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Strict liability in law

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Introduction

One in twenty-five rates pretty high as a chance in a lottery or sweep-stake. But what if the prize is a conviction—a conviction perhaps for an offence committed unintentionally or unawares, an offence of strict liability? This is a prize that each of us apparently has a one in twenty-five chance of winning each year. For each year one Canadian in twenty-five is convicted of just such an offence.

A typical year was 1969. That year, according to our estimate in *The Size of the Problem*¹, there were about 1,400,000 convictions for strict liability offences, and these, on a rough calculation, were accounted for by about 900,000² people. That year, in other words, since the population stood at 21,001,000,³ one in twenty-five of us was convicted of an offence “where it is not necessary for conviction to show that the accused either intentionally did what the law forbids or could have avoided doing it by use of care”.⁴ One in twenty-five then, was found guilty without necessarily having been at fault.

Can this be just? That depends of course on whether he actually was at fault. The mere fact that the law *says* people can be convicted without fault doesn't mean they *are*. Suppose, for example, that the only people prosecuted are those in fact at fault. This, however, is exactly what *Strict Liability in Practice*⁵ suggests. In cases of strict liability, it suggests, there is a high degree of correlation between fault on the defendant's part and the decision to prosecute. In short, only those at fault are prosecuted. So perhaps injustice is not a problem.

All the same, even if that study is correct and even if its findings can be extrapolated across the whole range of offences of strict liability, a problem still remains. For if we are not in fact prosecuting people technically guilty but morally faultless, then we have a divergence between law and practice. Law says one thing and law enforcers another. Law says fault isn't necessary for guilt and law enforcers say it is. So even if the law in prac-

tice isn't as bad as it is on paper, the price we pay is a sort of hypocrisy: the law isn't really what it purports to be.⁶

But what in fact does the law purport to be? This we must know, whether or not a divergence between law and practice exists. For either way we have a problem. Either there is no divergence, faultless people are being prosecuted, and however necessary this might be, it seems unjust. Yet is it? How can we tell until we know exactly what strict liability entails? Or there is a divergence and faultless people are not being prosecuted, contrary to traditional academic belief; and this, however consoling to lovers of justice, drives a wedge between law and practice and makes administrative discretion more important than enacted law. But is this in the public interest? How can we tell until we know precisely what enacted law administrative practice is diverging from? Either way, we need to know what the law is. But this is just what we cannot do.

For unfortunately the law on strict liability is woefully unclear. Not only is there quite possibly a gap between myth and reality, between law and practice—we aren't even sure what the myth is: the vast majority of offences are such that no one can tell, till a court pronounces, whether or not they require intention, knowledge, negligence or some other kind of "mental element" on the part of the defendant. Till a court decides, no one knows if any given offence is one of strict liability, nor, if it is, precisely what this means. We have no way of knowing either when liability is strict or how strict liability is, despite the fact that on the face of it the law is reasonably clear and simple.

Put simply the law is this. Every criminal offence requires *mens rea* but Parliament, being supreme, can dispense with the requirement as it thinks fit. In principle then, every crime has a "mental element" in the shape of intention, recklessness, knowledge, negligence—what we might loosely term some kind of fault on the offender's part. This, however, is a common law principle developed by the courts, and like other such principles can be overridden by the sovereign legislator. Parliament, or some other legislator making regulations under parliamentary authority, can expressly or impliedly dispense with the requirement of *mens rea* and create offences of strict liability. The only problem is to know when it does so and, if it does so, exactly what this means.

But if this is the only problem, it is an insoluble one. For Parliament and other legislators rarely tell us explicitly that an offence is one of strict liability. "The fact is", said Lord Devlin, "that Parliament has no intention whatever of troubling itself about *mens rea*. If it had, the thing could have been settled long ago. All that Parliament would have to do would be to use express words that left no room for implication. One is driven to the conclusion that the reason why Parliament has never done that is that it prefers to leave the point to the judges and does not want to legislate about it."⁷

So the question when an offence is one of strict liability is left to the judges. The presence or absence of *mens rea* is implied. That is to say, it is inferred—by the courts. It is inferred from the words of the statute or regulation, from the subject matter of the offence, the penalty provided and the stigma involved. Unfortunately inferences do not always coincide.

Nor do judicial views coincide on what strict liability signifies. “We do not know how strict ‘strict’ liability really is, or how absolute ‘absolute’ prohibition really is, till we see what the courts do with these ideas in practice.”⁸ But what courts do in practice varies. It differs from court to court.

What is Strict Liability?

Usually, in order to convict a person, it is necessary to prove both *actus reus*, i.e. the outward circumstances of an offence, and *mens rea*, i.e. some mental element on the part of the offender. There is, however, a vast number of what are called “regulatory”⁹ offences, i.e. offences created not so much to prohibit immoral and wrongful conduct as to protect public health, safety and so on. Examples are possessing liquor in certain circumstances,¹⁰ selling adulterated food,¹¹ having in use a faulty scale or balance,¹² or being in possession of undersized lobsters.¹³ To secure a conviction for one of these regulatory offences there is often no need to prove *mens rea*: an accused may be convicted on proof of *actus reus* alone. For these are offences of strict liability.

Generally, strict liability means this: it means that it is no defence to say “I didn’t mean to break the law”, or “I didn’t know the facts were such as to make my conduct illegal”. “Strict” liability means liability without fault.

But it doesn’t mean that the accused is stripped of *all* defences. Strict liability is never absolute.¹⁴ There must, for example, be proof of *actus reus*. There must be proof of an act, omission, or condition on the part of the offender which is not due to circumstances entirely beyond his control.¹⁵ The fact that the offender’s conduct is involuntary negatives all liability, with one exception.

The exception is found in the well known English case of *Larsonneur*.¹⁶ In that case the defendant, a Frenchwoman, was convicted under the Aliens Order 1920 in that she, being an alien to whom leave to land in the United Kingdom had been refused, had been found in the United Kingdom. The curious feature of the case, however, is that the defendant, after it had been made clear to her that she had no right to remain in the United Kingdom, had left for Eire, from which she was subsequently deported and brought under police custody to Holyhead in Wales. She was “found” in fact in a police station! There was nothing voluntary about her being or being found in the

United Kingdom with or without leave to land: she had no choice whatever in the matter.

This, said the Court of Criminal Appeal, was immaterial. Being in the United Kingdom in these circumstances was the *actus reus* of the offence. Here is the highwater mark of strict liability. Here is where "strict" becomes "absolute" and all defences are ruled out.

But are they? "It is a matter of speculation whether she might not equally have been held guilty if she had been insane, or if she had mistakenly believed that she was not an alien, or even if she had been parachuted from an aeroplane against her will. Such cases are most exceptional, because very few crimes are defined in the same way as that with which Madame Larsonneur was charged."¹⁷ As it stands, *Larsonneur* may be authority for the proposition that compulsion is no defence.¹⁸

We must distinguish, though, between lawful and unlawful compulsion. In the Australian case of *O'Sullivan v. Fisher*¹⁹, the offence was the strict liability one of being drunk in a public place. The defendant, who was clearly intoxicated, was first seen by the police in a private house. After some conversation with them, he accompanied them into the street, whereupon he was charged with being drunk in a public place. The charge was dismissed at first instance but the Court of Appeal sent the case back for a rehearing. In his judgement Reed J. observed that "if the respondent in the present case proved that he was compelled by physical force, used by a person or persons having no lawful right or authority to remove him from the premises, to go out into the street, he has established an answer to the charge."²⁰ Illegal compulsion would be a defence: lawful compulsion would not.²¹

But what about natural compulsion? Suppose Larsonneur was returned to England not by police with lawful authority to take her there but simply by a storm at sea driving her ship on to the English shore; would she still be liable?

These are unsettled questions, for they have rarely arisen in the courts. It is always open to a court to hold that strict liability excludes any defence, but in principle defences like compulsion should avail. Basic common law principle lays down that voluntariness is necessary for guilt.

But what of defences which claim not that the prohibited act was involuntary, but that it was justified? For example, is self-defence allowed? There is little case law, and what there is is contradictory and unhelpful. Typical are two decisions of the New Brunswick Supreme Court—*R. v. Breau*²² and *R. v. Vickers*.²³ In both, self-defence was pleaded in answer to a charge of strict liability. In *Breau* it was successful, in *Vickers* it was not. But self-defence was not appropriate here. Self-defence, in law, is resistance to an "illegal" attack. In these cases, though, the attacker was a moose. And how can animals attack "illegally"? The proper plea, of course, would be necessity.

But necessity has fared no better in the courts than self-defence. In *R. v. Kennedy*,²⁴ for example, it was stated *obiter* that necessity might be available to a defendant in certain circumstances, even though the offence is one of strict liability. In *R. v. Paul*,²⁵ however, where the charge was speeding, it was held that necessity could only succeed in “the most exceptional circumstances”. What these are, though, we were not told.

If it is hard to say which defences are excluded by strict liability, it is easier to say which ones are not. Insanity is not. Section 16 of the Criminal Code lays down explicitly that persons who commit crimes due to insanity are exempt from *any* form of criminal responsibility.²⁶

The same holds for infancy. Section 12 specifies that a child under seven cannot be found guilty of a criminal offence.²⁷ What is more, section 13 provides that in the case of a child between the ages of seven and fourteen, in order to convict it is necessary to show that “he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.”²⁸ In other words, even in the case of a strict liability offence, it would be necessary to show the guilty intent of such a child before you could convict. So infancy is a defence to strict liability offences as it is to all other crimes.

But if infancy and insanity are clearly not excluded and if it is not certain how far compulsion, self-defence or necessity are altogether excluded, what defences does strict liability rule out? The stock answer is: mistake of fact. If the accused was labouring under a mistake of fact, he did not act intentionally or knowingly—he did not have *mens rea*. But this is just what strict liability will not consider.

Here too, the law is less than clear. In any given offence we do not know if strict liability rules out mistake of fact as to all elements of the offence or only some. Worse still, we do not know if strict liability excludes mistake of fact entirely.

To take the first point, most of the cases concerning strict liability offences have only established that mistake as to one or more particular elements is excluded. For example, in the English case of *R. v. Woodrow*,²⁹ said to be the first to impose strict liability, the defendant was convicted of possessing adulterated tobacco although he did not know it was adulterated. Would he have been guilty, though, if he hadn't even known that what he possessed was tobacco? Suppose he had thought it was soap?³⁰

Or again, take the English case of *R. v. Prince*.³¹ Prince was charged with taking an unmarried girl under the age of sixteen out of the possession of her parents without lawful authority or excuse. The fact that he was honestly mistaken as to her age and believed her to be eighteen was held to be no defence. There is authority, however, for the proposition that a belief that he had her father's consent or that she was not in the possession of her parents would have been a defence.³² Mistake of fact as to *all* elements of the *actus reus* was not excluded.

But it is even questionable whether mistake of fact is entirely excluded anyway. In *R. v. Custeau*,³⁸ the Ontario Court of Appeal observed:

“In the case of an offence of strict liability (sometimes referred to as absolute liability) it has been held to be a defence if it is found that the defendant honestly believed on reasonable grounds in a state of facts which, if true, would render his act an innocent one.”³⁴

Authority for that statement is to be found in the Australian case of *Maher v. Musson*,³⁵ where it was held that where a person accused of possessing illicit spirits had no knowledge that the spirits were illicit and reasonably believed them to be lawful, there would be no conviction. The earlier case of *R. v. Woodrow*³⁶ was distinguished on the ground that the adulteration of the tobacco could have been ascertained. *Maher v. Musson*³⁷ was the precursor of the well known judgments in the Australian case of *Proudman v. Dayman*,³⁸ which established the defence of reasonable mistake of fact as a valid defence to a strict liability offence in Australia.

In Canada, however, the law is less clear. In the Supreme Court decision in *R. v. Pierce Fisheries*³⁹ which leans heavily on *Proudman v. Dayman*,⁴⁰ the defendants were charged with contravening section 3(1)(b) of the Lobster Fishery Regulations⁴¹ by being in possession of lobsters of a length less than that specified in the Schedule for that district. The evidence did not show that any officer or responsible employee of Pierce Fisheries Ltd. had any knowledge that the undersized lobsters were on their premises. In the majority judgment upholding the conviction on the ground that the offence was not of strict liability and that the defendants' lack of knowledge was therefore no defence, Ritchie J. nevertheless observed:

“As employees of the company working on the premises in the shed where fish is weighed and packed were taking lobsters from boxes preparatory for packing in crates, and as some of the undersized lobsters were found in crates ready for shipment, it would not appear to have been a difficult matter for some officer or responsible employee to acquire knowledge of their presence on the premises.”⁴²

This at least suggests that if it had been a difficult matter, still more if it had been impossible, to acquire such knowledge, there might have been a defence. In other words *reasonable* mistake of fact is not being entirely ruled out: the door is still left open.⁴³

In Canada, then, it is not clear whether mistake of fact is no defence at all to an offence of strict liability, as was the view taken by the English court in the case of *R. v. Woodrow*,⁴⁴ or whether reasonable mistake could be a defence, as was the view of the Australian court in *Proudman v. Dayman*.⁴⁵ In short we can't exactly say what strict liability means.

When is Liability Strict?

Equally impossible is it to say exactly when liability is strict. For when Parliament creates an offence of strict liability, it rarely does so explicitly. Instead it leaves it to the courts to infer that the offence is strict. Yet so difficult is it to know what inference to draw that judges have not been slow to complain that if Parliament wants to dispense with *mens rea* it should do so explicitly. As Cartwright C.J.C. remarked in his dissenting judgment in *R. v. Pierce Fisheries*:⁴⁶

“This suggests the question whether it would not indeed be in the public interest that whenever it is intended to create an offence of absolute liability the enacting provision should declare that intention in specific and unequivocal words.”

In the absence of specific and unequivocal words the courts are thrown back on what they can spell out by way of implication. In a sense then, strict liability is less an express creation of Parliament than a creation by judicial inference. Inferences are drawn from a variety of factors: from the enacted words and the context of the section, from the nature of the offence created, from the severity of the sanction and from the stigma incurred by conviction. From these factors, however, different judges draw different inferences.

1. *The Words of the Statute*⁴⁷

Take the first factor—the words of the statute. These, in a case where a court has to decide whether liability is strict or not, are never crystal clear. If they were, there would be no problem, nothing to decide and no case before the court. As it is, the words are always uncertain enough to allow of inferences in opposite directions. An illustration is the Supreme Court case of *R. v. Beaver*.⁴⁸

Beaver was charged with possessing a drug without lawful authority, and the question was whether it was a defence to say that he didn't know that

the substance was a drug. This, of course, the statute did not reveal.⁴⁹ What it did say, in a later section, was that if a drug is found in a *building* occupied by the accused, he will be deemed to be in possession of the drug unless he can prove it got there without his knowledge, authority or consent. What conclusions should we draw from this?

The judges in the Supreme Court drew different conclusions. Some reasoned as follows:⁵⁰ the later section provides that in the case of an occupier of premises, knowledge of the *presence* of the drug is necessary for conviction and so it by implication provides that in the case of such an occupier, knowledge of the *nature* of the substance is not; but the offence of possessing a drug can't vary from section to section; so, if knowledge of the nature of the substance is not necessary in order to convict an occupier, it is equally unnecessary in order to convict a defendant charged with having drugs on his person. Therefore, they concluded, the offence is one of strict liability.

Others reached a different conclusion.⁵¹ They reasoned thus: the later section merely shifts the burden of proof; so, if a package containing drugs is found in a defendant's cupboard and it got there without his knowledge, it is up to him to show he didn't know it was there, not up to the prosecution to show he did; but this doesn't take away the quite different defence which he would have if he didn't know what the package contained; this defence remains valid and is equally valid for a defendant charged with having drugs on his person. Therefore, they concluded, the offence is not one of strict liability.⁵²

2. *The Severity of the Sanction*

The words of the statute, then, are no clear guide. Nor is the severity of the sanction. *R. v. Beaver* again shows why.

In *R. v. Beaver*⁵³ the courts faced the fact that Parliament had taken the unusual step of providing a minimum penalty of six months' imprisonment. Surely then, some argued,⁵⁴ Parliament couldn't have intended the offence to be one of strict liability. As Cartwright J. observed:

"It could of course be within the power of Parliament to enact that a person who, without any guilty knowledge, had in his physical possession a package which he honestly believed to contain a harmless substance such as baking soda but which in fact contained heroin, must on proof of such facts be convicted of a crime and sentenced to at least 6 months' imprisonment; but I would refuse to impute such an intention to Parliament unless the words of the statute were clear and admitted of no other interpretation."⁵⁵

Others,⁵⁶ however, drew quite the opposite inference. To them the severity of the sanction, together with the rest of the enforcement provisions of the Act, manifested "the exceptional vigilance and firmness which Parliament thought of the essence to forestall the unlawful traffic in narcotic

drugs.”⁵⁷ In their view the subject-matter, purpose and scope of the Act were such that to subject its provisions to a construction requiring *mens rea* would defeat the very object of the Act. So they concluded that liability was strict, and if this could lead to injustice, then there were remedies under the law—stay of proceedings by the Attorney-General or free pardon under the Royal Prerogative.⁵⁸

3. *The Subject-matter of the Offence*

If the severity of the sanction is inconclusive, what about the nature of the offence? Cases on strict liability frequently distinguish offences into two categories: acts which are criminal and acts which “are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty.”⁵⁹ In the words of Ritchie J. in the majority judgment in *R. v. Pierce Fisheries*,⁶⁰

“Generally speaking, there is a presumption at common law that *mens rea* is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to any such presumption.”

This distinction, however, is nothing more than the traditional distinction between *mala in se* and *mala prohibita*—between real crimes and quasi-crimes—a distinction fraught with difficulties.⁶¹ As Bentham pointed out, if the law prohibits an act because it would be against the public interest to do it, then the act is surely anti-social; and if it is anti-social, then it is wrong. How does one of these prohibited acts differ, then, except in degree, from those more obviously criminal acts like theft and murder?

Take for example the following offence. In 1867 section 13 of the Fisheries Act⁶² provided that

“no one shall throw overboard ballast, coal, ashes, stones, or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is being carried on.”

Is this a real crime or a mere offence? Back in 1867 perhaps people might have regarded it as a mere offence, but that was before the era of oil spills, fish kills and the biological sterilization of our lakes and rivers. Would we be quite so tolerant today?

A hard and fast line between real and quasi-crimes, then, is difficult to draw. Perhaps the main distinction is, as Barbara Wootton has observed, that *mala in se* are *mala antiqua*.⁶³ But whether the distinction lies in the age of the offence or whether it is simply a matter of degree, it seems ill-suited as a criterion to determine whether the presumption in favour of *mens rea* is rebutted.

4. *The Stigma Involved*

One clue to the nature of the offence, and so to the question whether it requires *mens rea*, is said to be the amount of stigma incurred. In the words of Ritchie J. once more in *R. v. Pierce Fisheries*,⁶⁴ "I do not think that a new crime was added to our criminal law by making regulations which prohibit persons from having undersized lobsters in their possession, nor do I think that the stigma of having been convicted of a criminal offence would attach to a person found to have been in breach of these regulations."

But how much stigma does an offence involve? It depends on so many things: who committed it, how he did it, when he did it, and what was thought and said about it—especially by the court.

Take the question "when?" The period is clearly crucial to the question of stigma. Acts once thought scandalous no longer appear so, and *vice versa*. Obscenity might have seemed odious a hundred years ago, but does it today? Polluting rivers might have incurred little odium a hundred years ago, but not so now. One important answer, then, to the question of how much stigma is involved, depends on what period of time we have in mind.

But this torpedoed the notion that in deciding about *mens rea* the courts are simply interpreting statutes. For suppose a statutory offence has been in existence a long time and a judge, in order to decide if it requires *mens rea*, asks how much stigma it involves. Does he ask how much stigma it involves today?⁶⁵ But what has this to do with the intention of Parliament many years ago? So does he ask how much stigma it involved when the statute was enacted? But then how far should the morality of bygone ages have a controlling influence today?

Stigma then is a poor criterion. It varies from offender to offender and from case to case. It depends too much on the circumstances of the offence to be able to indicate whether the offence is in general one of strict liability. In short, stigma is too subjective.⁶⁶

It is also circular. For stigma depends amongst other things on what is said about the offence and particularly on what is said by the courts. So, when the Supreme Court found the possession of undersized lobsters to be lacking in stigma, how far was the lack inherent in the offence and how far was it simply due to the fact that the court refused to stigmatize it? Couldn't the court equally well have characterized the offence as one endangering an important natural resource vital to the economy of a national region?

