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Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

CRIMINAL LAW

**the meaning
of guilt**



STRICT LIABILITY

Working Paper 2

Law Reform Commission of Canada

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CRIMINAL LAW

strict liability

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NOTICE

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing by July 1, 1974, to:

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I

The Law and the Citizen

Mention the word "law" to the average man and the odds are he won't think of contracts, wills or all the other things that lawyers talk about. Ten to one he'll think of the police. The average man by "law" means first and foremost criminal law.

In this he shows good sense. For criminal law is the law that protects the citizens from violence, dishonesty and other "sins with legal definitions"—the law that sees him safely home. It's also the law that sees him into court: motoring, liquor and other lesser offences produce one and a half million convictions a year—one for every thirteen people in the country. Above all, the criminal law is our most basic and essential law, the law that is most concerned with right and wrong, and the law that more than all other law gives our society its shape.

But is it the shape we want? Criminal law isn't a one-way street, and while it protects the citizen, it also restricts his liberty for forbidding certain kinds of acts and by intervening to punish those who do them. As law reformers, then, we face three basic questions: (1) what right have we to have a criminal law—what is its justification? (2) does our criminal law restrict and intervene too much or not enough—what is its proper scope and ambit? and (3) does it punish the right people, or is it too severe on those who are not in fact at fault or is it too lenient on those who are—does it apply the right criterion of guilt? How far in these respects is our criminal law the kind of criminal law we ought to have?

The Criminal Law We Have

To begin with, what is the criminal law we have? In fact, what is the criminal law, and what is crime? Put simply, crime is anything against the law, but more than this; for acts against the law need not be crimes. Some, like breach of contract, are only civil wrongs—wrongs for which the wrongdoer can be sued and made by law to compensate those injured by them. Others—crimes—are wrongs for which he may be prosecuted and punished. On the face of it then, a crime is something prohibited and punishable by law.

This, though, is not enough. For many acts in Canada are prohibited and punishable by law without being crimes. To be a crime in Canada an act, in strict law, must be prohibited and punishable by federal law. In Canada, our constitution says, the power to make the criminal law is a federal power: the British North America Act entrusts this power to the federal Parliament.

The provinces, then, can make no criminal law. Yet all the same they create offences; for the B.N.A. Act lays down that the provinces can make it an offence to disobey the laws they have authority to pass and can impose penalties for disobedience to them. In consequence, they have created numerous offences (which in all respects look just like crimes) and which in fact produce by far the majority of convictions in our criminal courts—e.g. over 1,400,000 out of the 1,800,000 convictions recorded in 1969. You can be charged, convicted and punished for them just as for a crime. Nor would the ordinary citizen convicted, say, of driving without due care and fined and deprived of his licence, take comfort from the fact that, constitutionally speaking, he is guilty of a provincial offence and not a crime. This is a distinction he doesn't draw.

Instead he draws a different one, one dating back at least to Blackstone and the eighteenth century. A crime, he thinks, is not just anything that happens to be punishable by law, it is something that also *ought* to be so punishable. In the words of that nineteenth century master of the criminal law, Mr. Justice Stephen, to whom we largely owe our Criminal Code, a crime in the popular sense means "an act which is both forbidden by law and revolting to the moral sentiments of society." By contrast, acts simply forbidden by law but not revolting to the moral sentiments of society—e.g. parking at certain times in certain places—are mere prohibited offences. And between the two—between "crimes" and mere "offences"—there lies, the ordinary citizen contends, a basic difference.

But is he right? After all, what makes a crime like murder wrong? Surely the harm involved—direct harm to the victim, indirect harm to his family and harm in terms of fear and alarm to the rest of society. And why does the law forbid parking at certain times and places and make it an offence? Again surely because of the harm involved—street congestion and interruption of traffic flow. Is the difference, then, a simple difference of degree?

Not altogether. There are other differences: the harms involved are different in kind. "Crimes" violate fundamental rules, constitute wrongs of greater generality, and involve harm of a far more obvious kind than do "offences."

First, crimes contravene fundamental rules, while offences contravene useful, but not fundamental, ones. Murder, for example, contravenes a basic rule essential to the very existence and continuance of any human society—the rule restricting violence and killing. Illegal parking violates a different kind of rule, one which is by no means essential to society, useful though it may be to have it observed.

Secondly, crimes are wrongs of greater generality: they are wrongs that any person *as a person* could commit. Offences are more specialized: they are wrongs that we commit *when playing certain special roles* or when engaging in certain specialized activities. Murder and stealing, for example, are wrongs done by men simply as men. Illegal parking, unlawful sale of liquor and fishing out of season are wrongs done by men as motorists, as merchants or as fishermen. Such specialized offences we expect to find, not in criminal codes or books on criminal law, but in the specialized statutes and books on these particular topics.

But thirdly, crimes are far more obvious wrongs. Murder and robbery seem plainly wrong: they involve direct, immediate and clearly apparent harm to identifiable victims; and they are done with manifestly wrong intention. Offences are less clearly wrong: the harm involved is less direct, is collective rather than individualized, and is as often done by carelessness as by design. What is more, it is as often as not potential rather than actualized.

Perhaps this is why the defence of ignorance of law never found favour in the criminal law. For after all, what difference should it make if a murderer didn't know the precise law relating to his crime? He knows at least that killing is usually wrong. But should we say the same of mere offences? Are prohibitions of the traffic laws, the liquor laws and fisheries laws so obviously wrong that we can say the man who breaks them must have known his act was wrong?

Not that mere offences aren't wrong. To say they are less obviously wrong is not to say they are not wrong at all. Indeed this is the danger of the simple view that distinguishes crimes into the two categories of "crimes" and "offences". For it suggests that mere offences are in no way wrong and cause no harm. In truth, however, the accumulated harm caused by such offences as over-fishing, over-hunting, polluting the environment and so on, may well outweigh the harm resulting from more obvious crimes. So much so, in fact, that some would urge that no attention should be paid at all to the distinction.

But this would be unwise. For one thing, it's never wise to ignore completely distinctions drawn by ordinary citizens. Nor would it be advisable for law reformers to overlook the fact that one conviction for robbery will brand a man in ordinary life a "criminal" while a thousand convictions for illegal parking won't.

For another, it is well to learn the lesson taught by the ordinary man's distinction: "crimes" like murder, robbery and rape—though the law relating to them may descend to technical details—merely prohibit what common sense thinks wrong; "offences" like driving on the wrong side of the road and driving above the speed limit go much further. For here the law doesn't content itself with prohibiting what all of us think wrong—driving in a dangerous manner or at a dangerous speed: it proceeds to lay down which side we must drive on and exactly how fast we may drive; and about this there is inevitably an element of arbitrariness.

What we conclude is that in our criminal law there is a broad distinction which can't be pressed too far but which rests on an underlying reality.* On the one hand there exists a small group of really serious crimes like murder, robbery and rape—crimes of great antiquity and just the sort of crimes we should expect to find in any criminal law. These are the crimes originally defined by judges fashioning the common law, and now located in our Criminal Code; and all of them, of course, are federal crimes.

By contrast there exists a very much larger group of lesser offences like illegal parking, misleading advertising, selling adulterated foods—offences of much more recent origin. These are offences that were never known to common law and never gained entry into the Criminal Code. Instead they lurk within the confines of the Weights and Measures Act, the Combines Investigation Act, the Food and Drugs Act and all the various Acts and Regulations which our complex industrialized society produces. These "regulatory" offences, as they are often termed, are found in both federal and provincial law.

