason to distinguish a mistake about the existence of an assault from a mistake about its violence or about the degree of force which was necessary to repel it .

If a reasonable mistake can ground a defence under s. 34(1), then presumably it can also ground a defence under s. 37.

¹⁵¹*Whynot (Stafford), supra*, note 113,

that the husband was a very large and powerful man prone to violence against family members, especially when drinking or under the influence of drugs. On the day in question, he had been drinking heavily and had threatened to "deal with" the sixteen-year old son of the accused. When Mr Stafford passed out in a truck being driven by the accused, she shot and killed him. It was the theory of the Crown that the death was planned and deliberate and that the accused was aware of her act. Part of the theory of the defence was that she had shot Stafford in the belief that he was going to assault her son. Ultimately, after a new trial ordered by the Nova Scotia Court of Appeal, she pleaded guilty to manslaughter and received a sentence of six months' imprisonment and two years' probation.

The key issue before the Nova Scotia Court of Appeal was the original trial judge's instruction in regard to section 37 of the *Code*. In his charge, Burchell J., the trial judge, had stated:

It's therefore not a question of whether the accused thought it was necessary to shoot Mr. Stafford to defend persons under her protection in her particular state of mind at the time in question, it's a question of whether, for that purpose of defending those under her protection, the killing of Mr. Stafford was objectively or actually a matter of necessity. So you must look at the means employed in self-defence and decide whether those means were necessary. In addressing that question, of course, you may take into account what you know about the character and disposition of Mr. Stafford. But it is on an objective examination of what was necessary under the circumstances, not from the perspective of the accused, that you must judge the question of whether the force used was excessive or not.¹⁵²

When the jury asked to be re-charged on section 37, Burchell J., the trial judge, repeated his comments about the need for an objective evaluation in regard to the amount of force used. However, in regard to the question of whether or not intervention was required he adopted a more subjective approach suggested by some of the earlier decisions. Burchell J. instructed the jury that in considering whether the accused did act to defend herself or persons under her protection they should "take into account the state of mind of the accused and all factors affecting her state of mind."¹⁵³

¹⁵²*Ibid.* at 211, Hart J.A. He added: "Under no circumstances may that defence be raised as a cloak for retaliation or revenge."

¹⁵³*Ibid.* at 216. In regard to the second question, that is the amount of force used, Burchell J. stated: "[I]t is not from the perspective of the accused, that you should look at the question — you should look at that question as an objective question, and it really is whether an ordinary reasonable person who knew the kind of man William Stafford was would in the circumstances have believed that it was necessary to kill him." In *R. v. Rochon* (1987), 1 Y.R. 266 at 267-68 (Yukon Terr. Ct), Ilnicki J., the Court, without citing any authority, offered the following comment on s. 37 of the *Code*:

In order for the accused to avail himself of this defence of self defence, I must decide whether the use of force by the accused was necessary to protect his son

The Crown appealed a jury verdict of not guilty. The Nova Scotia Court of Appeal allowed the appeal and ordered a new trial on the basis that, given the evidence in the case, the trial judge had erred in placing section 37 of the *Code* before the jury. Hart J.A. held that since no one was being assaulted at the time of the killing there was no need to protect anyone from an assault. Accordingly, the jury should not have been permitted to consider a possible assault as a justification and section 37 should not have been left with them.¹⁵⁴ These comments flow from a very narrow definition of assault. Hart J.A. stated that since the legal definition of "assault" had not been placed before the jury, they "might well have understood that threats alone could amount to an assault."¹⁵⁵ He added that a person who seeks justification for preventing an assault must be faced with an actual, and not simply a threatened, assault before section 37 can be invoked. He also stated that the assault must be life-threatening before a person can be justified in killing in defence of his person or that of someone under his protection.¹⁵⁶

As Professor Stuart points out in his annotation to this case it has long been clear that under the general assault definition in the *Criminal Code* the two major forms of assault are applying force or threatening to apply such force. He also notes that under section 34 of the *Code* there is no automatic rule that the defender cannot strike first.¹⁵⁷ Accordingly, the decision must be viewed with a certain amount of skepticism.

In some cases in recent years the Ontario Court of Appeal chose not to elaborate on the defence of third person and the operation of section 37 even where the opportunity clearly presented itself.¹⁵⁸ However, in a recent unreported trial before the Supreme Court of Ontario, Mr Justice Campbell, in his charge to the jury, provided an extensive discussion of section 37 of the *Code*. *R. v. Anich*¹⁵⁹ provided one of the clearest opportunities for a

from assault and if the answer is yes, whether the force used was excessive. To determine this issue one must look at the state of mind of the accused when the incident occurred. Based on what the accused observed, as related in his testimony, I find that his observations cannot be construed as sufficient to justify an assault of this nature on the peace officer. Moreover, I find as a fact that the actions of the accused in swinging a garden rake at the head of the peace officer constitute the use of more force than was necessary under the circumstances.

¹⁵⁴*Whynot (Stafford)*, *ibid.* at 218-19, Hart J.A.

¹⁵⁵*Ibid.* at 217.

¹⁵⁶*Ibid.* at 218.

¹⁵⁷Stuart, Annotation: *R. v. Whynot (Stafford)*, *supra*, note 113 at 199. For the proposition which allows a pre-emptive strike, Stuart cites *R. v. Antley*, [1964] 1 O.R. 545, 42 C.R. 384, [1964] 2 C.C.C. 142 (C.A.) and *R. v. Stanley*, *supra*, note 134. As noted *supra*, note 136, the *Stanley* case may be viewed as a case of defence of third person.

¹⁵⁸*See R. v. Figueira* (1981), 63 C.C.C. (2d) 409 (Ont. C.A.).

¹⁵⁹*R. v. Anich*, in the Supreme Court of Ontario, Trial Proceedings, Charge to the Jury, Before the Honourable Mr Justice Archie Campbell, at Sault Ste. Marie, Ontario, 21-30 April 1986.

Canadian court to comment on the defence of third persons. Mr Anich, a twenty-year old Sault Ste. Marie man, was acquitted on a charge of second-degree murder in the shooting death of his father. The jury heard during the seven-day trial that Frank Anich, age forty-four, had frequently assaulted his wife and threatened to kill her. On the night in question, witnesses said Mr Anich returned home shortly before 8:00 p.m. and started to threaten both his wife and his son and to smash things in the kitchen. The son told the Court that he feared his father really meant to carry out his threats. He said he went to his room and took two bullets from a drawer, took a .303-calibre rifle from the basement and went back upstairs. He testified that he saw his father moving toward his mother with hands outstretched, and he feared for her life. He said he fired a shot, and ran to the home of a neighbour and called the police.¹⁶⁰

Mr Justice Campbell advised the jury that Anich's main defence dealt specifically with the situation where the accused acted under a reasonable apprehension of death or grievous bodily harm to his mother. He noted that in this defence the accused may use excessive force, that is, he may use force that is excessive having regard to the circumstances depending on what he reasonably believes. Mr Justice Campbell then proceeded to read the appropriate provision of the *Criminal Code* to the jury. However, the provision read to the jury was, in fact, a combination of subsection 34(2) and section 37 of the *Code*:

Everyone is justified, if a person under his protection is unlawfully assaulted and he causes death or grievous bodily harm in repelling the assault, if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and

(b) he believes on reasonable and probable grounds that he cannot otherwise preserve the person under protection from death or grievous bodily harm.¹⁶¹

Subsection 34(2) of the *Code* makes no reference to the defence of others. This combining of *Code* provisions is particularly curious in view of the Ontario Court of Appeal decision in *R. v. Mulder*¹⁶² where Arnup J.A. examined the relationship between sections 34 and 37 and found that while section 37 introduces the concept of proportionate force, this proportionality aspect was not a requirement of subsection 34(2):

¹⁶⁰*Ibid.*

¹⁶¹*Anich, supra*, note 159 at 39. Campbell J. did not specifically address the question of whether the mother was "under the protection" of the son, as per the language of s. 37. He appears to have assumed that this was the case.

