

TABLE OF CONTENTS

<i>Dedication</i>	iii
<i>Preface</i>	v
<i>Major Works Referred to</i>	ix
Chapter 1 INTRODUCTION: THE NEED TO ADOPT BROADER PERSPECTIVES	1
A. Canada's Criminal Code	1
B. Rocky Road to General Part	4
C. Sources of Criminal Law	8
1. Statutory	8
2. Judge-made	9
3. Charter of Rights and Freedoms	13
(1) Purposeful Interpretation of Entrenched Rights	13
(2) "Dialogue with Parliament": A Dangerous Metaphor ..	14
(3) Demonstrably Justified Reasonable Limits	17
(4) Impact of Charter on Criminal Justice	18
D. Rule of Law	20
1. Certainty	21
(1) As an Ideal	21
(2) As a Constitutional Imperative (Vagueness and Overbreadth)	25
2. Accessibility	34
3. Non-retroactivity	35
4. Strict Construction (Presumption in Favour of Liberty) ..	37
E. Procedural and Evidentiary Contexts	41
1. Presumption of Innocence	41
2. Contrasting Substantive Issues	52
3. Classification of Offences	52
F. Truths of Criminology	54
G. Using Penal Sanctions with Restraint	58
H. Sentencing Aims and Principles	63
I. Mandatory Minimum Penalties	69
J. "Diversion" and "Restorative Justice"	76
K. Rights of Victims	77
L. Feminist Perspectives	80
M. Overview	84
Chapter 2 THE ACT REQUIREMENT (ACTUS REUS)	87
A. Why Insist on an Act?	87
B. Definition	88
1. Act of Commission	92
(1) Ambiguously Defined Acts	92
(2) Status Offences	97
2. Act of Omission	99
(1) Definition	99

(2) Existing Law	101
(3) Omissions to Provide Necessaries of Life	106
(4) What Should the Law Be?	109
3. By a Human Being	113
4. Voluntary	113
(1) Generally	113
(2) Rationale	117
(3) Restrictions	121
(a) Insanity	122
(b) Voluntary Intoxication	142
(c) Negligence	144
(4) What Should the Law Be?	146
5. Causing Consequences	147
(1) Rationale	148
(2) Code Homicide Causation Rules	149
(3) <i>Smithers</i>	151
(4) Challenging the <i>Smithers</i> Test	153
(5) First Degree Murder (<i>Harbottle</i>)	154
(6) <i>Nette</i> : Re-consideration and Confusion	157
(7) Factual Cause	160
(8) Imputable Cause	163
(9) Acts of Independent Actors (<i>Maybin</i>)	170
(10) Codifying Causation Principles	176
Chapter 3 THE FAULT REQUIREMENT (MENS REA OR	
NEGLIGENCE)	179
A. Need for Fault	179
B. Subjective/Objective Distinction	182
1 For Substantive Tests	182
2 Objective Approach to Proof	183
C. Common Law Tradition of Subjective Approach to Mens Rea .	187
D. Fault for Public Welfare Offences	189
1. Prior to <i>Sault Ste. Marie</i>	189
2. The Decision in <i>Sault Ste. Marie</i>	196
(1) Classification of Offences	200
(2) “Half-way House” Approach	202
(3) Absolute Liability	206
3. Applying <i>Sault Ste. Marie</i>	206
(1) Supreme Court	206
(2) Lower Court Rulings	210
4. Distinguishing Real and Regulatory Offences	212
5. Minimum Charter Standard of Due Diligence for Any	
Offence	214
(1) Where Liberty Interest Threatened	214
(2) Where Security Interests Affected	218
(3) Due Diligence Standard Not to be Qualified	220
(4) Reverse Onus for Regulatory Offences	221
6. Summary: Normally Due Diligence Defence	224

