SUMMARY
OF
PROPOSED LEGISLATION

Principle of legality

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

Criminal liability

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

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

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

Mental requirements in definitions of offences

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

[Acts: Knowledge]

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

[Omissions: Knowledge]

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

[Other situations]

(*c*) by reason of any other situation (including possession) specified in the definition of that offence unless he knows the circumstances specified in that definition,

[Consequences: Foresight]

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

[Purposes]

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

Immaturity

Alternative (1)

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

Immaturity

Alternative (2)

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

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

Mental disorder

Alternative (1)

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

Mental disorder

Alternative (2)

5. Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he lacked substantial capacity

either to appreciate the nature, consequences or moral wrongfulness of such conduct or to conform to the requirements of the law.

Intoxication

Alternative (1)

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

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

Intoxication

Alternative (2)

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

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

Automatism

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

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

Physical compulsion and impossibility

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

Mistake or ignorance of fact

General rule

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

Alternative offences —

Offence under same section

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

Included offence

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

Offence under different section

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

Wilful blindness

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

Requirement of reasonableness in non-*Code* offences

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

Mistake or ignorance of law

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

General rule

Restriction concerning private rights

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

Restriction concerning non-publication, etc.

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

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

(*b*) reliance on judicial authority, and

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

Duress

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

Necessity

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

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

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

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

Self-defence

General rule

13. (1) Subject to the provisions of this section, every one is justified in using no more force than necessary to protect himself or any one under his protection against unlawful force, provided that the force used is proportionate to the harm apprehended from the unlawful force.

Restriction concerning law enforcement

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

Restriction on self-defence by an aggressor

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

Protection of movable property

General rule

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

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

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

Restriction on degree of force

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

Peaceable possessor

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

Protection of immovable property

General rule

15. (1) Subject to the provisions of this section, every one in peaceable possession of immovable property is justified in using no more force than necessary to prevent another from trespassing on it, to remove a trespasser from it or to defend his possession against any other person entering to take possession of it.

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

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

Restriction on degree of force

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

Law enforcement

General rule

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

Specific powers

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

(*a*) effecting lawful arrest,

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

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

Justification concerning defective process

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

Restriction on degree of force

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

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

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

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

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

Lawful assistance

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

Endnotes to the General Part

1. *R. v. Prue and Baril*, [1979] 2 S.C.R. 547 at 548, (1979) 46 C.C.C. (2d) 257, 8 C.R. (3d) 68, 96 D.L.R. (3d) 577, [1979] 4 W.W.R. 554.
2. *Shaw v. D.P.P.*, [1962] A.C. 220 at 268.
3. *Fagan v. Commissioner of Metropolitan Police*, [1969] 1 Q.B. 439.
4. Holmes, *The Common Law* (1881) 45.

4a. H. L. A. Hart, "The Ascription of Responsibility and Rights" (1949) 49 *Proc. Arist. Soc.* 171, at pp. 179-80.

5. *R. v. Tolson* (1889), 23 Q.B.D. 168 at 185.
6. *Ibid.*, at 187.
7. *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30.
8. *R. v. Prue and Baril*, *supra*, n. 1 at 553.
9. *St -Germain c. R.*, [1976] C.A. 185 (Qué).
10. *Harding v. Price*, [1948] 1 All E.R. 283, [1948] 1 K.B. 695.
11. *Hill v. R.*, [1975] 2 S.C.R. 402, 24 C.R.N.S. 297.
12. *Leblanc v. The Queen*, [1977] 1 S.R.C. 339, 29 C.C.C. (2d) 97, 68 D.L.R. (3d) 243.
13. *Arthurs v. The Queen*, [1974] S.C.R. 287, 7 C.C.C. (2d) 438, 28 D.L.R. (3d) 565.
14. *R. v. Coyne* (1958), 124 C.C.C. 176, 31 C.R. 335 (N.B.C.A.).
15. *Smithers v. R.*, [1978] 1 S.C.R. 506, 34 C.C.C. (2d) 427, 75 D.L.R. (3d) 321, 40 C.R.N.S. 79.
16. *R. v. Buzzanga and Durocher* (1980), 49 C.C.C. (2d) 369 (Ont. C.A.).
17. See for example Mewett and Manning, *Criminal Law* (1978) 92-93.
18. Kenny, *Outlines of Criminal Law* (19th Ed. Turner 1966) 80.
19. *R. v. B.C.* (1977), 39 C.C.C. (2d) 469 (Ont. Prov. Ct.).
20. Law Reform Commission of Canada, *The Criminal Process and Mental Disorder*, Working Paper No. 14 (1975).
21. *M'Naghten's Case* (1843), 4 State Tr. N.S. 847.

22. *Criminal Code*, R.S.C. 1970, c. C-34, s. 216.

23. *R. v. Kasperek*, [1951] O.R. 776, 101 C.C.C. 375, 13 C.R. 206 (C.A.). *McRuer Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases* (1956) at 64.

24. *More v. The Queen*, [1963] S.C.R. 522, [1963] 3 C.C.C. 289, 41 C.R. 98.

25. *Ibid.*; *Chartrand v. The Queen*, [1977] 1 S.C.R. 314, 26 C.C.C. (2d) 417, 64 D.L.R. (3d) 145, 8 N.R. 503.

26. *R. v. Blackmore* (1967), 1 C.R.N.S. 286, [1965-69] 4 N.S.R. 509 (N.S.C.A.); *R. v. Mulligan* (1974), 18 C.C.C. (2d) 270, 26 C.R.N.S. 179 (Ont. C.A.), affirmed [1977] 1 S.C.R. 612, 28 C.C.C. (2d) 266; *R. v. Hilton* (1977), 34 C.C.C. (2d) 206 (Ont. C.A.); *Meloche v. R.*, [1975] C.A. 558 (Que.).

27. See *MacDonald v. R.*, [1977] 2 S.C.R. 665 (robbery) and *Rabey v. R.*, [1980] 2 S.C.R. 513, 15 C.R. (3d) 225, affirming (1977), 37 C.C.C. (2d) 461 (Ont. C.A.).

28. See *R. v. Creighton* (1908), 14 C.C.C. 349 (Ont. H. Ct.) and *R. v. Jessamine* (1912), 19 C.C.C. 214 (Ont. C.A.).

29. *Criminal Code* s. 216 adopted in 1922 after an English Statute (1922). See Williams, *The Sanctity of Life* (1958).

30. *Homicide Act* (1957), s. 7 (Eng.).

31. *R. v. Borg*, [1969] S.C.R. 551, [1969] 4 C.C.C. 262; *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, 77 D.L.R. (3d) 507, 16 O.R. (2d) 129 (Ont. C.A.); *Cooper v. The Queen*, [1980] 1 S.C.R. 1149, 51 C.C.C. (2d) 129, 13 C.R. (3d) 97.

32. But see Dubin J., *R. v. Cooper* (1978), 40 C.C.C. (2d) 145 at 147 (Ont. C.A.).

33. Stroud, *Mens Rea* (1914).

34. See *R. v. Charlson* (1955), 39 Cr. App. R. 37, [1955] 1 All E.R. 859.

35. See *R. v. Kemp*, [1956] 3 All E.R. 249, [1957] 1 Q.B. 399.

36. See *Bratty v. A.-G. for Northern Ireland* (1961), 46 Cr. App. R. 1 (H.L.).

37. *R. v. Kemp*, *supra*, n. 35.

38. Recent cases provide comprehensive definitions of the term. See *Cooper v. The Queen*, *supra*, n. 31.

39. *R. v. Windle*, [1952] 2 Q.B. 826 (C.C.A.); *Schwartz v. The Queen*, [1977] 1 S.C.R. 673, 29 C.C.C. (2d) 1.

40. *R. v. Laycock*, [1952] O.R. 908 (C.A.); *R. v. Cracknell*, [1931] O.R. 634, 56 C.C.C. 190, [1931] 4 D.L.R. 657 (C.A.); *R. v. Harrop* (1940), 74 C.C.C. 228, [1940] 3 W.W.R. 77, [1940] 4 D.L.R. 80 (Man. C.A.) where "wrong" was interpreted as "morally wrong"; *contra R. v. Cardinal* (1953), 17 C.R. 373, 10 W.W.R. (N.S.) 403 (Alta. C.A.).

41. *Schwartz v. The Queen*, *supra*, n. 39, Dickson J. at 689-690.

42. *Ibid.*

43. *Criminal Code*, subs. 16(3).

44. McRuer Report, *supra*, n. 23 at 46.

45. *Woolmington v. D.P.P.*, [1935] A.C. 462.

46. *Smythe v. The King*, [1941] S.C.R. 17, 74 C.C.C. 273, [1941] 1 D.L.R. 497.

47. *R. v. Frank*, [1971] 1 O.R. 693, 2 C.C.C. (2d) 287, 12 C.R.N.S. 339 (C.A.); *Re Regina and Scroggie* (1974), 15 C.C.C. (2d) 309 (B.C.S.C.).

48. *R. v. Irwin* (1977), 33 C.C.C. (2d) 1 (Ont. C.A.).

49. *Criminal Code*, s. 542.

50. *R. v. Barnier*, [1980] 1 S.C.R. 1124, 51 C.C.C. (2d) 193.

51. *Schwartz v. R.*, *supra*, n. 39.

52. *R. v. Barnier*, *supra*, n. 50.

53. *Cooper v. R.*, *supra*, n. 31.

54. *R. v. Hilton* (1977), 34 C.C.C. (2d) 206 (Ont. C.A.); *R. v. Meloche* (1975), 34 C.C.C. (2d) 184 (Qué. C.A.); *R. v. Lechasseur* (1977), 38 C.C.C. (2d) 319 (Qué. C.A.).

55. Beck and Parker, "The Intoxicated Offender, A Problem of Responsibility" (1966) 44 *Can. Bar Rev.* 563.

56. *R. v. Davis* (1881), 14 Cox C.C. 563.

57. *R. v. Doherty* (1887), 16 Cox C.C. 306.

58. *D.P.P. v. Beard*, [1920] A.C. 479 (H.L.).

59. *Ibid.*

60. *R. v. Davis*, *supra*, n. 56.

61. *D.P.P. v. Beard*, *supra*, n. 58. See Mewett and Manning, *supra*, n. 17 at 170-177.

62. Smith and Hogan, *Criminal Law* (4th Ed. 1978) 189. Mewett and Manning, *supra*, n. 17 at 168.

63. *R. v. King*, [1962] S.C.R. 746, 133 C.C.C. 1, 38 C.R. 52, 35 D.L.R. (2d) 386, affirming (1961), 129 C.C.C. 391, 34 C.R. 264 (Ont. C.A.).

64. *R. v. George*, [1960] S.C.R. 871, 128 C.C.C. 289, 34 C.R. 1; *McAskill v. The King*, [1931] S.C.R. 330, 55 C.C.C. 81, [1931] 3 D.L.R. 166.

65. *R. v. George*, *supra*, n. 64.

66. *Leary v. The Queen*, [1978] 1 S.C.R. 29 at 42.

67. *R. v. Majewski*, [1977] A.C. 443 (H.L.).

68. *Leary v. The Queen*, *supra*, n. 66 at 47, 33 C.C.C. (2d) 473, 74 D.L.R. (3d) 103, 37 C.R.N.S. 60, [1977] 2 W.W.R. 628, 13 N.R. 592.

69. *Bratty v. A.-G. for Northern Ireland* (1961), 46 Cr. App. R. 1 (H.L.); *R. v. Hartridge*, [1967] 1 C.C.C. 346, 48 C.R. 389, 56 W.W.R. 385, 57 D.L.R. (2d) 332 (Sask. C.A.); *R. v. O'Brien*, [1966] 3 C.C.C. 288, 56 D.L.R. (2d) 65 (N.B.C.A.); *Cullum v. R.* (1973), 14 C.C.C. (2d) 294 (Ont. Co. Ct.); *R. v. Rabey* (1977), 37 C.C.C. (2d) 461 (Ont. C.A.).

70. *Rabey v. R.*, *supra*, n. 27.

71. *Bleta v. The Queen*, [1964] S.C.R. 561, [1965] 1 C.C.C. 1, 44 C.R. 193, 48 D.L.R. (2d) 139.

72. *R. v. Kemp*, *supra*, n. 35.

73. *R. v. Hartridge*, *supra*, n. 69.

74. *R. v. Quick and Paddison*, [1973] 3 All E.R. 347, 57 Cr. App. R. 722, [1973] Q.B. 910 (C.A.).

75. *Rabey v. R.*, *supra*, n. 27.

76. Hale, 1 *Pleas of the Crown* (1678) 434.

77. *R. v. McDowell* (1980), 52 C.C.C. (2d) 298 at 304 (Ont. C.A.).

78. Kenny, *Outlines of Criminal Law* (17th Ed.) 81.

79. *R. v. Bamber* (1843), 114 E.R. 1254 (Q.B.); *Strasser v. Roberge*, [1979] 2 S.C.R. 953.

80. *Richard Lamer Foundation Inc. v. Construction Office of Quebec* , 36 C.R.N.S. 257 (Qué. S.C.).

81. Smith and Hogan, *supra*, n. 62 at 211.

82. *R. v. Tolson* (1889), 23 Q.B.D. 168.

83. *R. v. Rees*, [1956] S.C.R. 640, 115 C.C.C. 1; *Beaver v. The Queen*, [1957] S.C.R. 531, 118 C.C.C. 129, 26 C.R. 193; *Pappajohn v. R.*, [1980] 2 S.C.R. 120, 14 C.R. (3d) 243, [1980] 4 W.W.R. 387; *R. v. Sault Ste. Marie*, *supra*, n. 7.

84. *R. v. Chapin*, [1979] 2 S.C.R. 121, 7 C.R. (3d) 225, 45 C.C.C. (2d) 333.

85. *R. v. Kundeus*, [1976] 24 C.C.C. (2d) 276, 32 C.R.N.S. 129, 2 S.C.R. 272, 5 N.R. 471, rev'g (1974), 17 C.C.C. (2d) 345, 32 C.R.N.S. 129, [1974] 4 W.W.R. 228 (B.C.C.A.).

86. *Idem*, [1976] 2 S.C.R. 272 at 280.

87. *Ibid.*, at 284.

88. *Roper v. Taylor's Central Garage Ltd.*, [1951] 2 T.L.R. 284.

89. *R. v. Sault Ste. Marie*, *supra*, n. 7.

90. See Fletcher, *Rethinking Criminal Law* (1978).

91. *Criminal Code*, s. 19.