Our concern, of course, is federal law. It is those serious crimes and regulatory offences in the federal law. All the same, whether an offence is created by federal or provincial law, questions of fairness, justice, humanity and so on still apply. So while, strictly speaking, our recommendations and suggestions are confined to federal law, in a wider sense they can be looked on as applying equally to provincial law. The principles involved remain the same.

Why Have a Criminal Law?

What, then, are these principles? What is the aim and purpose of the criminal law? In particular, is there any justification for having a

*Exactly what to call these two different kinds of offence is a problem. Various terms have been used, e.g. real crimes and quasi-crimes, and the second category has been variously termed "civil", "public welfare", "regulatory" offences and so on. Our own usage in this paper is to call the first category "crimes" or "real crimes" and the second category "offences" "mere offences" "regulatory offences".

criminal law at all? Or is it nothing more than a rationalization of the cynic's doctrine "might is right"? For what other right could we have for setting up a series of prohibitions and punishing disobedience to them?

After all, what right has society to punish an offender? To answer that offenders deserve to be punished is not enough: to say a man deserves to suffer for the wrong he has done is not to say other men are entitled to make him suffer for it. For other men are not entitled to play at being God. Yet if we say we are entitled to punish wrongdoers to protect ourselves, don't we commit ourselves to using an offender for the benefit of others—to treating him not as an end in himself but as a means to the greater good of others?

Enormous as this problem is, in this short Working Paper we can but indicate a possible solution. We have, we would contend, a basic right to protect ourselves from harm and in particular from the harmful acts of others. One way of getting this protection is to use the law to forbid such acts and punish those committing them. And whether we punish to deter, to reform, to lock up offenders where they can do no harm, or to denounce the wrongfulness of the act committed—this self-protection is in our view the overall aim and general purpose of the criminal law.

Now given this aim and purpose of our law, the offender can't complain, when punished, that he is being used simply for the benefit of others. The fact is, he isn't. Society's rules and their observance benefits us all, offender included; so punishment securing this observance benefits us all, the offender again included. The offender then is not just being used for the greater good of others.

On the contrary, he is no more being used for the benefit of others than is an aggressor whose victim uses force in self-defence. His attack on an innocent victim loses the aggressor his right not to have force used upon himself. Likewise his violation of the law loses the offender his right not to have the law intervene against himself. For criminal law is society's self-defence against the criminal.

Nor can the offender complain of being used and treated as a mere thing or object. Again, the fact is, he isn't. The fact is, the law is treating him as a rational being with free-will and power of choice. "Keep these rules", says the law, "accept society's burdens and enjoy its benefits; or break these rules, reject society's burdens and lose its benefits: the choice is yours". Accordingly, to punish the man who breaks the rules and rejects the burdens isn't unfair. On the contrary, what would be unfair would be to let him reject society's burdens but at the same time let him keep the benefits. For this would be to have

it both ways—to gain an unfair advantage over the rest of society and take the law-abiding citizens “for a ride”; they would be sticking to the rules that benefit him but deriving no corresponding benefit from him in return. And this is what his punishment prevents.

But this alone won't justify our criminal law. For what if those who make the criminal law seek to protect themselves against things they have no right to be protected against? The Norman kings who conquered England sought to reserve all wild deer in the country for their own pleasure, forbidding anyone else to kill them under pain of death. Yet hadn't peasants as great a right as princes had to kill and eat wild animals? And we in our time have laws prohibiting lifestyles which those who make the laws perhaps dislike. Yet, may there be a right for everyone, so long as he does no harm to others, to go to Hell in his own fashion?

Next, what if the law should penalize those who are in no way to blame because they are in no moral way at fault? The unfortunate English Admiral Byng, we may reflect, was put to death because of a naval defeat that was not in any way his fault—which prompted Voltaire to remark that “in that country they kill an admiral from time to time to encourage the rest”. But we in our time do things which, if less drastic, are equally unjust. We used to convict people having narcotics in their possession even if they were unaware that the thing in their possession was a drug at all, until happily in 1957 in *R. v. Beaver* the Supreme Court of Canada announced that possession without knowledge of the nature of the substance was no offence. Meanwhile an enormous number of offences still remains which can be committed unintentionally and unawares, and for which, accordingly, a person can be punished without being in any way to blame.

Yet surely criminal law and punishment are only justified provided two conditions are fulfilled. First, the law mustn't be oppressive and forbid things that the citizen has a moral right, and should be free, to do. Secondly, it shouldn't penalize those who are known to be without fault because they had no reasonable chance to comply with its provisions: it shouldn't punish those who do not break the law by choice.

So these are the basic problems for the criminal law. First, what are the things a person should be legally left free to do and what is the proper scope and ambit of the criminal law? Secondly, what sort of behaviour—intentional, reckless, negligent or lacking all moral fault—should attract criminal liability: what is the proper criterion of criminal guilt? This is the subject of our present inquiry.

In other words, to what extent should criminal liability be strict? How far should guilt depend on nothing more than the fact that

outwardly the offender has done the act forbidden by law? How far should his state of mind have any relevance? This is a fundamental problem of any criminal law. And the answer to it will do more than anything else to determine the kind of criminal law we want to have.

The Question of Guilt

The question, then, is this: should guilt be based on two factors—doing a wrongful act and meaning to do it—as it is in murder, robbery and other crimes? Or should it be simply based on doing the wrongful act, as it is in most regulatory offences, which in general can be committed quite unintentionally or unawares? Or does it all depend on the type of crime in question? Should “real” guilt be necessary for crimes and “technical” guilt enough for regulatory offences? Or again should we drop the idea of guilt altogether and base the law on dangerousness or harmfulness, as we do in the case of mentally disordered offenders, offenders who are neither punished nor released but detained at the Lieutenant-Governor’s pleasure?

Does it also depend on the type of defendant involved? Should the same criterion be used in the case of a corporate defendant as in the case of an individual accused? Real crimes are mostly committed by real or natural persons, but regulatory offences are committed as much by corporations as by natural persons. So questions about the criteria of guilt are also questions about the criminal liability of corporations.

This, though, is a major question in itself and one not dealt with in this Working Paper. For one thing the criminal liability of corporations raises other questions beyond that of the criteria of guilt, questions we reserve for a later Paper. For another, justice, liberty and humanity—or their absence from our law—mean more to ordinary persons than to corporations. What, then, should be the law’s criteria of personal guilt?

In concentrating, though, on personal guilt, we do not mean to exclude entirely from consideration the problem of vicarious liability. The question whether a person is criminally liable for the acts of others arises frequently with regulatory offences alongside the question whether criminal liability is strict. A typical example is that of an employer who is prosecuted, not because he himself was in the wrong, but because his employee in the course of his employment unwittingly contravened some regulation. On this, our tentative position is that vicarious liability in criminal law is only justifiable on the basis of personal fault in the employer himself. This tentative position is in line with our general view on personal guilt and the aims of the criminal law.

The Subordinate Aims of the Criminal Law

Given that the overall aim of the criminal law is the aim of self-protection, what should be the more immediate aim of the criminal law and the criminal justice system? Should it be bringing wrongdoers to justice—the kind of aim at work in the law of crimes, where trials are slow and solemn, convictions shameful, and punishment ignominious and deserved? Or should it be the less dramatic aim of simply deterring people from breaking the law—the kind of aim at work in the law of regulatory offences, where trials are short and speedy, convictions, labels and penalties mere disincentives? Or should our aim be simply harm prevention by means of a law, not of prohibitions and penalties, but of descriptions and prescriptions— description of harms to be avoided and prescriptions of avoiding action?

