

# Supporting General Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective

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## SYNOPSIS

After an expression of the writer's values and assumptions, a case is made for the general principles of criminal responsibility set out in the Model Penal Code (M.P.C.), with particular attention to its general requirements of act and culpability and provisions on justification and excuse. The point is made that such principles are of particular importance given the lack of constitutional protection in the United States by comparison with Canada. The argument that the assertion of general principles is too insensitive to the context of particular crimes and the issues of diversity is then confronted. I suggest that aspects of the present sexual assault law in Canada are potentially repressive precisely because they ignore sound general principles. A plea is made to keep principles simple, with consideration given to the recent bloody debate between Professors George Fletcher and Paul Robinson. The paper concludes with seven possible areas for reconsideration of the M.P.C.

## VALUES AND ASSUMPTIONS

Would-be criminal law reformers should lay bare their values and assumptions. The perspective here is that of someone who grew up in South Africa under repressive apartheid laws and taught law there, studied in the United Kingdom, and has now been immersed in the Canadian

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criminal justice context for some thirty years.

Canada has had a federal Criminal Code applying to every part of the country since 1892. Its first code relied heavily on the work of James Fitzjames Stephen for the British Royal Commission of 1879. It did not contain a comprehensive general part as there were no general principles enacted concerning conduct and fault. Although this is still true of the present Criminal Code,<sup>1</sup> there is, however, a tradition of the assertion of general principles of substantive liability by the Supreme Court before and after the entrenchment of the Canadian Charter of Rights and Freedoms in 1982.<sup>2</sup>

This is a very unsettling time for one who makes the following basic assumptions:

1. The criminal justice system is all about the presumption of innocence, just state punishment, and fair labeling;
2. The individual rights of the accused against the power of the state must be carefully safeguarded before, during, and after trial, and must take precedence over rights of victims;
3. There are no magic answers about what causes criminal behavior, how to treat and stop it, and how to predict dangerousness;<sup>3</sup> and
4. The criminal sanction is a blunderbuss power which

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1. Criminal Code, R.S.C., ch. C-46 (1985) (Can.) [Revised Statutes of Canada].

2. See Don Stuart, *Canadian Criminal Law: A Treatise* (3d ed. 1995) [hereinafter Stuart, *Treatise*]; Don Stuart, *Charter Justice in Canadian Criminal Law* (2d ed. 1996).

3. Even psychologists responsible for an influential and now widely used method of assessment in Canada, relied on for parole decisions and in dangerous offender applications, acknowledge that "[n]o one claims that its use will guarantee fairness, accuracy and absence of bias in each and every case." Christopher D. Webster et al., *The Violent Prediction Scheme: Assessing Dangerousness in High Risk Men* 65 (1994).

must be used with restraint, with prison as a last resort.

We live in increasingly law and order times. The dovish views expressed above now yield to those of expedient hawks. There are constant and widespread calls in the media for toughening the criminal law, especially as it relates to particular issues such as those of violence against women and children, crime by youth, and organized crime. Voices favoring restraint have been drowned out. Instead there are pleas for “zero tolerance” and concern that criminals have too many rights at the expense of victims.

In Canada and elsewhere, politicians of all stripes have been unable to resist the political expediency of pandering to the perceived need to toughen penal responses. There are no votes in being soft on crime. The only issue is how tough you want to be. In California “three strikes and out” is a winning strategy despite expert warnings about its pernicious and discriminatory effects. No prospective President of the United States would dare to oppose the death penalty. Enacting a new crime is a quick fix. In Canada, the Criminal Code, which addresses substantive law, procedure, and sentencing, has grown enormously to become an unwieldy and inconsistent statute of 841 provisions, many with very complex subsections. Despite a reform effort for some twenty-five years by law commissions,<sup>4</sup> academics,<sup>5</sup> and lawyers,<sup>5</sup> no Minister of Justice can be persuaded to try to enact a General Part.<sup>6</sup>

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4. See Law Reform Commission of Canada, Rep. 31: Recodifying Criminal Law (1987).

5. See Canadian Bar Association Criminal Recodification Task Force, Principles of Criminal Liability (1992).

6. The history of such efforts in Canada and new proposals are set out in *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Don Stuart et al. eds., 1999). This collection of reform proposals covering all aspects of the Canadian criminal justice system was the product of a conference of judges, lawyers, and academics held in Kingston, Ontario in November, 1998. There is an ongoing effort to set up a Task Force to continue this work, hopefully with both private and governmental funding. The effort has the support of the recently retired Chief Justice Antonio Lamer of the Supreme Court of Canada.

## WHY A GENERAL PART?

As the millennium arrives, the best case for a general part may be that general requirements of act and fault and the existence of just defenses are an important check against these unremitting pressures to extend the state power to punish. In jurisdictions where there is a criminal code with a general part, as is the case with those based on the M.P.C., it will be harder for a legislature to create new criminal responsibility which cuts across those general principles. In common law jurisdictions and code jurisdictions without such a general part, as in Canada, any such check lies with judges in their more limited role of interpretation.

An assertion of general principles also has the obvious rule of law advantage of consistency, clarity, and control on excessive discretion by police, prosecutors, and judges who apply the law. This is especially so where a criminal code, such as the M.P.C., contains both a general part and careful definition of specific offenses. An adversary system, which requires cases to be fairly put to impartial judges or juries, and which is based on a presumption of innocence, cannot work with legitimacy where there is confusion—as there is in Canada—as to the applicable tests on even basic matters such as which fault test or self-defense provision applies.

## LACK OF CONSTITUTIONAL PROTECTION IN THE UNITED STATES

The power of the courts will, of course, be significantly enhanced where the courts declare such principles entrenched under a constitution. There are now significantly stronger constitutional protections for the accused in Canada respecting principles of criminal responsibility as compared to the United States.

Under the Supreme Court's interpretation of section 7 of the Canadian Charter of Rights and Freedoms, Canada has a unique minimum constitutional standard of fault.

For any type of offense where there is a possibility of imprisonment, even if only in default of payment of a fine, there must at least be the possibility of a due diligence defense.<sup>7</sup> The Supreme Court struck down long-standing constructive murder categories because there was not even an objective foresight requirement.<sup>8</sup> In the case of a few crimes,<sup>9</sup> such as murder,<sup>10</sup> war crimes, and crimes against humanity,<sup>11</sup> the Court later imposed a constitutional requirement of actual, subjective foresight of risk. Where the fault standard is based on objective negligence, it has required there to be a marked departure from the norm.<sup>12</sup>

Compare, as well, the approaches of the Canadian Supreme Court in *Daviault*<sup>13</sup> and that of the United States Supreme Court in *Montana v. Egelhoff*<sup>14</sup> on issues of drunkenness. In *Daviault*, the majority relies on modern notions of fault and voluntariness before deciding that for any offense there should be an extreme intoxication defense.<sup>15</sup> In *Egelhoff*, the United States justices are constricted by a frozen rights theory. The due process inquiry is limited to determining whether, at the time of the Fourteenth Amendment was adopted, an emerging 18th century English common law approach to allowing intoxication to be considered on the issue of intent had

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7. See, e.g., In re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, [1985] 2 S.C.R. 486 [Decisions of the Supreme Court of Canada] (discussing the British Columbia Motor Vehicle Act, R.S.B.C. 1979 ch. 288 § 94(2) re-en. 1982 S.B.C. ch. 36 § 19 (Can.)); *The Queen v. Pontes* [1995] 3 S.C.R. 44.

8. See *Vaillancourt v. The Queen* [1987] 2 S.C.R. 636; *The Queen v. Martineau* [1990] 2 S.C.R. 633.

9. See *Creighton v. The Queen* [1993] 3 S.C.R. 3.

10. See *Vaillancourt* [1987] 2 S.C.R. 636; *Martineau* [1990] 2 S.C.R. 633.

11. *The Queen v. Finta* [1994] 1 S.C.R. 701.