¹⁶²*R. v. Mulder* (1978), 40 C.C.C. (2d) 1 (Ont. C.A.).

This section [s. 37] introduces the concept of "proportionate force"; it must not be more than is necessary to prevent the assault. There is no similar language in s. 34(2). The jury might well draw the erroneous inference that the degree of force permitted under the two sections was the same, and that despite reasonable apprehension of death or grievous bodily harm, no more force can be used in self-defence than is necessary under the circumstances to prevent death or grievous bodily harm. If s. 37 was to be referred to, it was incumbent on the trial Judge to distinguish its wording from that of s. 34(2) and thus avoid "watering down" the defence afforded by s. 34(2).¹⁶³

Thus, in regard to section 37, these comments could be used to base an argument that an accused is not entitled to use excessive force. Professor Stuart has argued that the concern with "watering down" the defence under subsection 34(2) is of "doubtful significance since our Courts do not insist on a mechanistic approach to proportionality where there is an element."¹⁶⁴ Professor Colvin notes that section 37 does not directly impose the limitations which are found in subsection 34(2) and section 35. He is concerned that while the general prohibition on the use of excessive force under subsection 37(2) may secure the same result there is no guarantee that triers of fact will apply it in this way. Colvin argues that it would be absurd if someone could escape the limitations of subsection 34(2) and section 35 merely by claiming a defence of prevention of assault under section 37 rather than self-defence. He suggests that the best way to avoid "this absurdity" is to treat self-defence as the exclusively available defence for assaults upon one's own person. He adds that an alternative way of avoiding absurdity is to read the limitations of subsection 34(2) and section 35 into the defence of prevention of assault. This approach would make those limitations applicable to the defence of persons under one's protection.¹⁶⁵ Again, an objective evaluation is preferable to a "purely objective" and strict proportionality requirement. In his explanation of the provision which he left with the jury in the *Anich* case, Campbell J. told them that the death was justified if the accused caused the death under reasonable apprehension of death or grievous bodily harm to his mother and if he believed, on reasonable and probable grounds, that he could not otherwise preserve her from death or grievous bodily harm.¹⁶⁶ By way of emphasis he added: "Remember also that the force used by the accused doesn't have to be proportionate to the force he repelled. The important thing is whether the accused reasonably believed that the force used was necessary. He might be wrong. He might be mistaken, so long as he had an honest and reasonable belief that the force he used was necessary."¹⁶⁷ The instruction provided by Campbell J.

¹⁶³*Ibid.* at 5, Arnup J.A. See also above, text accompanying notes 138-42.

¹⁶⁴Stuart, *supra*, note 51 at 411.

¹⁶⁵Colvin, *supra*, note 47 at 177.

¹⁶⁶*Anich*, *supra*, note 159 at 41, Campbell J.

¹⁶⁷*Ibid.* at 57.

should be applauded not just for its creativity but also for its sense of fairness. This is an excellent example of a court's ability to overcome poor draftsmanship while maintaining the spirit and clear intent of the legislation.

Unfortunately, when Campbell J. turned his attention to a combination of subsection 34(1) and section 37 he appears to have reverted to a purely objective evaluation. He explained to the jury that if the accused did not intend to cause death or grievous bodily harm then, unlike the previously discussed defence, there was no justification for the use of more force than was necessary. He described this defence as more limited and stated that "the accused cannot use more force than is, in fact, necessary."¹⁶⁸ Surprisingly, a third possible defence put forward by Campbell J. is section 37 itself which he read to the jury. Again, he stated that "unlike the main defence, the force used cannot be excessive, while in the main defence the force used by the accused can be excessive so long as he believes honestly, on reasonable grounds, that it is necessary."¹⁶⁹ With respect, these comments not only create apparent contradictions within the charge itself but appear to be very much at odds with the current approach of the Ontario Court of Appeal in decisions such as *R. v. Baxter*.¹⁷⁰ In Canada today, the doctrine of reasonable mistake in regard to the law of self-defence should be seen to override the remaining vestiges of the proportionality rule.

This takes us to the important question of whether the defence of mistake should be evaluated on a different basis simply because it arises in the context of self-defence. Professor Colvin has noted that "objectivist ideas about criminal culpability govern matters such as entitlement to a defence where a mistake has been made about the appropriate degree of force. The law of justification has no parallel to the rule that an unreasonable mistake can provide a defence of lack of *mens rea*."¹⁷¹ Accordingly, a mistake made in the context of a justification such as the defence of others, must be a reasonable mistake. As Colvin notes, there would be a distinct advantage to having one's self-defensive conduct labelled as an excuse rather than a justification, namely, the availability of an honest, albeit unreasonable, mistake about the appropriate degree of force.¹⁷² Our understanding has not been advanced by the judgment of Wilson J. in *Perka* where she accepts the validity of the distinction between justification and excuse but states that an act of necessity is sometimes justified and sometimes excused.¹⁷³

¹⁶⁸*Ibid.* at 58.

¹⁶⁹*Ibid.* at 59. Interestingly, in regard to the possible use of s. 27 of the *Code*, Campbell J. noted at 59 that an honest and reasonable mistake as to the amount of force required to prevent the commission of an offence would suffice.

¹⁷⁰*Supra*, note 125.

¹⁷¹Colvin, *supra*, note 47 at 167. See below, text accompanying notes 188-94.

¹⁷²*Ibid.* at 168.

¹⁷³*Supra*, note 46 at 268-79, Wilson J.

Although there may be some concern that in the context of the defence of others, mistakes could be assessed subjectively or objectively depending on whether the conduct was classified as a justification or excuse, this is unlikely to occur since the criminal law has tended to treat the two kinds of defences as mutually exclusive categories: "A given type of situation is taken to demand either a justifying defence or an excusing defence but not both. The provision of a justification for something like self-defence is therefore taken to preclude any excusing defence relating to self-defence."¹⁷⁴

The debate has been further clouded by the notion of "partial justification" raised in recent decisions of the Supreme Court of Canada. These decisions held that, in Canada, there is no qualified defence whereby the use of excessive force in self-defence or prevention of crime reduces murder to manslaughter.¹⁷⁵ The use of an objective evaluation of the extent of permissible force will by analogy play a significant role in cases involving the defence of others. It is interesting to note that in *R. v. Gee*,¹⁷⁶ the accused maintained that he and his co-accused were defending an associate from an assault being committed by the deceased. Surprisingly, defence of third persons was not discussed in the Alberta Court of Appeal or the Supreme Court of Canada.

