THE FALL OF THE HALF-WAY HOUSE: THE SUPREME COURT OF CANADA IN *GEE, BRISSON* AND *FAID*

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The qualified defense of excessive force in self-defense, which if successful reduces murder to manslaughter, would appear to be no longer available in Canada. In this comment the author reviews the leading Canadian cases in the area, after which he surveys and critically analyzes the Australian case law which gave birth to the defense. The author concludes with a discussion of the merits of the defense, from the perspective both of the accused, and Canadian society.

I. INTRODUCTION

For the last few decades, Canadian courts have recognized the common law qualified defence of excessive force.[1] This defence provides that when excessive force is used in self-defence or defence of others, what would otherwise be murder (that is, an intentional killing) should be reduced to manslaughter. The defense originated in, and was for the most part developed by, the High Court of Australia. The three leading Australian cases on the issue are *Regina* v. *McKay*,[2] *Regina* v. *Howe*,[3] and *Viro* v. *The Queen*.[4] It is the reasoning employed by the High Court in these cases that has been essentially adopted by many Canadian courts in support of their recognition of the qualified defence.[5] The Supreme Court of Canada, however, has rejected the validity of the defence in Canada in the three recent decisions of *Brisson* v. *The Queen*,[6] *Regina* v. *Gee*,[7] and *Regina* v. *Faid*.[8] The proposition advanced in this comment is that the Supreme Court was correct in rejecting the Australian common law defence for two main reasons. First, the reasoning of the Australian Court is faulty insofar as an attempt is made by the Court to determine the nature of an offence by considering the elements of a defence *to* the offence. Secondly, the argument of the Australian Court rests substantially on the concept of "malice aforethought", a concept that has little or no place in the distinction Canadian criminal law makes between murder and manslaughter. That having been said, however, it is still important to consider whether the defence *should* be available in Canada. This will be the concern of the latter part of this comment.

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1. As early as 1944, the British Columbia Court of Appeal recognized the partial defence in *R.* v. *Barilla* 82 C.C.C. 228 (B.C.C.A.). *See Brisson* v. *The Queen*, *infra* n. 6, where Dickson J. canvassed, and criticized, the important Canadian decisions that recognized the defence.
2. [1957] V.R. 560 (Australia H. Ct.).
3. (1958) 100 C.L.R. 448 (Australia H. Ct.).
4. (1978) 18 A.L.R. 257 (Australia H. Ct.).
5. The court with which this comment is mostly concerned is the Alberta Court of Appeal, and in particular the decisions of *R.* v. *Fraser* (1980) 55 C.C.C. (2d) 503 (Alta. C.A.), and *R.* v. *Gee* (1980) 55 C.C.C. (2d) 525 (Alta. C.A.).
6. (1982) 69 C.C.C. (2d) 97 (S.C.C.).
7. (1982) 68 C.C.C. (2d) 516 (S.C.C.).
8. (1983) 2 C.C.C. (3d) 513 (S.C.C.).

II. FACTS AND HISTORY OF THE CASES

A. *REGINA* v. *GEE*

The accused in this case was a transvestite. On the evening of November 15, 1979, two of his friends — Susan Fife, a prostitute, and Paul Racz, a male prostitute — met at Gee's residence before going into the street for the purpose of prostitution. The weather that night was bad. Gee therefore told his two friends about someone he knew — the deceased, Powley, whom Gee described as a "kinky trick with lots of money" — who would welcome them at his place. Gee then phoned Powley and made arrangements for the three of them to go to Powley's residence.

When they arrived, they had some drinks at the bar and then went to an upstairs bedroom. In the course of the activities in the bedroom, Powley attacked Racz. When this happened, Gee and Fife left the room, expecting Racz to free himself and follow. When he did not, they returned to the room to free or rescue him. They then assaulted Powley when he would not stop his attack on Racz, beating him over the head with several objects including bottles, a frying pan and a lamp. When they ceased, Powley was dead.

Susan Fife and Gee were charged with murder. The Crown's theory was that the three friends went to Powley's house with the intention of robbing him. While they were doing so, violence erupted. The theory of the defence was that the three merely went to Powley's place to take part in some kinky activity, and when Powley became displeased with Racz's reluctance to dress in black lingerie, he attacked Racz.

Gee's defence at trial was based on section 27 of the Criminal Code, whereas Fife's counsel relied on self-defence, section 27, provocation and drunkenness. The trial Judge left the defence of section 34 of the Criminal Code and the justification of section 27 of the Criminal Code with the jury, stating that success in either would lead to an acquittal. Moreover, the trial Judge told the jury that if they had any reasonable doubt with respect to the defence of self defence, but were satisfied that more force was used than was necessary, they must find the accused guilty of manslaughter only.

The two were convicted of murder and Gee appealed his conviction, arguing, in part, that the trial Judge erred in not directing the jury that if the accused had used excessive force in the prevention of the commission of an offence, then the verdict would be manslaughter and not murder. The Alberta Court of Appeal allowed the appeal and ordered a new trial.[9] Relying on Australian case law, the Court recognized the qualified defence of excessive self-defence in circumstances where the accused was defending himself or another from attack. Mr. Justice Moir stated that the following elements of the defence must be found: (1) certain serious circumstances existed which led the accused to reasonably believe a situation involving danger existed, (2) the accused used unreasonable or excessive force and (3) the accused was acting honestly when he used ex-

9. *Supra* n. 5.

cessive force in that he mistakenly believed that the degree of force he was using was reasonable. Even though there was an intent to kill, Mr. Justice Moir asserted, it may be excused or forgiven because of the surrounding mitigating circumstances.[10]

The Crown appealed to the Supreme Court. The grounds of appeal centered on the question of whether the qualified defence of excessive force in self-defence, as elaborated by the Alberta Court of Appeal, was available to the accused in Canada. The Supreme Court held[11] that the appeal should be dismissed, but in the opinion of seven of the nine judges who heard the appeal, the qualified defence of excessive force did not exist in Canada.

B. *BRISSON* v. *THE QUEEN*

Brisson had a failing grocery business in Montreal and decided to "walk away from everything". He orchestrated an elaborate kidnapping hoax and fled to Tahiti. Before leaving Montreal, however, he was undecided about his plan and went for a walk. He met a tramp with whom he had dinner and for whom he bought some liquor. Eventually the two drove around in Brisson's car, the tramp in the back seat drinking. According to the accused, a dispute erupted and the tramp hit Brisson with a half-full bottle of liquor. In response, Brisson stopped the car and, having failed to calm the tramp down, pushed him into a corner with one hand and with his free arm reached over the back seat, took another bottle and hit the tramp on the head with it to subdue him. The bottle broke and the tramp lay inert, bleeding from the ears. Brisson then drove around for some time before setting the car on fire.

