Constitutionalizing Self-Defence

Draft

Alan Brudner
Faculty of Law
University of Toronto

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1. Introduction

Of all common-law legal systems with written constitutions, Canada's has perhaps gone furthest in raising unwritten principles of penal justice to the status of binding constitutional norms. Whereas in the United States and Israel, constitutional testing of the penal law has been mostly confined to judicial review of criminal procedure for fairness and of specific offences for permissible criminalization, in Canada this process has extended to legislation touching the criminal law's general part—the part comprising criteria of culpability, justification, and excuse applicable to all criminal offences. As a result, common-law fault requirements and defences have been transformed from presumptive limits on penal legislation defeasible by clear statutory language into binding ones subject only to emergency override or to the politically stigmatic notwithstanding clause. Thus, statutory constructive murder provisions and absolute liability offences carrying prison sentences have been struck down as a violation of "fundamental justice";[1] and the highly restrictive statutory defence of duress has been held accountable to the standard of its more liberal common-law counterpart.[2] True, the common-law ship has not made the voyage to the Charter without a considerable loss of cargo—witness, for example, the gap between *R. v. Pappajohn* and *R. v. Martineau* on the role of subjective fault in criminal liability.[3] Nevertheless, there has been an

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important movement, unique (I believe) in the common-law world, toward the elevation to constitutional status (or "constitutionalization") of the general part's constraints on the state's use of punishment for the purpose of crime control.

In this essay, I hope to advance this movement by testing the self-defence provisions of the *Canadian Criminal Code* against the *Charter of Rights and Freedom*'s standard of fundamental justice. Section 7 of the Charter states that "every person has a right… not to be deprived [of liberty]…except in accordance with fundamental justice." In *The Motor Vehicle Reference,*[4] the Supreme Court of Canada held that fundamental justice means more than procedural justice, that it includes substantive constraints on the state's penal power, and that the most basic of these is that the innocent may not be exposed by the terms of a law to the possibility of imprisonment.[5] Accordingly, *The Motor Vehicle Reference* is potentially authority for the Court's reading into s. 7 a constitutional right to those common-law defences the gist of which is that the accused is innocent from the standpoint of the criminal law—that he or she does not deserve to be judicially punished.

By general agreement, self-defence belongs within the category of defences called justifications rather than within the category called excuses. Someone who pleads self-defence claims that he had a legal permission to repel force with force, not that his admitted wrong ought not to expose him to punishment. Now, of all the common-law defences, self-defence would seem to be the most amenable to constitutionalization, because a person who justifiably used force in self-defence is an innocent person if anyone is. One may reasonably debate about whether a negligent or grossly negligent

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actor is an "innocent" from the standpoint of the criminal law, and so one may question whether the Canadian common-law requirement of subjective fault for true crimes ought to be elevated to constitutional status. One may reasonably debate about whether excuses such as necessity and duress render an accused legally innocent or guilty *but* excused and about whether, if the latter is true, an accused has a constitutional right to the common-law version of these defences. One may also reasonably debate about whether someone who justifiably takes property to save life is an innocent, since his justification arguably presupposes rather than erases a wrong.[6] One may even reasonably debate about whether an iron-clad defence of consent to a charge of assault always renders one innocent, since the accused may have abused a position of authority. However, (I feel safe in saying) one cannot reasonably debate about whether someone who uses necessary and proportionate force in self-defence against a real wrongdoer is an innocent. Such a person is not justified in a wrong; rather, he or she has committed no wrong in the first place, for the wrongdoer had no permission to perform the action the defender prevented. That is why the defender will not be legally required to compensate his assailant for a battery. That a self-defence justification renders one legally innocent seems no more controversial than that an unforeseeable absence of volition does so.

Where controversy begins, however, is where controversy within the criminal law of self-defence begins. An actor whose force is justified by self-defence is an innocent, but when is force in self-defence justified? A statutory defence of self-defence will violate section 7 of the Charter if, in circumscribing the defence, it withholds a justification from someone who *is* justified, for it will then have exposed innocent

[6] As is shown by the fact that he will have to compensate the owner if and when he is able to; Vincent v. Lake Erie

persons to deprivations of liberty. Are the self-defence provisions of the Canadian Criminal Code vulnerable to invalidation on this basis? In what follows I limit my discussion to the sections pertaining to "Defence of Person", leaving "Defence of Property" to one side.

2. Issues in the Law of Self-Defence

I believe that the consensus among Canadian criminal law writers is that the sections dealing with self-defence are among the murkiest and most complex in the Criminal Code.[7] There are no fewer than four sections on "Defence of Person", each apparently applying to a particular paradigm case. Section 34(1) applies to the case where A uses force to repel an unlawful attack (assault) A did not provoke, not intending death or serious bodily harm to the attacker. The section states that A's force is justified if necessary to repel the attack. Section 34(2) envisages the case where A kills or causes serious bodily harm to B in repelling B's assault. The section states that A's force is justified if he caused death or serious bodily harm under a reasonable apprehension of death or serious bodily harm and if he reasonably believed that lethal force was necessary to preserve himself. Section 35 deals with the right of self-defence of an unlawful aggressor. It says that the aggressor may use subsequent force against his victim if (and presumably only if) he (a) reasonably apprehends death or serious bodily harm from the person he assaulted, (b) reasonably believes the force is necessary to preserve himself, (c) did not himself intend to cause death or serious bodily harm by his initial assault, and (d) retreated as far as he could before applying the force necessary to preserve himself. Section 36 defines provocation to include provocation by "blows, words, or gestures."

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Finally section 37 applies to the case of self-defence against a threat of imminent attack. It says that the use of force to prevent an attack or the repetition thereof is justified if the force used is no more than necessary and if it is proportionate to the nature of the threatened assault. These provisions give rise to the following questions.

Without having provoked the assault

First, s. 34(1) of the Code restricts the right of self-defence to those who did not provoke the attack they suffered. Those who provoke violence against themselves by blows, words, or gestures are not permitted to use force to repel the force they have provoked unless the response to their provocation is excessive or disproportionate.

Does a provoker rightly forfeit his right of self-defence against the person he or she provoked? Or does confining the statutory right of self-defence to nonprovokers allow punishment of an innocent? Of course, the answer depends on what counts as provocation for the purposes of s. 34(1). Must the provocation that results in forfeiture of one's right of self-defence be an assault or a threat (by words or gestures) of imminent assault, or are threats of harm falling short of an imminent assault sufficient? Are even taunts or insults sufficient, as they are for the defence of provocation?

On these questions s. 34(1) is ambiguous. It states that "Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force…" This can be read in two ways. On one reading, absence of provocation is what constitutes force an unlawful assault, so that the only kind of provocation that bars a right of self-defence in the provoker against the party responding to his provocation is the sort that would justify the response as an act of self-defence—that is to say, an assault or a

threat of imminent assault. Alternatively, the unlawful assault is constituted independently of the absence of provocation, so that if A has provoked (say by insulting words or threats of harm in the distant future) B unlawfully to assault him, he forfeits his right of self-defence even though B's response was unlawful.