The decision of *Gee* is based to a very considerable extent on the specific wording of section 27 of the *Code* which authorizes the use of force to prevent the commission of an offence. The use of language such as "reasonably necessary" and "reasonable and probable grounds" somewhat limits the potential for a subjective assessment. Nevertheless, in the Alberta Court of Appeal, McDermid J.A. held that the law in Canada was as in Australia and that an honest but mistaken belief that no more force is being used than is necessary is a defence that reduces what would otherwise be murder to manslaughter. Such defence was held applicable to the defence of self-defence by virtue of subsection 7(3) of the *Criminal Code*. He also held that the defence is applicable where an accused's defence is that the force was used to prevent the commission of a crime.¹⁷⁷ In the Supreme Court of Canada, Dickson J. attempted to describe the concurring opinions of Prowse J.A. and Moir J.A.:

¹⁷⁴Colvin, *supra*, note 47 at 168. As noted *supra*, note 49, in *Perka* at 276 Wilson J. stated that on the existing state of the law the defence of necessity as justification would not be available to the person who rescues a stranger since the absence of a legal duty to rescue strangers reduces such a case to a conflict of a legal with a purely ethical duty.

¹⁷⁵See *Brisson v. R.*, [1982] 2 S.C.R. 227, 29 C.R. (3d) 289, 69 C.C.C. (2d) 97; *R. v. Gee*, [1982] 2 S.C.R. 286, 29 C.R. (3d) 347, 68 C.C.C. (2d) 516 [hereinafter cited to S.C.R.]; *R. v. Faid*, [1983] 1 S.C.R. 265, 33 C.R. (3d) 1, 2 C.C.C. (3d) 513.

¹⁷⁶*Ibid.*

¹⁷⁷*Gee v. R.* (1980), 19 C.R. (3d) 222 at 228, 55 C.C.C. (2d) 525 (Alta C.A.), McDermid J.A. See sub-s. 7(3) of the *Criminal Code*, *supra*, note 1.

If I understand his judgment correctly, Mr. Justice Prowse purports to deal with the question on the basis of the *mens rea* required for murder; a person who honestly, but erroneously, believes that the force he is using is reasonable lacks the necessary intent for murder. Mr. Justice Moir agreed with Justice Prowse's conclusion but not his reasoning. He based his judgment upon the fact that "even though there was an intent to kill or injure it may be excused or forgiven because of the surrounding mitigating circumstances" [p. 245] and hence the possibility of reducing the charge of murder to manslaughter should be considered. An accused might apply force knowing that the result would be death or grievous bodily injury. In this sense, the accused would fall *prima facie* within the definition of murder in s. 212. However, if the accused applied force under the honest belief that it was necessary, then he could not be guilty of murder. Further, it does not appear that this belief need be reasonably held. In these circumstances the jury should "reduce" the charge of murder to one of manslaughter.¹⁷⁸

Although Dickson J. may have had some difficulty deciphering the decisions of the Alberta Court of Appeal he was patently aware of the unique approach taken in that Court. He stated that this was the first time in Canada that a partial defence had been allowed to reduce murder to manslaughter. Previously, there had been no "half-way house" and the defence of justification pursuant to section 27 had been regarded as a total defence, entitling the accused to an acquittal, or no defence at all.¹⁷⁹ Dickson J. rejected the concept of "partial justification" for the use of excessive force. Rather, he held that section 27 allowed a justification for as much force as is reasonably necessary to prevent the commission of an indictable offence. If the defence was established there would be an acquittal, even where there was an intent to kill on the part of the accused.¹⁸⁰ Thus, the key to resolution of the question is whether, objectively, the force was necessary.

Professor Allan Manson has sharply criticized the decision of the Supreme Court which has determined, in effect, that under the provisions of the *Code* an honest belief in the need for self-defensive measures or the extent of force required for such intervention would not act as a justification:

The rejection of the qualified defence by Dickson J. would leave situations of "lesser culpability" without any form of mitigation, since murder compels a mandatory sentence of life imprisonment. Assuming that the actor has developed the honest belief that he must kill or cause grievous bodily harm to protect himself, then he must bring himself within s. 34(2) if justification is to be found. He will not be justified if his apprehension of danger, when objectively viewed, is found to be unreasonable. Alternatively, he will not be justified even though the danger was real or reasonably apprehended if the actor's response exceeded what he could reasonably have considered necessary. In other words,

¹⁷⁸*Gee, supra*, note 175 at 297, Dickson J.

¹⁷⁹*Ibid.* at 297-98.

¹⁸⁰*Ibid.* at 301.

the Code does not justify the acts of someone whose apprehension of danger is unreasonable or who defends himself with unreasonably excessive force.¹⁸¹

These concerns should be considered applicable to cases involving the defence of others, particularly if section 37 is viewed as an "extension" of section 34 of the *Code*.

Manson expresses surprise that Dickson J. does not support a subjective assessment of the defence since in decisions such as *Pappajohn v. R.*,¹⁸² he "has articulately and persuasively carried the Supreme Court towards the subjectivist view of criminal law, often with substantial reliance on Glanville Williams: re mistake of fact However, when dealing with a defence, Dickson J. has chosen not to take the opportunity to give equal play to subjectivism."¹⁸³ On the other hand, as Manson himself notes, Dickson J.'s hands were, to a large extent, tied by the legislation. It would be difficult for the Supreme Court to completely ignore the word "reasonable", particularly, as in subsection 34(2) of the *Code*, where it appears several times.

Professor Manson sees a way toward a more subjective approach through the use of subsection 7(3) of the *Code* which allows the use of the common law defences. This approach assumes that the common law justifications are, in fact, evaluated on a subjective basis, a matter of some considerable and ongoing debate.¹⁸⁴ In any event, Dickson J. appeared to reject this possibility in *Brisson v. R.* where he stated: "Sections 25 to 45 of the Canadian *Criminal Code* equally cover comprehensively and authoritatively the occasions on which the use of force is legally justified. There would seem to be little room for competing or supplementary common law doctrine."¹⁸⁵ Professor Manson objects; he argues that in other contexts the Supreme Court has used subsection 7(3) to resurrect a common law defence to murder. He cites *Paquette v. R.*¹⁸⁶ where the Court used the common law defence of duress despite the existence of a statutory defence in the *Code*.¹⁸⁷

¹⁸¹A. Manson, "Excessive Force in the Supreme Court of Canada: A Comment on *Brisson* and *Gee*" 29 C.R. (3d) 364 at 370.

¹⁸²*Pappajohn v. R.*, [1980] 2 S.C.R. 120, 14 C.R. (3d) 243, [1980] 4 W.W.R. 387.

¹⁸³Manson, *supra*, note 181 at 370. At 371, the author cites the following passage from Williams, *Textbook of Criminal Law, supra*, note 35 at 454-55: "This recital of reasons strongly indicates that the subjective view is preferable. It should be applied not only to the existence of danger but to its magnitude."

¹⁸⁴See above, text accompanying notes 39-44.

¹⁸⁵*Brisson v. R.*, *supra*, note 175 at 251, Dickson J.

¹⁸⁶*Paquette v. R.*, [1977] 2 S.C.R. 189, 39 C.R.N.S. 257, 30 C.C.C. (2d) 417. See the recent decision *R. v. Mena* (1987), 57 C.R. (3d) 172, 34 C.C.C. (3d) 304, 20 O.A.C. 50 (C.A.).

¹⁸⁷At 372, Manson, *supra*, note 181 adds: "[I]f the real concern is that Parliament has spoken extensively and clearly about self-defence, leaving no room for matters of common law, one should consider the Supreme Court's application of s. 7(3) with respect to whether *autrefois acquit* is available in summary conviction proceedings: see *R. v. Riddle*, [1980] 1 S.C.R. 380, [1980] 1 W.W.R. 592, 48 C.C.C. (2d) 365 . . . per Dickson J. at p. 373."

