

## Contents

<i>Preface to the third edition</i>	<i>page</i> xvii
<i>Preface to the second edition</i>	xx
<i>Preface to the first edition</i>	xxii
<i>Table of cases</i>	xxv
<i>Table of statutes</i>	xxxii
<b>Prologue: A brief history of the ancient juridical city of Fictionopolis</b>	<b>1</b>
<b>Part I: Context</b>	<b>7</b>
<b>1 Contradiction, critique and criminal law</b>	<b>9</b>
1 Introduction	9
2 Rationality and legality	10
3 Individual justice	13
4 Understanding the contradictions	16
<b>2 The historical context of criminal doctrine</b>	<b>19</b>
1 Introduction	19
2 Legal individualism and social individuality	20
(i) Justice and deterrence in the penal theory of the Enlightenment	20
(a) The reformers' task	20
(b) Retributive justice	21
(c) Utilitarian deterrence	22
(d) The need for legality	24
(ii) Interests and ideology in reform penal theory	24
(a) Middle-class interests	25
(b) Middle-class interests and moral-legal individualism	25
(c) Abstractions and realities	26
(d) The character of modern law: its repressive individualism	29
3 Legal individualism and social control	30
(i) The common law and the criminal law in history	31
(ii) Logic, 'policy' and social class	33

x	Contents	
		35
4	The foundational tensions of criminal doctrine	35
	(i) Law's psychological individualism	35
	(ii) Law's political individualism	36
	<b>Part II: Mens rea</b>	39
<b>3</b>	<b>Motive and intention</b>	41
1	Introduction	41
2	Motive and intention: desocialising individual life	43
	(i) Conflicting motives and common intentions	43
	(ii) Hidden motives	46
	(a) Individual morality	46
	(b) Political morality	49
	(c) Social mores	50
	(iii) Informal remedies to the formal politics of denial	53
	(a) Discretion to prosecute	54
	(b) Discretion to convict	54
	(c) Discretion in sentencing	55
3	Indirect intention: legal and moral judgment	57
	(i) Two approaches to intention	57
	(a) The formal psychological ('orthodox subjectivist') approach	58
	(b) The morally substantive approach	59
	(c) Summary of the two approaches	61
	(ii) The law of oblique intention: <i>Moloney</i>	61
	(a) Guidelines to a jury in <i>Moloney</i>	63
	(b) <i>Moloney's</i> intended practical impact	64
	(iii) Having one's subjectivist cake and eating it: interpreting <i>Moloney</i>	64
	(a) Guidelines to a jury: <i>Hancock and Shankland and Nedrick</i>	64
	(b) <i>Hancock and Shankland's</i> practical impact	66
	(iv) <i>Woollin</i> and after	67
	(a) <i>Woollin</i> and the parameters of indirect intention	67
	(b) Two approaches to intention and indiscriminate malice	68
	(c) 'Entitled to find' and the moral threshold	70
4	Conclusion	71
<b>4</b>	<b>Recklessness</b>	73
1	Introduction	73
2	Subjectivism and objectivism in the law of recklessness	76
	(i) What was wrong with <i>Caldwell</i> ?	76
	(ii) Subjectivism and objectivism: an irreconcilable split	79
	(iii) <i>G and another</i> : roads not travelled	80

	(iv) What is wrong with orthodox subjectivism?	82
	(v) What is wrong with orthodox objectivism? Gross negligence manslaughter	83
	(vi) A 'third way'? Introducing 'practical indifference'	88
3	Recklessness as practical indifference	89
	(i) The concept of practical indifference	90
	(ii) Two questions about practical indifference	91
	(a) Practical indifference and determinacy	91
	(b) Is practical indifference subjective?	92
	(iii) The political limits of practical indifference	94
4	The historical roots of recklessness	96
	(i) 'Factual' versus 'moral' recklessness	96
	(ii) Antinomy and the forms of culpability	98
	(iii) An objection: the 'objective' question in orthodox subjectivism	99
5	Conclusion	100
<b>5</b>	<b>Strict and corporate liability</b>	102
1	Introduction	102
2	Differentiation: strict liability	104
	(i) Strict liability and the regulatory offence	104
	(ii) The ideological and practical context of the regulatory offence	106
3	Strict liability and 'real' crime: a presumption of mens rea?	109
	(i) The historic cases: returning to morals	109
	(ii) From moral judgment to legal principle	113
4	Assimilation: corporate liability	117
	(i) Introduction	117
	(ii) Assimilating corporate to individual fault: the identity doctrine	118
	(iii) From identity to aggregation and beyond	120
	(a) Aggregation	121
	(b) An organisational approach	121
	(c) Problems with the organisational approach	122
5	Between identity and organisation: the 2007 Act	124
6	Social complexity and the corporate form: responsibility and punishment	128
	(i) Economic integration and corporate responsibility	128
	(ii) Social co-ordination and corporate punishment	129
7	Conclusion	132
	<b>Part III: Actus reus</b>	135
<b>6</b>	<b>Acts and omissions</b>	137
1	Introduction	137
	(i) Acts	138
	(ii) Omissions	139