Brisson was convicted of murder at trial, but appealed his conviction to the Quebec Court of Appeal. One of the grounds of appeal was that the trial Judge, although leaving the defence of self-defence with the jury, had erred in failing to leave the qualified defence of excessive force which would reduce the charge from murder to manslaughter. The appeal was dismissed, with Mr. Justice Belanger dissenting, the court holding that no such qualified defence exists in Canadian law.

Brisson appealed to the Supreme Court and his appeal was dismissed.[12] Mr. Justice McIntyre[13] and Chief Justice Laskin[14] agreed that there was insufficient evidence to have left even the defence of self-defence, let alone the qualified defence, with the jury. The error committed by the trial Judge, then, was actually in favour of the accused and was accordingly a proper case for the application of section 613(1)(b)(iii) of the Criminal Code.

C. *REGINA* v. *FAID*

The accused in *Faid* was an acquaintance of, and had several drug transactions with, Wilson, the deceased. When told that Wilson had

10. *Id.* at 542.
11. *Supra* n. 7, Martland J., Ritchie and Estey J.J. concurring, dissenting.
12. *Supra* n. 6.
13. Martland and Estey J.J. concurring.
14. Ritchie J. concurring.

hired someone to kill him, Faid confronted him about this in the trailer they shared. Wilson laughed and said it was true. Faid then started to leave, but Wilson blocked his way and hit him twice in the head. Faid struck back, and Wilson produced a knife. A struggle ensued and Faid managed to disarm Wilson after hitting him on the head with a wrench. He was about to leave again when he thought he saw Wilson heading for a spear gun he believed was loaded. In response, Faid stabbed Wilson in the back, and then stabbed him a second and a third time until Wilson stopped moving forward and fell to the floor.

Faid was charged with murder and the only defence he relied upon at trial, and the only one left with the jury, was self-defence. He was convicted of second degree murder and appealed to the Alberta Court of Appeal which allowed the appeal on the ground that the trial Judge erred in failing to leave the qualified defence, and the defence of provocation, with the jury.[15]

The Crown appealed to the Supreme Court where Mr. Justice Dickson wrote the unanimous decision of a seven member bench in allowing the appeal and restoring the conviction.[16]

III. THE SUPREME COURT DECISIONS

In Gee's appeal to the Supreme Court, Chief Justice Laskin[17] held that the trial Judge erred in leaving self-defence (section 34) with the jury, as it had no evidentiary basis. Compounding this error, moreover, the trial Judge failed to deal adequately with section 27, "which was the only defence open to the accused:"[18]

> She did not leave it clearly open to the jury that a manslaughter verdict could be returned, even where excessive force had been used, if the jury doubted the existence of an intent to kill. This omission, coupled with the misplaced emphasis on self-defence under s. 34 of the *Code*, created confusion . . . .

The Chief Justice did not consider the question of the partial defence, however, finding it "unnecessary to explore the different views" of the Alberta Court of Appeal to decide the case,[19] and thus made no reference to Mr. Justice Dickson's views on excessive force either.

Mr. Justice Dickson[20] dismissed the appeal for the same reasons that Chief Justice Laskin did, but with respect to excessive force held that it had no applicability as a qualified defence at law. He stated, essentially, that the distinction between murder and manslaughter is a question of intent, and that "excessive force in self-defence, unless related to intent under s. 212 of the Code or to provocation, does not reduce murder to manslaughter."[21] In dissent, Mr. Justice Martland[22] agreed with Mr. Justice Dickson that "in relation to s. 27 . . . there does not exist a

15. [1981] 5 W.W.R. 349 (Alta. C.A.).
16. *Supra* n. 8.
17. McIntyre J. concurring.
18. *Supra* n. 7 at 519.
19. *Id.* at 519.
20. Beetz, Chouinard and Lamer J.J. concurring.
21. *Id.* at 527.
22. Ritchie and Estey J.J. concurring.

'qualified' defence of the use of excessive force in the prevention of the commission of an offence."[23] Mr. Justice Martland also agreed that there was no evidentiary basis for leaving self-defence with the jury, but would have allowed the appeal because he felt the undue attention paid to the section 34 defence was not prejudicial to the accused. He also believed that section 27 was adequately dealt with by the trial Judge.

In *Brisson*, as indicated earlier, Chief Justice Laskin[24] and Mr. Justice McIntyre[25] held that there was insufficient evidence to even require a charge on self-defence and so did not address the problem of excessive self-defence. Although Mr. Justice Dickson also expressed doubt about the evidentiary basis of self-defence in this case, he again took the opportunity to discuss the validity of the qualified defence. In his decision[26] Mr. Justice Dickson made two major points in rejecting the defence. First, he pointed out that the defence of self-defence has been codified in the Criminal Code and the qualified defence, as developed in jurisdictions where the criminal law has not been codified, is not applicable in Canada. He also elaborated his contention in *Gee* that:[27]

> . . . the facts on which the defence of self-defence was unsuccessfully sought to be based may in some cases go to show that the defendant acted under provocation or that, although acting unlawfully, he lacked the intent to kill or cause grievous bodily harm; and in such cases a verdict of manslaughter would be proper.

In conclusion, Mr. Justice Dickson rejected the notion that excessive force in self-defence, "unless related to intent under s. 212 of the Code or to provocation, reduces what would otherwise be murder to manslaughter."[28]

The judgment of the court in *Faid* was delivered by Mr. Justice Dickson. In his decision he disposed of the qualified defence with dispatch. In a single paragraph he summarized the arguments he marshalled to defeat the validity of the defence.[29] First, "it is inapplicable to the Canadian codified system of criminal law;" secondly, "it lacks any recognizable basis in principle;" thirdly, "it would require prolix and complicated jury charges;" fourthly, "it would encourage juries to reach compromise verdicts to the prejudice of either the accused or the Crown;" and his final, and perhaps most important point, concerned the question of intent:[30]

> If the jury considers that excessive force has been used, and has resulted in a death, they must then ask themselves whether the accused, in causing the killing, possessed the intent described in s. 212(a) of the Code, that is, an intent to kill or cause bodily harm likely to cause death. If they are satisfied beyond a reasonable doubt that the intent was present, they should find the accused guilty of murder. However, in the event they found no such intent existed, or had a doubt as to its existence, they should convict of manslaughter.