These comments raise two immediate concerns. First, as noted above, the application of the common law defence would amount to an exercise in futility if there were no appreciable difference from the *Code* provision, in particular, the use of objective evaluation. On the other hand, the common law defence is not limited to "anyone under his protection" as per section 37 of the *Code*, a phrase which has managed to escape judicial interpretation. Second, situations such as *Paquette* have used common law defences when the *Code* does not specifically deal with the situation. In that case, although there was a statutory provision, section 17 of the *Code*, dealing with the defence of duress, the provision was not applicable where the accused was charged as a party to murder rather than as a principal.¹⁸⁸ It would not be possible, particularly given the clear wording of subsection 7(3), to simply substitute a new common law test for a *Code* defence where the latter clearly covered the fact situation before the court. The common law defence could fill a vacuum if one existed, for example, if it was determined that the *Code* provisions did not apply to the defence of strangers. In that event, it is to be hoped that mistakes in both instances would be evaluated on the same basis. It is quite unlikely that the courts would allow a subjective evaluation of mistake in the defence of strangers but require a reasonable mistake when protecting members of one's family or others determined to be under the protection of the accused.

Professor Colvin has suggested an alternative analysis which would allow a subjective assessment of mistake, namely, classification of the defence as an excuse rather than a justification:

In essence, Dickson J. [in *R. v. Gee* and *R. v. Faid*] is contending (i) that the statutory defences of justification represent a complete codification of the law governing the use of defensive force, with no scope for supplementary judicial creativity under s. 7(3), and (ii) that the recognition of a partial defence for an honest albeit unreasonable belief about the appropriate degree of force would, in any event, be inconsistent with general principles of criminal culpability.

¹⁸⁸Colvin, *supra*, note 47 at 164-65:

Under the authority of this provision [s. 7(3)], the Supreme Court has recognized necessity as an excusing defence [*Perka v. R.*, [1984] 2 S.C.R. 233] and has affirmed the preservation of some parts of the excusing defence of duress at common law [*Paquette v. R.*, [1977] 2 S.C.R. 189]. There have also been suggestions that since the common law is open to continuing development, the provision may permit the creation of wholly new defences [for example, entrapment: *Kirzner v. R.*, [1978] 2 S.C.R. 487 and *Amato v. R.*, [1982] 2 S.C.R. 418]. It seems, however, that although the Supreme Court is willing to view s. 7(3) as a source of excusing defences, it is reluctant to use the provision in any way which might disturb the scheme of the *Code* defences of justification. In *Perka v. R.*, where necessity was recognized as an excusing but not a justifying defence, Dickson J. drew attention to the coverage of justification under the *Code* and suggested that any extension would be an inappropriate exercise of the judicial function.

These two arguments may be related. Dickson J. has referred to the proposed defence as one of "partial justification". There is, of course, something odd about the idea of partial justification. Either conduct is justified or it is not. But the claim for a defence on the ground of an honest albeit unreasonable mistake is not a plea of justification at all: it is a plea of excuse. The error of Dickson J. on this point makes his conclusion about the exhaustiveness of the statutory defences almost inevitable. Given the detailed coverage of circumstances of justification in the Code, the inference that supplementary judicial creativity is excluded is very strong. Nevertheless, the codification is confined to matters of justification. The Code does not speak at all to matters of excuse in the use of defensive force.

Gee and *Faid* were decided before the Supreme Court gave full recognition to the distinction between "justifications" and "excuses" in *Perka*. In light of the analysis in *Perka*, it can be argued that the issue raised by *Gee* and *Faid* merits re-examination. Whether or not the narrow rulings on excessive force are approved, the reasons for making these rulings must be judged inadequate.¹⁸⁹

There was an excellent opportunity to discuss all these issues in *R. v. Barkhouse*,¹⁹⁰ a 1983 decision from the Provincial Court of Nova Scotia. MacDonald J., without reference to any of the authorities described above, appears to have expressed support for the unfettered use of common law defences, including situations of self-defence. In this case, an R.C.M.P. police constable was attempting to seize the keys from an automobile being driven by one Donald Findlay. Mr Findlay resisted and a struggle ensued. At this point, Mr Barkhouse arrived on the scene, responding to a call for help from Mrs Findlay, and was alleged to have assaulted the constable. On the charge of assaulting a police officer in the execution of his duty, Barkhouse was acquitted because the officer was engaged in the illegal seizure of a motor vehicle and, therefore, was not in the execution of his duty. In regard to the included offence of common assault, MacDonald J. held that Barkhouse was entitled to rely on section 37 of the *Code*. In the alternative, if section 37 did not apply because the Findlays were not persons "under his protection" the common law defence of third person was available to him: "However, there is authority for the fact that at common law a rescuer such as Mr. Barkhouse ... could interfere. The authority is spoken of in *R. v. Duffy* (1966), 50 Cr. App. R. 68 (U.K.)" ¹⁹¹ MacDonald J. also suggests

¹⁸⁹*Ibid.* at 226-27. At 168 the author explains:

In contrast to a claim for justification, a claim for an excuse concedes the wrongfulness of the conduct. Concessions can therefore be made to human frailty. A defence which is designed to afford an excuse need not be cast as narrowly as it would be if it were designed to afford a justification. Moreover, the defence might be permitted where there has been a mistake of fact without the need for the mistake to have been reasonable. Culpable mistakes can be excused even though they cannot be justified.

¹⁹⁰*Supra*, note 113.

¹⁹¹*Ibid.* at 399, MacDonald J.

an objective evaluation, certainly in relation to the amount of force used and perhaps also in relation to the decision to render assistance as he states that "what Mr. Barkhouse did was reasonable in the circumstances ...".¹⁹²

The decision is inadequate in several respects. First, it is unclear whether a stranger, as in this case, can come under the protection afforded by section 37 of the *Code*. The Court simply stated that when Mrs Findlay called for help "it could well be that the Findlays at that moment came under Mr. Barkhouse's protection."¹⁹³ Second, it is not clear whether the Court viewed the common law defence as a substitute for the statutory provision or as an adjunct capable of filling a vacuum in the legislation. MacDonald J. states: "It is of course trite law that in Canada under s. 7(3) of the *Criminal Code* an accused in a criminal proceeding may invoke any common law defence."¹⁹⁴ As we have seen, the question is somewhat more complicated than that. Finally, the Court provides no hint as to whether the assessment of mistake differs between the statutory and common law defences. Thus, in terms of precedent value, the decision is just as well ignored, which appears to be the case to this point in time.

IV. Proposals for Reform

In 1982, Professor Stuart stated that the time had come to abandon the artificial and unnecessary distinctions in the self-defence provisions of the *Code*, for example, situations of fatal and non-fatal self-defence, defence of those under one's protection and defence of strangers. He suggested the following provision:

Everyone is justified in using force to protect himself or anybody else against unlawful force, provided that the force used was reasonable, having regard to all the circumstances including the harm apprehended, and whether the force used was proportionate to the harm apprehended.¹⁹⁵

In that same year the Law Reform Commission of Canada proposed its own draft legislation:

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.

¹⁹²*Ibid.* at 400.

¹⁹³*Ibid.* at 399.

¹⁹⁴*Ibid.* at 399-400.

¹⁹⁵D. Stuart, *Canadian Criminal Law* (Toronto: Carswell, 1982) at 402. He adds: "This defence would be available against any unlawful law enforcement. There cannot be a right of self-defence against lawful force such as a lawful arrest even if an arrestee is innocent. On the other hand there should be a right of self-defence against any illegal force."