2	Acts	140
	(i) Conflicting conceptions of voluntariness	140
	(a) Physical involuntariness versus moral involuntariness	140
	(b) Physical involuntariness versus moral voluntariness	144
	(ii) Limiting physical involuntariness	144
	(a) The requirement of unconsciousness	144
	(b) Intoxication, physical involuntariness and moral voluntariness	146
	(c) Denying physical involuntariness: situational liability cases	149
	(iii) Conclusion	151
3	Omissions	151
	(i) Constructing the concept of an omission	152
	(a) The drowning infant/stranger	154
	(b) Killing and letting die	155
	(ii) Juridifying the concept of an omission	156
	(iii) Abstract right and social need	159
	(iv) Beyond individualism?	162
	(a) Line-drawing and the duty of easy rescue	163
	(b) Specific duties of citizenship? Legal form and the preventive turn	166
4	Conclusion	168
<b>7</b>	<b>Causation</b>	171
1	Introduction	171
2	A critical approach to causation	172
3	Liberal principles for the imputation of causation	174
	(i) Abnormal conditions or contingencies	175
	(ii) Third-party voluntary interventions	177
4	Analysing the causation cases	179
	(i) The intervention of a new voluntary act	179
	(a) Framing cases narrowly or broadly	180
	(b) Fright and flight	181
	(c) Suicide	182
	(d) Drug-taking	183
	(e) Law enforcement	185
	(f) Refusing medical treatment	186
	(ii) The intervention of an abnormal occurrence	187
	(a) The medical treatment cases	187
	(b) The 'eggshell skull' case	191
	(c) The regulatory context	192
5	Conclusion	193

<b>Part IV: Defences</b>	197
<b>8 Necessity and duress</b>	199
1 Introduction	199
2 Necessity	201
(i) Necessity's ambiguous history	202
(ii) Judgment and context: the case of <i>Dudley and Stephens</i>	203
(iii) The re-emergence of necessity	207
(a) 'Excusatory necessity': duress of circumstances	207
(b) 'Justificatory necessity': medical cases	210
(c) 'Justificatory necessity': challenging the state	211
(d) 'Justificatory' or 'excusatory'? State necessity	213
(iv) Necessity, criminal law and social justice	214
3 Duress	218
(i) Conflicting positions in the murder cases	219
(ii) The conflict within the basic arguments	220
(iii) Further limits	224
(a) Mistake of duress	224
(b) Standard of resistance	225
(c) Self-induced duress	227
4 The formal structure of defences	229
(i) Offence and defence	229
(ii) Justification and excuse	231
5 Conclusion	233
<b>9 Insanity and diminished responsibility</b>	237
1 Introduction	237
2 Law against psychiatry: the social control of madness	239
(i) Law's rational subject	239
(ii) The asylum and psychiatry	240
(iii) Conflicting views of crime	242
3 Between law and psychiatry: the legal defences	243
(i) Insanity	243
(a) The breadth of the Rules: 'disease of the mind'	244
(b) The narrowness of the Rules: the two cognitive tests	245
(ii) Diminished responsibility	248
(a) Meaning of terms under the old law	248
(b) Conflict and cooperation in the law	249
(c) Modernising the law: the 2009 Act	251
(d) Alcoholism and diminished responsibility	254
(e) Why the partial defence to murder only?	256
4 Law and psychiatry in conflict: the politics of law reform	257