92. See *R. v. Howson*, [1966] 3 C.C.C. 348, 47 C.R. 322, 55 D.L.R. (2d) 582 (Ont. C.A.).

93. An honest but mistaken belief that a first marriage has been dissolved through divorce is a matter which has caused controversy under this rule. A line of cases illustrated by *R. v. Wheat and Stocks*, [1921] 2 K.B. 119 (C.C.A.), 15 Cr. App. R. 134 refuses the defence in such circumstances. This case was later overruled by *R. v. Gould* (1968), 52 Cr. App. R. 152 (C.C.A.). See the recent Canadian case *R. v. Woodridge* (1978), 40 C.C.C. (2d) 30 (Sask. Prov. Ct.).

94. Although this is clearly recognized for regulations (R.S.C. 1970, c. R-5, s. 6) there appears to be no modern authority which supports this where crimes are concerned.

95. *Molis v. R.*, [1980] 2 S.C.R. 356; *R. v. Shymkowich*, [1954] S.C.R. 606, 110 C.C.C. 97, 19 C.R. 401.

96. *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369, 22 C.R.N.S. 258 (Ont. C.A.); *R. v. Hemmerly* (1976), 30 C.C.C. (2d) 141 (Ont. C.A.); *R. v. Howson*, [1966] 3 C.C.C. 348 (Ont. C.A.).

97. See for example, *Criminal Code*, s. 202 defining criminal negligence, s. 238 on driving while disqualified. This latter section has been ruled *ultra vires* by the Supreme Court of Canada in *Boggs v. The Queen*, [1981] 1 S.C.R. 49.

98. For example, setting fire by negligence, *Criminal Code*, s. 392.

99. For example, trespassing at night, *Criminal Code*, s. 173.

100. *R. v. Andsten and Petrie* (1960), 33 C.R. 213 (B.C.C.A.) on *Criminal Code*, s. 173; *R. v. Villeneuve*, [1968] 1 C.C.C. 267; 2 C.R.N.S. 301 (N.S. Co. Ct.) on *Criminal Code*, s. 238.

101. *R. v. Prue and Baril*, *supra*, n. 1.

102. *R. v. MacLean* (1979), 49 C.C.C. (2d) 552, 12 C.R. (3d) 1, 32 N.S.R. (2d) 650 (C.A.).

103. R.S.C. 1970, c. R-5.

104. R.S.C. 1970, c. I-23, ss. 5 and 17.

105. There would seem to be no reported cases where this problem has been dealt with squarely. A case which comes close to our hypothesis is *R. v. Campbell and Mlynarchuk* (1973), 10 C.C.C. (2d) 26, 21 C.R.N.S. 273 (Alta. Dist. Ct.).

106. As above, no reported case fits squarely into our hypothesis. See for example, *R. v. Potter* (1978), 39 C.C.C. (2d) 538, 3 C.R. (3d) 154 (P.E.I.S.C.) and *R. v. Walker and Somma* (1980), 51 C.C.C. (2d) 423 (Ont. C.A.).

107. *R. v. MacLean* (1974), 27 C.R.N.S. 31 (N.S. Co. Ct.).

108. Smith and Hogan, *supra*, n. 62 at 199-206.

109. *R. v. Carker* (No. 2), [1967] S.C.R. 114, [1967] 2 C.C.C. 190, 2 C.R.N.S. 16, 60 W.W.R. 365, rev'g [1966] 4 C.C.C. 212, 48 C.R. 313, 56 W.W.R. 65 (B.C.C.A.).

110. *R. v. Paquette*, [1977] 2 S.C.R. 189, 30 C.C.C. (2d) 417, 70 D.L.R. (3d) 129, 11 N.R. 451.

111. *Ibid.*

112. *R. v. Carker*, *supra*, n. 109.

113. *Ibid.*

114. *R. v. Smith*, [1961] A.C. 290 (H.L.).

115. *R. v. Paquette*, *supra*, n. 110.

116. Williams, *Textbook of Criminal Law* (1978) at 553-558.

117. *Morgentaler v. R.*, [1976] 1 S.C.R. 616, 20 C.C.C. (2d) 449.

118. See for example *R. v. Nadeau* (1975), 19 C.C.C. (2d) 199, 8 N.B.R. (2d) 703 (N.B.C.A.); and *R. v. Henderson* (1976), 34 C.C.C. (2d) 40 (Ont. Co. Ct.).

119. *U.S. v. Holmes* (1842), 26 Fed. Cas. 360.

120. *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273.

121. *Morgentaler v. R.*, *supra*, n. 117.

122. *Idem*, [1976] 1 S.C.R. 678.

123. Williams, *supra*, n. 116 at 556.

124. *U.S. v. Holmes*, *supra*, n. 119.

125. *R. v. Dudley and Stephens*, *supra*, n. 120.

126. Smith and Hogan, *supra*, n. 62 at 325-331.

127. See for example, *R. v. Baxter* (1976), 27 C.C.C. (2d) 96, 33 C.R.N.S. 22 (Ont. C.A.); and *R. v. Bogue* (1976), 30 C.C.C. (2d) 403, 70 D.L.R. (3d) 603 (Ont. C.A.).

128. *R. v. Hay* (1973), 22 C.R.N.S. 191 (Ont. C.A.).

129. *R. v. Stanley* (1977), 36 C.C.C. (2d) 216 (B.C.C.A.); *R. v. Crothers* (1978), 43 C.C.C. (2d) 27 (Sask. C.A.); *R. v. Ouellette* (1950), 98 C.C.C. 153 (B.C.C.A.).

130. *R. v. Hay*, *supra*, n. 128.

131. Smith and Hogan, *supra*, n. 62 at 325-331.

132. *Frey v. Fedoruk*, [1950] S.C.R. 517, [1950] 3 D.L.R. 513, 97 C.C.C. 1.

APPENDIX A

Consent

No provision is included in this General Part concerning consent.

At common law no one can consent to death or grievous bodily harm. *Cr.C.* section 14, however, merely provides that no one is entitled to consent to have death inflicted on him.

Is *Cr.C.* section 14 really necessary? On the face of it, it might appear so, because it excludes consent as a defence to homicide. But consent is quite irrelevant to homicide offences, which consist of causing death with certain *mens rea*. In murder what is relevant is the intent to kill; in manslaughter it is the unlawful and dangerous nature of the act; in causing death by criminal negligence, it is the recklessness that accompanies the act or omission. *Cr.C.* section 14, then, is strictly surplusage.

What this highlights in fact is that consent has strictly nothing to do with the General Part. On the contrary it finds its context in the Special Part. What this means is that in certain offences (e.g. rape, assault, theft) the act must be *in invitum*; the victim's non-consent is essential — it is an element of the offence. Accordingly, if the victim consents, the charge against the defendant is not made out.

Equally important here is the fact that in such cases the victim's consent is not really a defence at all; it is not something which the defendant has to prove. On the contrary, absence of consent is something which the prosecution has to

prove. This is obscured by the fact that (surgical operations and sports apart) consent to violence is exceptional, that non-consent is therefore presumed and that in an ordinary case unless the defendant raises some evidence of consent, the victim's non-consent will be readily inferred. For this reason consent tends to be regarded, quite wrongly, as a defence.

Strictly speaking then, the right place for all rules regarding consent is in the relevant chapters of the Special Part. The chapter on crimes of violence should specify which crimes require the victim's non-consent and which do not. So should the chapter on offences of dishonesty.

Even where consent is relevant, the criteria may differ from crime to crime. In obtaining by false pretences, guilt is negatived by consent to pass the property, but not by mere consent to pass possession. In rape, consent as a defence is vitiated only by fraudulent representation concerning the nature of the act or the identity of the rapist. And in assault, consent as a defence is nullified by any sort of fraud. In consequence even if consent is dealt with in the General Part, repetition cannot be avoided because of the need to articulate these different criteria.

APPENDIX B

Lawful Correction

The Draft is silent on the question of lawful correction. The rule laid down in *Cr.C.* section 43 is not to be taken either as recommended for abolition or retention. This is a matter on which the Commission has not yet arrived at a final view.

The common-law rule allowing reasonable force in lawful correction extended at one time not only to children but also to apprentices, servants, soldiers, sailors, prisoners and convicted defendants. In course of time it was continually narrowed until it applied for all intents and purposes to one category of person only. In Canada, apart from discipline on board ship (*Cr.C.* s. 44) corporal punishment is only lawfully applicable today to children.

Whether the law should take the final step of abolishing corporal punishment completely is a difficult question. On the one hand champions of children's rights will stress the injustice of exempting children alone from physical force, the danger of child abuse and the inconsistency of meeting violence (or other wrongdoing) with violence. As against this, others will emphasize parental need for sanctions of last resort, the problem of unruly students in the high schools and the risk of opening the door to wholesale intervention by the criminal justice system into the family situation.

This being so, the question posed concerning *Cr.C.* section 43 involves a need for policy evaluation in the light of empirical investigation. In this regard the defence of lawful correction is unlike the defences of mistake of fact, duress and

so on, and like the defences of immaturity, insanity and intoxication. As compared with this latter category of defences, on which there has been considerable research and policy evaluation, the defence of lawful correction has been little examined to date. Moreover, the problem of corporal punishment of children is not just a matter for the criminal law; it is a matter involving family, educational and indeed general societal considerations.

For this reason the Commission proposes to defer any recommendation on this question pending completion of adequate research. This is being undertaken in the context of crimes of violence.

APPENDIX C

Burden of Proof

The Draft does not, apart from three exceptions, discuss burdens of proof. This is not meant in any way to minimize the crucial importance of this question. Rather it results from a desire to settle first the questions of principle and substance and to defer questions of evidence and procedure to a later paper.

The exceptions mentioned concern mental disorder, mistake of fact and intoxication. As to mental disorder Draft section 5 retains the present law on burden of proof. As to mistake of fact Draft subsection 9(1) codifies the present law which allows a defendant to escape liability for a regulatory offence by proving that he acted under reasonable mistake or ignorance of fact. As to intoxication Draft section 6 alternative (2) allows involuntary intoxication as a defence to the new included offence of Criminal Intoxication and places the burden of proving that defence on the defendant.

Building on the rules expressed in the Commission's Code of Evidence, however, the Draft General Part would operate as follows. First, the burden of persuasion would, as at present, remain on the prosecution unless the relevant enactment provides otherwise (see section 12 of the Code of Evidence). Second, this does not mean that the prosecution must disprove any and every possible defence that could be pleaded; the prosecution needs only to disprove those defences for which there is sufficient evidence to raise a reasonable doubt (see subsection 12(4) of the Code of Evidence). Whether all general defences should be governed by the presumption of innocence

and the reasonable doubt doctrine or whether some of them (such as insanity under present law) should constitute exceptions will be dealt with later. So too is the question of legal presumptions and logical inferences.

APPENDIX D

Transferred Intent

While much legal scholarship has centred round the problems of transferred intent, no special reference to this concept is made in the Draft. The reason is that such problems can be dealt with by reference to the defence of mistake or to the rule relating to consequences. For transferred intent problems fall really into two categories.

First, there is the case where a person intends to do one thing but by mistake does another. *X* intends to traffic in marihuana, thinks that what he has is marihuana and does not realize that it is morphine. In such cases legal scholars have inquired whether *X*'s wrongful intent concerning marihuana should be allowed to relate to the morphine, so as to render him criminally liable for offering for sale something he never meant to. The real problem, however, is that strict logic and practical policy conflict. Logic says that he cannot be convicted of trafficking either in marihuana (because he did not traffic in it) or in morphine (because he did not know it was morphine). Policy says that he meant to break the law, is therefore a social danger and should be punished.

In the Draft the conflict is resolved by subsection 9(2) on Mistake or Ignorance of Fact. A person accused of a crime (e.g. trafficking in morphine) when on the facts as he supposed them he would have committed a different crime (e.g. trafficking in marihuana) can only plead this defence if he admits liability for an attempt to commit that different offence. With this rule, no special provision for transferred intent is needed.

Second, there is the case where a person intends one consequence but by mistake or accident causes another. *A* aims a blow at one object but in fact hits another. Common-law tradition held that where the objects involved were of the same category, malice or intent could be transferred, but that where not, it could not. So, if *A* aims at *B* but hits *C*, he is as guilty as if he had aimed at *C*. Likewise, if he tries to damage *B*'s horse but instead damages *B*'s dog. Conversely if *A* aims at *B* but hits *B*'s dog (or vice versa), malice cannot be transferred and *A* can only be convicted if he was reckless.

Such problems are covered by Draft paragraph 3(*d*), which relates to consequences. Wherever *A* tries to bring about a certain unlawful consequence but in fact brings about another, he will be criminally liable in respect of that other consequence if he knew that he might cause it. He will also of course be liable for an attempt in regard to the intended consequence. This being so, no special provision for transferred intent is needed.

This is not to say that special provisions may not be needed in certain cases. One such case relates to murder, covered now by *Cr.C.* paragraph 212(*c*). Another relates to wounding with intent, covered now by *Cr.C.* section 228. These and any other "purposive consequence" offences will be dealt with in this respect within their proper context in the Special Part.

APPENDIX E

The Role of the General Part

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Law, Morality and the General Part

Everyone agrees upon the existence of a link between law, morality and justice but not upon its exact nature. This is particularly obvious in criminal law. What, after all, are crimes? Are they simply acts and omissions forbidden by criminal law?[1] Or are they rather "sins with legal definitions"?[2] On this point there is, says Fitzjames Stephen,[3] a division of opinion between lawyers and lay citizens: lawyers see crimes as acts prohibited and punished by law, but laymen see them as acts so prohibited and punished because they *ought* to be.[4] The former regard criminal law as a simple list of dos and don'ts, the latter view the list as qualified by applied morality.

Yet in a sense both views are correct. Clearly it is right to stress that in our legal system the only crimes are those defined by law: *nullum crimen sine lege* — legal prohibition is a necessary condition of criminality. Equally clearly, it is right to point out that criminal law has a further component, that legal prohibition is not a sufficient condition of criminality and that criminal law involves something more than defining specific crimes.

This something more consists of common sense, morality and justice. Criminal law prohibitions speak elliptically and legal rules about killing, robbing and other offences must be read in the light of more general moral principles concerning accident, mistake and so on. Such prohibitions can only be understood and applied in the context of general considerations regarding exoneration. The former belong to the Special Part, the latter to the General Part.[5]

Idea and History of the General Part

The term "General Part of Criminal Law", as used to denote the various general rules and principles relating to liability and exoneration, was introduced to English scholarship by Glanville Williams.[6] As he acknowledges, however, European theorists and continental codes were already quite familiar with such titles as *partie générale*, and so on. And of course in common law itself the existence of such general rules and principles had long been well known to writers such as Stephen,[7] Blackstone[8] and Hale.[9]

Indeed we could say that in common law the idea of the General Part of criminal law begins with Hale.[10] Before then criminal law in England consisted solely of Justices' handbooks and practice manuals relating to procedures and specific crimes.[11] Hale's pioneer work on general principles was such that "it is possible for the first time in the professional literature to recognize a potential *system* of the law of crimes."[12]

Hale systematized the criminal law in two ways. First, he singled out its basic premise as understanding and liberty of will.[13] Second, from that premise he derived corollaries concerning "incapacities or defects", i.e. principles relating to defences. Here we find the first organized account of infancy, insanity, accident, ignorance, compulsion, necessity and duress.

