Law Reform Commission of Canada

Commission de réforme du droit du Canada

Studies on Strict Liability

Studies in Strict Liability

Law Reform Commission
of Canada

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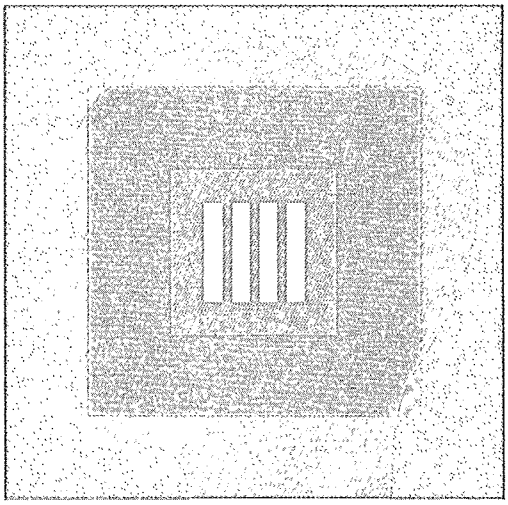

How strict do we want the criminal law to be? Strict enough to penalize anyone who breaks it, whether he knows he is breaking it or not? Or only strict enough to penalize those who break it knowingly?

This book examines these basic questions. Prepared by the Commissioners and research staff of the Law Reform Commission of Canada, it tackles the subject in a Working Paper which offers six proposals towards reform and which is supported by a series of in-depth studies by its Criminal Law Project.

In the light of those studies the Working Paper, *The Meaning of Guilt,* puts the question of strict liability into the larger context of the general question "what sort of criminal law ought we to have?" In that context it starts from the premise that the present law is unsatisfactory by reason of its lack of clarity. It then considers the various alternatives. Should the law incorporate strict liability completely and abandon *mens rea* altogether? Should it revert completely to the older doctrines that *mens rea* is always required and should it abandon strict liability? Should it remain as it is, keeping the requirement of *mens rea* for some offences and abandoning it in others? Or should the concept of strict liability be replaced by some alternative principle? In discussing these alternatives, the Working Paper sets out the Commission's basic philosophy of criminal law and guilt, though focussing in particular on the problem of strict liability.

For strict liability is a problem that has troubled lawyers, philosophers and all concerned about the criminal law since strict liability appeared. But is it a real problem? Is it a problem from a practical point of view? How many offences are there in Canada of strict liability really? And how many prosecutions are there for them? These are the questions the first study—*The Size of the Problem*—attempts to answer.

Secondly, even if the problem is one of considerable size, is there a real problem from a moral point of view? Even if the law does allow us to penalize those who are morally without fault, do the law-enforcers actually prosecute people who are morally innocent? Or do they only bring to court those who are actually at fault? Do they refrain from charging people labouring under an honest mistake? These are the questions with which the second study—*Strict Liability in Practice*—is concerned.

Thirdly, and in the light of the answers produced by the first two studies, what do we want the law to be? Do we want the law to remain as it is? Or do we want it to change? To answer these questions, we must first inquire exactly what the state of the present law is, and this is the subject of the third study—*Strict Liability in Law.*

The state of the present law on strict liability, however, must be seen against the more general background of the criminal law as a whole. One feature of that law is the distinction popularly drawn between "real crimes" and "regulatory offences". Is this a valid distinction? Is it relevant to Canadian criminal law? If so, what are its implications for a rational approach to the problem of strict liability? These questions are discussed in the fourth study—*Real Crimes and Regulatory Offences.*

Real crimes traditionally require *mens rea*—some element of personal fault. Regulatory offences in many cases do not. Here a premium is often put on administrative efficiency and law enforcement, with justice at a discount. But why not, as some have argued, extend the "regulatory offence" approach to real crimes too? How far is the doctrine of *mens rea* worth retaining? This question is examined in a note—*The Need for Mens Rea.*

But though *mens rea* may be worth retaining for real crimes, the same need not be true of regulatory offences. Still, this does not mean that such offences must be ones of strict liability. There is another possibility—they could be made offences of negligence. But would this be a gain in terms of justice? And what precisely should be meant by negligence? This is the topic of a second note—*Negligence.*

Besides, what would be the practical effect of substituting negligence for strict liability? Would law enforcement suffer? To some extent, it seems, our lawmakers think not. Increasingly since 1968 they have imported a defence of due diligence into regulatory law. A short computer-assisted survey was conducted on this question and is reported in a third note—*Due Diligence in the Statutes.*

Allowing a defence of due diligence, however, is only one alternative to strict liability. Others have been adopted or proposed by other law reformers. The most important of these are discussed in a fourth note—*Other Alternatives.*

The final note explains in detail the technique and methodology employed in the computer-assisted inquiries—*Strict Liability and the Computer.*

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I

The Law and the Citizen

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

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

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

The Criminal Law We Have

To begin with, what is the criminal law we have? In fact, what is the criminal law, and what is crime? Put simply, crime is anything against the law, but more than this; for acts against the law need not be crimes. Some, like breach of contract, are only civil wrongs—wrongs for which the

wrongdoer can be sued and made by law to compensate those injured by them. Others—crimes—are wrongs for which he may be prosecuted and punished. On the face of it then, a crime is something prohibited and punishable by law.

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

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

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

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

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

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

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

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

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

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

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

For another, it is well to learn the lesson taught by the ordinary man's distinction: "crimes" like murder, robbery and rape—though the law relating to them may descend to technical details—merely prohibit what common sense thinks wrong; "offences" like driving on the wrong side of the road

and driving above the speed limit go much further. For here the law doesn't content itself with prohibiting what all of us think wrong—driving in a dangerous manner or at a dangerous speed; it proceeds to lay down which side we must drive on and exactly how fast we may drive; and about this there is inevitably an element of arbitrariness.

What we conclude is that in our criminal law there is a broad distinction which can't be pressed too far but which rests on an underlying reality.[1] On the one hand there exists a small group of really serious crimes like murder, robbery and rape—crimes of great antiquity and just the sort of crimes we should expect to find in any criminal law. These are the crimes originally defined by judges fashioning the common law, and now located in our Criminal Code; and all of them, of course, are federal crimes.

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

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

Why Have a Criminal Law?

What, then, are these principles? What is the aim and purpose of the criminal law? In particular, is there any justification for having a criminal law at all? Or is it nothing more than a rationalization of the cynic's doctrine "might is right"? For what other right could we have for setting up a series of prohibitions and punishing disobedience to them?

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

Enormous as this problem is, in this short Working Paper we can but indicate a possible solution. We have, we would contend, a basic right to

protect ourselves from harm and in particular from the harmful acts of others. One way of getting this protection is to use the law to forbid such acts and punish those committing them. And whether we punish to deter, to reform, to lock up offenders where they can do no harm, or to denounce the wrongfulness of the act committed—this self-protection is in our view the overall aim and general purpose of the criminal law.

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

On the contrary, he is no more being used for the benefit of others than is an aggressor when repelled with force. An aggressor who attacks an innocent victim loses the right not to have force used upon himself. Likewise an offender who violates the law loses the right not to have the law intervene against himself. For criminal law is society's self-defence against the criminal.

Nor can the offender complain of being used and treated as a mere thing or object. Again he isn't: the law is treating him as a rational being with free-will and power of choice. "Keep these rules", says the law, "accept society's burdens and enjoy its benefits; or break these rules, reject society's burdens and lose its benefits: the choice is yours". Accordingly, to punish the man who breaks the rules and rejects the burdens isn't unfair. What would be unfair would be to let him reject society's burdens while letting him keep the benefits. For this would be to have it both ways—to gain an unfair advantage over the rest of society and take the law-abiding citizens "for a ride"; they would be sticking to the rules that benefit him but deriving no corresponding benefit from him in return. And this is what his punishment prevents.

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

Next, what if the law should penalize those who are in no way to blame because they are in no moral way at fault? The unfortunate English Admiral Byng, we may reflect, was put to death because of a naval defeat that was not in any way his fault—which prompted Voltaire to remark that "in that country they kill an admiral from time to time to encourage the rest". But we in our time do things which, if less drastic, are equally unjust. We used to convict people having narcotics in their possession even if they

were unaware that the thing in their possession was a drug at all, until happily in 1957 in *R.* v. *Beaver* the Supreme Court of Canada announced that possession without knowledge of the nature of the substance was no offence. Meanwhile an enormous number of offences still remains which can be committed unintentionally and unawares, and for which a person can be punished without being in any way to blame.

Yet surely criminal law and punishment are only justified provided two conditions are fulfilled: (1) the law mustn't be oppressive and forbid things that the citizen has a moral right, and should be free, to do; (2) it shouldn't penalize those who are known to be without fault because they had no reasonable chance to comply with its provisions: it shouldn't punish those who do not break the law by choice.

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

To what extent therefore should criminal liability be strict? How far should guilt depend on nothing more than the fact that outwardly the offender has done the act forbidden by law? How far should his state of mind have any relevance? This is a fundamental problem of any criminal law. And the answer to it will do more than anything else to determine the kind of criminal law we want to have.

The Question of Guilt

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

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

This is a major question in itself and one not dealt with in this Working Paper. For one thing the criminal liability of corporations raises other ques-

tions beyond that of the criteria of guilt, questions we reserve for a later Paper. For another, justice, liberty and humanity—or their absence from our law—mean more to ordinary persons than to corporations. What, then, should be the law's criteria of personal guilt?

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

The Subordinate Aims of the Criminal Law

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

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

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

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

II

Strict Liability and Present Law

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

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

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

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

But how big a problem is this in Canada today? How many strict liability offences and how many prosecutions for them are there? Our findings are as follows. First, federal laws contain about 20,000 regulatory offences and the laws of the average province about another 20,000, and of the combined total ninety per cent (90%) are offences of strict liability. Second, each year there are roughly 1,400,000 convictions[2] for strict liability offences and roughly 850,000 persons are convicted of them—a conviction a year for one in twenty-five of the population. The problem, quantitatively speaking, is enormous.

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

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

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

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

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

On this we have no doubts. The citizen has a right to know the law, and if any part of the law should be clear and certain, the criminal law should.

Since criminal law is the law that authorizes state intervention against the individual, liberty demands that the basis and the bounds of that intervention be clearly spelled out, so that we may know exactly what is forbidden and precisely when the state may intervene. Where mystery begins, observed Burke, justice ends. Mystery in the criminal law then is indefensible. So we conclude

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

III

Should Strict Liability Remain?

But should strict liability remain? As a preliminary we stress again three points made earlier: (1) our discussion is strictly confined to federal law, and our recommendations, therefore, relate only to this law, though our discussion may be of use to those concerned with provincial and municipal law; (2) this Paper confines its inquiry to the question of personal guilt; (3) we do not deal here with vicarious liability.

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

IV

Strict Liability, Real Crimes and Bringing Wrongdoers to Justice

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

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

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

Second, justice also means that like cases should be treated alike and different cases differently. This principle restricts taxation, conscription and other burdens to those best fitted to bear them, and allow benefits like the franchise to be restricted to those old enough to have some understanding of political issues. Justice discriminates on grounds that warrant discrimination.

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

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

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

V

A Different Sort of Law of Real Crimes

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

Also, with such an approach, strict liability would raise no question of irrationality or injustice. No one would any longer be convicted, stigmatized or punished: no question of punishing the innocent would arise. Indeed there could even be a marginal gain in the terms of justice from one standpoint—the standpoint of the victim of the harmful act. For the harm to the victim remains the same whatever the "offender's" state of mind: a man run over on purpose and a man run over by accident suffer equal pain, and the approach of concentrating on the harm itself and the need to prevent it would authorize intervention in either case against the car driver for diagnosis, prognosis and preventive treatment. A further gain, though not in terms of justice but of expediency, would be the lack of need to prove *means rea,* potentially one of the heaviest burdens in a criminal trial. Another would be an increased ability to deal with potential harm: a man bent on killing is at least as dangerous as a man who has already killed—why wait till he kills before we apprehend him? It's sometimes said that in the common law of tort a dog is entitled to his first bite. But surely none will say that a murderer is entitled to his first corpse.

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

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

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

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

Still more objectionable is the underlying attitude of the new approach—its attitude towards persons and the way to treat them. How different from that of the older theological approach! That approach at least pays the accused the compliment of regarding him as a person with a person's rights and duties, responsibilities and obligations: it tries to get him to mend his ways and live up to his obligations by reasoning, persuasion and even threats, but never pure compulsion. Its method is to announce by law what is forbidden, to lay down penalties for doing it and to give each man his choice. Then if anyone deliberately breaks the law, his trial and punishment show the law means business.

Contrast the new scientific approach. This would treat the offender not as someone responsible for his actions and someone to be reasoned

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

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

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

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

VI

Strict Liability, Deterrence and the Regulatory Offence

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

(a) *Regulatory Offences, Strict Liability and Inhumanity*

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

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

(b) *Regulatory Offences, Strict Liability and Liberty*

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

for example, and you risk paying a penalty for its adulteration even where you couldn't reasonably have known the food had anything wrong with it. This is simply to reduce the extent to which individuals can predict and avoid the intervention of the criminal law.

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

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

(c) *Regulatory Offences, Strict Liability and Justice*

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

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

But is it unjust? In one sense maybe not; at least not in the way it would be unjust in real crimes where bringing wrongdoers to justice is the aim. For there strict liability would expose a man to condemnation, stigma, shame and punishment which, by reason of his lack of fault, are not his due. In regulatory offences, however, condemnation, stigma, shame and punishment (in the full sense of a penalty deserved by the accused) are out of court. The penalty is not so much a punishment as a disincentive, so we can't object that defendants are receiving blame or punishment beyond their due. In theory then, no question should arise of imposing unfair or unjust burdens.

Unfortunately, it does in practice. Law, like life, is rarely so clear-cut as theorists like to think. For one thing, conviction for regulatory offences may carry a stigma. For another, penalties may be looked upon as more than simple disincentives; they may be thought of as deserved. What is more,

the possible penalty allowed by law is frequently imprisonment. According to our estimates it is a legal possibility in over 70% of strict liability offences. So, not surprisingly, the social consequences of conviction and punishment for such offences can be quite severe, including loss of job and loss of reputation. Kept out in theory, injustice in reality creeps back in.

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

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

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

But doesn't strict liability produce a rough-and-ready justice? After all, there is a great deal of hit-and-miss and a great deal of luck in the criminal law, and the few times you are convicted but not at fault make up for the many times you are at fault but not found out. But this is unconvincing. To say one injustice cancels out another looks suspiciously like saying two wrongs make a right. Besides, is the person convicted without fault making up for all the times when *he* is at fault but undetected? Or is he making up for all the times when *others* are? Justice as rough and ready as this is no justice at all—it is far too random and too arbitrary.

But randomness, it is argued, is the very justification for strict liability in regulatory offences. Businessmen, motorists, traders and so on must take safety precautions, and law enforcers must make sure they take them. So fines imposed on those convicted of regulatory offences are part of the cost of regulating the activity—a cost which is randomly imposed. But this won't wash. For one thing it isn't really randomly imposed: if randomness is what we really want, statisticians could produce a better random sample than does

the mere hit and miss of the law enforcer. For another, if the cost is generated by all, justice demands that the cost be shared by all. Random imposition of the cost is only justifiable if there is no other way of apportioning it, and if the total population from which the sample of cost-bearers is taken agrees with the method of selection. Since neither condition is fulfilled, the argument based on randomness won't do. Random punishment can't be really just.

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

Yes, surely, if there is a better and a juster way to teach. Slapping a toddler is justified if that is the only or best way to teach him not to play with fire. But there are different ways of teaching; and the older and more sensible the pupil, the less appropriate the slap on the wrist. Bentham once complained that the way our judges used to make the law by creating new rules when cases came before them was like the way a man might teach his dog—waiting till the dog did something the man didn't want and then hitting him. Rational adults, he contended—and he was surely right—deserved better: they could, and should, be told the rules beforehand and only punished for breaking them afterwards when they know the rules and have a chance of keeping them. This chance of keeping them, however, is just what strict liability excludes, for it results in penalizing those who may have had no opportunity to conform their actions to the requirements of the law. Yet is there no better alternative method of instruction? It's never proved there isn't, so the argument from education hardly holds.

But don't laws creating regulatory offences serve to promote high standards of care and to encourage traders and others to avoid mistakes and errors? And isn't this necessary because mistakes and errors, however innocent, can cause harm to others? For such harm, surely, the person responsible is the person who has caused it, the person who has made the mistake. So how can strict liability be all that unjust?

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

and exposed others to the risk—no one has to keep a dangerous animal. So strict liability can be just.

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

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

In fact, what strict liability in criminal law provides is that anyone entering on an activity likely to result in harm to others will pursue that activity at his peril. Again, this makes good sense in civil law. Keep a zoo, manufacture fireworks and so forth and you know that people may get injured as a result. Therefore, it is only right that you should have to compensate them if they do: this is a fair risk of the trade.

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

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

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

VII

Strict Liability in Practice and the Regulatory Offence

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

(a) *Unjust in Practice?*

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

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

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

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

Another answer with more force is this: in practice lack of fault due to reasonable mistake is only a defence if the law enforcer believes the offender made a reasonable mistake. So lack of fault does not mean lack of prosecution. Only belief in lack of fault could mean this. Meanwhile, how many convictions may result from administrative refusal to accept the offenders' honest pleas of reasonable mistake?

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

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

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

(b) *Justifiable in Practice?*

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

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

For one thing, justice isn't the sole consideration. In criminal law, justice is never sought to the complete exclusion of efficiency. Conversely, efficiency never absolutely precludes considerations of what is fair and just. In fact, from the most serious real crimes down to the most minor offences, fairness and efficiency are weighed against each other and different balances are struck. In serious crimes like murder, rape and theft, fairness far outweighs efficiency: here our paramount concern is to avoid convicting the accused unjustly—a concern reflected in the placing of the burden of proof squarely on the prosecution, and the requirement of *mens rea* conviction. In minor offences like illegal parking efficiency outweighs fairness: our main concern is to get courts through their workload with dispatch—a concern reflected in the use of streamlined procedure, the placing of the burden of proof quite often on the defence, and the lack of any requirement of personal responsibility for conviction.

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

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

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

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

(c) *Essential in Practice?*

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

Yet, is there any evidence for this? Is there any evidence that if prosecutors had to prove some kind of guilt or if absence of fault could count as a defence, law enforcement would become impossible? Administrators in departments clearly think so, but positive proof of it is never given. On the contrary, some counter-evidence exists: increasingly, since 1968, federal statutes in the regulatory sector have tended to include defences of due diligence and reasonable care, without producing any great anxiety among the law-enforcers. Yet no one has been heard to claim that these new statutes are unenforceable. Strict liability in regulatory offences, in short, has not been proved to be essential.

(d) *Justice v. Expediency*

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

Against these gains we have to weigh the cost. One cost is the injustice of convicting those who are not at fault. Another is that criminal liability without fault could well dilute the criminal law and lead to cynical

disrespect for criminal law as a whole. Hold a person guilty of a regulatory offence when he is not at fault and we may make him feel that being convicted of a real crime when he is at fault has little moral significance.

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

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

VIII

Alternatives to Strict Liability in Regulatory Offences

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

(a) *Violations*

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

(b) *An Administrative Solution*

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

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

(c) *Mens Rea*

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

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

(d) *The Nature of the Regulatory Offence*

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

Not every regulatory offence, however, is quite so clearly a continuing one. Take misleading advertising. Suppose a large department store advertises furniture and the advertisement is misleading, the store is warned about it, but shortly afterwards it advertises children's clothes and again the advertisement misleads: how far could we really say the first discrepancy shows that

the second one is deliberate or negligent? The same is true of motoring and other offences in the provincial sector: the fact that a driver failed to obey a stop sign yesterday doesn't prove that if he does the same again today, his act today is the result of negligence. What this means, then, is that the warning system, which works so well in Weights and Measures and in Food and Drugs, has far less application in some other fields.

(e) *Negligence*

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

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

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

Another reason we have heard suggested is that even a "due diligence" defence still makes it too easy for some defendants. Where large corporations are on trial, it could be all too easy to confuse the court with detail, and even in some cases, through abuse of economic power, to bring pressure on their suppliers to help them rig defences. To this we would make three replies: (1) We stress again that in this Working Paper we are concerned with personal fault and not with corporations; (2) We point out that there is a need to explore the possibility of extending the use of "third-party" provisions for cases where the defendant says he is not at fault because someone else, e.g. his supplier, was to blame. In such cases we could have the sort of provision to be found in s. 17 of the Proprietary or Patent Medicine

Act, R.S.C. 1970, c. P-25 or s. 29 of the Food and Drugs Act, R.S.C. 1970, c. F-27. This provides that where such a defence is raised, the name and identity of the third party alleged to be at fault must be given to the prosecution ten days before trial; and this allows the law enforced to proceed against the party claimed to be at fault.

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

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

Not that there is anything novel about this solution. It is the approach advocated by almost all writers on the subject.[3] It is an approach increasingly adopted in our statutes. And it is an approach that seems to work. So, we feel justified in concluding that by basing liability on negligence we lose little in terms of efficiency of law enforcement. On the other hand we gain a lot in terms of justice.

But do we? Is negligence any less unjust? And should it have a place in criminal law? Throughout the years a great doctrinal dispute has raged between those who argue that the traditional concept of *mens rea* doesn't cover negligence and those who argue that it does. This dispute we do not touch upon. Our question rather is whether negligence *should* be a ground for criminal liability.

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

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

How far a criminal law of negligence should take the defendant's "personal equation" into account is a question to be discussed outside this Working Paper. We leave the question open. For if the law adopts the defence

of due diligence, as we recommend, we can then consider later how far due diligence is to be assessed in terms of an external standard and how far in terms of the defendant's internal response to that standard. Meanwhile, we leave this problem to the courts.

Accordingly, we recommend,

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

IX

The Criminal Law We Ought To Have

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

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

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

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

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

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

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

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

Accordingly, we recommend,

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

NOTES

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

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

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

The size of the problem

P. J. Fitzgerald
T. Elton

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I

Introduction

Strict liability raises several problems. It goes against legal principle that no one is guilty without *mens rea*. It goes against moral principle that no one is to blame for a wrongful act unless he knows (or ought to know) the circumstances that make it wrongful. And it drives a wedge between the law and that ordinary morality which the law usually reinforces and underlines. In addition, offence-creating statutes and regulations so rarely specify whether *mens rea* is required, that no one can predict whether or not a court will hold that the liability they impose is strict. Who, for example, could have predicted that the Supreme Court of Canada would hold the offence of possessing lobsters less than 3 3/16″ in length to be one of strict liability?[1] In short, strict liability is at odds with legal principle, contrary to moral principle, and bedevilled with uncertainty—clearly a formidable problem.