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23. *Id.* at 519.
24. Ritchie J. concurring.
25. Martland and Estey J.J. concurring.
26. Beetz, Chouinard and Lamer J.J. concurring.
27. *Supra* n. 6 at 118.
28. *Id.* at 119.
29. *Supra* n. 8 at 518. The quotations that follow are taken from that paragraph on page 518.
30. *Id.* at 518.

In *Regina* v. *Gee*, then, seven judges of the Supreme Court rejected the qualified defence and two had no comment. In the concurrent decision of *Brisson* v. *The Queen*, four judges rejected the defence while the five other judges expressed no opinion on the issue. In the later decision of *Regina* v. *Faid*, however, the Supreme Court of Canada held 7-0 that the qualified defence does not exist in Canada. The issue now, therefore, seems to be settled.

IV. THE COMMENT

Perhaps the best way to comment on the Supreme Court's rejection of the partial defence is to look to what has been rejected. The common law development of the defence in Canada reached full judicial expression and elaboration in the Alberta Court of Appeal decisions of *Regina* v. *Fraser* and *Regina* v. *Gee*.[31] These appeals were decided on the basis of the common law doctrine that had been developed in Australia — specifically in the cases of *McKay*, *Howe* and *Viro*.[32] The Alberta decisions considered the three Australian cases at some length and the Court eventually adopted, as its reasons for judgment, the reasoning provided by these Australian authorities, in particular the reasons set out by Mr. Justice Mason in the *Viro* case.[33] The inquiry into this common law partial defence, therefore, would be best conducted by considering these three Australian cases in which the defence was developed.

The story begins with the *McKay* case,[34] in which the nascent defence was first enunciated by Mr. Justice Lowe:[35]

> If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter and not murder.

The significant thing to note about Mr. Justice Lowe's formulation is the telling lack of any mention of the intent to kill. He does not say that an *intentional* killing will only be manslaughter if excessive acts in self defence, felony prevention or apprehension are used. Support for the view that Mr. Justice Lowe's formulation would not apply to — that is, did not contemplate — an intentional killing is found in his approval of the summing up of the trial Judge of the case, Mr. Justice Barry, from which he quoted at some length:[36]

> If one person *intentionally* kills another or brings about his death by the *intentional* infliction of grave physical injury, he is guilty of the crime of murder *unless* the killing takes place in circumstances which, according to law, constitute *just cause or excuse.* The death of a human being, if it does not constitute the crime of murder, may constitute the crime of manslaughter; if a person kills another *unintentionally* in the course

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31. *Supra* n. 5.
32. *Supra* nn. 2, 3 and 4.
33. McDermid J.A. in *Fraser* at 511 and in *Gee* at 529; Moir J.A. in *Fraser* at 523, in *Gee* at 542; Prowse J.A. in *Gee* at 531, 535, and 538-9.
34. *Supra* n. 2. In this case, the accused, who lived on a poultry farm with his wife and family, shot and killed the deceased, whom he found at daybreak stealing fowls from the farm. He fired one shot which disturbed the deceased, and as the latter ran away the accused fired four more shots and it was one of these shots which entered the deceased's heart. The accused was convicted of manslaughter.
35. *Id.* at 563.
36. *Id.* at 563. (emphasis added).

> of the performance of an *unlawful* act, he is guilty of manslaughter. An unlawful act may be one which is unlawful in its nature or which becomes unlawful *because of the manner in which it is done.* In certain circumstances the law permits force to be used, but *the use of more force than is reasonably necessary* in those circumstances may, if it results in death, constitute manslaughter; the use of the force *would amount to an unlawful act* because it had exceeded what was reasonable in the circumstances.

The implication left to be drawn from this passage is that if a person kills another *intentionally* when killing is seen to be excessive (i.e. "in the course of the performance of an unlawful act"), the crime would *not* be reduced to manslaughter. The passage from Mr. Justice Barry's summing up quoted by Mr. Justice Lowe continues:[37]

> . . . if using the occasion (i.e. self-defence or preventing the commission of a felony), not for the purpose for which the law permits it to him, but for the purpose of satisfying some private grievance, [the accused] *intentionally* kills the felon or brings about his death by the *intentional* infliction of grave physical injury, he would be guilty of murder. Another state of affairs may arise, however: a citizen may seek to prevent the commission of a felony . . . and, *without intending to kill* the felon but honestly exercising the rights which the law allows, he may cause his death by the use of more force than is reasonably necessary, and in such circumstances he would be guilty of manslaughter.

The importance of intent in determining whether a killing will be murder or manslaughter is either expressly or implicitly recognized in the reasoning supporting the decision in *McKay.* So far, the distinction between murder and manslaughter still rests on the presence or absence of intent.

In the *Howe* decision,[38] the High Court of Australia, in supporting the partial defence of excessive self-defence, did not expressly address itself to the applicability of the defence to an *intentional* killing. At the level of the Court of Criminal Appeal of South Australia the court said that:[39]

> . . . it is the law that a person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the circumstances, is guilty of manslaughter and not of murder.

Again, as in Mr. Justice Lowe's formulation of the partial defence in *McKay,* no mention is made of the presence of the requisite intent for murder. The question remains: what if the intent to kill is present? Would the result still be manslaughter?[40] For the most part, the High

37. *Id.* at 564. (emphasis added).
38. *Supra* n. 3. In this case, the accused, a young man, and the deceased, an older and bigger man, went driving into the country. The accused was driving and stopped the car when the deceased reached for his private parts. They both got out of the car and had walked a few yards ahead of the car when the deceased grabbed the accused by the shoulders with both hands from behind. In fear of a homosexual assault, the accused ran back to the car and opened the driver's door. He then saw the butt of a rifle sticking out from beneath the seat, removed the rifle, and shot the deceased who was still a few yards in front of the car with his back to the accused. The wound was fatal, and the accused was convicted of murder at trial.
39. [1958] S.A.S.R. 95 at 121-22 (South Austr. Ct. Cr. App.).
40. It would seem not, for the basis upon which this proposition is founded implies the absence of the requisite intent for murder. Their Honours in the Court of Appeal regarded the situation they described "as a case of unlawful killing, without malice aforethought, for although the killer may clearly intend to inflict grievous bodily harm on his assailant, and *if necessary* to kill, his state of mind is not fully that required to constitute murder." (*id.* at 122, emphasis added) One may ask 'why not?', and the answer is found in the lack of requisite intent. Aside from the fact that Canadian lawyers and jurists should be careful not to confuse 'intent' with 'malice aforethought', one need only point out that to inflict grievous bodily harm on someone and *if necessary* to kill is not the infliction of grievous bodily harm on someone 'with the *knowledge* that death is *likely* to ensue.' The least reasonable doubt on this latter proposition cancels the requisite intent for murder.