Either reading leads to problems. If "without having provoked the assault" means "without having unlawfully assaulted or threatened imminent assault," then the phrase "without having provoked the assault" seems redundant; for it adds nothing to "Every one who is unlawfully assaulted"... In effect, the sentence would read: "Everyone who is unlawfully assaulted without doing that which renders the use of force against him lawful…" Accordingly, the first interpretation, while rendering the limitation of rightful force to nonprovokers consistent with the Charter (for one who intentionally uses force to prevent a permissible act of self-defence is not an innocent) arguably fails to give weight to the phrase it interprets. However, if "without having provoked the assault" means without having provoked an attack that is unlawful independently of the provocation, then someone who baits another into unlawfully assaulting him is deprived of the right to defend himself against a wrongful attack. And since even bad people have a right to defend themselves against wrongful attacks, this reading would allow the punishment of someone who, though open to moral criticism, is innocent before the law. On this reading, therefore, "without having provoked the assault" is an unconstitutional limitation of the right to self-defence.

I shall argue that the reading of s. 34(1) that renders it consistent with the Charter is one that its words will reasonably bear. Appearances notwithstanding, this reading does not treat the phrase "without having provoked the assault" as idle; for it interprets

this phrase as establishing in Canadian law a certain theory of the right to self-defence according to which the right is asymmetrical as between aggressors and defenders (only defenders have the right), so that there is normative closure to permissible violence. Since there are theories of self-defence that treat the right as symmetrical or possibly symmetrical as between aggressors and defenders, the work performed by the phrase (according to this interpretation) is of no inconsiderable importance.

There is yet another question raised by the "without having provoked" qualification. Some might argue that this limitation permits punishing someone who reasonably but mistakenly takes another for an assailant and then, still labouring under his mistake, defends himself with necessary force against the putative assailant's defensive force. Here the mistaken actor is a provoker to the person he mistook for an assailant; and if his force was justified in the first place, then so must be his subsequent use of defensive force if his mistake is still reasonable. So, those who think that the reasonably mistaken "self-defender" is justified in using force against an imagined assailant will also think that the "without having provoked" qualification must be declared inoperative in such a case; for otherwise an innocent will be punished.

I shall dispute this view. Against it, I'll argue that the reasonably mistaken self-defender is nonculpable, not because his force is justified, but because he lacks a culpable mind to go with his wrongful assault. Since his initial use of force was impermissible, his situation constitutes no exception to the rule that provokers have no right to use force to defend themselves against the necessary and proportionate force of those whom they have provoked with force or threats of imminent force.

Proportionality

Another issue of controversy concerns the requirement of proportionality. This requirement is a limit on the right to use the force that would be necessary to repel an unlawful assault. Section 34(1) denies the right to use necessary force to someone who, without a reasonable apprehension of death or grievous bodily harm, intends to cause death or grievous bodily harm. In other words, even if nothing short of lethal force would succeed in repelling a nonlethal threat, the defender's force will not be justified if he intended lethal force. Successfully to plead self-defence against a nonlethal assault, one must not *intend* disproportionate lethal force. This does not mean that lethal force is permitted against a nonlethal threat as long as it is not intended;[8] for s. 34(2) states that *causing* death or grievous bodily harm is permissible only under a reasonable apprehension of the same by the defender and only if the defender reasonably believed that lethal force was necessary to avert death. Thus, someone who accidentally kills an assailant he knows to be harmless may not claim self-defence in justification of the homicide, though he may plead lack of mens rea for a wrongful death. Nevertheless, s. 34(1) does seem to say that intending disproportionate force is *sufficient* to forfeit one's right of self-defence—that causing death is not necessary—even if lethal force is necessary to repel a nonlethal threat.[9]

There are two issues here. First, is the requirement of proportionality a justified limit on one's right to the measures necessary for self-defence? Does this requirement

[8] Contra: Baxter, 1975 27 CCC (2d) 96 Ont CA

[9] The Model Penal Code's section 3.06(3) agrees. It too denies the right to use deadly force to repel a trespasser who is not threatening dispossession, death, or serious bodily harm. But deadly force is defined as force one uses *for the purpose* of causing death or serious bodily harm or that one *knows* creates a substantial risk of death or serious bodily harm.

rightly take away one's right of self-defence when the force necessary to repel an assault or a trespass would be disproportionate force, or does the requirement of proportionality permit punishing an innocent? I'll argue that the answer depends on what work the proportionality requirement is understood to be doing. If it is a requirement that defensive force be measured to what the aggressor deserves, then it exposes to punishment someone who only did what was necessary to defend his right and who is being held accountable to the constraints of a public role—that of punishing authority—it would have been a crime for him to have taken upon himself. So, since the constraints of the role do not apply to him, the proportionality requirement (on this view of it) permits punishing an innocent. That requirement would also permit punishing an innocent if, as George Fletcher thinks, the duty to use proportionate force is a duty of virtue to forgo one's right to use necessary force for the aggressor's sake;[10] for the state would then be punishing someone for failing to display charitableness even though he committed no wrong to another person. The question, then, is whether the proportionality requirement can be understood as a requirement of justice apart from virtue and also apart from the justice of punishment. I'll argue that it can be and that the proportionality requirement is therefore a constitutionally permissible limit on the right to necessary self-defence.

The second problem raised by the proportionality requirement concerns the Code's apparent indifference to reality. Both s. 34(1) and s. 35 frame the proportionality requirement as a mens rea issue—as an issue about intent rather than one about fact. Thus, s. 34(1) bars a right of self-defence to someone who merely *intends* lethal force against a nonlethal threat; while s. 35 bars a right of self-defence to an unlawful aggressor who reasonably fears death or serious bodily harm in response to his aggression if he

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himself *intended* serious bodily harm to begin with, whether or not the force he initially applied was actually lethal or dangerous. On their face, these provisions seem to expose innocents to punishment. Can it be true that one loses the right of self-defence if one intends lethal force against a nonlethal threat even if the force one uses is in fact not lethal (suppose the gun one tries to fire at an intruder is a toy)? Or suppose one intends lethal force against a lethal threat one mistakenly believes is nonlethal (the intruder is, unknown to the defender, armed and prepared to shoot). It would seem that s. 34(1), by defining the proportionality requirement of rightful self-defence as a requirement that the defender possess a certain state of mind, would allow the punishment for thoughts alone of someone whose response to an unlawful intrusion *was* both necessary and proportionate; while s. 35 could expose to punishment someone who repels force that is actually disproportionate to his provocation just because it would not have been disproportionate to the provocation he intended. But is this not to punish for inward vice someone who has committed no wrong (or, in the latter case, no additional wrong) to another?

My answer will be 'no'. I'll argue that the Code's focus on intention here is correct—that disproportionate force in self-defence (unlike disproportionate punishment) is unjust force only because it joins to coercion the culpable denial of rights that a justification otherwise negates. Therefore, someone who intends disproportionate force culpably causes death or serious bodily harm even if the force he uses in fact matches the kind of force used against him. Because, moreover, proportionality in the context of self-defence is a state of mind, an unlawful aggressor (not being a mind-reader) cannot know whether the victim's response to his aggression is disproportionate, and so he is entitled

to act on reasonable beliefs. But he cannot reasonably believe his victim's response is disproportionate if he himself intended death or serious bodily harm, for he must be assumed to have intended to succeed. Accordingly, I'll argue, neither s. 34(1) nor s. 35 exposes innocents to punishment by virtue of barring a right of self-defence on the basis of intentions alone.