12. See *Creighton* [1993] 3 S.C.R. 3.

13. *Daviault v. The Queen* [1994] 3 S.C.R. 63.

14. 518 U.S. 37 (1996). For a discussion of the unique open debate conducted on this issue, see Ronald J. Allen, Foreword: *Montana v. Egelhoff*—Reflections on the Limits of Legislative Imagination and Judicial Authority, 87 *J. of Crim. L. & Criminology* 633 (1997).

15. [1993] S.C.R. 63 at 65-66. Parliament quickly responded and by adding section 33.1 to the Criminal Code, purported to abolish such a defense for general intent crimes against the person except for the partial defense to murder. A new round of Charter challenges has just begun.

become “deeply rooted.” Since that was not established, the Court concluded that in the state of Montana in 1996, a drunken killer could be constitutionally convicted of murder. It was not necessary to consider twentieth century thinking on the drunkenness defense.

Given the weak constitutional protection of substantive principles of criminal responsibility in the United States, the influence and success of the M.P.C. General Part seems particularly important. Despite the assertion of constitutional standards in Canada, the confusing and conflicting state of jurisprudence on such basic issues as which fault test applies, suggests that the day-to-day operation of the criminal justice system in an M.P.C. jurisdiction is likely much clearer and more consistent.

Constitutionalization does provide some protection against law and order expediency but is certainly no panacea. Constitutional standards are only as good as the Court that declared them. Already a drastically changed composition of the Canadian Supreme Court and recent decisions have raised serious concerns about the Court’s level of criminal law expertise and interest in protecting the core values of the criminal justice system.<sup>16</sup> There is certainly an argument that general principles of criminal responsibility may be better established by an independent body such as the American Law Institute, which should be able to draw on the country’s best legal and non-legal experts comparatively free of political pressures.

#### INSENSITIVE TO CONTEXT AND DIVERSITY INTERESTS?

Increasingly in Canada, pleas for the application of

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16. Consider especially the recent 4/3 decision in *The Queen v. Stone* [1999] 2 S.C.R. 290, in which the majority placed a persuasive burden on the accused to prove the defense of sane automatism, although that issue had not been raised in argument by any Crown counsel. For a critical perspective, see R.J. Delisle, *Judicial Activism Gone Awry To Presume Guilt*, (1999) 24 C.R. (5th) 9; David Paciocco, *Death by Stone-ing: The Demise of the Defense of Simple Automatism*, (1999) 26 C.R. (5th) 273.

general principles of liability to any type of offense are met with concerns that they not sufficiently sensitive to the context of particular offenses or to the need to respect diversity. The strongest voices pointing to dangers in general principles have been those of feminist scholars. This is usually expressed in debates about the adequacy of laws to redress the violence men disproportionately direct against women and children. A respected Canadian feminist scholar, Professor Christine Boyle, has expressed a wider concern:

I don't really strongly support the move to codification of the general principles. Its not that I actually object but I think it is likely that such codification will be based more on lawyers' interests in accessibility and order, and on the principles of consistency dictated by the internal needs of the system, rather than on a fundamental reexamination of the underlying values which should inform the principles. As well I think it more likely that codification will entrench judge-made ideas that don't particularly reflect the diverse interests of women than that it will challenge those ideas. For instance, I don't anticipate that necessity will be codified as to cover such chronic "emergencies" as hunger and homelessness.<sup>17</sup>

Recently Christine Boyle<sup>18</sup> emphasized her position with these words:

General principles do play a role in feminist analyses but they tend to be equality, cultural, and other forms of diversity, and security of the person, rather than, for instance, fault, causation and excusing conditions. . . . My main concern about the codification project, to put it bluntly, is that it is much more likely to reflect the mainstream of criminal law reform activity than the

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17. Expressed in a reservation to a brief I presented on behalf of a group of law teachers to a Parliamentary Subcommittee on the issue of a General Part. See Don Stuart, *A Case for a General Part*, in *Towards a Clear and Just Criminal Law*, supra note 6, at 98.

18. Christine Boyle, *Commentary*, in *Toward a Clear and Just Criminal Law*, supra note 6, at 146 (responding to my proposed General Part).

feminist critique. It runs the risk of entrenching principles which neglect the interests of groups which have traditionally had a voice in the framing of criminal law. Ironically, with respect to women, codification at this time would take place when women have just begun to play a significant role in criminal law reform. In this decade Canadian engaged in a public debate about the principles underlying Bill C-49, the reform of the criminal law relating to sexual assault. That debate made it clear that very different visions exist of the fundamental values of the criminal law.<sup>19</sup>

Such perspectives need to be considered in any attempt to declare or review a general part. Values change, and those expressed in the 1962 M.P.C. are not engraved in stone. It certainly is time that sexual assault laws in Canada take into account the views of women. In my view, there remains a strong case—even in the case of sexual assault, in the interests of justice for accused, whether male or female—to work consistently with such principles as voluntariness, fault, fair labeling, and fair justifications or excuses. There seems little evidence that commitment to such general principles results in widescale acquittals or intolerable leniency for the accused. This is especially true in jurisdictions, such as Canada and those following the M.P.C., which accept that the fault standard need not always be one of subjective awareness of risk. Many of the strongest critics of general principles such as Professor George Fletcher<sup>20</sup> are guilty of straw person reasoning in asserting that the criminal law always requires subjective awareness of risk and then railing against it.

But when key general principles are forgotten about in the interests of ad hoc responses to pressing social concerns or to anguished pleas of victims, there is a danger of an overreach of the criminal law that may produce injustice. I will suggest in this paper that the Canadian law of sexual

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19. *Id.* at 147-48.

20. See George P. Fletcher, *Rethinking Criminal Law* (1978). For a Canadian perspective, see James Stribopoulos, *The Constitutionalisation of Fault*, 42 *Crim. L.Q.* 227 (1999).

assault has become a good example of an overly broad and potentially repressive approach to a criminal section for the very reason that general principles have been ignored.<sup>21</sup>

#### NEED FOR SIMPLICITY

After some thirty years of teaching and writing about criminal law, I am increasingly convinced that legal scholars and reformers too easily overlook the value of simplicity. We should try to avoid excessive subtlety and esoteric distinctions and try to arrive at a criminal law that can be easily understood by the average counsel and judges and not just the most knowledgeable and/or experienced.

Professor George Fletcher<sup>22</sup> has recently attacked the M.P.C.'s attempts to define voluntariness, causation, and culpability largely on the basis that this should be left to philosophers, judges, and scholars to sort out. I certainly echo Professor Paul Robinson's robust retort<sup>23</sup> that the "missing Fletcher bits" would leave judicial power unfettered and would increase the potential for abuse, as well as Professor Robinson's concern that philosophers and scholars are often in disarray.

On the other hand, I do not agree with Professor Robinson's suggestion<sup>24</sup> that there should be two Codes: "Rules of Conduct," which would be simple and comprehensible to articulate rules of conduct for lay persons, and "Principles of Adjudication," which would set

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21. I have similarly attacked Canada's hastily conceived anti-gang laws. See Don Stuart, *Politically Expedient But Potentially Unjust Criminal Legislation Against Gangs*, 69 *Int'l Rev. Penal L.* 245 (1998).

22. George P. Fletcher, *Dogmas of the Model Penal Code*, 2 *Buff. Crim. L. Rev.* 3 (1998).

23. Paul H. Robinson, *In Defense of the Model Penal Code: A Reply to Professor Fletcher*, 2 *Buff. Crim. L. Rev.* 25 (1998).

24. Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 *Buff. Crim. L. Rev.* 225, 268-70 (1997) [hereinafter Robinson, *Top Ten List*]; see also Paul H. Robinson, *Structure and Function in Criminal Law* (1997) [hereinafter Robinson, *Structure and Function*]. Robinson's two code proposal was effectively criticised by Lawrence Crocker in a review of Robinson's book. Lawrence Crocker, *Book Review*, 10 *Crim. L. F.* 151, 157-59 (1999) (reviewing Paul H. Robinson, *Structure and Function in Criminal Law* (1997)).

out more legal rules for courtroom application by criminal justice professionals. Surely the goal should be to make criminal law comprehensible and accessible for all, lawyers and public alike. A "Code for Adjudication" seems likely to allow too easily for unnecessary legalize or detail. It seems strange for the public to have one set of rules and lawyers another, and such a state of affairs is unlikely to do much for lawyers' tarnished image!

#### SEVEN SUGGESTIONS FOR RECONSIDERATION OF THE M.P.C.

Given the above biases and views, the general principles of the M.P.C. by and large appear impressively thought out and drafted. The collected wisdom of 1962 should not be lightly abandoned. The focus in the remainder of this paper will nevertheless largely be on suggested reconsideration, often, but not always, inspired by the need for a more simple approach. From time to time, I will refer to the General Part I recently proposed for Canada<sup>25</sup> and which is here included in the Appendix. It may well be that aspects of this draft are too grounded in the reality of existing Canadian law to be transferred to the United States context.<sup>26</sup> The draft does, however, have the advantage of drawing on proposals advanced in Canada,<sup>27</sup> the United Kingdom,<sup>28</sup> and Australia.<sup>29</sup>

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25. Don Stuart, A Case for a General Part, in *Towards a Clear and Just Criminal Law*, supra note 6, at 95-145.

26. See Markus Dubber, Commentary, in *Towards a Clear and Just Criminal Law*, supra note 6, at 156-82 (commenting on my proposed General Part).

27. See supra, notes 4-6.

28. See U.K. Law Commission, Rep. No. 177, *A Criminal Code for England and Wales* (1989), U.K. Law Commission, *Legislating the Criminal Code: Offenses Against the Person and General Principles*, Rep. No. 218 (1993); Home Office, *Violence: Reforming the Offenses Against the Person Act 1861* (1998).

29. See Criminal Code Act, No. 12 of 1995, assented to Mar. 15, 1995, eff. Jan. 1, 1997. This Code stemmed from the impressive work of the Committee for the Review of Commonwealth Criminal Law, *Principles of Criminal Responsibility and Other Matters* (1990) [hereinafter Committee Report].

*1. Draw Brighter Lines Between Categories of Culpability*

From the Canadian context where courts are so often in disarray as to which test of fault to apply, the much vaunted M.P.C. provisions on Culpability<sup>30</sup> and Ignorance and Mistake<sup>31</sup> bring impressive clarity. There are, of course, four kinds of culpability there defined: purpose, knowledge, recklessness, and negligence. In the absence of legislative intent to the contrary,<sup>32</sup> recklessness is the usual minimum form of culpability and responsibility, for negligence requires a marked departure from the norm. Fault standards apply to all elements unless a contrary intent is expressed in the offense definition.<sup>33</sup> Mistake of fact defenses respecting elements of offenses are properly treated as denials of the appropriate fault requirement.<sup>34</sup>

I agree to some extent with Professor Fletcher's concerns about the high complexity of the M.P.C.'s definitions of culpability, although he surely should be held accountable for arrogance and overstatement in doubting whether any judge has ever mastered them.<sup>35</sup> But I am profoundly concerned by his questioning of whether the M.P.C.'s distinction between intentional and negligent conduct is a matter appropriately subject to legislative will.<sup>36</sup>

There is a vast difference between the reach of the criminal sanction when the state has to prove an actual intent or awareness of risk as opposed to not meeting an objective standard. This is surely a matter for a responsible legislature. Take the example of a youthful traveler who is asked to carry a package into another country. If the packet contains drugs, there is a huge difference between whether the drug possession law allows for conviction only

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30. See Model Penal Code § 2.02 (Proposed Official Draft 1962).

31. See id. § 2.04.

32. The M.P.C.'s scheme in section 2.05 for absolute liability for violations and offenses outside the Code would be constitutionally suspect in Canada. Id. § 2.05.

33. See id. § 2.02(4).

34. See id. § 2.04.

35. See Fletcher, *supra* note 20, at 6.

36. See id.

if the kid actually thought about the risk that the package contained drugs, or if the kid's conduct will be deemed criminal because he ought to have been on guard. The subjective awareness approach is the fairest basis for state punishment since full allowance is made for individual differences and all the circumstances. In the current vernacular, the subjective awareness test of fault is the most sensitive to the diverse background and experiences of particular accused.

In Canada, most Criminal Code offenses require, or are being interpreted to require, proof of subjective awareness of risk, and there is no convincing evidence that this has proved a vehicle for lawlessness. High conviction rates suggest that triers of fact are not duped by bogus defenses. Given that much conduct resulting in criminal charges is quite deliberate, the test of subjective awareness of risk only makes a difference in borderline cases where it operates as a vehicle for restraint and just results.

On the other hand, most judges, writers, and the M.P.C. recognize the need for some measure of criminal responsibility for failing to measure up to an objective, reasonable standard. Although responsibility on the objective standard is sometimes called for, as in the case of offenses causing or risking serious harm,<sup>37</sup> wholesale resort to a reasonableness standard would vastly expand the net of criminal responsibility. No such need has been demonstrated. The M.P.C. and the Canadian Supreme Court in *Creighton*<sup>38</sup> recognize the need for restraint in holding that negligence for criminal sanctions should require proof of a marked departure from the objective norm.

In suggesting that a revision of the M.P.C. might wish to draw brighter lines between categories of culpability, I offer three suggestions:

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37. Andrew Ashworth similarly concludes that negligence may be the appropriate standard for criminal liability where: (i) the harm is great; (2) the risk is obvious; and (iii) the accused had the capacity to take reasonable precautions. Andrew Ashworth, *Principles of Criminal Law* 199 (3d ed. 1999).

38. See *Creighton v. The Queen* [1993] 3 S.C.R. 3.

## (i) Abandon the Distinction Between Knowledge and Recklessness

Many of the subtleties in the distinctions in the M.P.C. and the writings of Glanville Williams between these two concepts seem to obscure the real question which is whether the accused was actually aware of the risk. If he or she was aware of the risk the packet contained a drug, is it really crucial to determine whether the accused knew for sure there was a drug or merely knew that was likely? The concept of awareness of risk satisfactorily subsumes that of knowledge.<sup>39</sup>

Fletcher does not support the distinction between purpose and knowledge.<sup>40</sup> To me, we can and should try to maintain a distinction between someone who intends and someone who merely takes a risk. There are instances where criminal responsibility seems properly limited to intent, as in the case of murder and attempts.

## (ii) Insist on Awareness of Risk for Recklessness

The law should not say one thing and do another. Double speak is not only confusing; it may be unjust. The M.P.C. may be wise in holding drunken offenders criminally responsible for causing harm. But it should not rely on the fiction of deemed recklessness as it does in section 2.08(2):

When recklessness establishes an element of an offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.<sup>41</sup>

In contrast, for drunkenness-specified offenses like impaired driving or for negligence offenses, there is no

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39. See Robinson, Top Ten List, *supra* note 24, at 237-38 (persuasively criticizing the asymmetry in the M.P.C. definitions).

40. See Fletcher, *supra* note 22, at 10.

41. Model Penal Code § 2.08(2) (Proposed Official Draft 1962).

doubt that the accused is being punished for not measuring up to an external standard, and the basis for guilt is clear and accurately recorded.