Court of Australia left these questions unanswered. Speaking for the majority, Chief Justice Dixon stated that if the accused[41]

> . . . used no more force than was proportionate to the danger in which he stood, or reasonably supposed he stood, although he thereby caused the death of the assailant he would not have been guilty either of murder or manslaughter. But assuming that he was not entitled to a complete defence to a charge of murder for the reason that the force or violence which he used [was excessive], of what crime does he stand guilty? Is the consequence of the failure of his plea of self-defence on that ground that he is guilty of murder or does it operate to reduce the homicide to manslaughter? . . . it seems reasonable in principle to regard such a homicide as reduced to manslaughter.

Although he doesn't expressly say so, Chief Justice Dixon probably felt it reasonable to regard such a homicide as manslaughter because of the absence of "malice aforethought".[42] This vague concept was important in the lower Court of Appeal decision in *Howe*[43] and was also to figure largely in the later High Court decision in *Viro*. The significant point to notice about this passage from Chief Justice Dixon's judgment, though, is the lack of any mention of intent. In concentrating attention on the elements of the defence of self-defence in his effort to determine whether the killing would be murder or manslaughter, he seems to ignore the elements of the offence of murder; by emphasizing (albeit implicitly) malice aforethought, he seems to ignore or overlook the question of *intent*. The first appearance of the concepts of "moral culpability" and "malice aforethought" that were to become so important to the *Viro* decision can be discerned here,[44] and the closely related yet grave conceptual error, which dominates the reasoning of the *Viro* decision, of characterizing the nature of the crime through a consideration of the elements of an excuse *for* the crime, is also first committed here.[45] Despite its appeal, the reasoning in *Howe*, elaborated in *Viro*, is faulty.

Attention must now turn to the Australian High Court's decision in *Viro* v. *The Queen*.[46] Although most of the written judgments are again silent on the question of whether the partial defence would operate in the

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41. *Supra* n. 3 at 460-61.

42. Taylor J. wrote a separate judgment in *Howe* (*supra* n. 3) in which he stated, at 467, that "at common law *malice aforethought* — whatever that term may now be taken to comprehend — was an essential ingredient of the crime of murder," and that cases of excessive self-defence may "be taken as sufficient to prevent the implication that the killing was malicious in the sense in which that term has come to be understood in relation to the crime of murder." (*See* also the judgment of Menzies J. at 472, par. 3; 473, par. 2; 474-75.) One may ask just what that term *has* come to mean, especially in view of Taylor J.'s own admission that its meaning is not certain. In Canada, surely the "essential ingredient of the crime of murder" is defined by s. 212 of the *Code*: intention.

43. *See* n. 40.

44. Indeed Mason J. in *Viro* (*supra* n. 4) states at 297 that "the underlying rationale of *R.* v. *Howe* is to be found in a conviction that the moral culpability of a person who kills another in defending himself but who fails in a plea of self-defence only because the force which he believed to be necessary exceeded that which was reasonably necessary falls short of the moral culpability ordinarily associated with murder."

45. *See* especially *Howe*, *supra* n. 3, at 460.

46. *Supra* n. 4. In this case, Viro attacked the deceased, R, with a jack handle, with the intention of stunning and robbing him. R produced a knife. Viro dropped the jack handle and grappled with him. A friend of Viro, G, then took hold of R by the neck, and at G's urging, Viro, using a knife he had, stabbed R a number of times. R died, and Viro and G were convicted of murder. The appeal against the conviction to the Court of Criminal Appeal of New South Wales was dismissed, and Viro sought special leave to appeal to the High Court.

presence of an intention to kill, Mr. Justice Mason, in his judgment, states that the partial defence of excessive self-defence would excuse the intent to kill:[47]

> Now that it has been acknowledged that provocation does not deny the existence of [the intention to kill or inflict grievous bodily harm], no insurmountable barrier remains in the way of reaching the conclusion that circumstances giving rise to an occasion of self-defence also *deprive an intention to kill* or inflict grievous bodily harm formed in consequence thereof *of the quality of malice aforethought.* Then, if the response is not excessive, the accused commits no offence; if it is excessive, he is guilty of manslaughter.

The intent to kill is excused because of a lack of "malice aforethought", whatever, to quote Mr. Justice Taylor from the *Howe* decision, "that term may now be taken to comprehend."[48] The absence of "malice aforethought" will excuse the intent to kill, moreover, because without such malice the intentional killing is less morally culpable than if the malice were present. This is the second major principle upon which the Court in *Viro* based their support for the partial defence of excessive force:[49]

> The moral culpability of a person who kills another in defending himself, but who fails in a plea of self-defence only because the force he used was more than reasonably necessary, falls short of the moral culpability of murder.[50]

It is clear, therefore, that the Court in *Viro* follows the lead of Chief Justice Dixon in the *Howe* decision of characterizing the nature of the *offence* by considering the elements of the *defence.* This approach emphasizes — and rightly so — the moral culpability of the act, but establishes moral culpability by looking to the vague concept of "malice aforethought" rather than to the presence or absence of an intent to kill.

One must seriously question the validity of such reasoning, and especially its applicability to Canadian criminal law. There are two major objections. First, is the vague concept of "malice aforethought" applicable in Canada where the Code definition of murder governs? Under the Code, the 'moral culpability' of manslaughter vis-a-vis murder is a question of *intent.* If a person commits culpable homicide under section 205(5) and, when doing so, intends to cause death or inflict grievous bodily harm he knows is likely to cause death, he will have committed murder pursuant to section 212(a). Without that intent, the homicide will

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47. *Id.* at 302. (emphasis added).

48. *Supra* n. 42. The headnote to the *Viro* case (18 A.L.R. at 258) states that Mason and Jacobs J.J. held (Stephen J. concurring) that "those circumstances giving rise to an occasion of self-defence deprive a consequent intention to kill or inflict grievous bodily harm of the quality of the malice aforethought necessary for murder." *See* the decision of Jacobs J. at 308, and the final sentences of Stephen J.'s judgment at 293.