The answer to these questions bears upon the criteria of guilt the criminal law should have. As the law now stands, real guilt—guilt in the fullest sense where the offender has done a wrongful act and meant to do it—goes with the aim of bringing wrongdoers to justice. For the wrongdoer being brought to justice must be shown to be a wrongdoer in the fullest sense and to have meant to do the wrong thing he did. A lesser kind of guilt—technical guilt—goes with the aim of simple deterrence, where time no longer allows trials to be tailored to the individual defendant but insists on each case being processed along the conveyor belt of dime-store justice, with no room left for inquiring whether the defendant was at fault and meant to do the act he did.

By contrast, the aim of simple harm prevention isn't concerned with guilt at all but only with suppression of potential danger. So, for example, the law authorizes inspectors to seize hazardous products, impound adulterated food, ground unsafe aircraft, destroy diseased livestock and so on. Here guilt is irrelevant because the law is acting, not against a person so much as against a harmful thing—proceedings are not *in personam* but *in rem*.

Given that our law works in these three different ways, how far should criminal liability depend on personal fault? Should it depend on intention, on recklessness, on a state of mind—what lawyers call *mens rea*? Should it depend on negligence—on some culpable condition falling short of traditional *mens rea*? Or is it justifiable to drop all requirements of *mens rea* or other culpability and to substitute a doctrine of strict liability, whereby all that is required is the doing of the forbidden act itself—the *actus reus*? In other words, how strict do we want our criminal law to be?

II

Strict Liability and Present Law

Should a person who breaks the law, then, be guilty whether or not he realizes he is breaking the law? Or should he only be guilty if he breaks it knowingly?

This far the law never went: it never reserved punishment solely for those who know they are breaking the law. Ignorance of law, says authority, is no excuse. It's no defence for a burglar to say he didn't know that burglary was against the law or for a possessor of stolen goods to say he didn't know the law prohibited such possession. For everyone is presumed to know the law; mistake of law is no defence.

Mistake of fact is. A person who buys stolen goods without realizing they are stolen has a good defence to a charge of possession. Legal tradition says that no one is guilty simply because he does the criminal act: he has to have the criminal knowledge or intention too. In principle, then, mistake of fact is a good defence.

Not necessarily, though, in practice. In practice many offences, especially regulatory offences, rule out defences based on mistake of fact. Of such offences one can be guilty without intention or knowledge or even carelessness. A trader who so packages food as to create an erroneous impression about its contents contravenes s.5 of the *Food and Drugs Act* and commits an offence even though the packaging is done in all good faith and with no lack of care. In such offences liability is strict.

But is it fair? Is it fair to convict people who are in no way to blame? Or is it inevitable? So complex and interdependent is modern life, and so important is it to maintain high standards of safety, hygiene and so on, that strict liability, it is often argued, is essential. Without it, runs the argument, the laws promoting these high standards couldn't be enforced. For the only people who know, and could ever know, whether the defendants were at fault or not are the defendants themselves, since only they know what goes on at their places of business. Take strict liability away and we could no longer enforce our public welfare criminal law. Justice, on this view, bows to expediency.

But how vast a problem is this in Canada today? How many strict liability offences and how many prosecutions for them are there? Our findings are as follows. First, federal laws contain about 20,000 regulatory offences and the laws of the average province about another 20,000, and of the combined total ninety per cent (90%) are offences of strict liability. Second, each year there are roughly 1,400,000 convictions* for strict liability offences and roughly 850,000 persons are convicted of them—a conviction a year for one in twenty-five of the population. The problem, quantitatively speaking, is enormous.

But is it real? In other words does strict liability exist in practice as well as on paper? To answer this we investigated three areas of law—misleading advertising law, weights and measures law, and food and drugs law—and we found that those areas are so administered that prosecutions are hardly ever launched against people who are not at fault. Extrapolate this finding across the board and apply it to all strict liability offences, and the potential injustice of strict liability would be no problem, practically speaking.

It is still a legal problem, though. For if the law says guilt doesn't depend on fault and practice says it does, we have a divergence between practice and law. This at best produces confusion, at worst hypocrisy. We suggest it is never advisable to tolerate too large a discrepancy between what the law really is in practice and what on paper it purports to be.

But what, after all, does the law on strict liability purport to be? Our investigations show that on this the law is utterly unclear. We never know, and never can know, till a court informs us, whether the average regulatory offence is one of strict liability or not. Nor can we with any confidence predict what courts will say. Take the leading case on the topic: *R. v. Pierce Fisheries Ltd.* The defendants were charged with possession of lobsters below the size permitted by the Fisheries Regulations: in their shipment of 50,000 lbs. of lobsters they had twenty-six below the regulation size. Did the prosecution have to show they *knew or should have known* the twenty-six were there? The trial court thought they did. So did the Nova Scotia Court of Appeal. But not the Supreme Court of Canada, to which the prosecution appealed. The offence, said the Supreme Court, was one of strict liability. Yet how could anyone have told?

*The calculations, as explained in Study Paper I, "The Size of the Problem", assume that 90% of summary convictions for offences under federal statutes (other than the Criminal Code), federal regulations, provincial statutes and provincial regulations are convictions for offences of strict liability. In fact nearly 80% of the convictions are for traffic offences. In this area of law, however, the proportion of strict liability offences is about 98%. Accordingly, our estimate of 1,400,000 convictions for strict liability offences is, if anything, conservative.

All we can tell is that ninety per cent of our regulatory offences *could* be offences of strict liability. The sections and regulations creating them are so drafted as to give no indication whether or not *mens rea* is required. Prior to judicial pronouncement we can only wait and see.

Can this be satisfactory? Satisfactory for a prosecutor who has to enforce the law and decide whether to launch a prosecution? Satisfactory for a defendant wondering if he has a good defence factory for the general public affected by these regulations?

On this we have no doubts. The citizen has a right to know the law, and if any part of the law should be clear and certain, the criminal law should. Since criminal law is the law that authorizes state intervention against the individual, liberty demands that the basis and the bounds of that intervention be clearly spelled out, so that we may know exactly what is forbidden and precisely when the state may intervene. Where mystery begins, observed Burke, justice ends. Mystery in the criminal law then is indefensible. So we conclude

- (1) **that whether or not strict liability should have any place in the criminal law, the law must be clarified so as to make it plain whether any given offence is one of strict liability.**

III

Should Strict Liability Remain?

How far, though, should strict liability remain? As a preliminary we stress again three points made earlier. First, our discussion is strictly confined to federal law, and our recommendations, therefore, relate only to this law. We trust, however, that our discussion will be of use to those concerned with provincial and municipal law. Second, this Paper confines its inquiry to the question of personal guilt. Third, as we have said, we do not exclude the question of vicarious liability, which, we contend, should be based on personal fault.

How far, then, should personal criminal liability depend on personal fault? The plan of our inquiry is to raise the following questions step by step: (1) Should liability depend on fault in real crimes, where criminal law appears primarily to seek to bring wrongdoers to justice? (2) Should criminal law here retain the aim of bringing wrongdoers to justice or should it adopt a different aim? (3) Should liability depend on personal fault in regulatory offences, where the law seems primarily to seek to deter? (4) Would it be practicable to abolish strict liability in regulatory offences? (5) If so, what alternatives are there? (6) What is the criminal law we ought to have?

IV

Strict Liability, Real Crimes and Bringing Wrongdoers to Justice

If criminal law has to do with bringing wrongdoers to justice—whether to denounce vice and uphold virtue, or to enable society to focus its attention dramatically on those things that most trouble it—then quite clearly strict liability has no place. Bringing wrongdoers to justice means condemning people, holding them up in disgrace and stigmatizing them as meriting punishment, and punishment that may take a particularly shameful form: imprisonment. Here strict liability would be both illogical and unjust.