(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.¹⁹⁶

This proposal recognized the distinction between excuses and justifications,¹⁹⁷ managed to combine subjective and objective tests, and failed to provide clear authority for the defence of strangers:

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.

...

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.¹⁹⁸

The proposal did provide that common law justifications, such as self-defence and the defence of others, would continue to be available.¹⁹⁹

After extensive consultation and a number of interim proposals, the Law Reform Commission returned, in 1986, with an Act to revise and codify

¹⁹⁶*Criminal Law: The General Part — Liability and Defences, supra*, note 52 at 101-102.

¹⁹⁷G. Garneau, *supra*, note 150 at 122:

First, it is necessary to briefly outline the general scheme of defences as presented in the Working Paper. The classifications are as follows: (1) exemptions (immaturity and mental disorder); (2) excuses (intoxication, automatism, physical compulsion and impossibility, mistake or ignorance of fact, mistake or ignorance of law and duress and necessity); and (3) justifications (self-defence, protection of property, advancement of justice and lawful assistance). Defences of special application (*e.g.*, provocation), defences which deny one or more elements of the charge (*e.g.*, alibi) and procedural defences (*e.g.*, *autrefois acquit*) are either dealt with elsewhere or apparently require no special treatment in the General Part.

¹⁹⁸*Criminal Law: The General Part — Liability and Defences, supra*, note 52 at 102-103. Interestingly, under the proposed defence of mistake of fact, the accused "must be judged on the facts as he perceived them." See at 71-75.

¹⁹⁹Sub-section 2(3) of the draft legislation found in *Criminal Law: The General Part — Liability and Defences, ibid.* at 21 reads as follows:

2.(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.

the criminal law. This proposal differs in several important respects from the earlier work. First, the Draft Code does not contain a provision equivalent to subsection 7(3) of the current *Code* allowing the supplemental use of common law defences. Although the Draft Code aims to include all exemptions, excuses and justifications in the interest of comprehensiveness, there is a recognition that "it remains open to the courts to develop other defences insofar as is required by the reference to 'principles of fundamental justice' in section 7 of the *Charter*."²⁰⁰ This apparently sounds the death knell for the common law defences in this country. The absence of any reference to these defences in the new proposed Code quite likely precludes their use under standard rules of statutory interpretation — "*expressio unius est exclusio alterius*" — the expression of one thing is the exclusion of another. If the courts fail to take up the call to use the *Charter*, an accused who wishes to argue the defence of others will find himself confined to the four corners of the statutory justification.

This concern is tempered by the considerable revision to the statutory provisions themselves. For example, a person is no longer limited to protecting "anyone under his protection". Rather, a person would be entitled to protect any other person regardless of the relationship:

3(10) Defence of the Person.

(a) General Rule. No one is liable if he acted as he did to protect himself or another person against unlawful force by using such force as was reasonably necessary to avoid the harm and hurt apprehended.

(b) Exception: Law Enforcement. This clause does not apply to anyone who uses force against a person reasonably identifiable as a peace officer executing a warrant of arrest or anyone present, acting under his authority.²⁰¹

The provision authorizes the use of reasonably necessary force and therefore establishes an objective test. Because the defence is restricted to cases of unlawful force no force may lawfully be used to repel lawful force such as lawful arrest or justifiable measures of self-defence.²⁰²

²⁰⁰*Recodifying Criminal Law, supra*, note 52 at 25. Section 7 of the *Canadian Charter of Rights and Freedoms* states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

²⁰¹*Recodifying Criminal Law, ibid.* at 34. See the legislatively drafted version, Appendix A, s. 21.

²⁰²*Ibid.* In regard to the exception to the provision the Commission states, at 34:

Clause 3(10)(b) excludes force altogether against arrest, made in good faith but in fact under a defective warrant, by a person who is clearly a peace officer. The policy is to restrict violence, to render it as far as possible a state monopoly and to make the arrestee submit at the time and have the matter sorted out later by authority.

The proposed Code also contains a “crime prevention” provision. Under this section a person would not be liable for using such force as is reasonably necessary to prevent a crime likely to cause death, serious harm to the person or serious damage to property, to effect an arrest authorized by law or to perform an act required or authorized by or under federal or provincial statute. The protection would not apply to anyone who purposely kills or seriously harms another person except where reasonably necessary to arrest, to prevent the escape of, or to recapture one who is dangerous to life.²⁰³ Again, the proposal clearly envisages an objective evaluation.

Any concern that the proposed provisions dealing with self-defence and prevention of crime will introduce a “purely objective” requirement of strict proportionality have been met by a separate provision entitled “mistaken belief as to defence”.²⁰⁴ That provision adopts a subjective approach in that it provides that as a general rule no one is liable if on the facts as he believed them to be he would have had a defence. The section will not apply where the accused is charged with a crime that can be committed through negligence and the mistaken belief arose through his negligence. The Commission has explained the operation of and rationale for this provision:

Generally, people should be judged on the facts as they perceive them. Where they are mistaken as to facts relevant to the culpability requirement, this result follows from the present law on *mens rea* Where they are mistaken as to facts grounding an excuse or justification, the present law is unclear; but perhaps mistake as to the former will suffice if genuine, and mistake as to the latter, only if reasonable. If so the law is oddly inconsistent. On the one hand, justification is a more powerful plea than excuse because it claims that

²⁰³Sub-section 3(13) of the proposed Code, *ibid.* at 36, reads as follows:

3(13) Protection of Persons Acting under Legal Authority.

(a) General Rule. No one is liable for:

- (i) using such force as is reasonably necessary to prevent a crime likely to cause death, serious harm to the person or serious damage to property;
- (ii) using such force as is reasonably necessary to effect an arrest authorized by law; or
- (iii) performing an act required or authorized by or under federal or provincial statute or for using such force as is reasonably necessary to do so.

(b) Exception. This clause does not apply to anyone who purposely kills or seriously harms another person except where reasonably necessary to arrest, to prevent the escape of, or to recapture one who is dangerous to life.

See the legislatively drafted version, Appendix A, s. 23.

²⁰⁴Sub-section 3(16) of the proposed Code, *ibid.* at 39 reads as follows:

3(16) Mistaken Belief As to Defence.

- (a) General Rule. No one is liable if on the facts as he believed them he would have had a defence other than an exemption under clauses 3(4), 3(5) and 3(6).
- (b) Exception. This clause does not apply where the accused is charged with a crime that can be committed through negligence and the mistaken belief arose through his negligence. See the legislatively drafted version, Appendix A, section 25.

what was done was not just excusable, but in fact right. On the other hand, mistaken belief in a justification seems less powerful than belief in an excuse because the mistake must not only be genuine, but also reasonable.

Accordingly, clause 3(16) provides that in general a mistaken belief that one is justified or excused negates liability. Mistaken belief in a justification, then, will operate as an excuse. Mistaken belief in an excuse will itself be an excuse. Actually, the position under the new Code is simplified by the fact that defences are not rigidly separated into justifications and excuses. In addition, by virtue of this clause together with clause 3(13)(a)(iii), a mistake as to a specific defence provided in the Special Part of this Code or by the statute creating the crime will also operate as an excuse.