49. From the headnote to the case (18 A.L.R. at 258). *See* the judgments of Stephen J. at 292; Jason J. at 297; Aickin J. at 330.

50. It was in following this concept of reduced moral culpability that the Alberta Court of Appeal accepted the Australian reasoning. In *Fraser* (*supra* n. 5), Moir J.A. states (at 524) that "the defence of self-defence which fails because of excessive force operates so as to excuse the intent to kill or injure where the circumstances are such as to reduce the moral culpability of the accused, as it does in provocation, and may make the crime manslaughter, not murder." In *Gee* (*supra* n. 5), Moir J.A. bases (at 542) his decision on his reasons given in *Fraser,* and McDermid J.A. states, at 529, that "the moral culpability of a person who in order to prevent the commission of a violent crime uses more force than is necessary, is not such as to make him guilty of murder but only of manslaughter."

only be manslaughter.[51] In Canada, culpable homicide varies in degree of culpability depending on the presence or absence of *intent* and, as Mr. Justice Dickson stated in *Brisson*, "it is to the Code and not the cases that we should primarily direct attention"[52]

The second major objection to the Australian reasoning is that such reasoning commits the serious conceptual error of determining the nature of a crime by considering the elements of an excuse or justification *for* the crime. The clearest expression of this error is provided by Mr. Justice Mason's model charge to the jury, adopted by the Alberta Court of Appeal.[53] The suggested order of inquiry or analysis manifests an incorrect conception of what must be determined in distinguishing murder from manslaughter. A careful and complex inquiry into the accused's state of mind in relation to the defence of self-defence is set out, without once addressing the question of whether the intent requisite for the offence of murder is present:[54]

> . . . where threat of death or grievous bodily harm to the accused is in question and the issue of self-defence arises the task of the jury must be stated as follows:
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> (1)(a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him was being or was about to be made upon him.
>
> (b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.
>
> (2) If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.
>
> (3) If the jury is not satisfied beyond reasonable doubt that there is not such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.
>
> (4) If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.
>
> (5) If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, *that depending on the answer to the final question for the jury — did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced.*
>
> (6) If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.

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51. The Australian Court's distinction between malice aforethought and intent, then, probably does not exist in Canada. It would therefore be, in Canada, contradictory and illogical to adopt (even implicitly) the argument that — when determining the nature or quality of the offence of murder — a lack of malice excuses the presence of intent.

    In two of the Australian jurisdictions with codified criminal law, Queensland and Western Australia, the courts rejected the qualified defence, in part, because of its reliance on the common law concept of malice aforethought. Such a concept has no place in a *Code* jurisdiction, the courts argued, when the *Code* defines the moral culpability of a killing in terms of *intent*, with no mention or contemplation of malice aforethought. (*See R.* v. *Johnson* [1964] Q.L.R. 1 (Ct. of Crim. App.) at 7 and 25 and also *Aleksovski* v. *The Queen* [1979] W.A.R. 1 (Ct. of Crim. App.) at 5 and 9.) As Wickham J. in *Aleksovski* stated, "the absence of the common law concept of malice aforethought as a qualifying factor in offences under the *Criminal Code* distinguished this case from the reasoning in *R.* v. *Howe* . . . and of the majority of the High Court of Australia in the recent case of *Viro* v. *The Queen.*" (at 9).

52. *Supra* n. 6 at 105.

53. *R.* v. *Fraser*, *supra* n. 5, at 524 and *R.* v. *Gee*, *supra* n. 5, at 542.

54. *Viro*, *supra* n. 4, at 302-3. (emphasis added).

The question of whether murder or manslaughter has been committed is determined by an analysis of the accused's state of mind in relation to the necessary elements of the *defence*, with no attention directed to the necessary elements of the *offence*. The dissenting voice of Chief Justice Barwick in the case pointed out this fundamental error. In the Australian Court his voice went unheeded.[55]

Mr. Justice Dickson in *Brisson*, however, approved of Chief Justice Barwick's dissent in *Viro*. Theirs is surely the preferred view.[56] In reducing murder to manslaughter, the Court is making a determination as to the nature of the offence committed. It should be clear that the determination of the *nature* of an *offence* will not depend upon a consideration — subjective or otherwise — of the elements of a *defence*: the defence is only raised once the nature of the offence is determined. As Mr. Justice Dickson stated in *Gee*:[57]

> The distinction between murder or manslaughter is one of intent. Intent is an element of the offence under s. 212 of the Criminal Code. A determination with respect to the presence or absence of this intent must underlie any consideration of the existence of a defence or justification. It is the nature of the offence which determines what possible defences may be open to the accused. For example, a "defence" of provocation under s. 215 . . . is unnecessary where there is a finding of absence of intent under s. 212.

The point that must be drawn from Mr. Justice Dickson's comment is that the excuse or justification exonerates (or not) the commission of a crime, but it does not determine the *nature* of the crime. With respect to murder or manslaughter, the answer to the question of intent determines the nature of the crime; this answer is the fundamental or primary determination, one could say, of the accused's "moral culpability". The success or failure of the defence of self-defence, on the other hand, does not determine the nature of the crime, but only whether it will be justified (or excused) or not: the secondary or ancillary determination, if you will, of "moral culpability". One therefore sees how important section 26 of the Code is to our problem. If the defence of self-defence fails because excessive force was used, the accused is "criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess." We have already seen that the nature of the crime is determined by the presence or absence of intent. Depending, therefore, on whether that intent is present or not, the accused will be guilty of murder

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55. Barwick C.J.'s recommended charge, then, presents a much preferred order of consideration for the jury — that is, the proper conceptual division of analysis. The first and fundamental question of moral culpability is whether intent is present. All else follows. "If the charge be murder, [the trial Judge] should tell [the jury] that they must first be satisfied that the fatal act was done with intent to kill or to do grievous bodily harm. Unless they are so satisfied, the accused should in any case be acquitted of murder. But if they are so satisfied, and either accept that he was reasonably defending himself or entertain a reasonable doubt that he was not doing so, they should acquit him. If they are not so satisfied and entertain no reasonable doubt that in killing the deceased the accused was not reasonably defending himself, they should convict the accused of manslaughter." (*Viro*, *supra* n. 4, at 267.).