Illogical, because it makes the criminal justice system contradict itself and tell a lie about itself. If the law purports to condemn persons as being in the wrong and deserving punishment, it is illogical for it at the same time to condemn and punish persons known to be not in the wrong and not deserving of punishment. To proclaim that a man deserves punishment without deserving it is a self-contradiction. This sort of “innocent” guilt is quite absurd, and strict liability here is quite irrational.

As well, it is unjust, and on two counts. First, one part of the meaning of justice is that every man should be given his due. To the man who doesn't deserve punishment, however, punishment is never due. Justice limits punishment to those to whom it is due—those who are at fault and are to blame not only because of the act they did but also because of their intention, knowledge, recklessness or negligence. Punishment is never due to those who make mere reasonable and unavoidable mistakes. To err is human and no one can be expected to be free from error. To require a man to be free from simple human error is to ask more than is due from him, and to punish him for such failure is to impose on him more than is due to him. On this count strict liability is quite unjust.

It is also unjust, though, on a second count. For another part of the meaning of justice is that like cases should be treated alike and different cases differently. This principle restricts taxation, conscription and other burdens to those best fitted to bear them, and allows benefits like the franchise to be restricted to those old enough to have some

understanding of political issues. In other words, justice discriminates on grounds that warrant discrimination.

But the difference between a person at fault and a person not at fault is just such a ground as warrants discrimination. A man who does a prohibited act intentionally and one who does it unawares are different and should, in justice, be treated differently. Strict liability treats both alike. And this is never just.

Our conclusion, therefore, is that strict liability has no place in this context and that *mens rea* has to be retained. We recommend

- (2) **that real crimes must always require mens rea, that guilt must always depend on personal responsibility, and that strict liability here should have no place.**

V

A Different Sort of Law of Real Crimes

But why keep the law as it is? Why not abandon the “theological” approach of guilt and punishment? Why not adopt instead a more scientific approach based on danger, harmfulness and treatment? Why not give up our criminal law, geared as it is to personal responsibility, and replace it by a law of anti-social behaviour, a sort of social hygiene system of preventive law analogous to preventive medicine? Using this approach, the law could authorize, indeed prescribe, treatment for those considered likely to engage in anti-social conduct and cause harm to others. Such treatment would neither depend on a finding of guilt nor form a response to the commission of a crime: it would be given in answer to a diagnosis of anti-social tendency, of which a criminal act would be just one symptom. The new approach then would look to the future, not to the past.

A new approach, then, but a drastic change and one we do not recommend. But though the suggestion of such an approach sparked off one of the most important and illuminating debates in criminal jurisprudence, here we can but summarize our own conclusions formed in the light of that debate.

First, with such an approach, strict liability would raise no question of irrationality or injustice. No one would any longer be convicted, stigmatized or punished: no question of punishing the innocent would arise. Indeed there could even be a marginal gain in terms of justice from one standpoint—the standpoint of the victim of the harmful act. For the harm to the victim remains the same whatever the “offender’s” state of mind: a man run over on purpose and a man run over by accident suffer equal pain, and the approach of concentrating on the harm itself and the need to prevent it would authorize intervention in either case against the car driver for diagnosis, prognosis and preventive treatment. A further gain, though not in terms of justice but of expediency, would be the lack of need to prove *mens rea*, potentially one of the heaviest burdens in a criminal trial. Another would be an increased ability to deal with potential harm: a man bent on killing is at least as dangerous as a man who has already killed—why wait till he kills before we apprehend him? It’s sometimes said that in

the common law of tort a dog is entitled to his first bite. But surely none will say that a murderer is entitled to his first corpse.

So a new approach would have advantages—efficiency and expeditiousness. But these we would purchase at a cost. First, think of the burden of change. Not to be underrated in the least is the effort involved in adopting, and adapting to, a whole new set of attitudes to anti-social behaviour. Not to be underrated either is the risk that older attitudes might persist and give us the worst of both worlds; we might end up trying to treat but managing only to punish—with a system of double-think, of double-talk, of “trick *and* treat”.

More important still would be the loss of liberty involved. The older approach gives us a choice: break the law and pay the price, or keep the law and have the law keep clear of us. And it is the doctrine of *mens rea* that gives this choice. For what that doctrine says is that we don't qualify as law-breakers without some intention, knowledge, recklessness or negligence: provided we don't knowingly do the act the law forbids, the law will stay away from us. This means we can predict the interventions of the law in our affairs and can plan them so as to avoid those interventions. After all, knowingly doing what the law forbids is something we do have a choice about and can avoid.

Without a doctrine of *mens rea*, however, the law could intervene whenever we did the act proscribed, whether we did it knowingly or unawares. Yet doing something unawares is not something we can choose to do; it is simply something that occurs—perhaps through mistake. Mistakes, though, aren't things we choose to make but things that happen to us. Dropping the requirements of *mens rea*, then, would widen the ambit of the criminal law, extend the scope of its interventions, and restrict the citizen's liberty. No longer could he predict that if he orders his affairs in a certain way the law will leave him alone; no longer could he so order them as to ensure he is left alone; no longer could he be so free.

But would this loss of freedom buy increased protection against harm? Perhaps. Surely, though, protection from harm is not an end in itself but simply a means to an end; it's a means to the end of establishing a framework in which the individual can be free to live and fulfil himself in his own fashion, provided he doesn't infringe the equal rights of other individuals to do the same. To establish such a framework at the expense of that very freedom the framework is designed to promote is pointless.

Still more objectionable is the underlying attitude of the new approach—its attitude towards persons and the way to treat them. How

different from that of the older theological approach! That approach at least pays the accused the compliment of regarding him as a person with a person's rights and duties, responsibilities and obligations. And it pays him the compliment of trying to get him to mend his ways and live up to his obligations by reasoning, persuasion and even threats, but never pure compulsion. Its method is to announce by law what is forbidden, to lay down penalties for doing it and to give each man his choice. Then if anyone deliberately breaks the law, his trial and punishment stress that the law means business.

Contrast the new scientific approach. This would treat the offender not as someone responsible for his actions and someone to be reasoned with, but rather as a wrongdoer needing to be turned somehow into a rightdoer—a computer needing a different program. Yet in the context of the criminal law would this be any more tolerable or appropriate than it would be in religious contexts to effect conversions by hypnosis, drugs, injections, surgery or some mechanical means? This way of changing people's behaviour is a way that would involve treating people as less than persons—a price society is loath to pay.

Not that we rule out a limited pursuit of the simple aim of harm prevention. We don't rule out confinement of those no longer amenable to reason and argument—the mentally disordered, for whom punishment is beside the point. Nor do we exclude the use of *in rem* proceedings in the regulatory sector of the criminal law. For here the noxious object, e.g. the contaminated food, is equally dangerous to health whether the vendor is to blame or not. Here measures to suppress the harm, e.g. by seizing the product itself, can't be complained of as unjust: the vendor can't in justice demand that his contaminated food be left on the shelves to poison potential customers just because it's not his fault that the goods are unsafe for consumption! On the contrary, to the extent that we feel it is unfair—in the way that life itself is unfair, when A's food becomes unfit but not B's, when A's livestock catch foot and mouth disease but not B's—to this extent we could devise ways of shifting the cost or burden of the loss from A to the rest of society, e.g. by insurance, by schemes of public compensation and so forth.

This, however, doesn't justify the suggestion that we drop *mens rea* altogether and adopt a "social hygiene" approach. That approach, as we have said, we do rule out. The effort involved in its adoption, the loss of liberty entailed and the inhuman attitude it rests upon combine to make the costs outweigh the benefits. We therefore recommend

- (3) **that the law of real crimes continue to be based on and require *mens rea*.**

VI

Strict Liability, Deterrence and the Regulatory Offence

But what about the minor criminal law—the law of the regulatory offence? Should these offences require *mens rea* too? For while most people, we imagine, would agree that the law should be clarified and that real crimes should require *mens rea*, fewer might agree that it should be required in regulatory offences too, where mere deterrence and simple law enforcement are the aim. This, then, is the heart of the problem about strict liability: how far is strict liability in this context objectionable on grounds of inhumanity or loss of freedom or injustice?