But how formidable? Are there in fact all that many of these strict liability offences? Is there in reality but a handful of them conflicting with legal and moral tradition and causing difficulties of interpretation for the courts? Or is there, as we generally suspect, a vast number of them? Do they indeed constitute by far the majority offences known to our law?

And even if they do, what does this mean in real terms? Are all of these offences ones for which prosecutions are brought? Or are many of them dead letters, existing only on the paper on which they are printed?

II

First Inquiry

How many strict liability offences exist?[2]

Offences are contained in five different types of legislation: (1) federal statutes, (2) federal regulations, (3) provincial statutes, (4) provincial regulations and (5) municipal by-laws. Our study focuses on (1) and (2). To examine (3), (4) and (5) would be such an enormous undertaking that we have done little more than take a preliminary look at them for comparative purposes and to give some slight indication of the overall size of the problem. Our main concern is with federal law.

In Federal Law

1. Methodology: Problems:

In deciding on our methodology we considered five different questions:

What type of search should we make?

What criterion should we adopt to decide whether an offence is created?

How many offences does a section create?

How do we determine whether an offence is one of strict liability?

Should the Criminal Code be included?

The type of search:

Two problems arise here.

(a) How up to date should the search be?

If, as we suspect, there are thousands of strict liability offences, an approximate estimate will suffice. We don't need to know precisely how many there are at this moment, say, in January 1974. For the more strict liability offences there are, the less likely is it that there will be much difference

between the number existing in January 1974 and the number existing in a reasonably recent consolidation of the statutes and regulations.

This was all the more important since we decided that our search could best be done through computer. For the QUIC/LAW computer bank contains data which, on the above argument, would be sufficiently up to date. At the date of this inquiry the data bank contained the Revised Federal Statutes of 1970 and the Federal Regulations in force at April 15, 1969. These two consolidations were the basis of our search.

(b) How large a search?

Constraints of time and cost made a total search impossible. Sampling was clearly inevitable. In addition, it was particularly feasible with the help of the computer. Accordingly, we took a 10% sample of the statutes and a 5% sample of the regulations.

When is an offence created?

Usually a glance at a section will tell if it creates an offence. Sometimes, however, it won't. Contrast these three formulae:

(a) "No person shall obstruct or hinder an inspector or other officer in the carrying out of his duties or functions under this Act."[3]

(b) "Every application for registration shall contain the following particulars . . .".

(c) "The court shall hear and determine . . .".

Of these three formulae, only the first clearly creates an offence. The second lays down a procedural requirement, failure to comply with which probably results, not in criminality, but in nullity. The third imposes a duty, failure to perform which would possibly be ground for mandamus, not for prosecution.

In cases like (a) and (b) careful examination of the whole statute might well be necessary before one could be completely certain. Such an examination, however, would make a sample survey impossible. Some operational rule, therefore, had to be adopted.

The rule adopted was this. If the formula either related to procedural matters or imposed a duty on a person or body of superior status, e.g. a court, minister or government body, we concluded that it did not create an offence. Otherwise, if the formula used words apt to impose a duty generally, we concluded that it did.

But what words would these be? Obviously any section using words like "guilty", "conviction", "offence", "punishment" and certain others would *prima facie* create an offence and would need to be retrieved from the data bank. And since all such words would be indexed in the computer, all such sections could be retrieved.

But this still left sections that could not be. For QUIC/LAW operates on the principle of indexing "significant" words. It does not index common

words of frequent occurrence such as "no" and "shall". At the same time, a section could well create an offence by merely using a formula like "no person shall . . ." without using any of the less common words listed in the computer index. So these sections could not be electronically retrieved.

Instead we had to resort to a supplementary manual sample. After completing our computer sample of all offence-creating sections, we then proceeded to use this as a base and to look manually in the Revised Statutes at the two pages preceding and following each sample section retrieved by the computer. In this way we were able to estimate the number of non-retrievable offence-creating sections that we had missed.

How many offences does a section create?

Sometimes the answer is obvious. For example s. 109 of the National Defence Act,[4] reads:

> "Every person who, when examined on oath or solemn affirmation before a service tribunal . . . knowingly gives false evidence, is guilty of an offence . . .".

Clearly this creates one single offence.

Often, however, the number created is far less clear. Consider s. 38 of the Animal Contagious Diseases Act.[5] This reads:

> "Every person who sells, or disposes of, or puts off, or offers or exposes for sale, or attempts to dispose of or put off any animal infected with or suffering from an infectious or contagious disease, or the meat, skin, hide, horns, hoofs or other parts of an animal infected with or suffering from any infectious or contagious disease at the time of its death, whether such person is the owner of the animal, or of such meat, skin, hide, horns, hoofs or other parts of such an animal, or not, shall, for every such offence, incur a penalty. . .".

There we have seven different ways of handling seven different objects contaminated in two different ways. Are there seven offences? Forty-nine? Or ninety-eight?

A complete answer would involve discussion of the law regarding duplicity. What we needed, however, was an operational rule to provide a quick but reasonably satisfactory solution. To be satisfactory, it would have to take into account that such a section obviously creates more than one offence and yet at the same time avoid arriving at an excessively bloated result. For example it would clearly be excessive to regard "contagious" and "infectious" as different enough in meaning to justify doubling the number of offences created by s. 38.

Our solution was in general to regard only the verbs in the formula as creating separate offences. S. 38, therefore, we would reckon, created only seven offences.

Another problem arises when a section requires a person to do several different things. Consider the following example:

> "Every person in charge of a coal mine shall at the end of each month send to the department of mines and the local mines office,
>
> (*a*) a report containing:
>
> (i) the work done,
>
> (ii) the wages paid, and
>
> (iii) the profit taken, and.
>
> (*b*) a statement of the purchases and sale of
>
> (i) land,
>
> (ii) building, and
>
> (iii) equipment."

This section could be broken down in several ways:

1. The proprietor could fail to send the report to the department or the local office,
2. He could fail to send the report or the statement,
3. The report could be defective in 3 ways,
4. The statement could be defective in 2 ways, and in each way regarding 3 different items.

In all it could be argued that the section contains 18 offences. Here again, we adopted a more moderate approach. Our practice was to count such a section as creating four offences—two things to be sent to two different bodies.

A third problem occurred when the section did not create a specific offence, but rather one of general application to that statute. We considered not including these sections as creating offences, insofar as they were incomplete in themselves. They did, however, indicate when breach of the duties required of a statute would be considered punishable, and specified what the punishment would be. We decided that such general sections would be counted as creating a single offence.

When is an offence one of strict liability?

To decide whether an offence is one of strict liability is often difficult. The statute or regulation may not specify, so that no answer can be gleaned from the words of the section. Instead, one has to look at a variety of things—the general policy of the statute, the mischief prohibited, the type of proceedings, the stigma, the penalty, and so on. To do this, in every case, however, would make our task impossible. We were compelled to devise a simple formula that could apply simply to the words of the section.

Our method was this. First we counted as *mens rea* offences all those where the creating section used words clearly requiring *mens rea,* e.g. "intentionally" and "knowingly". Secondly we counted as *mens rea* offences all those where the creating section used words indicating (but not necessarily entailing) *mens rea,* e.g. "allow" and "permit". In other words, when in doubt, we counted an offence as a *mens rea* one. The remainder we counted as offences of strict liability. And though this may mean that our estimate of *mens rea* offences is too high, it also means that our estimate of strict liability offences is conservative. We can say, therefore, with some confidence that the number of such offences is at least the number we arrived at.

However, our total estimated number of strict liability offences is not just the residue of offences remaining when all the *mens rea* and possibly *mens rea* offences are subtracted from the total. We also subtracted what we termed "general" offences. Suppose a section says:

> "anyone who contravenes any regulation made under this Act commits an offence".

This alone contains no indication whether the offence will be strict or not. Only a look at each regulation could answer this question. Our procedure, then, was to list all such general sections in a category of their own, and to subtract these too from the total of offences.

So our total of strict liability offences is calculated according to the following formula:

> The number of strict liability offences is the number left after subtracting all *mens rea* and all "general" offences.

Should the Criminal Code be included?

We decided not to include the Criminal Code in our search. We assumed that all offences created by the Code required some form of mental element. It was, therefore, not necessary when calculating the number of strict liability offences in federal statutes. However, our figures comparing *mens rea* and strict liability offences should be read as excluding the Criminal Code.

2. Federal Statutes: Procedure:

Having answered these preliminary questions, we then turned to the statutes. To begin with we took a rough sample without using the computer. This we followed up with a more complete sample based on QUIC/LAW.

First Sample:

For the first sample we took simply a random sample of Statutes from the Revised Statutes 1970. In the seven volumes of Revised Statutes there are, excluding the Criminal Code, 359 Acts. As a 10% sample, therefore, we took 36 randomly chosen statutes.

The results of this sample were as follows:

Number of offence creating sections	70	
Number of offences	172	
Number of *mens rea* offences	91	
Number of general offences	3	
Number of offences left (i.e. strict liability offences)	78	(172-94, i.e. app. 42%)

Though interesting, however, the results were not truly representative. For one thing, there are 7,992 pages in the seven volumes, whereas there were only 531 pages in the sample. Our 10% sample by statute, therefore, represented a mere 6.6% sample by pages. The reason for this is the variation in size of statutes. The Income Tax Act[6], for instance, contains 424 pages, whereas the Agricultural and Rural Development Act[6] runs to only 4 pages. Secondly, statutes differ enormously in the number of offences. Some, like the Shipping Act[6], contain a large number of offences; others, like the Overseas Telecommunication Corporation Act[6] contain hardly any. And no sampling by statutes could take this discrepancy into account.

Comparison with our second sample revealed, however, that though it had missed over half the offences in existence, nevertheless the percentage of strict liability offences was roughly the same (42% as compared to 44% in the second sample).

Second Sample:

Next, therefore, we turned to the computer and took a sample based on a different unit. We first selected out all offence-creating sections, by calling for all sections containing offence-creating words indexed in the computer, e.g. "conviction", "offence" etc. This gave us a total of 1,629 sections.

Of these we took a 10% sample to determine how many were offences of strict liability. The results were as follows:

Number of offence creating sections	164	
Number of offences	334	
Number of *mens rea* offences	171	
Number of general offences	16	
Number of strict liability offences	147	(334-187, i.e. app. 44%)

Next we had to remedy the fact that "no person shall" type sections had not been retrieved. Using the above sample as a base, we looked manually at the two pages preceding and following each sample section. On the basis of this manual sample (allowing for the problem of overlapping) we estimated that in the Revised Statutes as a whole there were 85 such sections in all, creating 242 offences, 52% of which are strict liability.

Multiplying the figures in paragraph 34 by ten, and adding the figures in paragraph 35, we conclude:

Total number of offences in federal statutes (Criminal Code excluded).	3,340	+ 242	= 3,582	= 100%
Number of *mens rea* offences	1,710	+ 125	= 1,835	= 52%
Number of strict liability offences..	1,470	+ 117	= 1,587	= 44%

3. Federal Regulations: Procedure:

Here our search was of the QUIC/LAW data base which contains all federal regulations in force in April 1969. The regulations, however, are not so well organized for our purposes as the statutes. Accordingly we adopted a different approach.

Our first step was to find the number of "computer pages" in the data base. This we found to be 15,050. Next we conducted a random 5% search of these pages using the computer terminal screen. Our results from this sample were as follows:

Number of offence-creating sections	501	
Number of offences	973	
Number of *mens rea* offences	32	(4%)
Number of strict liability offences	941	(96%)

These results we re-assessed in view of the fact that an offence might seem to be one of strict liability but not really be so if there was a *general* section (in the statute or in the regulations themselves) stating that anyone who *wilfully* contravened the regulations commits an offence. However, we found only 16 *general* sections in our random sample of statutes and none containing *mens rea* words. We concluded, therefore, that our results could stand.

From our sample we extrapolated to obtain the following estimate:

Number of offences in all	19,460	
Number of strict liability offences in all	18,820	(96%)

4. Findings: Federal Law:

Our overall findings, therefore, were as follows:—

Total number of offences—statutes	3,582	
regulations	19,460	
Total	23,042	
Offences of strict liability—statutes	1,587	
regulations	18,820	
Total	20,407	

Our conclusion, then, is that there are at least 20,407 offences of strict liability under federal law.

In Provincial Law

We next looked briefly at Provincial Statutes and Regulations to see if any rough estimate could be formed. What we needed here was a set of Provincial Statutes and a set of Provincial Regulations which would be recently consolidated and at the same time sufficiently representative for our purpose.

1. Provincial Statutes:

The Statutes we eventually selected were the Alberta Statutes. These were revised relatively recently—in 1970. And they were, we reckoned, reasonably representative. First, Alberta is neither one of the smaller nor one of the more populous provinces. Secondly, in terms of quantity of legislation the Alberta Statutes seem fairly typical. For the Alberta statutes run to 5,961 pages, whereas the total number of pages of provincial statutes for all ten provinces (if we reckon in terms of Alberta Statute page-equivalent) is 51,279. So Alberta, one of the ten provinces, accounts roughly for one-tenth of the quantity of provincial legislation.

Using the methodology employed for the federal law, we now conducted a 5% random search by pages of the Alberta Statutes and reached the following results:

	Sample
Number of sections	900
Number of offences	221
Number of offences requiring *mens rea*	39
Number of offences of strict liability	182

Multiplying, therefore, by twenty, we estimated the situation regarding the Alberta Statutes to be as follows:

	Total Projection
Number of sections	18,000
Number of offences	4,420
Number of offences requiring *mens rea*	780
Number of offences of strict liability	3,640

We concluded, therefore, by estimating that in the Alberta Statutes there are 4,420 offences and 3,640 (82%) offences of strict liability. And we should expect the picture to be much the same across Canada.

2. Provincial Regulations:

For this we selected the Ontario regulations. Our reason was that though Ontario is not a typical province it is the only English speaking province whose regulations were recently consolidated and revised.

Of these we took a 5% sample by pages and arrived at the following results:

Sample	
Number of sections	591
Number of offences	706
Number of offences requiring *mens rea*	10
Number of offences of strict liability	696

Multiplying again by twenty we projected as follows:

Total Projection	
Number of sections	11,820
Number of offences	14,120
Number of offences requiring *mens rea*	200
Number of offences of strict liability	13,920

We concluded, therefore, by estimating that in the Ontario Regulations there are 14,120 offences and 13,920 (98%) offences of strict liability. And again we should expect the same picture to obtain across Canada generally.

3. Findings: Provincial Law:

Our overall finding, therefore, was that, assuming the Alberta Statutes to be typical of provincial statutes and using Ontario Regulations as representative of provincial regulations, we are likely to find in any one particular province the following situation:

Total number of offences—statutes		4,420
	regulations	14,120
	Total	18,540
Number of offences of strict liability—statutes		3,640
	regulations	13,920
	Total	17,560

Our conclusion, then, is that in an average province there may well be at least 17,560 offences of strict liability under provincial law.

In Municipal Law

This proved an impossible area to survey. The main reason is that by-laws are not in a handy consolidated form. Without this the searcher has no quick and easy way of knowing even roughly the number or identity of by-laws in force. In Ottawa, for example, one search revealed the existence of 82 annual volumes of city by-laws starting in 1890 and ending in 1971. Each

volume contained on an average 338 by-laws and 933 pages. Unfortunately, however, it was impossible to discover without enormous research which of all these by-laws are currently in force. For this reason, therefore, our inquiry into the number of strict liability offences existing in law in Canada omits all reference to municipal by-laws. Our overall conclusion, therefore, must be read with this in mind. What it means is that our estimates of the number of strict liability offences, which (for reasons already explained) we believe to be a conservative one as it is, will be still more conservative since it fails to include the quite possibly large number of strict liability offences created by municipal by-laws for the different cities.

Conclusion to First Inquiry

If we ask how many strict liability offences there are in *all* the laws which govern and regulate the individual in a large Canadian city like Vancouver, Montreal or Toronto, the question is impossible to answer exactly. All we can say is that it is enormous. If, however, we ask simply how many there are in the federal and provincial laws governing the individual in any one province, we can conclude that the picture is as follows:

Total Numbers: Federal and Provincial			
Total number of offences—	Federal Statutes	3,582	
	Federal Regulations	19,460	
	Provincial Statutes	4,420	
	Provincial Regulations	14,120	
	Total	41,582	
Strict liability[7] offences—	Federal Statutes	1,587[8]	(44%)
	Federal Regulations	18,820	(96%)
	Provincial Statutes	3,640	(82%)
	Provincial Regulations	13,920	(98%)
	Total	37,967	

Our conclusion, then, is that in the average province the Canadian faces 37,967 offences of strict liability.

III

Second Inquiry

How many prosecutions are there for strict liability offences?

This proved a much more difficult question. The reason is simply that criminal statistics do not record how many charges or convictions relate to strict liability offences and how many to *mens rea* offences: they draw no distinction. Nor do the government departments which forward the original information to Statistics Canada draw this distinction either. All we can do, therefore, is inquire whether in the light of our estimate of the percentage of strict liability offences in federal and provincial law, we can draw any inference from criminal statistics as to the *probable* number of charges relating to strict liability offences.

To begin with, since the number of prosecutions *per annum* does not vary all that much and since 1969 was the year for which the QUIC/LAW federal regulations were in force, 1969 was the year we took as our typical year. For comparison, however, we looked also at the figures for the preceding year, 1968.

The total number of prosecutions numbered by offences was as follows[9]:

	1969	(1968)
Indictable—offences charged	71,921	(94,838)
convictions	62,550	(82,312)
Summary— convictions	1,711,036	(2,092,976)

However, since we were not after an absolutely exact calculation but were, if anything, content to err on the side of conservatism, and since we could assume that all (or almost all) strict liability offences are of a summary nature, we concentrated solely on the figures for summary convictions. These were as follows:

Summary Convictions by Offences[10]

	1969	(1968)
Criminal Code	77,860	96,458
Federal Statutes	25,777	25,741
Provincial Statutes	1,473,852	1,606,161
Municipal By-law	133,547	364,616
Total	1,711,036	2,092,976

Of these four categories we had to discard two. In the first place we could assume that convictions under the Criminal Code would be for *mens rea* offences, and could accordingly disregard them. Secondly, since we were unable to make any estimate about the municipal area, we also discarded the figure for municipal by-laws. We were left, therefore, with federal statutes and provincial statutes.

Federal Statutes

According to Statistics Canada the term "federal statutes" in this table covers also "federal regulations". So, of the 25,777 (25,741) convictions under "federal statutes" some will be under the actual statutes, some under the regulations. But there is no record here, or in the separate departments, of the proportion relating to either. It could be that there are far more cases under the statutes than under the regulations, or *vice versa.* And without knowing the exact proportion, we could not work out the proper weighing to give to the statute-percentage-probability and regulation-percentage-probability that an offence would be one of strict liability.

Given these limits on our information, all we could do was assume that each offence, whether under statutes or under regulations, has an equal chance of being the subject of one of the recorded convictions. In other words, we took the 3,582 statutory offences and the 19,460 regulatory offences estimated in paragraph 41 together as one homogeneous field of 23,042 offences.

Next we had to calculate the likelihood that an offence would be one of strict liability. The results recorded in paragraph 41 showed that of the 23,042 offences in this area 20,407 were offences of strict liability. The proportion of offences of strict liability, therefore, is roughly 90%. In other words, given any of our 23,042 offences randomly selected, the probability that it is an offence of strict liability is almost nine in ten.

Now, given that there were 25,777 convictions for these "federal statute" offences in 1969, we estimate that, since each offence (in the absence of any information to the contrary) has an equal chance of being the subject

of a charge and conviction, the number of convictions for offences of strict liability was likely to be roughly of the order of nine in ten of the total, i.e. 23,200.

Provincial Statutes

Here again the term "statutes" also includes regulations. And again the question is how many of the 1,473,852[11] convictions in 1969 related to statutes and how many to regulations. Again we treated the (Alberta) statutes and (Ontario) regulations as an imaginary homogeneous field.

Paragraph 51 showed that under provincial law (statutes and regulations) there are in all 18,540 offences; 17,560 are offences of strict liability. So the proportion of strict liability offences is again roughly 90%. So, given that any offence has an equal chance of being the subject of a conviction, the number of convictions for offences of strict liability under provincial law was likely to be roughly of the order of nine in ten of the total, i.e. 1,326,500.

Conclusion to Second Inquiry

We conclude, therefore, that the position is as follows. In a typical year—and we chose 1969—the probable number of convictions for strict liability offences not counting offences under municipal by-laws was:

Under federal law	23,200
Under provincial law	1,326,500
Total	1,349,700

The number of prosecutions, of course, would be greater. Only the figures for convictions, however, are recorded.

IV

Overall Conclusion

The two questions we asked were:

(*a*) How many strict liability offences are there?

(*b*) How many prosecutions are there for such strict liability offences?

Our answers to the two questions are:

(*a*) In any province the individual is regulated by laws containing on the average 41,582 offences, of which 37,967 (91%) are offences of strict liability.

(*b*) In any given year in the whole of Canada there are likely to be nearly 1,350,000 convictions for strict liability offences (not counting offences under municipal by-laws). The number of prosecutions will be considerably larger.

Quantitatively speaking, therefore, strict liability is a formidable problem.

NOTES

1. The Nova Scotia Court of Appeal and the Trial Court thought it was not: *R v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, rev'd [1971] S.C.R. 5.
2. For a similar inquiry into strict liability in state statutes see [1956] *Wis. L. Rev.*, 625.
3. Agricultural Products Standard Act, R.S.C. 1970, c. A-8, s. 11(1).
4. R.S.C. 1970, c. N-4.
5. R.S.C. 1970, c. A-13.
6. All statutes cited are from R.S.C. 1970.
7. See the explanation of the meaning of "strict liability" given on pp. 6-7, paragraphs 23-26.
8. Allowing for the standard deviations calculated for these percentages, we can estimate the percentages as follows: federal statutes: 44 $\pm$ 3.84, i.e., roughly 40-48; federal regulations: 96 $\pm$ 1.63, i.e., roughly 94-98; prov. statutes: 82 $\pm$ 2.58, i.e., rocghly 79-85; prov. regulations: 98 $\pm$ 0.44, i.e., roughly 98-99.
9. *Statistics of Criminal and Other Offences.*
10. It should be noted that these figures include offences under the Criminal Code.
11. Of this total about 1,200,000 (slightly over 80%) were convictions for traffic offences, but a sampling of traffic laws in provincial statutes and regulations revealed the incidence of strict liability here to be about 98%. Therefore, our overall estimate of 1,400,000 convictions for strict liability offences (based on our general finding of 90% strict liability in provincial law) is, if anything, conservative.