The unknowingly justified actor

The case of the unintended proportionate response is a special case of the unknowingly justified actor—the *bete noire* of most criminal law theorists. Assuming that "if" means "if and only if", then 34(2)(a) and (b) deny a justification to someone who kills without believing his life is under threat even if it is in fact under threat or without believing lethal force is needed to repel a lethal threat even if it is actually needed. That is to say, these provisions deny a justification to the actor who is unknowingly justified in using lethal force. Observe, however, that this qualification is not in s. 34(1). There is no explicit requirement that the actor know he is being unlawfully assaulted in order to be justified in using force against a real assailant. It is enough that he is being assaulted. The Model Penal Code (MPC), however, disagrees. Section 3.04(1) states that self-protective force is justified when (I assume this means when and only when) the actor believes (reasonably) that the force is necessary to protect himself. So the MPC denies the right of self-defence to the unknowingly justified actor generally.

The case of *R. v. Dadson*[11] is usually taken as common-law authority for the view that the unknowingly justified actor is not justified in breaking the law. There, a police constable shot a man who he thought was only filching some wood but who, in fact, was

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a felon for having stolen wood many times before. The constable would have been legally justified in shooting an escaping felon, but since he did not know the thief was a felon, he was found guilty of shooting with intent to wound. On its face, therefore, *Dadson* lines up with the MPC as denying *tout court* a justification to the unknowingly justified actor.

Does denying a self-defence justification to the unknowingly justified actor unconstitutionally allow punishment of an innocent? I'll argue that it does in the case of a private actor faced with a nonlethal threat but not in the case of a public official. *Dadson* is a case involving a public official. I'll also argue that the justification for repelling force with force enjoyed by the unknowingly justified private actor does not benefit the actor who uses *lethal* force not knowing that he is justified in using lethal force. *Dadson* is also a case involving the unknowingly justified use of lethal force, and so it can be distinguished both on this ground and on the ground of the public official exception; despite a widely held belief to the contrary, *Dadson* is not authority for denying a justification to the unknowingly justified actor generally. If successful, therefore, my argument will show that the nuanced Canadian position embodied in s. 34(1) and (2) is exactly right, whereas the MPC, which denies a justification to the unknowingly justified actor generally, exposes a legally innocent (though morally blameworthy) actor to punishment.

Putative self-defence

A fourth issue of controversy concerns putative self-defence or a reasonable but mistaken belief in the need for defensive force. In *R. v. Petel*[12] the Supreme Court of Canada held that a reasonable but mistaken belief that one is being assaulted justifies the force that would be necessary if the facts were as the accused believed them to be (306). It is not necessary that there have really been an assault; and so evidence of prior threats goes to reasonable belief, not to whether there was in fact an assault (307). This supposed permission to use force against an imagined assailant is not found in the words of s. 34(1), which says that everyone who *is* unlawfully assaulted is justified in repelling force with force. However, s. 34(2) says that a reasonable belief in the existence of a *lethal* threat is sufficient to justify *lethal* force. Accordingly, *Petel* extends the putative self-defence justification from a case of reasonable belief in the need for lethal force to a case of reasonable belief in the need for force simply. It seems that there need not be a real assault of any kind to justify lethal force. The Model Penal Code agrees with *Petel*. Section 3.04 says that a nonreckless and nonnegligent belief in the need for force justifies force and that a nonreckless and nonnegligent belief in the need for deadly force justifies lethal force.

The case of *R. v. Gladstone Williams*[13] offers an entirely different solution to the problem of putative self-defence. There the accused saw a man punching and dragging a youth. Believing he was witnessing an assault, the accused came to the aid of the victim by punching the assailant. In reality, the assailant was lawfully trying to arrest a robber, and so the accused was charged with assault occasioning bodily harm on the man making

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the arrest. He was convicted at trial after the recorder instructed the jury that the accused must prove a reasonable mistake that someone was being assaulted in order to successfully plead defence of another. The Court of Criminal Appeals held that instruction to be wrong. It said that a mistaken belief in the need for self-defence or defence of another negates *mens rea*, and the mistake need not even be reasonable. In some places, the judgment can be read as saying that an unreasonable mistake suffices for the defence of self-defence, and of course that cannot be correct if self-defence is a justification. But I think the better reading (see top of p. 312) is that a mistaken belief in justificatory circumstances, whether reasonable or unreasonable, exculpates because the accused then lacks criminal intent.

I'll argue that the distinction drawn in s. 34(1) and (2) between simple force and lethal force is the correct one to draw in determining whether putative justification justifies normally unlawful force. According to this argument, both *Petel* and the MPC are correct in regarding the actor reasonably mistaken about the need for lethal force against a real wrongdoer as justified, but they are both wrong in regarding the reasonably mistaken self-defender in general as justified. Someone reasonably mistaken about the need for defensive force is, I'll argue, not justified in using force against an innocent. He is indeed nonculpable, but exculpation comes, not from justified self-defence, but, as *R. v. Gladstone Williams* tells us, from the lack of a culpable mind. By contrast, someone reasonably mistaken about the need for lethal force against a real wrongdoer is, I'll try to show, justified in using lethal force, as s. 34(2) states. Accordingly, my argument will lead to the conclusion that s. 34(1) and (2) are exactly right on the rights of the putative self-defender. Put in terms of the Charter, the s. 7 injunction against depriving an

innocent of his or her liberty does not demand that a court interpret s. 34(1) as affording a self-defence justification to the person reasonably mistaken about the need for defensive force *simpliciter*.

To substantiate all the aforementioned claims I will adopt the following plan of argument. In the next section I outline two theories of the right to self-defence and compare them for their ability to account for what I take to be the uncontroversial elements of the positive law of self-defence. Then, I derive from the theory that best explains those uncontroversial features solutions to the controversies delineated above. What are the uncontroversial features of the legal right of self-defence? They are very few. Indeed, there may be none if the feature is described too specifically. Nevertheless, I believe there will be broad agreement on the following ecumenical propositions. First, the right of self-defence is exercisable only against someone who is either committing an assault or whose assault is imminent (though the assailant need not be culpable according to criminal law) or whom the defender reasonably believes is assaulting him or will do so imminently; the right does not extend to defending oneself against someone known to be a *lawful* threat and it certainly does not extend to using force against someone who is not, or is not perceived to be, a threat at all. Second, a defender has a right only to the force he or she reasonably believes is necessary to repel a real or reasonably feared attack; force that a reasonable person in the defender's shoes would consider unnecessary is excessive and a criminal assault. Third, there is no duty to retreat from an assailant before using harmless force; provided the defender uses force not dangerous to life or limb, he may stand his ground. By contrast, there is a duty to retreat (if retreat is possible) before

using lethal or seriously harmful force. I'll assume that a sound theory of permissible self-defence must at the very least preserve these four features of the law of self-defence.

3. Two Theories of Self-Defence

The theories of self-defence I want to compare for their ability to account for the uncontroversial features of the legal defence may be called the self-preservation theory and the dignity theory. The self-preservation theory is espoused by (among others) Aquinas and Hobbes, whereas the two most famous proponents of the dignity theory are Hegel and Kant.