(a) Regulatory Offences, Strict Liability and Inhumanity

Does strict liability in regulatory offences involve treating persons as things? In one sense, no: that is to say, not in the way that wholesale abandonment of *mens rea* in real crimes would do. For that, we say, would entail denying personal responsibility altogether. With strict liability in regulatory offences, though, personal responsibility is not wholly denied. Indeed, so long as *mens rea* remains the underlying doctrine of the criminal law, far from denying the offender's responsibility, it pays him too great a compliment: it not only treats him as a responsible person, it holds him responsible when he really isn't—in fact it treats him as *more* responsible than he really is.

Besides, since punishment is almost invariably a fine—the very paradigm of deterrence and of making crime “an ill bargain” to the offender—the law pays him the further compliment of regarding him as a deterrable, and so responsible, person; it looks on him not as an object to be cured but as a person to be deterred. The argument from “inhumanity”, then, so crucial in the major criminal law, has here no force.

(b) Regulatory Offences, Strict Liability and Liberty

But what about objections on the ground of liberty? Can these be raised? They can, of course, because a law that imposes penalties but dispenses with *mens rea* makes individuals act at their peril. Sell food, for example, and you risk paying a penalty for its adulteration

even in the case where you couldn't reasonably have known the food had anything wrong with it. This, as we saw above, is simply to reduce the extent to which individuals can predict and avoid the intervention of the criminal law.

All the same, objections on the ground of liberty have less force here than in the context of real crimes. For one thing, offences in the regulatory sector are mostly less serious than real crimes. For another, the penalties are lighter: imprisonment is rare in practice and small fines are the general rule. In consequence, though strict liability in the regulatory sector does lessen liberty and make individuals act at their peril, the peril is not so very great; and though individuals are less able to predict and control the interventions of the law, those interventions aren't so oppressive as are prosecutions and punishment for real crimes.

So while strict liability involves a loss of liberty, the gain in terms of prevention of harm, promotion of high standards of care and protection of the public welfare may well outweigh this loss.

(c) Regulatory Offences, Strict Liability and Justice

But what about the loss in terms of justice? Is strict liability in regulatory offences irrational or unjust? Irrational it is sometimes claim to be, in that it involves trying to deter what cannot always be deterred. Reasonably unavoidable ignorance and mistake, which is all the faultless offender is "guilty" of, *ex hypothesi* can't be avoided or deterred.

The argument, though, is unconvincing. Deterrence looks beyond the offender in court; it looks to all the potential offenders outside; and while no one can be deterred from making unavoidable mistakes a penalty imposed on those who make them can strengthen the whole system of deterrence, close possible loopholes through which defendants might escape, and encourage everyone to take the utmost care. If even blameless offenders don't get off, all the more reason for everyone else to take more care. Strict liability can serve a utilitarian purpose: it's not at all irrational.

But is it unjust? In one sense maybe not; at least not in the way it would be unjust in real crimes where bringing wrongdoers to justice is the aim. For there strict liability would expose a man to condemnation, stigma, shame and punishment which, by reason of his lack of fault, are not his due. In regulatory offences, however, condemnation, stigma, shame and punishment (in the full sense of a penalty deserved by the accused) are out of court. The penalty is not so much a punishment as a disincentive, so we can't object that defendants are re-

ceiving blame or punishment beyond their due. In theory then, no question should arise of imposing unfair or unjust burdens.

Unfortunately, it does in practice. Law, like life, is rarely so clear-cut as theorists like to think. For one thing, conviction for regulatory offences may carry a stigma. For another, penalties may be looked upon as more than simple disincentives; they may be thought of as deserved. What is more, the possible penalty allowed by law is frequently imprisonment. According to our estimates it is a legal possibility in over 70% of strict liability offences. So, not surprisingly, the social consequences of conviction and punishment for such offences can be quite severe, including loss of job and loss of reputation. Injustice, then, kept out in theory, can in reality creep back in.

But it was always there. For even without imprisonment the penalties for regulatory offences can be harsh enough. Loss of licence, with resulting loss of livelihood, can sometimes be far more severe than imprisonment itself. So, for example, a man convicted without fault of a strict liability driving offence can lose his licence and his job. And what is this, if not unjust?

Quite apart from this, strict liability in the law of regulatory offences is unjust in the second sense considered earlier. For, even with the aim of mere deterrence, it still offends against the principle that like persons should be treated alike and different ones differently. To treat alike one who is at fault and one who is not at fault is to disregard an important distinction: the two are not in the same category, nor should the law act as if they were. In doing so, it is unjust.

Not all that unjust, though, it is sometimes said. Justice is relative, and the slighter the penalties, the less the injustice of strict liability: convicting a man who is not to blame of illegal parking is far less unjust than convicting a man who is not to blame of murder. But does this mean the first conviction is not unjust at all? Or does it mean we need make no inquiry at all into the question whether the illegal parker was to blame? Appropriate as dime-store justice may be for minor offences, still dime-store justice isn't the same thing as no justice at all. Besides, we should remember it is the justice most people come in contact with—it is where the criminal process is most visible. Dime-store justice rules out "state" trials about fault and *mens rea* in such trivial cases; it doesn't rule out any trial whatsoever. But strict liability does; and this is why, for all the talk about the relativity of justice, strict liability results in no justice at all.

But surely, some will say, strict liability produces a rough-and-ready justice. After all, there is a great deal of hit-and-miss and a great deal of luck in the criminal law, and the few times you are

convicted but not at fault make up for the many times you are at fault but not found out. This too, though, is unconvincing. To say one injustice cancels out another looks suspiciously like saying two wrongs make a right. Besides, can we be sure the person convicted without fault isn't making up, not for all the times when *he* is at fault but undetected, but for all the times when *others* are? Justice as rough and ready as this is not justice at all—it is far too random and too arbitrary.

But randomness, it is argued, is the very justification for strict liability in regulatory offences. Businessmen, motorists, traders and so on must take safety precautions, and law enforcers must make sure they take them. So fines imposed on those convicted of regulatory offences are part of the cost of regulating the activity—a cost which is randomly imposed. But this won't wash. For one thing it isn't really randomly imposed: if randomness is what we really want, statisticians could produce a better random sample than does the mere hit and miss of the law enforcer. For another, if the cost is generated by all, justice demands that the cost be shared by all. Random imposition of the cost is only justifiable if there is no other way of apportioning it, and if the total population from which the sample of cost-bearers is taken agrees with the method of selection. Since neither condition is fulfilled, the argument based on randomness won't do. Random punishment can't be really just.

But punishment, it may be said, isn't what the law of regulatory offences is after. The penalty for committing such an offence is not really a punishment at all, it's part of an educative process. It's like the slap a parent gives a toddler to teach him not to play with fire. The parent doesn't stop to find out if the child is in the wrong or not, he simply acts immediately to teach a necessary lesson. Likewise, the purpose of the law of regulatory offences is to educate—to inculcate a respect for care and safety. This is what penalizing those who are not at fault can help to do. Seen in this light, then, is strict liability really so unjust?