On Hale's foundation systematic treatment of the General Part was gradually built up, not by judges, but by textbook writers.[14] The judges, though they created the General Part, never gave it systematic exposition. This was not their job. As one judge put it,

> Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England. That attractive if perilous field may well be left to other hands to cultivate.[15]

Accordingly such rationalization was left to writers like Blackstone who discussed the concept of crime and the principles concerning criminal participation, like Stephen who drafted the precursor of our *Criminal Code*, and like Jerome Hall[16] whose work on criminal theory has been a landmark in our time.

Today, however, in common-law countries the General Part is mostly to be found in legislation. Indeed except in England it is to be found in Criminal Codes. We see this in Australia,[17] in New Zealand,[18] in the United States[19] and in Canada.[20]

The General Part in Canada

Canada, however, is a special case. Originally in Canada as in England the General Part was basically left to common law. In 1892, however, Parliament enacted a *Criminal Code*[21] based on Stephen's *Digest*[22] and his Draft Code, which the English Parliament had rejected. This first *Criminal Code* recognized the idea of the General Part.[23] At the same time it kept in force such common-law excuses and justifications as were not inconsistent with the *Code* itself. Similarly, the present *Criminal Code*, revised in 1955, has a chapter[24] of rules about insanity, duress, criminal participation and other matters. This chapter is, however, incomplete: on the one hand it omits certain items like necessity and drunkenness, and on the other it preserves common-law defences which are not inconsistent with the *Code* or other Acts of Parliament.[25] Our General Part, then, is to be found partly within the *Criminal Code* but partly outside it.

If we turn first to the *Code*, we find, beginning with section 3, a fairly long chapter entitled "Part I — General". In keeping with its title Part I is a general part of the *Code* rather than of the criminal law. For while a general part of criminal law contains provisions relating to jurisdiction and responsibility, Part I includes numerous additional items (e.g. definitions[26] of terms like "age", "value" and "valuable security") and at the same time omits several matters of relevance to responsibility (e.g. necessity, mistake of fact and drunkenness).

In consequence by no means all matters relating to responsibility are dealt with by "Part I — General", which only governs infancy (ss. 12-13), insanity (s. 16), duress (ss. 17-18), ignorance of law (s. 19), participation (ss. 21-23), attempts (s. 24) and various justifications such as legal duty (ss. 25-33),

self-defence (ss. 34-37), defence of property (ss. 38-42), exercise of authority (ss. 43-44), performance of surgical operations (s. 45) and consent (s. 14).

Many matters regarding responsibility are dealt with elsewhere in the *Criminal Code*. Causation[27] and provocation[28] are treated in the Part on Homicide. The only definition of recklessness is found in the provisions concerning the offence of mischief.[29] Mistake of fact is dealt with only in an *ad hoc* manner in provisions like those on obscenity,[30] illicit sexual intercourse,[31] and other offences. Lawful excuse, justification and lawful authority are allowed, though not defined, in various offences.[32] General though these rules are in application, we find them scattered throughout the *Code*.

Finally, some matters relating to responsibility are still regulated by common law. The draftsmen of the *Criminal Code*, like those of the English Draft Code of 1876, not wishing to put criminal law into a strait-jacket, laid down in section 7 that common law should plug the gaps left in the *Code*.[33] Accordingly it is to common law that we must turn for the basic concepts of *actus reus* and *mens rea*, the principles underlying the rules on infancy and insanity, the definitions of key terms like "intent", "recklessness" and "negligence" and the rules relating to defences like necessity and drunkenness.

The General Part of Criminal Law in Canada, therefore, is found in these three different areas: in *Criminal Code* "Part I - General", in the rest of the *Criminal Code* and in the common law. But wherever it is to be found, any attempt to evaluate its adequacy must rest on an assessment of the purpose and function of a general part.

Purpose and Function of a General Part

Discussion of the purpose of the General Part can well begin with Jerome Hall. Hall's *General Principles of Criminal Law*, which provides the first comprehensive theoretical treatment in general of the criminal law and in particular of the General Part, divides criminal law into three different constituent elements: (1) rules, (2) secondary principles and (3) basic principles. Rules (e.g. rules defining murder, robbery and other offences) are relatively specific, concern relatively narrow issues and are found mainly in the Special Part. Secondary principles (e.g. principles relating to insanity, mistake and other defences) are wider than rules, concern more general matters and are found mainly in the General Part. Basic principles (e.g. the basic principle of culpability) are widest of all, relate to the most broad and fundamental issues and, in Hall's view, stand strictly outside the law itself.[34]

Each of these three ingredients plays its own particular part. Rules specify what is distinctive about each offence. Secondary principles complete the rules by specifying factors common to all offences, i.e. matters of justification and excuse. Basic principles comprise the fundamental axioms from which the secondary principles are derived. This being so, these three ingredients are to be found unequally distributed in the criminal law. Whereas the Special Part, the part specifying offences, contains merely rules, the General Part, the part specifying defences, may contain rules, secondary principles and basic principles. Hence the General Part's greater depth and increased complexity.

Each of these three ingredients, then, performs a different function. Basic principles illuminate and systematize the criminal

law: the principle of responsibility, for example, articulates the moral basis of the criminal law and orients it towards freedom of choice. Secondary principles provide concrete applications of the basic principles: for instance, the principles about mistake, ignorance of fact and various other defences afford specific instances of the principle of responsibility. Finally, there are general rules neither derived from basic or secondary principles nor belonging to evidence or procedure which should find their place within the General Part: e.g. the rules relating to jurisdiction and to limitation of time. Ideally, then, there are three functions for the General Part: to avoid repetition in the criminal law, to facilitate its systematization and to provide it with a theoretical basis.

Avoidance of repetition is primarily the function of general rules. While rules of special application will obviously be located in their own special context, rules of more general application must either be located in a general part or else be re-iterated with reference to each offence. The "year and a day"[35] rule that no one commits culpable homicide unless the death occurs within a year and a day of his wrongful act is a special rule applying only to homicide and therefore rightly located in the sections on homicide. By contrast the infancy[36] rule that no one under seven can be convicted of an offence applies across the board to all offences and would have to be repeated in every offence-creating section unless articulated once and for all in the General Part.

Systematization results from primary and secondary principles. As Hall observes, it was Hale who first brought system and order to the criminal law because he had an eye for "the one in the many".[37] Hale, therefore, and those who followed in his path showed how the various rules and particularly those relating to defences were interrelated and connected by reference to the underlying principles. These principles, then, provide the structure and organization of the criminal law.

Finally, as Hall observes, "theory is concerned with the ultimate ideas which comprise the foundation of a science or a social discipline".[38] As such it can arrange, organize and

explain a mass of ordinary data, and so provide a powerful tool for understanding. Just as scientific theory can do this for science, so legal theory can do the same for law, providing it with rationale and coherence, giving practitioners a deeper insight into all the different rules which make up that law, and enabling courts and lawyers to deal confidently with new unfamiliar problems, with questions arising from social change and with issues surfacing in the field of law reform.

Criminal-law theory, then, to quote Hall once again, provides "a set of ideas by reference to which every penal law can be significantly 'placed', and thus explained".[30] It does so by articulating the basic premises of the criminal law and by deriving from them the various corollaries in terms of defences of infancy, insanity, mistake, ignorance of fact, necessity, compulsion, duress, automatism, drunkenness and so on. For, roughly speaking, all our criminal law results from the interplay of the two principles that (1) wrongful conduct should be punished and (2) punishment should depend on personal fault. Finding the right balance is the task of the lawmaker and justifying it the task of the theorist.

Contents of a General Part

Accordingly a General Part needs to be structured on the following lines with propositions at three different levels. It needs to articulate a set of overall objects for the *Criminal Code*. Next it must set out a list of basic principles to guide the operation of the *Code* towards those objectives. Finally it must contain rules to translate those principles into operational form. Here we briefly discuss each of these three levels.

An Objects section would contain, not the objects of criminal law, but the objects of the *Code*. The difference is this. Whereas the objects of criminal law may be reduction of crime, underlining values, etc., the object of the *Code* will not be only to advance those objects but also to do three other things: to express the basic values of our society in an accessible form, to provide rules for the application of the criminal law and to preserve the side-constraints that limit it.[40]

As well as objects, a Code should set out principles.[41] These are broad guidelines concerning considerations of fairness, justice and morality relating to the achievement of the objects of the *Code* and underlying the application of its operational rules. Whether written into the *Code* or not, such principles exist in fact in criminal law and are to be found as the premises, often unarticulated, of judicial reasoning in the case law. Without them, however, a Code becomes merely a list of rules devoid of structure, rationale or moral underpinning.

Finally, a Code needs rules. While principles are general, abstract and painted in broad terms, rules are particular, concrete and applicable in detail to specific situations. While

principles are the reasons behind the rules, the rules are the operational elements of the *Code*.

In short, a Code needs three types of provisions: objects to provide overall direction, principles to furnish credibility and rules to afford practicality. Accordingly a General Part should have the following kind of structure:

Chapter I — Objects

Chapter II — Application

A — In criminal legislation
- — precedence of *Code*
- — classification of offences
- — interpretation

B — In time — rule of law

C — In space — jurisdiction

Chapter III — Criminal Liability

Introductory Section: Principle of Liability

Rules governing:

A — Conduct

B — Responsibility
- I — requirements
- II — defences
  - (a) exemptions
  - (b) excuses
  - (c) justifications

C — Corporate Liability

Chapter IV — Participation and Inchoate Offences

A — Participation

B — Incitement

C — Attempt

D — Conspiracy.

Fulfilment of Function by the General Part in Canada

How far does our General Part in Canada fulfil the functions outlined above? How far does it serve to avoid repetition, to systematize the criminal law and to provide it with a theoretical basis?

1. The Avoidance of Repetition

At first sight our General Part is fairly successful in helping our criminal law avoid repetition. Its general rules, being mostly contained either in "Part I — General" of the *Code* or in the common law, need no re-iteration with regard to each offence. Closer inspection, though, reveals that many such rules are scattered throughout other chapters of the *Code* with consequent repetitiveness and lack of generality.

Take the question of *mens rea*. Common law maintains that criminal liability requires blameworthiness.[42] On this, Part I of the *Criminal Code* says virtually nothing, except as regards infancy (ss. 12-13), insanity (s. 16) and ignorance of law (s. 19). By contrast in Parts II-X, the definitions of offences often imply intent by words like "assaults", "sells", "defrauds", "seduces", "uses words to indicate", and just as often express intent by words like "fraudulently", "intentionally", "knowingly" and "wilfully" — indeed no less than 250 of the 280 offence-creating sections use *mens rea* words. On this central matter, then, the *Code* affords no general guidance but merely a variety of specific provisions.

Or again, take the question of general defences. Common law has always recognized the existence of exculpating factors

by way of excuse or justification.[43] Unlike *mens rea*, defences are specifically dealt with in Part I of the *Criminal Code*, which has not only a general provision (s. 7(3)) preserving common-law defences but also detailed provisions on mistake of law (s. 19), infancy (ss. 12-13), insanity (s. 16), advancement of justice (ss. 26-33 and 37), lawful correction (ss. 43-44), self-defence (ss. 34-35, 38-42) and duress (ss. 17-18). But in Parts II to X, the Special Part, we also find specific provisions, e.g. mistake of fact (ss. 253(2), 254, 260, 267-8 and 378(2)), mistake of law (ss. 253(2), 254, 260, 267 and following and 378(2)), self-defence (s. 64(3)), duress (s. 150) and necessity (ss. 221(2) and 241(4)). On general defences too, then, the *Code* gives a variety of detailed provisions.

2. Systematization and Orderly Arrangement

Nor does our General Part fare any better when it comes to systematization. Orderly arrangement of the rules and principles, coherent interaction with the Special Part, and general comprehensive simplicity are still lacking. Instead there is a scattering of the rules throughout the *Code*, a problem over the interaction of the General and Special Parts, and a complex and yet far from comprehensive multiplicity of rules.

Take first the scattering of the rules. As pointed out above, the *Code*'s General Part is incomplete and must be supplemented by the common law. The law on *mens rea*, for example, is largely contained, not in the *Code*, but in the case law, which is often hard to ascertain, for courts have tended to concentrate pragmatically on specific issues. Recently, however, our courts have moved away from a piecemeal approach and, assisted by academic scholarship, have tried to simplify the law relating to *mens rea* by clarifying it as a concept of general application. Clear examples are the majority judgment in *O'Grady v. Sparling*,[44] which adopted Turner's[45] view that *mens rea* consisted either of intention or recklessness, and the dissenting judgment of Dickson J. (concurred in by Laskin C.J. and Spence J.) in *Leary v. The Queen*,[46] which provides a neat, clear and simple definition of *mens rea* as a term of general

application, distinguishing intent and recklessness, contrasting them and leaving them as concepts readily applicable in principle to any offence to which they may be relevant. Welcome though this kind of clarification is, its proper place in any comprehensive Code is surely within that Code's General Part.

Next, the problem concerning the interaction of the General and Special Parts. This arises from the fact that while the former provides rules on general defences, the latter provides rules on specific defences and also frequently defines offences as acts done "without lawful excuse or justification". Here a still unsettled question exists as to the meaning of such phrases: do they simply refer to general defences allowed by the General Part or do they provide for some particular excuse or justification over and above the general defences?[47] The resolution of such questions is clearly necessary in the interests of consistency.

Finally, the matter of complexity, which can best be illustrated by reference to defences. First, there are three different levels of provisions: the provision in subsection 7(3) preserving general "common law" defences, the specific Part I provisions on general defences and the Parts II to X provisions on special defences. Second, the provisions on special defences work in two different ways: some, like subsection 215 on provocation, operate as (wholly or partly) exculpating factors; others, like subsection 146 on consent to unlawful sexual intercourse, exclude certain defences. Third, many sections use expressions like "without lawful justification, excuse, authority", "without reasonable grounds, excuse" and thereby advert to special matters which may exculpate. Fourth, and finally, all these provisions cannot be fully understood without reference to the case law.

Case law itself, however, may be confusing. Let us take, for example, the basic defence of mistake of fact. As classically defined, mistake of fact consists of "an honest and reasonable belief in a state of fact, which, if true, would make [the] act innocent". On this two crucial questions still remain unanswered by the cases: (1) Must the belief be not only honest but

also reasonable?[48] (2) What constitutes an innocent mistake? On the one hand it cannot simply be one that makes the accused, on the facts supposed, innocent of the precise crime charged, otherwise a defendant charged with assaulting *X* would have to be acquitted if he mistook *X* for *Y*. On the other hand it does not need to be one that makes the accused innocent of any crime whatsoever, otherwise a defendant charged with murder would have no defence of mistake even in cases where he mistakes his actual victim for an animal.