There is a pernicious tendency in Canadian case law to undercut awareness of risk standards by requiring a so-called defense of mistake of fact as to a material element to be both honest *and reasonable*. This is contrary to the clear statement of principle by former Chief Justice Dickson for the majority in *Pappajohn*,<sup>42</sup> a controversial decision on the mistaken belief in consent defense to rape. The Court decides that when subjective mens rea is the fault requirement, a mistake to excuse need merely be honest, with reasonableness only relevant to the assessment of credibility. To insist on the belief being reasonable would wrongly import negligence, reasoned Justice Dickson. It seems advisable to go further than the M.P.C. and spell out the proper principles as I have done in my proposed General Part as follows:

15. (1) Where the fault requirement is intent or recklessness, to excuse a mistaken belief need not be reasonable although reasonableness is relevant to determining whether the belief existed.

(2) Where the fault requirement is criminal negligence, to excuse a mistaken belief must be reasonable.

So too the law can well do without a separate concept of willful blindness, which Professor Glanville Williams invented to extend his category of knowledge of circumstances. One who is aware of a possible risk but deliberately refrains from inquiries and is deliberately ignorant or willfully blind, as Williams put it, is also subjectively reckless as to the risk. Knowledge, recklessness, and willful blindness are all embraced by a concept of actual awareness of risk. There is surely no difference in practice in Ontario drugs trials where the

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42. *Pappajohn v. The Queen* [1980] 2 S.C.R. 120.

Ontario Court of Appeal allows liability for willful blindness but not recklessness,<sup>43</sup> in contrast to other Canadian provincial court decisions.

The major problem with the concept of willful blindness is that it is unstable in that it may easily become the vehicle for relying on the objective standard with triers of fact convicting on the basis that the accused ought to have foreseen the risk.<sup>44</sup> This is undoubtedly the trend in Canada.<sup>45</sup> The Australian Code avoids willful blindness. Its drafters noted that knowledge and recklessness fairly cover the field.<sup>46</sup>

(iii) Separate Negligence Offenses with Lesser Penalties

In striking down Canada's constructive murder categories, the Canadian Supreme Court relied on three principles in *Martineau*,<sup>47</sup> as follows:

1. The stigma attached to the offense and the available penalties require a mens rea reflecting the particular nature of the crime;
2. The punishment must be proportionate to the moral blameworthiness of the offense; and

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43. *The Queen v. Sandhu* (1989) 73 C.R. (3d) 162 (Ont. C.A.) [Canada: Criminal Reports, reporting Decisions of the Ontario Supreme Court, Court of Appeal].

44. See Joshua Dressler, *Understanding Criminal Law* 110 (1995). Dressler uses the example of an ostrich burying its head in the sand when highly suspicious and rightly points to the danger of convicting merely careless birds! Actually the ostrich metaphor is based on a myth. Ostriches do not in fact bury their heads in the sand. Their small heads foraging for grain may from a distance look buried!

45. See, e.g., *The Queen v. Sansregret* [1985] 1 S.C.R. 570; *The Queen v. Tutton* [1989] 1 S.C.R. 1392.

46. See Committee Report, *supra* note 29, at 29; see also Report of the Crimes Consultative Committee 14 (N.Z. 1991) (describing willful blindness as an evidentiary matter, not appropriate for a substantive Code).

47. *The Queen v. Martineau* [1990] 2 S.C.R. 633.

3. Those causing harm intentionally must be punished more severely than those causing harm unintentionally.<sup>48</sup>

Unfortunately, the overlapping second and third principles were soon reduced by the Court in *Creighton*<sup>49</sup> to the proposition that they could be adequately taken into account in sentencing, provided there was no minimum penalty.

This suggests, for example, that the Canadian Parliament's scheme for sexual assault—which penalizes in the same prohibition carrying a flexible penalty, one who is deliberately aware of a risk of non-consent and one who did not take reasonable steps to ascertain whether there was consent—will survive Charter scrutiny. If the Supreme Court is consistent, it will insist on the principle in this context as well that upon conviction, a deliberate accused must receive a higher sentence than one who acted without taking reasonable steps.

Even if this is the outcome of Charter challenges to the substantive sexual assault reforms, there will still be much to be said,<sup>50</sup> on the basis of fair labeling and justice and also in the interests of encouraging guilty pleas to spare victims from testifying, for separate offenses with separate penalties. This has long been the case with murder and manslaughter, and in Canada now for intentional and negligent arson.<sup>51</sup> Canada has also long had the generic but underused offense of criminal negligence causing harm or death.<sup>52</sup> Recently in *Ewanchuk*,<sup>53</sup> the Supreme Court drastically limited the mistaken belief in consent defense to

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48. See *Creighton v. The Queen* [1993] 3 S.C.R. 3. A fourth Martineau principle, that fault be related to the consequence, was not accepted in *Creighton* as a constitutional requirement although it was stated to be the ideal. A fault test not properly related to the context is not meaningful.

49. *Id.* at 4-5.

50. See Stuart, *Treatise*, *supra* note 2, at 273-80.

51. Parliament added the separate offense of arson by criminal negligence in 1990. See Criminal Code, R.S.C. 1985, ch. C-46, § 436. The maximum penalty is reduced from life to 5 years imprisonment.

52. See Criminal Code, §§ 219-221.

53. [1991] 1 S.C.R. 330.

sexual assault. In my opinion,<sup>54</sup> a lack of attention to fundamental fault and proportionality principles by our Parliament and now our highest court has led to a potentially repressive law which criminalizes under the single label of sexual assault the rapist, the deliberate sexual predator, those who do not meet a new standard of reasonableness, unwanted touching of all types, and now those who misperceived, irrespective of whether the misperception arose because of drunkenness. Some of this complaint reflects the downside to Canada having replaced the distinction between rape and indecent assault with the single category of sexual assault. A well-intended reform appears to have backfired. It was an effort to avoid the preoccupation with whether there was penetration and instead to focus on the violence of the attack. I suggest that as a result, rape has been unwittingly trivialized. Attempted or actual penetration is surely a more serious offense than sexual touching and this should still be reflected in separate offense categories.

In the United Kingdom, Professor Andrew Ashworth has made a strong case for the “principle of fair labeling”:

Full adoption of this principle would not necessarily lead to a massive code of finely graded and differentiated offenses, sometimes derided as “the law professor’s dream”, although there are places where it might lead to greater detail and more offenses than modern orthodoxy contemplates. The strength of the principle is to ensure that arguments of proportionality, fairness to individuals, and the proper confinement of executive and judicial discretion are taken seriously when new offenses with broad definitions and high maximum penalties are under consideration.<sup>55</sup>

Although startled by Paul Robinson’s suggestion<sup>56</sup> that the M.P.C. needs twenty rather than the present five categories and that ten categories can easily be made, I

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54. See *id.* at 39-49.

55. Ashworth, *supra* note 37, at 92-93.

56. Robinson, *supra* note 23, at 247-52.

would certainly argue for a classification that includes a distinction between intentional, reckless, and negligent behavior with negligent behavior attracting markedly lower penalties.<sup>57</sup>

2. *Allow for Some Individual Factors in Any Objective Standard*

If recent Canadian experience is any guide, it would be advisable for the M.P.C. to indicate which individual characteristics of the accused may be taken into account in applying objective standards of fault or in defining justifications or excuses.

Most academics in Canada and elsewhere<sup>58</sup> are of the view that an objective standard is only morally appropriate for the criminal sanction where generous allowance is made for individual factors: The reasonable standard is only appropriate where the accused had capacity to take care. In *Creighton*,<sup>59</sup> Chief Justice Lamer set out to build on this consensus. He carefully develops such an approach, emphasizing that the test remains objective and that some factors such as intoxication are excluded from consideration. However, he requires consideration of individual traits that the accused could not control or manage in the circumstances.

Regrettably, Justice Lamer could not find a majority for this view. Madam Justice McLachlin, writing for a five/four majority of the Supreme Court, held that an objective standard in criminal law cannot take into account individual factors short of incapacity. Justice McLachlin's recognition of incapacity as an exception is grudging and she sees it arising only rarely. The only example she concedes is illiteracy in the case of a person handling a marked bottle of nitroglycerine. The majority expressly excludes consideration of possibly relevant factors such as

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57. See Dressler, *supra* note 44, at 41.