Stigma, then, is wholly inadequate as a criterion of liability. Its use is irreconcilable with the doctrine of statutory interpretation. This calls into question the medium of statutory interpretation as a means of determining whether liability is strict.

5. *The Test of Utility*

Indeed a criterion quite divorced from statutory interpretation has been recently suggested by the Privy Council in the case of *R. v Lim Chin Aik*.⁶⁷

Convicted under a Singapore Immigration Order making it an offence for someone prohibited from entering Singapore to remain there, Lim Chin Aik had been so prohibited but the prohibition had not been published or made known to him. His conviction was quashed because of the futility of imposing punishment in such a case.

"It is not enough," said the Privy Council, "merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so there is no reason in penalizing him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."⁶⁸

There might be advantages in this doctrine. First, it would transform strict liability into negligence: if there is something the defendant could do and he has not done it, then he has not done all he should—he has been negligent. Second, it frees the courts from mere statutory interpretation. Whether there is anything the defendant can do cannot be answered by just looking at the words of the statute.

There are snags, however. First the logic of the decision is dubious. The Privy Council equates the question "will putting the defendant under strict liability assist in the enforcement of the regulations?" with the question "is there something he can do to promote the observance of the regulation?". But these are not identical. The fact that there is nothing *this* defendant can do does not entail that penalizing him will not assist in general enforcement. It may serve to impress on others the extreme care the law requires. As Hart observes, "actual punishment of those who act unintentionally or in some other normally excusing manner may have a utilitarian value in its effects on others."⁶⁹ Penalizing Lim Chin Aik would have been unjust, but hardly futile.

It would hardly have been futile since it would have freed the prosecution from having to prove *mens rea* or disprove its absence. This is the doctrine of administrative expediency, the prime justification in *Woodrow* for holding possession of adulterated tobacco to be a strict liability offence. The same justification could also have been applied in *R. v. Lim Chin Aik*.⁷⁰ Allow *mens rea* in, says the administrator, and we'll get no more convictions; for we can never prove, in these offences, what was in the defendant's mind.

Secondly, the *Lim Chin Aik* test is an unsatisfactory one. It concentrates unduly on the offender and disregards the offence. For if we ask whether *this* offender could have done anything, then we must realize that there could be cases in which two individuals committing the same act might

have to be treated differently on this test. Suppose the following: two individuals are prohibited from entering the country; one enters, not having had the prohibition made known to him; the other, knowing the prohibition, enters by landing on the coast, which he mistakes in the fog for the coast of the United States. Each is unaware that he is doing what the law forbids. But the first must be acquitted because, if we follow *R. v. Lim Chin Aik*, there was nothing he could do to promote the observance of the regulation forbidding persons from entering the country. But the second has to be convicted because there is something he could do: he could have abstained from sailing off the Atlantic coast.

But isn't this an odd conclusion? Is it rational to impose strict liability on the second individual and not on the first? Is it satisfactory to hold that one and the same offence is now strict and now not strict, is strict for this person and not strict for that? Isn't it the general doctrine that a strict liability offence is strict in all circumstances, strict in general and regardless of individual offenders? *R. v. Lim Chin Aik* spells the end of this objectivity.

Why is the Law Unclear?

On strict liability then the law is far from clear. It is not clear how strict 'strict' liability is, how absolute 'absolute' liability is. Nor is there any sure and certain method of determining whether an offence is one of strict liability or not.

If the law is unclear, however, the reason for its lack of clarity is not. Our criminal law is based on the doctrine that liability requires fault, while strict liability is liability without fault. Put together, they produce a contradiction that has never yet been reconciled.

Fault-based liability was the older and more central doctrine.⁷¹ By the nineteenth century few offences were punishable without proof of fault:⁷² the accepted view was that it was a principle of natural justice that *actus non facit reum nisi mens sit rea*.⁷³

With the case of *R. v. Woodrow*⁷⁴ strict liability appeared on the scene like an uninvited guest. Like many such guests it stayed but was never fully made at home. There followed a whole series of public welfare offences—selling adulterated food,⁷⁵ keeping lunatics without a licence,⁷⁶ selling intoxicants to persons already inebriated⁷⁷—where mistake of fact was no defence.

Nor was England alone in her move away from the pristine purity of *mens rea*. France⁷⁸ too gave birth to crimes of strict liability and other parts of the common law world witnessed similar trends: strict liability appeared in the United States,⁷⁹ in Australia, in New Zealand,⁸⁰ and in Canada.

In this development some have seen a move from eighteenth century moralism to a new enlightenment when *mens rea* will wither away.⁸¹ Others have seen a later and counterbalancing trend back to *mens rea* and away from strict liability.⁸² But as Howard observes, "the truth of the matter is that no one knows why the doctrine appeared when it did, or at all; we know only that it appeared."⁸³ All history reveals is that strict liability arrived and remained. Instead of being rejected out of hand it was wedded to a system based on fault liability, and the union, though curious, survived.

Why? Was it because of the nature of strict liability offences themselves? Punishable mainly by small fines, carrying little stigma and relating to acts thought neither criminal nor dangerous, they hovered on the outskirts of the criminal law. Not for them the central place in the Criminal Code, the criminal law books or the criminal courses. Their place was in the confines of non-criminal statutes and regulations on shipping, fisheries, food and drugs, weights and measures, and so on. Civil, rather than criminal offences, they were considered; and as such they were, by criminal lawyers, all too easily ignored. The irony is that offences far outnumbering "real" crimes never gained entry into the heart of criminal jurisprudence, with the result that no solution to the problem "when is an offence one of strict liability?" has been devised or is to be found either in theory or in practice.

1. *Theory*

All enterprises and disciplines stand in need of theory. Theory it is that organizes, systematizes and gives direction. And law is no exception. Without theory law degenerates into pragmatism, "ad hocery" and a wilderness of single instances. It is theory, then—criminal law theory—that could be expected to provide the solution to our basic problem.

So far it has never done so. Instead it has concentrated on a quite different question: the question for the criminal law theorist has been "How can strict liability be justifiable?" And amid the clamour of the dispute between those out to abolish strict liability⁸⁴ and those out to extend it to all offences,⁸⁵ we lose sight of the more urgent problem: while strict liability is with us, what test determines its application?⁸⁶ This has been left to be worked out in practice by the courts.

2. *Practice*

The unhappy results of this have already been seen. The fact is, left to themselves with no theory to guide them, the courts do their best but their best is far from good.

One reason is this. In our common law system of law, judges play the part of pragmatists, not theorists. Their job is to develop the law step by step, not build coherent theory. "Your Lordships' task in this House," said Lord MacMillan, "is to decide particular cases between litigants and your Lordships are not called on to rationalize the law of England. This attractive, if perilous field, may well be left to other hands to cultivate."⁸⁷

But there is a more important reason. The courts see the problem as basically one of statutory interpretation, and this is a piecemeal approach. Each decision is nothing more than a decision on this offence, on this section, on this particular formula of words. It has no authority when a court comes to consider a different offence, a different statute and a different formula. Decisions on statutes are by their nature limited in effect.

Hence the sorry state of the law on statutory interpretation. Books on the topic consist of nothing but conglomerations of maxims, which, like proverbs, hunt in pairs—every maxim has its opposite. Trying to clarify the law on strict liability by recourse to statutory interpretation is like trying to lighten our darkness with a wickless candle—especially since the courts have never clarified their own role in the matter of statutes.

What is their role? Few perhaps would adopt the robust views of Hobart or Blackstone that courts have the right to declare void a statute contrary to justice, the law of nature or the law of God.⁸⁸ But how many would take the opposite stance of the nineteenth century English judge who confessed that the courts “sit here as servants of the Queen and the legislature”?⁸⁹ Judicial observations on strict liability—witness Cartwright J. in *R. v. Beaver*⁹⁰—indicate the acceptance of a middle course, of treating Parliament as a wise minister treats an impetuous monarch: he accepts the sovereign’s supremacy but meanwhile governs as he thinks the sovereign ought to govern, unless the sovereign’s plain and express words prevent him.

For though the courts see themselves as interpreting statutes, they are clearly doing more than this. “How much stigma is involved?” cannot be answered by construing a statute. “Was there anything the defendant could have done to promote the observance of the regulation?” can’t be answered by looking at the words of an Act. And the central point of the whole question—the presumption in favour of *mens rea*—comes not from parliamentary words or practice but from the notions of the courts.

For the presumption in favour of *mens rea* is a common law presumption which Parliament is taken to know and legislate in the light of. As Glanville Williams argues, “every criminal statute is expressed elliptically. It is not possible in drafting to state all the qualifications and exceptions that are intended. One does not, for instance, when creating a new offence, enact that a person under eight years cannot be convicted. Nor does one enact the defence of insanity or duress. The exemptions belong to the general part of the criminal law, which is implied into specific offences. On the continent, where the criminal law is codified, and similarly in those parts of the Commonwealth with a criminal code, this general part is placed by itself in the code and is not repeated for each individual crime. Now the law of *mens rea* belongs to the general part of the criminal law, and . . . it is not reasonable to expect the legislature every time it creates a new crime to enact *mens rea* or even to make reference to it.”⁹¹

But why not? *Mens rea* is quite different from infancy, insanity and certain other defences. A rule about infancy is easily defined and applied to the whole of the criminal law.⁹² *Mens rea* is a difficult and complex concept embracing different sorts of intent, recklessness, knowledge and so on; it requires elaboration and specification from offence to offence. Indeed it is much more reasonable to expect the legislator to enact *mens rea* than to assume it.

And this is precisely what we find! Few offences in the Criminal Code rely on the presumption of *mens rea*: in most the words of the statute make the position clear. Criminal legislation today teems with *mens rea* words. The Revised Statutes of Canada use “wilfully”, “knowingly” and “fraudulently” or their roots over a thousand times, and “recklessly”, “negligently”, and “corruptly” several hundred.⁹³ With older English statutes it is the same: a random examination of thirty offences in the Offences Against the Person Act (1861)⁹⁴ revealed that each one required a mental element which was specifically detailed and described.

By contrast, offences found to be offences of strict liability almost never do away with the mental element explicitly. They merely avoid mentioning a mental state.

So legislators do seem, with all respect to Lord Devlin,⁹⁵ to think about criminal liability. They seem to specify a mental element where required and to omit it not by inadvertence but design. Administrators and draftsmen are apparently aware, as some acknowledge, of the need to specify *mens rea* when drafting sections creating more serious offences.⁹⁶

The implied requirement of *mens rea*, then, is not an assumption on which Parliament, draftsmen or administrators seem to work. Rather, it is a presumption which the courts impute to them. This is the way the courts think legislators ought to work. But this is hardly statutory interpretation in the strictest sense.

Small wonder then that the courts, trying to solve the problem of strict liability partly by interpretation with all its inherent problems and partly by judicial control with all that this implies, have failed to produce a coherent doctrine. Their failure is entirely understandable.

Does the Uncertainty Matter?

Understandable, but unfortunate. Rarely can we tell, as the law now stands, if any given regulatory offence is one of strict liability. About 90% of our offences are created by laws so framed that no one knows quite what they forbid. This undermines the rule of law.

The rule of law aims at uniformity, certainty and exclusion of arbitrary government. It aims at uniformity and seeks to treat like cases alike and different ones differently. It aims at certainty so that we can know where we legally stand, predict the legal consequences of our acts and plan our lives accordingly. And it aims at government by objective standards instead of subjective discretion. In short, it maximizes fairness, freedom and human dignity.

Can this be done if laws are less than clear? Given unclear laws, different courts give different interpretations and uniformity is at an end. So is freedom, once the citizen no longer knows precisely where he stands and cannot predict the interventions of the law: he is at the mercy of the whim and caprice of the official. Fairness, freedom and dignity are at a discount.

Take fairness. Treating like cases alike and different ones differently is just what our present law on strict liability prevents. This it does in two quite different ways.

First, the doctrine itself is at odds with fairness. It makes us treat alike cases that are significantly different. For there is a world of difference between things done intentionally and things done unawares: as has been said, even a dog knows the difference between being kicked and being stumbled over. Classical common law, with the distinction it drew between murder and manslaughter, was alive to the difference. Regulatory laws are not: conscious possession of undersized lobsters is no more an offence than inadvertant possession, said the Supreme Court in *R. v. Pierce Fisheries*.⁹⁷ Other examples could be multiplied.

But the situation is worse. For as the law now stands, like cases are also treated unlike. In *R. v. Paris*⁹⁸ the charge was one of knowingly or wilfully committing an act producing, promoting or contributing to a child being or becoming a juvenile delinquent. This the British Columbia Supreme Court held, following previous authority, to be an absolute prohibition: it was irrelevant whether the accused knew that the girl was under the material age. By contrast, in *R. v. Rees*,⁹⁹ where the charge was the same, the Supreme Court of Canada took the opposite view: knowledge that the victim was under age was a prerequisite and the conviction was quashed. Again, examples can be multiplied—cases where one and the same act is dealt with differently by different courts. For instance, possessing a drug was held to be an offence, even though the possessor did not know it was a drug, by the trial judge in *R. v. Beaver*.¹⁰⁰ Quite the contrary was held by the Supreme Court of Canada in the same case: possession unaccompanied by knowledge is not an offence. At one time, then, and at one place a thing is said to be a crime; at another time and at another place the same thing is reckoned no offence. And how can this be just?

Can it be expedient either? Expediency demands a degree of predictability. The trader, the businessman and the ordinary citizen needs to be able to foretell whether or not his conduct will be viewed adversely by the criminal courts. As the law stands, however, no such prediction can be made. Who could have predicted with confidence that the Supreme Court of Canada would decide in *R. v. Beaver*¹⁰¹ that possession of a drug, without knowing what it was, is no offence, and that the view of Cartwright J. would be accepted by the majority of the Court? And who could have predicted that the same court in *R. v. Pierce Fisheries*¹⁰² would decide that possession of undersized lobster without knowledge of the possession is an offence, and that the views of the Nova Scotia Court of Appeal and of Cartwright C.J. would fail to be accepted by the majority of that court? Before the Supreme Court has spoken, no one can tell what it will say and, hence, what the law really is.

Instead, we must muddle on in hope or fear, or squander time and money fighting cases to the highest court. If we muddle on, our expectations are always liable to be defeated. For years we all assumed that s. 5(1) of the Food and Drugs Act contained an absolute prohibition against deceptive labelling.¹⁰³ In 1972, however, the Saskatchewan District Court decided otherwise:¹⁰⁴ *mens rea* was an essential element. For years everyone thought that s. 37 of the Combines Investigation Act¹⁰⁵ contained a strict prohibition against misleading advertising. Yet in 1972 the contrary was argued in the Supreme Court of Canada, which in the event found it unnecessary to decide whether *mens rea* was required or not. Uncertainty like this in matters affecting everyday life, business and commerce can't be satisfactory.

Besides, what of the cost in terms of time and money? *R. v. Pierce Fisheries*¹⁰⁶ involved a trial before a magistrate, an appeal before the Nova Scotia Court of Appeal and a further appeal to the Supreme Court of Canada.

*R. v. Rees*¹⁰⁷ was worse: here was a trial in the Juvenile Court in Vancouver, an appeal to the Supreme Court of British Columbia, a further appeal to the Court of Appeal of British Columbia and a final appeal to the Supreme Court of Canada. Is it really in the national interest to devote this amount of our resources to answering questions which, if the law were clearer, need never arise? Is it really fair to the individual to shoulder the burden of an uncertainty that either leaves him ignorant of his liabilities or else forces him to pay for the privilege of finding out, through painstaking research by his lawyer and lengthy disputation in court, things that, if the law were otherwise, could be crystal clear?

Unfortunately, the law is not otherwise. Unfortunately, the law is, as we have shown, without rhyme or reason and utterly lacking in system. Chaotic and disordered, it is impossible to expound and impossible to ascertain. In consequence the citizen has no sure understanding of his liabilities and responsibilities under regulatory laws; he lacks full understanding of his law. Yet, as has been said, what we do not understand we do not possess. Canadians do not fully possess—in this sphere—the law that by right is theirs. Instead they are at the mercy of individual law enforcers and individual courts. As luck would have it, Canadians are blessed with fair and reasonable law enforcers and judges. But will we always be? Or should we guard against what men may do rather than rely on what they will? Should we not make it absolutely clear what the law in each regulatory offence forbids?

NOTES

1. *The Size of the Problem, supra*, at 41.
2. This is inevitably a rough estimate. Statistics do not reveal how many persons were convicted of summary offences; they only reveal the number of convictions. However, the figures for indictable offences do both. In 1969, for example, *Statistics of the Criminal Law and Other Offences—1969*, Statistics Canada, (Ottawa: Information Canada, 1972) 10-12, show that there were 62,550 convictions for indictable offences and 38,017 persons convicted of them. This gives very roughly a ratio of 2:3; roughly two persons account for each group of three convictions. Extrapolating, we can estimate that the 1,400,000 convictions for strict liability offences (based on the estimate in *The Size of the Problem, supra*) were accounted for by 900,000 people.
3. This figure was obtained from the Bureau of Vital Statistics, Federal Government, Ottawa.
4. H. L. A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) 20.
5. *Strict Liability in Practice, supra*, at 63.
6. "Couching the law in language expressive of strict liability, while at the same time having the tacit understanding that if an accused person has complete and unshakeable proof of innocence, he will not be prosecuted, has the disadvantage that whoever believes the legislator means what the statute says, also has reason to believe the law is excessively severe. And those who recognize that the legislator does not precisely mean what the words of the statute say, have reason to view the law as hypocritical; and this recognition may result in disrespect for the law." Marlin, *Morality and the Criminal Law*, unpublished doctoral thesis, Department of Philosophy, University of Toronto, Toronto, Canada, *cf.* note 16.
7. P. Devlin, *Samples of Law Making* (London: Oxford University Press, 1962) 71.
8. *Supra*, note 4 at 112.
9. "Regulatory" is the adjective usually but not always used to describe these offences. Other descriptions are: "Public Welfare Offences", Sayre, *Public Welfare Offences* (1933), 33 Col. L. Rev. 55, "Civil Offences", Perkins, *The Civil Offence* (1952), 100 U. Pa. L. Rev. 832, "Violations", *Model Penal Code* (1954), Tentative Draft No. 2, 5. 1.05(5); from Starrs, *The Regulatory Offence in Historical Perspective in Essays in Criminal Science* (Mueller ed., London: Sweet & Maxwell, 1961) 241.
10. See *R. v. Ping Yuen, infra*, note 43.
11. Selling adulterated food is the classic example of a regulatory offence and was the subject matter of the *locus classicus* of strict liability *Regina v. Woodrow*, 11 M. & M. 404 (Exch 1846); 153 E.R. 907, in which a merchant was convicted of selling adulterated tobacco although he was personally ignorant of the contamination. See also *Hobbs v. Winchester Corporation* [1910] 2 K.B. 471, in which a butcher was convicted for selling unsound meat although unaware of the unsoundness of the product. But *cf. Gleeson v. Hobson, infra*, note 19.
12. See s. 43(1) of The Weights and Measures Act, R.S.C. 1970, c. W-7; *Leblanc v. Lafontaine*, (1940) 78 C.S. 547, 75 C.C.C. 277; *Bourget v. Têtu*, (1940) C.S. 56; *R. v. Piggly-Wiggly Canadian Ltd.*, (1933) 4 D.L.R. 491, 60 C.C.C. 104, 2 W.W.R. 475.
13. Lobster Fishery Regulations, s. 3(1)(b), P.C. 1963-745, SOR/63-173, made pursuant to s. 34 of The Fisheries Act, R.S.C. 1952, c. 119, which was found to create a strict liability offence as to the size of purchased lobsters; *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, [1970] 5 C.C.C. 193.