E. Fault for Crimes	225
1. Charter Standards.....	225
(1) Constructive Murder Unconstitutional.....	225
(2) Constructive First Degree Murder Constitutional.....	223
(3) Subjective Awareness Required for Few Crimes to Reflect Stigma and Proportional Punishment.....	235
(4) Intentional Conduct to be Punished More Than Negli- gence	237
(5) Objective Crimes Require Marked Departure; Crimes Based on Predicate Offences Merely Require Reasonable Foresight of Harm.....	238
(6) No Constitutional Requirement of Foresight of Conse- quences.....	238
2. Three Categories of Crime (<i>Creighton</i>).....	241
(1) Subjective Mens Rea.....	241
(a) Express or implied	242
(b) Policy favouring subjective awareness	251
(c) Intent or knowledge.....	252
(d) Intent or motive.....	253
(e) Indirect intent or knowledge	259
(f) Extension to recklessness	260
(g) Definition of recklessness.....	266
(h) Wilful blindness	270
(i) U.K. courts return to subjective standard	275
(j) Foresight of consequences.....	277
(k) Knowledge of wrongness not required	277
(l) Particular states of mind.....	278
(i) Dishonesty, etc	278
(ii) “Specific intent”	280
(iii) Planned and deliberate murder	283
(m) The “doctrine” of transferred malice.....	287
(2) Objective Crimes (Negligence).....	291
(a) Trend to individualised objective standards.....	291
(b) Express or implied	294
(c) Marked departure requirement (<i>Creighton</i> and <i>Beatty</i>).....	295
(d) No individual factors short of incapacity (<i>Creighton</i>).....	298
(e) Activity-sensitive Approach to Objective Fault (<i>Javanmardi</i>)	302
(f) “Criminal negligence” under section 216: Marked and substantial departure	304
(3) Crimes Based on Predicate Offences	309
(a) Limited fault requirements.....	309
(b) Why have constructive liability?.....	310

(c) Special case for constructive manslaughter?.....	310
(d) Aggravated assault and assault causing bodily harm.....	311
F. Basic Deficiencies of Current Law on Fault	314
1. Due Diligence Compromise for Regulatory Offences Sets Standard Too Low	314
2. Current Objective Standards for Criminal Code Offences Need to be Further Restricted	315
3. Clear Definitions of Various Forms of Fault Need to be Codified.....	316
4. Guidelines Needed as to Fault Standard	319
G. Normative Theories	319
Chapter 4 MISTAKE OR IGNORANCE	323
A. Mistake or Ignorance of Fact	323
1. Question of Fault	323
2. Ignorance and Mistake	324
3. Subjective or Objective	325
(1) U.K. Law	325
(2) Canadian View	328
(3) Mistaken Belief in Consent	332
(a) Air of reality test	332
(b) Honest belief approach (<i>Pappajohn</i>).....	336
(c) Are general principles adequate for sexual assault?.....	339
(d) Duty to take reasonable steps (Parliament)	340
(e) <i>Ewanchuk</i> limits	345
(f) Testing <i>Ewanchuk</i> in ambiguous situations.....	351
(g) <i>Barton</i> tightens the limits	357
(h) Possible Charter challenges	358
4. Materiality.....	364
B. Mistake or Ignorance of Law	374
1. General Rule	374
2. Rationale.....	375
3. Exceptions	382
(1) Impossibility (Including Non-publication).....	382
(2) Colour of Right.....	387
(3) Reliance on Erroneous Statement of Law	391
(4) Incapacity	401
C. Distinguishing Mistakes of Fact and Law	402
D. Mistake or Ignorance and Omissions	406
Chapter 5 THE SIMULTANEOUS PRINCIPLE	409
A. Generally	409
B. Departures.....	411
1. Superimposing Intent on Innocent Act.....	411
2. Failing to Correct Created Danger.....	412
3. Regarding Series of Acts as One Transaction.....	412
4. Intoxication for Purpose of Crime	413