58. See, e.g., H.L.A. Hart, *Negligence, Mens Rea and Criminal Responsibility*, in *Punishment and Responsibility* 152-57 (1968); Ashworth, *supra* note 37.

59. See *Creighton v. The Queen* [1993] 3 S.C.R. 3.

age, inexperience, and poverty.

The Supreme Court's view was applied most dramatically in the companion case of *Naglik*<sup>60</sup> to exclude consideration of the inexperience, lack of education, or youth of a mother charged with failing to provide necessities to her child and, in *Gosset*,<sup>61</sup> of the fact that the accused was a police officer who had experience and training in the use of firearms. Justice McLachlin's major justifications are that there must be a single, uniform standard applying equally to all, and that this tough standard will deter others. Factors like experience, education, age, financial situation, or cultural factors can be addressed at the time of sentencing. Her tough position here clearly contradicts her justification of a marked limit on the test of criminal negligence.<sup>62</sup> It seems strange that one category of subjective offenses, including murder, can fully account for individual differences but the objective standard cannot consider any.

Justice McLachlin's sources are also odd. She frequently relies on tort law. Surely it is elementary that principles developed to respond to the needs of a wronged victim cannot simply be applied to the quite different task of deciding whether punishment can be justly imposed. This reversion to a rigid objective standard cuts across a well-recognized need to ensure that the criminal justice system is sufficiently sensitive to issues of gender, race, and disadvantage.

A further objection to this aspect of the *Creighton* ruling is that it is so impractical. Take the case of a teenager who has been driving only a week and is involved in an accident. He is charged with dangerous driving or criminal negligence. Is the majority really serious that a jury must be instructed to ignore the age of the accused and to apply the standard of the average, experienced driver? This would defy common sense and the jury would likely ignore it. The law cannot say one thing and do

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60. *Naglik v. The Queen* [1993] 3 S.C.R. 122.

61. *Gosset v. The Queen* [1993] 3 S.C.R. 76.

62. See *Creighton v. The Queen* [1993] 3 S.C.R. 3.

another. In a case like *Gosset*, where a police officer was charged with an offense, are we really to ignore the fact that the accused was an officer trained in the use of firearms who knew about how the gun cocked?

In *Prentice*,<sup>63</sup> the House of Lords found it to be obvious that experience *should* be considered in applying the objective standard. The case involved several appeals in manslaughter cases heard together. Some accused were doctors:

But in expert fields where duty is undertaken, be it by a doctor or an electrician, the criteria of what the ordinary prudent individual would appreciate can hardly be applied in the same way.<sup>64</sup>

The majority in *Creighton* is applying the objective test in an abstract vacuum such that the law is unworldly. Judging everyone by a inflexible standard of a monolithic reasonable person, where an accused could not have measured up, amounts to absolute liability. Justice McLachlin anticipated such criticism and denies that the majority approach is applied in a vacuum. The standard is to be particularized in application by the nature of the activity and the circumstances surrounding the accused's failure to take the requisite care.<sup>65</sup> She accepts that a welder who lights a torch causing an explosion may be acquitted if he made an inquiry and was given advice, upon which he was reasonably entitled to rely, that there was no explosive gas in the area. Yes, but what if that mistake derived from his personal experience as a welder? According to Justice McLachlin, that experience cannot be

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63. [1993] 42 W.L.R. 927 (H.L.) [England: Weekly Law Reports].

64. *Id.* at 936.

65. *Creighton* [1993] 3 S.C.R. at 217. In *The Queen v. Dixon* (1993) 26 C.R. (4th) 173 (N.B.C.A.) [New Brunswick Court of Appeal], a case involving the reasonableness standard for the defense of property under section 41(1) of the Criminal Code, the Court relied on this passage in *Creighton* to enable it to consider the full context of a single parent arriving home to be confronted with his 15 year old daughter drinking and partying with strange men. This approach is certainly understandable but takes into account individual factors in a way not permitted by *Creighton*.

considered.

The Supreme Court has already not followed its approach in the case of the reasonable belief requirement for self-defense. In *Petel*,<sup>66</sup> the full Court confirmed its trailblazing *Lavallee*,<sup>67</sup> ruling that where self-defense is relied on by an accused in an abusive relationship, the situation and experience of the accused *must* be considered. The application of a reasonable battered woman test in such cases has been widely seen as an important advance.<sup>68</sup> Individual factors which the accused could not control or manage are equally relevant to a just application of a reasonable standard of fault.

In my suggested draft for Canada, I proposed provisions to reflect the Chief Justice's approach:

#### Reasonableness Standard

14. For the purposes of section 13 [defining criminal negligence] and the application of any reasonableness standard under this Criminal Code, the trier of fact must take into account the person's awareness, if any, of the circumstances and also factors the person could not have controlled or managed such as race, gender, age and experience, where relevant, but not self-induced intoxication.

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66. *The Queen v. Petel* (1994) 26 C.R. (4th) 145 (S.C.C.); see also *The Queen v. Thibert* (1996) 45 C.R. (4th) 1 (S.C.C.), in which Justice McLachlin joined a majority judgement holding that the objective part of the partial defense of provocation to murder had to take into account an "ordinary person, of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance." *Id.* at 10.

67. *The Queen v. Lavallee* (1990) 76 C.R. (3d) 329 (S.C.C.).

68. The Court's reliance on a concept of a "battered women's syndrome" has however since been criticized as unduly constricting and based on bad science. See, e.g., David Paciocco, *Getting Away With Murder* 306-08 (1999). Two female members of the Court have already urged that the notion of a syndrome be abandoned. See *Malott v. The Queen* [1998] 1 S.C.R.123.

### 3. *Declare Generous Individualized Excuses*

The outsider's impression of the M.P.C.'s Article 3 on justifications is that it is one of bewildering complexity built around series of rigid rules. It contrasts sharply, for example, with the economy and generosity of the M.P.C.'s codification of the affirmative defense of duress.<sup>69</sup> This is an area where the M.P.C. has not commended itself to reformers in other countries.

Reconsideration of the M.P.C. should pursue the implications of Professor George Fletcher's well-known insights. In his view, the distinction between justification and excuse is vital. His basic distinctions are as follows:

Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act.<sup>70</sup>

Fletcher's major thrust is to stress the advantages of the German approach of "individualized excusing conditions" where the inquiry is whether a particular individual "can be fairly blamed for having violated the law."<sup>71</sup> The common law is said to refer to positivist rules of justification in which individual factors are not taken into account, with emphasis placed on the "quality of the deed" rather than be "character of the doer."<sup>72</sup> According to Fletcher, excuses do not express policy goals but are simply reflections of compassion and justice in the individual case.<sup>73</sup>

If there was ever a regime crying out for a Fletcher

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69. Model Penal Code § 2.09 (Proposed Official Draft 1962).

70. Fletcher, *supra* note 20, at 759.

71. George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269 (1974).

72. *Id.* at 1272.

73. *Id.* at 1308-09.

approach it would be the M.P.C. Article 3 with its commitment to strict balancing of harms tests, such as that the harm must be greater than that sought to be prevented by the defining offense<sup>74</sup> and “immediately necessary” limits even on self-defense.<sup>75</sup>

The problem with the justification/excuse distinction is that writers and courts<sup>76</sup> have such difficulty in drawing it. At one point,<sup>77</sup> Fletcher indicates that justifications based on a test of reasonable belief, which he calls “putative” justifications, are better classified as excuses. On this analysis, most defenses in present Anglo-Canadian law should be considered excuses. If excuses are to swallow up justifications, why wrestle with the distinction? The advantage of avoiding the M.P.C. emphasis on justifications is that we can also avoid any focus on the highly unruly question of whether an act was morally right. Reconsideration of the M.P.C. or any other code should simply define a number of individualized defenses avoiding, where possible, rigid ex post facto limits such as those of immediacy and mechanistic balancing of harms tests. The goal would be to arrive at fair principles for not punishing accused persons who, based on reasonably held beliefs, truly found themselves in situations of agonizing choice. I would avoid Fletcher’s abstract and difficult label of “moral or normative involuntariness,”<sup>78</sup> and I have difficulty with Robinson’s purely objective approach to justification.<sup>79</sup>

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74. See Model Penal Code § 3.02(1)(a) (Proposed Official Draft 1962).