14. ". . . the need for a mental element is not ruled out, completely by the fact that an offence is one of strict liability. It may be necessary to prove that D. was aware of all the circumstances of the offence save that in respect of which strict liability is imposed. . . . There is no reason why all other defences should not be available as they are in the case of offences requiring full *mens rea*". Smith and Hogan, *Criminal Law* (2nd ed. London: Butterworths, 1969) 67. See also P. Brett, *An Inquiry into Criminal Guilt* (Sydney: Law Book Company of Australasia, 1963), C. Howard, *Strict Responsibility* (London: Butterworths, 1963), and J. L. Edwards, *Mens Rea in Statutory Offences*, in 8 Cambridge Studies of Criminology (Nendeln/Liechtenstein: Kraus Reprint, 1968).
15. *Harding v. Price*, [1948] 1 Q.B. 695, *Hill v. Baxter*, [1958] 1 Q.B. 277, [1958] 1 All. E.R. 196, 42 Cr. App. R. 51.
16. (1933), 24 Cr. App. R. 74. Professor Randall Marlin of the Philosophy Department of the University of Carleton, has pointed out to us that despite the academic criticisms levelled at the decision, careful reading of contemporary accounts of the actual trial show that Mlle Larsonneur seemed to have no doubt that she had acted "wrongly". She was endeavouring, by a marriage of convenience to a complete stranger, to get around the spirit of the immigration laws in force at the time. Her first attempt, a marriage in England, was stopped by the Home Office. Having been refused permission to be in the United Kingdom, she would in the normal course of events have gone to France or to some other country, from which she could only have returned to the United Kingdom through a port subject to passport control, whereupon her entry would have been barred. Instead, she went to Eire, a country from which (for historic and political reasons) persons could enter the United Kingdom without passport control because the "Irish" ports, i.e. Liverpool and Holyhead, were not subject to such control. There she again tried to go through a marriage to obtain citizenship and to defeat the whole purpose of the Aliens Order. She was within the letter but not the spirit of the law. Again her marriage was stopped, she was brought back to England, charged, convicted and ordered to be deported to a country from which she could not return to the United Kingdom without being subject to passport control. See *The Times*, April 28, 1933 and Marlin, *Morality and the Criminal Law*, *supra*, note 6.
17. Cross and Jones, *Introduction to Criminal Law* (6 ed. London: Butterworths, 1968) 56.
18. Smith and Hogan contend, in spite of *Larsonneur*, *supra*, note 16, that compulsion is a good defence to a crime of strict liability; Smith and Hogan, *Criminal Law*, *supra*, note 14 at p. 67.
19. [1954] S.A.S.R. 33.
20. *Ibid*, 35-36.
21. Howard, however, does not agree. "It is absurd, and indeed if the matter were not so serious it would be ludicrous, to suggest that the police have power forcibly to put a person who has no right to resist (because his arrest is lawful) into a position where he becomes guilty of some offence for which he was not originally arrested." C. Howard, *Strict Responsibility*, *supra*, note 14 at 194. However, he is prepared to allow conviction in other cases of lawful compulsion, such as the legal expulsion of an unwanted guest into the street, *ibid*, 195.
22. (1959), 125 C.C.C. 84.
23. (1960), 44 M.P.R. 345, 33 C.R. 182, 127 C.C.C. 315. For a full discussion of *Breau*, *supra*, note 22, and *Vickers*, *supra*, see LaForest, *Mens Rea dans les infractions de Chase* (1961-62), C.L.Q. 437.
24. (1972), 7 C.C.C. (2d) 42, 18 C.R.N.S. 80.
25. (1973), 12 C.C.C. (2nd) 497.
26. "No person shall be convicted of an offence in respect of an act or omission on his part while he was insane." The Criminal Code, R.S.C., c. C-34, s. 16(1).

27. "No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of seven years." The Criminal Code, R.S.C. 1970, c. C-34, s. 12.
28. The Criminal Code, R.S.C. 1970, c. C-34, s. 13.
29. *R. v. Woodrow* (1845), 11 M. & M. 404 (Exch. 1846), 153 E.R. 907.
30. Such a fundamental mistake of fact would probably be a defence; see Smith and Hogan, *The Criminal Law, supra*, note 14 at 59, and Cross and Jones, *An Introduction to Criminal Law, supra*, note 17 at 95. See also *Gleeson v. Hobson*, [1970] V.L.R. 148, in which it was held that on a charge of selling bad meat, while unnecessary to prove the accused knew the meat to be bad, it should be proved that he at least intended to sell meat.
31. *R. v. Prince* (1875), L.R. 2 C.C.R. 154, [1874-80] All E.R. 88, 13 Cox C.C. 138.
32. *R. v. Hibbert* (1869), L.R. 1 C.C.R. 184, in which it was held that an accused cannot be convicted of abduction (section 55 of The Offences against the Person Act, 1861) in the absence of evidence that he knew or had reason to believe that she lived with her parents. This offence has been codified in The Criminal Code, R.S.C., c. 34, s. 249.
33. [1972] 2 O.R. 250, 17 C.R.N.S. 127, 6 C.C.C. (2d) 179, where the accused was found guilty of selling L.S.D. in violation of *The Narcotics Control Act*, although he mistakenly believed the drug to be mescaline which is also a restrictive drug under the Act. The result of the case suggests a theory of transfer of *mens rea*.
34. *Ibid*, 6 C.C.C. (2d) 128, per MacKay J.
35. 52 C.L.R. 100; [1935] A.L.R. 80. See also *Thomas v. R.*, 59 C.L.R. 279; [1938] A.L.R. 37, and *Brown v. Green* (1952) 84 C.L.R. 285.
36. *Supra*, note 11 and note 29.
37. *Supra*, note 35.
38. *Proudman v. Dayman* (1941), 67 C.L.R. 536; [1944] A.L.R. 64 cf. *Sherras v. DeRutzen* [1895] 1 Q.B. 918, 64 L.J.M.C. 218, Cox C.C. 157, in which Wright J. acquitted an accused on the basis that no care on his part could have saved him from a conviction.
39. *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, [1970] 5 C.C.C. 193.
40. See note 38.
41. P.C. 1963-745, SOR/63-173, made pursuant to s. 34 of Fisheries Act, R.S.C. 1952, c. 119.
42. *Supra* note 39, [1970] 5 C.C.C. 193, 205.
43. In *Rex v. Ping Yuen* (1921), 14 Sask. L.R. 475; 3 W.W.R. 505; 65 D.L.R. 722; 36 C.C.C. 269, in circumstances similar to *Maher v. Musson, supra*, note 35, a chinese grocer was convicted of possession of illicit spirits, although he was unable to ascertain the contents of the beverage in question (he was prohibited from so doing by provincial health regulations). The case was decided on the basis of *Woodrow, supra* note 29, and consideration of ascertainability was specifically rejected. Per Turgeon J.A. at page 271, "it is true that the accused in *R. v. Woodrow* could have avoided trouble by having his (tobacco) analysed, and that this precaution was not feasible in this case where the beer was purchased and left in bottles, but I do not think that this provided a sufficient reason to affect the result". But, in the case of *R. v. Regina Cold Storage and Forwarding Co. Ltd.* (1923), 41 C.C.C. 21, 17 Sask. L.R. 507; (1924) 2 D.L.R. 286, decided by the same court, it was held that where a storage company in possession of illicit beverages is precluded by law from examining the contents of such beverages, no conviction will lie. In other words, the personnel of the storage company could not ascertain whether the temperance beer was illicit, and they reasonably believed it was not. *Pierce Fisheries, supra*, note 39, does not resolve this point and the Canadian position on mistake of fact as a defence to a strict liability charge is, therefore, uncertain.

44. *Supra*, note 29.
45. *Supra*, note 38.
46. *Supra*, note 39, [1970] 5 C.C.C. 193, 198. See also *Fowler v. Padget*, 7 Term. R. 509, 4 R.R. 5 ". . . it is a principle of natural justice and of our law that *actus non facit trium nisi mens sit rea* the intent and the act must both concur to constitute the crime . . .". There are, however, some notable exceptions (e.g. manslaughter by means of an unlawful act.) It was also recognized that in three areas of the Statutory Penal Law, the requirement of *mens rea* was often not present. In the words of Wright J. in *Sherras v. DeRutzen*, [1895] 1 Q.B. 918, [1895-9] All. E.R. 1167, 18 Cox, C.C. 157, there are three principal classes of exceptions. 1) Acts which are not criminal in any real sense but which are prohibited in the public interest under a penalty (*R. v. Woodrow* is an example of this class). 2) Public nuisance, as in *R. v. Stephens* (1866), 14 L.T. 593, L.R. 1 Q.B. 702 and 3) Cases where although the proceedings may be criminal in form, they are really only a summary mode of enforcing civil right. In practice, offences of strict liability in Canada fall under the first category.
47. When the statute specifically includes or excludes *mens rea*, there is no problem. But what if a statute is silent on the requirement of *mens rea*? If a rule of strict literal interpretation were followed, there again would be no problem: a statute making no reference to *mens rea* would be interpreted as imposing strict liability. (This approach has been applied at times by the courts, see *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207, [1881-5] All. E.R. 412. See also Pigeon, *Rédaction et Interprétation des Lois*, cours donné en 1965 aux conseillers juridiques du gouvernement du Québec, 38-39.) But for *mens rea* the accepted rule of interpretation is quite different. Section 11 of the Interpretation Act, R.S.C. 1970, c. I-23 stipulates that every enactment shall be deemed to be remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. To apply this rule of construction the courts must determine the spirit as well as the letter of the law. Furthermore, the common law rule of construction implies the requirement of *mens rea* in every statute unless it is excluded by necessary implication.
48. *Beaver v. R.*, [1957] S.C.R. 531, 118 C.C.C. 129, 26 C.R. 193.
49. "Every person who . . . (d) has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority; . . . (f) manufactures, sells, gives away, delivers or distributes, or makes any offer in respect of any drugs or any substance represented or held out by such person to be a drug, to any person without lawful authority; is guilty of an offence and is liable (i) upon indictment, to imprisonment for any term not exceeding seven years and not less than 6 months, and to a fine . . . and, at the discretion of the judge, to be whipped." The Opium and Narcotic Drugs Act, R.S.C. 1952, c. 201, s. 4(1).
50. Fauteux and Abbott JJ., dissenting, *supra*, note 48, 26 C.R. 193, 207.
51. Cartwright, Rand and Locke JJ., *supra*, note 48, 26 C.R. 193, 195.
52. The Supreme Court's decision in *R. v. Rees*, [1956] S.C.R. 640, 24 C.R. 1, 115 C.C.C. 1; 4 D.L.R. (2d) 406, is of interest on this point. In that case the accused was charged with "knowingly or wilfully" doing an act contributing to a child being or becoming a juvenile delinquent, contrary to section 33(1)(b) of The Juvenile Delinquents Act, R.S.C. 1952, c. 160. Although the accused had no knowledge of the girl's age and had reasonably believed her to be over eighteen years of age, he was convicted at trial on the authority of *R. v. Paris*, 16 C.R. 101, 105 C.C.C. 62, 7 W.W.R. 707. Paris is a rare example of statutory interpretation which found an offence to be one of strict liability in spite of the presence of clear *mens rea* words in the offence. And although Paris was overruled by *Rees*, it received strong support in dissent from Fauteux J., 24 C.R. 1, 15, and was the law of British Columbia for over three decades.

53. *Supra*, note 48.
54. Cartwright, Rand and Locke JJ., see also note 51.
55. *Supra*, note 48, 26 C.R. 193, 206.
56. Fauteux and Abbott JJ., see also note 50.
57. *Supra*, note 48, 26 C.R. 193, 210.
58. *Ibid*, 26 C.R. 193, 217.
59. *Sherras v. DeRutzen*, *supra*, note 46, [1895] 1 Q.B. 918, *per* Wright J., paraphrasing Lush J., in *Davies v. Harvey*, L.R. 9 Q.B. 433.
60. *Supra*, note 39, [1970] 5 C.C.C. 193, 199.
61. *Mala in se—mala prohibita*. See P. Devlin, *Law and Morals* (1961). Also, see Fitzgerald, *Crime, Sin and Negligence* (1963), 79 L.Q.R. 351, and *Crimes and Quasi-Crimes*, 10 *Natural L. Forum* 62.
62. 31 V., c. 60, s. 14, consolidated, The Fisheries Act, R.S.C. 1886, c. 95, s. 15. This particular offence has proved to be extraordinarily durable. Although it has undergone six changes in section number, its text is virtually the same and is now section 33(1) of The Fisheries Act, R.S.C. 1970, c. F-14.
63. Wootton, *Crime and the Criminal Law* (London: Stevens, 1963) 43. (One possible distinction, however, is that *mala in se* mostly consist of acts causing harm to an identifiable victim.)
64. *Supra*, note 39.
65. See note 62. The present text of section 33 of The Fisheries Act, *supra*, note 62, is over one hundred and twenty years old.
66. It is interesting here to note that regardless of the subjective severity of a crime, be it indictable or summary, a convicted accused will receive a criminal record, Criminal Records Act, R.S.C. 1970, c. T-3.
67. [1963] A.C. 160, [1963] 1 All E.R. 233, [1963] 2 W.L.R. 42.
68. *Ibid*, [1963] A.C. 160, 174 *per* Lord Evershed. In *Aik*, the Privy Council relies upon the judgement of Devlin J. in *Reynolds v. G. H. Austin and Sons Ltd.*, [1951] 2 K.B. 135; [1951] 1 All E.R. 606. The rule in *Aik* is, in fact first formulated in *Reynolds*: "I think it is safe, in general principle to follow . . . that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence, then, in the absence of clear and express words, such punishment is not intended", *per* Devlin J., *supra* [1951] 2 K.B. 150.
69. Hart, *Punishment and Responsibility*, *supra*, note 4 at 20.
70. *Supra*, note 67.
71. On the importance of the doctrine of *mens rea* to current criminal theory, Jerome Hall says, "*mens rea* is the ultimate evaluation of criminal conduct and, because of that, it is deeply involved in theories of punishment, mental disease, negligence, strict liability, and other current issues. . . . If any distinction is to be drawn *inter pares*, the crown, therefore, must surely go to the principle of *mens rea*." *General Principles of the Criminal Law* (2nd ed. Indianapolis: Bobbs-Merrill, 1960) 70.
72. This, however, was not always the case. In the earliest periods of English legal history there appears to have been very little attention paid to the mental processes of an accused. Essentially viewed as an instrument to compensate the victim either in kind or equivalence, the criminal law was more concerned with the harm done than with the intent, if any, accompanying it. "In the main the principles upon which liability for wrongdoing is based are the logical outcome of a system dominated by the ideas of the blood feud and of bot and wer. When the main object of the law is to suppress the blood feud by securing compensation to the

injured person or his kin, it is to the feelings of the injured person or his kin that attention will be directed, rather than to the conduct of the wrongdoer.

" . . . The main principle of the earlier law is that an act causing physical damage must, in the interests of peace, be paid for. It is only in a few exceptional cases that such an act need not be paid for. Even if the act is accidental, even if it is necessary for self-defence, compensation must be paid. *Qui peccat inscienter scienter emendat*, say the laws of Henry I, and they say it more than once. A man acts at his peril." 2 Holdsworth, *The History of the English Law* (4th ed. Goodhart & Hansbury, London: Sweet & Maxwell, 1966) 51. This early development has been characterized as the "period of strict liability", *Kenny's Outline of the Criminal Law* (19th ed. C. Turner, Cambridge: Cambridge University Press, 1966) 7.

73. The first written appearance of a requirement of *mens rea* was in the *Leges Henrici Primi*, 4 Leg. Hen. Pr. 5, as a test of guilt for the crime of perjury. It was elaborated upon in the works of Bracton and the now famous phrase *Et actus non facit reum nisi mens sit rea* first appeared in the early 1600's in the writings of Sir Edward Coke. In this regard, see *Kenny's Outlines of the Criminal Law*, *supra*, note 72 at pp. 9-20.

By the early nineteenth hundreds there were very few offences punishable without proof of fault. "(It) is a principle of natural justice that *actus non facit reum nisi mens sit rea*. The intent and the act must concur to constitute the crime." *Fowler v. Paget* (1798), 101 E.R. 1103, 7 T.R. 509; also see *R. v. Banks* (1794), 1 Esp. 145, 170 E.R. 307. The same view has been more recently reasserted by Lord Denning, "In order that an act should be punishable, it must be morally blame-worthy, it must be a sin." Denning, *The Changing Law* (1953) 112.

74. *R. v. Woodrow*, *supra*, note 29. Prior to *Woodrow* sale of adulterated or impure food had to be intentional to be punishable. See, for example, *Rex v. Dixon*, 3 M. & S. 11 (K.B. 1814); *Treves Case*, 2 East P.C. 821; and, *Rex v. Stevenson*, 3 Fost. & F. 106 (N.P. 1862). Although *Woodrow*, *supra*, is heralded as the genesis of the modern doctrine of strict liability in statutory offences, strict liability did exist in the common law. Those few common law offences punishable without proof of *mens rea* were limited to certain kinds of nuisance (see, for example, *Rex v. Welby*, 6 Car. t P. 292 (K.B.) and *R. v. Stephens*, 3 R.R. 1 L.R. 1 (Q.B.) 702) and libel (see, Sayre, *Public Welfare Offences*, 33 Col. L.Rev. 55, 57). But most nuisance offences continued to require proof of *mens rea*; see *Rex v. Vandillo*, 4 M. & S. 73 (K.B.) and *Rex v. Burnett*; 4 M. & S. 272.
75. *Hobbs v. Winchester Corporation*, [1910] 2 K.B. 471, 79 L.J.K.B. 1123.
76. *R. v. Bishop* (1880), 5 Q.B.D. 259.
77. *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207; [1881-5] All E.R. 412.
78. R. Legros, *Élément Moral dans les Infractions* (Paris: Sirey, 1952), P. Bougat et J. Pinatel, *Traité de droit pénal et de criminologie* (Paris: Dalloz, 1970) 267.
79. The development of no fault liability in the United States was contemporaneous with, yet independent from, the English doctrine. The American equivalent of *Woodrow*, *supra*, is *Barnes v. State*, 19 Conn. 389 (1849), in which it was held that the defendant was guilty of selling liquor to a common drunkard despite lack of knowledge that the purchaser was a common drunkard. Previously, intention had to be proved. For example, in the case of *Meyers v. State*, 1 Conn. 502 (1916), a defendant accused of renting his carriage on Sunday was acquitted on the grounds that he reasonably believed that he was renting it for charity, which was an exception to the law. The penalty was a low fine with no threat of imprisonment or social stigma. By acquitting the accused the Supreme Court of Connecticut affirmed the maxim that ". . . a criminal intent is necessary to commit a crime," (at page 504). And this continued to be the law until *Barnes v. State*, *supra*, decided by the same court.

Prior to *Barnes v. State*, *supra*, American jurists equalled their English counterparts in their unconditional acceptance of the principle of *mens rea* in the criminal law. See, for example, 1 Bishop, *Criminal Law* (9th ed. 1930) 287, "There can

be no crime, large or small without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist."

For a detailed history of strict liability in the United States, see Sayre, *Public Welfare Offences* (1933), 33 Col. L. Rev. 55, 62-67.