Strict liability in practice

P. J. Fitzgerald

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I

Introduction

The General Problem of Strict Liability

How should we look on strict liability—as indefensible anomaly or necessary evil? For necessary or not, it is certainly evil . . . according to traditional legal thought. It goes against fundamental legal principles too well established to be lightly breached. It offends against fairness, justice and common sense which all alike forbid the punishment of those without moral fault. And it is counterproductive, for a criminal law that treats the morally guilty and the morally innocent on a par falls rapidly into general contempt. For these and other reasons too well known to be rehearsed, strict liability stands almost universally condemned by writers in the field.[1]

A solitary but significant challenge to the conventional wisdom comes from Baroness Wootton.[2] Strict liability, she argues, is not only justifiable but desirable. Indeed she would have the criminal law jettison *mens rea* completely—at any rate before the post-conviction stage. Her reasons are first that questions about *mens rea* are, like all questions about the state of another person's mind, in principle impossible to answer; and secondly that the job of the criminal law is to protect us against anti-social behaviour regardless of whether that behaviour is done intentionally, negligently or even without moral fault of any kind.

Her reasons, though, will not stand up. As Hart[3] has shown, the first rests on a philosophical skepticism that is untenable. The claim that we can never know for sure what goes on in another man's mind turns out to be not only a claim contrary to common experience but a claim which no counter-evidence is allowed to refute; in other words, it turns out to be a pseudo-claim masquerading as a statement of fact.

The second reason too falls down. For once again, as Hart[4] has demonstrated, her position fails to take into account that *mens rea* can only be abandoned at a cost. And the cost is a lessening of individual liberty. For under the traditional criminal law the individual knows there are certain

things he must not do, but so long as he avoids these he can organise his life as he pleases without fear of intervention by the law. Abandon *mens rea,* however, and he can be guilty of breaking the law without even knowing he is doing so, and thus he can no longer be sure at any time that he may not be subject to legal intervention. And this is a serious price to pay.

But is it a price we *have* to pay? Is strict liability an evil but a *necessary* evil? Such is the traditional view of the administrator and the law-enforcer. Without strict liability, he argues, conviction would be impossible in the realm of welfare offences. In this area only the defendant really knows what takes place in his factory, store or place of business and no one else can prove intention, recklessness or negligence on the defendant's part. All the more so when the defendant is a company, for no board of directors will ever admit they countenanced the dishonesty or carelessness of the individual employee. Without strict liability law enforcement would grind to a halt. *Mens rea* must be sacrificed on the altar of efficiency.

Now this assumes the only alternative to strict liability is to make the prosecution prove *mens rea.* But why not reverse the onus of proof and hold the defendant guilty unless *he* can prove the *absence of mens rea?* Yet even this alternative fails to satisfy all law enforcers. The defendant's more intimate knowledge will always, it is argued, enable him to escape responsibility by throwing dust in the eyes of the court and blinding the judge with science. Law enforcers cannot be required to take account of moral fault.

Yet is there a real issue between the lawyer and the law enforcer? Or does the controversy rest on an assumption that is false? The assumption common to both sides of the argument is that in areas of strict liability law enforcers refuse to take account of fault. This is precisely what the lawyer considers unjust and what the enforcer reckons (or is supposed to reckon) must be done. But is it?

This was the assumption Hadden set out to challenge. An inquiry he conducted into the administration of the food and drug laws in England and Wales in 1967 discovered that fault played a much larger part in the decision to prosecute than had been suspected: food and drugs inspectors tended only to prosecute in cases where they felt the defendant had been morally at fault.[5] Following this discovery, Hadden and Fitzgerald were asked by the English Law Reform Commission to investigate the enforcement of the Factories Act in 1968. This later investigation confirmed the finding of the former.[6] For though the offences under the Factories Act are offences of strict liability, the factory inspectorate, it transpired, administers the Act in such a way as to take account of fault in a moral sense. Apart from offences resulting in death and offences consisting of failure to fence dangerous machinery, both of which are prosecuted automatically for reasons of policy, offences against the Act are not prosecuted unless the inspector considers the defendant to have been morally culpable.

The conclusions drawn from this second study were that strict liability in the Factories Act in reality caused little or no injustice, since (apart from the two exceptions referred to above) those not morally at fault were not being prosecuted; that strict liability in this area was not in practice essential because the inspectors did know whether the defendant was morally at fault and could prove that he was, and this without undue trial difficulties; and that it might well be advisable to redraft the law to accord with the realities of the situation, bearing in mind that the inspectorate's concept of fault and that of the lawyer are not wholly identical.

These inquiries, however, were on a relatively small scale. Besides, they relate only to England and Wales. Would their conclusions hold elsewhere? More particularly, would they hold in Canada? This was the question the Law Reform Commission instructed me to explore.

The Hypothesis

The hypothesis I set out to test was that in the area of welfare offences, despite strict liability, law enforcers do take account of moral fault. More precisely,

> That there is a correlation between the existence of moral fault on the defendant's part and the law enforcer's decision to prosecute.

This hypothesis was subdivided into two sub-hypotheses:

1. Where a putative defendant is not morally at fault he is not prosecuted.
2. Where a defendant is prosecuted he is morally at fault.

A third question, which becomes crucial if 1 and 2 are confirmed, is:

3. If the law were amended so as to import a requirement of *mens rea* into offences that are at present offences of strict liability, this would affect:
   (a) the selection of cases for prosecution, and
   (b) the law-enforcer's ability to secure convictions.

Testing the Hypothesis

To test the hypothesis suitable areas of law had to be chosen. For the purpose of this research suitability was found to depend on six factors:

1. Because of the jurisdiction of the Law Reform Commission the area should be within federal law. Also, it should be one where the enforcement itself is in federal hands.
2. The area had to be one containing strict liability offences.
3. Enforcement had to be in the hands of a specialized department or agency, so as to make overall investigation and search for departmental policy on a national scale viable.

4. For practical reasons and convenience of access, the location of the decision-making process had to be in Ottawa.
5. To facilitate the inquiry it was preferable to take an area under a department that documents and files all decisions, decisions not to prosecute as well as decisions to prosecute.
6. There had to be enough material to make the research meaningful. This meant there had to be enough decisions to prosecute and not to prosecute, i.e. the volume requirement. It also meant that the programme of enforcement must have been in the hands of the department long enough to allow a pattern of administration to develop and a policy to crystallize, i.e. the time requirement.

A preliminary survey of several areas covered by federal statutes and administered by government departments in Ottawa showed that there was one department, with three areas of law, which admirably fulfilled all the requirements.[7] This was the Department of Consumer and Corporate Affairs, and the three areas of law are:

Misleading Advertising;
Weights and Measures;
Food and Drugs.

All three areas of law are under federal jurisdiction. All are strict liability areas, and all are administered at the final stage from the Department from Ottawa. The documentation is such as to allow fruitful investigation of the files, both with regard to positive and negative decisions. The volume of cases and the time span are both sufficient to allow a pattern to emerge and be clearly visible. And the Department has consciously framed and formulated a rational prosecution policy which it endeavours to follow.

Method of Investigation

The scheme devised was as follows:

1. An initial discussion between the relevant members of the department, the Law Reform Commission and the researchers.
2. A pilot investigation of the misleading advertising law enforcement, followed by a detailed investigation, through the files.
3. A preliminary report on the investigation, to be scrutinized by and discussed with the relevant members of the department.
4. A similar pilot project on food and drugs, and on weights and measures, followed by a detailed investigation through the files.
5. A similar preliminary report, to be scrutinized by and discussed with the relevant members of the department.
6. Both reports to be finalized and discussed with the department and Law Reform Commission at a final meeting.

It should be observed, that though it is normal in such investigations to discuss reports of findings before finalizing them, stages 3, 5 and 6 have been deliberately included formally for the same reason as led to the inclusion of stage 1. This is that while stage 1 was meant to be an exploration of ways and means of conducting the research, it was also meant to be more than that. Likewise, while stages 3 and 5 are meant to be useful discussions and checks on the accuracy of the research, they too are meant to be something more. The same goes for stage 6, the final discussion with the Law Reform Commission.

What these stages are meant, or hoped, to be in addition to their more obvious role, is difficult to express shortly. The aim is to bring the departmental law-enforcers into a dialogue with the researchers, but more importantly with the Commission, so as to produce some common exploration of the problem at issue. And the idea is not just that the Commission and researchers will learn from the department what happens and how it happens, but that the department will get a feedback from the other parties to the dialogue suggesting what ought to happen or what might be changed, and then that there will be a feedback in turn from the department to the Law Reform Commission explaining how far this is viable.

In this way it was envisaged that the investigation would be more useful and more meaningful, while at the same time the programme would accord with the Law Reform Commission's own brief to discuss the law with relevant agencies and bodies in Canada.

Part II of this report deals with the investigation into misleading advertising, Part III with food and drugs and weights and measures.

II

Misleading Advertising

The Problem of Advertising

The problem of advertising is one special facet of the conflict between seller and buyer. According to orthodox economic theory each seeks to maximize his own interest—the seller to get the highest price, the buyer the best buy. Hence the need for advertisement. For the seller must maximize his persuasion of the buyer, while the buyer must maximize his information about the product. As one writer observes, "the conflict between the seller and the buyer becomes clear: the former must, within the bounds of truth, make claims which will result in the maximum attraction of the buyer to the product; while the latter wants as much relevant factual information, without unnecessary or deceiving puffery, as possible."[8]

In an ideal world such a conflict solves itself. For the market produces an equilibrium. Let the seller's claims outstrip the truth and demand for his product eventually slumps. The trouble is, the slump is a long-term affair. In the short run the buyer needs speedier protection. He needs the protection of the law.

Also, in the real world the seller-buyer model is too simple, in at least two different ways. First, advertising in the world of today is big business. Cohen estimated that by 1969 advertising in the United States had grown to an eighteen billion dollar industry, while in Canada it increased 128% between 1954 and 1965.[9] Secondly, there is more than one party today for the buyer to contend with. In fact there are three—seller, advertiser, and media: often the seller hires an advertising firm to promote his product on television, radio and so on.

So the consumer needs protection against all three. From the seller he needs protection against dishonesty and deceit. From the advertiser he needs protection against manipulation stultifying freedom of choice. From the media he needs protection against advertisement pollution.

Of these three needs Canadian law satisfies only the first. Whereas in the United States "both the informative and persuasive aspects of the content of any advertisement may be questioned, in Canada the law deals basically only with false information."[10] And even this position took time to reach.

Common law history and doctrine show why. The general attitude of common law was against penalizing mere words alone, as can be seen from the time it took to establish that an action lies for careless statements. In any case puffery was always allowed: the huckster had a licence to exaggerate and the more fool he who fell for the line and agreed to be had. And goods that failed to live up to the claims made about them were a matter more for the law of contract than the criminal law, more a question of wordbreaking than of lying.

So the common law view was "buyer beware!" It was up to the buyer to keep an eye on the seller and see he gave full weight and full measure. "What is it to the public," asked the judge in an early case, "whether Richard Webb hath or hath not his eighteen gallons of amber beer?"[11]

But it would be a matter for the public if the utmost prudence on Richard Webb's part could not have ensured that he got what he paid for. What if the seller's weights and measures themselves were false? Against that sort of trickery no one but a weights and measures inspector could guard. That sort of trickery was a fraud on the public itself and was established early on as the crime of public cheating.

Private cheating too came under the law in due course. For eventually the offence of obtaining by false pretences came into the criminal law. Here too, though, the law was still careful never to penalize mere puffery or breaking your word. The pretence had always to be one of present and existing fact: the defendant had to lie. The accent was where it has always remained—on deception.

Deceptive advertising in Canada today, however, is a matter for legislation. It is partly dealt with by sections 36 and 37 of the Combines Investigation Act.[12] In an Act dealing almost exclusively with mergers and monopolies it seems surprising to find these two sections on an apparently unrelated subject. Indeed, s. 37 was originally part of the Criminal Code, where it first appeared in 1914 as s. 406A, then later became and remained s. 306 till its removal to the Combines Investigations Act[13] in 1969, originally as s. 33D. One reason for this removal was its lack of success in the Code. There were few prosecutions under it, because the police, not being specialists in this area, preferred to prosecute in areas closer to their own expertise, i.e. fraud; and there seems to have been only one reported case.

Meanwhile in 1960 s. 33C, later to become s. 36, had been added to the Act. The reason for the addition, as explained by Mr. David Henry,[14]

serves also to reveal the philosophy behind the inclusion of the two sections in this Act:

> This provision was inserted after the combines branch had a number of cases brought to its attention where a vendor, in order to make it appear that the price at which he was offering an article was more favourable than was actually the case, misrepresented the price at which the article was ordinarily sold in the market generally. Besides being dishonest and likely to mislead the buying public, this kind of tactic was regarded as unfair as a basis of competition.[15]

The Law[16]

Basically s. 36 prohibits misleading advertising with regard to price, while s. 37 is wider and prohibits misleading advertising generally. The text of the sections is as follows:

> 36. (1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be ordinarily sold, is guilty of an offence punishable on summary conviction.
>
> (2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

Several points are worth noting about this text, one of which is particularly relevant for this investigation. That is the existence of 36(2) which, by allowing a defence of good faith to a publisher, impliedly refuses it to any other offender. In other words, this subsection suggests that s. 36 creates in subsection (1) an offence of strict liability. And indeed this was one of the main reasons for the decision in *R.* v. *Allied Towers Merchants Limited*[17] in the Ontario Supreme Court that the offence was one of strict liability, a decision that has been almost universally followed.

Other points of interest are that s. 36 forbids making *any* materially misleading *representation . . . by any means whatever.* In this respect s. 36 is wider than s. 37. On the other hand it is narrower than s. 37 in that there is only an offence if the misrepresentation is made to promote the sale or use of an *article.*

Finally, the offence is a summary offence, and, apart from some of the s. 37 offences, is the only one under the Act to be punishable summarily. Proceedings, therefore, must be brought within six months of the date of commission of the offence.

S. 37 is much longer and reads as follows:

> 37. (1) Every one who publishes or causes to be published an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or

arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years. If the advertisement is published

(*a*) to promote, directly or indirectly, the sale or disposal of property or any interest therein, or

(*b*) to promote a business or commercial interest.

(2) Every one who publishes or causes to be published in an advertisement a statement of guarantee of the performance, efficacy or length of life of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is if the advertisement is published to promote, directly or indirectly, the sale or disposal of that thing, guilty of an offence punishable on summary conviction.

(3) Subsections (1) and (2) do not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

(4) For the purposes of subsection (2), a test that is made by the National Research Council of Canada or by any other public department is an adequate and proper test, but no reference shall be made in an advertisement to indicate that a test has been made by the National Research Council or other public department unless the advertisement has, before publication, been approved and permission to publish it has been given in writing by the President of the National Research Council or by the deputy head of the public department, as the case may be.

(5) Nothing in subsection (4) shall be deemed to exclude, for the purposes of this section, any other adequate or proper test.

The main question from the standpoint of this research is whether the offences are offences of strict liability. Clearly subsection (1) includes one offence that incorporates *mens rea* to some extent, because it states that "everyone who publishes . . . an advertisement containing a statement that purports to be a statement of fact but that . . . is intentionally so worded or arranged that it is deceptive or misleading . . .". Apart from these words the section makes no reference to the mental element, except for the purpose stipulated in s. 37(1)(*a*) and (*b*).

The original text of its predecessor in the Criminal Code, s. 406A, had begun "every person who knowingly publishes . . .". In 1931, however, the word "knowingly" was removed, but there was added to what was now s. 406(2) a proviso that a newspaper publishing an advertisement in good faith in the ordinary course of business was not to be liable, and a further proviso that if the accused proved good faith he was to be acquitted. These provisos were repealed in 1935 and replaced by a proviso that any person publishing an advertisement accepted in good faith in the ordinary course of business was not liable. So the history of the section suggests a deliberate intent on the legislature's part to turn the offence into one of strict liability except so far as concerns the publisher. And in 1972 in *R.* v. *Firestone Stores*

Ltd.[18] the Ontario Court of Appeal held that s. 33D(1) "comprises two offences, one of which requires the proof of *mens rea* and one which does not".

The other points of interest about the text of s. 37 are more or less the converse of the points made earlier about s. 36. S. 37 is in some respects narrower, being restricted to statements of fact in advertisements instead of dealing simply with representations. On the other hand, in two respects it is wider than s. 36, since the misleading information need not concern the *price* of anything and the advertisement need not be published to promote the sale or use of an *article.*

Apart from these elementary and obvious points there are three things to be said here about the law and jurisprudence relating to these two sections. Twelve years of s. 36 and three of s. 37 have given the courts long enough to develop a healthy and interesting line of cases on the different problems arising under the two sections. Some of the problems are as fascinating and as fundamental as can be imagined in the whole of law or economics. For example, is a free offer really free? This, and many other intriguing problems, however, have little to do with *means rea* and cannot be discussed here.

The second thing to emphasize is that though from the purely "legal" point of view the cases may look simple, appearances are deceptive. It is true that the average s. 36 or 37 case does not give rise to many "pure law" problems such as would find their way into textbooks on basic criminal law. On the other hand, in order to prove that a defendant has misrepresented, say, the regular price, the department may have to undertake laborious and time-consuming surveys of comparative pricing. From the evidentiary standpoint, if not from the legal, there is nothing simple about the average misleading advertising case.

Third, whereas s. 36 creates a summary offence, s. 37(1) creates an indictable offence. Accordingly, the six-month time limit does not apply. In addition, the penalties are higher, and consequently the offence is considered much more serious than a s. 36 offence.

The Law in Practice

Misleading advertising is not a departmentally policed area of law. In this it is unlike weights and measures or food and drugs, areas where regular routine inspections bring to light many of the violations that end up in court. Misleading advertising is virtually self-policing. That is to say, offences come to the notice of the department primarily through complaints of consumers or competitors. They are dealt with by the Misleading Advertising Division of the Combines Branch.

There are, in fact, three avenues leading to the investigation by the department of an instance of misleading advertisement. First, under s. 7 any six persons, Canadian citizens, resident in Canada, twenty-one or over, may make formal application to the Director of Investigation and Research for an inquiry into the matter. Secondly, if the Director has reason to believe that the Act has been or is about to be violated, he must cause an inquiry to be made. Thirdly, whenever he is directed by the Minister of Consumer and Corporate Affairs to inquire whether there is a violation, he must see that an inquiry is held (s. 8).

The vast majority of inquiries fall under the second head, and are made either because the Branch itself has had its eye on certain practices or merchants or because it has received complaints about certain advertising practices. The majority arise from complaints. Indeed, it has been the policy of the department to do all it could to encourage complaints. Considerable publicity was devoted to his end. And the publicity paid off.

Complaints come to the department from consumers, from competitors and from the Consumer Affairs Bureau. They are received either by the Trade Practices Branch in Ottawa, by the departmental regional offices or through Box 99. Since the introduction of s. 37 in mid-1969, the Misleading Advertising Division has received 7,500 complaints as of November 1972. At present, the Division is receiving 250 complaints a month about misleading advertising only. About 300 cases have led to charges under ss. 36 and 37 during the period and the majority of prosecutions have been successful.

Another gauge of the size of the problem is the number of files opened each month in the departmental filing office. Each file relates to a complaint that has to be examined. In March, 1972, the number of files opened was 304. In April it was 262. In May, 304. And these were fairly average months repeating much the pattern of the last two years' overall trend.

So the volume of complaints—what we might call the case load—is high. The same can't be said for the human resources that have to cope with it. Without going into too much detail about the administration of the department, it is easy to see that the key person, when it comes to working out how many of the complaints can be dealt with and to what degree, is the investigator. But the number of investigators across Canada is only twenty-one. It is clear, then, that scarcity of human resources is a crucial limiting factor as regards the processing of complaints and cases under the two sections.

Departmental Policy[19]

For this reason the Combines Branch has been forced to take stock and articulate for itself a policy to follow. All the complaints must be looked into, in order to see if there is any substance in them. Investigation to this level, however, needn't cause undue strain on resources. The majority

of complaints may well turn out to have little or no substance in them, or at least not to be worth pursuing further. This can be seen from a scrutiny of the files mentioned above. For example, the files investigated in this inquiry are numbered TP 808 up. At the time the research started the latest file was numbered TP 5439. Of these, 3,142 had been closed. But they are closed in three categories.

Closed (2)—closed immediately or after preliminary investigation	1,767
Closed (3)—closed after full investigation	1,208
Closed (4)—closed after court action	167
Total	3,142

Closed (2) files at the time the research started numbered 1,767, out of a total of closed files of 3,142. In other words, nearly three-fifths of the complaints up to the time of recording raised no question under the Act and required little by way of investigation.

On the other hand, 1,375 complaints demanded further inquiry. Of these 1,208 were investigated but led to no court action, and the relevant files were eventually closed (3); 167, however, were prosecuted and the files eventually closed (4).

Investigation even only to the level resulting in a closed (3) file can be very time consuming. It is the prosecution cases, however, that form the biggest burden, especially in view of the evidentiary requirements for successful court action.

In addition to processing complaints and conducting inquiries the Branch also has been giving attention to the promotion of voluntary compliance. The programme of compliance is intended to be a vigorous and sustained programme involving education and explanation, discussion of business problems and the giving of opinions concerning the application of the Act. Businessmen are encouraged to discuss their problems with the department before they decide to introduce policies which might prove to be in conflict with the Act, and the Director and his staff study matters businessmen submit to them and indicate whether or not the adoption of proposed plans would lead the director to launch an inquiry. As part of the programme of compliance senior staff members undertake speaking engagements before trade associations and other business societies.

Clearly, then, without some policy of selection with respect to prosecutions, departmental resources would be strained beyond capacity. As the department handout dated June, 1972, puts it[20] "staff resources which can be made available to investigate complaints are not unlimited." In order to meet the objectives of bringing about an overall improvement in the quality of market information directed to consumers, it will be necessary to concentrate in the selection of cases on those which are most likely to contribute to the objectives sought by the legislation. The principles followed in

assessing the priority of complaints are the degree of coverage of the advertisement, the impact of the advertisement on the public, the deterrent effect of a successful prosecution and the selection of the best cases to allow the courts to establish new principles and clarify the law.

Selectivity is manifestly then part of departmental policy and publicly articulated as such. It is noteworthy, however, that of the four principles mentioned above not one is immediately and obviously concerned with the absence of *mens rea.* There is no public statement to the effect that the department won't prosecute offenders whose offence arises simply from error, inadvertence or honest mistake. Whether or not this forms part of the policy can only be discovered by looking not at what the department says but what it does.