Where the mistake arises through the accused's criminal negligence and the offence charged is one that can be committed by criminal negligence, then under clause 3(16)(b) he can be convicted of negligent commission of that crime. To this extent an unreasonable belief is no defence.²⁰⁵

V. Punishing the Bad Samaritan

In addition to these reforms, the federal Law Reform Commission has followed up on its earlier work²⁰⁶ and proposed the creation of a new crime, "failure to rescue". Under this proposal there will be an offence for failure to take reasonable steps to assist another person perceived to be in immediate danger of death or serious harm. The provision will not apply where the person cannot take reasonable steps to assist without risk of death or serious harm to himself or another person.²⁰⁷

The imposition of a duty to render assistance is not only long overdue, it is a necessary and important companion to the provisions which deal with self-defence and the prevention of crime. This approach will not only allow people to intervene on behalf of others but will compel them to do so. Obviously if we require people to render assistance this should clear up any uncertainty as to whether they are authorized to act.

²⁰⁵*Ibid.* at 39.

²⁰⁶Law Reform Commission of Canada, *Omissions, Negligence and Endangering* (Working Paper No. 46) (Ottawa: Supply and Services Canada, 1985) at 17-20.

²⁰⁷Sub-section 10(2) of the Code proposed in *Recodifying Criminal Law, supra*, note 52 at 64 reads as follows:

10(2) Failure to Rescue.

(a) General Rule. Everyone commits a crime who, perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him.

(b) Exception. Clause 10(2)(a) does not apply where the person cannot take reasonable steps to assist without risk of death or serious harm to himself or another person, or where he has some other valid reason for not doing so. See the legislatively drafted version, Appendix A, section 54.

The debate as to whether an individual should have a legal obligation to save others from bodily harm has been ongoing in the United States, and in Canada to a lesser extent, since the early part of this century.²⁰⁸ Couching their policy decisions in the language of misfeasance and nonfeasance the common law courts have resisted efforts to impose affirmative duties of action. As a general rule, an individual has no duty to aid another in danger if he did not create the perilous situation. This doctrine of "bad samaritanism" is a prevalent feature of the Anglo-American legal systems. There are, however, more than twenty countries where the criminal law punishes persons who, without incurring serious risks themselves, were able to help another person in grave peril, and who failed to give such help.²⁰⁹ Even in these jurisdictions the concern of the criminal law with assisting others is a relatively recent development:

²⁰⁸See J.B. Ames, "Law and Morals" (1908-09) 22 Harv. L. Rev. 97; F.H. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability" (1908) 56 U. Pa L. Rev. 217. Recent incidents such as the Kitty Genovese murder and the New Bedford, Massachusetts pool table rape have produced a flood of new articles. In "Bad Samaritanism and the Duty to Render Aid: A Proposal" (1985) 19 U. Mich. J.L. Ref. 315 at 315 n. 3,4, M.K. Osbeck describes these incidents as follows:

In this infamous case, a knife-wielding assailant attacked a young woman named Kitty Genovese three separate times over a period of thirty five minutes on her own residential street. Thirty-eight of Genovese's neighbours witnessed the attacks, but no one helped her or even called the police. Only after the victim's death did one witness bother to summon the police, who arrived on the scene within two minutes of the call. N.Y. Times, Mar. 27, 1964, at A1.

...

Attackers repeatedly raped a woman on the pool table of a local tavern in New Bedford, Massachusetts, while fifteen patrons watched. Not one of these witnesses summoned the police during the entire seventy-five minute episode, and some, in fact, cheered the rapists on, encouraging them to continue. Newsweek, Mar. 21, 1983, at 25.

See also F.J.M. Feldbrugge, "Good and Bad Samaritans, A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue" (1966) 14 Am. J. Comp. L. 630; C.E. Radcliffe, "A Duty to Rescue: The Good, the Bad and the Indifferent — The Bystander's Dilemma" (1986) 13 Pepperdine L. Rev. 387; T. Rodriguez, "I Am My Brother's Keeper: A Trend Towards Imposing A General Duty Upon A Bystander To Assist A Person In Danger" (1985) 26 B.C.L. Rev. 497; A. Rudzinski, "The Duty to Rescue: A Comparative Analysis" in J. Ratcliffe, ed., *The Good Samaritan and the Law* (Magnolia, Minn.: Peter Smith, 1966); T.M. Benditt, "Liability for Failing To Rescue" (1982) Law and Phil. 391; A. D'Amato, "The 'Bad Samaritan' Paradigm" (1975) 70 Nw. U.L. Rev. 798; J. Kleinig, "Good Samaritanism" (1976) 5 Phil. and Pub. Aff. 382; A.M. Linden, "Rescuers and Good Samaritans" (1971) 34 Mod. L.Rev. 241; W.M. Rudolph, "The Duty to Act: A Proposed Rule" (1965) 44 Neb. L. Rev. 499; E.J. Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L.J. 247; A.D. Woolley, "A Duty to Rescue: Some Thoughts on Criminal Liability" (1983) 69 Va. L. Rev. 1273.

²⁰⁹Feldbrugge, *ibid.* at 652. In an Appendix, the author has provided legislation from Albania, Belgium, Bulgaria, Czechoslovakia, Denmark, Ethiopia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Netherlands, Norway, Poland, Rumania, Russia, Spain, Turkey, Ukraine, and Yugoslavia.

In ancient Egyptian and Indian law there are provisions which order the punishment of those who fail to aid persons in danger. However, Roman law and scholastic thought were unfavorably inclined toward legislation of this nature. It is only in the nineteenth century that a similar provision reappears, in the Russian Criminal Code of 1845, followed by the criminal codes of Tuscany (1853), the Netherlands (1881), and Italy (the Zanardelli Code of 1889). Other codes in the first half of the twentieth century also conformed to this pattern; but it has been only since World War II that almost every new criminal code contains a failure-to-rescue provision.²¹⁰

Article 63 of the French Penal Code is typical of existing provisions and has been suggested as a model for North American legislators:

Sera puni ... quiconque s'abstient volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ni pour les tiers, il pouvait lui prêter, soit par son action personnelle, soit en provoquant un secours.²¹¹

Two American states, Vermont and Minnesota, have enacted such legislation, making it a misdemeanor for people who witness others in serious danger not to render reasonable assistance, providing they can do so without endangering themselves. Two other states, Rhode Island and Massachusetts, require those who witness certain violent crimes to notify the police.²¹² One American writer, Mark Osbeck, finds the Rhode Island statute especially puzzling: "It imposes the duty only when the witness observes an actual or attempted first-degree sexual assault Why such a duty should apply when someone witnesses a rape but not, for example, a murder, is difficult to understand."²¹³ He argues that legislators should enact legislation which imposes a "duty to notify" rather than a duty to rescue. This approach would overcome many of the objections to affirmative duties to act identified below. In Osbeck's proposed model statute the duty arises in all cases in which people witness others in danger:

Duty to Notify

²¹⁰*Ibid.* at 630-31. At 633, the author notes that the present tendency of the European legislators is to extend the failure to rescue provisions to situations in addition to danger to life. In many jurisdictions the obligation to render assistance includes situations of potential serious injury and, in some cases, all injuries and danger to health.

²¹¹*Code pénal* (Paris: Jurisprudence générale Dalloz, 1987-88). See also Rodriguez, *supra*, note 208 at 519-22. At 520, Rodriguez provides the following translation of art. 63:

Whoever abstains voluntarily from giving such aid to a person in peril that he would have been able to give him without risk to himself or third persons by his personal action or by calling help . . . shall be punished

For a more complete translation of article 63, see D. Stuart & R.J. Delisle, *Learning Criminal Law*, 2d ed. (Toronto: Carswell, 1986) at 183.