80. Although the doctrine of strict liability in Australia is based on English antecedents. The case law of both countries, especially the former, has made important contributions to the area; generally see Howard, *Strict Responsibility*, *supra* note 14.
81. This trend is mentioned by Professor Lon Fuller in, *The Morality of Law* (New Haven: Yale University Press, 1964) 76, "It is a kind of cliché that there exists today a general trend toward strict liability. It seems, indeed, often to be assumed that this trend is carrying us remorselessly towards a future in which the concepts of fault and intent will cease to play any part in the law." For two authors of the 'remorseless' variety, see, Baker, *The Eclipse of fault liability* (1954), 40 Va. L. Rev. 273, and Stallybrass, *The Eclipse of 'mens rea'*, 52 L.Q.Rev. 60.
82. See, for example, Jacobs, *Criminal Responsibility* (London: L.S.E. research monographs 8.K.70) 98-99, and Brett and Waller, *Criminal Law, cases and text* (3rd ed. Melbourne: Butterworths, 1971) 874.
83. Howard, *Strict Responsibility* (London: Butterworths, 1963) 13.
84. A leading spokesman for the abolition of strict liability is Jerome Hall, see Hall, *General Principles of the Criminal Law*, *supra*, note 71, and, *Negligent Behaviour Should be Excluded from Penal Liability* (1963), 63 Colum. L. Rev. 632, in which Professor Hall applies the same arguments he marshals against negligence to strict liability.
85. See, for example, B. Wootton, *Social Science and Social Pathology* (London: Harven and Unwind Ltd., 1959). See, also, Levitt, *Extent and Function of the Doctrine of Mens Rea* (1923), 17 Ill. L. Rev. 578 in which the author suggests that the court only be concerned with assessing whether the act alleged has been committed, relegating all consideration of the mental element to the determination of punishment.
86. H. L. A. Hart warns of the potential danger in such an "either or" situation. In his book, *Punishment and Responsibility*, *supra*, note 4 at 38, he says, "it is important to see what has led Professor Hall and others to the conclusion that the basis of criminal responsibility must be moral culpability . . . , for latent in this position, I think, is a false dilemma. The false dilemma is that criminal liability must either be 'strict' . . . or must be based on moral culpability. On this view there is no third alternative."
87. *Read v. J. Lyons & Company Ltd.*, [1947] A.C. 156, 175.
88. See, C. Allen, *Law in the Making* (London: Oxford University Press, 1964) 450.
89. *Lee v. Bude & Torrington Junction Rly. Co.* (1871), L.R. 6 C.P. 576, 582 *per* Wills J.
90. "It would, of course, be within the power of Parliament to enact that a person who, without any guilty knowledge, had in his physical possession a package which he honestly believed to contain a harmless substance such as baking-soda but which in fact contained heroin, must on proof of such facts be convicted of a crime and sentenced to at least 6 months' imprisonment; but I would refuse to impute such an intention to Parliament unless the words of the statute were clear and admitted of no other interpretation", *per* Cartwright J. *Beaver v. R.*, *supra*, note 48, 26 C.R. 193, 206. See also Lord Kenyon in *Fowler v. Padget* (1798), *supra*, note 73, 7 T.R. 509, 514. "I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for . . ."; and Lord Goddard, C.J. in *Reynolds v. Austin & Sons Ltd.*, *supra*, note 68 (1951), K.B. 144, 148, "Unless compelled by the words of the statute so to hold, no court should give effect to a proposition which is so repugnant to all the principles of criminal law in this kingdom."
91. Williams, *Criminal Law, The General Part* (2d ed. London: Stevens, 1961) 259-60.

92. Using the dictionary search option of QUIC/LAW we were able to ascertain the number of times and the number of documents in which the following words appeared in the R.S.C. 1970.

	<i>Occurrences</i>	<i>Documents</i>
Corruptly	3	3
Intentional	3	3
Intentionally	5	5
Maliciously	2	2
Negligence	63	51
Negligent	9	9
Negligently	34	30
Recklessly	2	2
Reckless	4	2
	<hr/>	<hr/>
Total	125	107

	<i>Occurrences</i>	<i>Documents</i>
93. Fraudulent	105	82
Fraudulently	76	44
Knowing	88	75
Knowingly	274	215
Knowledge	285	245
Wilful	66	53
Wilfully	276	210
Willing	28	25
Willingly	4	3
	<hr/>	<hr/>
Total	1,202	952

94. (1861) 24 & 25 Vict. c. 100; 5 *Halsburys Statutes of England* (2nd ed., London: Butterworths, 1948) 786.

95. *Supra*, note 7.

96. See, for example Pigeon, *Rédaction et interprétation des lois, supra*, note 47. "Le *mens rea* est un élément essentiel du crime mais non d'une infraction statutaire. Si l'on veut le dire . . . au contraire dans l'infraction statutaire, si l'on veut que l'intention coupable soit un élément essentiel, si l'on veut par conséquent que l'inculpé puisse se défendre par l'absence d'intention coupable, il faut le dire. C'est la raison pour laquelle chaque fois que l'on crée une infraction statutaire, si l'on veut que l'intention coupable soit un élément essentiel il faut introduire le mot "sciemment" ou "volontairement" ou quelque chose d'analogue afin d'introduire la règle de *mens rea*".

97. *Supra*, note 39.

98. *R. v. Paris* (1953), 16 C.R. 101.

99. *R. v. Rees* [1956] S.C.R. 640, cf. notes 48, 50, 52.

100. *Supra*, note 48.

101. *Ibid.*

102. *Supra*, note 39.

103. R.S.C. 1970, c. F-27.

104. *R. v. Standard Meat Ltd.*, [1973] 6 W.W.R. 350, 13 C.C.C. (2d) 194, rev'd [1972] 4 W.W.R. 373.

105. R.S.C. 1970, c. C-23.

106. *Supra*, note 39.

107. *Supra*, note 99.

Real crimes and regulatory offences

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Introduction

Put real crimes in the Criminal Code and regulatory offences in other statutes and in regulations—so recommends the Working Paper. But is the recommendation sound?

Before deciding to classify offences according to this distinction—the distinction between real crimes and regulatory offences—we must ask four questions:

1. is the distinction logically tenable?
2. is it relevant in the context of Canadian law?
3. is it compatible with the law's existing classification of offences?
4. is it a workable and practical distinction?

II

A Tenable Distinction?

How far is the distinction between real crimes and regulatory offences a tenable distinction? It's certainly a common sense one.¹ Crimes, says common sense, are serious contraventions; all other contraventions are mere offences. We see this from the meaning of words like "crime" and "criminal". A criminal, as we ordinarily use the term, is a person guilty of a serious offence, not someone guilty (however often) of a minor violation. And a criminal record, in the ordinary citizen's eyes, is a record of convictions for serious offences, not minor violations. The ordinary citizen draws a sharp distinction.

Now this distinction reflects the well known theory that distinguishes between acts wrong in themselves (*mala in se*) and acts wrong simply because they are forbidden (*mala prohibita*). This theory owes something to Aristotle² and much to Judaeo-Christian tradition. It was championed by Blackstone³, by certain nineteenth century judges⁴ and more recently by Devlin⁵. And it has been attacked by Bentham⁶, Goodhart⁷ and more recently by Barbara Wootton⁸.

There are in fact three different methods of attack, all very Benthamite in character: (1) the difference between the two types of offences is one of degree, not one of kind; (2) no act can be demonstrated to be wrong in itself; (3) no prohibited act can be shown to be merely illegal and not wrongful.

1. *Difference of Kind or Difference of Degree?*

The first objection is dealt with in the Working Paper⁹. The difference, say, between a crime like murder and an offence like illegal parking, argues the Paper, is not just a difference of degree of harm: it isn't just that murder causes greater harm than illegal parking. There are other differences.

Fundamental and Non-Fundamental Wrongs

For one thing, real crimes are wrongs of a more fundamental kind. Murder, for instance, harms a definite individual; illegal parking hurts the community in general. Murder causes obvious, direct, immediate harm; illegal parking causes less obvious, less direct and less immediate harm. Illegal parking violates rules made for the well-being of society; murder violates rules essential to its very existence. Given man's selfishness, a motorised society without rules about parking would be less attractive than the society we have. But given man's aggressive instincts and his physical vulnerability, a society without rules against gratuitous violence would quickly cease to qualify as a society at all.

For this reason, crimes like murder contravene fundamental rules, while offences like illegal parking merely contravene non-fundamental rules. This we stress by calling the first class "real crimes" and the second "quasi-crimes", or "civil offences".

General and Non-General Wrongs

There is a further difference, though, between the two. Crimes like murder violate very general rules, offences like illegal parking highly specialized ones. The rules about violence and killing, for example, are rules about life in general—violence and the need to restrain it are central to social life: the way we park our cars is not. Rules forbidding parking in certain times and places regulate the special activity of parking and prescribe how it shall be carried on. By contrast, rules forbidding murder don't regulate the activity of killing and prescribe how this shall be carried on, but outlaw it entirely. Or, to put it another way, rules about parking regulate what we do as motorists, rules about murder regulate what we do as *human beings*. This we mark by the terms "real crimes" and "regulatory offences".

Standards and Details

There is, however, yet another difference. Rules violated by real crimes incorporate, by and large, general standards of behaviour: those violated by regulatory offences constitute technical legal rules. Crimes of violence for example are created by laws which enshrine and underline the general principle and standard that force is not to be used except on certain privileged occasions and even then not beyond what is reasonably necessary. By contrast, regulatory offences are created by laws which not only enshrine but also arbitrarily define a standard: traffic law, for instance, defines the speed limit, not as the maximum safe and prudent speed in the circumstances, but rather as some arbitrary figure—30 m.p.h. Regulatory law then does not leave the citizen to apply a general standard to the particular situation: it substitutes precise and rigid rules. This is brought out by the contrasting terms "real crimes" and "technical offences".

But, isn't the law of real crimes as full of technicalities as regulatory law?¹⁰ The law of real crimes is certainly more technical than ordinary morality. But then it has to be. For law is constantly concerned with border-line cases, where ordinary morality and common sense stop short and give no definite answer. This the law can't do. The law must always give an answer, no matter how border-line the situation. The law of murder, theft and so on, then, is technical, but only at the edges. But regulatory law is technical through and through. It doesn't build upon a moral principle and just refine the edges. Instead it replaces general moral principles (e.g. about selfishness) by detailed rules (e.g. about illegal parking).

These are the differences, then, between real crimes and regulatory offences, and they are differences which justify our regarding them as different in kind. But do real crimes in fact consist of acts intrinsically wrong? Are there such things as acts wrong in themselves?

2. *Are Any Acts Really Wrong in Themselves?*

This is the second method of attack upon the theory. The theory claims that certain acts, *mala in se*, are not only legally wrong but also morally wrong. And this, it seems, entails the existence of objective moral truth.

Yet how can moral propositions ever admit of proof? How can we prove that any act is morally wrong objectively? How can we say anything more than that we think it wrong?

One answer is, we have no need to. All the theory claims, or needs to claim, is that real crimes, besides being illegal, are also generally *considered in the society in question* to be immoral. All it claims is that the law of real crimes underlines positive or current morality, not necessarily objective morality.¹¹

A second answer, outside the scope of this particular Note, would meet the attack head-on¹². Of course, the answer runs, there are acts that are objectively wrong, and murder is a paradigm example. For murder involves serious harm to individual victims and constitutes a threat to social life itself. So if murder isn't wrong, what would "wrong" mean? "Wrongfulness" is intimately connected with "harm", "other people" and "society"; so much so that to say that an act like murder isn't wrong would be, though not self-contradictory perhaps, at least highly peculiar logically. The objection that the theory presupposes objective morality is not so fatal after all.

3. *Are Any Acts Wrong Only in a Legal Sense?*

But—and this is the force of the third attack upon the theory—are *mala prohibita* wrongful only in their illegality? Illegal parking, for example, harms the community by leading to congestion. Such harm the parking laws aim to prevent. So, violations of those laws must not be just illegal but immoral too.

True, perhaps, but this doesn't mean there can't be acts whose only wrongfulness consists in their illegality. In fact three possible classes of such acts exist: wicked laws, mistaken laws and neutral laws.

First, wicked laws. Suppose a lawmaker deliberately and knowingly enacts a wicked law¹³. Suppose for instance that this law makes it an offence to practise any religion. Here we have an act—practising a religion—which has become legally wrong but which remains morally not at all wrong. Here we could only save the contention that *mala prohibita* are morally, as well as legally, wrong by adopting a natural law view that wicked laws, like the anti-religion law, are not laws at all—*lex iniusta non est lex*. And this is a price no Benthamite would wish to pay.

Second, mistaken laws. Suppose the lawmaker enacts a law with a view to the common good, but his assessments and predictions are mistaken¹⁴. Indeed, suppose compliance with it will be the very worst thing for the society in question. Here contravention—by a person knowing better than the lawmaker—would be illegal but not necessarily immoral.

Third, neutral laws. It often happens that we have *some* rule though it doesn't at all matter which: it doesn't in the least matter which side of the road we drive on so long as we all stick to the same rule. If we adopt the rule that you must drive on the right-hand side, then anyone driving on the left is likely to cause harm, and, therefore, does a wrongful act. Its wrongfulness, however, lies, not in the act itself, but in the harm it may cause—harm resulting, not from the nature of the act itself, but from the fact that it contravenes a rule on which road users now rely. But then the rule could well be otherwise—we could have opted for the left-hand side—and then it would be wrong to drive on the right, and right to drive on the left. Absent the rules, there's nothing wrong with driving on either side. Absent the legal rules about homicide, however, murder is still wrong.

There can be, therefore, acts which are illegal but not intrinsically immoral. And yet the opposite view has point: it recognizes that the criminal law is essentially concerned with punishment, and punishment is something imposed not because something was done, but because it *ought not* to have been done.¹⁵ Conviction and punishment condemn and stigmatize the offender and the offence. Without this notion criminal law would simply become a law levying taxes on certain activities, as revenue law levies tax on those who make an income, with no suggestion that the activity should not be followed. But this would be a very different criminal law from what we have. The criminal law we have may well contain offences which don't consist of wrongful acts at all. But this is only possible because at its centre the criminal law contains a kernel of immoral acts—acts which certainly ought not to be committed.

This kernel, says the Working Paper, is just what the Criminal Code should contain. All other offences should be contained elsewhere. In recommending this, it relies on a distinction which is not only one of common sense but one that, we conclude, is completely tenable.

A Distinction Relevant to Canadian Law?

But is it relevant to Canadian law? It is in fact a distinction *about* the law rather than a distinction *of* the law. Writers who have used it have done so, not for problem-solving, but for description and analysis. Judges who have drawn on it in deciding cases have not embodied it in a rule of common law. And legislators have pretty well ignored it: they have classified offences in many different ways, but never by reference to the distinction between real crimes and regulatory offences.

Yet this is the classification which the Working Paper recommends. It does so partly to bring the law in line with common sense, partly to make the law reflect reality. For this distinction is not only one we ordinarily make, but also one we are entitled to make—it is a real distinction, particularly in the context of Canadian law.

1. *What is a Crime?*

The fact is that Canadian law faces a problem not faced by the English law—the problem of determining what *is* a crime? This was no problem for English law or English lawyers. Wedded to the Austinian view that law is but the command of the sovereign backed up by a sanction, English lawyers were content to ask of any act: has it been prohibited by the sovereign with penal consequences¹⁶? If so, it was a crime.

In Canada it proved less easy. Here too the Austinian influence is strong, but the constitution causes complications. Such complications make it not enough in Canada to ask of any act: has it been prohibited by the sovereign? We also have to ask: has it been prohibited by the *right* sovereign? The BNA Act created several sovereigns in Canada, but only one with power to make the criminal law—the federal Parliament; the others—the provincial legislatures—have power to create offences in order (on good Austinian lines) to sanction disobedience to laws enacted under other heads of jurisdiction. Accordingly, an act prohibited by Parliament becomes a crime: an

act prohibited by a provincial legislature is a mere offence. So the answer to the question "Is this act a crime?" depends on which sovereign made the law prohibiting it.

Not only that—it also depends on something else. It also depends on whether the sovereign that made the law prohibiting it had authority to do so. We can't conclude that such and such an act is a crime merely because it has been prohibited by the sovereign with authority to make the criminal law. That sovereign may be legislating outside the scope of its authority. In that case an act prohibited by Parliament might turn out not to be a crime at all: it might be an act falling outside the scope of the criminal law. Conversely an act prohibited by a Province might turn out not to be an offence at all: it might be an act falling within the scope of the criminal law and therefore outside provincial jurisdiction.

2. *Criminal Law and Penal Law*

This highlights a distinction obscured in English law—the distinction between criminal law and what we here term "penal" law. In English law the two are confused, since both consist of offences created by the same authority, dealt with in the same courts, and sanctioned by the same punishments. In Canada, however, we can discern three types of offence-creating laws: (1) criminal laws, made by Parliament or under its authority; (2) provincial penal laws, made by provincial legislatures to enforce their other laws; (3) and federal penal laws, made by Parliament to enforce its other (non-criminal) laws. Of these three types of laws the first creates crimes, the second and third types regulatory offences.

In practice Canadian lawyers tend to confuse categories (1) and (3), just as English lawyers tend to confuse criminal and penal laws. In fact federal offences such as those found in the Weights and Measures Act and Regulations can be regarded either as criminal offences created by virtue of the criminal lawmaking power¹⁷ or as penal offences created by virtue of Parliament's intrinsic general power to enforce laws made under its jurisdiction over Weights and Measures¹⁸.

So while the question "what is the difference between a crime and an offence?" may be an academic one for English lawyers, for Canadian lawyers it goes right to the heart of constitutional law. Until we know the test for distinguishing crimes and criminal law, we cannot know how to tell whether Parliamentary exercise of its criminal law-making power is constitutionally authorized.

3. *The Test of Criminality*

But what is the test? In the *Board of Commerce*¹⁹ case the Privy Council held that Parliament could not make a crime out of anything it liked: it could only enact criminal laws and make new crimes "where the subject

matter is one which by its nature belongs to the domain of criminal jurisprudence".²⁰ It could, the court said, make a crime of incest but not of hoarding.

But what lies within the general domain of criminal jurisprudence? In *PATA*²¹ the Privy Council held that this was not a satisfactory test and fell back on the Austinian view: the only indication of an act's criminality, they said, was its being prohibited with penal consequences²². This view, however, quite ignores provincial prohibitory powers. What is more, it quite ignores the fundamental problem of federalism—maintaining the balance of power between the central and provincial authorities: if federal criminal lawmaking power were deemed unlimited it could be used to encroach on heads of provincial jurisdiction²³.

A better test than either the nature and substance test of *Commerce*²⁴ or the legalistic test of *PATA*²⁵ is the "Rand-Duff" test of legislative purpose. The criterion, according to this test is: "Is the prohibition enacted with a view to a public purpose which can support it as being in relation to criminal Law? Public peace, order, security, health, morality, these are the ordinary though not exclusive ends served by the law".²⁶

To apply this test, the Courts should look at the purpose which Parliament had or perceived itself as having in enacting the legislation. If Parliament was, or thought it was, legislating to guard against "acts and neglects [which], in their actual effects, physical or moral, [are] harmful to some interest which it is the duty of the state to protect",²⁷ then it has validly exercised its criminal lawmaking jurisdiction. Invalid exercise results if Parliament had no genuine intention of doing this but was, under the guise of criminal law, legislating for some other purpose, e.g. to protect the butter industry.²⁸

On this view, then, one and the same act may fall within both federal and provincial jurisdiction. Take traffic laws. Road traffic is primarily a matter of "a merely local . . . Nature in the Province". As such it falls under Article 92(16). The provinces, then, have jurisdiction to make traffic laws and to create offences out of acts contrary to those laws. But though primarily a matter for the provinces, road traffic is also of wider concern. Dangerous driving is a source of such actual and potential harm as to constitute something against which Parliament should protect the citizen. A province could enact an offence-creating law for the purpose of traffic regulation: Parliament could enact a crime-creating statute for the purpose of general protection of the citizen from harm.

4. *The Concept of Crime in Canadian Law*

On this view crimes—the subject matter of the criminal law—are acts or neglects causing physical or moral harm. In short they are "real crimes". As such they should, the Working Paper says, be in the Criminal Code, admit of serious punishment, involve significant stigma, and require "real" guilt, i.e. traditional *mens rea*. All other offences, (federal or provincial) should be

excluded from the Code, admit of lesser penalties (imprisonment excluded), involve less stigma, and not necessarily require *mens rea*—for these regulatory offences lack of due diligence might be enough.

There would still be an overlap, however, between offences in the Code and those outside. First, wilful non-compliance with a court order regarding a regulatory offence—e.g. wilful non-payment of a fine—should amount to a Criminal Code offence. Second, regulatory laws may well contain detailed sections on specialized offences corresponding to (or exemplifying) general offences under the Code. For instance, the Code contains a general offence of fraud. Corresponding to this, regulatory laws may have a variety of different offences which can only be committed by persons engaging in particular professions, trades or activities, e.g. by bankers or by stockbrokers. Such offences are too serious to be less than crimes, but are too specialized to warrant inclusion in a Code of general criminal law.

One possible solution would be for regulatory laws to provide that the acts in question shall constitute fraud under the Criminal Code. At the same time the Code could provide that fraud should consist of the acts defined in the Code and of all acts deemed by regulatory laws to amount to fraud under the Code. The unity and simplicity of the criminal law could be preserved, if first the Code cross-references the relevant regulatory laws and secondly—and more important—the regulatory laws truly exemplify in particularities the general prohibition of the code.