The Design of the Research

(a) *Definition of lack of fault*

The aim of the inquiry is to investigate whether lack of *mens rea* in an offender is a sufficient condition for a decision not to prosecute. To proceed with the inquiry we had to define precisely what we understood by lack of *mens rea.* Next we had to devise a scheme whereby to test the hypothesis.

So far as concerns the definition of *mens rea,* we approached this question pragmatically rather than with undue attention to philosophical and jurisprudential problems over the conceptual question. We suspected that in many cases the advertiser would tell the department that he didn't mean to mislead anyone, that he had made a mistake, or that the representation had been made by inadvertence or oversight. All such excuses, though different maybe in important respects one from another, we considered closely related enough to be grouped together under the common heading of "honest mistake".

What we meant by this term was:

(i) that the advertiser said he had made an error or mistake;

(ii) that he was telling the truth, i.e. was being honest when he said he made a mistake.

We did not understand by the term that the mistake would only count as an honest mistake if it was reasonable to make such a mistake. For our purpose, if the advertiser made a silly, unreasonable mistake, which no sensible man in his position would—or even should—make, we would nonetheless count this as an honest mistake, provided it was clear he *did* make the mistake.

Having adopted this as our starting definition, we decided to proceed pragmatically. If varieties of lack of *mens rea* appeared that couldn't be lumped under our general heading, we would meet that difficulty when it occurred and maybe extend our definition to meet it. As appears later, this was to become important in due course.

One species of lack of fault, or lack of *mens rea,* which might have been expected to arise frequently is the excuse: "Well, I did put the advertisement in, but I never meant to mislead." To this, even one in general opposed to strict liability could justifiably reply: "You use words at their peril. You must be taken to know what they mean. And what they mean, in the ultimate, has to be decided by a court." In other words, we could adopt a Holmesean position and regard the meaning of your language as one of the teachings of common experience and something you fall short of at your peril.

In practice, however, this excuse hardly ever appeared. The reason was that it was submerged in a wider and stronger sort of excuse: "There's nothing misleading about the advertisement at all. It doesn't mean what you say it does. What it means is . . .".

(b) *Pilot Project*

Having determined a working definition of lack of fault, we then set about designing the project. As outlined above, the filing system neatly and conveniently classified the cases into:

closed (2)—not deeply investigated, because no question under the Act arose;

closed (3)—investigated but not prosecuted;

closed (4)—prosecuted.

Our plan was to take a sample from the closed (4) subset and match it against an equal sample from the closed (3) subset. So initially we decided, as a pilot investigation, to match very small samples from each subset.

Our inquiry was much assisted by the existence of two prosecution index books[21] in the filing office. One of them listed all the prosecutions under s. 36, the other those under s. 37. The total number of s. 36 prosecutions listed in the index, starting at 23 January, 1962, and continuing till 10 May, 1972, is 145 (though this figure is growing continually). Since our search would be through the TP files, we concentrated our attention on those prosecutions listed under TP file numbers. Beginning on 11 September, 1970, and continuing till 10 May, 1972, these numbered 39. At the time of the pilot survey, however, they numbered 33.

Likewise with the s. 37 prosecutions.[22] The total listed, running from 17 September, 1969, to 10 May, 1972, is 91 (this figure too, of course, is growing). The total of TP cases, however, running from 26 August, 1970, to 10 May, 1972, is 71. At the time of the pilot survey it was 58.

We decided to extract five s. 36 cases and five s. 37 cases through the prosecution indexes and match them against ten non-prosecution cases extracted through the closed (3) index, five under each section. A random selection of one in seven s. 36 prosecutions and one in eleven s. 37 prosecutions produced the ten prosecution cases. The ten matching non-prosecution cases were more difficult to extract, since the s. 36 and s. 37 cases are all

listed together in one large index and at this time we had discovered no way of telling in advance (i.e. before actually scrutinizing the file) whether the case fell under one section or the other. This being so, we simply extracted at this stage ten cases out of the total closed (3) subset, randomly selecting 1 out of 120.

The information we looked for particularly in all these cases was:

1. the nature of the complaint;
2. the excuse given, if any;
3. the action taken by the Branch;
4. the reason for the action;
5. the result of the action.

Result of Pilot Project

(a) *Closed (3) cases*

Reasons for *not prosecuting* were as follows:

1—advertisement was only ancillary to a fraudulent scheme and the firm was prosecuted and investigated under the Criminal Code;

1—the case went stale and it was not certain what false statement the complaint referred to;

3—the advertisement was not considered misleading;

1—the firm had changed ownership since the complaint;

4—the Branch considered there had been an honest mistake.

10

Honest mistake seems to have been a significant factor in 40% of the cases. Where it is decided not to prosecute, there is a 40% likelihood that the advertiser has made an honest mistake.

(b) *Prosecuted Cases*

6—the defendants gave an excuse. In four of these they pleaded guilty. All six were convicted and in three cases there were prohibition orders. In one of these cases, before it was known whether the accused would advance an excuse, the Branch noted the fact that the company had already been convicted under s. 33(D), that the fraud squad had raided it and that (in the Department's view) the officers of the company had no scruples.

4—claim of honest mistake was made, but the Branch did not accept the claim. In one case, however,—the Branch later withdrew the prosecution, so may have really attached some belief to the excuse.

10

The Pilot survey suggests:

1. that mistake is a factor in a significant number of cases;
2. that this number constitutes a *minority* of the cases, however;
3. that the proportion of prosecuted mistake cases is the same as the proportion of non-prosecuted mistake cases; and
4. that there is a correlation between non-prosecution and Branch belief in the existence of honest mistake.

The full investigation

In view of the results of the pilot survey we decided to match the totality of prosecutions listed under TP numbers against an equal sample of non-prosecution cases. At the time of starting these numbered 100, subdivided as follows:

s. 36—35
s. 37—65

We had further learned that closed (3) files were marked 36 or 37 in the closing index to indicate what section had been considered with regard to the file. A count through this index gave the following return:

s. 36—214
s. 37—944

Accordingly, we extracted randomly as follows:

s. 36—35 out of 214, appoximately 1 in 7 taking every seventh case from the index by number.
s. 37—65 out of 944, approximately 1 in 15, taking every fifteenth case.

The detailed information we looked for we listed under:

1. Place of offence;
2. Type of product;
3. Nature of complaint;
4. Excuse;
5. Reason for prosecuting/not prosecuting and in the case of prosecuted cases,
6. Plea;
7. Conviction or acquittal;
8. Penalty.

We also noted that in some cases a prosecution was considered or instituted under both sections. Where no prosecution followed we listed the

case under the section considered most relevant by the department, as appeared from the file. Where prosecution followed, in many cases—especially where a plea of guilty to the charge under one section was entered—the charge under the other was dropped. Such a case we listed under the section under which the prosecution continued. Where prosecution under both sections continued, we listed the case under the more significant or more relevant section. In doing this, however, we simply followed the way the Branch had indexed the cases itself, so that no great difficulty arose.

It had also become clear from the pilot survey that all the information we required could be found from the files. There was no need to attempt a survey by questionnaire of the investigators. One reason for this was that the ultimate decision regarding a prosecution always turned out to be made in the Branch in Ottawa and to be recorded on the file. Decisions in fact are made in two stages. First, there is the administrative decision whether or not to request the Department of Justice to prosecute. Second, there is the legal decision by the Department of Justice that there is or is not a good case to proceed. This latter decision is made on legal and evidentiary grounds and is, as it were, the advice of the lawyer to his client. The former decision, the administrative decision, is that of the client department, and is made on grounds of policy. This was the decision that we were interested in, and it could always, it seemed, be discerned from the relevant file.

If necessary, we could always supplement our findings by oral discussion with the administrative branch of the Department of Consumer and Corporate Affairs, in order to build up an impressionistic picture.

Results of the full survey

The breakdown of cases was as follows:

(a) *s. 36 prosecuted cases*

1. Honest mistake not argued		26
2. Honest mistake argued		
(a) not accepted by branch	7	
(b) accepted but prosecuted and pleaded guilty	2	
	9	9
Total		35

Of the nine "honest mistake" excuse cases, seven were not accepted by the Branch. In four of these no reason was given in the file for non-acceptance, but the excuse was only faintly argued, and the accused when charged pleaded guilty. All four were convicted. In the remaining three, no reason

was given for non-acceptance, but reasons for prosecuting were given in each case. They were:

1—there had been many complaints about the advertisement, suggesting that this was no slip or mere error.

1—the merchant said that the wrong picture had been used in the advertisement but he never complained to the newspaper that printed it.

1—the advertiser said he thought the manufacturer's suggested retail price and the regular price were the same thing, and the Branch considered this a good case, presumably to establish clearly that they were not the same thing.

All three pleaded guilty and were fined.

The remaining two cases of the nine are more difficult. In one a national retail firm gave an excuse of honest mistake which the Branch appears to have accepted as genuine, but it nevertheless prosecuted. Although the defendant pleaded guilty, this could have been because in law they were advised that this was no defence. This was the most significant counter-example under s. 36 to the generalization that if the Branch accepts that there is an honest mistake it doesn't prosecute. In the other case, a defendant overstated the regular price by error, having been overcharged themselves by the distributors. Here too, the Branch accepted the excuse but prosecuted and the defendants pleaded guilty. This too constitutes an important counter-example.

In none of the other twenty-six cases was there any suggestion of honest mistake.

These results did little to refute the suggestion that the presence of honest mistake was sufficient to lead to a decision not to prosecute. Though honest mistake was aired in nine of the thirty-five cases, it was not believed in by the Branch in seven of them. In only two did the Branch prosecute despite accepting that there may have been honest mistake, and it was not clear from the files why they did. It seems fair to conclude that in prosecutions under s. 36 there is less than a 6% probability that in any prosecuted case the defendant was believed by the Branch to have made an honest mistake.

(b) *s. 36 non-prosecuted cases*

The breakdown was as follows:

Total number of cases	35
Number of cases in which no offence was committed	14
Number in which there was insufficient evidence	10
Number in which there was honest mistake	8
Number in which either consumer complaint was satisfied or the advertiser complied with the suggestion of the Branch.[23]	10

The numbers measure the frequency of appearance of reasons, so they do not total 35. But a further breakdown is as follows:

s. 36 non-prosecuted cases

1. Cases in which mistake was not a factor but where there was insufficient evidence, time lapse, change of business ownership, or some other reason for not prosecuting			28
2. Cases in which mistake or compliance was a factor:			
(a) honest mistake alone	3		
(b) honest mistake and compliance	4		
	7		7
Total			35

So the picture emerging is that when no prosecution follows there is a 20% likelihood that honest mistake is a factor, and an 8% likelihood that it is the only factor.

(c) *s. 37 prosecuted cases*

The breakdown of cases was as follows:

1. Honest mistake not argued				51
2. Honest mistake argued:				
(a) accepted by branch:				
(i) guilty plea	1			
(ii) prosecution withdrawn	1			
	2		2	
(b) not accepted by branch:				
(i) reasons given:				
—convicted	4			
—acquitted	3			
—prosecution withdrawn	2			
	9	9		
(ii) no reasons given:				
—convicted	2			
—acquitted	1			
	3	3		
		12		
			12	
			14	
Total				65

The only difficult case for the hypothesis is the one where the Branch seemed to have accepted the excuse but prosecuted nevertheless. This, however, was a case where the defendant (described in the file as a possible "fly-by-nighter") made a quite unsubstantiate claim for the goods he was selling. Apart from the claim being "a bit wild", the defendant contended that he had relied completely on the advertiser when he had bought it. While the department seems to have accepted that he may have made an honest mistake and been misled, and even had some sympathy with him, there was the added difficulty in this case that the department could not reach back behind this defendant since he was the original importer. The Branch considered that someone in Canada had to take responsibility and since the defendant appeared to be the original importer, he was the one. This is the only counter-example to the hypothesis and is explicable by the very special circumstances.

In only 2 out of 65 cases then, did prosecution follow the acceptance of the excuse of honest mistake, and in one of these proceedings were dropped. The other can be explained. With this one explicable exception the hypothesis that where there is absence of fault because of honest mistake, the defendant is not prosecuted, seems to stand.

(d) *s. 37 non-prosecuted cases*

The breakdown is as follows:

Total	65
No offence	33
Insufficient evidence	9
Business closed or changed hands meanwhile	4
Too much time had elapsed	1
There was a question of prosecuting for a more serious offence	1
Compliance	23
Honest mistake	18

The numbers measure the frequency of appearance of reasons, so they do not total 65. But a further breakdown is as follows:

Cases in which mistake was not a factor, but where there was insufficient evidence, time lapse, change of business ownership, more serious prosecution pending, or some other reason for not prosecuting		46
Cases in which mistake or compliance was a factor:		
(a) honest mistake alone	5	
(b) compliance alone	3	
(c) honest mistake and compliance	11	
	19	19
Total		65

It seems therefore that where no prosecution follows, there is a 24% likelihood that honest mistake was a factor, and an 8% likelihood that honest mistake was the only factor. And in the non-prosecuted cases where insufficient evidence, lapse of time, etc. are not factors, there is an 80% likelihood that honest mistake was a factor.

Preliminary Conclusion

So far the results seemed to support the hypothesis "no fault—no prosecution".[24] Complete support is lacking, however, on account of three counter-examples—2 under s. 36 and 1 under s. 37. The latter seemed explicable from the files: the claim was extravagant, the defendant was the original importer, and the foreign seller whose word he claimed to have relied on could not be prosecuted. The other two could not be explained: elucidation would have to come from discussion with Branch personnel concerned. With these exceptions, however, the position seemed to be (1) if a person was prosecuted, the Branch believed him to be at fault, and (2) if the Branch believed him not to be at fault, there was no prosecution.

We also tabulated various other items of information gathered during the course of the survey, though not central to this investigation. These are shown in Tables 1-5. While they might well be useful for other studies by the Law Reform Commission, they do suggest certain questions relevant to the present inquiry:

1. Why is the average fine for national firms hardly higher than for small firms, under both sections?
2. Why is the acquittal rate so much higher under s. 37 than under s. 36—27% as opposed to 14%?
3. Why is the Prohibition Order used more in s. 37 than in s. 36—30% as opposed to 25%? When does the Department seek an Order? And how effective is it?

These questions we proposed to take up with the Department.

Accordingly, we saw our next steps as:

1. preparing a more detailed analysis of the mistake and other "no fault" cases;
2. seeking impressions from outside the Department on the view taken of offences under the two sections;
3. discussion and clarification with the Branch;
4. if necessary, a short investigation into closed (2) files.

We then turn to the more detailed analysis.

Note: Number of "No fault" cases in all and proportion prosecuted

The survey discloses that there were 2 judged no-fault cases prosecuted under s. 36 and 2 under s. 37; that there were 7 non-prosecuted non-fault

cases under s. 36 and 19 under s. 37. How many no-fault non-prosecuted cases were there in all?

To answer this we have to estimate the extent to which we can rely on our two non-prosecuted samples as being representative. Under s. 36 we have 20% no-fault cases in our non-prosecuted sample. Applying the standard of percentage error $= \sqrt{\frac{p+q}{n}}$ formula (where p = the percentage of no-fault cases, q = the percentage of other cases, n = the number in our sample) we find that the S. of P.E. = 6.6%. Our sample should be representative within 2 × standard of percentage error in either direction. So the true percentage of no-fault cases in the whole non-prosecuted population will lie between 7% and 33%; i.e. there could be anything from 15 to 70 (i.e. 7% and 33% of 214). So the proportion of no-fault cases prosecuted could be anything from 2/72 to 2/17, i.e. from 2.8% to 11.7%.

Applying the same reasoning to s. 37, where we have 28% no-fault non-prosecuted cases, we find the S. of P.E. = 5.5%. Our sample, then, will be representative within 2 × 5.5% in either direction. Accordingly the total of no-fault cases in the non-prosecuted population will be somewhere between 17% and 39% of 944, i.e. between 160 and 368. So the proportion of no-fault cases prosecuted could be anything from 2/370 to 2/162, i.e. from 0.5% to 1.2%.

Detailed Analysis

We next proceeded to a closer and more detailed analysis of those 71 cases where[25] "honest mistake" was raised or where for some other reason the defendant contended that he was not really at fault in any moral sense. Having analyzed the cases, we discussed them in detail with the relevant members of the Branch, the Director's staff, to get their reaction to our conclusions and to satisfy ourselves that we had drawn the correct inferences from the files. In this we were greatly assisted by the forethought of the Director's staff, who arranged for all the non-prosecution files that we detailed to be checked in the office by a research student, who indeed drew to our attention factors which in some cases we had overlooked. In the light of this check and of the discussion with the Staff, who of course were the persons responsible in most cases for the decisions recorded in the files, the emerging picture began to take on a slightly different hue.

The first thing to emerge was that our categorizing of cases as cases of honest mistake was far too simplistic. For one thing, there are several different types of mistake or error, and these were worth distinguishing. For another, the defendant's argument was not so much "I made a mistake" as "You can't really blame me, I wasn't meaning to do anything wrong"; and this is much wider, rougher and less formalized than "I made a mistake"—the sort of defence a lawyer, focussing his attention on *mens rea,* naturally calls to mind.

So the second upshot of the analysis was that mistake in the strict sense was not nearly so crucial as we had thought. It did play a role, but only a restricted role. In other words it was part of a wider issue altogether. Two other factors involved were the defendant's compliance, either with the Branch when the misleading nature of the advertisement was brought to his notice, or with the dissatisfied customer himself; and the significance or insignificance of the matter in issue—how far was the whole thing trivial, and if so, what would the courts think of a Branch hauling a defendant into court over a storm in a teacup?

This led thirdly to a reconsideration of the problem where, in these cases, the decision to prosecute or not to prosecute is taken. The answer to this question turned out to be less simple than we had so far understood. Accordingly we decided to investigate further in the files, but at an earlier stage, at the stage before the case goes on for further consideration. In other words, having surveyed a sample of closed (3) and closed (4) cases, we now turned our attention to a sample of closed (2) cases, those cases that are turned down without even going forward for further investigation or discussion. In this we were helped by a full and frank discussion with the Branch member whose main responsibility it is to operate this stage and order the files closed into category (2).

Finally we discussed our findings and conclusions with the Director's staff at a number of meetings, for which they kindly found the time. Ultimately we were fortunate enough to be able to discuss the whole problem at a full and lengthy meeting with the Director himself. By this stage the question under discussion was becoming, naturally, not so much how the staff were administering the law in practice but how the law relating to misleading advertising ought to be framed: in other words, how far strict liability should be retained.

Analysis of the Offences

Roughly speaking the offences under ss. 36 and 37 can be termed offences of dishonesty. They are types of economic fraud. The advertiser is lying to the public and trying to cheat them.

If we apply traditional legal analysis here and distinguish between *actus reus* and *mens rea,* we can spell out the *actus reus* elements as

1. telling
2. the public
3. an untruth
4. to promote business.

(4) involves purpose and should more strictly be grouped with *mens rea.* It is convenient, however, to locate it here, since *mens rea* is not required by the sections (apart from the second offence listed under s. 37(1) of an advertisement intentionally so worded as to deceive).

These being the "physical" or external requirements of the offences, the *actus reus* defences will be

1. I never said
2. I never told the *public*—there was no publication
3. What I said was true
4. It was never said to promote business interest or the sale or use of an article.

These of course will not be the only defences. They are only the *actus reus* defences, and indeed they don't quite cover all of these. For whereas s. 36 is concerned with false representations, s. 37 only refers to false *advertisements,* so that an additional *actus reus* defence arises: (5) it wasn't an advertisement. Indeed, this defence has raised difficult and interesting problems, e.g., does a label qualify as an advertisement?, which lie outside the scope of our inquiry.[26]

Other defences relating to the *actus reus* and commonly raised are (6) that it wasn't the defendant who made the representation. This often raises the technical problem of identifying the accused, a problem of considerable dimensions in certain cases where interlocking companies are involved. (7) that the evidence is incomplete: this might well be so in a case relating to a misrepresentation of the regular price, where the Branch could find it very difficult to establish what the regular price was. And (8) "it was all the fault of some stupid clerk—sloppiness is certainly not our policy, but how can you get good clerks now?". This of course raises the question of when the clerk's act is counted as the act of the corporation, which raises a question less of strict liability than of vicarious liability.[27] Without embarking on a thorough analysis we could say roughly that the act of the servant is taken to be that of the corporation if (a) it is the act of someone so high up in the structure that he can be identified with the "mind and heart" of the organization, or (b) it is the act of an ordinary employee done within the scope of his employment. Most of the cases we dealt with would not give much scope for defence (8) at a formal or court stage, since the clerk or employee who fails to give the discount offered, etc., can hardly be said to be acting outside the scope of her employment. Taking the customer's money for the goods, after all, is what she is employed to do. Consequently, this is a contention we hear much more at the pre-trial stage when the offender and the Branch are discussing the matter together.

Mens rea (apart from the exception referred to in paragraph 98) is not required. S. 36 creates an offence of strict liability, according to the case of *Allied Towers*;[28] s. 37 according to the *Firestone* case.[29] If, however, absence of *mens rea* were a defence, then the defendant would be exonerated if in fact he wasn't being dishonest. Broadly the *mens rea* defence would be

"I wasn't acting dishonestly."

This can be broken down into a variety of cases. We start with a representation or advertisement which is untrue and so doesn't correspond with reality. The cases then will vary according to what it is that has produced this discrepancy between reality and the representation. We divided the cases according to the following scheme:

1. "I made an error or mistake."

This in turn subdivides according to what sort of error the defendant made.

(*a*) he simply took the wrong one, put the wrong number or picture in the advertisement, perhaps in the rush of business—the sort of slip anyone can make,

(*b*) he put in the number, picture, etc., he intended, but he mistakenly thought it was the right one—e.g. he put in the price figure he meant to, only he had miscalculated and got the figure wrong.

(*c*) he meant to say what he did, but he was labouring under a misunderstanding—he said X was the regular price, when in fact it is not, but he misunderstood what is meant by the term "regular price",

(*d*) he wrongly thought that what he said was true because he was relying on what he was told by some third party.

2. "The advertisement was true, but things have changed since it was first put out"—so it isn't a case of an advertisement not corresponding with reality, but with reality altering so as to make the advertisement out of line.

3. "It may be strictly and literally untrue, but it isn't really misleading"—of course it wasn't strictly true to say that everyone wears bellbottoms, but surely that's not a lie?

4. "It may be untrue, but I'm new to this business. I am not the one who said it."

5. "But I never intended to cheat anyone. You can see that from the fact that I made every effort to satisfy the complainant." and

6. (As in (5) above) "You can see that from the fact that I made every effort to satisfy the Department and changed the offending advertisement".