²¹²The provisions are cited in Osbeck, *supra*, note 208 at 317-18.

²¹³*Ibid.* at 318.

Sec. 1. Any person who knows or has reason to know that another person is in serious physical danger, and who witnesses this person's predicament, shall notify a police agency of the danger as soon as reasonably possible, unless:

- (a) the person witnessing the predicament knows that a police agency has already been notified; or
- (b) the person witnessing the predicament is unable to notify a police agency with a reasonable effort; or
- (c) the endangered person appears able to notify a policy agency without outside help.

Sec. 2. A violation of Section 1 is a misdemeanor punishable by a fine of not more than \$500, imprisonment for a term not to exceed 30 days, or both.

Sec. 3. Proof of a violation of this statute does not constitute grounds for imposing civil liability on persons who violate the statute.²¹⁴

Although, as stated earlier, there is currently no general duty to render assistance, the common law has created a number of exceptions to this rule apart from the statutory enactments described above. First, courts have imposed a duty to render aid upon parties who share special relationships, for example, parent and child, innkeeper and guest, employer and employee. Second, courts have recognized that individuals bound by certain contractual agreements have a duty to render aid, for example, the duty imposed on a paid lifeguard or gatekeeper. Third, courts have imposed a duty to rescue upon those who put others in danger through ordinary negligence, for example, a person who negligently starts a fire has a duty to provide reasonable assistance to persons threatened by the fire. Fourth, a person who begins to render assistance to another has a duty to provide continued assistance if the rescuer's termination of the rescue attempt would put the victim in a worse position than he was in prior to the rescue attempt. For example, if someone volunteers to care for an infant and then fails to do so adequately and the child dies, that person will be liable for the child's death. The rationale for this rule is that a potential rescuer's aborted rescue attempt discourages others from helping who could otherwise save the vic-

²¹⁴*Ibid.* at 343. There have been many other proposed models. For an example of a model which requires a person to act rather than simply report, see Rodriguez, *supra*, note 208 at 527. In that article, at 498, the author notes that in California the Fifth District Court of Appeals has modified the common law rule that a bystander owes no duty to a stranger. In *Soldano v. O'Daniels*, 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (Dist. Ct. App. 1983), the Court held that a business establishment has a legal duty to let bystanders use its telephone in an emergency. At 515-18, the author provides a discussion of this case and the decision of *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976), where the Supreme Court of California held that psychotherapists owe an affirmative duty of reasonable care to third parties who are threatened by patients under the psychotherapist's treatment.

tim. Finally, courts have imposed certain duties to warn or rescue on land-owners; thus, the development of the law of occupier's liability.²¹⁵

Further, in many jurisdictions, a duty to aid others, usually in specific situations, has been imposed by statute. For example, most American and Canadian jurisdictions have enacted statutory provisions which require a driver involved in an accident to stop and render assistance to any injured person, even if the driver was not at fault.²¹⁶ In some situations people will be required to assist the police.²¹⁷ Another example is provided by statutes which require individuals to report incidents of child abuse.²¹⁸ In terms of imposing a general duty to render assistance, section 2 of the Quebec *Charter of Human Rights and Freedoms* comes much more directly to the point:

2. Every human being whose life is in peril has a right to assistance. Every person must come to the aid of anyone whose life is in peril either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.²¹⁹

Although such provincial legislation does not itself create a criminal offence, "it may render the causing of harm by its breach criminal: failure to provide necessities to a dying common law 'spouse' resulted in a homicide conviction in the Québec case of *R. v. Fortier* — a result impossible in any of

²¹⁵Osbeck, *supra*, note 208 at 322-23. See also Rodriguez, *supra*, note 208 at 503-06.

²¹⁶See Rodriguez, *ibid.* at 507-508, and Osbeck, *ibid.* at 323. For example, para. 174(1)(b) of the Ontario *Highway Traffic Act*, R.S.O. 1980, c. 198 reads as follows:

174.(1) Where an accident occurs on a highway, every person in charge of a vehicle . . . that is directly or indirectly involved in the accident shall,

...

(b) render all possible assistance.

²¹⁷Sub-section 118(b) of the *Criminal Code*, *supra*, note 1 reads as follows:

118. Every one who

...

(b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, is guilty of

...

(d) an indictable offence and is liable to imprisonment for two years, or

(e) an offence punishable on summary conviction.

²¹⁸For example, sub-s. 49(1) of the *Child Welfare Act*, R.S.O. 1980, c. 66 reads as follows:

49.(1) Every person who has information of the abandonment, desertion or need for protection of a child or the infliction of abuse upon a child shall forthwith report the information to a society.

See s. 68 of the *Child and Family Services Act*, S.O. 1984, c. 55. Professors Stuart and Delisle have noted that under the Ontario legislation it is only an offence for "every person who performs professional or official duties with respect to a child" to fail to report suspected abuse. See Stuart & Delisle, *supra*, note 211 at 183. For American legislation in this area, see Rodriguez, *supra*, note 211 at 508.

²¹⁹*Charter of Human Rights and Freedoms*, R.S.Q. c. C-12.

the common law provinces."²²⁰ Such use of provincial statutes creates a totally untenable situation, namely, that identical conduct could result in a criminal conviction in one province but not in another.

In addition to statutes which impose a duty to act there have been other developments which encourage rescue. For example, many jurisdictions have enacted "good samaritan" legislation which protects those who seek to offer assistance from subsequent litigation except in cases of gross negligence.²²¹ Similarly, criminal injuries compensation schemes indemnify individuals who are personally injured or suffer property damage in aiding the prevention of a crime or in the apprehension of a criminal.²²² In a

²²⁰*Omissions, Negligence and Endangering, supra*, note 206 at 18. The Report provides the following citation: *R. v. Fortier* (17 November 1980), Longueuil 500-01-050-805 (C.S.).

Section 49 of the Quebec *Charter of Human Rights and Freedoms, ibid.*, makes provision for compensation and the awarding of exemplary damages.

²²¹For example, s. 2 of the *Emergency Medical Aid Act*, R.S.A. 1980, c. E-9 reads as follows:

2. If, in respect of a person who is ill, injured or unconscious as the result of an accident or other emergency,

(a) a physician, registered health discipline member, or registered nurse voluntarily and without expectation of compensation or reward renders emergency medical services or first aid assistance and the services or assistance are not rendered at a hospital or other place having adequate medical facilities and equipment, or

(b) a person other than a person mentioned in clause (a) voluntarily renders emergency first aid assistance and that assistance is rendered at the immediate scene of the accident or emergency, the physician, registered health discipline member, registered nurse or other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his part in rendering the medical services or first aid assistance, unless it is established that the injuries or death were caused by gross negligence on his part.

Professor Linden notes that Nova Scotia has similar legislation but private member bills introduced in Ontario have died on the order paper: see C.A. Wright, A.M. Linden & L. Klar, *Canadian Tort Law*, 8th ed. (Toronto: Butterworths, 1985) at 8-55. For American legislation, see Rodriguez, *supra*, note 208 at 509-10.