56. *Brisson*, *supra* n. 6, at 118: "As Barwick C.J. pointed out in dissent in *Viro* v. *The Queen*, the justices in *R.* v. *Howe* . . . ignored the fundamental considerations applicable to murder and manslaughter . . . the distinction between murder and manslaughter is based upon intent. The presence or absence of intent must be determined by the jury and that finding of fact is determinative of all that follows."

57. *Supra* n. 7 at 527.

or manslaughter if his act of killing is excessive. As Mr. Justice Dickson put it:[58]

> Success under s. 27 leads to acquittal. If the defence under s. 27 does not succeed, the jury should render the verdict which would have been rendered, absent s. 27. This may be a verdict of manslaughter, not because of partial justification under s. 27 but because the special element required for guilt of murder has not been proven. In other words, the half-way house is not to be found in s. 27 but, if at all, in s. 212.[59]

V. CONCLUSION

It has been my intention in this comment to show the major conceptual weakness in the qualified defence of excessive force which had been increasingly established in Canada prior to the Supreme Court decisions of *Brisson* (1982), *Gee* (1982) and *Faid* (1983). In these decisions the Supreme Court rejected the qualified defence, and rightly so. The reasoning of the High Court of Australia, which had been essentially adopted by those Canadian Courts that accepted the Australian common law defence, looked to the elements of the *defence* of self-defence, rather than to the elements of the *offence* of murder, to determine the "moral culpability" of the homicide. The nature of the offence, however, is not so determined. The defence is an answer to a crime, not a determination of it. Moreover, the Court distinguished "malice aforethought" from "intent to kill", stating that the latter is subordinate to the former in determining moral culpability. Such a distinction does not exist in Canada, however: under the Code, moral culpability is determined by the presence or absence of *intent*, not malice aforethought. Despite its appeal, the argument of the Australian Court is fundamentally unsound and the major premise upon which it rests is unapplicable to Canadian criminal law.[60]

VI. AMID THE RUINS OF THE HALF-WAY HOUSE

Having drawn that conclusion with respect to the Supreme Court's decision does not, of course, conclude the discussion of whether the qualified defence *should* be available in Canada, but rather galvanizes such discussion. The question raised by this issue cannot easily be answered. The arguments in favour of the defence are attractive, almost

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58. *Id.* at 529.

59. The Court of Criminal Appeal of Tasmania, one of the Australian jurisdictions with *Codes*, spoke in *Masnec* v. *The Queen* [1962] Tas.S.R. 254 (Tas. Ct. Crim. App.) on the applicability of s. 52 of the Tasmanian *Code*, an almost verbatim equivalent of our s. 26, and stated that "the 'nature' of homicide proceeding from excessive force is that it is unlawful and therefore culpable. Its 'quality' is determined by the mental element which accompanies it . . . the 'quality' of an unlawful homicide caused by excessive force must still be determined by the intention accompanying the act and will not necessarily be murder. But it will be murder if under pars. (a) and (b) of s. 157(1) [the equivalent of our s. 212(a) and (b)] there was a specific intention either to cause death or bodily harm which the offender knew to be likely to cause death." (at 263-4).

60. Should the common law partial defence be considered law in Canada by virtue of s. 7(3) of the *Criminal Code*? Although this question will not be discussed in this comment, it is at least arguable that this common law justification or excuse is inapplicable in Canada because it is, in fact, altered by and is inconsistent with the combination of s. 34(2) and s. 26 of the *Code*. On this matter, *see R.* v. *Johnson* [1964] Q.L.R. 1 at 9, and *Masnec* v. *The Queen* [1962] Tas.S.R. 254 at 264-5 (Tas. Ct. Crim. App.).

seductive, and we must therefore be cautious and deliberate in our consideration of the opposing policy claims. Only then will the complexities of this issue be properly appreciated, and our eventual decision approached with appropriate modesty.[61]

Perhaps the fundamental argument in favour of the defence is that the application of the objective standard in determining criminal liability is repugnant to the principles of modern criminal law. The criminality of an act is surely to be determined by looking to the accused himself, and to why he acted as he did, and not to the reasonable man and how *he* would have acted. The proponents of the qualified defence argue that the law, by entirely disallowing the defence of self-defence if a reasonable person would not have believed what the accused believed in certain circumstances, is too harsh and inflexible to adequately provide for the peculiar circumstances of the individual, which is the proper concern of the criminal law.

The objective test applied in assessing the reasonableness of the force used, and the belief held, in self-defence, however, already imports a substantial subjective component. The two leading Canadian decisions on the issue come from the Ontario Court of Appeal: *Regina* v. *Baxter*[62] and *Regina* v. *Bogue*.[63] In *Baxter*, the court held that the limits of the section 34(2) defence are not strictly determined by the objective standard of the reasonable person.[64] Although the accused's subjective belief is required to be based on reasonable grounds,[65] the court felt that in determining this issue the jury would have to consider what a reasonable person would do *under the circumstances* of the case.[66] Moreover, a mistaken but reasonable belief would not deprive the accused of the defence: "An accused's belief that he was in imminent danger from attack may be reasonable," asserted Mr. Justice Martin, "although he may be mistaken in his belief."[67] In *Bogue* the court further stated that 'excessive force' such as removes the defence of self-defence must be determined with regard to the state of mind of the accused at the time the an-

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61. For a discussion of the qualified defence see: N. Morris, *An Australian Letter* [1960] *Crim. L. Rev.* 468; C. Howard, *An Australian Letter: Excessive Defence* [1964] *Crim. L. Rev.* 448; N. Morris and C. Howard, *Studies in Criminal Law* (1964) 113; G.E. Parker, *A Plea of Self-Defence Resulting in Manslaughter* (1963) 3 *Alta. L. Rev.* 17; C. Howard, *Two Problems in Excessive Defence* (1968) 84 *L. Q. Rev.* 343; P. Smith, *Excessive Defence — A Rejection of Australian Initiative?* [1972] *Crim. L. Rev.* 524; C. James, *The Queensbury Rules of Self-Defence* (1972) 21 *Int. and Comp. L.Q.* 357; M. Sornarajah, *Excessive Self-Defence in Commonwealth Law* (1972) 21 *Int. and Comp. L.Q.* 758; I.D. Elliott, *Excessive Self-Defence in Commonwealth Law: A Comment* (1973) 22 *Int. and Comp. L.Q.* 727; A.D. Gold, *Manslaughter and Excessive Self-Defence* (1975) 28 C.R.N.S. 265; A. Manson, *Excessive Force in the Supreme Court of Canada: A Comment on Brisson and Gee* (1982) 29 C.R. (3d) 364; B. Ziff, *R. v. Faid: An Annotation* (1983) 25 Alta. L.R. (2d) 2.