This sub-analysis, however, should not give the false impression that in the cases such distinctions are always drawn. Obviously a firm might air more than one such excuse at once. Obviously too, they reinforce one another. (5) and (6), for example, not only go to show lack of dishonest intention generally, but would tend to substantiate excuses (1) to (4). Moreover, since these excuses are raised and dealt with at the informal pre-trial level, they are naturally treated in a less formal and structured manner than would be the case in court, so that the distinctions are less precisely drawn and the filed information consists of a short sentence or two rather than an essay in jurisprudence. So our sub-analysis was devised simply as an aid to considering the cases.

Case Analysis

On inspection the cases broke down as follows:

	Prosecuted	*Non Prosecuted*	*Total*
1. Mistake			
(a) a slip, the wrong one, etc.	9	20	29
(b) miscalculation	2	2	4
(c) misunderstanding	1	1	2
(d) relied on others	4	0	4
2. Facts have changed	2	8	10
3. Not really false	6	8	14
4. New to business	0	1	1
5. Satisfied the customers	0	2	2
6. Satisfied the Department	0	3	3
7. Other factors	0	2	2
Total	24	47	71

Of these cases, the section breakdown is:

	Total in this Group	*Prosecuted*	*Not Prosecuted*
s. 36	24	6	18
s. 37	47	18 (2 withdrawn)	29
Total	71	24	47

Clearly there is a substantial difference between the two sections in this respect. Of the s. 36 cases in this group only 25% were prosecuted. Of the s. 37 cases almost 40% were prosecuted. This is no doubt related to the fact that s. 37 creates indictable offences which are, therefore, and are regarded as, more serious crimes than those created by s. 36. Consequently, if there is evidence in a s. 36 case of lack of real moral fault there is less likelihood of a prosecution because, all things considered, the offence anyway is only a summary one and what the defendant actually did may have caused so little harm as to border on the trivial. By contrast in a s. 37 case, despite evidence that the defendant was without real moral fault, it may yet remain true that the offence is a serious one and considerable harm was done. For this reason the Branch would naturally be less willing to accept an excuse of mistake so readily and might even be prepared to prosecute even though it believed the excuse offered.

Next, if we consider the Branch's reaction to a plea of mistake or error, as shown in the files, we can see that it accords with what common sense

would expect. The reasons most often recorded in the files for accepting an excuse of mistake are:

1. there is evidence to substantiate it, or
2. there are other factors, with or without (1).

The reasons recorded for not accepting an excuse of mistake are:

1. there is no evidence in support of the excuse
2. there is evidence against the excuse
3. the excuse wouldn't excuse completely anyway
4. there have been lots of complaints against this firm with regard to this question
5. (where the excuse is miscalculation, misunderstanding or reliance on others) it wasn't a reasonable mistake
6. (where the excuse is "not really false") a desire to test whether it is false or not in court
7. the defendant's story is just too far-fetched to believe.

The following cases extracted from the file illustrate the kinds of excuse given and the kinds of reason which might exist for accepting them or rejecting them and prosecuting. To highlight the illustration we have, where possible, compared under each section a prosecuted case with a non-prosecuted case.

1 (a) Mistake—Simple Error

1A. s. 36 Not Prosecuted

Facts	*Excuse*	*Reasons*
article advertised value "X" whereas in fact value less than "X".	seller compared the wrong model—the manufacturer makes three models.	some evidence that the comparison was reasonable.

NB: There were also other factors, however. In fact no test purchase was made and the original product was unavailable.

1B. s. 36 Prosecuted

Facts	*Excuse*	*Reasons*
article advertised "X% off" but were not being sold X% off the regular price.	error—new girl was handling the advertisements and by error followed old copy.	none

NB: Plea Not Guilty—convicted, but court considered the matter *de minimis* (the article only costs two or three dollars) and so imposed only a minimum penalty).

2A. s. 37 Not Prosecuted

Facts	*Excuse*	*Reasons*
article wrongly advertised as incorporating special feature.	98% of the models did have this feature, so that the salesman assumed this one did too.	initial decision to prosecute then case withdrawn as good explanation apparently.

2B. s. 37 Prosecuted

Facts	*Excuse*	*Reasons*
article advertised at "regular price X" when it was really less than X.	error in the advertisement.	advertisement placed 19 March and still not correct by April when it read "regular price X".

NB: Plea of Not Guilty and acquitted, on the ground that the prosecution failed to establish the regular price (was the court motivated by the plea of error?).

1 (b) Miscalculation

1A. s. 36 Not Prosecuted

Facts	*Excuse*	*Reasons*
advertisements inflated regular price.	price of each item unique. Items part of special purchase and price worked out.	article not now available, so no evidence now, but the firm complied and dropped the price: don't waste resources by prosecuting *all* cases. Other prosecutions were in hand.

1B. s. 36 Prosecuted

Facts	*Excuse*	*Reasons*
advertisement inflated regular price.	firm had to calculate regular price from customs duties, markup, etc. Mistake in the price.	none

NB: The excuse would only apply to one of the prices.

1 (c) Misunderstanding

1A. s. 36 Not Prosecuted

Facts	*Excuse*	*Reasons*
firm giving constant discount off the "regular value", but in fact their discount price now equals the regular price.	manager misunderstood Branch guideline—thought "regular price" meant price previously marked, not price previously obtained.	complied with Branch advice.

1B. s. 36 Prosecuted

Facts	*Excuse*	*Reasons*
advertisement inflated regular price.	thought regular price identical with list price.	the article was a well-known model so defendants were most probably aware of the true picture.

NB: Defendant pleaded guilty.

1 (d) Reliance on Third Party

s. 36 Prosecuted

Facts	*Excuse*	*Reasons*
goods advertised regular price was $20, stated to be $42.	seller relied on a dealer who said they were selling for $42 in another city.	none

NB: Defendant pleaded guilty.

2. *Facts Have Changed*

1A. s. 37 Not Prosecuted

Facts	*Excuse*	*Reasons*
on Saturday sale of articles advertised, but none on sale on Monday.	by error some flyers were distributed on Saturday, so that sale had to begin then. As a result, all sold out by Monday. Number of articles in stock based on last year's figures. Rainchecks given to disappointed customers for dearer articles at reduced prices.	excuse substantiated.

1B. s. 37 Prosecuted

Facts	*Excuse*	*Reasons*
goods advertised as of higher quality than they were.	originals out of stock—these are substitutes.	substitutes sent out over a long period, even before the advertisement appeared.

2A. s. 37 Not Prosecuted

Facts	*Excuse*	*Reasons*
features advertised—not incorporated in fact.	at 12th hour feature removed due to circumstances beyond firm's control. Other customers satisfied. Firm trying hard to smooth out initial difficulties.	not clear what description of feature meant—note action taken by firm—the matter seems trivial.

2B. s. 37 Prosecuted

Facts	*Excuse*	*Reasons*
advertisement—"world's largest display of certain items".	1. items delayed at customs border; 2. error—ad man copies last year's publicity; 3. the truck bringing the items broke down.	1. there were only *three* items anyway; 2. no record of entry at customs border.

3. "*Not Really False*"

1A. s. 37 Not Prosecuted

Facts	*Excuse*	*Reasons*
contest prize: failing to live up to advertisement.	complainant got wrong information but now satisfied.	"communication breakdown".

1B. Prosecuted

Facts	*Excuse*	*Reasons*
"odorless" material advertised, but had a faint smell.	though no material of this type could be completely odorless, this is as odorless as you could get.	this still doesn't make it odorless.

2A. Not Prosecuted

Facts	*Excuse*	*Reasons*
advertisement offering to buy articles—in fact the seller had to solicit advertisements for the "buyer".	advertisement really devised by advertiser's principal.	advertiser apparently acted in good faith, no longer in the business, so no value in prosecuting.

2B. Prosecuted

Facts	*Excuse*	*Reasons*
goods advertised at X cents but cost more.	seller gives a coupon for a service worth the difference.	dubious situation, continued to use sign after problem drawn to his attention.

3A. Not Prosecuted

Facts	*Excuse*	*Reasons*
articles described as "X" but in reality "Y".	in the trade "X" is a recognized description for this quality "Y".	some supporting evidence for trade usage. Firm no longer uses this advertisement. Firm recognized problem and adjusted practice accordingly.

3B. Prosecuted

Facts	*Excuse*	*Reasons*
"duty-free goods from duty-free centre" but goods not duty-free.	firm pays duty, puts low markup, so customer pays no duty.	no such premises exist as "duty-free centre" for such goods.

The above case comparison should suffice to show at work the sort of consideration operating in the decisions to prosecute or not to prosecute. We should stress that they only serve to indicate roughly how the Branch's mind works. They are not to be taken as hard and fast rules. In discussing these cases with the Branch, however, we realized that we had taken insufficient note of several crucial points. First, in some cases mistake could operate to negative *actus reus* and so prevent an offence from having been committed. Secondly, in most of the cases where there was no prosecution, mistake was far from being the only factor.

Mistake and Actus Reus

If a seller advertises his goods at X dollars "regular price Y dollars", he commits an offence if the regular price is less than Y dollars. Now if he put "Y dollars" by mistake, this goes only to *mens rea,* which is not required, and provides no defence. If, however, it was the newspaper that made the mistake (e.g. copying down a wrong figure), then this goes to *actus reus.* For now we can no longer say that the *seller* has advertised the regular price as being Y dollars. Some of the cases which we listed under mistake and which seemed to show the Branch as accepting the excuse of honest mistake turned out in fact to be cases of this kind. In fact the Branch was accepting the defence because it did, even as the law stands, negative guilt.

This is also true of that species of mistake which we listed under "not really false". The line between cases where the advertisement is only strictly untrue so that in fairness one ought not to prosecute and cases where the advertisement is not really untrue at all so that no offence has been committed is extremely hard to draw. But some of the cases which we tended to put into the former category could well be put into the latter. "Everyone's wearing bell-bottoms" for example: this isn't true. But is it a case where we should say it would be too harsh to prosecute because the advertiser never meant to mislead and be taken literally? Or is it one where we have to say no one's being misled?

Mistake and Other Factors

The second point which we had not always sufficiently appreciated was the fact that though mistake might be contended and be accepted by the Branch, it might well have been the least important factor at work in the decision not to prosecute. The sort of factor at work might be that time was running out, that the evidence was not a hundred per cent satisfactory from the Branch's point of view, that the case was too trivial to proceed, that there were other prosecutions pending against the same firm for the same offence, that the offence was in fact part of a whole fraudulent scheme which should be prosecuted as fraud, that the complainant wished to drop the proceedings, that the complainant was now satisfied, or that the Branch was now satisfied. These were the commonest of the other factors we found to be at work.

Re-assessment of the Cases

In the light of these two factors we recalculated the number of cases. We found that in the mistake cases where there was no prosecution we had not taken into account cases where there was really no offence. In five of these cases the mistake (two being mistake on the part of a third party such as the newspaper carrying the advertisement) resulted in there being no offence committed. Also we had failed to take into account that in eleven cases there was evidence not only of mistake but also of a co-operative attitude on the part of the defendant; in five cases the matter was reckoned to be trivial; and in nine cases there were other factors such as those listed in para. 106. Accordingly the corrected totals were:

Non-Prosecuted Cases under ss. 36-37, where "no fault" was argued:

Reasons for not prosecuting	
Mistake	5
Mistake and Compliance	5
Mistake and Other factors	6
Trivial matter	5
Compliance	3

Compliance and Other factors (other than mistake)	14
Other factors	4
No offence	5
Total	47

Conclusions from Closed (3) and Closed (4) Files

From this detailed analysis, following on the larger survey, we concluded that mistake played a lesser role than we had imagined. On the other hand, if we widened the concept of "no moral fault" to cover all cases where for some reason or other it might be true that the seller or advertiser was not really being dishonest, then the hypothesis that the Director's staff were not inclined to prosecute cases involving no moral fault seemed to stand up. Of the 100 prosecuted cases under ss. 36 and 37, 47 were cases where "no fault" in this wider definition was argued and the remainder were cases where "no fault" was not argued but other factors prevented prosecution. Of the 47 cases where "no fault" was argued 38 seem not to have been prosecuted because of this lack of fault and 9 because of other factors.

Accordingly, the survey and detailed analysis show that

1. out of 200 cases in total the number of cases where "no fault" is raised is 71—35%;
2. out of 100 prosecuted cases "no fault" is raised in 24 cases—24%;
3. out of 100 non-prosecuted cases "no fault" is raised in 47 cases—47%;
4. out of this 100 the number of cases not prosecuted partly because of "no fault" in a wider sense is 38—38%.

In conclusion, "no fault" in this wider sense is a factor in the decision. On the other hand, if we narrow the area of those cases where "no fault" in the wider sense was the only factor, then we find that the total of non-prosecuted cases was only 13.

The Problem of Scarce Resources

A legal researcher is naturally inclined to view the problem from the point of view of possible defences and to focus attention on the question of presence or absence of fault. Discussion with the Director and his staff, however, drew our attention to the quite different considerations which they, as administrators, have to take into account also—considerations which are obvious and based on common sense but which are easily lost sight of in a jurisprudential inquiry. For bearing in mind the extremely limited resources of the Director's staff, one realizes that uppermost in their minds must be the question whether a particular prosecution justifies its cost in terms of time, money, etc. This is why in some of the cases it was decided, however

clearly or obviously an offence had been committed, that the triviality of the matter was such that it did not justify prosecuting. In our sample at least five cases fell clearly into this category. Moreover, we felt that there were others where, although this was nowhere spelt out and recorded, the same consideration applied. For the impression we got from the staff was that one of the overriding factors in applying and enforcing this area of law was the degree of harm caused by the misleading advertisement and the degree to which the public needed protection. And just as in ordinary law the gravity of an offence appears to be gauged partly by the amount of actual harm done and the "wickedness of intent" on the part of the defendant, so here too the seriousness of the matter seems to be measured partly by the extent of actual harm done and the degree of dishonesty on the advertiser's part. So the less dishonest the advertiser, the more likely is the staff to regard the matter as not warranting prosecution.

This is partly common sense. It is partly also a result of the social reaction to offences committed "without fault" and above all of the reaction of courts. In this scarce resources operation the staff are highly concerned, as they made clear to us, to preserve their credibility in the courts. To "waste time" prosecuting cases where the defendant was clearly in no way dishonest would do little to present the courts with the image of a Department seriously concerned with important and "real" offences. Indeed, two cases of our sample of 71 "no fault" cases bear this out. In one the court appears to have acquitted (wrongly surely from a strictly legal point of view) on account of the absence of fault. In the other the court convicted but considered the matter trivial and gave a minimum penalty.

Locating the Decision

Another result of our survey was to raise the question of how far the decision was actually taken at the closed (3) and closed (4) stage. Some doubt was thrown on our possibly too facile view by our further discussions with the Director's staff. On the one hand we had been under the misapprehension that the decision to prosecute was that of the Branch, while the Justice personnel were there only to advise the client department whether it had a good case or not. Indeed, the exact relation between the latter and the Justice personnel is hard to describe, but as one member put it to us, perhaps the best way of looking at it is to say that Justice is like a large law firm and the Department is one large client, and so it is convenient that those members of that law firm who work solely on that client's affairs should be physically located in the Department's offices. Yet, in the final analysis it seems the Branch, when deciding to prosecute, hands over the case to Justice "for such action as the Attorney-General thinks best", so that ultimately the decision to prosecute or not is not that of the Department but of Justice.

Though Justice may on occasion turn down a case submitted to it by the Branch, normally it will follow the Branch's recommendation. In the same

way we had the feeling that by the time a case had got beyond the closed (2) stage it had gone far enough and involved enough Departmental resources to militate against too simple a rejection. This would be extremely hard to gauge, but we did decide to make a short investigation of the closed (2) files to see what considerations were at work at this stage.

Closed (2) Files Analysed

Before examining these files we had a discussion with the staff member solely responsible for the cases at this stage. He gave us to understand that almost half the files are closed because they are without substance and that the rest divide equally into those where there is insufficient evidence, where there is no fault on the advertiser's part, and where other action is more appropriate. The first half tends to be closed immediately, the second half after further information is received.

Inspection of the filing indexes and records revealed that by the end of the period under investigation about 3,700[30] files had been closed into the closed (2) category. We decided to survey a sample of 100 of these files. Accordingly, we took a randomised selection of one in 37 files. Our survey gave us the following figures:

1.	Cases without substance		46
2.	Cases with administrative problems:		
	(a) insufficient evidence	12	
	(b) other action more appropriate	14	
	(c) other factors (i.e. out of time)	12	
		38	38
3.	Cases lacking fault:		
	(a) mistake or improvement	10	
	(b) customer satisfied	3	
	(c) no further advertisement	3	
		16	16
Total			100

Our conclusion from these figures was that if we group the last three figures together there is a small yet sizable quantity of cases closed at this initial stage because the investigator or administrator thinks that the lack of fault means that use of resources would not be justified in prosecuting. This was not out of line with our findings on the main survey and the detailed analysis. "No fault" does play some part in the decision not to forward a case for prosecution. It does not, however, play a conclusive part. Added

to other factors it can render a case "not worth prosecuting". By itself it may not suffice, as is shown by the main counter-example to our thesis. This was a case (TP 1508) where vinyl flooring was being advertised and the regular price was inflated due to a mistake, and where the staff appeared to have accepted that a mistake was made but decided to prosecute nevertheless.

General Conclusion of Part II

On the other hand a tendency in the Director's staff not to prosecute if the defendant is not really being dishonest is clearly established. Equally, it is submitted, it is self-evidently justified. The object of the staff is to prevent fraud to the public and to ensure truthful advertising. This is an object best secured by education and enlisting the co-operation of advertisers rather than by too officious policing of the Act. A "strict liability administration" of the Act would be as costly as it would be counterproductive, it seems.

So what would be the reaction of the Branch if the law were altered to reflect this recognition of the need for fault? Would the Branch be adversely affected by the abolition of strict liability in this area? The result of this discussion we leave till after a consideration of the Food and Drugs and Weights and Measures Investigation, since the same point arises there too and the two areas can best be dealt with together.

TABLE 1

S. 36 PROSECUTIONS

Convictions, Acquittals and Penalties

	Total	Acquitted	$0–100	100+	200+	300+	400+	500+	1000+	Prohibition Order
Full Sample	35	5	3	7	10	3	1	6	—	9
Size of Firm—										
Large/National (Av* Fine=300)	6	—	—	1	2	—	—	3	—	2
Small (Av Fine=200)	14	2	2	3	3	3	—	1	—	5
"Mistake" raised	9	—	1	2	3	1	—	2	—	4

*Average

TABLE 2

S. 37 PROSECUTIONS

Convictions, Acquittals and Penalties

	Total	Acquitted	$0–100	100+	200+	300+	400+	500+	1000+	Prohibition Order
Full Sample	65	17	3	8	14	6	4	6	7	20
Size of Firm										
Large/National (Av* Fine=300)	10	4	—	—	1	2	1	2	—	2
Small (Av Fine=200)	27	7	3	4	4	3	2	3	1	10
"Mistake"	14	7	—	—	2	2	1	1	1	2

*Average

TABLE 3

NON-PROSECUTIONS

	S. 36	S. 37
Total	35	65
Large National	6	26
Small	7	11

TABLE 4—PRODUCTS

Product	S. 36				S. 37			
	Total	Acquitted	Convicted of fine	P.O.	Total	Acquitted	Convicted of fine	P.O.
Appliances	2	1	1	—	—	—	—	—
Autos, etc.	—	—	—	—	4	1	3	2
Building Material	1	—	1	—	5	2	3	1
Carpets	2	—	2	1	2	1	1	—
Clothing	2	1	1	1	7	2	5	1
Contests (See note 31)	—	—	—	—	1	—	1	—
Detergents	—	—	—	—	1	—	1	—
Drugs, Cosmetics, etc.	5	2	3	1	1	—	1	—
Food	1	—	1	—	3	1	2	—
Furniture	5	—	5	2	6	—	6	3
Furs	4	—	4	3	1	—	1	1
Gasoline	—	—	—	—	5	—	5	4
Household	—	—	—	—	1	—	1	—
Miscellaneous	6	1	5	3	9	1	8	2
Photographic	1	—	1	—	4	2	2	1
Realty, Apartments	1	—	1	—	5	2	3	—
Services	—	—	—	—	5	2	3	—
Sewing Machines	—	—	—	—	1	—	1	1
TV, Radio, Stereo	5	—	4	1	4	3	1	1

TABLE 5

PRODUCTS: SS. 36 AND 37 COMBINED

Product	Total	Acquitted	Convicted of fine	Prohibition Order
Appliances	2	1	1	—
Autos	4	1	3	2
Building materials	6	2	4	1
Carpets	4	1	3	1
Clothing	9	3	6	2
Contests[31]	1	—	1	—
Detergents	1	—	1	—
Drugs and Cosmetics	6	2	4	—
Food	4	1	3	—
Furniture	11	—	11	5
Furs	5	—	5	4
Gas	5	—	5	4
Household	1	—	1	—
Miscellaneous	15	2	13	5
Photographic	5	2	3	1
Realty, Apartments	6	2	4	—
Services	5	2	3	—
Sewing Machines	1	—	1	1
TV, Radio, Stereo	9	3	5	2