Compatibility with the Existing Classification of Offences

The distinction, then, between real crimes and regulatory offences makes good sense, enjoys validity and has relevance for Canadian law. But how does it compare with our present way of classifying offences?

1. *Existing Classification Under Federal Criminal Law*

Offences defined by federal criminal law are classified into two categories: indictable offences and offences punishable on summary conviction. Section 27 of the Interpretation Act classifies an offence in accordance with the type of proceeding applicable to it²⁹: an indictable offence requires a prosecution by indictment, a summary offence does not. There is an exception to this rule: the Juvenile Delinquents Act defines as a delinquency any offence committed by a child.³⁰ In addition the law contains a host of hybrid offences, which may be prosecuted on indictment or by summary proceedings.³¹

2. *The Meaning of the Present Classification*

This classification into indictable and summary offences affects a whole variety of factors: severity of punishment,³² form of prosecution,³³ time limitation,³⁴ power of arrest,³⁵ right to bail,³⁶ and establishment of a criminal record.³⁷ One factor, though, which it does not necessarily affect is the seriousness of the offence.

Admittedly, in broadest outlines the indictable-summary distinction corresponds with common sense. Offences at either end of the spectrum are also poles apart in terms of seriousness. Murder, for instance, is clearly a very serious crime: vagrancy equally clearly is not.

Once we leave the ends of the spectrum, though, the distinction no longer harmonizes with common sense. Between both ends there is a wide-ranging middle ground where summary offences may be no less serious than

indictable ones. Is cruelty to animals (summary offence),³⁸ for instance, necessarily a less serious offence than mischief (indictable offence)?³⁹

To mark the degree of seriousness which he attaches to offences in this middle ground, the legislator relies, not on the indictable-summary distinction, but on something else. He relies on the punishment prescribed.

This we can see by looking at the category of indictable offences itself. Such offences we can group by reference to the maximum penalty allowed: imprisonment for life, fourteen years, ten years, five years or two years. Robbery with violence for example, we assume, the legislator considers more serious than theft of an object worth less than \$200. For robbery with violence carries a maximum penalty of life imprisonment, while theft under \$200 carries a maximum of only two years.

The same holds true when we compare indictable with summary offences. In general, summary offences carry a maximum penalty of six months' imprisonment, with a fine of not more than \$500 in addition or in substitution. In principle, then, we could assume, summary offences are less serious in the legislator's eyes than indictable offences.

In practice, though, things may be otherwise. For one thing, the law itself sometimes annexes a higher maximum penalty to a summary offence than it does to many an indictable one.⁴⁰ For another, the actual punishment received—and this surely is what really defines the seriousness of an offence—depends not just on the maximum penalty allowed by law but also on the sentencing practice and policy of the courts. In practice a person convicted of a summary offence may well receive a severer penalty than one convicted of an indictable offence.

In consequence, then, the distinction between an indictable and a summary offence says little about the seriousness of offences falling in the middle of the scale. This is due to two particular factors. First, with few exceptions, all federal offences are punishable by imprisonment, whether or not they are indictable. Second, apart from trial by jury, the differences between procedure on indictment and summary procedure are becoming blurred and have to do with purely technical matters.

3. *Existing Classification and Strict Liability*

But does the classification tell us anything about the nature of the offence—whether it is one of strict liability or not? The question has only to be asked and we can see the answer. Strict liability offences form a category not included in the legislator's classification. Nor should we be surprised at this; for strict liability has been the creature, not of the legislator, but of the courts.⁴¹

Whether or not an offence is one of strict liability, then, is something that is determined by the courts. In making this determination, though, the courts, as we have seen in *Strict Liability in Law*, consider just those factors which the existing classification in principle reflects—the nature and serious-

ness of the offence. What is more, the courts also have regard to the existing classification—the type of proceedings prescribed for the offence. And in addition they take into account the severity of the punishment prescribed.

In taking note of all these factors judges often use the expression “statutory offence”⁴² to describe a category of offences created by specific statutes, and less strongly affected by the common law presumption that *mens rea* is required. In this connection, the courts generally draw a clear distinction between offences contained in the Criminal Code and those contained elsewhere.

The fact remains, though, that this concept of the “statutory offence” contributes little to existing criminal law. In one sense, since new offences can no longer be created by common law,⁴³ all our offences are statutory. In other words, they are all enshrined in statutes rather than in customary law. Nor does the term “statutory offence” tell us whether an offence is a real crime or a mere breach of a regulation. Though generally the Criminal Code deals with crimes and specific statutes deal with regulatory offences, this is not completely so. At present there are many exceptions.

4. *Towards a New Classification*

There are then at least three different ways of classifying offences: first the procedural classification into indictable and summary offences; second the moral classification into real crimes and regulatory offences; and third the legal classification into offences requiring *mens rea* and offences of strict liability. At present all these overlap. Some indictable offences are serious, others less so; some require *mens rea*, others not. Some real crimes don't require *mens rea*; some regulatory offences do.

Yet each of the three classifications makes sense. The procedural one reflects the fact that major offences need careful procedure while minor offences can be dealt with more expeditiously. The moral classification reflects common sense and underlines distinctions considered earlier in this study. And the legal distinction into offences requiring and offences not requiring *mens rea* mirrors (though inadequately) the fact that some offences consist of deliberate harm while others consist of harm caused by negligence.

The Working Paper's recommendation is that the category of *mens rea* offences be made identical with that of real crimes, and that this latter category be made identical with that of Criminal Code offences. Conversely it recommends that the category of strict liability offences (for which a defence of due diligence would be allowed) be made identical with that of regulatory offences, and that this latter category be made identical with that of non-Criminal Code offences. Whether the first group should also be made identical with the category of indictable offences and the latter group identical with the category of summary offences is a further question, to be considered in the context of a general inquiry into the classification of offences.

Meanwhile the key distinction, according to the Working Paper, is that between real crimes and regulatory offences. This is the distinction which should lead the legislature to put an offence in the Criminal Code or elsewhere. This is the distinction which would govern whether an offence requires full *mens rea* or only negligence. This, therefore, is the prime distinction.

Is the Distinction Workable?

Yet how is the legislator to tell whether an offence is a real crime or a regulatory offence? The differences were spelled out in part one of this study. But these were differences in principle. How would a legislator proceed in practice? What assistance could he get from the courts' approach?

1. *The Regulatory Offence in the Eyes of the Courts*

How, then, do the courts define the regulatory offence? Unfortunately they don't. For, dealing as they do with specific instances rather than general trends, they have never comprehensively defined the regulatory offence. Rather, like an intuitive doctor who can't define a sick person but "knows one when he sees one", the courts have identified a number of characteristics or "symptoms" of the regulatory offence. These symptoms point towards an offence being regulatory, but aren't conclusive.

There is then no authoritative, comprehensive definition of the regulatory offence in the decided cases. One reason may simply be that it is undefinable. The regulatory offence—concerned with such matters as pollution, natural resources, consumer protection, health, and marketing—is maybe just too broad to be effectively squeezed into a hard and fast definition.

Instead, we have a situation analogous to that which faced the English Royal Commission on Income Tax⁴⁴ regarding "trade". "Trade" encompasses such a broad range of activities that it can't be defined. There are, however, certain identifiable indications or symptoms of trade, which the Commission referred to as "badges of trade". The more badges a particular transaction exhibits the more likely it is to be a trade. Similarly, there are identifiable symptoms or "badges" of the regulatory offence.

The Badges of the Regulatory Offence

What are these badges? Many have been identified by the courts⁴⁵ and by the writers.⁴⁶ They relate to four different aspects: law, conduct, harm, and penalty.

Law

The regulatory offence usually does not require proof of *mens rea*. So absence of *mens rea*, therefore, points toward an offence being regulatory.

But the regulatory nature of an offence depends on more than an absence of *mens rea*. This is clear from the approach taken by the courts in strict liability cases. It is only *after* having affirmatively answered, "is the offence regulatory?" that the courts consider "is it strict?". So, while absence of *mens rea* may be a good indication of an offence of regulatory character, it is an indication after the event. The fact that the court decided liability was strict shows that it thought the offence was regulatory. But it thought the former because it thought the latter.

Conduct

A more useful pointer is the conduct or subject matter which the law seeks to control. Taken as a whole, regulatory law deals with specialists. Its concern is not with the citizen *per se* but with the citizen as a motorist, as a trader, or as some other sort of specialist. Regulatory offences, then, are not found in the general criminal law (that is to say, in the Criminal Code) but in a variety of specialized statutes, orders and regulations.

What is more, the conduct prohibited by regulatory law is usually not considered reprehensible. One reason is that a single regulatory offence causes little or no harm. Only when the offences and their consequences are viewed aggregately does the harm become apparent. The individual who commits a regulatory offence may by himself cause no immediate threat or danger to the community. For this reason, little or no real stigma attaches to his act.

Harm

In general the kind of harm that regulatory law aims to avoid is cumulative—the result of many separate acts which when taken individually cause little or no damage.

It is as if the harm has a critical mass below which there is no damage at all. For example, one person using a phosphate detergent may not in any measurable way endanger the ecology of the neighbouring river into which his sewage flows. In fact, the small amount of increased plant life encouraged by his phosphates might be beneficial. But when many people use phosphate detergents the resulting over-abundance of plant life is definitely harmful. The acts of many create a danger where the act of one does not.

Because the harm is cumulative, many separate acts must be committed for there to be real harm. This means there must be multiple offenders. For example, the automobile of sixty years ago was a far worse polluter than its modern counterpart, yet at that time there were no vehicular pollution control laws, because there were relatively few motorists. There were not

enough potential offenders to affect the quality of the air. Today the car's ubiquity creates a sufficient menace to warrant regulation.

Because the harm is aggregate, there may be no harm or extremely little harm resulting from a single act. In law, therefore, actual harm is not essential for commission of a regulatory offence. The law which prohibits overloaded trucks, for instance, protects the nation's highways from unnecessary damage. One overloaded truck would probably not cause any perceptible damage to the road surface, but many overloaded trucks would. To establish a standard of loading to ensure protection of the roads, individuals may be penalized without causing any actual ascertainable damage. And this is true of most regulatory offences.

But, the harm involved in regulatory offences is not only cumulative and aggregate; it also tends to be collective. Breach of regulatory law rarely affects an identifiable victim. Who, for example, is victimized when a truck is overloaded; when a builder pushes mud into a remote stream;⁴⁷ or, when a food manufacturer slightly exceeds the maximum permissible percentage of polyunsaturates in margarine?⁴⁸ Clearly, the victim is not a particular individual but society itself.

In other words, the damage is collective. Road damage from overweight trucks is injurious to road transport and to taxpayers on whom falls the burden of road repairs. Muddying the waters of a remote stream may suffocate fish eggs and adversely affect an industry vital to the national economy. Excessive polyunsaturates in a particular brand of margarine alone threaten no particular consumer, but consumers generally. As was said in a case concerning such an offence,

"In recent years the medical profession has become aware of the relationship between heart disease and the level of cholesterol in the blood, and physicians have been suggesting certain food products with a view to depressing this cholesterol level. It is vitally important, therefore, that claims made on behalf of food products be scientifically and medically accurate . . . It is most important . . . to the consuming public in general, that in chemically analysing a food product such as margarine, a method be used which isolates and measures (cholesterol content)."⁴⁹

Admittedly some regulatory offences do affect identifiable victims. In such cases, it is often the "victim" who brings the offence to the attention of the authorities. But even these offences are less concerned with the aggrieved individual, than with the greater well-being of society. Nowhere is this better illustrated than in the law against misleading advertising.

The purpose of misleading advertising legislation is to "regulate certain aspects of legitimate trade and commerce in light of a new awareness of the need for additional safeguards for the consuming public".⁵⁰ The focus, then, is not just on the individual consumer but the entire consuming society and its need for fair competition. As a result, even though there is almost always a victim, "it is not incumbent upon the Crown to show that any person was

misled and the case is complete upon proof of the publication of the advertisement containing the untrue statement".⁵¹

In general, then, the harm which regulatory law prohibits is harm of a collective kind (i.e. harm to society rather than to the individual) and caused by an accumulation of isolated acts.

Penalty

Another badge of the regulatory offence is the slightness of the penalty prescribed. The lighter the penalty, the more likely the offence is a regulatory one. For in theory regulatory offences only carry light sanctions.

But how far does theory mirror practice? To answer this we looked at the sanctions prescribed for statutory offences and found a gap between the theory and reality. The data collected for *The Size of the Problem*, enabled us to analyse the sanctions provided for those offences which we characterized as "regulatory". The results were quite surprising: few of these offences (27%) are punishable only by fines, and even fewer (20%) by small fines, while almost three quarters (73%) of the regulatory offences can be punished by imprisonment.⁵² A typical example is section 42 of the Canadian Wheat Board Act,⁵³ which states, "Every person who being required to make any return or declaration under this Act or any regulation . . . is guilty of an offence and liable on summary conviction . . . to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years, or to both". Two years in prison with a five thousand dollar fine hardly corresponds to our notion of the regulatory penalty, yet it may be far more typical than the usually touted "small monetary fine".

This, of course, is not to say that individuals are presently being sent to jail for regulatory offences; only that they could be. This became very apparent in an analysis we made of several recent cases in which an offence was first characterized as being regulatory and then a fine was imposed.⁵⁴ In all such cases no one was sent to jail. But prison sentences were always possible. So our conclusion is that the claim that regulatory offences are usually punishable by light monetary penalties is untrue: what is true is that they are in general *punished* only by such penalties. The statement is descriptive, not of the sanctions allowed by statute, but rather of the sanctions actually imposed by courts. Slight penalties, then, are less the result of legislative enactment than of judicial discretion.

3. The Legislator and the Badges of the Regulatory Offence

The factors outlined above are pointers indicating that an offence is of a regulatory kind. As such they have been used extensively by courts, in order to decide whether an offence *is* regulatory. Could they help legislators decide whether an offence *shall be* regulatory? Could legislators use them equally well?

In fact they could, and better. For these criteria are better suited to legislative than judicial use. Judicial use is affected by the way the different criteria pull in different directions, so that no one can predict a court's decision—no one can foresee whether the court will hold an offence to be a crime requiring *mens rea* or a regulatory offence of strict responsibility. This lack of uncertainty, *The Size of the Problem* points out,⁵⁵ is quite intolerable in criminal law.

But how could we be any better off by letting legislators make the decision? Until the legislator decided whether an offence was to be a crime or a regulatory offence, we couldn't know which it would be. But this is only to say that till he makes a law, we can't exactly know what law he'll make. Still, this is only natural, and no problem: until he makes the law, we're not affected by it. Contrast the present situation: the legislator makes the law but leaves it to the courts to decide what sort of offence he has created. In this situation we are already affected by a law we cannot fully know and will be affected by the court's decision retroactively. Both these—uncertainty and retroactiveness—are objections against the present practice. Both would be avoided by making the legislator specify whether an offence is a crime or regulatory offence. In other words a set of criteria unsuitable for judicial use seems tailor-made for legislators.

Conclusion

In our view, therefore, the distinction suggested by the Working Paper is tenable, relevant to Canadian law, logically compatible with that law's existing classification of offences, and workable in practical terms. The same criteria as at present lead judges *ex post facto* to categorize offences as crimes or regulatory offences could serve to lead legislators to make the same categorization *ex ante*. This would, amongst other things, import more certainty into the criminal law. It would also avoid the objection of retroactiveness.

To show how the criteria would work, take an example concerned with weights and measures—the offence of selling short-weight. How is a legislator to decide whether to make this a crime or a regulatory offence? What criteria should he use?

We grouped criteria under four headings—law, conduct, harm and penalty. Of these the first must be discarded: “*does the offence require mens rea?*” can't serve to throw light on the question “*shall the offence be a crime and shall it require mens rea?*” The second criterion is more useful: are we legislating against deliberate (or reckless) short-weight sales or only against negligence? Might we perhaps want to create two different offences—a crime of deliberate short-weight selling, a species of fraud, and a regulatory offence of negligent short-weight selling, where due diligence would be a good defence? The third criterion is harm: in short-weight sales the real harm is cumulative and aggregate; and this argues that the offence should be a regulatory one. Finally, the question of penalty—a matter less helpful than the second and third criteria, since these depend on facts about the offence while penalty depends on what the legislator wants to do. All the same, what he wants to do will be affected by the general popular view about selling short-weight—about the stigma it involves. If people regard it generally as pretty reprehensible and the legislator thinks the same, this will lead him to categorise it as a crime and prescribe a serious punishment. By contrast, lack of

popular condemnation, if accepted by the legislator, will lead him to categorize it as a regulatory offence and simply annex a monetary penalty.

But how would these criteria apply to short-weight sales? In general we would suggest that the lack of direct harm, the lack of deliberate intent usually to be found and the lack of general stigma would lead a legislator to create in this context a regulatory offence. At the same time, the possibility of widespread deliberate fraud on the public—with all the stigma that involves—would justify a separate crime of fraudulent short-weight sale. This would in fact form a special species of fraud. As fraud it should qualify as a crime under the Code (although its particularity might require it to be defined in specific legislation and cross-referenced in the Code itself).

In sum, the example of short-weight selling shows the distinction between a crime and a regulatory offence, and points the way to how the legislator could construct a rational criminal and penal law with reference to that distinction.

NOTES

1. On the distinction generally see *The Distinction Between "Mala Prohibita" and "Mala in Se" in Criminal Law*, 30 Col. L. Rev. 74, Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965) 26-42, Fitzgerald, *Real Crimes and Quasi-Crimes*, 10 Natural L. Forum 21.
2. *Nicomachean Ethics* 1134^b.
3. 4 *Com.* 42.
4. e.g. in *Prince* (1875), L.R. 2 C.C.R. 154, [1874-80] All E.R. 881. See also *R. v. Donovan*, [1934] 2 K.B. 498 and *Re Piper*, [1946] 2 All E.R. 503.
5. Devlin, *supra*, note 1.
6. Bentham, *The Influence of Time and Place in Matters of Legislation*, 1 *Works* 193 (London, 1843).
7. See 72 L.Q. Rev. 318.
8. Barbara Wootton, *Crime and the Criminal Law* (London: Stevens, 1963) 41-46.
9. See M. G. Singer, *Moral Rules and Principles*, in *Essays in Moral Philosophy* (Melden ed. Washington: University of Washington Press, 1958), H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961) and Fitzgerald, *supra*, note 1, at 31.
10. See note 7.
11. See Fitzgerald, *supra*, note 1 at p. 35, and Fitzgerald, *Crime, Sin and Negligence*, 79 L.Q. Rev. 353.
12. On the question of moral objectivity, see, P. Foot, *Moral Arguments*, and G. E. M. Anscombe, *On Brute Facts*, in *Ethics* (J. Thomson and G. Dworkin, New York: Harper Row, 1968).
13. R. A. Wasserstrom in *H. L. A. Hart and the Doctrines of Mens Rea and Criminal Responsibility* (1967-68) 35 U. Chicago L. Rev. 92, 97 suggests that such laws are much rarer than may be thought. "When we go through the typical Criminal Code it is more difficult than Hart appears to allow to find many criminal laws with even moderately severe penalties that do not proscribe actions that those enacting the statute thought to be immoral. Murder, rape, theft, even the odious laws of the South that relate to segregation, prohibit conduct that either is or was believed to be immoral." Perhaps examples of wicked laws are to be found, not so much then in say Nazi or South African racial legislation (for which some sort of justification is always advanced), but in particular commands of the sovereign, e.g. Herod's order to massacre the Holy Innocents or Richard III's supposed order to kill the princes in the tower.
14. This sort of objection can often be raised against government policy. Why not then against laws formulated to carry out that policy? In *Chandler v. D.P.P.* [1962] 3 All E.R. 142 defendants, charged with conspiring to contravene the Official Secrets Act 1911 by entering a prohibited place (in fact an Air Force Station) for "a purpose prejudicial to the safety or interests of the State", argued that it was the British Government's policy (possession of nuclear armaments) and not their entry (planned as a demonstration against that policy) which was prejudicial to the safety and interests of the state. The courts, however, refused to embark on this debate.
15. A view advanced especially by Jerome Hall, in *General Principles of the Criminal Law* (2nd. Indianapolis: Bobbs-Merrill, 1960).