5. Negligence Offences	413
Chapter 6 INCAPACITY	415
A. Immaturity	415
1. Special Criminal Laws for Children	415
2. Rules of Age Incapacity.....	419
B. Insanity (Mental Disorder)	421
1. Introduction	421
(1) Limited Truths of Psychiatry	421
(2) Dangers of Civil Commitment Procedures	426
(3) Limited Dispositional Alternatives in Criminal Law	427
2. Fitness to Stand Trial	430
(1) Present Law.....	430
(2) Unfitness Not Due to Mental Disorder.....	433
3. Defence of Insanity (Mental Disorder) at Trial	434
(1) Under Section 16.....	435
(a) Onus.....	437
(b) “Disease of the mind”	439
(c) “Incapable of appreciating the nature and quality of an act or omission”	444
(d) “Incapable” of “knowing” conduct is “wrong”	448
(e) Juristic nature of section 16 defence.....	452
(2) Evidence of Mental Disorder Negating Mens Rea.....	453
(3) Reform Options.....	457
C. Intoxication	469
1. Generally.....	469
2. Defences to Specific Intent Crimes (<i>Beard</i> Rules).....	471
(1) “Specific Intent”	473
(2) Incapacity or Intent in Fact?.....	480
(3) Degree of Intoxication	482
3. Case Against Specific/General Intent Approach	485
4. Extreme Intoxication Akin to Automatism or Insanity as Defence to General Intent Crimes (<i>Daviault</i>).....	489
5. Parliament Abolishes the <i>Daviault</i> Defence	495
6. Three Degrees of Intoxication (<i>Daley</i>)	500
7. Reform Options.....	500
(1) Allow Intoxication to be Considered for All Mens Rea Determinations but Not Negligence	500
(2) Proposals Aimed at Drunken Offenders.....	502
(a) Constructive mens rea.....	502
(b) Special verdict like that for insanity	503
(c) An independent intoxication offence	504
(d) Special verdict of guilty but intoxicated	507
Chapter 7 JUSTIFICATIONS OR EXCUSES	509
A. Generally	509

xvi TABLE OF CONTENTS

1. New Defences: At Common Law or Under the Charter	509
2. Principle of Justification or Excuse	511
3. Purported Distinction Between Justification and Excuse	511
4. “Moral Involuntariness” becomes Charter Standard for Defences	514
5. Subjective or Objective	517
6. Putative Justifications	518
7. Onus of Proof and “Air of Reality”	519
B. Individual Defences	522
1. Defence of Person (Including Self-defence).....	522
(1) Outdated and Unduly Complex Criminal Code Rules	522
(2) New Simplified Umbrella Approach in Section 34.....	523
(3) Sensitivity where Accused Victim of Abuse	533
2. Defence of Property.....	538
3. Duress (Compulsion, Coercion)	540
(1) Excluded Offences	544
(2) Nature of Threat	549
(3) Belief of Accused	551
(4) No Safe Avenue of Escape and Proportionality	552
(5) Not a Party to Conspiracy.....	553
(6) Need for Major Reform.....	554
4. Protection of Persons Administering and Enforcing the Law	556
5. Lawful Authority or Reasonable Excuse	562
6. Protection of Persons in Authority.....	564
(1) Physical Discipline of Children	564
(2) Physical Discipline on Board Ship	571
(3) Surgery	572
7. Necessity (Including Impossibility).....	576
(1) <i>Perka</i>	576
(2) <i>Morgentaler</i>	579
(3) <i>Latimer</i>	582
(4) Other Necessity Claims	588
(5) Separate Defence of Impossibility?.....	592
(6) Residual Defence of Necessity?.....	593
(7) A More Generous Defence of Necessity.....	597
8. Partial Defences to Murder.....	599
(1) Provocation	599
(a) Only to murder.....	600
(b) Provocation and voluntariness	601
(c) Anger alone not sufficient.....	601
(d) Wrongful act or insult	603
(e) 2015 Narrowed Trigger.....	604