75. *Id.* § 3.04(1).

76. The Supreme Court of Canada adopted it in *Perka v. The Queen* [1984] 2 S.C.R. 232. The majority defined the defense of necessity as an excuse.

77. Fletcher, *supra* note 20, at 762-66.

78. *Id.*

79. See, e.g., Paul H. Robinson, *Competing Theories of Justification: Deeds Versus Reasons*, in *Current Problems in Criminal Law Theory* 45 (A.P. Smith & A.H.T. Simester eds., 1996); Robinson, *Structure and Function*, *supra* note 24. The latter book is trenchantly criticised on this point by Lawrence Crocker in a review. See Crocker, *supra* note 24. For additional criticism of Robinson’s position, see Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *Colum. L. Rev.* 1897 (1984); Cynthia Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 *Buff.*

Consider, for example, my recently proposed definition of the defense of self-defense for Canada:

Defense of Person

23. A person is not criminally responsible for using force against another person if he or she

(1) reasonably believes that force is necessary for self-protection or the protection of a third party from unlawful force or the threat thereof; and

(2) the degree of force used is reasonable.

The defense of self-defense is likely one of the most commonly raised defenses. Since 1892, Canadian courts have struggled with excessively convoluted Criminal Code sections<sup>80</sup> based on Sir James' Stephen's questionable assumption that it is wise to distinguish in advance between fatal and non-fatal self-defense cases and to have a tougher rule for an initial aggressor. Threats to third parties, even close family members, have been only indirectly included in a section<sup>81</sup> respecting actions to prevent harm. The courts have struggled with little success to simplify matters for themselves and juries. In this context, Canadian courts have long favored showing generosity to people who are trapped in agonizing situations requiring unlawful force to be repelled in which the degree of force cannot be nicely weighed. A strict proportionality requirement would drastically curtail the considerable efforts made by the Supreme Court to show special sensitivity to those in abusive relationships who defend themselves.<sup>82</sup> The proposed section 23 includes the

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Crim. L. Rev. 191 (1998).

80. See Criminal Code, R.S.C., ch. C-46 §§ 34-37 (1985) (Can.).

81. *Id.* § 37.

82. See *The Queen v. Lavallee* (1990) 76 C.R. (3d) 329 (S.C.C.).

defense of a third party, which our present general Code section does not. It also makes it clear that there will first be an inquiry into what the accused believed and also a determination as to whether the force used was reasonable on that belief and in all the circumstances. I have come to accept that a subjective belief test would be over-generous to the accused. If an accused believes without any basis whatsoever that his or her life is about to be ended, on that unreal view of the world, a significant measure of self-defense can be considered reasonable and will too easily excuse violent conduct.<sup>83</sup>

#### 4. *Preserve the Presumption of Innocence with No Reverse Onuses*

A principled review of the M.P.C. would require abandonment of the view that the presumption of innocence is not engaged by requiring the accused to prove affirmative<sup>84</sup> or other<sup>85</sup> defenses.<sup>86</sup> These general provisions do not expressly refer to persuasive burdens on accused. The United States Supreme Court, on the other hand, has made it clear that there is no constitutional protection against a legislature requiring an accused to prove an affirmative defense.<sup>87</sup>

In *Oakes*,<sup>88</sup> Chief Justice Dickson for the majority of the Supreme Court of Canada<sup>89</sup> saw the presumption of innocence as embodying cardinal values lying at the very heart of criminal law which are protected expressly by

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83. Most writers agree that defenses of duress and necessity would be more restrictive than those of self-defense. My proposed definitions have been criticised as too restrictive. See Boyle, *supra* note 18 (expressing concern about the "immediate necessity" limits); Dubber, *supra* note 26 (pointing to inconsistencies).

84. Model Penal Code § 1.12(2)(a) (Proposed Official Draft 1962).

85. *Id.* § 1.12(2)(b).

86. The M.P.C. expressly requires that the accused must prove a mistake of law defense by a preponderance of the evidence. See *id.* § 204(4). This view is criticized by Fletcher, *supra* note 22, at 21-22.

87. See *Patterson v. New York*, 432 U.S. 197 (1977); see also Dressler, *supra* note 43, at 54-59.

88. *The Queen v. Oakes* (1986) 50 C.R. (3d) 1 (S.C.C.).

89. *Id.* at 19.

section 11(d) of the Canadian Charter but also integral to the general protection of life, liberty, and security of the person in section 7:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offense faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.<sup>90</sup>

In *Whyte*,<sup>91</sup> Chief Justice Dickson extended the protection of the presumption of innocence beyond proof of essentials to include defenses. At issue was the constitutionality of the Criminal Code presumption<sup>92</sup> with respect to the offense of having care or control while impaired, which declares that a person occupying the seat normally occupied by the driver of the motor vehicle must prove an absence of an intent to set the vehicle in motion. The Crown argued that, although the section requires that the accused prove that he did not intend to set the vehicle in motion, this was not an essential element of the offense of having care and control of a vehicle while impaired and that therefore, absence of proof on this point did not infringe the presumption of innocence. The Chief Justice gave this argument short shrift:

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90. *Id.* at 15.

91. *The Queen v. Whyte* (1988) 64 C.R. (3d) 123 (S.C.C.).

92. See R.S.C. ch. C-46 § 258(1)(a) (1985) (Can.).

The short answer to this argument is that the distinction between elements of the offense and other aspects of the charge is irrelevant to the section 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defense should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused. The trial of an accused in a criminal matter cannot be divided neatly into stages, with the onus of proof on the accused at an intermediate stage and the ultimate onus on the Crown.<sup>93</sup>

*Whyte* clearly stands for the proposition that any type of persuasive burden of proof on the accused is offensive to the presumption of innocence in section 11(d). This is a very welcome development. The precept of the presumption of innocence is too important to be ducked by the mechanical application of an artificial dichotomy between elements of offenses and defenses. Commentators in Canada<sup>94</sup> and elsewhere<sup>95</sup> often argue that the

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93. *Whyte* (1988) 64 C.R. 3d. at 135.

94. See, e.g., David Finley, *The Presumption of Innocence and Guilt: Why Carroll Should Prevail over Oakes*, 115 (1984) 39 C.R. (3d); Thomas Cromwell & A. Wayne MacKay, *Oakes in the Supreme Court: A Cautious Initiative Unimpeded by Old Ghosts*, 34 (1986) 50 C.R. (3d); Irit Weiser, *The Presumption of Innocence in Section 11(d) of the Charter and Persuasive and Evidential Burdens*, 31 *Crim. L.Q.* 318 (1989); Thomas Cromwell, *Annotation to R. v. Burge*, 55 C.R. (3d) 132 (1986); Richard Mahoney, *The Presumption of Innocence: A New Era*, 67 *Can. Bar Rev.* 1 (1988); Andrea Tuck-Jackson, *The Defense of Due Diligence and the Presumption of Innocence*, 33 *Crim. L.Q.* 11 (1990).

95. Glanville Williams, *Offenses and Defenses*, 2 *Legal Stud.* 233 (1982); John

distinction cannot work and, moreover, is dangerous, in that it encourages legislative drafting to avoid the strictures of the presumption of innocence. In the future, there will be no need for Canadian courts to grapple with the mysteries of the English distinction between “inculpatory” and “exculpatory” elements or with the attempt to distinguish “affirmative” defenses in the United States.