16. *Kenny's Outlines of the Criminal Law* (15th ed. Turner, Cambridge: Cambridge University Press, 1936) esp. chapters 1, 6. Williams, *The Definition of Crime* (1955), 8 C.L.P. 107 Smith and Hogan, *Criminal Law* (2nd ed. London: Butterworths, 1969) esp. chapter 2.
17. The British North America Act 1867, 30 and 31 Vict. c. 3 (U.K., s. 91 (27)).
18. *Ibid* s. 91 (17).
19. *Re the Board of Commerce Act and the Combines and Fair Prices Act, 1919* [1920] 60 S.C.R. 456, affirmed [1922] 1 A.C. 191.
20. *Ibid*, per Viscount Haldane at A.C. 198.
21. *Proprietary Articles Trade Association v. Attorney-General of Canada* [1931] A.C. 310.
22. "The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?" *ibid*, per Lord Atkin at 324.
23. "The words of head 27 read in their widest sense would enable Parliament to take notice of conduct in any field of human activity, by prohibiting acts of a given description and declaring such acts to be criminal and punishable as such. But it is obvious that the constitutional autonomy of the provinces would disappear, if it were open to the Dominion to employ its powers under head 27 for the purpose of controlling by such means the conduct of persons charged with responsibility for the working of provincial institutions. It is quite clear also that the same result would follow, if it were competent to Parliament, by the use of those powers, to prescribe and indirectly to enforce rules of conduct, to which the provincial legislatures had not given their sanction, in spheres exclusively allotted to provincial control". *Reference re Validity of the Combines Investigation Act and of s. 498 of the Criminal Code* [1929] S.C.R. 409, per Duff J. at 412.
24. *Supra*, note 4.
25. *Supra*, note 6.
26. The *Margarine Reference* case—*Reference as to the Validity of s. 5(a) of the Dairy Industry Act* [1949] S.C.R. 1, D.L.R. 433, per Rand J. at S.C.R. 50.
27. *Combines Investigation Act Reference* case, *supra*, note per Duff J. at 413.
28. As in the *Margarine Reference* case, *supra*, note 26.
29. Interpretation Act, R.S.C. 1970, c. I-23, s. 27.
30. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 3.
31. i.e. Assault, Criminal Code, R.S.C. 1970, c. C-34, s. 244; providing necessities, Criminal Code, *supra*, s. 197; traffic offences: dangerous driving, Criminal Code, *supra*, s. 233(1), leaving the scene of an accident, Criminal Code, *supra*, s. 233(2), dangerous driving, Criminal Code, *supra*, s. 233(4), and impaired driving, Criminal Code, *supra*, s. 234; and several others.
32. In principle the maximum sanction for summary offences is six months imprisonment and/or 500 dollars, Criminal Code, *supra*, s. 722. The maximum for indictable offences is usually provided for in the section creating the offence or a section providing for the sentence of a particular crime (i.e. Murder, Criminal Code, *supra*, s. 218) or a class of crimes (i.e. attempts, Criminal Code, *supra*, 421).
33. "Form of prosecution" refers to the traditional difference between procedure by indictment and summary proceedings. In the former the accusation is made in the name of the sovereign and usually allows trial by jury with very formal rules of procedure, while in the latter the information is usually laid by an individual and the trial is before a justice of the peace with simplified rules of procedure. On this subject generally, see Lagarde, *Droit pénal canadien* (Montréal: Wilson et Lafleur, 1961).

34. In general there is no time limitation for prosecution of indictable offences, while prosecution of summary offences is limited to six months (see s. 721(2)) of the Criminal Code, *supra*.
35. S. 449 and 450, Criminal Code, *supra*.
36. S. 451-458, Criminal Code, *supra*.
37. Criminal Records Act, R.S.C. 1970 (1st Supp.), c. 12, s. 4.
38. S. 402, Criminal Code, *supra*.
39. S. 387, Criminal Code, *supra*.
40. i.e. Fisheries Act, R.S.C. 1970, c. F-14.
41. *Le droit de la responsabilité stricte*.
42. Pigeon, *Interprétation et rédaction des lois*, cours donné en 1965 aux conseillers juridiques du gouvernement du Québec.
43. S. 7, Criminal Code, *supra*.
44. Gt. Brit. Parliament (1955/56) Cmd. 9474.
45. For a complete discussion of the various criteria used by the courts to determine the regulatory nature of an offence, see *Paper 3, Strict Liability in Law, supra*.
46. Most writers on criminal law have enumerated different characteristics of the regulatory offence. Of these, perhaps James E. Starrs provides the most comprehensive list: "1. Concrete damage is unnecessary, 2. Guilty intent is not required, 3. An act and an omission to act are punished, 4. The penalty is usually a lighter monetary fine, 5. Widespread public injury is or is thought to be, averted, 6. Multiple offenders are probable, 7. An act not universally or even popularly deemed reprehensible is prohibited, 8. An act by which no dangerous personality is revealed is punished." *The Regulatory Offence in Historical Perspective in Essays in Criminal Science* (Mueller ed. London, Sweet & Maxwell, 1961).
47. *R. v. McTaggart* (1973) 6 C.C.C. (2d) 258.
48. *R. v. Westminster Foods Ltd.* (1971) 5 C.C.C. (2d) 120.
49. *Ibid*, 121.
50. *R. v. J. Clark & Son Ltd.* (1972) 8 C.C.C. (2d) 322.
51. Per Kane J.A., *R. v. Imperial Tobacco Products Ltd.* (1971) 4 C.C.C. (2d) 423, page 432.
52. When the data sheets for *The Size of the Problem, supra*, at 41, were compiled more than just the presence or absence of *mens rea* words was noted (although this was all that was necessary for that study). As well, where possible, note was made of the sanction imposed. To give us some idea of the sanctions imposed in regulatory offences, we took all the offences which did not contain *mens rea* (therefore considered to be regulatory in *The Size of the Problem*) and classified them according to their sanction. In all, 154 offences were considered. This number does not correspond exactly to the total number of *non-mens rea* offences cited in *The Size of the Problem, supra*, at 52, for the following reasons. First, offences containing no sanction in their text (relying, therefore, on a general provision for the prescribed punishment) were not included. Secondly, offences which could be prosecuted either by indictment or summarily and offences which were susceptible to different sanctions on second conviction, were counted twice. The results were as follows:

1. Total number of offences	154	100%
2. Number of summary offences	132	86%
3. Number of indictable offences	22	14%
4. Offences punishable by a fine of less than 500 dollars	32	20½%

5. Offences punishable by a fine of more than 500 dollars	10	6½%
6. Offences punishable by imprisonment only	4	2½%
7. Offences punishable by a fine of less than 500 dollars, and/or imprisonment for less than 6 months	64	42%
8. Offences punishable by a fine of more than 500 dollars, and/imprisonment for more than 6 months	44	28½%
9. Offences punishable by fine only (total of 4 and 5)	42	27%
10. Offences possibly punishable by imprisonment (total of 7, 8 and 9)	112	73%

Because of the double counting and the impossibility of taking into consideration offences without penalties in their text, the figures should be treated with some caution. It is to be noted, however, that over 75% of the offences in the sample did contain provisions for sanctions, and that an analysis of the 15 general penalty sections revealed the possibility of severe punishment in those sections as well. The data, then, is descriptive of the kinds of regulatory sanctions applied in the Revised Statutes of Canada, 1970.

53. R.S.C. 1970, c. C-12.

54. The following recent cases on regulatory offences were considered; *R. v. Royal Canadian Legion* (1971) 4 C.C.C. (2d) 196, *R. v. Westminster Foods Ltd.* (1971) 5 C.C.C. (2d) 120. *R. v. Allied Towers Merchants Ltd.* [1966] 1 C.C.C. (2d) 220, *R. v. Peconi* (1970) 1 C.C.C. (2d) 214. *R. v. Consentino Ltd.* [1965] 2 O.R. 623. *R. v. Industrial Tankers Ltd.* [1968] 4 C.C.C. 81. *R. v. Standard Meat Ltd.* (1970) 7 C.C.C. (2d) 165. *R. v. G. Tamblyn Ltd.* (1972) 6 C.C.C. (2d) 471. *R. v. McTaggart* (1972) 6 C.C.C. (2d) 8, *R. v. Burkinsaw* (1973) 12 C.C.C. (2d) 479. *R. v. Paul* (1973) 12 C.C.C. (2d) 497.

Of the above cases involving individual defendants, *R. v. McTaggart* is typical. McTaggart had been charged with destroying the eggs of fish fry in a spawning ground. It was found that the offence was one of strict liability and that McTaggart was guilty. He was fined a nominal amount. However, under section 61 of the Fisheries Act, R.S.C. 1970, c. F-14, he could have received a prison term of up to one year. In all the cases cited above, although none of the defendants were sent to prison, incarceration was possible under the pertinent legislation.

55. *The Size of the Problem, supra*, at 41.

Notes and bibliography

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The Need for *Mens Rea*

Strict liability and a criminal law oriented towards punishment are morally incompatible. For strict liability sanctions punishment of persons innocent of fault, and punishing the innocent is never just. The working Paper, therefore, recommends eliminating strict liability from our criminal law.

But why not eliminate *mens rea* and punishment instead? Why not adopt a “preventive” criminal law, a “social hygiene” law, divorced from ideas of punishment, unconcerned with notions of fault and guilt, and interested only in dangerousness and its reduction? This is the sort of criminal law that Barbara Wootton would urge us to adopt.¹

It has, she argues, two advantages. It frees us from the impossible task of trying to prove *mens rea*.² And it has more prospect of success than the criminal law we have, in that it looks to the future rather than the past.³

How real, though, are these two advantages?

Proving Mens Rea

First, is *mens rea* really impossible to prove?⁴ Suppose we have to prove that the defendant meant to kill and knew the gun he fired was loaded. Why can't we prove this from what he says, what others say—in short from all the evidence? Because, it's claimed, there still remains a gap between reality and our conclusion. All we can do is infer from all the evidence that he knew or didn't know, and inferences are no guarantee of truth—we may be wrong. Only the defendant ever really knows what went on in his mind. We merely guess: he only can be sure.

But can he? Surely he can only say that, looking back, he recollects that he knew (or didn't know) the gun was loaded—that he meant (or didn't mean) to kill. In other words his memory tells him what was in his mind. But memory can play us false: it doesn't come complete with built-in

guarantee of its correctness. So those who claim that we can never know whether a defendant had *mens rea* must, by the same token, admit that he can't either.

But worse than that: the skepticism we may have about *mens rea* applies to *actus reus* too. We may think that, whatever our doubts about *mens rea*, we know at least the defendant did the *actus reus*—he fired the fatal shot. But how do we know? From all the evidence, from witnesses who saw the incident and so on? But this too is only evidence, from which we draw our inferences. These inferences too leave a gap between reality and our conclusion: the witnesses may be lying, they may have mis-remembered, they may have misperceived. What really happened we can never know.

Once let in skepticism about *mens rea* and we are on a slippery slope that ends in total skepticism about the ordinary world. For skepticism about *mens rea* is only part of a larger skepticism about the existence of other minds and about our knowledge of them. And this in turn is only part of a larger problem—the problem of our knowledge of the external world. The claim, then, that *mens rea* is impossible to prove is not a novel and special claim about our criminal law: it is only an exemplification of an old and very general philosophic problem.⁵

As such, it merits philosophic treatment, outside the scope of this particular paper. Meanwhile, in legal practice, however hard it is to prove *mens rea* and *actus reus*, we have to do the best we can.⁶ If this isn't good enough, what does the skeptic want? To be able to prove the existence of *mens rea* like we can prove propositions of logic—like we can prove the conclusion that “A is smaller than B” from the premise “B is greater than A”? But this is to demand the wrong sort of proof. The reason why we can know for sure that this conclusion follows from this premise is that, given the way we use the words involved, the whole statement “If A is smaller than B, then B is greater than A” is tautological—it's always true but tells us nothing about either A or B—about the real world. By contrast, statements like “he knew the gun was loaded” aren't tautological: they're not self-evidently true, but then they make a claim about the defendant and the gun—about reality. They do not function like tautologies. The skeptic has no right to claim they should. The claim, then, that *mens rea* is impossible to prove has only limited validity: it's only true given a very unusual meaning of “impossibility”.

Not that it isn't often very difficult to prove *mens rea*. And here maybe the Wootton argument moves on to stronger ground. The difficulty is a practical one, and on two counts. First, the cost in terms of time and effort. Second, there is the fact that the legal process in the criminal courts is far too blunt an instrument to discover the intentions, motives and state of mind of those on trial: for this we need not a criminal court and a few hours or days, but a novelist or dramatist and unlimited time. Given the limitations of our legal system, would it perhaps be better to give up a task that is too hard?

But neither argument convinces. First, the time and effort spent on *mens rea* could be saved but only at the cost of ignoring *mens rea* completely. This the “social hygiene” system wouldn’t do, because the presence or absence of *mens rea* is one significant factor by which to gauge the defendant’s dangerousness and must therefore be taken into account in determining the kind of treatment to prescribe. Accordingly, the “social hygiene” system would not eliminate but transfer inquiry about *mens rea* from the pre-conviction to the post-conviction stage—a gain in informality perhaps, but hardly one in terms of time and effort.

Secondly, although the difficulty of understanding the defendant’s whole behaviour is a real one, this is not to say we should avoid it. After all, what is our overall objective in the criminal law? To maximize convictions? Or to learn about those acts which pose problems in our social life? Without such learning we cannot know the best preventive measures. Our need, surely, is not a simpler, speedier procedure, but a more thorough, careful and deliberate inquiry—perhaps fewer trials, but trials concerning really crucial problems.

Punishment or Prevention?

The other disadvantage of the “social hygiene” system is, it is claimed, that prevention is better than punishment. The problem posed by an offender who has killed is, not that he has killed, but rather that he may kill again. The need is not for punishment by way of response, but treatment to prevent repetition.⁷ It is the future that matters, not the past.

But this has disadvantages. For one thing this approach is far too wide: it opens the door to interventions against those who have done no wrong at all. If a man who kills without *mens rea* is dangerous, what of the man who hasn’t yet done anything but whose make-up suggests anti-social tendencies? Should we not subject him too to treatment? One reason for not doing so, however, is the diminution of liberty this would entail. All legal intervention reduces individual liberty, while the limitation of such interventions to those committing offences sets bounds to this reduction. So does the doctrine of *mens rea*: a rule excluding punishment or treatment where acts are committed out of ignorance or mistake sets further limits to the interventions of the law. It thereby maximizes legal freedom: as Hart has shown,⁸ the requirement of *mens rea* as a precondition to the intervention of the criminal law enables the individual to predict and so control the intervention of the law against him. He has a choice: so long as he doesn’t deliberately, knowingly, or in some cases negligently break the law, he is free to live his life in his own fashion. But isn’t this the very purpose of the criminal law—to make this possible by protecting us against harm and injury from our fellow-men? This purpose the “social hygiene” system would abandon; in doing so it casts its net too wide.

It also sets its sights too narrowly. In concentrating on the person singled out for treatment, it overlooks the fact that criminal trial and punishment is meant to have effect not only on the defendant before the court but also on the rest of us. It aims to speak not only to the accused but to those outside the court, by way of general deterrence and by way of underlining the basic values which we hold and which the accused has chosen to disregard. How far it is successful—what effect general deterrence and underlining values has—is an empirical question difficult to answer.⁹ How far, even though successful, it is an aim we should pursue is a still more difficult question. Possibly we might be better off with a “social hygiene” system, but the case has not begun to be made out.

A final disadvantage of the “social hygiene” system is its substitution of a kind of mechanistic technique for the traditional, more personal approach. That technique regards the offender as an object to be improved: the traditional approach regards him as a person to be reasoned with, threatened, rewarded and punished but never simply as a machine to be overhauled or as a computer to be re-programmed. Suppose, though, that the traditional approach were less efficient than the treatment technique: if so, why keep it? Because, the Working Paper argues, it is more in line with the way in which we interact with one another—with what it is to be a person, to be human. For human beings are not just objects that happen to come in physical contact with each other; they are creatures whose feelings, motives and intentions vitally colour and give meaning to all they do. A criminal law that disregards this fact, however otherwise efficient it might be—and this is not established—is lacking in the most important respect of all; humanity.¹⁰

In conclusion, neither the argument based on the impossibility of proving *mens rea* nor that based on the superiority of preventive treatment is made out. Imperfect as it is, the traditional type of criminal law seems preferable. And this entails retention of the doctrine of *mens rea*. Not this, but strict liability, must be eliminated.

Patrick J. Fitzgerald

Negligence

In recommending that strict liability be replaced by negligence in regulatory offences, the Working Paper does not deal with all the problems raised by negligence itself. First, what is negligence? To some it is simply inadvertence, to others, simply failure to take due care. Some see deliberate failure to take care as recklessness; others see a difference between the two. Next, what part does negligence play in criminal law? Some see it as a purely civil concept with no place within traditional criminal law; others contend that, whatever the theory, negligence creeps in in practice, in assessing the accused's defence—e.g. was his mistake reasonable?

Thirdly, is there any justification for grounding criminal liability on negligence? Again, opinion is divided: some would contend that criminal law and punishment should stay clear of negligence; others see no reason why negligence should be confined to the civil law.

These difficult questions clearly lie outside the present Working Paper. The meaning of negligence, the part it plays in criminal law, and the extent to which it differs from recklessness are questions needing special treatment in a full inquiry into the mental element in crime. They are largely irrelevant, however, to the present recommendation that regulatory offences should admit of a defence of due diligence.

Not so irrelevant is the question of justifying the punishment of negligence. This issue, however, we avoid. All that need be said here is that however objectionable this may be, it is at least less objectionable than strict liability. The policy question, then, can in this context be side-stepped.

One problem, though, which cannot be side-stepped, is whether liability should be objective or subjective. Here the difficulty is that neither type of liability seems wholly right. Objective liability seems unjust, subjective liability impolitic.

Suppose, for example, the defendant is charged with using an unjust or false weighing-machine in trade. In present law his liability is strict: once

let the scales go out of true and he commits the offence. The recommendation would alter that: we know that scales can go out of true, and so the defendant would be acquitted if he could establish that he exercised due diligence to ensure that the scales were still true. Let us hypothesise that due diligence, as recognized by the trade, by the Weights and Measures inspectorate and by the Courts, requires simply a monthly examination of the scales. Under the recommendation, then, a defendant using untrue scales would, other things being equal, be acquitted if he made the monthly check, convicted if he did not.

Yet now suppose his failure to make the monthly check arises out of some circumstance beyond his control. For example, on the day he makes the check he is suddenly taken ill and has no time even to tell someone else to make it. In such a situation the unjust scales are still being used in trade (if the store stays open) and the defendant has not exercised due diligence. All the same, justice would argue that he should not be criminally liable: the reason why he did not take due care was that he could not. In short, he is not at fault. And if the argument against strict liability is that it is unjust to punish people not at fault, the same holds good regarding objective negligence. It is not fair to expect the impossible.

Nor would the law expect this if it merely requires that the defendant must take as much care as would a reasonable man in the defendant's position. In the above example a reasonable man, struck down suddenly with illness, could have done no more than did the defendant. The defendant, therefore, did not fail to live up to the standard of the reasonable man.

But how far can we go along this road? How far, for purposes of assessing the defendant's conduct by reference to the reasonable man, can we put the latter into the defendant's shoes? Suppose, for example, the defendant fails to check his scales, not because of some sudden illness, but because he cannot see to read the markings on the scales. Can we in all fairness expect the same from him as from one less handicapped? Of course not, but we can demand that those unfortunate enough to suffer from such defects take reasonable steps to ensure that they do not result in actual or potential harm to others.

In some cases, alternative arrangements can be made: the merchant can in fairness be required to hire a man to examine the scales which he himself cannot see; and only in exceptional circumstances, where for some reason this proves unexpectedly impossible, might such a merchant be exonerated. In other cases prudence may dictate complete abstention on account of the defendant's defect from the activity in question: to take an extreme case, a blind man could never, through no fault of his own, take the precautions required by safety, and should therefore never drive at all. In both these types of cases, then, though in one sense there is no negligence because the defendant cannot take the care a reasonable man would take, in another sense there is negligence if he nevertheless knowingly persists, despite his defect, in an activity requiring more care than he can take.