(f) Sufficient to deprive an ordinary person of self-control	606
(g) Accused must have acted in response to provocation	612
(h) On the sudden before there was time for his passion to cool	613
(i) Air of reality and proof	614
(j) Murder with extenuating circumstances?	620
(2) Voluntary Intoxication.....	624
(3) Diminished Responsibility	624
(4) Excessive Force	625
(5) Cumulative Effect on Intent (“Rolled up” Charge)	628
(6) Infanticide	629
8. Defence of Prank.....	632
9. Obedience to Orders	633
Chapter 8 OTHER DEFENCES	637
A. Consent	637
1 Juristic Nature.....	637
2 Subjectively Determined.....	639
3 Express or Implied.....	639
4 Informed	641
5 Codifying “No Means No” Philosophy for Sexual Assault	642
6 Not to Death.....	650
7 Not Excluded by the Nature of the Offence.....	651
8 Freely Given.....	651
9 Vitiating by Fraud	654
10 Vitiating by Policy Considerations	661
11 Concluding Comment	665
B. Entrapment	665
1 Generally.....	665
2 Defence in United States.....	666
3 Stay as Abuse of Process	669
4 Substantive Requirements	672
5 Matter for Trial Judge.....	677
6 Burden and Standard of Proof.....	678
7 Mitigating Sentence	679
8 Should There Be Defences of Entrapment?	680
C. Dispensing Powers.....	682
1. Generally.....	682
2. Discharges	682
3. De Minimis Non Curat Lex.....	684
Chapter 9 PARTIES TO AN OFFENCE	691
A. History	691
B. Principals	693
C. Aiders and Abettors	694
1. Actus Reus	694

xviii TABLE OF CONTENTS

2. Mens Rea	698
3. Special Rules	701
D. Counsellors and Procurers	703
E. Doctrine of Common Intent	705
1. Common Intent	707
2. Carrying Out Common Purpose	707
3. Ought to Have Known About Probable Commission of Offence.....	710
4. Party Commits Offence in Carrying Out Common Purpose	711
F. Reforming Law of Complicity	712
G. Accessories After the Fact	713
1. Present Law.....	713
2. Reform Considerations.....	716
H. Vicarious Responsibility.....	716
Chapter 10 INCOMPLETE CRIMES: ATTEMPTS, CONSPIRACY AND COUNSELLING	723
A. Attempts.....	723
1. Rationale.....	723
2. Mens Rea	724
3. Actus Reus	728
(1) Existing Tests	728
(2) A Time for Re-appraisal.....	735
4. Should the Law of Attempts be Abandoned?.....	739
5. Voluntary Desistance.....	740
6. Impossible Attempts	742
7. Attempting Any Offence.....	744
8. Penalty	745
B. Conspiracy	745
1. Common Law History.....	745
2. Legislative Background.....	746
3. Abolishing Common Law Conspiracies.....	748
4. General Doctrine.....	750
(1) Agreement for Common Purpose.....	751
(2) Between Two or More Persons	759
(a) Spouses.....	760
(b) One person companies	761
(c) Agents provocateurs	762
(3) Purpose Prohibited by Statute.....	762
(a) Conspiracy to commit indictable offence (section 465(1)).....	764
(b) Conspiracy to commit summary conviction offence (section 465(1)(d)).....	764
5. Need to Further Restrict Conspiracy	767
6. Voluntary Desistance.....	769
7. Impossible Conspiracies	770
8. Merger.....	770

9. Specialized Conspiracies.....	772
C. Counselling.....	774
1 Present Law.....	774
2 Comment.....	775
D. Combining Incomplete Crimes.....	776
Chapter 11 GROUP RESPONSIBILITY: CORPORATIONS, CRIMINAL ORGANIZATIONS AND TERRORIST GROUPS	779
A. Corporations.....	779
1. Common Law.....	779
2. United Kingdom.....	783
3. United States.....	785
4. Applying General Principles to Corporations.....	786
5. Reform Options.....	789
(1) Change Focus to Corporate Culture.....	789
(2) Special Standards for Directors.....	791
6. New Criminal Code Provisions for Organizations (2003). 792	
B. Criminal Organizations (Anti-gang Laws).....	794
1. Biker Violence.....	794
2. Participation in Criminal Organization (Gangsterism) (1997).....	795
3. Fiasco of Manitoba Warriors Trial.....	797
4. Widening Gangsterism Laws (2001).....	799
C. Terrorist Groups.....	804
1. 9/11 Attacks.....	804
2. Definition of Terrorism.....	805
3. Broad New Offences.....	807
4. Three-Year Review.....	811
5. 2020 Realities.....	812
<i>Appendix A Draft General Part</i>	<i>815</i>
<i>Table of Cases</i>	<i>821</i>
<i>Index</i>	<i>877</i>