Yes, surely, if there is a better and a juster way to teach. Slapping a toddler is justified if that is the only or best way to teach him not to play with fire. But there are different ways of teaching; and the older and more sensible the pupil, the less appropriate the slap on the wrist. Bentham once complained that the way our judges used to make the law by creating new rules when cases came before them was like the way a man might teach his dog—waiting till the dog did something the man didn't want and then hitting him. Rational adults, he contended—and he was surely right—deserved better: they could, and should, be told the rules beforehand and only punished for breaking them after-

wards when they know the rules and have a chance of keeping them. This chance of keeping them, however, is just what strict liability excludes, for it results in penalizing those who may have had no opportunity to conform their actions to the requirements of the law. Yet is there no better alternative method of instruction? Since this is never proved, the argument from education hardly holds.

Even so, it may be said, laws creating regulatory offences serve to promote high standards of care and to encourage traders and others to avoid mistakes and errors. And this is necessary because mistakes and errors, however innocent, can cause harm to others. For such harm, surely, the person who ought to be held responsible is the person who has caused it, the person who has made the mistake. So how can strict liability be all that unjust?

Look, for example, at the civil law. Our law of tort, which deals with compensation for injuries, has long accepted strict liability and no one seems to regard it as unjust. For instance, a person who keeps a wild and dangerous animal is liable if it escapes and causes injury, even though it was not his fault that it escaped. In such a case the law quite reasonably takes the view that where one of two innocent people has to suffer, the one to suffer is the one who, however innocently, caused the harm. He after all is the one who had the choice: he need not have brought the dangerous object on his land and exposed others to the risk—no one has to keep a dangerous animal. So strict liability can be just.

But this is quite different from the criminal law. For civil law is concerned to shift the loss, in money terms at least, from the innocent victim on to the man who brought about the dangerous situation—from the plaintiff to the defendant. The latter can of course insure against the loss, make it a cost of the enterprise and pass it on to his customers—the public. So ultimately the loss, instead of being borne wholly by one unfortunate victim, is spread among us all.

The criminal law, by contrast, is concerned not with shifting the loss, but with punishing and deterring. The fine doesn't go to compensate victims or potential victims: it's imposed in order to deter. Besides, insofar as the fine is treated as a cost of the business and passed on to the public, this could mean the public foots the bill for a fine to be paid to the public—to say the least, an odd result! So strict liability in criminal law can't be justified on the same grounds as it can in civil law.

In fact, what strict liability in criminal law provides is that anyone entering on an activity likely to result in harm to others will pursue that activity at his peril. Again, this makes good sense in civil law.

Keep a zoo, manufacture fireworks and so forth and you know that people may get injured as a result. Therefore, it is only right that you should have to compensate them if they do: this is a fair risk of the trade.

Does this same principle make sense in criminal law? To do so it would have to ensure that we stand to gain thereby. One gain could be to ensure that those who cause harm to others, even innocently, should compensate those others—but this is taken care of by the civil law. Another gain would be to discourage the activity in question without going so far as to prohibit it. We see this elsewhere in the law—for example in the law relating to intoxication; the law doesn't prohibit drinking alcohol altogether—we have learned something from the history of the *Volstead Act*—but by refusing almost entirely to countenance drunkenness as a defence to a criminal charge it shows that he who drinks, drinks at his peril. But some activities aren't like this: take selling and distributing food—an activity absolutely essential to society. If strict liability forces us to pursue essential or socially useful activities at our peril, it in fact discourages them. Far from being useful, it has indeed a negative value.

For all these reasons, therefore, we conclude that strict liability in the law of regulatory offences is unjust. We, therefore, recommend

- (4) **that regulatory offences should require some kind of fault, that guilt for such offences should depend on personal responsibility and that strict liability here should have no place in principle.**

VII

Strict Liability in Practice and the Regulatory Offence

But this of course is only principle. What about strict liability in practice? Can strict liability in fact be dropped?

(a) *Unjust in Practice?*

Does it need to be dropped? For however much in principle it is unjust to punish people who are not to blame, in practice does this ever really happen? As pointed out above, the evidence suggests quite otherwise: the evidence suggests that in the areas we investigated regulatory law is so administered that by and large the only people prosecuted are those who are at fault. Reasonable mistake, in practice, may well be a defence; for an offender who has simply made a reasonable mistake, it seems, escapes being charged.

But this is only natural. What law enforcer ever has enough resources to prosecute each and every offence he gets to know about? Inevitably he has to use discretion—he must select. And understandably enough the offences he selects and prosecutes are those he thinks most serious. One thing making an offence a serious one is the fact that the offender was at fault. So lack of fault may well mean lack of prosecution.

If this is so, then where is the injustice? It exists surely only in form and not in substance. So why not leave the law of strict liability exactly as it is? Why worry about injustice that may be only theoretical?

One answer is the one we gave above. Gaps between law in the books and law in practice are undesirable. If law says guilt does not depend on fault and practice says it does, we have at best confusion and at worst hypocrisy. Far better surely that the law should do what it says and say what it does. Myth and reality must not draw too far apart.

Another answer, though, and one with more force is this: in practice lack of fault due to reasonable mistake is only a defence if the law enforcer actually believes the offender made a reasonable mis-

take. So lack of fault does not mean lack of prosecution. Only belief in lack of fault could mean this. Meanwhile, how many convictions may there be as unjust in practice as in principle because of administrative refusal to accept the offenders' honest pleas of reasonable mistake?

Yet couldn't these offenders claim the right to say, "Let's see if our plea is accepted by a court"? For otherwise the prosecutor, not the court, becomes in this respect the judge of guilt. The prosecutor then becomes in this respect a judge in his own cause. Yet this is just what common law condemns; for principles of "natural justice" long ago worked out by common law lay down precisely that no one should be judge in his own cause.

In practice, then, as well as principle our regulatory law may be unjust. It also may be dangerous. For making the prosecutor judge in his own cause puts the citizen at his mercy; it puts him entirely in the hands of the law enforcer, of the administrator. In consequence we have a government of men and not of laws. Administrative discretion by itself, however fairly exercised, is no substitute for what we need—that mixture of law and discretion we know as justice.

Practice, then, fails to alleviate the injustice of strict liability in regulatory offences. Instead it generates other hazards—the possibility of petty tyranny and administrative oppression. So strict liability, we conclude, remains unjust and must be dropped if possible.

(b) *Justifiable in Practice?*

But is it possible? If so, is it even desirable? To say that strict liability is unjust is not to say it is unjustifiable; to say it is objectionable is not to say it has necessarily to be removed. For after all is justice all that is at stake, or do efficiency and expedition matter too?

This is a debate where both sides have some merit. On one side strict liability is said to be unjust and we have seen the truth in this. On the other side it is said to be not really so unjust because we can't afford in trials for regulatory offences the luxuries we allow the accused in trials for real crimes. The trouble is, both sides are right.

For one thing, justice isn't the sole consideration. In criminal law, justice is never sought to the complete exclusion of efficiency. Conversely, efficiency never absolutely precludes considerations of what is fair and just. In fact, from the most serious real crimes down to the most minor offences, fairness and efficiency are weighed against each other and different balances are struck. In serious crimes like murder, rape and theft, fairness far outweighs efficiency: here our paramount concern is to avoid convicting the accused unjustly—a concern reflected

in the placing of the burden of proof squarely on the prosecution, and the requirement of *mens rea* conviction. In minor offences like illegal parking efficiency outweighs fairness: our main concern is to get courts through their workload with dispatch—a concern reflected in the use of streamlined procedure, the placing of the burden of proof quite often on the defence, and the lack of any requirement of personal responsibility for conviction.

But this is not to say that in trials for real crimes efficiency has no role, or that in trials for regulatory offences fairness is out of court. On the contrary, each plays a role in limiting the other.