In some cases, however, we can't say this: we can't say that it is negligent for a handicapped person to persist in an activity where a reasonable man would take more care than he can. For all activities require some care, and this would debar the handicapped from doing anything at all. A person may be required not to drive, but cannot be required not even to walk. That solution would demand too much.¹¹ As H. L. A. Hart contends,¹² before a person is found guilty of a crime of negligence we ought to satisfy ourselves not only that he failed to reach the standard of the reasonable man but also that he had the capacity to reach that standard.

All the same, the handicapped must recognize their limitations, make allowances for them and perhaps make other arrangements. But what if the defendant cannot realize his need to make such arrangements? Suppose he suffers from a defect of intellect: suppose he is too stupid to take the necessary precautions (e.g. examine the scales), and too stupid even to realize that he is too stupid for the activity of trading? Here, surely, he is not at fault at all.

What about defects of character? Suppose the defendant is too lazy: suppose he is constitutionally incapable of making the effort to take due care. Or suppose he is too fearful, too forgetful, or too impetuous to act like a reasonable man or even to be able to act like a reasonable man.

In these situations we are pulled two ways. On the one hand, we feel that maybe the defendant is not at fault, is not to blame and should not be punished. On the other hand, we feel that it would be impolitic to acquit defendants on these grounds. Certainly, the law should not require the impossible, and concessions to human weakness should be made, and are—e.g. in the law regarding provocation and insanity. But make concessions to stupidity, laziness and impetuosity and the standard of the reasonable man would disintegrate. Nor is it just a question in these cases of the difficulty of proving that the defendant not only did not, but could not, exercise due care. For even if we concede that this defendant cannot take due care, we still want to insist he goes on trying. And this is part of the force behind Holmes' contention¹³ that the law should not take the defendant's personal equation into account.

So the problem is a large one. It is also a very deep and fundamental one. It is basically the problem of working out which human defects should be catered to, which should not, and what should be the rationale behind the division.

A Working Paper on strict liability clearly could not embark upon an inquiry into this. As it is, the recommendation provides a blend of objectivity and subjectivity. Of course, the standard of care will be objective, a standard set for all by regulations or by courts. Also, of course, the question whether the defendant did what is required by that standard will have to be determined objectively by inference from all the evidence. But where a defendant did not take the steps required by the standard, here subjectivity has its place. For if his failure to take these steps was due to factors beyond

his control, then, provided he has done all that he can reasonably be expected to do, he was not negligent and is not at fault. Admittedly, a literal, pedantic interpretation of a due diligence clause might lead to the conclusion that a defendant who took no steps, because he could not, has simply not exercised due diligence and has to be convicted. A more functional approach and one more in line with the spirit of the recommendation would recognize that a defendant who did all that he could—even if there was nothing he could do—has not fallen below the standard set by law and can still put forward a defence of due diligence. For he has exercised as much diligence as was due from him.

On this approach the merchant who falls suddenly ill would have a defence. But what about the merchant who is too stupid or too lazy? Are stupidity and laziness factors beyond our control? If so, would we want the law to cater to them? Such questions have to wait for treatment in the general context of a thorough study of the mental element in crime. Meanwhile, they can only be answered pragmatically, as they arise, in court.

Patrick J. Fitzgerald

Due Diligence in the Statutes

Introduction

The Working Paper recommends that all strict liability in the regulatory criminal law be replaced by negligence.¹⁴ It proposes to do this by creating a general defence of due diligence; that is, where an accused's conduct is not, as a minimum, negligent he cannot be convicted. Accordingly, motorists, merchants, bankers and bakers who conduct their affairs with due diligence (reasonable care) will be free from criminal liability.

Although this general defence will significantly alter the regulatory criminal law, due diligence *per se* is no stranger to Canadian legislation. In fact, "due diligence" appears many times in the statutes, often creating a defence. This note considers the present use of due diligence defences in the statutes of Canada.

Due Diligence in the Statutes

Due diligence appears in the statutes¹⁵ fifty-two¹⁶ times: of these, twenty-six¹⁷ create separate defences of due diligence. These defences may be divided into three categories:

1. defences in which an accused avoids liability by showing he exercised due diligence in a particular activity.
2. defences in which a corporate director avoids liability for an offence of his corporation by showing he neither consented to nor knew of the offence and exercised due diligence to prevent its commission.
3. defences in which an employer avoids liability for an offence committed by his employee by showing he neither consented to or knew of the offence and exercised due diligence to prevent its commission.

Defences in which an accused avoids liability by showing he exercised due diligence in a particular activity.

Section 22 of the Defence Production Act¹⁸ is typical of this category of due diligence.

22. It is a defence to any charge laid in respect of an offence alleged to have been committed by a person under this Act by reason of failure to make any return or to comply with any direction or order if that person establishes that he used all due diligence to make the return or comply with the direction or order and failed to do so for a reason beyond his control.

A person or corporation charged with an offence under this Act would be held liable only where he cannot demonstrate lack of negligence.

Similar defences appear in the Food and Drugs Act¹⁹ and the Proprietary and Patent Medicine Act²⁰, but with an additional condition. In both Acts a merchant who sells a prohibited or contaminated item may avoid liability by showing he could not have reasonably ascertained the defect of the merchandise, but *only* if he has previously indicated to the prosecution the name and address of the person from whom he obtained the offending item.

Due diligence defences of this first category effectively prevent conviction without evidence of, at a minimum, negligence (lack of care). Had such defences been generally applied in England in 1845, the tobacconist Woodrow²¹ would not have been convicted for his innocent possession of adulterated tobacco. Nor, had a similar offence been available in Saskatchewan in 1921, would the grocer, Ping Yuen²² have been convicted of possession of illicit spirits where it was impossible for him to ascertain the alcoholic content of the beverages he sold.

This is not to say, however, that Woodrow and Ping Yuen would have been able to respectively sell adulterated tobacco and illicit spirits. In both the Food and Drugs Act²³ and the Proprietary and Patent Medicine Act²⁴, even where an accused who did exercise reasonable care is not convicted, there are provisions²⁵ to seize the offending merchandise.

2. *Defences in which a corporate officer avoids liability for an offence of his corporation by showing he neither consented to nor knew of the offences and exercised due diligence to prevent its commission.*

An example of this category of "due diligence" defence is found in section 17 of the Aeronautics Act.²⁶ In this section paragraph (1) creates an offence of strict liability (no person shall operate a commercial air service without a licence). Paragraph (2), prescribes the penalty for violation of paragraph (1) (\$5,000 fine and/or one year in prison). And paragraph (3) extends the liability of a guilty corporation to its officers and directors, but provides them with a due diligence escape hatch:

"every . . . director or officer of the corporation is guilty of the like offence, unless he proves that the act or omission constituting the offence took place without his knowledge or consent, or *that he exercised due diligence to prevent the commission of the offence.*"

The effect of paragraph (3) is this: the corporation is guilty upon proof of the prohibited act alone, but the officers of the corporation may only be held liable if they cannot prove lack of negligence. Similar provisions appear in the Immigration Act,²⁷ the Export and Import Licence Act,²⁸ and the Defence Production Act.²⁹

Although the above due diligence clauses make the corporate officers vicariously liable for the offences of their corporations, they do provide a defence of reasonable care which is not available to the corporation or to individuals charged under the same section. As such, corporate officials may avoid liability by showing they exercised due diligence where the corporation or an individual may not. In practice, however, the offences contemplated in the above mentioned legislation would almost *always* be committed by a corporation.³⁰ The real effect, then, of this category of due diligence defence is to require proof of negligence to convict individuals within the corporation while holding the corporation itself strictly liable.

3. *Defences in which an employer avoids liability for the offence of an employee by showing he neither consented to nor knew of the offence and exercised due diligence to prevent its commission.*

Typical of this category of due diligence defence is section 21 of the Consumer Packaging and Labelling Act:³¹

21. (1) In any prosecution for an offence under this Act it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

Identical or similar defences appear in the Canadian Dairy Commission Act,³² the Export and Import Licence Act,³³ the Fresh Water Fish Marketing Act,³⁴ the Pest Control Products Act,³⁵ the Pesticide Residue Compensation Act,³⁶ the Oil and Gas Production and Conservation Act,³⁷ the Plant Quarantine Act,³⁸ the Arctic Waters Pollution Prevention Act,³⁹ the Canada Water Act,⁴⁰ the Motor Vehicle Safety Act,⁴¹ the Northern Inland Waters Act,⁴² the Radiation Emitting Devices Act,⁴³ the Saltfish Act,⁴⁴ the Textile Labelling Act,⁴⁵ the Clean Air Act,⁴⁶ the Farm Products Marketing Agencies Act,⁴⁷ and the Consumer Packaging and Labelling Act.⁴⁸

Some of these offences seem applicable to individuals only, others to individuals or corporations, and others to corporations only. But whether the accused is an individual or a company, the effect of the due diligence clause is the same: the accused is liable for an offence committed by his employee unless he shows he did not know of the offence and exercised due diligence to prevent its commission. Put another way, an employer may avoid liability by showing he exercised reasonable care.

Those clauses make the employer vicariously liable for the acts of his employee and, as such, it could be argued, they should not be considered

as defences to offences of strict liability. Vicarious and strict liability, after all, need not be the same. A statute could create a *mens rea* offence and yet impose vicarious liability; or it could create a strict liability offence without imposing vicarious liability. However, in the regulatory law, especially where the accused is a corporation or an employer, the liability imposed is often vicarious and strict. This is only natural, for how else may a corporation act than through its employees?

Pierce Fisheries Ltd,⁴⁹ for example, was convicted of possessing under-sized lobsters because some employee or employees purchased the lobsters in question. Had there been a clause similar to those mentioned above in the Fisheries Regulations,⁵⁰ Pierce Fisheries would have been convicted only if the offence could be attributed to some lack of care or neglect on its part. The effect, then, of diligence clauses of this type, is to allow employers to avoid liability where they would have otherwise been strictly liable.

Taken as a group, the legislation containing due diligence clauses of this third type manifest a number of common characteristics. First, they are all of very recent legislative origin. The patriarch of the group was enacted in 1968, and over three quarters of the rest were passed since 1970.

Second, the subject matter of the legislation falls into two areas: protection of the environment or protection of the consumer. These two areas, above all, are mentioned by administrators as needing strict liability for effective enforcement. Yet here, in fifteen separate acts intended to protect the environment or the consumer, there are due diligence clauses which allow the great majority of persons affected to avoid strict liability. And there has been no evidence (at least, we are aware of none) that the provisions of these acts are unenforceable.⁵¹

Third, in most of the Acts there are expeditious procedures to suppress the feared harm in which no question of guilt arises. A floundering ship, for example, may be destroyed as a threat to the environment⁵², and material found to be emitting dangerous radiation is promptly seized and disposed of.⁵³ These *in rem* procedures are there to suppress the apprehended danger without any inquiry into fault or liability.⁵⁴

Last, all the Acts contained a variety of liabilities: some offences which appear on their face to be strict (qualified, of course, by the applicability of the due diligence clause), other offences which clearly require *mens rea*, and some sections which provide *in rem* proceedings which involved not even the vocabulary of fault.

Conclusion

Although there is not now a general defence of due diligence in the regulatory criminal law, present use of due diligence clauses in the statutes seems to indicate that such a general provision should be successful.

Tanner Elton

Other Alternatives

Introduction

The purpose of this note is to analyse briefly some alternative solutions to the recommendations contained in the working paper, in particular that of the American Law Institute propounded in its Model Penal Code and that of the English Law Commission set out in its Working Paper No. 31 on The Mental Element of Crime.

The Model Penal Code

1. General Approach

The Model Penal Code does not provide for the total abolition of strict liability in the criminal law. Instead, it seeks to confine strict liability to a special class of offences called "violations". These are contrasted to the other classes of offences, felonies and misdemeanours, from which they differ both in the kind of culpability which they require and in the punishment which they entail.

2. The Requirement of Culpability

Criminal offences, such as felonies and misdemeanours, require a culpable mental state, which the Code defines in terms of purpose, knowledge, recklessness or negligence. This requirement of culpability does not apply to violations; for these liability may be completely absolute or strict, consisting simply in the commission of the *actus reus*, or partially strict in that knowledge may be excluded as to one or more circumstances of the *actus reus*.

3. Punishment

Unlike criminal offences, for which a sentence of imprisonment may be imposed, violations merit merely a fine, forfeiture or other civil penalty. In

addition, the Code provides that a conviction for a violation entails no disability or legal disadvantage. In providing this, the Code seeks to remove violations from the category of crimes and put them on the same footing as civil offences.

In effect, the Model Penal Code excludes strict liability for any offence carrying the possibility of imprisonment and reserves it for those offences for which only a fine, forfeiture or any other civil penalty may be imposed.

4. *Evaluation*

Although, the Model Penal Code provides a good basis for reforming regulatory laws, we have not adopted its solution for the following reasons:

- (a) the solution of the Model Penal Code is apt to achieve certainty in the Code itself; but, it is otherwise unsatisfactory as it leaves to the courts the task of determining where and how strict liability applies to offences created by statutes outside the Code. Our somewhat more ambitious objective is to provide for certainty in regulatory law.
- (b) strict liability, when limited to offences involving penalties short of imprisonment, may be less unjust, but is not wholly free of injustice.

First, the solution of the Model Penal Code is not a complete answer to the problem of certainty in legislation. In fact, it does not make the law of strict liability any more certain outside the Code. Supposing that our objective were merely to clarify the law of strict liability, the solution adopted by the Model Penal Code would still have serious shortcomings. For it defines violations by reference to the kind of liability and punishment they entail: the liability may be strict and punishment cannot consist in imprisonment. Only express designation in the Code or statutes clearly identifying which offences call for strict liability can clarify the law. In fact, this the Code does only for violations it creates; offences created by statutes other than the Code do not necessarily have such express designation but may be construed as violations by reference either to punishment of the kind of liability. Thus, the solution of the Model Penal Code leaves room for reliance by the courts on "necessary implication" in the determination of the regime applicable to each specific offence. This would apply to the vast majority of violations. Therefore, the Model Penal Code leaves the practical determination of the vast majority of potential strict liability offences entirely to judicial interpretation. Yet, the uncertainty of the law of strict liability stems precisely from the inability of the courts to achieve clear and predictable criteria in determining whether or not an offence is a strict liability offence. The adoption of the Model Penal Code solution would significantly improve the present situation, but it would not eliminate uncertainty from the regulatory law.

Our second, and perhaps more fundamental reason is that the Model Penal Code does not eliminate the injustice of strict liability. Provision that the author of a violation may be punished by a fine, forfeiture or civil penalty, merely reduces the harshness of the present doctrine of strict liability.

But, the fine imposed for a violation may be a quite serious punishment in itself. So may a forfeiture order or a civil disability. Furthermore, it is unrealistic to put fines, forfeiture and civil penalties on the same footing. The fact of the matter is that a fine is and will always be seen as a criminal punishment despite the words of caution used by the Model Penal Code in order to eliminate the stigma from a conviction for a violation. As many authors have said, one does not change the nature of a penalty or a punishment by merely changing its name. And it is our view that punishing people who are not at fault is neither just nor fair no matter what we call punishment.

The English Law Commission

1. General Scope

The position taken in the Working Paper is basically the same as that of the English Law Commission; both would eliminate strict liability from criminal law and substitute negligence with a reverse onus. The English Law Commission makes it clear that if it were not for Parliament's authority to define the requirements of culpability required in each and every offence, strict liability should be wholly eliminated from criminal law. Indeed, the English Law Commission recommends that negligence be a minimal basis for criminal liability and also that in all offences where negligence is required it may be treated as established in the absence of any evidence to the contrary. But, here the similarity of the English Law Commission's approach and that of the Law Reform Commission ends.

The recommendation of the English Law Commission aims at certainty in legislation. Indeed, it provides the draftsman and the courts with definitions and formulae concerning the mental element of criminal offences without determining any basis for differentiating strict liability offences from other offences requiring either negligence, recklessness or intention. Thus the recommendation establishes no necessary relationship between the nature and the gravity of an offence and the requirement of culpability.

Every offence created after a certain date would require a mental element consisting of intention, knowledge or recklessness on the part of the defendant in respect of the elements of the offence, unless such requirement is expressly excluded by the legislation creating the offence.

2. Negligence in the Criminal Law as seen by the English Law Commission

Under the recommendations, negligence may be called to play a major role in criminal law irrespective of the nature of the offence and the gravity

of the punishment. Where the requirement of intention, knowledge or recklessness is expressly excluded as to some or all the elements of an offence of commission, culpability consists in negligence unless of course the offence is stated to be one of strict liability. As to offences of omission, negligence would be the fault normally required, unless strict liability or a mental element is expressly or impliedly required. Although it seems clear that liability for negligence is seen as a substitute for strict liability, which would apply only in cases where Parliament would so define, in fact negligence becomes the minimal basis of criminal liability in all cases where intention, knowledge, recklessness or strict liability is not required.

3. Difference between the approach taken by the working paper and that of the English Law Commission

The English Law Commission states that the law should accord with the ordinary man's conception of what is just, that similar crimes be treated the same and that a person should not, in general, be punished for an offence which he does not know he is committing and which he is powerless to prevent. With this we agree. In fact these are the principles which are behind our proposal. But we think that the recommendations of the English Law Commission are not totally conducive to the fulfilment of these stated purposes.

First, the recommendations of the English Law Commission give the courts guidelines that will enable them to interpret legislation but fall short of providing Parliament with guidelines concerning the possible cases of strict liability. Although we appreciate the fact that Parliament is sovereign in determining the requirements of culpability, it should be feasible to restrict the application of strict liability to exceptional circumstances and confine it within restrictions concerning the type and the gravity of the punishment. This is what the working paper tries to do in drawing the distinction between real crimes and regulatory offences. This distinction should bring Parliament to pay attention to the nature of the activity it wants to prohibit or regulate and adopt the most appropriate model to deal with it.

Second, we think that liability should depend to some extent on the gravity of the offence and the seriousness of the punishment. Insofar as the recommendations of the English Law Commission do not restrict liability for negligence to certain types of offences and punishments, negligence seems to be too low a standard of liability to receive such wide an application in the criminal law.

Finally, although the recommendations as they stand would certainly achieve certainty in the law, they would not necessarily achieve fairness and equality in the law for they fail to take into account the nature of the regulatory offence and instead rely wholly on the intent of Parliament for the determination of liability. Indeed, under the recommendations Parliament may decide to impose strict liability in circumstances where liability for negligence would be more appropriate. This possibility can be reduced if

the concept of regulatory offences is worked out in such a way as to make it possible to describe the nature of the regulatory offence. We attempted to do that in suggesting a criterion for the definition of regulatory offences: the regulatory offence is usually an offence consisting more in a continuing practice than in an isolated act and is an offence of negligence.

In short, we agree with the rationales behind the recommendations of the English Law Commission but think that the recommendations themselves do not go far enough in terms of setting out the basic requirements of culpability and hinging these to the nature of offences and gravity of punishments.

Jacques Fortin

Strict Liability and the Computer

Introduction

The Criminal Law Project's research for *The Size of the Problem* was greatly aided by the legal computer service QUIC/LAW*. *The Size of the Problem* contains only as much on the computer as was necessary to understand our methodology and calculations; a more thorough exposition of our use of the computer was reserved for this note.

Strict Liability in the Federal Statutes

The first random search

Our first attempt to estimate the incidence of strict liability was a manual random sample based on the number of statutes. It was later rejected as being unrepresentative. It was conducted as follows: we knew that in the first seven volumes of the Revised Statutes of Canada, 1970, there were, excluding the Criminal Code, 359 acts. We reasoned, therefore, that a ten percent sample would give an accurate reflection of the contents of the volumes. The number six was randomly chosen and every tenth statute beginning with the sixth (6, 16, 26, etc.) was selected. Starting with The Agricultural Products and Cooperative Marketing Act and ending appropriately enough with the Winding-up Act, the sample contained thirty-six statutes. These, then, were examined for *mens rea* and strict liability offences.

Although the results of the search were interesting, they were not representative for the following reasons. First, there were roughly 8,000 pages in the seven volumes of statutes, but only 531 pages in the sample. The sample, then, although based on 10% of the number of statutes, represented only about 6.1% of the total number of pages. This disparity, of course, was due to the unequal length of the statutes (another sample including several of the larger statutes could easily represent 15% of the total pages).

* Q.L. Systems Ltd., Ottawa, Ontario.