3. Theory and Basic Principles

The state of our criminal law regarding theory is equally unsatisfactory largely because of history. Originally, our *Code* was not intended as a comprehensive statement of the criminal law, gaps were meant to be filled by reference to the common law, and new situations were to be dealt with by application of common-law rules and principles.

As pointed out above, theory is concerned with ultimate concepts and basic principles. Nowhere, however, does our General Part — whether we refer only to Part I of the *Code* or to all the general rules and principles of criminal law wherever they are to be found — articulate its basic principles. Indeed Part I contains no principles but only a random list of rules.

For this reason Part I affords no theoretical structure. Instead of highlighting fundamental principles, then setting out secondary rules and principles relating to defences and thereby producing a coherent whole, our *Code* just catalogues certain defences. In consequence the reader is left without guidance or direction.

The Principle of Responsibility

Clearly one guiding thrust throughout our criminal law consists in the principle relating to responsibility. Here is to be found the moral aspect of the criminal law reflected in the General Part provisions on liability and defences. But how central is the principle of responsibility, how central should it be, and how in effect should it be defined?

1. Centrality of the Principle in History

The thrust of the responsibility principle is simple: no one is guilty of a crime unless he is to blame — no criminal liability without moral fault. But since morality relates not only to behaviour but also to conscience, it must concern the actor's state of mind. "The full definition of every crime", said Stephen J. in *R. v. Tolson*,[49] "contains expressly or by implication a proposition as to a state of mind". As common law put it, *actus non facit reum nisi mens sit rea*:[50] an act does not make you guilty unless your state of mind is guilty — no guilt without moral responsibility.

"Responsibility" means etymologically "having to answer".[51] A government minister, for example, is responsible, i.e. must answer, for his department. Now what people are primarily responsible for — must answer for — is their own conduct, but because their answer may not necessarily satisfy, "responsibility" tends to acquire a pejorative connotation.

Not that an agent is responsible in this sense for anything and everything. In criminal law, as in morality, responsibility is generally limited in four respects. An agent only has to

answer (1) for his own actions, (2) for actions he meant to do, (3) for actions done by him as a responsible agent and (4) for actions which are neither justifiable nor excusable.

Morally an agent only has to answer for his own actions. Natural occurrences, other people's actions and things done involuntarily by the agent are not his responsibility. Accused of some act, he can exonerate himself by showing that he did not do it, that it was not *his* act but that of someone else, or that it was not his *act* but rather something that happened to him.

Even if he did do an act, however, morally he only has to answer for it if he meant to do it. Acts done by mistake or accident usually attract no responsibility.

Next, although most people have to answer for their actions, some do not. Some people are held to lack the general capacity to act responsibly. These include the very young and the mentally disordered. Such persons incur no responsibility on the ground that they fail to qualify as responsible, or moral, agents.

Finally, even a responsible agent can sometimes avoid blame by reason of special circumstances. His act may have been justified — he may have done the right thing in the situation. Or it may have been excusable — perhaps he could not fairly be expected to do otherwise.

Morally, then, an agent's responsibility for an act depends on whether he really did it, whether he meant to do it, whether he was responsible for his actions and whether he had some justification or excuse. In legal terminology responsibility depends on whether he committed an *actus reus* with *mens rea*.

In criminal law, however, the notion of responsibility has not been constant. Its evolution is often divided into roughly four periods.[52] First there is a primitive period when law is based on private vengeance and compensation. Then the community becomes involved and legal liability is strict — anyone

or anything causing harm is held responsible and criminal liability may even be imputed to animals.[53] Next comes a more enlightened stage, where criminal law draws close to morality — liability depends on fault and legal writers discuss *mens rea*.[54] Finally, law diverges again from morality — Parliament legislates increasingly to protect public welfare, and liability need not depend on fault.[55]

This picture, though, is over-simplified. For instance in the earliest period, however strict the law, morality was never wholly out of court. After all, vengeance itself links up with fault. This point is brought out by Holmes:

> Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked.[56]

Indeed, old Norman statutes distinguished between accidental and intentional harm. Nor is this surprising says Winfield:

> No sane human being, ancient or modern, needs any mental education beyond that of general experience to say '*A* did not mean to do this' and therefore to inflict a lighter penalty or possibly none at all. Mediaeval man is at least that much removed from a beast.[57]

The evolution of the principle of responsibility, then, may be more fruitfully considered in terms of four main strands which influenced it: vengeance, royal concern with crime, church influence, and positivism.

Vengeance is a major factor. "It is commonly known", says Holmes, "that the early forms of legal procedure were grounded in vengeance".[58] In this light crimes and prosecutions are acts of private warfare done in a setting not far removed from Hobbes's state of nature.[59] Indeed trial by combat was introduced by William the Conqueror as a modified form of private war — "trial by battle was . . . private war under regulations".[60] The emphasis is on the primary harm resulting from a crime (injury to an individual victim), on the causal link between the wrongdoer and that harm, and on the victim's desire for redress. No clear distinction is drawn between crime and tort, the lawmaker's object being "rather to reconcile

antagonists upon established terms than to put down crimes by the establishment of a system of criminal law, as we understand the term"[61] — a notion still at work in rules about restitution, criminal compensation and private prosecution.

Equally important was royal concern with crime, seen in the development of the concept of breach of the peace. According to Stephen, "peace was an exceptional privilege, liability to war the natural state of things".[62] Increasing royal power, however, gradually extended the King's peace throughout the realm.[63] Thus crimes were seen as public wrongs against peace, order and good government. Emphasis switched to secondary harm[64] (fear and alarm to the community), and to the suppression of criminal activity. This view of crimes as public wrongs continues to dominate common-law thinking, criminal prosecutions being instigated by the Crown.

A third strand was the influence of the Church. Legal thought was naturally affected by ideas of personal fault and inner morality stemming from Aristotle and other philosophers, from Scriptures, from Church teachings and from the doctrine of natural law.[65] Crimes came to be regarded as "sins with legal definitions"[66] with emphasis on sinfulness, conscience, wickedness and retribution. The relevance of this view can still be seen in the distinction between "real" crimes and quasi-crimes,[67] in the prohibition of offences against morality[68] and in the law relating to *mens rea*.

Church influence, however, affected not only the meaning but also the imputation of responsibility. Law moved from magic and intuition to rationality and evidence. Early procedure — trial by battle, trial by compurgation and trial by ordeal — allowed no place for logical investigation.[69] But Church prohibition, in the Fourth Lateran Council (1215), against clerical participation in trial by ordeal, necessitated a new type of procedure, and England's choice was trial by jury.[70] At first the criminal trial remained a rough-and-ready process with juries conducting their own inquiries, with defendants barred from bringing evidence, and with fault being inferred solely from external factors.[71] In course of time, however, procedural

changes brought about a more rational approach to evidence — defendants were allowed to testify, witnesses with personal knowledge were required and juries had to base their verdicts on the evidence.[72]

The fourth strand in the legal notion of responsibility was positivism.[73] The view that law, like other social phenomena, should be scientifically investigated for what it is in fact — rules enforced by power and authority — had obvious repercussions in the criminal law. If law is seen simply as the sovereign's command, it no longer needs to reflect morality but can create crimes that are not "sins with legal definitions" but merely legal definitions. On this view *mens rea* connotes not moral fault or wickedness but simply the mental element in the definition of an offence. There is, as Stephen points out, no such thing as *mens rea* but only many different *mentes reae*.[74] This view was fortified by the proliferation of statutory offences providing for a variety of mental elements peculiar to specific provisions and couched in purely descriptive terms like "knowingly", "intentionally" and so on. For these *mens rea* tended to be interpreted simply by reference to the words of the enactment in question. Consequently the moral content of *mens rea* was obscured.

In other areas it was totally eclipsed.[75] Regulatory legislation designed to protect public welfare created numerous offences which were seen, not as wrongs in any obvious moral sense, but merely as contraventions of legal prohibitions for which *mens rea* was unnecessary.[76]

These four strands helped shape the notion of responsibility. Vengeance imports some notion of blame. Royal concern with crime left lesser offences to local courts and concentrated only on the most reprehensible. Church influence stressed morality, conscience and personal fault in crimes — an idea still evident in the notion of stigma.[77] Positivism produced the exception that proves the rule — regulatory offences dropped *mens rea* because they were not really part of criminal law.[78] Clearly responsibility has always been at the centre of our criminal law.

2. Centrality of the Principle Justified

The doctrine of *mens rea*, however, is not universally accepted. It has been challenged by criminologists, psychiatrists and lawyers. Their objections fall into three categories. An argument based on law itself contends that already responsibility is often jettisoned in the interests of social protection. An argument based on theory claims that legal liability must be objective and that an individual's "personal equation" cannot be taken into account. An argument based on criminology maintains that the question of responsibility should be sidestepped and replaced by emphasis on social danger and on treatment.[79]

These arguments, however, can be met. First, the existence of strict liability is not self-justifying. Second, objective liability conflicts with ordinary notions of morality and justice. And emphasis on dangerousness regardless of responsibility involves a cost in terms of freedom and humanity.[80]

The root of the problem concerns the aims of criminal law — the aims it ought to have. Here there are surely two points of agreement. First, criminal law should aim at decreasing certain undesired activities. Whatever the strategy — denunciation, deterrence or reform — surely the only general justifying aim is the reduction of offences.[81] Second, pursuit of this aim must remain subject to constraints, for criminal law is not an end in itself but rather a means to an end — to the securing of a society worth living in.[82] Such a society must surely try to maximize freedom, justice and humanity. Accordingly the fundamental question is what kind of criminal law best accommodates these values — one based on *mens rea* and punishment or one based on dangerousness and treatment.

In previous papers[83] we argued for the retention of responsibility. We did so on three grounds — liberty, justice and humanity. First, the doctrine of *mens rea* maximizes liberty: given a requirement of *mens rea*, the individual knows he is

secure unless he breaks the law deliberately, and so can plan his life accordingly. Second, it maximizes justice: historically our law has always been to some extent concerned with doing justice, justice bases liability on fault, and *mens rea* articulates that basis. Third, the doctrine satisfies requirements of humanity: it makes criminal law treat persons as persons, i.e. creatures to be reasoned with and called upon to answer for their actions.[84]

In fairness, however, opponents of *mens rea* are not against the concept of responsibility in general but only against keeping it in the law. But could people be treated as persons outside the law but not within it? Three factors give rise to doubt. First, such a criminal justice system would be so at variance with our present law that it might prove unworkable. Second, a legal system which no longer safeguarded liberty, humanity and justice might well lose all credibility. Third, crime and criminal law cannot be isolated from the context in which they have their existence — everyday social life involving personal interaction and responsibility.

There is one further argument, which relates to the aim of criminal law. Its general justifying aim, we saw, is generally agreed to be the decrease of undesired activities. Its more particular aims, the means of carrying out the general aim, enjoy less consensus: some stress prevention, others deterrence, yet others reform. Our view, set out in our Report to Parliament, *Our Criminal Law*, is that our criminal law's main contribution is to underline our values by forbidding conduct violating them. Such values, however, are not normally seen as so seriously violated by acts done involuntarily or by mistake as to warrant reprobation by the criminal law. Such reprobation is reserved for more deliberate defiance of societal values by conduct involving personal moral fault.

For these reasons, it is argued, the principle of responsibility must remain central in our criminal law.

3. Meaning of the Principle and Related Problems

The basic thrust of the responsibility principle is clear and simple but its detailed analysis and application have become confusing. Its basic thrust is *no liability without fault* — a proposition enjoying general acceptance. Its application in cases and its analysis in scholarly literature have produced considerable inconsistency. This is largely due to a significant change in common law — a move from the moral cogency of principles towards the legal authority of precedents and statutes.

(a) From Principles to Precedents to Statutes

Beginning as the application of common-sense principles by royal judges, the common law, said Chief Justice Coke, was "nothing else but reason".[85] It was, said Blackstone, an "admirable system of maxims and unwritten customs".[86] As such it had three fundamental features: it consisted of maxims, principles or guidelines, it arose from customary court practice and it was discovered rather than created; for in making the law, the judges fashioned it out of already existing material — accepted principles of common-sense morality.

Within a hundred years of Blackstone's death, however, there came about significant alteration. Common law changed from a system of broad principles into a set of narrow rules, from a system based on customary court practice into a series of judicial *fiats*, and from a system resulting from declaratory practice into a collection of regulations created by judicial legislation.[87]

This change was due to many factors, one of which was legal positivism. Positivists like Austin saw law as rules laid down by sovereigns.[88] Ideally these should be laid down by Parliament in statutes, in practice they would often be laid down by judges.[89] As delegates of the sovereign legislature, such judges were now viewed as vested with a special authority, their decisions taken as binding, and their precedents adhered to according to the strict doctrine of *stare decisis*.[90]

A second reason for the change was the inability of the earlier judicial consensus on doctrines, principles and rules to survive the vast increase in scale of legal operations. In Lord Mansfield's time, for instance, when there were only twelve judges in the Courts of common law, each judge was intuitively aware of the views and practices of his brother judges. Today in Canada, when there are about three hundred high court judges, no such intuitive awareness remains possible and law comes to depend less on consensus than on authority. What resulted has been described as "the collapse of a degenerate system of customary law".[91]

A third reason was the improved state of law reporting.[92] So long as law reports were variable in quality, as was indeed the case till the mid-nineteenth century, courts had to rely largely on memory, common sense and principle, for rigid adherence to authority was impossible. The establishment of official law reports, however, gave new significance to precedent, authority and scholarship.

Finally, one other possible reason was a shift in judicial perception as to the identity of the judge's audience. Originally, judges addressed themselves primarily to lay juries, which of course gave no reasons for their verdicts. Later, when non-jury trials became the rule and judges gave decisions backed by reasons, they addressed themselves rather to appeal courts and sought to make their decisions stand up to detailed scrutiny at higher levels. Common-sense jury directions were increasingly replaced by legal analysis with emphasis on correctness and authority.[93]

Common law, then, became a rigid precedent system. In Blackstone's day "precedents and rules must be followed unless flatly absurd or unjust",[94] but there was always power to disregard decisions contrary to well-established principle. Later on the judges tended to follow binding precedents regardless of injustice.[95] The new watchword was: *sit finis litium*[96] — better certainty with injustice than uncertainty in search of justice.

At the same time, though precedents never completely moved away from principle and were not necessarily construed

like statutes, they were increasingly replaced by them.[97] This replacement was due to similar factors. The rise of positivism, the increased scale of operations and the growth of industrial society combined to increase the need for legislation. Parliamentary intervention was required to regulate industries, improve social conditions and lay the foundations of the welfare State. With statutes, however, law becomes articulated as though it were not based on principles but simply consisted in a set of detailed rules.