In serious crimes the needs of efficiency limit the lengths we can go to in fairness to the accused. Juries, for instance, consist of twelve jurymen—in certain provinces, of six. Yet why not more? Surely, the larger the jury, the less the chance of convicting an innocent defendant? True perhaps, but then what about the increased delay, the extra cost of trials, the greater burden jury-service would impose on the citizen?

By contrast, in our regulatory law efficiency is in the driver's seat with justice at the brakes—procedure is far more summary than it is for real crimes. It's not completely arbitrary, though: at least commission of the wrongful act—the *actus reus*—must be proved; and liability, though strict, is less than absolute, since defences other than mistake of fact still probably obtain.

So throughout the criminal law there is a trade-off between efficiency and justice. In any case, justice is not simply justice to the accused; there are in fact two sides in every trial and justice says that the rights of the accused must be balanced against those of the community. Justice to the accused demands care not to convict the innocent, justice to the community demands also care not to let the guilty go scot-free.

(c) *Essential in Practice?*

So this is why, the law-enforcer says, strict liability in regulatory offences has to stay: without it he could not enforce the laws. For in such cases only the defendant ever knows what really happened, only he is aware of what went on at the defendant's place of business. Insist that prosecutors prove *mens rea* or some lesser kind of fault and we would never get convictions: the guilty would escape.

Yet, is there any evidence for this? Is there any evidence that if prosecutors had to prove some kind of guilt, or at least if absence of fault could count as a defence, that law enforcement would become impossible? Administrators in departments clearly think so, but positive proof of it is never given. On the contrary, some counter-evidence

exists: increasingly, since 1968 federal statutes in the regulatory sector have tended to include defences of due diligence and reasonable care, without producing any great anxiety among the law-enforcers. Yet no one has been heard to claim that these new statutes are unenforceable. Strict liability in regulatory offences, in short, has not been proved to be essential.

(d) *Justice v. Expediency*

If not essential, though, doesn't it still have value? It shortens trials, and makes enforcement easier. What is more, it lets the question of fault be dealt with more informally, either by the law enforcer when deciding whether to prosecute or by the court when deciding what sentence to impose.

Against these gains, however, we must weight the cost. First is the cost of the injustice involved in convicting those who are not at fault. In addition there may be other undesirable consequences. One is that criminal liability without fault could well dilute the criminal law and lead to cynical disrespect for criminal law as a whole. Hold a person guilty of a regulatory offence when he is not at fault and we may make him feel that being convicted of a real crime when he is at fault has little moral significance.

Another undesirable consequence which strict liability may have is that of making life too easy, not only for the law enforcer, but for the offender too. The law enforcer gets a conviction without really having to inquire whether the defendant's business practices fell below acceptable standards of care and honesty. The offender pleads guilty, saves face on the ground that he wasn't really at fault, and yet avoids having the spotlight of the court investigation focused on his practices. For all that the conviction rate looks good, how far are care and safety being in fact promoted?

By contrast, a system of prosecuting regulatory offences without relying on strict liability would force the attention of the court on the very matter with which the law is concerned—the extent to which the defendant's practice fell below required standards. Instead of allowing this to be swept under the rug, a system without strict liability would allow the trial to bring it out where it belongs—into the open. For after all, standards of care are public property; a matter of public concern—not least because improved technology and the wisdom of hindsight constantly serve to raise them. As such, they need to be probed, assessed and explored, not in the backrooms of the administrators, but in open court. This is precisely what strict liability prevents.

VIII

Alternatives to Strict Liability in Regulatory Offences

What alternatives are there to the present law? How can we avoid buying efficiency at the cost of injustice?

(a) Violations

One way is by keeping the efficiency and “abolishing” the injustice—by re-classifying regulatory offences as mere “violations”. This has indeed some value: it manifests that here there is no question of blame, of stigma or of trying to bring wrongdoers to justice. Otherwise, however, it serves little purpose. For the injustice of penalizing those who are not at fault is not reduced by calling the offences violations: injustice by any other name will smell as bad. In truth, this solution—which is that of the American Model Penal Code—is not entirely satisfactory: the new bottles still contain the same old wine.

(b) An Administrative Solution

Then why not deal with these offences by an administrative process? Yet isn't this suggestion also too simplistic? For the outcome of an administrative inquiry would still presumably involve some hardship to the “offender”—closure or suspension of his business, revocation of his licence, or else some pecuniary levy. In short, the outcome would be a kind of penalty. Transferring regulatory offences, then, from criminal to administrative law by no means solves the problem of avoiding the injustice of penalizing those who are not at fault. It simply displaces it.

Not that we think the administrative solution has no merit. Indeed we think it has, and for that reason we have urged that law enforcers should pay more attention to *in rem* proceedings. But even in these proceedings justice still demands that he who stands to lose as a result should be able to contest the facts alleged as justifying an administrative order. Meanwhile, suppose that the order is meant, not just as a means of suppressing harm, but as a means of discouraging disobedience to the law. In that case, we would emphasize, if liability is strict, it is objectionable: it still involves penalizing those who are not at fault and not to blame.

(c) *Mens Rea*

An even less appealing alternative would be to import into the law of regulatory offences the full traditional doctrine of *mens rea*—to say that no one shall be guilty of a regulatory offence unless the prosecution proves intent or recklessness. There the traditional objections of the law enforcer have much force. How could the law enforcer ever prove *mens rea*? How, for example, could he ever prove that an advertiser deliberately meant to deceive the public? How could he prove that a merchant deliberately or recklessly sold food unfit for consumption? How could he prove it wasn't just a mistake? Import the full requirement of *mens rea* and it's difficult to see how law enforcers could ever enforce the law.

But worse than this: import a full requirement of *mens rea* and we entirely alter the nature of the regulatory offence. For, as we pointed out above, regulatory offences are those which, typically, are committed as much through carelessness as by design. Put it another way, the objective of the law of regulatory offences isn't to prohibit isolated acts of wickedness like murder, rape and robbery: it is to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, higher standards of respect for the need to preserve our environment and husband its resources. In other words, the regulatory offence is basically and typically an offence of negligence.

(d) *The Nature of the Regulatory Offence*

In essence, then, the "mischief" regulatory laws aim to prevent is not the sporadic commission of isolated acts. It is their negligent repetition. For example, the problem about selling short-weight is not that of the honest merchant who by accident or mistake makes one isolated short weight sale. It is that of the merchant whose repeated short weight sales show either an intention to defraud his customers or a lack of reasonable care to see his customers get full value for their money. And law enforcement practice in this area of our law clearly recognizes the distinction. For that practice, as our researches in this area showed, incorporates a warning system, which works as follows: if inspection reveals a short weight sale, the administrator doesn't prosecute but issues a warning and makes a later check, but if that later check reveals further short weight sales, the administrator then concludes that the trader still hasn't mended his ways and starts a prosecution. These law enforcers, as it was explained to us, are interested not so much in isolated acts as in what they term "the bad actors" whose continued conduct shows a failure to maintain the standard which the law requires.

Not every regulatory offence, however, is quite so clearly a continuing one. Take misleading advertising, for example. Suppose a large department store advertises furniture and the advertisement is misleading, the store is warned about it, but shortly afterwards it advertises children's clothes and again the advertisement misleads: how far could we really say the first discrepancy shows that the second one is deliberate or negligent? The same is true of motoring and other offences in the provincial sector: the fact that a driver failed to obey a stop sign yesterday doesn't prove that if he does the same again today, his act today is the result of negligence. What this means, then, is that the warning system, which works so well in Weights and Measures and in Food and Drugs, has far less application in some other fields.