It would be disingenuous not to acknowledge that the Canadian Supreme Court has often found that a persuasive burden of proof on an accused can be held constitutional as a demonstrably justified reasonable limit under section 1,<sup>96</sup> as the Court has decided for defenses of mental disorder, extreme intoxication and, very recently,<sup>97</sup> sane automatism. The Court has not been consistent in its analysis and only sometimes insists on the less intrusive option of an evidentiary burden.<sup>98</sup>

In my view,<sup>99</sup> the principle of the presumption of innocence is of superordinate importance such that a criminal justice system can and should do without reverse onuses. Where there is a reasonable doubt on such issues as fault or voluntariness or whether a defense such as self-defense is made out, the accused should receive the benefit of the doubt. Arguments justifying reverse onuses are often made on the basis that the matter is peculiarly within the knowledge of the accused. Such arguments could equally justify reverse burdens on any issue. There is no convincing evidence, for example, that requiring the Crown

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Calvin Jeffries, Jr. & Paul B. Stephen III, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 *Yale L.J.* 1323 (1979); Patrick Healy, *Proof and Policy: No Golden Threads*, *Crim. L. Rev.* 355 (1987), Glanville Williams, *The Logic of “Exceptions,”* 47 *Camb. L.J.* 261 (1988).

96. Section 1 reads “The Canadian Charter of Rights and Freedoms guarantees the rights and freedom set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 § 1.*

97. See *The Queen v. Stone* [1999] 2 S.C.R. 290.

98. See *The Queen v. Laba* (1994) 34 C.R. (4th) 360 (S.C.C.).

99. See also Patrick Healy, *Legislating Without Reverse Burdens, in Towards a Clear and Just Criminal Law*, *supra* note 6, at 85-94.

to prove subjective mens rea or to negative self-defense has produced exaggeratedly liberal results. Of course an accused always has the task of pointing to evidence in the case so that a matter can be properly put to the trier of fact.

5. *Return to Strict Construction of Ambiguous Criminal Law*

A commitment to the presumption of innocence and the concept of proof beyond reasonable doubt points to a return to strict construction or to what American writers call the principle of lenity. Where the law is in doubt, the accused should have the benefit of the doubt as he or she does where facts are in doubt.

Strict construction is still in place in Canada. The leading authority in the Supreme Court is the judgment of Justice Wilson for a unanimous bench in *Pare*.<sup>100</sup> The Court confirmed that where real ambiguity exists, the accused must receive the more generous interpretation. Although the original justification for the doctrine of strict construction had been substantially eroded “the seriousness of imposing criminal penalties of any sort demands that reasonable doubts be resolved in favor of the accused.”<sup>101</sup>

Justice Wilson further adopted a dictum of Justice Dickson that:

It is unnecessary to emphasize the importance of clarity and certainly when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of the subject, then that statute should be applied in such a manner as to favor the person against whom it is sought to be enforced.<sup>102</sup>

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100. *The Queen v. Pare* (1987) 60 C.R. (4th) 346 (S.C.C.).

101. *Id.* at 368.

102. *Marcotte v. Can. (Dep. A.G.)* (1976) S.C.R. 108 at 115.

### 6. *Define Criminal Responsibility for Omissions*

The M.P.C. rests responsibility for omissions where that is express in the offense definition<sup>103</sup> or where a duty to perform the omitted act is otherwise imposed by law.<sup>104</sup>

Allowing criminal responsibility to rest not only on breach of statutory duty outside the Criminal Code but on any common law duty such as those found in torts is a fundamental breach of the principle of legality.<sup>105</sup> Duties imposed in the context of civil compensation where the issue is often which party can better bear the risk of harm may well be inappropriate to the issue of just punishment. In a federal system like Canada there is the particular problem that duties imposed in the provincial context, such as the good Samaritan duty imposed in Quebec,<sup>106</sup> may be used in that province to impose criminal responsibility.

Clearly the drafting of general duties to act in a criminal code is difficult, but that does not mean that the task should not be attempted. My draft suggests that there should be a legal duty to act where a person created a danger to the life or safety of others and rectification was reasonably within that person's control. Whether there would be a specific crime of failing to rescue along European lines would be a matter for the Special Part.

### 7. *Separate Issues of Cause and Culpability*

The M.P.C.'s scheme<sup>107</sup> for attributing the causing of a result to an accused differs according to the fault requirement. There is a general but-for test and then a three part scheme depending on whether the offense involves (a) purpose or knowledge, (b) reckless or

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103. See Model Penal Code § 2.01(3)(a) (Proposed Official Draft 1962).

104. See *id.* § 2.01(3)(b).

105. See, e.g., Fletcher, *supra* note 22, at 12 (noting that there has been virtually no discussion in the English literature). There certainly has been such a debate in Canada.

106. See Charter of Rights and Freedoms, R.S.Q. 1977, c. C-12, § 2 [Revised Statutes of Quebec] (Can.).

107. See Model Penal Code § 2.03 (Proposed Official Draft 1962).

negligence, or (c) absolute liability. Dragging in fault issues seems to produce undue clutter. An accused who did not foresee a risk should be acquitted if the crime is one of recklessness and it will not be necessary to plumb the mysteries of cause determination.<sup>108</sup>

The most difficult cause cases tend to involve multiple actors, especially where a chain of events leads to much graver results. On this difficult issue of whether the further consequence should be imputed to one of the actors, the M.P.C. has a requirement respecting both categories (a) and (b) of “not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of the offense,”<sup>109</sup> and for absolute responsibility crimes, merely a test of “probable cause.”<sup>110</sup>

It is not apparent why these tests should differ depending on the fault requirement. There is also reason to be concerned at the vagueness of the “just bearing” formulation.<sup>111</sup> Although nobody has been able to suggest a totally satisfactory approach; lawyers and triers of fact need a more workable test. I prefer an approach like that in the United Kingdom which rests on the language of a “significant cause” and recognizes that other causes may become overwhelming. I suggested such a formulation for Canada to redress our Supreme Court’s usual “a contributing cause outside the de minimis test,”<sup>112</sup> which is a rule of too sweeping accountability.

8. (1) A person causes a consequence when that person’s acts or omissions significantly contribute to that consequence.

(2) A person may significantly contribute to a consequence even though that person’s acts or omissions are

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108. Robinson, *supra* note 23, at 245 distinguishes between culpability sense of blameworthiness and the special sense of offense culpability requirements.

109. Model Penal Code §§ 2.03(2)(b); (3)(b) (Proposed Official Draft 1962).

110. *Id.* § 2.03(4).

111. See also Fletcher, *supra* note 22, at 5.

112. *Smithers v. The Queen* [1978] 1 S.C.R. 506.

not the sole or main cause of the consequence.

(3) No one causes a consequence if an independent, intervening cause so overwhelms that person's acts or omissions as to render those acts or omissions as merely part of the history or setting for another independent, intervening cause to take effect.

Other tests tend to use the test of reasonable foresight. For example, the U.K. Code has a special clause 17(2) dealing with an "intervening act or event" as follows:

A person does not cause a result where, after he does such an act or makes such an omission, an act or event occurs -

(a) which is the immediate and sufficient cause of the result;

(b) which he did not foresee, and

(c) which could not in the circumstances reasonably have been foreseen.

Again my concern is that the reliance on a foreseeability test appears to muddy the waters with an inquiry best left to the particular fault requirement.