CHART 1

Prosecutions Under s. 36

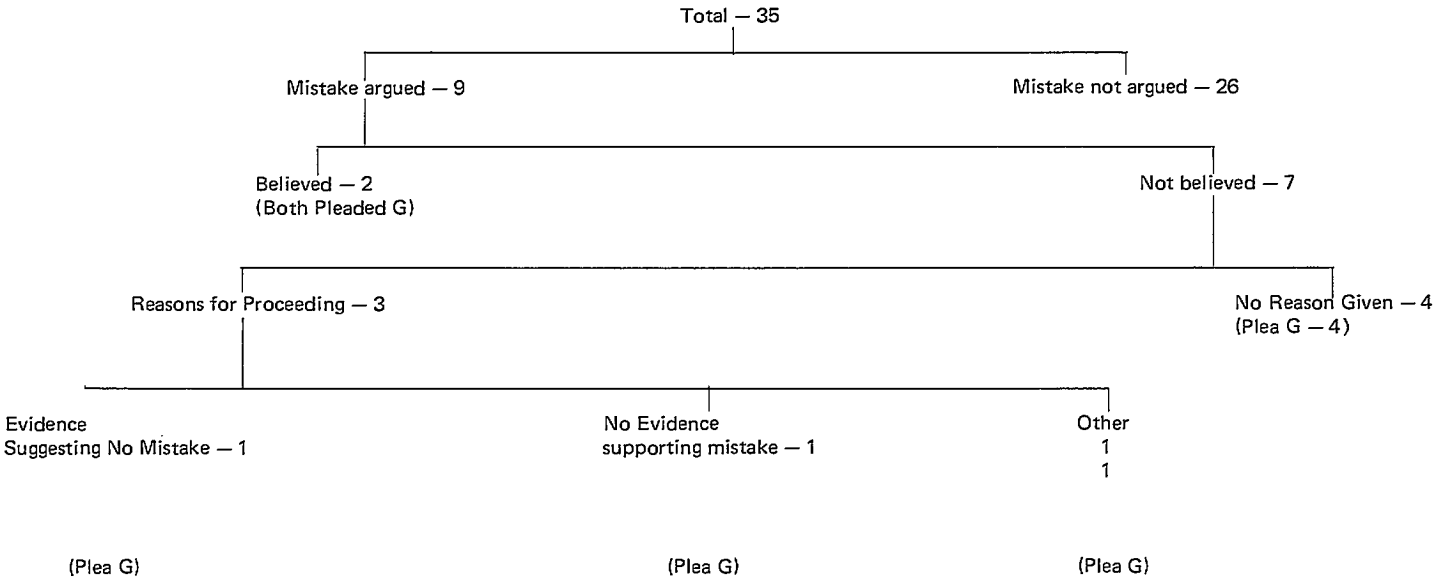


CHART 2

s. 36 — Non-Prosecuted

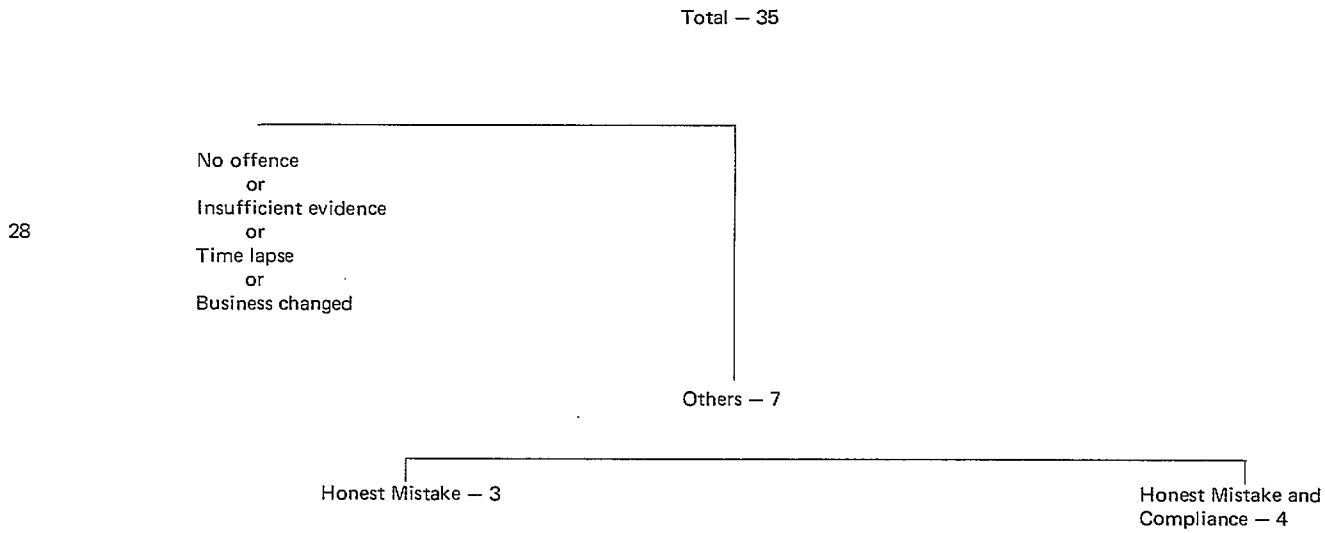


CHART 3

Prosecutions Under s. 37

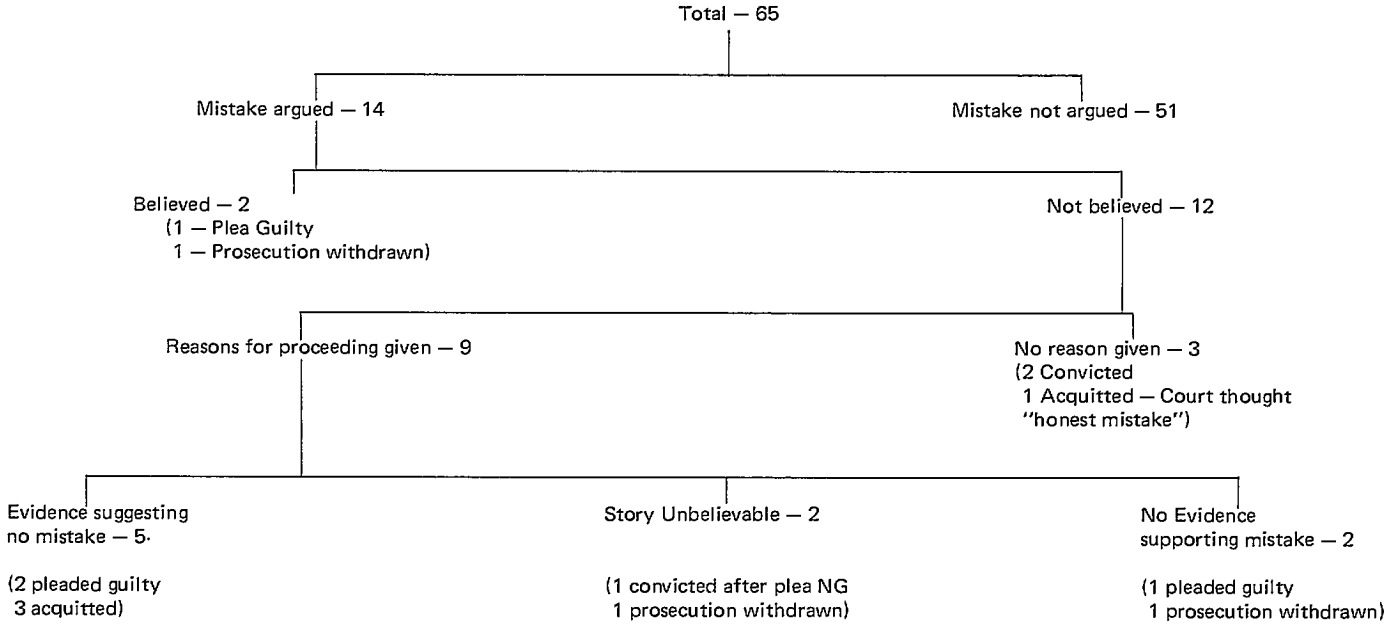


CHART 4

Prosecutions Under ss. 36 and 37

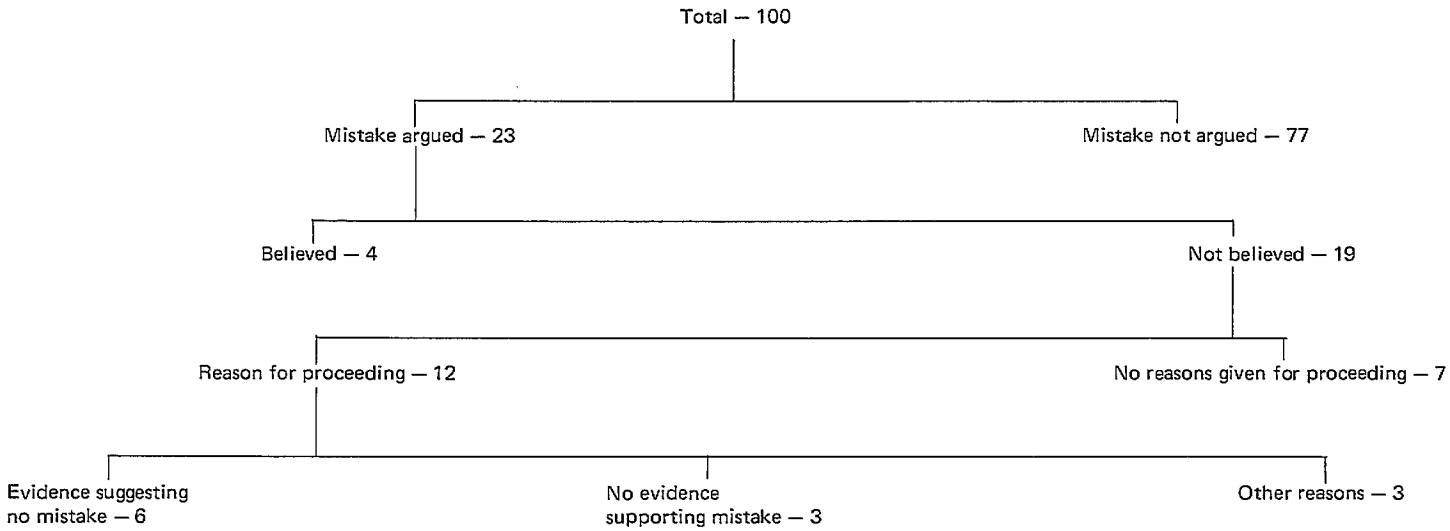


CHART 5

s. 37 — Non-Prosecuted

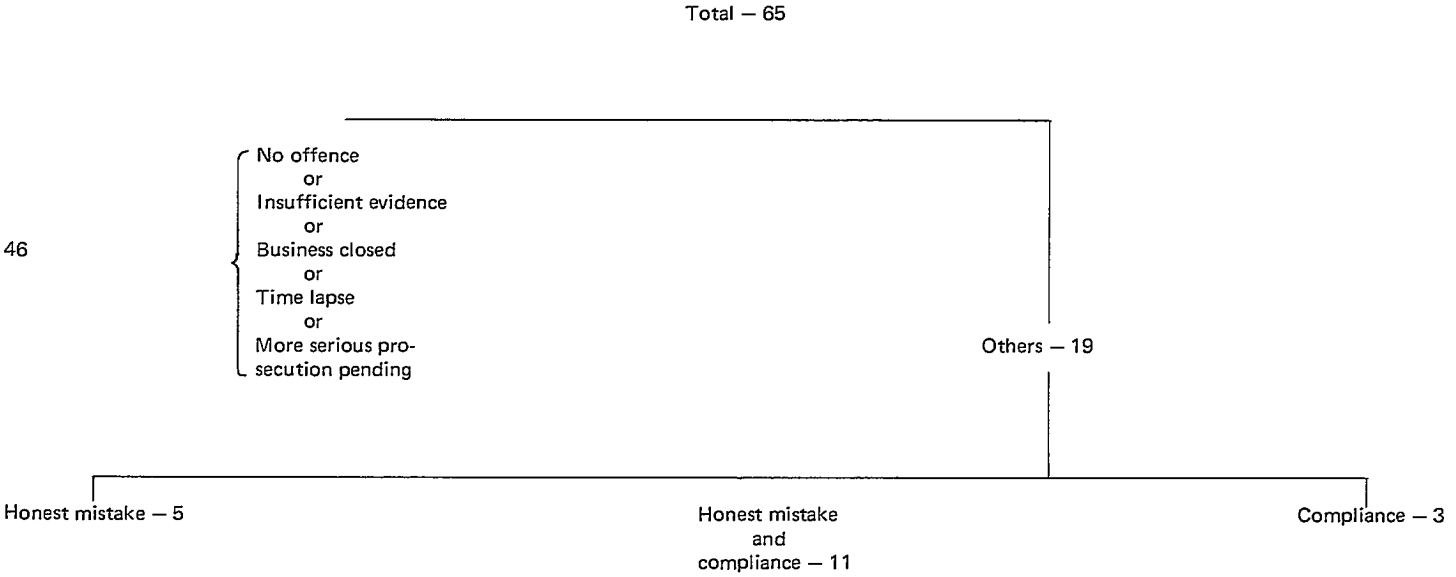


CHART 6

ss. 36 – 37 Non-Prosecuted Cases

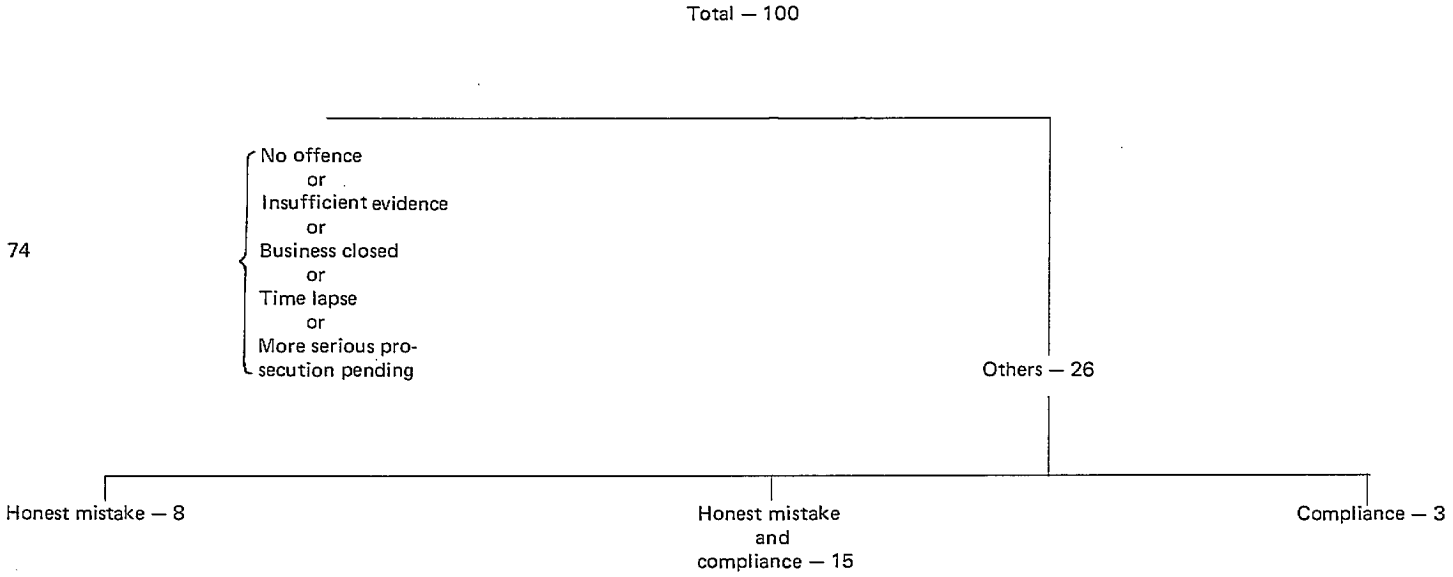


CHART 7

Prosecuted and Non-Prosecuted Cases Under ss. 36 and 37
Where "No Fault" Was Argued

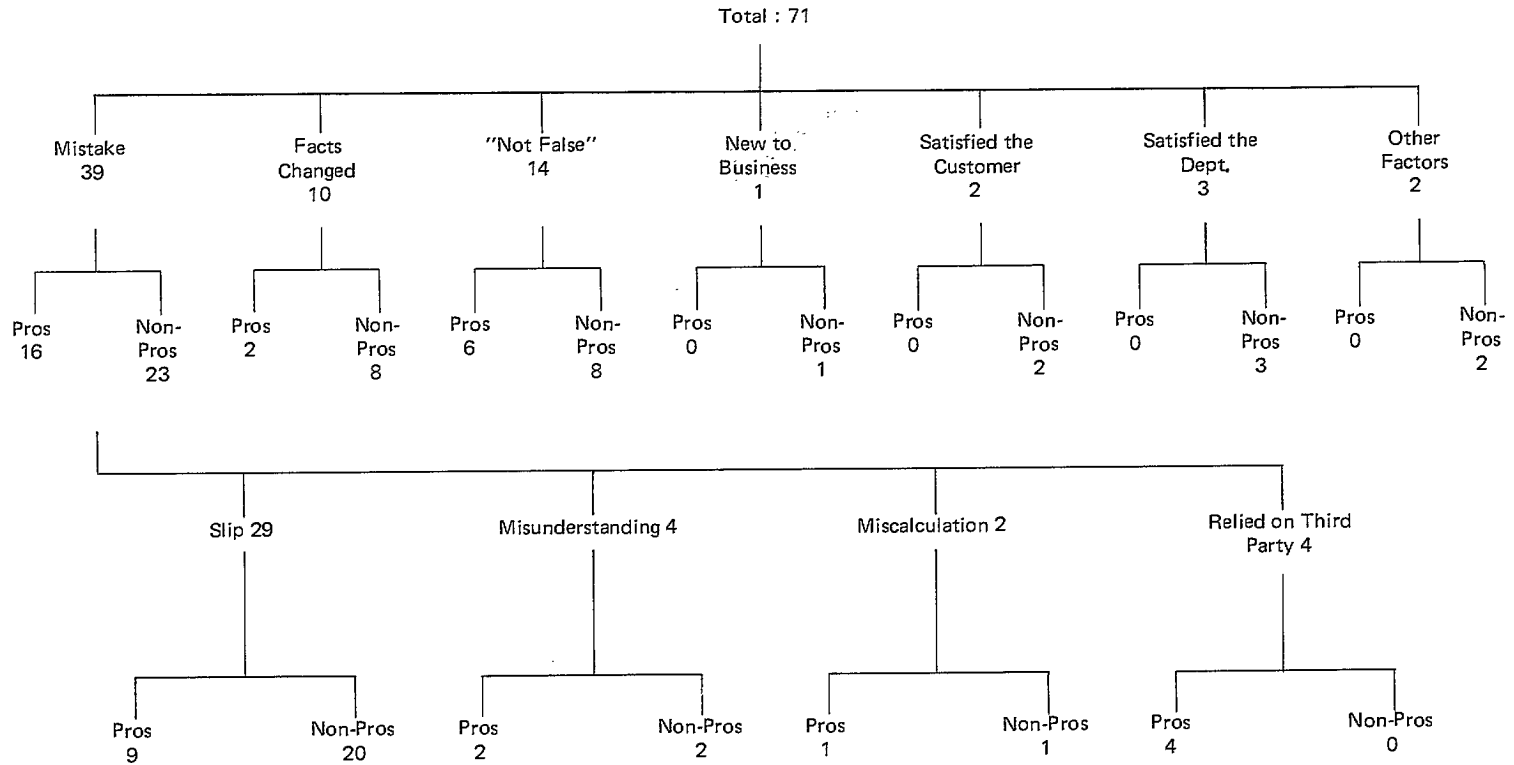
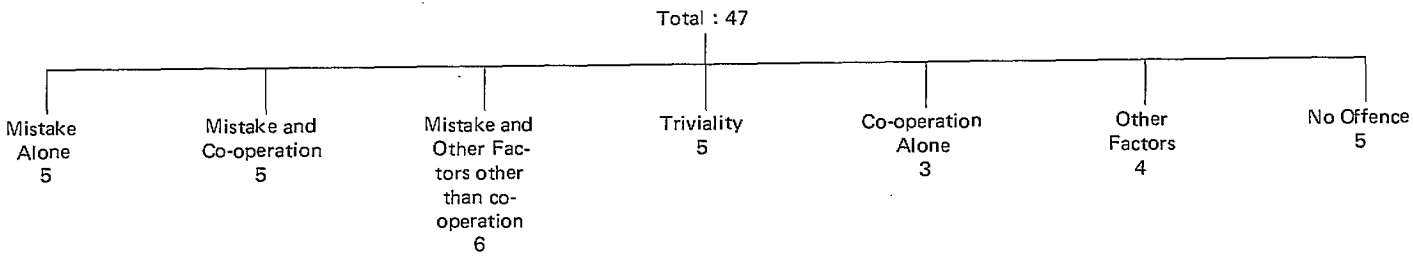


CHART 8

Non-Prosecuted Cases Under ss. 36 and 37
Where "No Fault" Was Argued



III

Weights and Measures and Food and Drugs

Introduction

The second part of the investigation proved far simpler. As a result, this part of the report is considerably shorter than Part II. The reasons are two-fold. First the law relating to these areas is more cut and dried; secondly, while discretion has a role, this has been carefully regulated by departmental policy.

First the law. Misleading advertising law is broadly stated in two sections of the Combines Investigation Act.[32] The details therefore have had to be worked out by the courts and are still being worked out. Consequently, there are grey areas where one can't be sure if an offence has been committed or not. For instance, is a label an advertisement in the eyes of the law? In such cases, the department may understandably not wish to employ scarce resources uneconomically and may therefore decide not to prosecute. In some it may also be suggested that the merchant was not at fault. In any event, there are many such cases, the files on them are lengthy and it took time to investigate them.

By contrast, the law relating to Weights and Measures and Food and Drugs is more precisely stated in details in a wealth of sections and regulations. Far less room is left for uncertainty. In general the law here leaves less to discretion, there are fewer non-prosecuted cases in the files, and those there are proved a lot shorter and easier to digest.

In fact the ratio between the prosecuted and non-prosecuted cases in Weights and Measures and Food and Drugs is the reverse of that in misleading advertising cases. In the misleading advertising files, we counted roughly 100 prosecuted as against about 1,200 non-prosecuted cases; and these 1,200 were merely cases which the Director's staff decided after investigation not to prosecute—they didn't include the larger number of cases not even sent forward for further investigation. The ratio, therefore, of prosecuted to non-prosecuted cases was 1:12. By contrast, in Weights and Measures we counted

39 prosecuted cases as against 23 non-prosecuted—a ratio of nearly 2:1 and in Food and Drugs we counted 105 prosecuted cases as against 34 non-prosecuted—a ratio of just over 3:1.

One reason for this difference is the difference between the ways in which cases are initiated in the three areas. A misleading advertising case is initiated by a complaint from a customer or member of the public. It then has to be investigated to discover whether an offence is being committed, and not surprisingly the number of cases without substance outweighs the number of cases with. Food and Drugs cases, however, like Weights and Measures cases, are most often initiated by an inspector discovering that (in the inspector's view) an offence is being committed. Naturally, therefore, it is more than likely to be true that an offence is being committed, and so not surprising that the number of cases proceeded with should outweigh the number of cases dropped.

All the same, as the existence of these non-prosecuted cases shows, discretion does play a part in Weights and Measures and Food and Drugs. Its role, however, has been formalized; and this is the second way in which the situation regarding these areas differs from that regarding misleading advertising. When these two areas came under the jurisdiction of the Department of Consumer and Corporate Affairs, the Department took the opportunity of working out and articulating a comprehensive policy concerning the prosecution of offences, a policy which we consider in detail later on. Since this policy regulates the discretion to prosecute, little problem arises in the individual case. The only question tends to be whether or not a case fulfills the criteria required by the departmental policy for prosecution. As a result, the filed reports tend to be much briefer and in many cases, mention no reasons for prosecuting or not prosecuting. Where an offence is reported by the inspector, this seems sufficient reason for prosecuting. Reasons, if they are to be found, are more to be expected in the less frequent case where there is no prosecution.