²²²For example, s. 5 of the *Compensation for Victims of Crime Act*, R.S.O. 1980, c. 82 reads as follows:

5. Where any person is injured or killed by any act or omission in Ontario of any other person occurring in or resulting from,

(a) the commission of a crime of violence constituting an offence against the Criminal Code . . . ;

(b) lawfully arresting or attempting to arrest an offender or suspected offender for an offence against a person other than the applicant or his dependant or against such person's property, or assisting a peace officer in executing his law enforcement duties; or

(c) preventing or attempting to prevent the commission of an offence or suspected offence against a person other than the applicant or his dependant or against such person's property,

the Board, on application therefore, may make an order that it, in its discretion exercised in accordance with this Act, considers proper for the payment of compensation

For American legislation, see Rodriguez, *supra*, note 208 at 510.

comment on the legislation in Ontario, one Court stated that it "gave an affirmative answer to the question — 'Am I my brother's keeper?', and by implication considered it meritorious to aid one's neighbour."²²³

A whole array of arguments have been constructed both for and against the creation of a general duty to render assistance, or at least notify authorities that someone needs assistance. In a recent article, Mark Osbeck has succinctly summarized the American writing in this area.²²⁴ In supporting a duty to notify, he argues that such a duty would have a deterrent effect on potential wrongdoers. The duty to notify would also prevent, or at least mitigate, some potential harm by facilitating the early arrival of the police. In addition to its preventive value, he also argues that this duty would serve the important function of formally declaring society's disapproval of "bad samaritanism". Finally, Osbeck foresees an increase in altruism, that is, imposition of a duty may inspire people to go beyond the minimum requirements of the duty and may help change people's attitudes about "getting involved". On the other side of the ledger there are both theoretical and practical objections to a general duty to render assistance or to notify the authorities:

Four major theoretical arguments have been raised in the legal literature against the duty to rescue. One asserts that omissions cannot give rise to liability because they do not cause harm. Another asserts that all non-contractual positive duties the state imposes are illegitimate. A third asserts that the duty to rescue is a type of forced altruism and that forced altruism is wrong. And the fourth holds that the duty to rescue imposes an undue burden on individual liberty.²²⁵

The author concludes that although the last of these arguments may have some force against the duty to rescue, none of the arguments presents a problem for the duty to notify.²²⁶

Legal commentators have also raised several arguments designed to show that the duty to rescue would be impractical. First, it has been argued that it would be impossible to draw a line between the duty to rescue and other positive duties of which most people would not approve. For example, would this obligation include a duty to give money on demand to starving beggars? Second, the duty to rescue may be "non-verifiable" and therefore undesirable. The concern here is the inability of individuals to know in a given situation whether the statute requires them to act or not. A third argument claims that the duty to rescue would be unenforceable. The main thrust of this objection is that the police cannot identify all those who may

²²³*Gambriell v. Caparelli, supra*, note 128 at 209, Carter J.

²²⁴Osbeck, *supra*, note 208 at 323-42.

²²⁵*Ibid.* at 328.

²²⁶*Ibid.* For elaboration, analysis and criticism of these theoretical arguments, see at 328-36.

witness a serious accident or violent attack and then fail to report it or actively intervene.²²⁷

Without question, the most interesting argument advanced by opponents of a general duty to render assistance is the "faker argument" which asserts that criminals may feign serious injury to lure would-be rescuers into a trap to rob them. While arguing that a duty to notify statute would avoid this problem, Osbeck is prepared to admit that a duty to rescue statute "seems to encourage such criminal behaviour by making it easier for those feigning injury to entice would-be rescuers into their trap."²²⁸

In order to avoid most of these concerns, both theoretical and practical, the failure to rescue provision of the proposed new Criminal Code²²⁹ should be re-written to provide that, in appropriate circumstances, notification of authorities will suffice. While the existing phrase "does not take reasonable steps to assist him" would allow simple notification in many cases, the language should be more specific. The remaining concerns outlined above are far outweighed by the need for such a provision. This revision, in combination with the proposals for self-defence²³⁰ and mistake,²³¹ will effect a dramatic change in the lot of the good samaritan. Individuals will not simply be authorized, they will be required to help strangers. Further, mistakes made during the course of these efforts will be assessed, not objectively, but rather on the basis of that person's state of mind and perception of events.

Conclusion

There are both common law and statutory bases for the defence of others. Despite some suggestions to the contrary I have argued that both are available for the defence of an accused person in Canada. As demonstrated, problems have arisen because there are considerable differences between the scope and application of the defences.

At common law, a person may intervene in defence of another, including total strangers. Although there are no statutory provisions in Canada which specifically authorize the defence of strangers, there are a number of sta-

²²⁷*Ibid.* at 336-42. While a thorough discussion of these issues is beyond the scope of this work, readers are referred to Osbeck who has provided a good analysis of these arguments, complete with references to American authorities. For an excellent discussion of the pros and cons of the arguments both for and against a general duty to rescue, see B. Lipkin, "Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue" (1983) 31 U.C.L.A. L. Rev. 252. See also Rodriguez, *supra*, note 208 at 500-502.

²²⁸*Ibid.* at 342.

²²⁹*Supra*, note 207.

²³⁰*Supra*, note 201.

²³¹*Supra*, note 204.

tutory provisions which assist the good samaritan. Some of these provisions, such as those which provide the power to arrest or prevent breaches of the peace, place no restriction on whose person may be defended. However, other provisions restrict assistance to those persons "under your protection". Arguably, this would not include strangers. Also, in dealing with the statutory provisions, some courts have determined that persons may, in appropriate circumstances, cause death or grievous bodily harm in defence of themselves but not in defence of others. The common law does not appear to make this distinction.

Another divergence between the common law and statutory bases for the defence of others involves the doctrine of mistake of fact. There are many cases where good samaritans have been mistaken as to the need to intervene and the amount of force required for effective intervention. In most cases, the common law subjectively evaluates one mistaken belief (the need for intervention) but objectively evaluates the other (a mistaken belief in the extent of force required). With regard to the common law defence of necessity there is an argument to be made that the defence may be grounded upon honest mistakes of fact whether or not they are reasonable.

In some instances, courts basing the defence of others on statutory provisions have taken the same approach to the question of mistake as those decisions which relied on the defence at common law. However, for the most part, while the courts continue to pay lip service to the concept of subjective fault, and while the test is not "purely" objective any more than it is "purely" subjective, an objective evaluation is being used. There must be an honest and reasonable belief that intervention is required and the force used to achieve that result must be reasonably necessary. A simple honest belief in the necessity of defensive measures or the extent of force required will not be sufficient to found the defence. The lingering distinction between justifications and excuses has further served to cloud the issue.

In order to overcome deficiencies in draftsmanship, the courts have combined statutory provisions. For example, several courts have suggested that section 37 of the *Code* is simply an extension of section 34. The courts have also created confusion by combining aspects of the common law and statutory defences. Clearly, where the statutory provisions apply, they will take precedence. However, the common law defences could fill a vacuum if one existed, for example, if it were determined that the *Code* provisions did not apply to the defence of strangers. The obvious concern is that the courts may be using different tests for mistake of fact depending on whether the defence falls under the statutory provisions or the common law.

The proposed solution to this problem is two-fold. First, a statutory provision should be enacted which specifically authorizes intervention on

behalf of others, including total strangers. Such provision, or a companion section, should contain a clear statement on evaluation of mistakes made during the defence of another. Second, this would be an appropriate time for Canada to move toward a system which not only protects good samaritans but sees fit to punish the bad samaritans among us. In this regard, legislation should be enacted which imposes, at the very least, a criminally sanctioned affirmative duty to notify authorities when people need assistance. These proposals should be welcomed by good samaritans and the citizenry as a whole. Their enactment would represent real progress toward a more rational and civilized system of criminal justice.