## APPENDIX: TEXT OF SUGGESTED GENERAL PART

## PREAMBLE

Whereas the Criminal Code of Canada has not, since it was first enacted in 1892, comprehensively declared basic principles under which persons can be justly held criminally responsible,

Whereas criminal law should be clear and accessible to all,

Whereas the declaration of such principles by the courts has become unduly complex and sometimes inconsistent, and

Whereas the Criminal Code should reflect minimum constitutional standards declared by the courts to be mandated in interpreting the Canadian Charter of Rights and Freedoms,

Parliament hereby enacts a new Part 1 of the Criminal Code entitled Principles of Criminal Responsibility.

## PRINCIPLE OF LEGALITY

1. No one can be found guilty of conduct that is not an offence under this Act or another Act of Parliament.

## PRINCIPLES OF INTERPRETATION

2. In the absence of clear legislative intent to the contrary, the principles in the General Part are to be applied in the interpretation of any offense in the Criminal Code or other Act of Parliament.

3. Where a provision of the Criminal Code is reasonably capable of two interpretations, the interpretation which is more favorable to the accused must be adopted.

## CRIMINAL RESPONSIBILITY

4. Except where otherwise specifically provided, no one is criminally responsible for an offense unless that person engages in the prohibited conduct with the requisite fault and in the absence of a lawful justification, excuse, or other defense.

## PROHIBITED CONDUCT

5. Prohibited conduct consists of an act committed or omission occurring in specified circumstances and sometimes with specified consequences.

## OMISSIONS

6. No one is criminally responsible for an omission unless

(1) there is a legal duty declared by the offense definition in the Criminal Code or other Act of the Parliament of Canada, or

(2) that person created danger to life or safety of others and rectification was reasonably within that person's control.

## INVOLUNTARY CONDUCT

7. (1) No one is criminally responsible for involuntary conduct.

(2) Conduct is involuntary if it was beyond that person's ability to control.

(3) This section does not apply to conduct resulting from rage, mental disorder, or where the accused getting into the involuntary state satisfied the fault requirement for the offense charged.

## CAUSATION

8. (1) A person causes a consequence when that

person's acts or omissions significantly contribute to that consequence.

(2) A person may significantly contribute to a consequence even though that person's acts or omissions are not the sole or main cause of the consequence.

(3) No one causes a consequence if an independent, intervening cause so overwhelms that person's acts or omissions as to render those acts or omissions as merely part of the history or setting for another independent, intervening cause to take effect.

#### MINIMUM FAULT FOR CRIMINAL CODE OFFENSES

9. Unless the law creating the offense specifies to the contrary, criminal responsibility under the Criminal Code requires proof of fault in the form of intent, recklessness, or criminal negligence.

10. Unless the law creating the offense specifies to the contrary, recklessness is the fault element required in relation to each element of the offense.

#### INTENTION

11. A person acts "intentionally" with respect to

(1) a circumstance where that person hopes or knows that it exists or will exist;

(2) a consequence when that person's purpose is to cause it, or that person knows that it would occur in the ordinary course of events if he or she were to succeed in his or her purpose of causing some other consequence.

#### RECKLESSNESS

12. A person acts "recklessly" with respect to

(1) a circumstance when that person is aware of a risk that it exists or will exist;

(2) a consequence when that person is aware of a risk that it will occur; and it is, in the circumstances known to that person, unreasonable to take the risk.

## CRIMINAL NEGLIGENCE

13. A person is “criminally negligent” where a reasonable person in the accused’s situation would have been aware of the risk and the failure to avoid it constituted a marked and substantial departure from the standard of care a reasonable person would have exercised in the circumstances.

## REASONABLENESS STANDARD

14. For the purposes of section 13 and the application of any reasonableness standard under this Criminal Code the trier of fact must take into account the person’s awareness, if any, of the circumstances and also factors the person could not have controlled or managed such as race, gender, age and experience, where relevant, but not self-induced intoxication.

## MISTAKE OF FACT

15. (1) Where the fault requirement is intent or recklessness, to excuse a mistaken belief need not be reasonable although reasonableness is relevant to determining whether the belief existed.

(2) Where the fault requirement is criminal negligence, to excuse a mistaken belief must be reasonable.

(3) Where the accused has a mistaken belief within the meaning of subsections (1) or (2), he or she may nevertheless be convicted of an included or attempted offense where the belief constitutes the requisite fault for that offense.

## FAULT FOR OFFENSES UNDER OTHER ACTS OF PARLIAMENT

16. (1) Unless Parliament expressly requires intent, recklessness, or criminal negligence as a fault requirement or expressly imposes absolute liability, negligence is required for penal liability.

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(2) A person acts “negligently” where he or she departs from the standard of care expected of a reasonable prudent person in the circumstances.

(3) Before imprisonment can be imposed, intent, recklessness, or criminal negligence must be proved.

(4) Where the Crown has proved the conduct specified in the offense for which the fault requirement is negligence, the accused is presumed to have acted negligently in the absence of evidence to the contrary.

## COMMON LAW DEFENSES

17. No defense, justification, or excuse shall be unavailable unless contrary to an express provision of the Criminal Code.

## MISTAKE OR IGNORANCE OF LAW

18. Ignorance or mistake of law is not an excuse.

19. No one is criminally responsible for a mistake or ignorance of law reasonably resulting from

(1) the law not being properly made known to those likely to be affected, or

(2) reliance on a judicial decision or official advice.

## AGE INCAPACITY

20. No person is criminally responsible for conduct committed while under the age of twelve years.

## MENTAL DISORDER INCAPACITY

21. (1) No person is criminally responsible for conduct while suffering from mental disorder that rendered the person incapable of appreciating the nature and quality of the conduct or of knowing that it was morally wrong.

(2) For the purpose of subsection (1), every person is presumed not to suffer from a mental disorder, in the absence of evidence to the contrary.

## SELF-INDUCED INTOXICATION

22. Self-induced intoxication is not a ground of incapacity, nor may it be considered in any determination of reasonableness under this Act.

## DEFENSE OF PERSON

23. A person is not criminally responsible for using force against another person if he or she

- (1) reasonably believes that force is necessary for self-protection or the protection of a third party from unlawful force or the threat thereof; and
- (2) the degree of force used is reasonable.

## DEFENSE OF PROPERTY

24. A person is not criminally responsible for using force against another person if he or she

- (1) reasonably believes that force is necessary to protect property (whether belonging to that person or another) from unlawful appropriation, destruction, or damage, or to prevent or terminate a trespass to that person's property; and
- (2) the degree of force is reasonable.

## DURESS

25. A person is not criminally responsible for conduct under threat where

- (1) that person reasonably believes
  - (a) that a threat has been made to cause death or serious personal harm to that person or another if the conduct is not performed;
  - (b) that the threat will be carried out immediately if that person does not act or before that person or that other can gain official protection; and
  - (c) that there is no other way of preventing the threat being carrying out;

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(2) the threat is one which in all the circumstances that person cannot reasonably be expected to resist; and

(3) the person has not recklessly exposed himself or herself to the risk of threat.

## NECESSITY

26. A person is not criminally responsible for conduct under necessity where

(1) that person reasonably believes that it is immediately necessary to avoid serious personal harm to that person or another or serious harm to property;

(2) in all the circumstances that person cannot reasonably be expected to do otherwise; and

(3) the person has not recklessly and without reasonable excuse exposed himself or herself to the danger.

## ACCESSORIES

27. Everyone is an accessory to an offense and liable to the same penalty as a perpetrator who

(1) does or omits to do anything with intent to procure, assist or encourage another to commit an offense;

(2) with the fault required for that offense; and

(3) that other person commits the offense, whether or not that other person can be convicted of it.

## CORPORATIONS

28. (1) Corporations may be held criminally responsible for any offense if, on consideration of that corporation's organizational structure and culture, the corporation can be justly held to have acted with the fault specified for the particular offense, whether this be intention, recklessness, or criminal negligence.

(2) For purposes of the determination under subsection (1), consideration is to be given to acts of authorization or delegation, corporate goals and practices, past practices, any past offenses, and the existence and sufficiency of compliance programs.