Nevertheless, the inquiry into Weights and Measures and Food and Drugs has greater importance than the length of this part of the report would suggest. For the routine system adopted by the department in these areas suggests a possible way of reconciling the demand of justice for a fault-based criminal law and the demand of expediency for a strict liability system that can be simply administered and enforced.

The Law

The law on both Weights and Measures and Food and Drugs is much more voluminous than the law on misleading advertising. The law on Weights and Measures is contained in the Weights and Measures Act,[33] and regulations made thereunder. The Act itself contains 54 sections and 4 schedules; the Weights and Measures regulations number 25 and contain 9 schedules. Sec-

tions 40-53 are the sections concerning offences, such as selling short weight, measure or quantity (section 43); using in trade false or unjust weight, measure, weighing machine or measuring machine (section 45); and knowingly using a falsified weight, etc. On the whole, these sections have not given rise to such difficult jurisprudential problems as have sections 36 and 37 of the Combines Investigation Act.[34] The regulations clarify and define the Act and in particular lay down the tolerances.

The Food and Drugs Act[35] has 46 sections and 8 schedules. Offences are created by sections 3-21, 22 (5)-(7), 34 and 42. An example is s. 5:

1. No person shall label, package, treat, process sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.
2. An article of food that is not labelled or packaged as required by the regulations, or is labelled or packaged contrary to the regulations shall be deemed to be labelled or packaged contrary to subsection (1).

and s. 6:

> where a standard has been prescribed for a food, no person shall label, package, sell or advertise any article in such a manner that it is likely to be mistaken for such food, unless the article complies with the prescribed standard.

The regulations run into a hundred and fifty pages, or more.

Both Weights and Measures offences and Food and Drugs offences are severally considered offences of strict liability. As regards Weights and Measures, *R.* v. *Piggly-Wiggly Canadian Limited*[36] decided that *mens rea* was not an essential element of the offence created by section 63 of the Weights and Measures Act[37] (selling or delivering anything by weight, measure or number which is short of the quantity ordered or purchased). As regards Food and Drugs, section 29 of the Act provides that an accused may be acquitted if he proves that he purchased the article in question from another person in its packaged form and sold it in the same package and in the same condition and also that he couldn't with reasonable diligence have ascertained that the sale of the article would be in contravention of the Act. But this doesn't apply unless the accused, at least 10 days before the day fixed for trial, gives written notice that he wishes to use this defence and discloses the name and address of the person from whom he purchased the article. This would imply that, apart from this defence (where the onus is on the accused), there is no defence of mistake of absence of fault.

Recently, however, a Saskatchewan District Court has decided that *mens rea* is an essential element of the offence created by s. 5(1) of the *Food and Drugs Act*.[38] This decision—*R. v. Standard Meat Ltd.*,[39] [1972] 4 W.W.R. 373, was appealed; the higher court endorsed the more general view that this is a strict liability area.

The Law in Practice

The administration of the two areas of the law falls under the jurisdiction of the Department of Consumer and Corporate Affairs. The first line of attack is the inspector. An inspector may issue a verbal warning to an offender. He may, if his Regional Manager has delegated this authority to him, issue a written warning, or else he will recommend that a written warning be issued or he may recommend a prosecution.

This recommendation will go to his Regional supervisor, who will normally accept it and pass it on to the Regional Manager, who in turn will nearly always accept the recommendation of his subordinate and forward the case to the Department Headquarters in Ottawa. The Department next forwards the case to any other relevant department, for example a Food and Drugs case will be forwarded to the Department of National Health and Welfare for its comments.

The reason for these inter-departmental consultations lies in the history of the matter. Originally jurisdiction over Food and Drugs offences lay with the Department of Health and Welfare but in due course those offences which particularly related to consumer protection (i.e. offences of deception in food labelling) were placed under the aegis of the Department of Consumer and Corporate Affairs, whereas those relating to safety and health hazards remained with the original Department. Consequently the Department of Consumer and Corporate Affairs affords the Department of National Health and Welfare an opportunity to make such comments, on the basis of its long experience in administering the Act as a whole, as they think useful with respect to a prosecution.

After such comments are received, a routine case will then be remitted to the region, and the Manager instructed to proceed in co-operation with the local Justice Department officials; if there is no Justice Department official in the relevant area, a legal representative will be appointed by the Justice Department in Ottawa. A non-routine case, i.e. one raising particular legal difficulties, will be passed for consideration to the Department of Justice, which has 2 members connected with the consumer programme and permanently located in the Headquarters of the Department of Consumer and Corporate Affairs.

Such is the chain of procedure concerning prosecution under these Acts. When it is borne in mind, however, that the number of inspectors is small, it is readily understandable that by no means all infractions can be prosecuted. Since there are only 19 Food and Drugs inspectors (with 3 vacant posts) and 169 Weights and Measures inspectors for the whole of Canada, clearly, selectivity is inevitable. For this reason, the Department has worked out a careful and detailed approach to the problem.

This approach is described in Policy Circular (Consumer Affairs) No. 70-1, March 2, 1970. The Circular sets out the objective of the Bureau's retail enforcement program as being

> to reduce incidents of economic loss by consumers and insure that consumers' choice is based on accurate mandatory information.

The Circular then lists the goals of the program as follows:

(*a*) to realize through an effective compliance program
  (i) the specific objectives of the Acts being administered:
    —the accuracy of Weights and Measures used in trade;
    —the proper grading, labelling and marking of food;
    —the prevention of fraud and deception with respect to food.
  (ii) the ultimate general objectives of this legislation:
    —the reduction of economic loss by consumers;
    —honest competition in the marketplace and improvement in the quality of food offered for sale;

(*b*) to ensure consistent and uniform application of the law;

(*c*) to ensure an approach to infractions that is logical, consistent and fair and sufficiently stringent to deter wilful contraventions;

(*d*) to maximize compliance at a minimum cost to consumers and government.

Finally, the Circular describes the operating objectives as follows:

(*a*) to implement the enforcement program designed to educate consumers and retailers concerning the law;

(*b*) by inspection activity to encourage retailers to comply not only with the law but also with the *ultimate objective of the law* and to deter and determine non-compliance with the law;

(*c*) to issue warnings (including instructions to re-grade and re-pack and re-label) and/or to prosecute for violation of the law.

From the standpoint of the present investigation, the most important part of the Circular concerns contraventions. These are divided into four categories.

1. Offences which represent danger to health or safety of the individual, e.g. selling hazardous products banned under Part 1 of the schedule to the Hazardous Products Act.[40]

These offences are to be prosecuted without warning.

2. Acts which are clearly wilful, because of their very nature; e.g. interfering with an inspector, selling horsemeat as beef, adjusting a scale so that it is unjust.

These are to be prosecuted without warning.

3. Acts which are wilful or unwilful, depending on the facts of the case; e.g. deliberately or unintentionally using a scale that is inac-

curate, selling vegetables marked one grade better than they are, adding too much filler to meat product.

If there is clear evidence that these were done deliberately, they are to be prosecuted without warning.

If there is no evidence whether or not they were done deliberately, a warning is to be issued.

4. Acts of such minor nature that prosecution is only appropriate in the case of habitual offenders.

There are, then, 3 types of offences which are to be prosecuted without warning:

Health hazards;
Wilful acts of their very nature; and
Acts which there is evidence to suggest have been deliberately committed.

The first category does not concern us; for the Department's responsibility in this field is under the Hazardous Products Act[41] and not the Food and Drugs Act.[42] Offences of the second and third category, however, do fall under the Acts which concern this investigation, and they are, according to the circular, to be prosecuted without warning.[43] Other offences, i.e. offences that are neither a danger to health and safety, nor committed deliberately, are to be dealt with by written warning. Normally only one such warning is issued, a second violation being dealt with by prosecution. And habitual offenders may be prosecuted without warning.

The Problem of Fault in our Inquiry

Clearly, this cut-and-dried approach to selection goes far to limit the scope and value of the present inquiry. The warning system means roughly that whenever the Department prosecutes, it believes the offender was at fault morally since he acted deliberately or at least negligently. This belief will be based either on the ground that the offence is by nature one than can only be committed deliberately, or on the ground that the offender was acting deliberately or carelessly because he had already been warned. *A priori* it is unlikely, therefore, that there will be any cases of prosecution in the absence of such fault, or at least of departmental belief in the existence of fault, on the defendant's part. It is equally unlikely that there will be cases where the department believes there is fault on the defendant's part but declines to prosecute. These were the *a priori* conclusions we set out to test.

Pilot Project

(a) *Weights and Measures*

The Weights and Measures cases whose files we examined ran from April 1970 to March 1972. There were 39 prosecuted and 23 non-prosecuted cases. For the pilot project, we selected 5 prosecuted and 5 non-prosecuted cases at random.

Our search was for:

1. prosecutions of defendants without fault; and
2. evidence in non-prosecutions that Departmental belief in defendant's lack of fault led to the decisions not to prosecute.

Of the *5 prosecuted cases* the breakdown was as follows:

3—previous warnings issued.

2—no warning, no other reason given.

In these two cases, however, there was no evidence whether a previous warning had been given or not.

Of the *5 non-prosecuted cases* the breakdown was as follows:

1—not prosecuted because of difficulties regarding evidence.

2—not prosecuted partly because too much time had elapsed.

1—a possible partial honest error on the part of the defendant.

1—the defendant was striving to perfect its weights and no justice would be served by prosecuting.

Our conclusion was (1) that there was no evidence that defendants not at fault had been prosecuted and (2) there was some slight evidence in two cases that lack of fault led to a decision not to prosecute. In one, where there had possibly been an error by the defendant, there were in fact other reasons for not prosecuting—the prosecution witness was a poor witness and time was running out. In the other, where there were no such difficulties, the file notes that the defendant was co-operating with the objects of the legislation. The fact was, however, that the defendant was being prosecuted on a large number of charges, had been convicted on 28 charges and fined $4,200, and had improved his practice. Accordingly, the remaining charges were dropped.

(b) *Food and Drugs*

The Food and Drugs files we examined ran from March 1970 to March 1972. There were 105 prosecution and 34 non-prosecution cases.

The *5 prosecution cases* had a breakdown as follows:

4—previous warning issued.

1—no warning.

The latter was a case of adding non-permitted preservative—an offence that can only be committed deliberately—and the offence admitted "we are caught", so no warning was needed.

The breakdown of the *5 non-prosecution cases* was as follows:

2—probably no offence committed.

1—evidence difficulties.

1—defendant now out of business.

1—business had changed hands.

We concluded, therefore, that (1) in no prosecution case was the defendant without fault; and (2) there was no evidence that lack of fault had led to the decision not to prosecute.

Our general conclusion from both parts of the pilot study, therefore, was that

(1) all prosecuted defendants would have been morally at fault; and
(2) there was very slight evidence that lack of such moral fault might have contributed to decisions not to prosecute.

The Full Survey

(a) *Weights and Measures*

As there were 23 non-prosecuted cases and 39 prosecuted cases, we selected randomly 23 prosecuted to match with the 23 non-prosecuted cases. The breakdown of the *Prosecuted Cases* was as follows:

23 cases were selected, and the offences were divided as follows:

Short weight	21
False scale	2

Plea

17 pleaded guilty
6 pleaded not guilty
All 23 were convicted.

Fine

up to $ 75	8
$ 100	5
$ 150	4
$ 300	3
$800 - $1,200	3

Status

12 defendants were corporations, 11 private individuals.

Warnings

9 cases had warnings, and there were 3 previous prosecutions.

Comments

Previously warned and/or prosecuted (intent mentioned in 3 cases)	10
Intent indicated by extent of practice	3
Intent indicated by extent of the shortage	1
No previous warning appears in file	9
Total	23

The *Non-Prosecuted Cases* broke down as follows:

Of the 23 cases, 20 involved short weight, and 3 involved a false scale. 10 defendants were corporations, 13 private individuals.

Reasons for Not Prosecuting (as checked with the Index Book)

Time expired or insufficient time	11
Owner bankrupt	1
Lack of Evidence	2
Withdrawn on recommendation of inspector and Crown counsel	2
No reason appears in Index Book	7
Total	23

The files of the 7 cases for which no reasons were recorded in the Index Book produced the following reasons:

Business changed hands	1
Defendant bankrupt	1
Wrong name charged	1
Other cases probably pending	1
No record of warning	1
Honest error	1
Defective Law	1
Total	7

In the "no previous warning" case, there was no record of a warning letter having been sent, although this had been recommended, and so the Department did not proceed. In the "Defective Law" case, the problem was that the law was ambiguous as drafted, and the Department did not think it right to try and get the court to rewrite the Act and remedy the defect in this way. Two cases of short weight concerned the same company which had already been prosecuted several times, and paid a large total of fines. In one case of short weight, the Department did not proceed because the shop concerned had recently changed hands, and the new owner should have had the scales checked by the Department. Since the owner had tried to co-operate and had had the scales replaced by new ones, but had not realized that those had to be checked also, the Department felt it was an *honest mistake.* This was the only case in which the defence of honest mistake was raised. In the remaining cases the Department was not in a position to proceed.

So far as the Weights and Measures are concerned, then we conclude that the warning system may bring about a result whereby a defendant is not prosecuted unless he is believed to be morally at fault. This seems to emerge

from the prosecuted cases. In 14 of those cases, there was either clear evidence of intention or previous warning. In the other 9 cases too, which were all prosecutions for short-weight sale of pre-packed meat where there was no record of any previous warning it is possible that warnings were issued.

So far as concerns the non-prosecuted cases, in 18 the Department was not in a position to proceed. As to the remaining 5 cases, one was dropped because the law was defective, another because the defendant was not really blameworthy, another because no warning had been issued, and the other two because the defendant had already been prosecuted.

(b) *Food and Drugs*

As there were 105 prosecuted cases and 34 non-prosecuted cases, we selected 34 prosecuted cases to match with the 34 non-prosecuted cases. The *prosecuted cases* broke down as follows:

Adulteration/Composition	21
Labelling	4
Short Measure	8
Other (Assault)	1
Total	34

Plea

In 22 cases there was a plea of guilty.
In 5 cases there was a plea of not guilty.
In 7 cases the plea was not in the records.
All 34 were convicted.

Status

15 of the defendants were limited companies, 19 private individuals.

Fine

Up to $ 75	8
$150	9
$250	9
$400	2
$600	4
$1,000 or over	2
Total	34

Comments

1. Previous warning (one warning—4 multiple warnings—10)		14
2. Previous convictions		5
3. No previous warning		
(a) substitution of food matter (e.g. cod for haddock, beef liver for calf)	3	
(b) adulteration of coffee with chicory	3	
(c) use of non-permitted preservative or colouring	6	
(d) incorrect percentage of alcohol in a cider-type drink—prosecuted in order to protect the public	1	
(e) false labelling of margarine	1	
(f) insufficient net content in milk	1	
		15
Total		34

Fourteen of these 15 no-warning cases concern deliberate offences, for which no warning is required. The exception is 3(f)—insufficient net content in milk—where (in the opinion of members of the Department with whom we discussed the cases) in all probability a warning was issued but not recorded.

Non-Prosecuted Cases

In these cases, 20 of the defendants were limited companies, 14 private individuals. In the 34 non-prosecuted cases, the offences were divided as follows:

Adulteration/Composition	15
Labelling	13
Short Measure	5
Other	1
Total	34

Of the first group, 11 were offences against standards (i.e. excess fat in ground meat, vegetable oil in butter, etc.). Four were cases of using non-permitted colouring matter or preservative.

Reasons for Not Prosecuting (checked against the index book)

Insufficient evidence	5
Exceeded time limit	8
Sent to Department of Agriculture	1
Method of analysis in question	6
Withdrawn by Justice lawyer	2
Firm out of business	2
Error in analyst's Report	2
Bread cases—deficiency in regulations	3
Other regulation deficiency cases	2
Death of offender	1
Offender not morally at fault	1
Policy	1
Total	34

The policy case concerned excessive cereal content in sausage but the excess was insufficient to "warrant prosecution action". The "no fault" case concerned the composition of meat product. Since the manufacturer claimed that he had relied in good faith on the instructions of his supplier, Justice advised that it would be improper to prosecute.

Our conclusion regarding Food and Drugs was that no defendant prosecuted is likely to have been without fault. In 19 cases previous warnings or convictions suggest that the repetition was at least careless if not in fact part of a dishonest practice. In 14 cases where no warnings were issued, the offences would have been deliberate and fallen into category 2 of the circular (see p. 146), and this was confirmed in discussion with the Department. In the one remaining case, where there is no record of a warning, a warning was most probably issued, we were informed.

We were less able to draw any conclusions from the non-prosecuted cases. But the one "no fault" case referred to above, in which the Department of Justice advised against a prosecution on the ground of lack of fault and this advice was accepted by the Department, confirms to some extent the conclusion drawn from the prosecuted cases.

Conclusion from the Files

The conclusion of this part of the investigation is that there is a requirement of moral fault before cases can be prosecuted, but it is a requirement that has been incorporated into the departmental policy and warning system set out in the Circular of March 2, 1970—Policy Circular (Consumer

Affairs) No. 70-71. Our survey of the files did little more than show us the policy at work. There was no clear evidence that any defendants without moral fault were ever prosecuted, because even where there was no record of warnings and the offences were not self-evidently deliberate, we could not assume, we were told, that no warnings had been issued. So whereas our survey of the Misleading Advertising files enabled us to deduce what the policy in that area was, our survey of the files in this area told us little that we did not know already.

On the other hand, there was some slight evidence (additional to what is contained in the Circular and to what we learned from members of the Department in discussion) that absence of fault can lead to a decision not to prosecute. This seems to have been the case in two of the Weights and Measures cases (one being the "honest mistake" case, the other being the case where no previous warning had been given), and in one Food and Drugs case (the case where the manufacturer relied on his supplier).

Further Investigation

Clearly fault plays a role then in this area. According to Departmental policy, one species of fault—wilfulness—warrants prosecution without warning; while another species of fault—carelessness—comes to be measured or proved conclusively by the fact that the offender has already been warned. So the filed cases in Ottawa leave little scope for inquiry into whether fault was really present. By the time a case reaches Ottawa it has already been decided that the offence was wilful; or else the defendant has already been warned.

Lower down the line, however, a stage must be reached if we go back enough where someone (an inspector or someone of some senior rank) must have exercised discretion. In a non-wilful case, for example, someone must have decided to give a warning or to recommend a prosecution. In a wilful case someone must have decided that the offender was acting deliberately. In other words, judgment here at this level must be exercised, and the question is: on what criteria?

In order to probe this further, we arranged three meetings with Regional Managers, two of which took place in Toronto where we had a lengthy discussion with the Regional Manager, the District Supervisor for Weights and Measures and the District Supervisor for Food and Drugs.

The Regional Office Level: Administrative Organization

To appreciate the nature of the work at this level it is important to understand the administrative organization of the country for the purposes of this area of law. The breakdown is as follows.

Canada is divided into five Regions: Ontario, Quebec, Atlantic Provinces, British Columbia, and a fifth Region consisting of the Prairie Provinces, the

Northwest Territories, and the Yukon. Each Region is divided into districts, each district being an area of considerable size: e.g. Manitoba is one whole district. Finally, each district is divided into zones.

Each region is in charge of a Regional Manager, under whom come the Regional Supervisors, one for Weights and Measures and one for Food and Drugs. These two supervisors, subject to the authority of the Regional Manager, are responsible for the Weights and Measures programme and Food and Drugs programme respectively. So under each Supervisor come the District Inspectors, who are in charge of the Districts, in which the "infantry", of course, are the Inspectors.

(This is only a rough picture of the set-up. In particular it should be stressed that this analysis is more strictly appropriate to the situation in Weights and Measures. The Food and Drugs position is not totally the same. However, the chain of command from Inspector to District Inspector to Supervisor to Manager generally holds good.)

The Inspection System

One of the main differences between the two fields relates to Inspections. In Weights and Measures annual inspections are carried out in accordance with the Weights and Measures Act.[44] As a result there is continuous ongoing check of all stores in the country, from which the Inspectorate can build up a fair picture of all the different business involved. In Food and Drugs, however, the annual inspection system does not exist. Instead there are various inspection programmes based rather on a sampling technique. There is for example the national programme designed by the Standards Branch of the Department. Then in Ontario there is a Regional programme designed by the Regional Supervisor. Thirdly, there is a programme in Ontario by agreement with CRTC to check commercials.

Consequently information in the two fields arises from different sources. Information suggesting offences against the Weights and Measures Act[45] arises for the most part directly from inspections. Information suggesting violations of the Food and Drugs Act[46] comes from many different sources: from sample inspections under the programmes mentioned above, from consumer complaints, from complaints from the trade, and from complaints and reports from other agencies and inspectors, e.g. Products Inspectors who do not, in fact, operate under the Food and Drugs Act,[47] but whose inspections may disclose violations of this Act.

Offences in the Two Areas

A further, and most important, difference relates to offences. Weights and Measures offences fall roughly into two categories: technical and non-technical. "Technical" in this context, however, does not mean "in form only"; it means rather "of a technical nature". An example of a technical offence is using in trade an incorrectly balanced scale. The incorrectness, and

hence the offence, is discovered by the technical inspection of the device, and the inspection is, for all practical purposes, conclusive. If the inspector finds the scale incorrectly balanced, no argument would arise by which the retailer would contest the inspector's finding. In reality, then, the retailer's duty is to see that his scales satisfy the inspector.

Non-technical offences consist of offences other than using improper weights, measures and devices. Examples are selling short weight or short measure. Here the offensive practice is brought to light by inspection, but the offence has to be proved by test purchase following a warning. Even here, however, the test purchase is for practical purposes conclusive. It would be very rare (if at all) that the retailer would contest the inspector's evidence on this.

Food and Drugs offences do not fall into this two-fold division. Nor are they such that the inspector's evidence is conclusive. Typically the inspectorate will obtain their official analysis of the product, but the defendant can have his part of the sample analysed and can contest the findings of that provided by the inspectorate.

Weights and Measures Practice

(a) *The Warning System*

Resulting from the annual inspection various possibilities arise. Typically the inspector will discover that both technical and non-technical offences are being committed. For instance, the retailer is using an incorrectly balanced scale in trade, and is also selling short weight. And, depending on the circumstances, the inspector may (1) give a mere verbal warning, (2) give a verbal warning and make a further visit, (3) recommend a written warning. The action taken or proposed will appear on his official report.