(i)	The post-Hinckley debate in the United States	257
(ii)	Reform proposals in England and Wales	259
5	Law and psychiatry combined: the decontextualisation of madness	261
(i)	Covering up for the law	263
(a)	Poverty and the insanity defence	263
(b)	Women, infanticide and diminished responsibility	264
(c)	Limits to compassion and pragmatism	266
(ii)	Covering up for society: men killing women	267
6	Conclusion	269
(i)	The nature of madness	269
(ii)	Law and psychiatry: consensus and conflict	271
<b>10</b>	<b>Self-defence</b>	274
1	Introduction	274
2	Principles, contexts, conflicts: a ‘commonsensical’ logic	276
(i)	Necessity and imminence	278
(a)	Necessity	279
(b)	Imminence	281
(ii)	Proportionality and the ‘heat of the moment’	284
3	Mistaken self-defence: offence, defence and the ‘inexorable logic’ of mens rea	286
(i)	The ‘inexorable logic’ of mens rea	287
(ii)	Self-defence as a defence: the counter-argument	289
(iii)	The evaluative context	291
(a)	Self-defence as justification or excuse	291
(b)	Mistaken self-defence: warranted excuse or imperfect justification?	292
(c)	Offence or defence?	294
4	Mistake as to amount of force: combining conflicting logics	295
(i)	Mistakes of fact and law	296
(ii)	Honest and reasonable mistakes	297
(a)	Fusing incompatible alternatives	297
(b)	Further flexibility	299
5	Conclusion	301
<b>11</b>	<b>Loss of control</b>	304
1	Introduction	304
(i)	Reforming the law	305
(ii)	Historical shifts in understanding provocation	305
2	The new law and the old law	307
(i)	The new law	307
(ii)	Problems with the old law	308
(a)	Concern over the subjective test	309

	(b) The objective test: unacceptable grounds for provocation	309
	(c) The objective test: over-subjectivisation of the reasonable person	311
	(iii) The underlying philosophy	312
3	Central issues for the new law	314
	(i) Controlling the grounds of provocation	314
	(a) The power of the judge	314
	(b) Sexual infidelity	315
	(ii) Controlling the objective test	316
	(a) The normal person test: who does it exclude?	316
	(b) Age and sex	319
	(iii) The abused woman	320
	(a) The fear trigger	320
	(b) The anger trigger	321
	(iv) Loss of control	322
	(a) Why was loss of control reinstated?	322
	(b) What is the effect of reinstatement?	324
4	The old and the new: history, structure and form	325
	(i) Changes in the law in historical context	325
	(ii) Form, substance and the new defence	328
	<b>Part V: Concluding</b>	331
<b>12</b>	<b>Sentencing</b>	333
	1 Introduction	333
	2 Deterrence	336
	(i) Individual deterrence and its social context	338
	(ii) Individual versus general deterrence	341
	3 Retributivism	344
	(i) Introduction: 'just deserts' and sentencing	344
	(ii) Legitimising the allocation of punishment	346
	(a) The ideal and the actual in classical retributivism	347
	(b) 'Just deserts in an unjust society'?	348
	(iii) Limiting punishment through proportionality	350
	(a) The classical approach	350
	(b) Cardinal and ordinal proportionality	350
	(c) The living standards analysis	352
	4 Rehabilitation and incapacitation	353
	(i) Individualism versus individualisation	354
	(ii) Individualisation and sentencing	355
	(a) Rehabilitation	355
	(b) Incapacitation	356
	5 Competing ideologies and a dominant rationale	359

xvi	Contents	
		<hr/>
	(i) The antinomies of sentencing	359
	(ii) A dominant rationale?	360
	(iii) The indeterminacy of the legal form	361
	6 Conclusion	363
<b>13</b>	<b>Conclusion</b>	<b>365</b>
1	The political nature of juridical individualism	365
	(i) Psychological individualism: the repressive function	366
	(ii) Political individualism: the expressive function	367
2	Juridical individualism in the criminal law	369
	(i) Offence: mens rea	369
	(ii) Offence: actus reus	373
	(iii) Defences	375
	(iv) Sentencing	378
3	Criminal law as praxiology	379
	<i>Bibliography</i>	382
	<i>Index</i>	395