This difference can be brought out by comparing the *Criminal Code* provision concerning the question of reasonable belief in bigamy with the treatment of that question in *R. v. Tolson*.[98] Bigamy is generally defined as going through a form of marriage with one person while already married to another. But what if the defendant thinks that that other is now dead and that she is no longer married to him? In *Tolson* Stephen J. dealt with the question in terms of basic principle as follows:

> The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. . .
>
> I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.[99]

By contrast the *Criminal Code* deals with the question solely by means of an *ad hoc* rule, which on the face of it has no particular connection with basic principles, *Criminal Code* subsection 254(2) provides:

> No person commits bigamy by going through a form of marriage if
>
> (*a*) that person in good faith and on reasonable grounds believes that his spouse is dead, . . .

Comparison of paragraph 254(2)(*a*) and *Tolson* highlights the difference between rules and principles. Rules are much more specific than principles — the propositions of the *Code*

are clearly narrower than those taken from *Tolson*. Second, rules are more arbitrary than principles, which are largely self-evident and based on common sense. Third, rules exist, as it were, on the surface of the law, whereas principles constitute the deep structure from which rules can be derived — if rules lay down the law, principles articulate the reason for that law.

Linked to these differences is a further matter — the nature of legal and judicial reasoning. "Most people suspect", says Guest, "that lawyers reason in a peculiar way".[100] Indeed Coke C.J. pointed out to James I that "causes . . . are not to be decided by natural reason but by the artificial reason and judgment of the law".[101] Accordingly, it has been argued that "the life of the law has not been logic: it has been experience",[102] and that pure logic has no place in law.

This goes too far. Law is not and should not be illogical. As Devlin said, "the common law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it".[103]

In this connection the term "logic" is often taken to refer only to deductive reasoning. That kind of reasoning moves from proposition to proposition with each step following inescapably from those before it. So, in an argument like

> "All men are mortal;
> Socrates is a man;
> Therefore Socrates is mortal."

the conclusion is dictated necessarily by the premises.

In law and everyday life, however, we make more use of a different and more pragmatic type of reasoning. It is a type in which propositions are advanced, countered with objections and then modified. Take the following argument:

> Any one committing an offence while too drunk to form the requisite intent, specific or general, lacks *mens rea* and shall be acquitted;
>
> But such a person is a social danger and should not just go scot free;
>
> So, even if he has to be acquitted of offences requiring specific intent, he should still be convicted in respect of offences requiring only general intent.[104]

Here the original proposition is met by a counter-argument in the light of which it is then modified.

Legal reasoning, then, typically uses a kind of "yes, but" argument.[105] We start with a general rule, follow with an objection and end up with a qualified rule. But this is only natural; for in law no general rules are complete in themselves but all are expressed against a background of competing principles and values, and besides while logic is concerned only with the validity of the inference, law and real life are concerned with the acceptability of the conclusion.

We see this in the criminal law and particularly in the General Part. This Part was a logical *response* to, and *limitation* on, the Special Part. It was the "yes, but" part of criminal law. Guilt, responsibility, *actus reus* and *mens rea* — all these have always been defeasible concepts.[106] So with *mens rea*, for example, the truth is not that with intention, foresight and so on you automatically have *mens rea* but rather that without them, i.e. if you act by mistake, ignorance and so on, you have not.

All this, however, has been to some extent obscured by several factors. Law, like ethics, philosophy and religion, was seen less as a process than as a product[107] — less as a search for truth than as the enunciation of particular truths. Meantime science, mathematics and formal logic had made such progress that their mode of reasoning, deduction,[108] came to be regarded as the ideal, which moral, legal and other non-deductive reasoning fell short of — the "rational" and the "reasonable" were confused.

In consequence courts tended at times to veer towards pure logic rather than practical considerations. This is particularly evident in statutory interpretation. For example in *Whiteley v. Chappell*,[109] where the accused had voted in a dead man's name in an election and was charged with "personating 'a person entitled to vote'", he was acquitted on the ground that a dead man is not a person entitled to vote. In such cases, it is often argued, courts concentrate unduly on the letter of

the law instead of on its spirit and the policy behind it — they see law as purely descriptive instead of as partly descriptive and partly normative.

(b) Effect on the Principle of Responsibility

The General Part, then, was the "yes, but" part of criminal law. As the accused's answer to the Special Part it was comprised of justifications, excuses and other defences negativing criminal liability. Such defences were broad and flexible enough to meet the needs of justice in novel, borderline cases because they were expressed in terms of general principles. These principles in their turn were based on the more general fundamental principle, "no guilt without moral fault".

All this, however, was altered by the development outlined above. The move away from principle to precedent and statute blurred our understanding of the nature and operation of the General Part. Replacing principles by rules meant largely substituting pedigree for content, rigidity for flexibility and "slot-machine" deduction for "yes, but" arguments that take account of the part played by defeasibility, especially in the context of guilt.

Guilt, blame and criminal liability rests after all on common-sense morality. When blaming someone for some action, common sense proceeds in two stages. First, it asks whether the person in question did the act complained of. Second, in certain circumstances it asks whether there was anything taking the act out of the standard category — was the person in question unable to avoid doing as he did? was he labouring under some mistake or misapprehension? or was he suffering from some mental abnormality?

Parallel to this, the law could have also asked two questions. It could have posed the basic question, "did the defendant do the act alleged?". It could then, if the defendant raised *prima facie* evidence of some exonerating factor, have raised the question "was he acting under automatism, mistake, insanity, etc.?".

Instead, the law, at least in theory, asks three questions: (1) did the defendant commit an *actus reus*? (2) if so, did he do so with *mens rea*? (3) if so, did he have some justification or excuse?

This approach has produced several problems. There is the artificial separation of *actus reus* and *mens rea*, the question of the proper location of voluntariness, the problem over the "correct" description of an act, the blurring of the normative and defeasible dimension of *mens rea*, and the obscuring of the relevance in this context of the Rule of Law.

(i) *Separation of* actus reus *and* mens rea

Since Descartes, if not before him, Western thought in general looked on body and mind as distinct elements instead of aspects of a single whole. So in law we differentiate between *actus reus* and *mens rea*.

To see the artificiality of this distinction, consider the following hypothetical example. A policeman tries to infiltrate a drug gang. He is discovered, injected regularly with heroin and turned into an addict. Now desperate for the drug, he steals heroin from a hospital. The *actus reus—mens rea* distinction leads us to ask the following three questions: (1) was there an *actus reus* or was the taking of the hospital's heroin involuntary? (2) was there *mens rea* or did the involuntary addiction rule out an intent to steal? (3) if there was *actus reus* and *mens rea*, is there some other defence, e.g. involuntary intoxication? Surely, however, the more natural approach would be to ask: Is he to blame — is this the sort of thing that should be punished? Instead of analyzing into different compartments, common sense looks at the situation as a whole.

Or take the case *R. v. Dadson*.[110] *D*, a constable, trying to arrest *P* for stealing wood, shot at him to stop him escaping. This would not have been lawful unless *P* had had two previous convictions. *P* did have two such convictions but this was unknown to *D*. *D* was found guilty on the ground that *P*'s convictions being unknown to *D* could not justify the shooting. On this some theorists[111] argue that *D*'s act considered apart

from his state of mind was lawful, that "bad motive and ignorance can't turn [it] into an *actus reus*" and that therefore *D* should have been acquitted. This, as Jerome Hall[112] points out, is to ignore the intertwining of *actus reus* and *mens rea*. The right to arrest is limited by a requirement of reasonable and probable grounds to effect it, so that the justification of *D*'s act depends not only on *P*'s convictions but also on *D*'s knowledge of them. "No external situation of itself", says Hall, "can be criminal — there is always the mental side to be considered".[113] *Actus reus* and *mens rea* must not be separated artificially but treated together as a whole.

(ii) *Involuntariness*

Neither in morals nor in law are people generally held to blame for things they cannot help. In morals we can say, with Kant, that "Ought implies can". In law we say *lex non cogit ad impossibilia* — law does not expect the impossible.

Here we are primarily concerned with one aspect of impossibility — conduct impossible to avoid in that it is involuntary. Such conduct may be involuntary by reason of external or internal causes. Acts involuntary for external causes are acts done under physical compulsion. "If", says Hale,[114] "*A* takes *B*'s arm and the weapon in his hand and stabs *C*, *B* is not guilty because there is no voluntary act on his part". Acts involuntary due to internal causes include acts done in sleep, under hypnosis or as a result of automatism — in a word, what is usually termed involuntary behaviour.

In criminal law, this second type of involuntariness creates problems resulting from a clash between the dictates of morality and of public interest. Suppose *D* in a nightmare kills *P*. Morally *D* cannot help it, is not to blame and should not be punished. Socially, however, *D* is a potential danger, clearly needs investigation and should perhaps in the public interest be treated or restrained.[115] Accordingly the law is torn two ways. On the one hand, it tends to say there was no *actus reus* and so *D* is not guilty. On the other, if the behaviour results from disease, it tends to view the defendant as legally insane and liable to intervention by way of treatment.

Such policy problems are perhaps inescapable. More artificial is the problem whether voluntariness should be located under *actus reus* or *mens rea*. Orthodoxy[116] favours *actus reus* because involuntariness is a defence even in crimes of absolute liability requiring no *mens rea*. A minority view,[117] however, would favour *mens rea* on the ground that involuntary acts are acts done without intention. This kind of problem, which arises from the separation of *actus reus* and *mens rea*, is in itself unnecessary and is of no relevance to the real policy problem discussed above.

(iii) *Description of an act*

Criminal law operates by defining specific acts as offences. Exceptionally it also prohibits omissions.[118] *Cr.C.* s. 50 makes it an offence not to try and prevent a person known to be about to commit treason from committing it. *Cr.C.* s. 197 states that everyone has a duty to provide necessaries for his wife and children. *Cr.C.* s. 199 provides that every one who undertakes to do an act has a duty to do it if omitting to do it may be dangerous to life. And of course homicide can be committed by omission.

Most criminal offences, though, consist of positive acts. Theft basically consists of taking another's property, not of failing to restore it to him: I have no duty to take back to you the goods you lose, I simply must not keep them. Fraud fundamentally consists of deceiving, not of failing to enlighten: I have no obligation to disabuse you of your own self-induced misconceptions. And assault consists of applying force, not of failing to prevent its application: I must not deliberately trip you but I am not bound to stop your tripping over yourself.

But when is conduct an omission, when is it a positive act? In *Fagan v. Metropolitan Commissioner*[119] *D*, directed by *P*, a policeman, to park nearer the kerb, accidentally drove his car onto *P*'s toe. In reply to *P*'s remonstrations *D* then switched off the ignition and refused to move. Charged with assault, *D* argued that there was no *actus reus* — when applying force he acted unintentionally and when he did have an intention he in fact did nothing, he merely omitted to

remove the car. The appeal court divided on the issue. Two judges found him guilty because his keeping the car on *P*'s toe was an *actus reus*. One would have acquitted because the application of force was unintentional and *D*'s intentional keeping of the car where it stood was simply an omission.

In such a case the problem cannot be solved by seeking the definitive description of *D*'s act. Acts do not come neatly labelled — "an act has no natural boundaries" — so the description must depend ultimately on context and on policy. Legal theorists have sometimes sought answers to such problems in scholastic definitions of "act" and thereby helped to complicate the learning on *actus reus*. The best approach, however, is to inquire whether *D*'s conduct in its overall context should be assimilated to doing nothing and not penalized or should be assimilated to doing something and counted as assault.

Similar problems arise over the correct description of a person's intention. Take for example the offence of obstructing a peace officer in the execution of his duty (*Cr.C.* s. 118). For this offence the *mens rea* is to intend to do the act forbidden by law. But what is the precise act forbidden by law? Is it the act of obstructing someone who, whether you are aware or not, happens to be a peace officer and happens to be acting in the execution of his duty? Or is it the act of obstructing-a-peace-officer-in-the-execution-of-his-duty, i.e. you have to know that you are obstructing him, that he is a peace officer and that he is acting in the execution of his duty? If the former, intent need only relate to the obstruction. If the latter, it relates also to the status and activity of the victim. The problem is that the words in the section leave this ambiguous.

Or take the following example. *D*, wishing to destroy an airplane and recover insurance compensation, puts a bomb in it timed to go off during flight, and thereby kills the crew. Here should we say that *D*'s act is putting the bomb in the aircraft, that his intent is to destroy the plane and that the deaths are a foreseen but unintended consequence? Should we say that *D*'s act is blowing up the aircraft, that his intent is to obtain the

money and that the deaths are obliquely or indirectly intended? Or should we say that *D*'s act is trying to obtain insurance money by blowing up an airplane and its crew in flight?

Such problems have no obvious solution. Each of the three descriptions is admissible. None is exclusively correct, though some answers may be better than others. Which ones are better depends on various things — on the purpose, values and concerns of the criminal law. Which one, therefore, is favoured by the criminal law will not depend on ever more intricate analysis of *actus reus* and *mens rea*, but on the wording of the relevant statute, its common-sense interpretation and the general policy behind the law.

(iv) Mens rea *as a standard*

Although the principle of responsibility highlights the subjectivity of guilt, as do such earlier common-law phrases as "malicious design", "wicked mind", "vicious will" and "guilty mind", such guilt need not be totally subjective. For one thing, law sets objective standards and a person can be guilty without feeling or believing that he is. For another, since guilty intent must be inferred from external factors, an accused's actual state of mind may differ from that inferred.

First, criminal law imposes objective standards to which all must conform, as can be seen from the rules concerning motive and ignorance of law. Motive is generally irrelevant to guilt.[120] If criminal law forbids an act, then anyone committing it is (unless specifically exempt by law) criminally liable however laudable his motive: one who steals is guilty of a crime no matter what his motive — the law concerns itself with theft, not with the reason for it, and its standards are not those of individual defendants but those of the whole community. So too, ignorance of law is generally no excuse.[121] Because the standards of the criminal law are those of the whole community, individual members of it are assumed to know them and required to live up to them. Murder, robbery, theft and other real crimes which clearly violate community standards are known by all to be "off limits", whether or not they know the precise *Criminal Code* provisions.

At the same time, criminal guilt is never totally objective. However irrelevant a defendant's motives, morality and personal beliefs, his state of mind is always pertinent. Criminal law, like morality, is concerned not just with things that simply happen but with things that people do. Murder, robbery and theft are done by people who intend to kill, to rob, to steal. Crucial, then, in any criminal trial will be the question: what did the defendant mean to do? To this extent criminal liability remains subjective.