The self-preservation theory

Aquinas explains the right of self-defence in the following way:[14]

> Nothing keeps one act from having two effects, one of which is in the scope of the agent's intention while the other falls outside that scope. Now, moral actions are characterized by what is intended, not by what falls outside the scope of intention, for that is only incidental, as I explained previously.
>
> Thus from the act of defending himself there can be two effects: self-preservation and the killing of the attacker. Therefore this kind of act does not have the aspect of "wrong:" on the basis that one intends to save his own life, because it is only natural to everything to preserve itself in existence as best it can. Still an action beginning from a good intention can become wrong if it is not proportionate to the end intended.
>
> Consequently, if someone uses greater force than necessary to defend his own life, that will be wrong. But if he repels the attack with measured force, the defence will not be wrong. The law permits force to be repelled with measured force by one who is attacked without offering provocation. It is not necessary to salvation that a man forgo this act of measured defence in order to avoid the killing of another, since each person is more strongly bound to safeguard his own life than that of another.

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> But since it is wrong to take human life except for the common good by public authority, as I already explained, it is wrong for a man to intend to kill another man in order to defend himself.

The foregoing passage from the *Summa Theologica* is the *locus classicus* of the double effect theory of self-defence—the theory according to which otherwise wrongful harm is permissible if it is an incidental effect of carrying out a lawful purpose rather than a desired result or aimed-at means of achieving a desired result. What I want to focus on, however, is not that theory but rather the claim that the permission to use force in self-defence derives from the more basic permission to do what is necessary to preserve oneself in existence. According to Aquinas, human beings have this permission because it is "only natural" for them to preserve themselves in existence as best they can. The permission thus derives from nature. Natural things are permitted to behave as the law of their natures inclines them to behave. Moreover, the natural inclination to self-preservation is, according to Aquinas, not peculiar to human beings; it is, he writes, common to "everything," by which he presumably means every living thing. So human beings are permitted to do what is necessary to preserve themselves because it is in their nature as biological entities to do so. The bearer of the permission is the living body.

Hobbes too bases the right of self-defence on "the right of nature," which he defines as "the liberty each man has to use his own power, as he will himself, for the preservation of his own nature—that is to say, of his own life—and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto."[15] The right of nature is thus a liberty to act in all ways one may judge useful for self-preservation; and in a stateless condition, where everyone has reason to distrust everyone else, this right of nature is a right, not only to self-defence against

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actual aggression, but "to anything, even to one another's body" to make sure of one's safety. (110).

From the right of nature Hobbes distinguishes a law of nature. Yet the law of nature does not set limits on one's natural liberty to do whatever one judges useful for self-preservation. Rather, it imposes an obligation to exercise this liberty—to do what is necessary for self-preservation and to forbear from doing "that which is destructive of [one's] life or takes away the means of preserving the same…" It is the law of nature so understood that enjoins human beings to quit the state of nature in which their lives are insecure, to surrender as much of their natural liberty to an omnipotent sovereign as is necessary for peace and security, but to "use all helps and advantages of war" if others hold out or defect.[16] Moreover, the same law of nature that obliges human beings to seek peace for the sake of self-preservation also forbids them from surrendering to the sovereign their right of self-preservation; and so they do no wrong in resisting by force those who threaten to kill, wound, shackle, or imprison them, even when those who threaten them do so at the sovereign's command.[17] Indeed, argues Hobbes with the uncompromising rigor for which he is famous, they do no wrong even in resisting the force of the sovereign in enforcing the law, for the right of self-preservation belongs to the guilty not less than to the innocent.[18]

If the right of self-defence derives from a natural law enjoining self-preservation, then the features of the legal right identified above as being beyond serious controversy become problematic. Nothing in a right of self-preservation logically limits the right to defence against an unlawful threat or against a threat perceived as unlawful. As Hobbes

[16] 110
[17] 112
[18] 178

shows, the right must also extend to lawful threats posed by law-enforcement authorities as well as by lawful defenders against one's own unlawful aggression, even when these threats are known to be lawful by the person threatened by them. Accordingly, a right to self-defence based on a natural right to self-preservation is symmetrical as between aggressor and defender even in a civil condition. Neither is privileged over the other, and so someone who comes to the aid of a victim of aggression becomes an ally of a particular interest who may also be resisted.[19]

Further, nothing in the right of self-preservation logically limits it even to a right of self-defence against threats of *force*. Thus, if I cannot preserve myself except by killing a competitor for scarce means of survival (for example, oxygen in a caved-in mine), then the right to self-preservation permits me to kill my competitor, though he threatens me not by force but simply by his existence. Nor can the right of self-preservation be logically limited to a right to defend oneself against *threats*. Thus, if I cannot preserve myself against an aggressor except by means that will also kill a non-threatening bystander, the right of self-preservation permits me to kill the bystander. If the right of self-defence derives from a natural right to self-preservation, then all these actions are not simply wrong but excused; they are permitted. In this way, the right of self-defence becomes a particular instance of a more general right of necessity to preserve oneself at another's expense. On this view, the right of self-defence is a right of necessity against threats of force, where the concept of a threat of force has no special significance—does no special justifying work. Hence the right of self-defence loses its specific identity.

[19] True, Aquinas denies the right to a provoker, but this qualification is incoherent within the self-preservation view of the defence. I argue this at length in *Punishment and Freedom* (Oxford, 2009).

Nor can a right of self-defence conceived as a natural right of self-preservation account for the positive law's limitation of the right to that of necessary force or even to that of force reasonably perceived as necessary. This is so for the reason that Hobbes gives. In a state of nature, where no one is secure, a right of self-preservation is a right to do anything subjectively seen as *helpful* to self-preservation. Thus killing a potential enemy is permissible, for a potential threat is thereby removed, and everyone is a potential enemy. In a civil condition, where each may have confidence in the other's fear of the sovereign as well as in the sovereign's ability to protect oneself, the liberty to do whatever is helpful to self-preservation is cut down by law to a liberty to do what is reasonably necessary; but this limitation lasts only as long as a person fearful for her safety can trust in the sovereign's protection or trust that her tormentor will be cowed by the threat of certain punishment. In some cases (domestic estrangement, for example) neither of these conditions will obtain, and so the right of self-preservation will revert to the shape it has in a state of nature; it will be a right to do whatever is subjectively thought to be helpful to self-preservation. As a consequence, the level of force exercised by the defender will be beyond review; "necessity," the Hobbesian judge will intone, "knows no law."

Nor, finally, can the self-preservation theory of self-defence account for the right to stand one's ground against a harmless aggressor in repelling him with harmless force. This is so because, assuming a civil condition and no exceptional circumstances undermining trust in the sovereign, the right of self-preservation is a right to do only what is reasonably necessary to avert *bodily harm* to oneself. But this limitation implies a requirement to *flee* from a harmless aggressor, who, after all, does not engage the right to

self-preservation. By contrast, the right to self-preservation entails a right to kill an attacker threatening lethal or seriously harmful force without retreating at all, for such a threat reinstates the right of nature to do whatever one thinks is most advantageous for security. Thus, the self-preservation theory yields a duty to retreat and a right to stand exactly the reverse of what the law of self-defence requires.