See also: 11 Halsbury's Laws (4th) 629; G. Williams, *Textbook of Criminal Law* (1978) 497; J.C. Smith and B. Hogan, *Criminal Law* (4th ed. 1978) 328; D. Staurt, *Canadian Criminal Law: A Treatise* (1982) 447.

62. (1975) 27 C.C.C. (2d) 96 (Ont. C.A.).

63. (1976) 30 C.C.C. (2d) 403 (Ont. C.A.).

64. *Baxter, supra* n. 62, at 107-08.

65. *Id.* at 108.

66. *Id.* at 108-09.

67. *Id.* at 111.

tagonistic force was applied.[68] Both decisions, moreover, follow the Privy Council in *Palmer* v. *The Queen* [69] in stating that "a person defending himself against an attack, reasonably apprehended, cannot be expected to weigh to a nicety the exact measure of necessary defensive action."[70] It is clear, therefore, that the common law has altered the objective test to such an extent that the jury is expected to make a considerable subjective inquiry into the accused's state of mind at the time of the killing.

Indeed, in a case in which the determination of fact results in either an acquittal on one hand or a finding of murder on the other, the jury would be very circumspect in arriving at a verdict and would — with or without the sanction of the common law — make many subjective considerations. Given the power to convict a man for murder or to acquit him, jurors cannot help but make allowances for him: before condemning him, their conscience compels them to view things from his position. The point at which a jury's reasonable doubt is most important in these cases, then, is not when they consider whether intent was present or not (although this consideration is of vital importance) but at the point of deciding whether the accused acted in self-defence; whether, that is, his act was excessive. The availability — through the qualified defence — of a compromise verdict of manslaughter, then, may very well work against, rather than for, the accused. After placing themselves in his position at the moment of threatened danger, the jury may have a reasonable doubt that the accused acted excessively in response to that danger, but still not feel quite right about granting a complete acquittal. With no 'half-way house' available — when the only choice is between a murder conviction or an acquittal — the presence of a reasonable doubt in the collective mind of the jury would 'give them pause', and they would be more inclined to find in the accused's favour than if a compromise verdict of manslaughter offered them an easy solution to their dilemma.[71]

One sees, therefore, that a paradox arises in the application of the qualified defence which even the proponents of the defence would have to acknowledge. We have seen how the common law, and the natural tendencies among jurors, relieve the harshness of the objective test by importing a substantial subjective component to it. It is also clear, though, that when an alternative middle-ground manslaughter verdict is available, the objective test gains new life and significance and would more readily and strictly be applied. Those who object to the presence of the objective standard in serious criminal matters, and mean to restrict or

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68. *Bogue, supra* n. 63, at 408.

69. [1971] 1 All.E.R. 1077 (J.C.P.C.).

70. *Baxter, supra* n. 62, at 111; *Bogue, supra* n. 63, at 407-08.

71. This point is clearly made in *Reference under s. 48A of the Criminal Appeal (Northern Ireland) Act 1968)* [1976] 2 All.E.R. 937 (H.L.) at 958-59 where Lord Simon points out that the Attorney-General *wanted* the partial defence: "I can well understand the wish of the Attorney-General that it should be possible for a jury . . . to bring in a verdict of manslaughter rather than murder. In the first place, the natural reluctance of a jury to bring in a verdict of murder, with its fixed penalty of life imprisonment, is more likely to lead to a perverse acquittal than if a verdict of manslaughter . . . is available as an alternative."

eliminate its operation or impact on the determination of criminal liability by adopting the qualified defence, would, by adopting the defence, paradoxically *increase* its operation and impact.

A further consideration to be made along the same vein concerns the jury's determination that the accused acted unreasonably but honestly. In order for the qualified defence to be available, the jury would have to be satisfied that the accused acted unreasonably, but also satisfied that he acted honestly in the belief that the force he was using was reasonable. This 'honest belief in force necessary' would always be a fact that the jury must find in order to apply the half-way defence. Now, given the considerable subjective inquiry into the accused's state of mind permitted the jury by common law, and their own tendency to identify with the accused, if they were to find, as a matter of fact, the 'honest belief' necessary — that is, they were to believe the accused when he says he honestly felt he had to kill to save himself from death or grievous harm — could they also find as a matter of fact that the use of force was excessive or unreasonable? Such a result is possible, but unlikely.[72]

To look at it another way, the accused has killed someone and the Crown has proven — or the accused himself has admitted — that he did so intentionally. He claims, though, that in the circumstances he honestly believed that he had to kill to save himself. Now if the test of section 34(2)(a) — that he was under reasonable apprehension of death or grievous bodily harm — has been met (remembering that such apprehension may be reasonable although mistaken), could the jury then find that the intentional infliction of death or grievous harm in response would be unreasonable, especially in view of the fact that they are not to expect from the accused a nicely measured response in the situation? (And, of course, any reasonable doubt on this matter would lead to an acquittal.)

In short, the qualified defence may be superfluous at best, and harmful to the accused (by offering a compromise verdict) at worst.

In answer to these arguments one may readily point out that criminal law is not solely concerned with the rights of the accused: just as important is society's reliance on the criminal law to protect the community's interest in not having a person intentionally kill another unless it is reasonably necessary to do so. The proponents of the qualified defence, then, are not discomforted by the fact that the defence may work against the accused's interest, for the accused's interest is not necessarily the criminal law's interest. It may seem, therefore, that the supporters of the defence are confused as to why the defence should operate: whether it is to operate in the accused's favour, and to be embraced for that reason, or in society's favour, and therefore welcomed. Although the adversary system of law tends to foster such a division of perspective, the division is ultimately artificial. Surely the proper task of the criminal law is to establish a balance between the rights of the individual and the interests of the community, and it is towards this goal that criminal law should

72. In *Palmer*, *supra* n. 69, Lord Morris stated, in an oft-quoted passage, that "if a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken." (at 1088).

develop. The qualified defence, its proponents argue, would go a considerable way in realizing this objective. As was pointed out by Lord Simon in the *Criminal Appeals Reference*,[73] the fixed penalty for murder frequently leads to rigidities in the law which the half-way manslaughter verdict would relax. There would be cases when the qualified defence would act in the accused's favour by reducing what, under the current test for self-defence, would be a murder conviction to manslaughter, while in other cases, as Norval Morris claims, the qualified defence would be[74]

> . . . a wise technique whereby wrongdoers, who would otherwise have been acquitted, are convicted of manslaughter, and thus may help to affirm in the criminal law that reverence for life which is the fundamental requirement of a civilized community.