In fact objectivity and subjectivity are normally two sides of the same equation. Personal and legal guilt usually coincide, for murderers, robbers and thieves not only mean to murder, rob and steal but also know in general that they should not do so. Only in rare and marginal cases is there discrepancy, where religious belief or conscientious objection conflicts with criminal law. Normally, then, the need for subjectivity poses no problem for the objectivity of criminal-law standards. As Hall puts it, "the insistence that guilt should be personal must be interpreted to accord with the paramount value of the objectivity of the principle of *mens rea*".[122]

Second, *mens rea* must inevitably be proved by inference from external factors. In this regard our criminal law builds on common sense and presumes that basically people are psychologically equal. "Men", says Hale,[123] "are endowed with the two great faculties: understanding and liberty of will. And will, which presupposes understanding, is that which makes human actions commendable or punishable". So while this presumption can be rebutted by showing that an accused is unable to form *mens rea* by reason of infancy or insanity and is therefore not a proper subject for the criminal law, the normal individual is held to be responsible for his actions. Accordingly intent is normally inferred from external circumstances.[124]

Indeed, in earlier days the courts had little concern with the defendant's actual intent. Their primary concern was with the act from which they could infer the necessary "wicked intent". The more injurious the act, the stronger the presumption of wickedness — he who did evil was presumed to do it

with an evil mind unless the act and the surrounding circumstances pointed to accidents, mistakes, insanity and so on, which excused him.[125]

As time went on, the situation changed. Statutory creation of *mala prohibita* gave *mens rea* an air of artificiality. "Wickedness" could hardly be inferred from acts not wicked in themselves. Courts had two options: to restrict *mens rea* to mere states of mind or else to dispense with it entirely. They did both. On the one hand they readily interpreted statutes as impliedly dispensing with *mens rea* and creating strict-liability offences.[126] On the other hand they began to regard *mens rea* as devoid of any moral connotation and as simply relating to intent, recklessness or knowledge on the part of the defendant.[127]

(v) *The defeasible nature of* mens rea

In recent years writers like H. L. A. Hart and Peter Brett have stressed the fact that *mens rea* is a defeasible concept.[128] By doing so they take us back to Hale, who epitomized the common-law concept of criminal responsibility in the following terms:

> General notions or rules are too extravagant and undeterminate, and cannot be safely in their latitude applied to all civil actions; and therefore it has been always the wisdom of states and law-givers to prescribe limits and bounds to these general notions, and to define what persons and actions are exempt from . . . penal law in respect of their incapacity or defect of will.[129]

In other words, principles rationalize responsibility but cannot make it operational. Only rules do this.

Such rules qualify the general notions of the criminal law. They do so by exempting certain persons and actions from criminal responsibility. In consequence the traditional common-law approach to criminal responsibility is essentially negative, being less concerned with what responsibility is than with what it is not. So, just as Hale[130] defined and classified defences as "incapacities or defects", so too our *Criminal Code* nowhere defines criminal responsibility but sets out defences of insanity, self-defence and duress and so on. So too

with the case law, where courts less often define the meaning of *mens rea* than the meaning of its absence, as they have done most obviously with respect to mistake of fact.[131] In short the common-law approach is that once we define excuses and justifications, we have defined responsibility.[132]

Over the last century, however, scholars like Holmes, Salmond and others[133] developed a positive approach. By analysing the ingredients of offences into act and conduct, motive and intent, circumstances and consequences, they sought to reduce the gap between common sense and scientific knowledge. Instead of simply defining the different *mentes reae* of each crime, they attempted a general definition in terms of foresight of consequences.[134]

For all its useful insights, this analysis had unfortunate results. First, it exaggerated the split between *actus reus* and *mens rea*, which was discussed above. Second, it defined *mens rea* too positively, as though in murder cases for example the natural thing to ask is "did *D* do a voluntary act of killing *V* and did he have intent to kill?" whereas the common-sense question is "was there anything unusual in the circumstances to defeat the charge of murder, e.g. did *D* not know the gun was loaded?". Third, it attempted to reduce the question of responsibility to one of fact denuded of any normative or moral aspects.[135]

Both approaches to *mens rea*, the positive and negative approach, are found in present law. Take *The Queen v. King*.[136] Injected with pentothol by his dentist, *K* was warned not to drive until his head cleared, drove and was charged with impaired driving. His defence was lack of responsibility for his impairment. This was rejected by the trial court on the ground that the offence was one of strict liability and did not require *mens rea*. *K*'s conviction was quashed by the Court of Appeal and the Crown appealed to the Supreme Court of Canada. Here Taschereau J. adopted the positive approach, used the *actus reus/mens rea* dichotomy and held that the *actus reus* was the driving, that *K* was unconscious when driving, and that there was therefore no *actus reus*. Ritchie J., speaking for the majority, took the negative, more common-sense approach,

held that the court must look at the whole episode consisting of the administration of the drug, the warning and the driving, and determined *K*'s responsibility by applying the common-law defence of involuntary intoxication. Though both approaches turn eventually on the same issue (*K*'s appreciation of the drug's effect) and lead to the same conclusion (*K*'s acquittal), the negative approach is surely closer to common sense.

(vi) *Specificity and the rule of law*

In our law there is no such thing as criminal activity in general. An individual can only be charged with some specific offence. This is a direct corollary of the rule of law.

Put simply, the rule of law calls for "a government of laws and not of men". Ministers, executives and public servants must not be left entirely free to do just what they please; instead they must be subject to authority and have their powers defined and limited by law. The individual must not be at the mercy of his government but must be able to foresee the possibility of government intervention against him and to arrange his affairs in such a way that he steers clear of it. In order to be able to do this the citizen must have the preconditions of such intervention written down in black and white.

This doctrine is rooted in history. As early as the 13th century Bracton was asserting that the King was "under God and the law".[137] Four centuries later Coke was to rely heavily on this assertion in his opposition to James I.[138] Eventually it came to be accepted that, as Dicey[139] put it, no one was punishable except for a distinct breach of law and no one was above the law. In Canada the rule of law is implied theoretically by the preamble to *The British North America Act*, which states the intention of creating a constitution "similar in principle to that of the United Kingdom",[140] and has been applied in practice in the celebrated civil liberties cases of the 1950's.[141]

Within the particular context of the criminal law the doctrine claims that people should not be convicted except for breaches of already existing law — lawmakers should not create offences retroactively. In line with that principle the

Supreme Court of Canada in 1950 in *Frey v. Fedoruk*[142] decided that "if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts". In line too with that selfsame principle in 1955 the revised *Criminal Code*, section 8 provided that "no person shall be convicted (*a*) of an offence at common law". Today, therefore, in Canada new crimes can only be created by Parliament.

The rule of law, then, has a twofold implication. Obviously, and most importantly, it applies to the executive — to ministers, public servants and other administrators, whose power must be kept within the confines of authority. Less obviously, but equally important for our purposes, it applies to the judiciary. If courts are to behave consistently, treat like cases alike and different cases differently, and avoid arbitrary reliance on personal preferences, they must be legally obliged to apply stable and consistent rules of law.

While the Special Part, however, of the criminal law must be specific, the General Part can be more open-ended. For while freedom from arbitrary oppression requires offences to be defined in fairly precise detail, fairness and justice require allowance to be made for all appropriate exonerating circumstances. Such circumstances cannot be completely catalogued beforehand — we cannot possibly know in advance all the excuses we may be prepared to accept when raised. This is why *mens rea* has been said to be a defeasible concept and why accusations are always open to some "yes, but" type of rebuttal. To allow for the operation of such rebuttals is the task of the General Part.

The above discussion, however, is not meant as an exhaustive treatment of the law on criminal liability. It has merely examined certain problems illustrating the operation of the more important rules concerning *actus reus*, *mens rea* and general defences and showing the tendency of criminal law towards formalism, over-emphasis on concepts and lack of recognition of the nature of "real life" situations.

Conclusion

The main thrust of this paper has been as follows. First, history has driven a wedge between the theory and the practice of the criminal law. As a result we find judges and scholars frequently pulling in opposite directions. Scholars have tended to concentrate on conceptual analysis of terms together with sophisticated exegesis of statutes and precedents. Judges have tended to take a more practical approach and operate by common sense. To scholars in the classroom judges have often seemed like poor relations unable to cope with the beautiful complexities of criminal law. To judges in the courtroom scholars have often seemed like ivory tower inhabitants quite out of touch with real life.

Second, this wedge between theory and practice has been doubly unfortunate. For, as this paper has argued, criminal-law theory needs to learn from practice and at the same time criminal-law practice needs to learn from theory. Criminal-law theory has to bear in mind that criminal law has basically to do with ordinary people — it is a highly practical, common-sense and down-to-earth area of law. At the same time criminal-law practice has to recognize that criminal law is not a catalogue of *ad hoc* rules and decisions but a branch of law rooted in moral principle.

Surely the time has come for both theory and practice to draw closer so that both may better recognize the nature of the criminal law. This nature — injunctions directed against wrongdoing and founded on moral principles — should be reflected in general in our *Criminal Code*. It should be reflected in particular in its General Part.

To assist this reflection our General Part needs to be allowed to fulfil its proper function in the criminal law. This function, it has been argued in this paper, is to avoid repetition, to order and systematize the law and to provide theoretical underpinnings in terms of the basic principle of responsibility.

Unfortunately our General Part fails to perform any of these functions adequately. As for avoidance of repetition, our General Part is obviously inadequate. Many of the general rules concerning our criminal law are scattered throughout the *Code* with resulting repetitiveness and lack of generality. This is true both as regards *mens rea* and as regards general defences.

As to order and systematization, our General Part fares no better. The scattering of general rules in the General Part of the *Code*, the Special Part and the common law robs our General Part of unity, simplicity and comprehensiveness. This can be seen particularly from the rules relating to *mens rea*, which have been largely left to common law, and from general defences not yet incorporated in the *Code*.

Finally, as to theoretical underpinnings, our General Part is sadly lacking, mainly for reasons of history. Nowhere does our *Criminal Code* express its basic principle, i.e. the principle of responsibility. Meanwhile that principle, left to common-law articulation, has acquired undue complexity, generated a variety of problems and lost the fundamental moral thrust which it originally encapsulated.

To recover that thrust our General Part needs to make a fresh start. It needs to steer clear of undue sophistication, to employ terms usable by judges in directing juries, to use such terms to codify rules existing in the *Code* or in the case law, and to express these rules in such a way as to bring up front the basic principles on which those rules are founded. In particular it needs to bring to the fore the most basic principle of all, the principle underlying the whole General Part, the principle forming the subject matter of this paper — the principle of responsibility.

Endnotes to the Role of the General Part

1. *Proprietary Articles Trade Association v. The Attorney General of Canada*, [1931] A.C. 310 at 324 (J.C.P.C.).

2. Devlin, *The Enforcement of Morals* (1965) 27.

3. Sir James Fitzjames Stephen (1829-1894) in *A General View of the Criminal Law of England*, published in 1863, made the first attempt since Blackstone to give a systematic statement to the principles of criminal jurisprudence. His subsequent endeavour, the 1877 *A Digest of the Criminal Law* was an attempt to codify criminal law. Later that same year, Stephen drafted *Indictable Offences*, a Bill which was in effect a criminal code. His last work *History of the Criminal Law of England* was published in 1883.

4. 2 Stephen, *History of the Criminal Law* (1883) 76.

5. Criminal law is generally divided into two categories, substantive law and adjectival, or as it is often called, procedural law. Substantive law is itself divided into two sub-categories, the General Part and the Special Part. Our *Criminal Code* contains a Special Part which creates offences, such as rape, theft, etc., and also a General Part which sets out rules which apply to the whole *Code*.

   Not all criminal offences are contained in the Special Part of the *Code*. Many offences have been created by particular statutes and defined within these statutes. For example, offences of possession or sale of narcotic drugs, are created and defined by the *Narcotic Control Act*, R.S.C. 1970, c. N-1, ss. 3 and 4.

6. Williams, *Criminal Law: The General Part* (2nd Ed. 1961) v.

7. See n. 3, *supra*.

8. Sir William Blackstone (1723-1780) is remembered principally for his *Commentaries on the Laws of England* published in four volumes between the years 1765 and 1769. The importance of his work for the criminal law lies largely in his analysis of criminal offences and his detailed classification of offences in Volume 4 of the *Commentaries*.

9. Sir Matthew Hale (1609-1676) in his first contribution to criminal-law literature, *Pleas of the Crown or a Methodical Summary of the Principal Matters Relating to That Subject* (1678) produced what was in essence a classification of crimes. His *History of the Pleas of the*

Crown, published posthumously in 1736-39, was the first work in the professional literature to give a detailed discussion of the general part of criminal law.

10. Before Hale, most works written on criminal law concentrated on criminal procedure. They did not attempt to explain or organize the criminal law but tried only to outline it. In the first major work in criminal-law literature, Bracton's *De Legibus et Consuetudinibus Angliae*, which was unfinished at his death in 1268, there is hardly any classification of crimes. Among works published after Bracton, Lambarde's *Eirenarcha* (1610) attempted to classify crime but arrived only at creating a digest of cases.

11. Hall, *General Principles of Criminal Law* (2nd Ed. 1960) 6. The 16th century marked a transition from a period of anonymous year book reports to a period of reports written by named authors, most of whom were judges or lawyers writing for their own use rather than for publication. These unofficial reports aided the lawyer in his practice and served the judge as handbooks or notebooks. Some of the most respected reports of the day were: Plowden's Reports (1549-1580); Dyer's Reports (1513-1582); Coke's Reports (1552-1635). For a complete list of law reports published in 16th and early 17th centuries see 5 Holdsworth, *A History of English Law* (7th Ed. 1956) 358-363.

12. Hall, *op. cit.*, at 9.

13. 1 Hale, *Pleas of the Crown* (1736) 14.

14. Hale's *History of the Pleas of the Crown* (1736) provided the first great peak in the English literature on criminal law. The influence of his treatise is manifested in the work of all subsequent textbook writers. Among the most important of these authors are Hawkins, *A Treatise of the Pleas of the Crown 1716-1721* (Reprinted in 1973); Foster, *Crown Cases* (3rd Ed. 1792); Russell, *Crimes and Misdemeanours* (12th Ed. 1964); Stephen's works mentioned in n. 3, *supra*; Kenny, *Outlines of Criminal Law* (19th Ed. 1966); Williams, *Criminal Law: The General Part* (2nd Ed. 1961).

15. *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156 per Lord MacMillan, at 175.

16. Jerome Hall (1901-) is considered one of the foremost American legal writers of our time. His many works include: *General Principles of Criminal Law* (2nd Ed. 1960); *Theft, Law & Society* (2nd Ed. 1952); *Studies in Jurisprudence and Criminal Theory* (1958); *Foundations of Jurisprudence* (1973).

17. General criminal-law jurisdiction is not exercised by the Commonwealth of Australia but vested in the different States.