The dignity theory

In paragraph 94 of the *Philosophy of Right*, Hegel writes:

> Abstract right is a right to coerce, because the wrong which transgresses it is an exercise of force against the existence of my freedom in an external thing. The maintenance of this existent against the exercise of force therefore itself takes the form of an external act and an exercise of force annulling the force originally brought against it.

By "abstract right" Hegel means the paradigm or framework of law whose fundamental end is the protection of the agent's capacity to act from ends it freely chooses against the force and constraint of other agents. The agent's capacity to act from ends it freely chooses is what is meant here by "freedom," and it is this capacity that, in distinguishing agents from things, endows the agent with the dignity of a right-bearer. My freedom to act from ends I freely choose can be negated only by force directed toward "the existence of my freedom in an external thing" because, while force cannot touch my metaphysical capacity always to have chosen otherwise than I did, it can prevent my exercise of this capacity in a particular choice; for the exercise is possible only through a physical body that can be held, pushed, abducted, etc. by overpowering force according to the laws of physics. When applied with the voluntariness signifying a claim of permission, such force

is "wrong" because inconsistent with the agent's right, founded on its dignity as a free being, to act from ends it freely chooses.

The right to act from ends one freely chooses entails the further remedial right to coerce or to apply force to a wrongdoer in order to prevent his act of force; for if there were no right to prevent actions inconsistent with the right to act freely, the latter right would be nonexistent, hence self-contradictory. The right to use preventive force in self-defence thus derives from the more fundamental right of an agent to act from freely chosen ends. Force in self-defence is justified insofar as it is nothing but the force necessary to the realization of that more basic right. This means that the aspect of provocative force that is salient from the standpoint of a right to repel force with force is not the threat the provocation poses to the body but the threat of interference it poses to freedom (and hence the affront it poses to dignity) through the body. Conversely, the bearer of the permission to repel the provocation is not the living body but the free will.

Kant says something similar. In *The Doctrine of Right*, he writes:[20]

> Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as a hindering of a hindering to freedom) is consistent with freedom in accordance with universal laws, that is, is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.

Since coercion hinders freedom, coercion that prevents a hindrance of rightful freedom promotes rather than hinders freedom. Therefore, a right to freedom in accordance with universal laws entails a right to use force to hinder hindrances to rightful freedom. In

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contrast to the initial act of coercion, the preventive one is "right" and therefore engenders no right in others to prevent it in turn.

The upshot is that a right to self-defence is not a right to self-preservation or even a right to safety against bodily harm. It is rather a right to realize one's right of free agency against actions inconsistent with that right. This means that the right to self-defence is a right to use force only against threats that engage, or bear implications for, the right of free agency—that is to say, against threats inconsistent with the right. Only such threats are wrongful threats and only wrongful threats engage the right to self-defence. The wrong need not be a criminal wrong with *mens rea*. It need only be an action that is inconsistent with another agent's right of free agency as limited by generally binding laws. An action will be inconsistent with that right if, and only if, it is a voluntary act (involuntary motion does not engage the right because it implies no claim of permission inconsistent with the right's reality) that either interferes or threatens an imminent interference with one's freedom to decide for one's body as one pleases, whether or not it threatens harm. A threat of imminent interference is sufficient, for if an actual interference with free choice were necessary, one would be required to permit an interference before responding; and that requirement would be inconsistent with having a right against interference. To be coherent as a right, therefore, the right to act on ends one freely chooses requires a temporal buffer, and the permission to prevent an imminent attack reflects this requirement. Because the buffer zone is entailed by the right, an imminent assault is already an assault—a transgression of someone's rightful boundary. Nevertheless, "imminent" does not necessarily mean "temporally immediate". Since the point of the imminence threshold is to fulfill the right to act free of others' interference,

the requirement is satisfied by a threat of interference the victim reasonably believes he could not successfully defend his right against were defensive action further delayed.

The dignity theory of the right to self-defence explains the uncontroversial features of that right. Because the right of self-defence extends only as far as necessary to realize the right to free agency against actions inconsistent with it, it is a right to repel only wrongful threats, not threats of harm as such. That is to say, it is a right to repel only threats that, by restraining or directing one's bodily movements without a self-defence justification to do so, amount to an infringement of the right to act freely. Thus a wrongful assailant cannot claim a right of self-defence against the person he assaulted, because the threat to him is not a wrongful threat; it is justified by his assault as necessary to realize the victim's right of free agency. It follows that the dignity theory can, whereas the self-preservation theory cannot, explain the asymmetrical nature of the right of self-defence—can explain, that is, the privilege enjoyed by the defender and law-enforcement authorities over the aggressor. Further, because the dignity theory understands a right of self-defence as a right to realize a right of free agency against actions inconsistent with that right, it alone clearly separates the right of self-defence from a right of necessity (if such there be) to preserve oneself against nonwrongful threats of bodily harm or nonthreatening bystanders.

Further the dignity theory explains the necessary force limitation on the right to self-defence. Since the right to use force is justified only as necessary to realize the right to free agency, unnecessary force is wrongful force against which the original attacker may defend himself. Even in a state of nature, the right of self-defence is a right only to necessary (not merely helpful) force, though each is judge of what is necessary. In the

transition to a civil condition, agents renounce the right to judge for themselves what is necessary, but they do not suffer any substantive diminution of their natural right. Consequently, when public protection is unavailable, they do not revert to a condition where they may use the force they think merely helpful to self-preservation. Rather, they simply reacquire the right to self-help and to judge reasonably what is necessary to realize their right of free agency. Hence their judgment of necessity is subject to review by a court for reasonableness.

Finally, the dignity theory explains the absence of a duty to retreat from aggressive force before using harmless preventive force. Since what is protected against force is the agent's dignity as a right-bearer rather than its body, the agent who is attacked may stand his or her ground even though retreat is possible; there is no requirement to use force as a last resort, for such a duty would be inconsistent with the dignity the right is meant to protect. Why there is a duty to retreat before using lethal or seriously harmful force I try to explain below.

4. How the Dignity Theory Shapes the Right to Self-Defence

Since the dignity theory of the right to self-defence can account for the uncontroversial features of that right, whereas the self-preservation theory cannot, we can usefully mine the dignity theory for solutions to the controversies mentioned at the outset. This will determine whether the restrictions on the right to self-defence in the Canadian Criminal Code violate the Charter's injunction against exposing innocents to punishment.

Without having provoked the assault

Does the qualifying phrase in s. 34 (1) "without having provoked the assault" mean "without having assaulted or threatened imminent assault"? Or does it mean "without having provoked" in a broader sense encompassing threats of future violence (inchoate threats), words or actions reasonably mistaken for threats, insults, taunts etc.? To see more clearly what is at stake here, consider a variation of the facts in *Lavallee v. The Queen*.[21] Suppose that, instead of threatening his domestic partner with death after house guests departed, Kevin Rust had threatened her with death the following week if she did not kill him first. Suppose that, as he turned to walk away from her, she pulled out a gun and aimed it at Rust and that Rust then shot her dead. Would Rust's action have been murder or justified homicide?