The desired balance between the interests of the accused and of the community, so the argument runs, would be more easily and reasonably approached than at present. The courts and triers of fact would not be forced into the austere and often unreasonable dilemma now cast upon them by the present law.

One must, however, consider this question of balance realistically. In a criminal matter, the state itself has accused an individual of committing a criminal offence and its powerful machinery is set in operation against him. Moreover, the accused stands to be condemned as a criminal and to suffer the consequences of a criminal conviction, especially serious when the indictment is for murder. In such situations, one would demand the state to be certain of its accusation and to prove it on a very high standard. Accordingly, the law has already "balanced the scale" in criminal matters by giving the accused the benefit of all reasonable doubt, and in a serious charge (for example, murder) this burden of proof becomes proportionately heavier. We have seen, however, that by introducing the partial defence the law would permit the jury to convict — of manslaughter — even though they harbour a reasonable doubt. The protection afforded the accused by centuries of legal development in the criminal law would thereby be severely weakened. The balance of interests that the law has carefully structured by developing the standard of reasonable doubt would in fact be undermined, and not promoted, by the introduction of the qualified defence.

Related to the need for balance in the criminal law, though, is the further supporting argument for the defence concerning the worthiness of the law's sensitivity to criminal culpability. Although the practicalities of the law's operation in the courtroom are definitely factors to be weighed in any policy consideration, they are not all that is to be valued. The broad policy concerns of the criminal law must focus on criminality, which is a moral concern, and the imposition of criminal liability for an act must reflect the presence and degree of moral culpability involved. The proponents of the defence argue that, because of its alternate verdict of manslaughter (and hence its variable sentence), the qualified defence would permit a greater flexibility in the assessment of the criminal liability of an actor (and thus a greater sensitivity to the moral culpability of an

73. *Supra* n. 71 at 959.

74. N. Morris, *An Australian Letter* [1960] *Crim. L. Rev.* 468 at 477.

act) than is presently available under the law. Charles James suggests that "there must be logic in the contention that the killer motivated by the need to protect himself is guilty of a lesser offence than the killer with an unmitigated intention to kill,"[75] and Morris contends that, because of the variable sentencing available on a manslaughter verdict:[76]

> Judges will have no difficulty in expressing by the form and severity of sentence their view of the gravity of the offence, whereas if the only choice is between murder and acquittal either excessive or no punishment will occur.[77]

Just as there is a need to balance the respective interests of society and the individual, so too should the criminal law be sensitive enough to inquire into varying degrees of moral guilt and be flexible enough to punish accordingly: it should as nearly as possible accommodate the reality of the human situation it is called upon to deal with.

It cannot be denied that the flexibility offered by the defence could potentially allow the law to be more sensitive to moral culpability, but the practical realities are still rooted in the dynamics of the courtroom and the inclinations of the jury. Although arguments of counsel would encourage the jurors to be sensitive to the moral culpability of a particular killing, still the jurors — if there was any question of doubt — would rarely be bold enough to commit themselves one way or another and decide to either convict or acquit, but would simply opt for the middle ground and the accused would suffer conviction for manslaughter. Their reluctance to convict of murder would be balanced by their hesitation to absolutely acquit in a case of doubtful, but intentional, killing. Significantly, it is only when there is an element of doubt that the jury would welcome this middle ground option, the doubt that would, under current law, lead to an absolute acquittal. It is perfectly understandable that the jury would embrace the compromise verdict, for nobody likes to be caught in a dilemma. But moral questions of the magnitude involved in a murder trial often become moral dilemmas, and such questions are not honestly answered — such dilemmas are not honestly solved — by avoidance. The difficulty of the decision under current law forces the jurors to be sure, forces them to grapple with the moral questions involved and become acutely sensitive to them, whereas the availability of a compromise verdict would relieve them of their onerous responsibility and may invite them to be less rigorous in their struggle with the moral questions involved. The moral questions would be slighted, rather than honoured, by the qualified defence.

The 'austere' dilemma currently imposed by the law, then, is paradoxically a better guarantee of a proper moral inquiry than the compromise verdict would be, and the current objective test, in its practical operation,

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75. C. James, *The Queensbury Rules of Self-Defence* (1972) 21 *International and Comparative L.Q.* 357 at 361.

76. *Supra* n. 74 at 476.

77. Peter Smith, in *Excessive Defence — A Rejection of Australian Initiative* [1972] *Crim. L. Rev.* 524 at 534, states that were a conviction of manslaughter available or required in cases of excessive self-defence, "the judge would have a much freer hand in selecting the appropriate sentence for the convicted man. The seriousness of the offence could properly be reflected in the sentence."

provides for a more subjective determination of criminal liability than would the availability of the compromise verdict.

The qualified defence is certainly attractive, but we must be cautious in our approach and wary of any possible hidden dangers. Of the most serious of these dangers is the compromise verdict which the defence would allow, and the threat such a verdict poses to the substantial subjective inquiry into the moral culpability of a killing currently permitted by the law. Moreover, it upsets the balance between the interests of the community and of the individual accused that has already evolved in the criminal law, and would deaden, rather than quicken, sensitivity to the moral culpability of a killing. Admittedly these dangers all arise from the practical operation of the defence in the courtroom, and the policy concerns of the law should not be limited solely to such practicalities, but it is still in the courtroom that the reality of the criminal law, and its operation in the life of society, is found. Any decision concerning the desireability of the defence, therefore, should not ignore — but should be primarily concerned with — that reality.

The dangers posed by the compromise verdict outweigh the benefits to, or advances in, the criminal law which the compromise offers. The Supreme Court has rejected the defence for several reasons and, if for no other reason than these dangers of compromise, it should continue to be rejected. As Mr. Justice Dickson asserted in *Faid*, "it lacks any recognizable basis in principle."[78] That is, the major concerns of the criminal law are already served by the defence of self-defence, and the new qualified defence would simply be an unwarranted and damaging intrusion.

78. *Supra* n. 8 at 518.