    Howard, *Australian Criminal Law* (2nd Ed. 1970) and following.

18. *New Zealand Crimes Act*, 1961.

19. In the United States substantive criminal law falls mainly within the jurisdiction of the individual States. Bassiouni, *Substantive Criminal Law* (1978) 3 and following.

20. In early Canadian history each territory in Canada, except Québec, was governed by the criminal law in force in England. Later, English criminal law was imposed on Québec as well by the *Quebec Act, 1774*. In addition, each territory was given some limited power to change this English law.

    At Confederation power over the area of criminal law was assigned to the federal government under *The British North America Act, 1867*.

    The challenge given the new Canadian government was to pull together the existing criminal law, which was made up of common law, English statute law, and Canadian pre-Confederation statutes, into a unified Canadian system.

    First, to remedy the problem of the differing legislation which existed in each territory, the government passed a series of statutes to standardize criminal procedure, offences relating to property and offences against the person.

    Because these *ad hoc* provisions failed to create a homogeneous Canadian criminal law, the government turned to England's studies on codification, begun in 1838, for a possible solution to the problem. Impressed by the simplicity and clarity of codified law, and also with Stephen's work in the area (see note 3, *supra*) in 1891 the government introduced in Parliament a measure to codify criminal law.

    The draft bill, embodying many of the provisions in Stephen's Code, was first referred to judges and lawyers for their comments, then it was re-introduced in Parliament and was adopted in 1892. The draft of the Bill was completed by Robert Sedgwick, Deputy Minister of Justice, and by Mr. Justice G. W. Burbidge. The basic influences which shaped the draft were Canadian statute law and a version of Stephen's *Digest* adopted for Canadian use by Mr. Justice Burbidge in 1889.

    The *Code* was amended many times between 1892 and 1955 to correct problems and meet new situations. In 1955 the *Code* was revised. This revision made no substantial alteration in the law but it did abolish all common-law offences, offences under Imperial Acts, and offences under pre-Confederation statutes.

    See also Mewett & Manning, *Criminal Law* (1978) 1-10; and Laskin, *The British Tradition in Canadian Law* (1969).

21. 55 & 56 Vict., c. 29.

22. See n. 3, *supra*.

23. 55 & 56 Vict., c. 29, Part II, Matters of Justification or Excuse.

24. R.S.C. 1970, c. C-34, Part I — General.

25. *Id.*, s. 7.

26. *Id.*, s. 2.

27. *Id.*, sections 207, 208, 209, 211.

28. *Id.*, s. 215.

29. *Id.*, subs. 386(1).

30. *Id.*, subs. 159(6).

31. *Id.*, s. 146.

32. For examples see *id.*, s. 170 (nudity); subs. 159(2) (obscenity); s. 305 (extortion); s. 307 (unlawful presence in a dwelling).

33. MacLeod & Martin, "Offences and Punishments under the New *Criminal Code*" (1955) 33 *Can. Bar Rev.* 20 at 23-27.

34. Hall, *General Principles of Criminal Law* (2nd Ed. 1960) 17.

35. R.S.C. 1970, c. C-34, s. 210.

36. *Id.*, s. 12.

37. Hall, *op. cit.*, at 8.

38. *Id.*, at 1.

39. *Ibid.*

40. In the importance of distinguishing side-constraints or limiting principles governing an institution from its general justifying aim, see Hart, *Punishment and Responsibility* (1968) 9-10. See also Nozick, *Anarchy, State and Utopia* (1974) 28-35.

41. Fitzgerald, "Law and Systems" (1975) 14 *Western Ontario Law Review* 215. For further reading on the differences between rules and principles see Dworkin, *Is Law a System of Rules* in *Essays in Legal Philosophy* (Ed. Summers 1968) 25; Hall, *op. cit.*, at 17-26; and see the Law Reform Commission of Canada's Study Paper *Criminal Law: Towards a Codification* for the role that rules and principles play in criminal law.

42. See n. 101, *infra*. See nn. 98 and 99, *infra*.

43. Fletcher, *Rethinking Criminal Law* (1978) 576.

44. [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. (N.S.) 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

45. Turner, *The Mental Element in Crimes at Common Law* in *Modern Approach to Criminal Law* (Eds. Radzinowicz & Turner 1948) 195.

46. *Leary v. The Queen*, [1978] 1 S.C.R. 29, 33 C.C.C. (2d) 473, 37 C.R.N.S. 60, 74 D.L.R. (3d) 103.

47. See *The Queen v. Natarelli and Volpe*, [1967] S.C.R. 539, [1968] 1 C.C.C. 154, 1 C.R.N.S. 302 and *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35, 36 C.R.N.S. 1 (Ont. C.A.).

48. The classic definition of mistake of fact requires that an accused, at the time he committed the offence, believed in a state of facts and, that this belief was based on good faith and reasonable grounds (see *R. v. Tolson* (1889), 23 Q.B.D. 168 at 188). Recent cases however

insist that the true test for mistake of fact is the honesty of the belief entertained by the accused (see Cartwright J.'s judgment in *Beaver v. The Queen*, [1957] S.C.R. 531 at 538, 118 C.C.C. 129 at 137 and *R. v. Morgan*, [1976] A.C. 182 at 203).

The comments made above are limited to true crimes. In the area of strict liability a mistake of fact must be reasonable.

49. (1889), 23 Q.B.D. 168 at 187.

50. This maxim has a long and somewhat obscure history (Hall, *op. cit., supra*, at 80). Alternatively the maxim may have made its first appearance at a later date as *ream linguam non facit nisi mens rea* from St. Augustine's work, *Sermones*, no. 180, c. 2 (Kenny, *op. cit., supra*, at 13).

The maxim was restated in the 12th century by Henry I as *reum non facit nisi mens rea* in *Leges Henrici Primi* (Sayre, "*Mens Rea* " (1932) 45 *Harv. L. Rev.* 974 at 983). The current version of the maxim *actus non facit reum nisi mens rea* which came into use sometime after the 12th century was first mentioned by Coke in *Institutes of the Laws of England* (1642) Part III 107. See also Broom, *Legal Maxims* (10th Ed. 1939) 207.

51. The derivation comes from the Latin word *respondere* (to answer). On responsibility generally see Hart, *op. cit., supra*, and "Varieties of Responsibility" (1967) 83 *L.Q. Rev.* 346 at 363.

52. See Pound's *The Spirit of the Common Law* (1921). Pound sees four stages of legal evolution: first a stage which developed "composition for the desire to be avenged", second a stage of strict law with inflexible rules, third a stage of equity or natural law and fourth a stage resulting from the marriage of certainty and equity. For criticism of this view see Falk Moore's *Law as Process* (1978) 82 and following. As Moore observes, "the tenets which Pound used to characterize stages of legal evolution . . . are more illuminating, not when taken literally, but . . . when studied as a system of categories and legitimating classes, or as ideological aphorisms" (*op. cit.*, at 85).

53. In Exodus XXI : 28 we find the statement "If an ox gore a man or woman, that they die; then the ox shall be surely stoned and his flesh shall not be eaten . . .". For more information on ancient notions of criminal responsibility see *ibid.* and 2 Holdsworth, *A History of English Law* (7th Ed. 1956) 46-47.

54. The noted criminal-law writer Glanville Williams defines the concept of *actus reus* and *mens rea* as follows: *Mens rea* refers to the mental element necessary for a particular crime. This element can be either the intention to do the act, or bring about the consequences, or, in some cases it may be intention or recklessness as to the elements constituting the *actus reus*. *Actus reus*, on the other hand, comprises the whole situation proscribed by law with respect to the particular offence, with the exception of the mental element (*Criminal Law: The General Part* (2nd Ed. 1961) 18 and 31).

55. Dicey, *Law and Opinion in England* (1905). Dicey's book outlines the growth of legislation to promote social reform generally and to create rights for individual groups, such as married women and workers. At 359-396 Dicey deals with legislative changes which allowed married women to be treated in law as single women. At 219-242 he sets out how the legislature dropped its *laissez-faire* approach to industrial problems and began to regulate factories. See also Wolfgang Friedmann, *Law in a Changing Society* (2nd Ed. 1972) 46-47.

56. Holmes, *The Common Law* (1881) 6-7.

57. Winfield, "The Myth of Absolute Liability" (1926) 42 *L.Q. Rev.* 37.

58. Holmes, *op. cit.*, at 2; "Revenge is a kind of Wild Justice" *Bacon's Essays* (Ed. West 1897) Essay IV of Revenge 11. See also Manser, "It Serves You Right" (1962) 37 *Philosophy* 293.

59. See also Hobbes, *Leviathan* (1651) Chap. XIII; Rommen, *The Natural Law* (1947) 82-86.

60. 1 Stephen, *History of the Criminal Law of England* (1883) 61.

61. *Ibid.*, at 60.

62. See n. 61, *supra*.

63. A detailed history of the extension of this concept may be found in Allen, *The Queen's Peace* (1953) 3-35; 2 Pollock & Maitland, *The History of English Law* (2nd Ed. 1898) 453-464.

64. Bentham, *Introduction to the Principles of Morals and Legislation* (1970) 143-145.

65. It is generally believed that Jewish penal law was extremely harsh. In fact, although the "criminal code", the Penitude, was very strict and very severe, the law in its application was quite humane due to the rules of procedure which were designed primarily to protect the accused. For example, at trial the prosecution not only had to prove that the accused committed the prohibited act but also that the accused was guilty in his heart.

    Not only was the concept of moral fault an integral part of a Jewish criminal trial, it was also a main theme of Jewish prophetic writing. These prophetic writings were the main source of inspiration of the early philosophers of the Christian era, like St. Augustine and Saint Justin Martyr. St. Augustine states "man has a free will to do evil or good and this must be so, for unless acts are committed voluntarily their punishment would not be just". (Augustine, *The Free Choice of Will*, Books I-III and *Retractions*, Book I, Chap. 9.) See also, Justin Martyr, *The First Apology*, Chaps. 42-46.

    This reasoning was also adopted by an early and a major proponent of the natural law, who refers to the relationship between man's destiny and his free will in three main parts of his *Summa Theologiae*, Part I, Question 22, Article 2, Answer to the fourth Question, Part 1, Question 1, Article 1; I-II Prologue.

66. See n. 2, *supra*.

67. People generally think of crimes as wrongful acts quite apart from the law. "The term 'criminal' is generally reserved for those who commit crimes of violence and dishonesty": Fitzgerald, *Criminal Law and Punishment* (1962) 4. See also, 2 Stephen, *History of the Criminal Law of England* (1883) 75-77. For a discussion of the difference between *mala in se* and *mala prohibita* see Fitzgerald, "Real Crimes and Quasi Crimes" (1965) 10 *Natural Law Forum* 21 and Kenny, *op. cit., supra*, at 28-29.

68. As Lord Devlin states, the law's function is not simply to protect individuals from injury, annoyance, corruption and exploitation. The law also must protect the institutions and the community of ideas, political and moral, without which people could not live together: Devlin, *The Enforcement of Morals* (1965) 22.

69. 1 Holdsworth, *A History of English Law* (7th Ed. 1956) compurgation 305-308; trial by battle 308-310; trial by ordeal 310-312.

70. Radcliffe & Cross, *The English Legal System* (6th Ed. 1977) 67.

71. Brett, in *An Inquiry into Criminal Guilt* (1963) 140, describes the Holmesian view that our inability to ascertain the state of a man's mind obliges us to determine his guilt by external criteria. Williams, *op. cit., supra*, at 89-98 also looks at a product of this "external" view in his examination of the "presumption of intention". This is a presumption of fact that an accused's guilty intent can be inferred simply from looking at his acts. For a historical account of the development of trial evidence and procedure see 1 Wigmore, *On Evidence* (3rd Ed. 1940) 14-25.

72. In 1898 the *Criminal Evidence Act* made the accused and his or her spouse competent but not compellable: Radcliffe & Cross, *op. cit.*, at 348-349; 9 Holdsworth, *A History of English Law* (7th Ed. 1956) 123. For a detailed account of the change in the jury's role from givers of evidence to interpreters of evidence see 1 Holdsworth, *op. cit.*, at 332-337.

73. The expression "positivism" is used to designate one or more of the following contentions: (1) that laws are commands of human beings; (2) that there is no necessary connection between law and morals, or law as it is and law as it should be; (3) that the analysis or study of meanings of legal concepts is an important study but to be distinguished from (though in no way hostile to) historical inquiries, and the critical appraisal of law in terms of morals, social aims, functions, etc.; (4) that a legal system is a closed logical system in which correct decisions can be deduced from predetermined legal rules by logical means alone; (5) that moral judgments cannot be established as facts can by rational argument, evidence or proof (Hart, *The Concept of Law* (1961) 253-254).

    The following are some of the principal positivist writers:

    1. Jeremy Bentham, *The Limits of Jurisprudence Defined* (Ed. 1945) and *Fragment of Government* (1891).

2. John Austin, *The Province of Jurisprudence Determined* (1832) and *Lectures on the Philosophy of Positive Law* (3rd Ed. 1869).

3. J. C. Gray, *The Nature and Source of Law* (1902).

4. Hans Kelsen, *General Theory of Law and State* (1949).

74. *R. v. Tolson* (1889), 23 Q.B.D. 168 at 185.

75. See Stallybrass, "The Eclipse of *Mens Rea*" (1936) 52 *L.Q. Rev.* 60 at 64.

76. A regulatory offence is one in which, to prove the accused guilty, the prosecution needs to prove only that the accused did the act alleged; it is not required to prove that the act was done with guilty intent. Sayre, the major proponent of regulatory offences, endorses their use only for crimes carrying small fines and involving no moral delinquency. According to Sayre "true crimes of classic law" should not be subjects for the strict liability of the regulatory offence ("Public Welfare Offences" (1933) 33 *Colum. L. Rev.* 55). Perkins, another proponent of the regulatory offence in "The Civil Offence" (1952) 100 *U. of P. L. Rev.* 832 categorically states that regulatory offences were never part of the criminal law. He asserts that a *malum prohibitum* (something wrong only in that it is against the law) is not a crime. Perkins claims that this has always been recognized, and has been underscored by such noted criminal-law authors as Blackstone, Kenny and Roscoe Pound. As evidence for his conclusion Perkins points to the fact that there is a persistent search for the appropriate label for these offences such as "public tort", "public welfare offence" and "quasi-crime". On the subject generally see also Edwards, *Mens Rea in Statutory Offences* (1955).

    For a thorough analysis of how Canadian Courts have dealt with regulatory offences see Jobson, "Far from Clear" (1975-76) 18 *Cr. L. Q.* 294.