On the narrow reading of provocation as assault, Rust's action is a justified homicide, for his threat of future harm did not constitute an assault (there was time for the victim to report a criminal death threat to the police and perhaps to seek refuge in a shelter), and so he may avail himself of the right of self-defence. On the broad reading of provocation, by contrast, Rust is guilty of murder, for he certainly "provoked" his partner's assault with a weapon. The narrow reading renders s. 34(1) consistent with the Charter, for wrongful assailants who intentionally use force to repel the lawful defensive force of their victims are not innocents; yet this reading seems to give no interpretive weight to "without having provoked the assault". By contrast, the broad reading puts that phrase to work but exposes to punishment someone who only defended himself proportionately against an unlawful threat of imminent death.

[21] [1990] 1 SCR 852.

The dignity theory resolves this conundrum. For the dignity theory, the only kind of provoker who triggers a right of self-defence in the person provoked is someone whose provocation consists either in an assault or an imminent assault (in the sense defined above); for only such provocations engage the right to act from freely chosen ends. Those whose provocation consists in inchoate threats or in actions misperceived as threats or in taunts or insults do nothing inconsistent with the provoked party's right to act from ends it freely chooses, and so they are free to resist any force the provoked party uses against them. The same is true of those whose provocation consists in the use of force to defend their rights. But this means that the dignity theory picks out wrongdoers as the only kind of provokers who may not avail themselves of a right of self-defence against those who use force against them. Hence it exposes no innocent to the possibility of punishment.

It might be objected that the provoker whom the dignity theory deprives of a right of self-defence may be a wrongdoer, but he is not necessarily a criminal wrongdoer, since he need not have the *mens rea* for a criminal assault. He may be a child, or someone acting under an insane delusion, or someone simply mistaken about the need for self-defence. The response, however, is twofold. First, this actor will have his criminal law defence of insanity or lack of mens rea, and so his not being able to plead self-defence does not expose him to punishment; it simply removes that defence from his otherwise well-stocked arsenal. Second, it is important to focus on those whom the dignity theory does *not* deprive of a right of self-defence. It does not deprive nontrespassers of a right of self-defence against those whom they have provoked by vague threats or insults, and so it does not expose to punishment those who intentionally use force to defend themselves against responses to their nontrespassory provocations. In that sense the

dignity theory does not expose the legally innocent to punishment for criminal assaults, whereas the broad interpretation of "without having provoked" would.

The question, however, is whether the dignity theory's interpretation of "without having provoked the assault" is one that the words of s. 34 (1) will reasonably bear. Does not that interpretation render the phrase redundant? If so, then the only reasonable interpretation of that phrase probably renders it an unconstitutional limit on the right to self-defence.

The dignity theory's interpretation of "without having provoked the assault" does not render that phrase otiose. This becomes clear once we consider the phrase against the background of the controversy in self-defence theory between self-preservation theorists and dignity theorists. For those who think that the right of self-defence rests on an inalienable right of self-preservation, provocation cannot be a reason to deprive the provoker of his right of self-defence against the person responding to his provocation, not even if the provocation consists in an assault or imminent assault. For the self-preservation theory of self-defence, the right of self-defence is symmetrical even as between lawful and unlawful threats. By contrast, the dignity theory of self-defence preserves asymmetry as between lawful and unlawful threats, for it views only provocations that engage the right of free agency as triggering the right of self-defence; threats posed by those defending the right of free agency against impermissible actions, while they threaten bodies, do not infringe rights, and so they do not trigger a reverse right of self-defence in the provoker. Accordingly, by adding the phrase "without having provoked the assault", the drafters of 34 (1) may be taken to have legislatively resolved the controversy between the self-preservation and dignity theories of self-defence in

favour of the dignity theory. Provocation amounting to an assault deprives the provoker of a right of self-defence against the person repelling his assault. It would not do so for the self-preservation theory.

Proportionality

We come now to the qualification on the right to use necessary defensive force imposed by the requirement of proportionality? Someone who repels a nonlethal threat intending to kill or seriously harm the trespasser may not claim a right of self-defence even if lethal or seriously harmful force was necessary to repel the threat. At first sight, this constraint seems at odds with the preventive rationale of self-defence, for it requires the defender to forgo a defence of his property if nothing but lethal force will repel the thief. Indeed, Fletcher thinks that the proportionality requirement is out of place in a coherent law of self-defence—that it either belongs to punishment or derives from a duty of ethics to moderate enforcement of one's strict right for the benefit of the attacker.[22] But if either of these possibilities were so, then the proportionality requirement would be an unconstitutional limitation on the right of self-defence. For if the requirement were one of just punishment, then the defender would be held accountable to a role it would have been criminal for him to have adopted; and if it were a requirement of virtue, then it would expose to punishment for want of charity someone who only did what was necessary to defend his right.

The dignity theory of self-defence explains the proportionality requirement as a requirement of just force separate from both the limits on just punishment and from a duty of virtue. According to the dignity theory, the defender is not justified in using

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lethal force to repel a challenge to a property right even if no lesser force would succeed, because agency is the capacity for property rights and so cannot be subordinated to a particular item thereof without denying the possibility of the right the defender seeks to realize. On this view, the point of the requirement of proportionality between response and attack is not that the attacker must receive no more than he deserves. It is rather that the force used to defend the right cannot impliedly assert an order of ends (property over personality) that denies the possibility of rights. Accordingly, a disproportionate response negates justification by reintroducing the right-denial that constitutes a criminal *mens rea*. What was supposed to be force that realizes rights of free agency becomes force that impliedly denies their possibility. That is why it is sufficient to forfeit the right of self-defence that one *intend* what the law regards as a disproportionate response whether or not one's response in fact matched the provocation. And that is why an unlawful aggressor (who cannot read his victim's mind) forfeits his right to defend himself against a lethal response in fact mismatched to his provocation if, by virtue of having intended lethal force, he cannot reasonably believe that it is mismatched. Because the proportionality requirement withholds the right of self-defence only from those whose use of force against an agent signifies a denial of rights, it does not expose innocents to punishment.

The same rationale that underlies the proportionality constraint also demands that lethal force be applied to repel wrongful lethal force only if escape is impossible.[23] Just as the capacity for property (i.e. agency) cannot be subordinated to a particular item thereof, so the capacity for rights cannot be subordinated to a particular exercise of rights. Only when killing a wrongdoer is necessary to preserve agency can one kill without

[23] *Model Penal Code*, s. 3.04 (2) (b) (ii).

denying the priority of agency that makes a right to coerce in self-defence possible. Accordingly, the duty to retreat in the face of lethal force is quite consistent with the right to stand one's ground in the face of simple force. Both phenomena embody the idea that the dignity of agency, not the natural inclination to avert harm, underlies the right to self-defence.

The unknowingly justified actor

Section 34(2)(a) states that a reasonable belief in the threat of death is necessary to a justification of lethal force. Thus someone who kills a lethal threat not knowing him to be one is not justified in his lethal force. As we saw, however, this limitation is not stated in s. 34(1), which deals with self-defensive force *simpliciter*. Nothing in s. 34(1) explicitly deprives the unknowingly justified user of nonlethal force of his right of self-defence. It would seem that if s. 34(1) is correct, then s. 34(2), by depriving the unknowingly justified actor (UJA) of a right of self-defence, exposes an innocent to punishment. Conversely, if s. 34(2) is correct, then s. 34(1) must be read as incorporating the same limitation on the UJA, for otherwise the law would exculpate a guilty person. I shall argue, however, that both sections are correct.