Another more serious problem with the search was caused by a few statutes (i.e., The National Defence Act, The Fisheries Act and The Shipping Act) which contain a disproportionately large number of offences. Because of such Acts and because of the relatively small base of the sample, the disparities in the number of offences created would not be levelled off in a random selection. Inclusion or exclusion of one or several of the heavily offence weighted statutes would considerably affect the representative validity of a sample. For these reasons some other method of random selection was necessary.

Recourse to the computer

Our initial search taught us that a valid random sample had to be based upon a large number of similar and approximately equal units. Neither statutes nor pages were appropriate. If, however, the offence creating sections of the statutes were known, they could be meaningfully randomized. The key, then, was to locate all offence creating sections.

To manually search the statutes for offences would be as time consuming as a comprehensive search, thereby negating our purpose in using a random sample. To sample effectively we needed to quickly locate the great majority of offence creating sections in the statutes. To do this we used QUIC/LAW, a computerized legal service.

Why QUIC/LAW was appropriate

QUIC/LAW was ideal for our purposes for the following reasons: First, one of its data banks was the Statutes of Canada complete to January 4, 1973. Secondly, the base unit of the data base (the smallest unit upon which a search may be conducted—called a “document” in computer language) was a single legislative section. Thirdly, because the QUIC/LAW system is operated by the user personally and employs a cathode screen which allows visual scanning of the data base, we were able to experiment with and check our technique before committing ourselves to a full computer search.

Search technique for the statutes

The QUIC/LAW computer searches each unit or document of a designated data base for a word or a combination of words requested by the user. The problem then was to find a combination of words which would retrieve the maximum number of offence creating sections with a minimum of non-offence sections. To do this we carefully considered the words often common to the offence creating sections in our first sample. Various combinations of these words were tried and after many false starts the following key words were selected: conviction, contravene, contravenes, offence, penalty, violate, violates. The computer was then used to retrieve all sections (docu-

ments) which contained one or more of the key words and a title-printout (a printout of the reference to the sections, but without text) was requested.

This title-printout was ideal for sampling because it contained virtually all the offence creating sections of the statutes. As well, it consisted of a large number of similar and approximately equal units. A 10% sample was thought adequate and we proceeded as follows. The number "2" was randomly chosen and every tenth title in the printout after the second was selected. Each of these sections was manually looked up in the printed volumes of the statutes and analyzed.

Finding the information

Although our immediate objective was to calculate the number of strict liability offences in the sample, the analysis of the sections provided us with an opportunity to gather additional information about statutory offences. It was therefore decided that as well as recording the number of offences containing or not containing *mens rea* words (in accordance with the methodology described in *The Size of the Problem, supra*), we would also include on our data sheet: whether the section provided for penalty; and, if so, whether the sanction was by way of summary or indictable conviction, punishable by fine and/or imprisonment and the amount of the fine and the length of the imprisonment. This additional information later provided us with an invaluable insight into the nature of the regulatory sanction (see *Real Crimes and Regulatory Offences, supra*).

Problems with the computer sample

Obtaining a valid sample based on the computer title-printout was complicated by two problems. First, the statute data base of the computer did not contain the marginal notes. Offence sections in the statutes are almost always indicated in the margin by words such as "offence", "penalty", "fine", "prohibition", or "forfeiture". Our inability to search the marginal notes concurrently with the text caused the computer to retrieve sections on jurisdiction and procedure which were related to but not creating offences. Such sections were disregarded when compiling the data sheets.

The second problem was more serious. At the time our research was conducted the QUIC/LAW computer could not search for words in tandem; neither could it search for words which were deemed too common to index. As a result the words "no person shall"—always indicative of an offence—could not be retrieved in order or even randomly because both "know" and "shall" had not been indexed. Since a few sections contained "no person shall" without containing one of our key words, some offences were not retrieved by the computer. Although we believed that very few such offences had been missed in the printout, the validity of our figures needed to be checked. Therefore, to approximate the number of "no person shall" offences which were missed in our computer search, we proceeded as follows:

Checking "no person shall . . ."

Each section of the title-printout sample was manually looked up in the statute books. The page it was on as well as the two pages before and after (five in all) were examined for sections creating offences but not containing one of our key words. Whenever such a section was found, the number of offences and the presence or absence of *mens rea* was noted. Initially we intended to record the sanctions, but this was unnecessary as all offences containing sanctions were retrieved in the title-printout. In all, 96 offences were found.

To calculate the total number of offences not retrieved by the computer we had to take into account double counting. Our sample, it is to be remembered, was based on the computer printout, *not* on the statutes themselves. However, our check for "no person shall . . ." offences was based on the five pages of statutes which surrounded each section of the sample taken from the title-printout. Because offences tend to come in bunches, the pages examined in the check covered many offences which had been retrieved in the printout. This created a substantial overlap. First, the five pages examined for each section of the sample also included many sections which *had* been retrieved and which were included in the printout. In other words, a similar check based on a different 10% sample would reveal many of the same offences. In addition, there was the possibility (indeed, the probability) of double counting within the sample itself. Because the sections of the printout were not selected in the order they appear in the statutes but, rather, in accordance with a ranking procedure to be within two pages of one another. This would result in the same "no person shall . . ." being counted twice within the same sample. Taking all this into account, we estimated that the incidence of overlap was such that the offences located in our check represented roughly 40% of the total "no person shall . . ." offences missed in the printout. The total number missed, then, was approximately 240 ($96 \times 10 \div 4$).

Our examination of the "no person shall . . ." offences not retrieved by the computer revealed that except for a marginally larger percentage of strict liability offences, they were almost identical to the offences retrieved by the computer. This indicated that the "no person shall . . ." offences missed in the printout did not represent a particular type of offence with particular characteristics. In any event, the incidence of "no person shall . . ." offences was very small and was taken into account in our final figures.

Strict Liability in Federal Regulations

Many offences created by the Federal Government are not to be found in the statutes but rather in the numerous regulations which government ministries are empowered to make. Therefore, to give us an idea of the total number of strict liability offences in the federal sphere, it was necessary to calculate the amount of strict liability offences in the regulations.

However, whereas it would have been difficult but not entirely unpractical to manually search the statutes, a manual search of the regulations was out of the question. Unlike the well organized and relatively few statutes, the regulations were characterized by their imposing mass and lack of organization. Here again, we were fortunate that QUIC/LAW had a data base of federal regulations based on a consolidation of the Justice Department. The data base, although not completely current, was relatively recent, being complete to April 15th, 1969. It was therefore possible to continue to use the computer to search the regulations.

Computer techniques for the regulations

Our approach, however, was somewhat different than for the statutes. We found it impracticable to base our random sample on a title-printout of the computer. For four reasons: First, due to the poor organization of the regulations it would have been too difficult to manually locate each title of the sample. Secondly, the base unit or "document" of the regulations data base was not a simple legislative section (as it had been with the statutes) but an entire regulation which could vary in length from one to several hundred pages. This made randomization based on a title-printout unreliable. Thirdly, we were unable to successfully find a combination of words which, when retrieved by the computer, would include virtually all the offences in the regulations. And fourthly, "no person shall . . ." offences, rare in the statutes, were used very frequently in the regulations. We, therefore, abandoned the method used for the statutes, and proceeded as follows.

Because it was possible to view the regulations very rapidly and effectively with the computer, we decided to base our sample on the number of pages of the regulations. The sampling, then, was done entirely with the computer.

The first essential information was the total number of pages in the data base. Unfortunately, the computer was unable to directly furnish this information. We were able to learn, however, that there were approximately 19,500,000 characters in the data base, and that there were 1,920 characters per page. This gave us a rough total page count of 10,156 pages. However, many of the regulations contained blanks and half pages which would have the effect of making the above figure much smaller than it should be. We therefore decided to calculate the exact number of pages in each regulation and thereby the entire data base. This was done as follows.

Calculating the number of pages in the data base

We first formulated a combination of words which would retrieve virtually every base unit document in the data base. By looking at the dictionary function of QUIC/LAW we selected a number of words which appeared in a large number of documents. After considerable experimenting

we selected the following key words: "act", "minister", "governor", and "order". By requesting all documents containing any or all of these words we were able to retrieve 1,091 of 1,093 documents.

These documents were ranked one through 1,091 by the computer, and any particular document could be requested by typing "R=" plus the document's rank. To calculate the number of pages, then, it was necessary to find the last page of each document.

With the "locate" option of QUIC/LAW, this was relatively simple. The first document (R=1) was requested. The computer was then asked to locate a specific word in the document. The word would be entered once at the outset of the search and could be requested thereafter by pressing "L" on the key board. If the word did not appear in that document, the computer merely showed the last page thereby indicating the number of pages in the document. The entire operation would take place in two or three seconds.

The trick, then, of getting to the last page was to ask the computer to locate a word not appearing in the document. The word requested, however, had to appear somewhere in the data base to be searched. We, therefore, used the dictionary function to find a word which occurred rarely in the data base. We chose "hump-backed" which occurred only once in one document.

Using this method, we found the total number of pages in the data base to be approximately 15,000.

The random search of the regulations

The search then, was a five percent sample based upon the total number of pages in the data base. Having randomly chosen the number 3, the third page and every twentieth page thereafter was requested and scanned visually for offences, using the same criteria as for the statutes. When a section was cut in half the previous or following page as the case may be was read, but only offences appearing on the requested page were counted. The results are recorded on page 52 of *The Size of the Problem*.

General sections

There were two considerations which reflect upon the validity of these figures. First, because the sanction for breach of a regulation is most often provided for in a general section of a statute, offences appearing to be strict might require *mens rea* due to the general section of the statute. For example, an offence which states in a regulation, "no person shall drive a vehicle without a licence" would nonetheless require *mens rea* if the general section of the statute under which the regulation made pursuant to this act is subject to . . .". It was important, therefore, to estimate the incidence of general offence sections containing *mens rea* words. Examining the general sections which occurred in the random sample of the statutes, there was not one

containing *mens rea* words in respect of regulations. We concluded, therefore, that the offences in the regulations which do not contain *mens rea* words are unlikely to be affected by the general section in the statute.

Due diligence

The second consideration concerned the presence of some due diligence clauses in the regulations. A separate computer search found 17 due diligence clauses in the regulations, of which 11 were applicable to more than one offence. However, when compared to the large number of offences in the regulations, the incidence of due diligence clauses was so low as to not seriously affect the results of our search.

Tanner Elton

NOTES

1. Her thesis is never articulated in full detail, but the following passage indicates her approach.

"If the primary function of the courts is conceived as the prevention of forbidden acts, there is little cause to be disturbed by the multiplication of offences of strict liability. If the law says certain things are not to be done, it is illogical to confine this prohibition to occasions on which they are done from malice aforethought; for at least the material consequences of an action, and the reasons for prohibiting it, are the same whether it is the result of sinister malicious plotting, of negligence or sheer accident . . .

"The conclusion to which this argument leads is, I think, not that the presence or absence of the guilty mind is unimportant, but that *mens rea* has so to speak—and this is the crux of the matter—got into the wrong place . . . The question of motivation is *in the first instance* irrelevant.

"But only in the first instance. At a later stage, that is to say, after what is now known as a conviction, the presence or absence of guilty intention is all-important for its effect on the appropriate measures to be taken to prevent a recurrence of the forbidden act."

B. Wootton, *Crime and the Criminal Law* (London: Stevens, 1963) 51-53. See also *Social Science and Social Pathology* (London: Harven and Unwind, 1959) esp. chapter 8.

2. See *Crime and the Criminal Law*, *supra*, note 1, at 74. "The propositions of science are by definition subject to empirical validation; but since it is not possible to get inside another man's skin, no objective criterion which can distinguish between "he did not" and "he could not" is conceivable."
3. *Ibid*, 32-57.
4. If it is, then one conclusion is that there is no logical justification for the criminal law including crimes of attempt. See H. L. A. Hart, *Punishment and Responsibility* (Oxford, Clarendon Press, 1962) 209.
5. As pointed out by, amongst others, F. G. Jacobs, *Criminal Responsibility* (London: L.S.F. Research Monographs 8, 1971) 151 ff.
6. "It can hardly be said that the doctrine [of *mens rea*] is a practical impossibility, since it is operated daily by courts everywhere." Jacobs, *ibid*, 150.
7. "But it is equally obvious, on the other hand, that an action does not become innocuous merely because whoever performed it meant no harm. If the object of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which were due to carelessness, negligence or even accident" *Crime and the Criminal Law*, *supra*, note 1, at 52. In fact, however, even with the traditional doctrine of full *mens rea* the law does not turn a blind eye to such actions; for charges may be laid and cases prosecuted—the law may intervene at least up to a point, even though failure to prove *mens rea* results in acquittal. Moreover, the law could punish carelessness and negligence without going over completely to a doctrine of strict liability.
8. See H. L. A. Hart, *Punishment and Responsibility*, *supra*, note 4, at 181-182.
9. See Andenaes, *The General Preventive Effects of Punishments* (1966), 114 U. Pa. L. Rev. 949.
10. See H. L. A. Hart, *Punishment and Responsibility*, *supra*, at 182-183; and Ted Honderich, *Punishment, the Supposed Justifications* (New York: Penguin, 1971) 130-137.

11. On this distinction see, Seavey, *Negligence—Subjective or Objective?* (1927), 41 Harv. L. Rev. 1.
12. See, H. L. A. Hart, *Negligence, Mens Rea and Criminal Responsibility in Punishment and Responsibility* (Oxford: Clarendon Press, 1968) 136.
13. O. W. Holmes, *The Common Law* (M. Howe ed. Boston: Little, Brown, 1963), 108.
14. *The Meaning of Guilt—Strict Liability*, Working Paper 2, of the Law Reform Commission of Canada (Ottawa: Information Canada, 1974).
15. The phrase “due diligence” was located in the statutes with the act of the QUIC/LAW legal computer service. At the time the service was used the data bank on the federal statutes was complete to January 4th, 1973.
16. When not creating a defence of reasonable care, the phrase “due diligence” usually refers to the efficiency of an activity (as in, for example, s. 25(13) of The Bankruptcy Act, R.S.C. 1970, c. B-3; “Where proceedings on a petition have been staged or have not been prosecuted with *due diligence* . . .”) or to reasonable failure in meeting a deadline (as in, for example, s. 76 of The Bills of Exchange Act, R.S.C. 1970, c. B-5; “Where the drawer of a bill . . . has not time, with the exercise of due diligence, to present the bill for acceptance before . . . the day it falls due, the delay caused is . . . excused, and does not discharge the drawer and endorsors”).
17. S. 17, Aeronautics Act, R.S.C. 1970, c. A-3; s. 21(3), Canada Dairy Commission Act, R.S.C. 1970, c. C-7; s. 49, Immigration Act, R.S.C. 1970, c. I-2; s. 21(5) and 22, Defence Production Act, R.S.C. 1970, c. D-2; s. 50(3), Estate Tax Act, R.S.C. 1970, c. E-9; s. 20 and 21, Export and Import Act, R.S.C. 1970, c. E-17; s. 30(2), Fresh Water Fish Marketing Act, R.S.C. 1970, c. F-13; s. 52, Oil and Gas Production and Conservation Act, R.S.C. 1970, c. O-4; s. 10(2), Pest Control Products Act, R.S.C. 1970, c. P-10; s. 9(2), Pesticide Compensation Act, R.S.C. 1970, c. P-11; s. 10(2), Plant Quarantine Act, R.S.C. 1970, c. P-13; s. 17(1), Proprietary or Patent Medicine Act, R.S.C. 1970, c. P-25; s. 657, Canada Shipping Act, R.S.C. 1970, c. S-9; s. 20(1), Arctic Waters Pollution Prevention Act, R.S.C. 1970 (1st Supp.), c. 2; s. 31, Canada Waters Act, R.S.C. 1970 (1st Supp.), c. 5; s. 18(1), Motor Vehicle Safety Act, R.S.C. 1970 (1st Supp.), c. 26; s. 35, Northern Inland Waters Act, R.S.C. 1970 (1st Supp.), c. 28; s. 13(1), Radiation Emitting Devices Act, R.S.C. 1970 (1st Supp.), c. 34; s. 29(2), Saltfish Act, R.S.C. 1970 (1st Supp.), c. 37; s. 13(1), Textile Labelling Act, R.S.C. 1970 (1st Supp.), c. 46; s. 36, Clean Air Act, R.S.C. 1970 (1st Supp.), c. 47; s. 38(2), Farm Products Marketing Agencies Act, S.C. 1970-71-72, c. 65; s. 21(1), Consumer Packaging and Labelling Act, S.C. 1970-71-72, c. 41; s. 29(1)(b), Food and Drugs Act, R.S.C. 1970, c. F-27.
18. R.S.C. 1970, c. D-2. See also the defence provided for executors in section 50(3) of The Estate Tax Act, R.S.C. 1970, c. G-9.
19. R.S.C. 1970, c. F-27, s. 29(1)(b).
20. R.S.C. 1970, c. P-25, s. 17(1).
21. *Regina v. Woodrow* (1845), 11 M. & M. 404 (Exch. 1846), 153 E. R. 907, 15 M. & W. 404.
22. *Rex v. Ping Yuen* (1921), 14 Sask. L. R. 475, 63 D.L.R. 722, 36 C.C.C. 269, 3 W.W.R. 505.
23. *Supra*, note 6.
24. *Supra*, note 7.
25. There are several provisions in The Food and Drugs Act, *supra*, note 6, which allow the seizure and detention of goods (see, for example, sections 22(1)(d) and 37). In The Proprietary and Patent Medicine Act, *supra*, note 7, provides that, regardless of the “guilt” of the accused, “declare the medicine forfeit to the Crown” (s. 17(1)).

26. R.S.C. 1970, c. A-3.
27. R.S.C. 1970, c. I-2, s. 49.
28. R.S.C. 1970, c. E-17, s. 20.
29. R.S.C. 1970, c. D-2, s. 21(5).
30. With the probable exception of offences under The Immigration Act, *supra*.
31. S.C. 1970, c. 41, s. 21.
32. R.S.C. 1970, c. C-7, s. 21(3).
33. R.S.C. 1970, c. G-17, s. 22.
34. R.S.C. 1970, c. F-13, s. 30(2).
35. R.S.C. 1970, c. P-10, s. 10(2).
36. R.S.C. 1970, c. P-10, s. 10(2).
37. R.S.C. 1970, c. O-4, s. 52.
38. R.S.C. 1970, c. P-13, s. 13.
39. R.S.C. 1970 (1st Supp.), c. 2, s. 20(1).
40. R.S.C. 1970 (1st Supp.), c. 5, s. 31.
41. R.S.C. 1970 (1st Supp.), c. 26, s. 18(1).
42. R.S.C. 1970 (1st Supp.), c. 28, s. 35.
43. R.S.C. 1970 (1st Supp.), c. 34, s. 13(1).
44. R.S.C. 1970 (1st Supp.), c. 37, s. 29(2).
45. R.S.C. 1970 (1st Supp.), s. 13(1).
46. S.C. 1970-71-72, c. 47, s. 36.
47. S.C. 1970-71-72, c. 65, s. 38(2).
48. S.C. 1970-71-72, c. 41, s. 21(1).
49. *The Queen v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193 [1971] S.C.R. 5.
50. D.C. 1963-745, SOR/63-173, made pursuant to s. 34 of The Fisheries Act, R.S.C. 1952, c. 119.
51. What case law there is indicates that enforcement of legislation with due diligence defences is neither impossible nor too difficult. In *R. v. Sheridan*, [1973] 2 O.R. 193, for example, the accused was found guilty of a pollution offence even though he pleaded "due diligence". The accused did have the opportunity to show what precautions were taken, but the court found them to be inadequate. As such, the trial served as a sort of public announcement to the industry as to what standards of care are required.
52. See, for example, section 13(1) of The Arctic Waters Pollution Prevention Act, R.S.C. 1970 (1st Supp.), c. 2, "Where the Governor General in Council has reasonable cause to believe that a ship that is within the arctic waters and is in distress, stranded, wrecked, sunk or abandoned, is depositing waste or is likely to deposit waste in the arctic waters, he may cause the ship or any cargo or other material on board to be destroyed . . .".
53. See s. 19(1) of The Radiation Emitting Devices Act, R.S.C. 1970 (1st Supp.), c. 34.
54. As was mentioned earlier (page 3), there are also *in rem* proceedings in most due diligence defences of the first category.

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