    The recent case of *The Queen v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, 3 C.R. (3d) 30 may have great repercussions in this area of the law. In this case the City of Sault Ste. Marie hired independent contractors to dispose of the city's garbage. In disposing of the garbage the contractors polluted a nearby creek and river. The City was charged with pollution. The Supreme Court of Canada held that the offence was one of strict liability and therefore the doing of the prohibited act *prima facie* imported the offence. However, the Court held, the City could avoid liability by proving that it took all reasonable care in the circumstances. A new trial was granted to give the City an opportunity to prove that they were duly diligent.

77. See the cases of *Sweet v. Parsley*, [1970] A.C. 132 at 149, [1969] 1 All E.R. 347 at 350, [1969] 2 W.L.R. 470; *The Queen v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5 at 17, [1970] 5 C.C.C. 193, 12 C.R.N.S. 272, 12 D.L.R. (3d) 591; *The Queen v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1312.

78. See n. 76, *supra*.

79. Criminologists like Garofalo, in *Criminology* (1914) and Lombroso in *Crime: Its Causes and Its Remedies* (1911) have questioned whether *mens rea* is a good principle on which to base criminality. Barbara Wootton in *Social Science and Social Pathology* (1959) and *Crime and Criminal Law* (1963) contends that *mens rea* has become an outdated concept by reason of the proliferation of regulation offences, that responsibility can no longer in a time of broadening psychological horizons be seen in black and white terms and that a new basis of criminal culpability must be established. See also Jacobs *Criminal Responsibility* (1971) 143-172.

    The idea of criminals not as wrongdoers deserving punishment, but as unfortunate and sometimes dangerous people needing help, rehabilitation, and neutralization has permeated the criminological literature of the last two decades. See Teeters and Barnes, *New Horizons in Criminology* (3rd Ed. 1959) 468-481; Sutherland and Cressey, *Criminology* (19th Ed. 1978) 360-384.

    A psychiatrist who takes an approach which is similar to the criminologists' approach is Szasz in *Law, Liberty and Psychiatry* (1963) 123-127.

80. Hart, *Punishment and Responsibility* (1968) 177-185.

81. Hart, *op. cit.*, at 6.

82. Law Reform Commission of Canada, *Our Criminal Law* (1976) 5-6, 20-21.

83. *Ibid.*, and Law Reform Commission of Canada, *Studies on Strict Liability* (1974).

84. Etymologically "person" designated the mask worn by an actor on the Roman stage. Later it denoted roles played by wearers of such masks — the *dramatis personae*. Later still it described roles played upon the wider stage of life. Finally, it referred to beings capable of playing such roles — people. The original meaning of person draws a distinction mirrored in our laws. In plays we have the characters, the properties and the stage itself; in law and life we have people, things, and the environment. Whether on stage or off it then, persons are creatures who choose, plan, wish, intend, and act accordingly. Subjects rather than objects, they do things rather than simply have things done to them.

    No legal system can totally neglect this factor; even an Austinian system of commands needs people to issue, apply and enforce it, even a system making us treat persons as things must treat the treaters as persons. Persons then, are essential features of the social landscape. This being so, human society could hardly exist without allowing for the way we react to persons — without praise or blame, without some notion of 'fault' or 'excuse'. If it did, it would so differ from societies we know as not to qualify as "human". Still more important, it might well turn out to be psychologically impossible since human interaction involves reacting to people as moral agents.

85. Coke, *Institutes of the Laws of England* (19th Ed. 1832) Part I 97b.

86. 4 Blackstone, *Commentaries on the Laws of England* (1769) 405.

87. See Simpson, *The Common Law and Legal Theory* in *Oxford Essays in Jurisprudence*, second series (Ed. Simpson 1973) 78-79, 98-99.

88. Austin, *The Province of Jurisprudence Determined* (Ed. Hart 1954).

89. *Ibid.*, at 191.

90. Analogy, employed in early times to bring fairness and continuity to law, forms the basis of our common-law system of precedent, or *stare decisis*. The principle dictates that a judge, when deciding a case before him in a particular area of law, must draw an analogy between the current case and cases previously decided in the same area. If the current case has most of the same relevant factors as a previous one, it should be decided in the same way. For more on the role of analogy see Guest, *Logic in the Law* in *Oxford Essays in Jurisprudence*, (Ed. Guest 1961) 190-193; Pound, *An Introduction to the Philosophy of Law* (1954) 52; Cross, *Precedent in English Law* (2nd Ed. 1968) 182-192.

    The quintessential statement on *stare decisis* was perhaps Parke J.'s dictum in *Mirehouse v. Rennell* (1833), 1 Cl. & Fin. 527 at 546. Parke J. stated: "Our common law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency and certainty we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise and we are not at liberty to reject them; and to abandon all analogy to them, in those to which they have not been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science." For general reading on *stare decisis* see Allen, *Law in the Making* (7th Ed. 1964) 161-366 and Salmond, *On Jurisprudence* (12th Ed. 1966) 141-188.

91. Simpson, *op.cit.*, at 99.

92. A complete outline of the growth of law reporting may be found in Daniel, *The History and Origin of the Law Reports* (1884); Allen, *op. cit.*, at 187-235; Dias, *Jurisprudence* (4th Ed. 1976) 166-169.

93. Many changes occurred in England in the 19th and early 20th centuries to bring about changes in the judicial attitude. Within a few years of the *Judicature Acts* 1873-1875 (which fused the administration of law and equity) the normal mode of trial came to be by a judge alone. Within a few years of the passing of these Acts, the use of juries in civil cases at common law declined drastically; from 1885 until 1916 roughly half the cases heard in the King's Bench division were before a judge. The shortage at manpower during 1917 led to restrictive measures and in the early 1920's jury trial was at a very low ebb. A small measure of recovery took place, aided by the repeal of the restrictive measures in 1925, but the popularity of the jury trial again declined. There were severe restrictions upon jury trial during the war,

and since these were revoked in 1947 there has been an even lower proportion of jury trials than before the war.

Juries have never been popular in county courts, and changes in the right to jury trial were made on the same lines as for the King's Bench, the rules governing county courts being enacted in the *County Courts Act* 1934. The result was a virtual end to jury trial in county courts. Juries are not used in Chancery Division or in the Admiralty Court. In defended divorce cases and in contested probate cases there are no restrictions and either party may apply for a jury, but this occurs in very few cases; recently there has been on average less than one case a year tried by jury. (R. M. Jackson, *The Machinery of Justice in England* (6th Ed. 1972) 91-92.)

In 1966 Devlin pointed out that as far as criminal matters are concerned approximately 85% of offences are tried without a jury (Devlin, *Trial by Jury* (1966) 129-130).

In Canada, in the first year after Confederation Ontario made a severe inroad on the civil jury by providing that civil actions were to be tried by judge alone unless either party served notice that he wished the action to be tried by a jury. A similar rule was not adopted in England until 1883.

In 1969 Laskin pointed out that while the practice on civil jury trials varied from province to province, as a general rule few civil trials were held with juries. In Manitoba between the years 1944-1969 there were only 4 civil trials with juries. In Nova Scotia only 24 cases were set down for trial by jury in the years 1967-1968 and of these only half went to trial. The only province in which civil jury trials enjoy a limited popularity is in Ontario. There were 232 jury trials in Supreme Court actions in Ontario in 1967 and 179 in 1968. In the two years a total of 1,700 actions were started in which jury trials were sought.

On the criminal side, trial by jury was becoming less frequent each year. In 1906 the percentage of cases tried by jury was 7.4. By 1966 it had dropped to 2.1 (Laskin, *The British Tradition in Canadian Law* (1969) 42-49).

The middle of the 19th century also marked the beginning of a new source of legal comment, the law reviews. They featured reviews of important current court decisions. The first review in Canadian common-law jurisdiction was the Upper Canada Law Journal, published from 1855 to 1864 and the earliest civil-law journal was the Lower Canada Law Journal 1866-1868.

The following are some of the early journals which started publication after Confederation:

1. *La Revue légale* 1869-92 (Discontinued for two years, new series 1895 to date).

2. *The Canadian Law Journal* 1865-1922 and the *Canadian Law Times* 1881-1922 (united in 1923 to form the Canadian Bar Review).

3. *Western Law Times* 1889-1896.

4. *Manitoba Law Journal* 1884-85.

A change which occurred in the early 20th century was the institution of full appeals in England in 1907 by virtue of the *Criminal Appeal Act*. In 1923, similar provisions were enacted in Canada which provided for appeals proper in criminal matters for the first time. The notable difference was that under the Canadian statute a new trial could be ordered whereas under English law the Court of appeal could only quash the decision and enter a verdict of acquittal.

94. 1 Blackstone, *Commentaries on the Laws of England* (1765) 70.

95. For the development of binding precedent in English law, see Ellis Lewis, "The History of Judicial Precedent" (1930) 46 *L.Q. Rev.* 207 at 341, (1931) 47 *L.Q. Rev.* 411 and (1932) 48 *L.Q. Rev.* 230.

96. *Debet esse finis litium* is first cited in Jenk. Cent 61; Case XV, 145 E.R. 44. The maxim is also found in Coke, *op. cit.*, 303(a)-(b), as *expedit rei publicae ut sit finis litium* meaning "it is for the public good that there be an end to litigation".

97. The amount of legislation passed by the Parliaments of England and Canada today is much greater than it was in the 19th century. While the number of acts passed in a given sitting of Parliament has remained approximately the same, the number of pages of legislation has increased dramatically. In England in 1876 the legislature passed 81 Acts totalling 512 pages. In 1976 the English legislature passed 86 Acts but in 2,079 pages. In the first session of the First Parliament of Canada, 1841, 4 & 5 Vict. our legislature passed 100 Acts in 138 pages whereas in the First Session of the 30th Parliament Sept. 30, 1974-Oct. 12, 1976 our legislature passed 60 Acts in 1,310 pages.

98. (1889), 23 Q.B.D. 168.

99. *Ibid.*, at 187-188.

100. Guest, *op. cit.*, at 176. See also Wasserstrom, *The Judicial Decision* (1961) 12-28 and Levi, *An Introduction to Legal Reasoning* (1949).

101. "Prohibitions del Roy" (1607) 12 *Co. Rep.* 63 at 65.

102. Holmes, *The Common Law* (1881) 5.

103. *Hedley Byrne and Co. v. Heller and Partners*, [1964] A.C. 465 at 516, [1963] 2 All E.R. 575 at 602.

104. This is an approach first adopted by Lord Birkenhead in *D.P.P. v. Beard*, [1920] A.C. 479. This approach has been resurrected in many recent decisions, see *D.P.P. v. Majewski*, [1977] A.C. 443 at 479, and *Leary v. The Queen*, [1978] 1 S.C.R. 29, 33 C.C.C. (2d) 473, 37 C.R.N.S. 60.

105. Lucas, in "Not 'Therefore' But 'But'" (1966) 16 *Philosophical Quarterly* 289 calls this process development by dialectic reasoning.

106. Brett, *An Inquiry into Criminal Guilt* (1963) 40, 41; Hart, "Ascription of Responsibility and Rights" (1949) 49 *Proc. Arist. Soc.* 171, 179.

107. Wittgenstein, *Tactus Logico - Philosophicus*, 4.112.

108. The following authors have commented on the prestige of deductive reasoning; Toulmin, *Uses of Argument* (1964) 149; Salmond, *On Jurisprudence* (12th Ed. 1966) 183-188.

109. *Whiteley v. Chappell* (1868), L.R.4 Q.B. 147.

110. (1850), 2 Den 35, 169 E.R. 407.

111. Williams, *Criminal Law: The General Part* (2nd Ed. 1961) 23-27.

112. Hall, *General Principles of Criminal Law* (2nd Ed. 1960) 228.

113. *Ibid.*, at 230.

114. 1 Hale, *Pleas of the Crown* (1736) 434.

115. *Fain v. Commonwealth* (1879), 78 Ky. 183, 39 Am. R. 213.

116. Williams, *op. cit.*, at 11; Smith & Hogan, *Criminal Law* (4th Ed. 1978) 34-38.

117. Kenny, *op. cit.*, at 26.

118. See Smith and Hogan, *Criminal Law* (4th Ed. 1978) 45; Hall, *op. cit.*, *supra*, at 190-207; Glazebrook, (1960) 76 *L.Q. Rev.* 386.

119. [1969] 1 Q.B. 439.

120. Williams, *op. cit.*, at 49.

121. *Ibid.*, at 288.

122. Hall, *op. cit.*, at 104.

123. 1 Hale, *op. cit.*, at 14.

124. This is the so-called presumption of intent. See n. 71, *supra*.

125. The case of *R. v. Dixon* (1814), 105 E.R. 516 illustrates that the more serious the offence and the consequences which flow from it, the more likely it is that the Court will find the accused responsible for the offence. See also n. 71, *supra*, on the presumption of intent.

126. See Sayre, "*Mens Rea*" (1932) 45 *Harv. L. Rev.* 974; Law Reform Commission of Canada, *Studies on Strict Liability* (1974); Stallybrass, "The Eclipse of *Mens Rea*" 52 *L.Q. Rev.* 60; Sayre, "Public Welfare Offences" (1933) 3 *Colum. L. Rev.* 55; Sayre, *The Present Signification of Mens Rea in the Criminal Law* in *Harvard Legal Essays* (Ed. Pound reprint 1967) 399.

127. Fletcher, *Rethinking Criminal Law* (1978) 396.

128. See n. 106, *supra*.

129. 1 Hale, *op. cit.*, at 15.

130. *Ibid.*

131. An example of this reasoning is the statement made by Sir Richard Counch in *Bank of New South Wales v. Piper*, [1897] A.C. 383 at

389-390, "the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused in the existence of facts which if true would make the act charged against him innocent".

132. Brett, *op. cit.*, at 40.

133. See Austin, *Lectures on Jurisprudence XVII-XIX*; Holmes, *The Common Law* (1881) 54, 91; Fitzgerald, *Acts and Involuntary Acts* in *Oxford Essays in Jurisprudence* (Ed. Guest 1961) 1 and Hart, *Punishment and Responsibility* (1968) 99 n. 24.

134. Kenny, *op. cit.*, at 32-35.

135. Fletcher, *op. cit.*, at 491-504.

136. [1962] S.C.R. 746, 38 C.R. 52, 35 D.L.R. (2d) 386.

137. Bracton, *De Legibus et Consuetudinibus Angliae* f. 5b.

138. Coke argues for the supremacy of law in "The Case of Proclamations" (1611) 12 *Co. Rep.* 74 at 76, 77 E.R. 1352 at 1354.

139. Dicey, *The Law of the Constitution* (9th Ed. 1956) 193.

140. *The British North America Act, 1867*, 30 & 31 Vict., c. 3 (U.K.); R.S.C. 1970, App. II, No. 5.

141. *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

142. [1950] S.C.R. 517 at 530, 97 C.C.C. 1, [1950] 3 D.L.R. 513.