Those who view the criminal law through the lens of morality will say that, for someone to be justified in a coercive act, it must be the case, not only that there were sufficient reasons to act as he did, but also that he acted for those reasons. For only in that case could one say that the *subject* who performed the action was justified in the action; and it is with the subject alone that morality is concerned. Because moral justification depends on the conformity of one's motive with the objective reason for justification,

moral theory will view the UJA as lacking justification for his coercive act. So too will those whose theory of justification generalizes from the case of justification for public officials. Since the official's justification for a wrong is that it was necessary to the achievement of a public purpose, the official must act for that purpose if he wishes to cloak his coercive action with the justification of public authority.[24] Otherwise he acted as a private individual who must find his permission elsewhere.

However, sections 34 and 35 deal with private actors, not public officials. Moreover, morality's judgment of the UJA departs from the law's judgment in the case of unknown justification by consent. Someone who enters a house marked "open house, all welcome" believing he lacks permission is not legally guilty of a trespass though he is a trespasser at heart. The dignity theory of justification explains why this is so. Because that theory views justification from the standpoint of an action's consistency with rights rather than from the standpoint of what the action says about the character who performed it, it is concerned only with actions as they may or may not impinge on rights. Actions inconsistent with another's right of free agency are wrongful and may be repelled with force; those consistent with that right are permitted. Consensual entries are consistent with the owner's right of free agency within his exclusive domain; therefore they are permitted, regardless of the invitee's motives or beliefs. The invitee may deserve a rebuke for entering without knowledge of his invitation, but he may not be coerced.

The dignity theory applies with equal force to the case of unknown justification by self-defence. Since the attacker is really a wrongdoer, the victim has a right to use the force necessary to realize his right of free agency against an action inconsistent with that

[24] Dadson (1850), 169 ER 407; Thain (1985), 11 NI 31; *Smith and Hogan Criminal Law*, p. 37.

right. Because the attacker had no permission for his action, the force that blocks the action violates no right of the attacker, and so the attacker is precluded from applying further force. The UJA's beliefs and motives change nothing, for, in contrast to the moral point of view, the right-based one focuses on the external action rather than on the inner person and on what the action implies for the reality of another agent's rights. Just as actions inconsistent with rights may be done for benevolent motives, so may actions consistent with rights be done for wicked motives; and that is the case with the UJA.

Accordingly, legal (as distinct from moral) justification for private actors requires the existence of justificatory facts alone; with a nuance I'll come to presently, it does not require that the agent act for the justifying reason, and so s. 34(1) does not exculpate the guilty in the case of the UJA.

Suppose, however, that A knows B is about to assault him but does not know that B intends to kill him. Nevertheless, to secure his peace of mind for the future, A intentionally employs lethal force against B and kills him. Here the dignity theory's account of the proportionality requirement determines that A must indeed act in the knowledge that B intends him death or serious bodily harm in order successfully to plead a justification for a homicide. This is so because a breach of proportionality negated justification by implicitly asserting an order of ends (property over personhood) destructive of the right of personality the defender was alone justified in defending; that is, it transformed the meaning of the defensive act from one of right-realization to one of right-denial. The same reasoning applies when the defender intends a response the law would regard as disproportionate were the circumstances as the defender believed them to be. Thus, someone who kills an assailant not knowing that the latter intends him death or

serious bodily harm makes a choice to which a culpable denial of the possibility of rights is imputable. He is therefore a criminal deserving punishment; and since he intentionally caused death, he is responsible for a homicide in the degree known as murder. Inasmuch as he is a criminal wrongdoer, s. 34(2), in refusing to bestow a legal justification on his action, does not expose an innocent to punishment.

It is true that the defender's lethal force was *in fact* proportionate. But this is irrelevant here, because the point of the proportionality requirement of rightful self-defence is not to match force to the assailant's desert but to preserve the public meaning of the defender's choice as one of right-realization rather than right-denial. What is wrong with disproportionate force in self-defence is the *intention* to do that to which a right denial may be imputed. And so if the defender chooses what, given his beliefs, is a disproportionate response, then he chooses culpably regardless of the true state of affairs.

The upshot is that, whereas his knowledge of the imminence of an assault is irrelevant to whether the party attacked is justified in disabling the assailant (the fact alone matters), his knowledge of the existence of a lethal threat is necessary to justify lethal force. Indeed, belief is enough, for what matters here is not whether force *is* proportionate (this is not punishment) but whether the victim acts for a reason consistent with the priority of agency and the possibility of rights (the reason alone matters). Still, the belief in the existence of a lethal threat must be reasonable, for otherwise the defender used unnecessary force, which is beyond the scope of his justification. And this configuration is precisely the position of s. 34(1) and 34(2).

Putative self-defence

According to the Supreme Court of Canada in *R. v. Petel*, a reasonable but mistaken belief that someone is about to attack you wrongfully justifies your force against the imagined attacker. This supposed justification for the putative self-defender is not expressly given by s. 34(1), though it is given by s. 34(2) to the defender reasonably mistaken about the existence of a lethal threat from a real wrongdoer. Must a permission for the putative self-defender be read into s. 34(1) in order to satisfy constitutional law? Would denying a right of self-defence to someone who uses force in the reasonable but mistaken belief in the need for self-defence mean punishing an innocent?

Currently, the prevailing Anglo-American view is that the justifiably mistaken defender is justified.[25] Those who think that legal justification depends on moral justification will regard him as legally justified, for they will see justification as depending solely on the principle informing one's action; how circumstances in the world fortuitously turn out does not affect the moral quality of the will. If this is indeed the correct position, then the "without having provoked" qualification on the right to self-defence would have to be interpreted so as not to include the reasonably mistaken self-defender as a provoker; otherwise an innocent would be deprived of a right of self-defence against the person he mistook for an assailant and who is now repelling his force with force.

Yet this view is not without problems. In particular, to regard the putative defender as justified in using defensive force against an innocent is to sacrifice asymmetrical justification and hence normative closure to permissible violence; for surely an *innocent* is justified in resisting the putative defender's threat, while the

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putative defender, if he was justified in the first place, must be justified in resisting in turn, and so on. We would thus revert to the mutually inconsistent justifications characteristic of a state of anarchy, wherein each is judge of right and wrong. Now, it might be argued that someone who gives another person reasonable grounds for believing he is an assailant is not an innocent; he is a wrongful provoker who forfeits his right to respond to the preventive force he provoked. This position might rest on the idea that boundaries between agents must be drawn along lines both could accept, and the standard of reasonableness is the one that fairly allocates the risk of mistake as between two parties to an interaction. So if it is reasonable for A to believe that B is an assailant, then B *is* an assailant.[26]

However, this argument fails, for it falsely assumes that the standpoint of the reasonable person in the circumstances of *one* of the parties to an interaction is an impartial standpoint. To see that it is not, consider a case of mistaken identity. Say a plainclothes policeman (A) is making an arrest. B happens on the scene and, reasonably believing A is a mugger, tries to prevent the arrest with force. If we agree that the policeman has a right to resist B, then a putative justification will give rise to symmetrical justifications. Moreover, there is no principled way to carve out a mistaken identity exception to a general rule that A's reasonable belief that B is an assailant makes him an assailant.[27] This is so because the reason this rule is unjust in the mistaken identity case applies to all cases: as between two parties whom we posit as objectively innocent, the standpoint of the reasonable agent in the shoes of one of them is not an impartial standpoint. The only standpoint that is impartial as between two epistemically partial

[26] Ripstein
[27] Ibid

perspectives is omniscience (another finite perspective might be neutral in being indifferent to both but by definition it would not be impartial).