(e) *Negligence*

This doesn't mean that the offences in these other fields are not offences of negligence. On the contrary, the advertisers we're concerned about are precisely those who, if not fraudulent, mislead customers through sloppy advertising practices. The motorists we're concerned about are precisely those who, if not deliberate dangerous drivers, drive so carelessly as to be a menace on the road. So our suggestion is a third alternative: **let us recognize the regulatory offence for what it is—an offence of negligence—and frame the law to ensure that guilt depends upon lack of reasonable care.**

After all, there are many ways, quite apart from warning systems, of distinguishing careless conduct from unavoidable accidents and reasonable mistakes. We do so frequently outside the criminal law. We do so in our ordinary life; we also do so in the civil courts whenever we determine whether or not a defendant is liable for negligence. Why can't we do it in the criminal law, and in the law of regulatory offences?

One reason, often suggested, has to do with burden of proof. It would be far too onerous, it is said, to make the prosecutor prove the defendant's negligence beyond a reasonable doubt. But this is a burden of proof appropriate to real crimes. Regulatory offences are different. These are offences which the law creates in order to promote standards of care—standards liable to rise as knowledge, skill, experience and technology advance. Such standards need to be explored, examined and assessed in open court. For this, we have to know exactly what the defendant did and how and why he did it. We argue therefore that in regulatory law, to make defendant disprove negligence—in other words, prove due diligence—would be both justifiable and desirable. Justifiable, since penalties are lighter and stigma less. Desirable, since it best achieves the aims of regulatory law.

Another reason which we have heard suggested is that even with this—putting the burden of exculpation on the defence—a “due diligence” defence still makes it too easy for some defendants. Where large corporations are on trial, it could be all too easy to confuse the court with detail, and even in some cases, through abuse of economic power, to bring pressure on their suppliers to help them rig defences. To this we would make three replies. First, we stress again that in this Working Paper we are concerned with personal fault and not with corporations. Second, we would point out that there is a need to explore the possibility of extending the use of “third-party” provisions for cases where the defendant says he is not at fault because someone else, e.g. his supplier, was to blame. In such cases we could have the sort of provision to be found in s.17 of the *Proprietary or Patent Medicine Act* R.S.C. 1970, P-25 or s. 29 of the *Food and Drugs Act*, R.S.C. 1970, F-27. This provides that where such a defence is raised, the name and identity of the third party alleged to be at fault must be given to the prosecution ten days before the trial; and this allows the law enforcer to proceed against the party claimed to be at fault.

A third thing we would stress is that there still remains the need of harm prevention. The law must still provide the law enforcer with remedies to suppress potential dangers. In fact we would advise the law enforcers in these different fields of regulatory law that when they are reviewing their regulations they should try to make generous provision for *in rem* proceedings to supplement the ordinary criminal proceedings.

In essence, then, our proposed solution is to abolish strict liability in regulatory offences by incorporating a due diligence defence. This, in law, turns the offences into what they are in fact: offences of negligence.

Not that there is anything novel about this solution. It is the approach advocated by almost all writers on the subject.* It is an approach, as we have seen, increasingly adopted in our statutes. And it is an approach that seems to work. So, we feel justified in concluding that by basing liability on negligence we lose little in terms of efficiency of law enforcement. On the other hand we gain a lot in terms of justice.

But do we? Is negligence any less unjust? And should it have a place in criminal law? Throughout the years, of course, a great doctrinal dispute has raged between those who argue that the traditional

*Including the English Law Commission, whose approach, however, is very different from ours.

concept of *mens rea* doesn't cover negligence and those who argue that it does. This dispute we do not touch upon. Our question rather is whether negligence *should be* a ground for criminal liability.

The problem is this. Traditionally criminal liability is based on fault—wrongful intention or recklessness. And this, we feel, is right: this is how we want our criminal law to be; for criminal law is a sort of applied morality, so criminal guilt and moral guilt must not diverge. But isn't carelessness a kind of fault? Not altogether, in our law. For our civil law defines carelessness, or negligence, as failing to take that care which a reasonable man would take. But what if the defendant in a negligence action was too stupid or clumsy to be able to reach the standard of the reasonable man? This is no defence in a civil suit for negligence.

But should it be in criminal law? The difficulty is this. On the one hand it is unfair to punish anyone for things that aren't his fault. Accordingly, the man who falls below the standard of the reasonable man because he can't help doing so should not be convicted. On the other hand to exonerate people who fall below the standard of reasonable care by reasons of their own clumsiness, stupidity or ignorance (albeit unavoidable) may put an undesirable premium on such defects.

How far a criminal law of negligence should take the defendant's "personal equation" into account is a question to be discussed outside this Working Paper. At this time we leave the question open. For if we adopt the defence of due diligence, as we recommend, we could then consider later how far due diligence is to be assessed in terms of an external standard and how far in terms of the defendant's internal response to that standard. Meanwhile this problem we would leave to the courts.

Accordingly, we recommend,

- (5) **negligence should be the minimum standard of liability in regulatory offences; therefore an accused should never be convicted of a regulatory offence if he establishes that he acted with due diligence, that is that he was not negligent.**

IX

The Criminal Law We Ought To Have

So we conclude that in the regulatory law strict liability be replaced by negligence and that the law as a minimum allow a defence of due diligence with a reverse onus of proof. This, in our view, is a useful halfway house between full *mens rea* and strict liability, a compromise that allows us to meet the needs both of justice and of efficiency. On the one hand, no one would be penalized except for being at fault; on the other hand, there is no concrete evidence that efficiency of law enforcement would be reduced. Admittedly more time in court would be devoted to inquiring whether the defendant took due care, but as it is, considerable time is taken inquiring into fault before sentence is passed. So we conclude the extra time involved would not be all that great.

We see our recommendation as being implemented in the framework of a criminal law divided into two parts. One—the part consisting of all the traditional offences, the real crimes—would be contained in the Criminal Code. Here ignorance of law would be, at least in general, no defence. Here too, in general, the punishment prescribed could justifiably include imprisonment. The other part—consisting of regulatory offences—would be contained in other federal statutes and in federal regulations. Here ignorance of law might be allowed, to some extent at least, as a defence. Here too, imprisonment should generally be excluded as a punishment, though regulatory offences committed deliberately or recklessly could, in appropriate cases, constitute offences under the Criminal Code and merit imprisonment. So too could wilful non-payment of a fine and non-compliance with a court order, even though the fine or order concerned a regulatory offence.

The Criminal Code meanwhile would still include a general part on general principles and defences. In this we would include a section on these lines:

(1) unless Parliament expressly states otherwise, every offence in the Criminal Code requires *mens rea*;

(2) unless Parliament expressly states otherwise, every offence outside the Criminal Code admits of a defence of due diligence; and

(3) Parliament shall not be taken to have stated otherwise unless it has made the offence one of strict liability by declaring that due diligence is no defence.

Such a criminal law, we argue, would achieve the best of both worlds. It would be efficient and also fair. Efficient, we contend, because it would better promote those standards of care and safety which are the real objectives of regulatory law. Fair, too, because it would avoid the injustice of penalizing those known not to be at fault.

This then, we argue, is the shape we ought to give to our criminal law, our most basic and essential law—the law that more than all other law concerns itself with right and wrong. Let it concern itself with what is really wrong, not with some mere pretended or fictitious wrong. Otherwise we could end up with a society of cynics who, seeing individuals penalized when not to blame, just shrug their shoulders and remark: “That’s life!” And yet, why should it be? What need is there for life to be like this? Besides, is that society the sort of society we in Canada want to have?

Accordingly, we recommend,

- (6) **that all serious, obvious and general criminal offences should be contained in the Criminal Code, and should require *mens rea*, and only for these should imprisonment be a possible penalty; and that all offences outside the Criminal Code should as a minimum allow due diligence as a defence and for these in general imprisonment should be excluded.**