Accordingly, the position that a reasonable but mistaken belief in the need for self-defence suffices for a justification engenders symmetrical and inconsistent justifications—the very state of affairs a civil condition is supposed to cancel. And yet the opposed position seems equally problematic. According to that position, the putative defender is excused rather than justified; and, since excuse presupposes a wrong, the innocent can resist. This no doubt saves asymmetry; but if the putative defender's mistake was reasonable and the truth could have been known only to an omniscient observer, it seems unjust to require him to rely on excuse, for his act was nonculpable. How, after all, can we expect him to have exercised a cognitive capacity no human agent possesses?

The problem is easily resolved, however, through the approach taken in *Gladstone Williams*. Someone who transgresses a boundary under a sincere but mistaken belief in the existence of justificatory circumstances has chosen nothing from which a denial of rights may be inferred. Therefore, his transgression is not a culpable one justifying punishment. Nevertheless, it is still a transgression, for, as there was really no act inconsistent with the defender's right, his force was not justified by right-realization. Therefore, the innocent has a right both to resist the putative defender; and the putative defender, though a tortfeasor, is exculpated from crime. This is the intuitively correct result—reached without sacrificing asymmetry of justification or requiring the justifiably mistaken defender to rely on excuse. He is exculpated rather than excused, but

exculpation comes, not from justification, but from the absence of a culpable mind.[28]

Accordingly, no constitutional right against punishing the innocent would be violated by reading s. 34(1) according to its plain meaning: that the justification of self-defensive force is available only against real wrongdoers. Nor need the "without having provoked" qualification be read down so as not to apply to the reasonably mistaken self-defender. He is indeed a provoker for the purposes of s. 34(1) and so may not resist the force of the person he provoked; but if he does, he will be exculpated for lack of mens rea.

However, the case is different, I want to argue, with respect to the actor who is reasonably mistaken about the existence of a *lethal* threat from a real wrongdoer, as s. 34(2) states. Suppose A approaches B menacingly but without intent to kill. B, reasonably believing that A means to kill him (A had previously announced his wish to kill B), steps backward as far as he can and then draws a gun. A stops and retreats, but B now advances, pointing his gun at A. A then pulls out a gun and shoots B.

Section 34 (2) permits the use of lethal force to someone who reasonably (not just correctly) apprehends a wrongful threat of lethal force, provided he reasonably believes no escape is possible.[29] Our earlier remarks about proportionality show how counting

[28] Does our conclusion that correctness of belief alone justifies force in self-defence entail that the "reasonable and probable ground" standard for justifiable arrest by police officers is incorrect? No. The arrest power belongs, not to the defence of rights against wrongdoers in general, but to the process of law enforcement through the punishment of criminal wrongdoers in particular. Since the truth of the matter of criminal guilt is a legal truth that results from a trial, there is, at the moment of the decision to arrest, nothing but a reasonable or unreasonable belief in guilt (the belief cannot be mistaken). Moreover, asymmetry of justification is here secured by the authority of a public official acting on the only truth available at the time. In the case of defence of rights, however, there is a truth of the matter at the point of decision as to whether A is wrongfully invading B's boundary, since "wrongfully" means only voluntarily and without consent. Because no judgment of culpability is required, truth is not mediated by due process. No doubt a court will determine whether A's boundary crossing was voluntary and without consent; but the truth of these matters is here ascertained by the court, not produced by it.

[29] *Model Penal Code*, s. 3.04(2)(b); *Canadian Criminal Code*, s. 34(2).

putative justification as justification in this case avoids the symmetrical permissions that make putative justification legally absurd as a justification *tout court*.

One of the rules of proportionality, we saw, is that the defender may use lethal force against a real or apprehended threat of unjustified lethal force only as a last resort; for only under that condition is the capacity for rights (agency) prioritized over a particular exercise of rights. So, the defender (B) may use lethal force against a wrongful aggressor (A) whom he reasonably but mistakenly perceives as a lethal threat only after he has retreated to the wall. Likewise, the wrongful aggressor (A), though he may use defensive lethal force against a disproportionately lethal response to his attack, may do so only if he has retreated as far as he can.[30] But if A is obliged to retreat when B's permission crystallizes (after B has exhausted his alternatives), the permission to use lethal force is not symmetrical. And yet A is not legally helpless, because A's retreat ends B's permission to use force of any kind and puts both parties back to their legal position before the confrontation. If B persists with a real threat of lethal force, he is now the wrongdoer, and so A may use lethal force against him, while B may not resist. Thus permission remains asymmetrical throughout.

5. Conclusion

Our inquiry into the constitutionality of the self-defence provisions of the Canadian Criminal Code has uncovered no blemish. Though these provisions have frequently been criticized for excessive complexity, it turns out that the complexity in the law accurately tracks the nuances demanded by the theory of self-defence best qualified to interpret the provisions. The "without having provoked the assault" qualification is

[30] *Canadian Criminal Code*, s. 35.

neither redundantly narrow nor unconstitutionally broad, for it importantly establishes in Canadian law the dignity theory of self-defence, according to which the right of self-defence is asymmetrical as between aggressors and defenders. The proportionality requirement imposes on the defender neither a duty of charity nor a constraint of punishment to match response to desert; rather it ensures that right-realization is not corrupted into right-denial, and so the focus on the defender's intention (and on the aggressor's beliefs) rather than on fact in assessing the proportionality of his response turns out to be well placed. Likewise, the omission in s. 34(1) and inclusion in s. 34(2) of a reference to reasonable beliefs are both correct, for the unknowingly justified actor is generally justified in law, if not in morality, but the actor who unknowingly applies proportionate force applies force with the implicit right-denial that constitutes culpable force. Moreover, putative justification is not generally a justification, for otherwise justification would be symmetrical as between aggressor and victim; though it is for someone who believes reasonably (though incorrectly) in the existence of a lethal threat from a real wrongdoer, for in this case justification rests asymmetrically on victims. People who use force under a reasonably mistaken belief in the need for nonlethal defensive force are wrongdoers without criminal intent rather than justified actors; and so the Supreme Court erred in reading a reasonable belief justification into s. 34(1).

The American Law Institute's Model Penal Code has not withstood constitutional scrutiny as well the Canadian Code. By denying outright a justification to the unknowingly justified actor, it can expose someone whose action is innocent to the possibility of imprisonment; and by granting a justification to the person reasonably

mistaken about the need for self-defence, the MPC gives its *imprimatur* to the inconsistent justifications the rule of law is meant to abolish.