1. *Verbal Warning*

The sort of case where a verbal warning would suffice is as follows. The retailer might have a scale which has become incorrect at the very top end. This, apparently, is a hazard of age, and results from changes in the rubber stop of the scale. The inspector might find, therefore, that the scale is quite incorrect around the 30 lb. mark. On the other hand, he may know from his experience of this particular retailer and his particular business that this retailer never weighs beyond 15 lbs. In such a case the inspector might well content himself with pointing out the defect to the retailer and warning him not to use the scale at the top end. Indeed, in some cases the inspector might not even report the matter.

2. *Verbal Warnings and Revisits*

A case where a verbal warning might be followed by a further visit might be the following. Inspection reveals one or two items of short weight

sold, though the number and the size of the error are insufficient to warrant written warning. After a verbal warning, however, the inspector may decide on a further check.

3. *Written Warning*

Where, however, the offence is more serious, the inspector will recommend a written warning if, for example, a considerable number of items are sold short weight and the weight discrepancy is considerable (according to the guidelines worked out by the inspectorate); a written warning will be recommended. This takes the form of a letter, from the Manager or Supervisor, informing the retailer that the inspector discovered items being sold short weight, that this is a violation of the Act, and that he should take steps to avoid such violations.

The written warning itself does two things. First, it complies with the requirements of Departmental policy that the offender should be warned first time and not prosecuted, unless the offence is self-evidently deliberate. Second, it sets in motion an automatic test-purchase within the next 20 days.

4. *Test Purchases*

When a test purchase is made, the inspector or other official buys the product and immediately checks the weight. If the number and size of errors is still considerable, prosecution will be recommended. If however, there are still errors but they are small in number and size, the matter will be dropped. The reasons for dropping the case are not formalized in the report, but are simply common sense: the retailer is mending his ways, the discrepancies are trivial and relatively little harm is done to the public, courts would not look too kindly on a prosecution in such a marginal case.

(b) *Enforcement Action*

Technical offences, however, receive different treatment. Although such offences are reported and result in warnings, they are hardly ever prosecuted, and for very good reason. For suppose a retailer is using an incorrectly balanced scale. Here the inspector's concern is not to get a conviction but to see to it that the violation ceases forthwith. And he has other weapons far apter than prosecution.

The sort of action open to him is to seal the scale against use. This effectively prevents the retailer from using the scale in trade until it has been put right, checked and passed fit for use. This deals with the problem immediately without all the delay involved in legal proceedings.

Alternatively, if the machine or device is not too large, the inspector may seize it. Or he may threaten seizure. For example, if he finds a retailer using in trade bathroom scales marked "not legal for use in trade", he may tell the retailer, "Get this out, or else I'll seize it." And in such a case he would probably make a follow-up visit.

We can see, then, that a great deal is, and must be, left to individual judgment. In technical offences the inspector must decide whether to take enforcement action or merely warn, the example of the scale defective at the top end being one where warning would suffice. In other offences he has to decide whether to recommend written warnings, and later on (after test-purchase) prosecutions.

How far is the inspector's decision the one that becomes the final decision? Or how often is his recommendation rejected by his superiors? On this we have no statistical findings. We have only a "guesstimate", but one by a very experienced supervisor. On his reckoning, a D.I. will turn down about 10% of an inspector's recommendations; a Regional Supervisor about 1 to 5% of a D.I.'s recommendations; and a Regional Manager about 1 to 5% of the Supervisor's findings.

Rejection of a recommendation does not necessarily mean of course that the subordinate is wrong. It may well arise from the fact that the subordinate is not so clearly in the picture as the superior. An inspector may find a clear case of short weight against a store, not knowing that the office is on the point of prosecuting several other offences from other branches of that particular store and that accordingly to prosecute for this offence too could be not only pointless but counter-productive—the court might look on it as persecution. Or the inspector might have good evidence of a violation where the Regional Manager may have evidence that the retailer is involved in such a fraudulent scheme as would warrant prosecution, not under the Act, but under the Criminal Code.

Where, however, it is decided not to prosecute (either by the inspector or his superiors), the reason seems to be an amalgam of factors, some of which were mentioned above. The inspectorate is concerned not with the isolated mistake but rather with intentional or careless practice. So the questions to consider are: (1) how much harm is it causing?—clearly an isolated case causes little harm, as does a very small discrepancy; (2) how much to blame is the offender in terms of intent or carelessness? and (3) how would we look in court if we prosecute?—judges don't approve of trivial violations being hauled into Court.

Highly relevant to question (2) is the trading character of the offender. Is he "a bad actor"? Has he been found selling short weight time and time again? From the annual inspection reports the inspectorate easily builds up a fairly accurate picture of the retailers and the "bad actors" quickly become known. Accordingly, they are more carefully watched, and when caught violating, more severely dealt with. A good example of this factor at work is provided by the case of two different chain stores selling short weight at Christmas. Chain store X had had many short weight warnings throughout the year. Then, at Christmas, a check revealed evidence of short weight in 100% of items tested. Since this was a once-in-the-year sale programme, it

was not practicable to follow the normal routine of warning—test-purchase—prosecute, but in view of the record of past warnings and the extent of the error, prosecutions were instituted without warning. Chain store Y had also had warnings during the year for the same offence and when Christmas came, was discovered by checks to be given short weight in 20% of cases checked. Because the extent was only 20% and not 100% it was decided not to prosecute without warning but only to prosecute those branches that had been warned within the previous two to three months.

Here we can see several different aspects. From the culpability aspect, X was more blameworthy than Y, for whereas Y's violations might have been isolated, X's were so numerous as to imply a totally intolerable practice of carelessness, if not indeed of deliberate fraud. From the harm aspect, X's violations were clearly more injurious than Y's since they were more widespread. And from the previous record aspect clearly X was more of a "bad actor" than Y.

Reaction to the Abandonment of Strict Liability in Weights and Measures

If, for all these reasons and taking all these factors into account, the Weights and Measures inspectorate in practice adopt a fault-based approach, would they object to the law being rewritten to write in some requirement of fault? Would they object to the law being brought into line with practice?

Reaction was cautious. Immediate reaction was a fear that the inspector's authority might be weakened. Perhaps the effectiveness of the warning system might be impaired. And it would certainly put obstacles in the way of the law enforcers.

On reflection, however, there was some support for the view that the inspectorate should have no great worry about a change in the law to the effect that a defendant who proves he took due care should be acquitted. For a defendant who has been caught out, warned and caught out again in a test purchase, would be hard put to negative carelessness. Moreover such a change in the law would not be inconsistent with the inspectorate's own image of itself and its concept of its job. For the inspector and his superiors see themselves as educators rather than policemen, as persuaders rather than prosecutors. As regards technical offences they stay away from prosecution and prefer to rely on enforcement remedies. As for the others, they are happier to enlist the retailer's co-operation by pointing out errors and legal requirements than to resort to the big stick. They would not, therefore, be too horrified if the law allowed a defence of "no negligence".

We would stress, however, that the above reaction is only our own picture gleaned impressionistically from discussions with persons in the field. It does not in fact even exactly represent the views of any one person, but one Weights and Measures Supervisor and one Manager seemed not to disagree with our suggestion.

Food and Drugs

(a) *The Warning System*

In many respects the warning system in the Food and Drugs area is similar to that employed in the Weights and Measures area. However, the distinction between offences self-evidently wilful and offences not self-evidently wilful may be more relevant in Food and Drugs. For in this area there are many offences which can hardly be committed other than wilfully, e.g., adding chicory to coffee or adulterating beef with chicken can hardly be done by accident or mistake. Wilful offences of this nature will usually be prosecuted without prior warning, in accordance with Departmental policy.

Offences which are not self-evidently deliberate, however, are normally prosecuted only after prior warning. If an inspection brings to light the commission of such a non-wilful offence, there normally follows the issuance of a warning letter, informing the manufacturer that there appears to be a violation of the Act and that the violation should be discontinued. This not only warns the manufacturer but also sets in motion an automatic further check within four to six weeks. Should the check reveal that the violation is continuing, prosecution normally follows.

(b) *Enforcement Action*

As alternatives to prosecution the Food and Drugs inspectorate has a variety of enforcement procedures. They can seize a product or a label which violates the Act. Any article so seized, however, must be released once the Act is complied with. Failing such compliance, the product may be destroyed voluntarily or by court forfeiture. Or the inspector may allow it to be offered to a charitable institution as a gift or at a reduced price. The seizure of an offending label is a way of forcing the manufacturer to make his labels comply with the requirements of the Act. In one such case 140,000 labels were seized in this manner. If the manufacturer were to continue using a label so seized without changing it as required, prosecution would follow. If, on the other hand, the labels are incapable of being altered to conform to the Act, the inspectorate can have them destroyed in the presence of an inspector.

Food and Drugs: Criteria for Action

In Food and Drugs, it is probably less easy than in Weights and Measures to commit an offence unawares. For example a scale may quite possibly become inaccurate gradually without the knowledge of the trader using it. By contrast it is less easy to conceive of the existence of lack of awareness in the case of false labelling of products or adulterated food.

However, in Food and Drugs too the emphasis is on education rather than prosecution, on the ground that this is the better way of securing compliance with the Act and protection of the consumer. So cases can arise where investigation, warning and subsequent check might not result in a prosecution.

A butcher for instance, putting sausage meat into hamburgers, even after warning might not be prosecuted if he could provide a reasonable explanation e.g. that this was accepted practice in his country of origin. Such explanations would never be accepted a second time, but there is a place for leniency on a first occasion sometimes. This is specially so with regard to people who, through language or other difficulties, may not have fully appreciated the thrust of the warning letter. Here again the inspectorate sees its function as education.

To illustrate the attitude of the inspectorate various examples were given of instances where prosecution without warning would be instituted and of instances where warning would be given first. A case of adding sulphides to hamburgers would be prosecuted without warning, since this can only be done wilfully. But a case of too high a fat content would not normally be prosecuted without warning, since it is hard for the ordinary person to know accurately the amount of interstitial meat, so that it may be a case of lack of knowledge by the butcher; in such a case he would be warned that he must take due care and make sure, using if necessary the special testing machine devised for this purpose, that the fat content is not too high. Again, adding chicory to coffee or replacing sugar by saccharine in soft drinks will be prosecuted without warning, since this is always wilful. On the other hand, the incorrect labelling of milk would probably be a case for warning. For example, if the manufacturer labels the milk as "2% homogenized milk" instead of "2% part-skimmed milk", as required by the Act, he would receive a warning. If, however, he put skimmed milk in a whole milk carton, the inspector would investigate whether this was a simple mix-up or not; if it was, warning would be issued; if it was not just a mix-up, there would be a prosecution.

So the distinction here is very much between wilful cases together with warned cases on the one hand and non-wilful non-warned cases on the other. In this respect the inspectorate, following Departmental policy, draws in practice a rough distinction between the culpable and the non-culpable. Unlike the inspectors in Weights and Measures, however, they have less cause to distinguish between harmful and purely trivial cases, though they are forced by scarcity of resources to order their priorities and a case concerning a product only available for fifty consumers must take a lower priority than one concerning a product available for five thousand. Again unlike the inspectors in Weights and Measures, they have little cause to rely on the concept of the "bad actor".

Finally, we looked for an estimate of the number of recommendations rejected by higher authority. No percentage could be suggested but it was reckoned that the number of cases where this might happen in Ontario would be not more than one or two a month. One reason, however, for this may be that in Toronto the Food and Drugs system seems to involve much more collective action than does the corresponding system in Weights and Measures. Whereas in the latter area the inspector's report is considered by

the D.I. and so on up the chain of command, in Food and Drugs we understand that the six inspectors and the Supervisor consider all the cases together, so that rather than a recommendation being overruled or rejected, what happens is that the individual's preliminary view may not necessarily be the same as the final collective conclusion.

Reaction to Abandonment of Strict Liability in Food and Drugs

Reaction in this area was much less cautious and more hostile than in the Weights and Measures area. It was argued that the question whether the defendant was careless or not would be too subjective and difficult for courts to decide; that there would be far more acquittals; that this would weaken law enforcement and respect for law and lead to more violations; and finally, that even more manpower would be needed for law enforcement.

Part III Conclusion

In both areas studied in Part III culpability plays a part in practice. Though this was not so evident from the files in Ottawa, it clearly emerged from discussions with those in the field. The reasons for this practice were obvious to common sense. The administrators view their prime function as being to educate and enlist the co-operation of the trade. They are compelled by shortage of manpower to be selective. They, like anyone else, are not anxious to penalize persons they know to be guilty of no moral fault. And partly for that reason and partly because they need to preserve their credibility with the courts, they are averse to prosecuting trivial cases.

On the other hand, reactions to the suggested change of the law to allow a defence of "no negligence" varied. Weights and Measures might not find too great a difficulty in this, and for this reason were not so concerned to object to the idea. Food and Drugs were afraid it might make their task impossible and deprive their inspectors of any authority.

IV

Conclusion

The Requirement of Fault in Practice

The general conclusion of the study is that some degree of fault is in practice required in all three areas before an offender is prosecuted. In misleading advertising there was evidence of a tendency not to prosecute the defendant who was doing his best to comply with the law's requirements. There was a considerable number of cases not prosecuted partly because the defendant was thought not to have been at fault in the sense that he was deliberately or negligently deceiving the public, while almost all the prosecuted cases but one were cases where there had been at least culpable carelessness. In Weights and Measures and Food and Drugs a requirement of fault has been to some extent built into the departmental policy and the warning system, so that a defendant who is prosecuted will either have committed an offence that could not be other than wilful, or will on the evidence be thought to have acted wilfully, or thirdly will have already been warned so that repeated violation will at the least be careless. This emerged less from consideration of the files than from discussion with the manager and supervisors themselves.

The Concept of Fault

The concept of fault in this context, however, is slightly different from that normally used in legal discussion. In misleading advertising the advertiser not at fault is not so much the one who made an honest mistake as the one who is trying to comply generally with the law, and his trying to do so is evidenced less by the fact that he made an error than by the fact of his co-operation with the complainant or the department. The distinction is between the advertiser who misleads the consumer and doesn't try to make sure his advertisements are correct and the advertiser who tries to do this and makes every effort to satisfy the dissatisfied customer and to put the wrongful advertisement right.

In the other two areas the distinction is between the trader who violates the law wilfully or after being warned, and the one who does so but not wilfully and who has not been warned. Moreover, in Weights and Measures particular attention is paid to the general record of the defendant, the "bad actor" 's record being evidence to the inspector of wilfulness or carelessness.

Reasons for the Practice

The reasons for requiring fault in this sense to some degree are clear. The law enforcer's own leanings are against penalizing people not really at fault. Secondly, his view of his role is that it is primarily to educate and enlist co-operation rather than to police. Finally, there is his view of the reaction of the courts, which dislike the prosecution of faultless defendants and of trivial offences. This is shown by the slightness of the penalties imposed in such cases, and even by the occasional acquittal.

Should Strict Liability Be Abandoned?

Why not alter the law to reflect this practice? Even if the prosecution could never prove the existence of fault, why not allow the defendant to secure an acquittal if he can prove absence of fault? A general problem here is the problem of the corporate defendant. The automatic reaction of the corporation, it is said, is to blame the employee. How can you get good clerks nowadays? it is asked. So in a case where a supermarket has goods on offer and the cashier fails to give the reduction when she totals up the customer's purchases, the company will always blame the cashier, producing clear statements on paper of the company's policy and affording evidence of clear instructions given to all the employees, whereas the truth of the matter may well be that alongside the paper policy exists another policy of encouraging the employees to "make mistakes" and get away with as many as they can. The prosecution could never disprove that the company had taken all due care, it was argued. You could never show that they were conniving at or condoning the wrongful behaviour of their employees.

A second problem put most forcefully to us was the problem of the rigged defence. Take the case of a large and economically powerful retailer. Such a retailer can all too easily argue that he was misled by his suppliers, and so far are the suppliers in the retailer's power in some instances that there is a real danger that the retailer can make them say anything he wants. Fabricated defences like this could never be disproved.

There arguments were raised chiefly in the misleading advertising area, where the director's staff were universally opposed to the idea of abandoning strict liability on the ground that it would make their task impossible. Equal concern was felt in the Food and Drugs area, though in Weights and Measures the idea caused less consternation.

Arguments Against Strict Liability

Briefly there are three main objections to strict liability.

1. it is counter to common morality and our ordinary sense of fairness and justice to punish people who are without moral fault.
2. it is also counterproductive. For the social cost of blurring the legal distinction between those with and those without fault is the danger of bringing the whole of the criminal law into contempt and disregard, so that seeing people convicted and punished who were without fault we may begin to consider other people who were convicted and punished but who were at fault to be not really very culpable either.

This has a special bearing on the problem of misleading advertising. At one extreme misleading advertising is a type of economic fraud: the advertiser is lying to the customer. And the advantage of prosecuting and convicting is not only the punishment but also the stigma of having been convicted of lying. If, however, we convict advertisers who are without moral fault and were not lying, then not only does the stigma not operate in this case but it may begin not to operate in the case where the advertiser *is* lying. So, if we want to maintain that misleading advertising is a type of lying, we can't penalize the faultless. If we don't want to restrict punishment to cases of lying, then much of the value of the stigma is lost.

3. the traditional criminal law doctrine maximizes liberty. For if the law says no one is guilty without *mens rea,* the citizen who refrains from deliberately, recklessly or (in certain cases) negligently doing what the law forbids will be free from the intervention of the law. Provided he takes care not to step knowingly or carelessly outside the bounds set by the law, he is legally free to live his life as he pleases. Nor does he land in trouble simply through making some mistake or error or through acting under some misapprehension or misunderstanding of the circumstances. Under a full old-fashioned *mens rea* system he should be free of trouble altogether in these cases; under one which includes negligence he would be free of trouble provided the mistake, error, misapprehension or misunderstanding itself was excusable. Neither system would intervene against the man who, despite taking every care that he or any prudent man would or could take, nevertheless has the misfortune to technically infringe the law. Neither system would penalize the retailer who takes every possible step to check that his scales are properly balanced but who finds that even after all his precautions they have gone out of balance; or the manufacturer who exercises every care to ensure that his skimmed milk is not put into the whole milk container but without being able to avoid the rare occasion when it is.

Enforcement Considerations

As against this it was strenuously argued in two of the areas that to write in any requirement of fault, even in the limited sense suggested, would make law enforcement impossible. This we could not but accept. Moreover, it was urged upon us in the Food and Drugs area that even with the law as it stands the position is far from satisfactory. For one thing, courts are frequently too busy to pay more than cursory attention to Food and Drugs prosecutions, with the result that in many cases ridiculously low penalties are imposed, far and away incommensurate with the real harm done to the public. For another, even where there is a conviction and penalty, the real benefit to the community is the ensuing publicity, but there is some suspicion that it is only the conviction of the small trader in the corner store that gets reported in the more obvious sections of the newspaper; and that the large trader, being also the large advertiser, could ensure that the report of his conviction is tucked away in the advertisements of women's girdles near the back pages.

Is Strict Liability Really a Problem?

Moreover, is it not the case that investigations like the Factories Act inquiry and the present inquiry show that in practice strict liability is no problem at all? For if the objections to strict liability are that it is unjust, counter-productive and an infringement of liberty to prosecute, convict and punish people not at fault, all the same in practice we find that law enforcers are not doing this. Indeed, for the most part they are concentrating their efforts precisely on those who are acting intentionally or without due care. So, if the objections to strict liability are objections in theory rather than in practice, why not simply leave the law as it is?

Two answers can be given. First, one concerning the general problem of whether the law should say anything at all about strict liability, regardless of what it might say. Secondly, one on the narrower problem of what the law ought to say.

(a) *The General Problem*

The situation at present is that, except for the rather general guideline which says that *mens rea* is required and that in any offence it shall be presumed to be required unless the presumption can be rebutted, the law rarely tells us anything. We rarely know, for example, nor are we often told, whether any particular offence in a statutory section is absolute or not. On the one hand we have the general doctrine suggesting that any such offence is not absolute. On the other we may find various pointers in the statute or in the section indicating that *mens rea* is not required, e.g. the history of the section (as in the case of s. 37 of the Combines Investigation Act).[48] But until a court pronounces we can never be sure; and indeed not even then, because a later and higher court might always pronounce in

the opposite sense. As a result we find ourselves in the extraordinary and intolerable situation where all of us may be quite certain that an area of law is (or is not) one of strict liability, only to discover one day in court telling us that it is not (or is). All of us are quite sure that s. 5 of the Food and Drugs Act[49] creates absolute offences and then we are told by the district court of Saskatchewan in the Standard Meat[50] that it does not.

This is in no way consistent with the need for certainty in law, a need paramount in an area like the criminal law. There are indeed areas where it is sensible not to try and spell everything out but to leave details to be filled in by the courts as and when problems arise, but the criminal law is not one of them; nor is the question "strict or not strict liability?" just a detail to be filled in judicially. For the sake of certainty in the interest of the citizen as well as for the sake of clarity and the avoidance of undue waste of time and effort endlessly debating in each particular section whether the offence is absolute or not, the law should spell out whether *mens rea* is required. Quite what form this should take is beyond the scope of this inquiry, but one way of tackling the problem would be to enact a general rule to the effect that *mens rea* is always necessary unless the words creating the offence explicitly state otherwise; and then to enact the precise formula necessary for the imposition of strict liability in every case. And this would have the virtue, among others, of forcing the legislature to face up to the question whether absolute liability was desirable or necessary each time it created a new offence, rather than running away from the problem and leaving it to the courts.

(b) *What Ought the Law to Say?*

Of course one solution open to the law would be to simplify matters by stating that all offences are strict unless the contrary is shown. Simplicity and certainty are not commodities than can only be purchased by abolishing strict liability. Nor, it could be argued, would there be anything to be lost by adopting this solution, since in practice law enforcers don't prosecute those not at fault. Even so, to the extent that this is true—and it appears almost 100% true in the three areas of this study—it is still open to objections. In the first place, in so far as strict liability should not be imposed, we only avoid it by relying on the goodness of heart of the administrator—a situation on which perhaps the last word was said by Junius when he pointed out that what we need is not to rely on what men *will* do but to guard against what they *might*; which is precisely why the framers of the Constitution of Massachusetts demanded a government of laws and not of men. And in the second place, even though the administrator were never to do anything that we could remotely object to, nevertheless the fact that his decisions are necessarily taken informally and in private means that the citizen—in this case the manufacturer or retailer—doesn't really know the criteria on which those decisions are based. What we get is a system, not of law, but of lore.

The Notion of the Welfare Offence

We arrive then, it is submitted, at an impasse. On grounds of morality and justice strict liability is intolerable. On grounds of practicability it is essential. Yet the fact that it exists only on paper and not in practice is no answer. Openness, certainty and justice dictate that matters of exculpation, such as mistake, must be written into the letter of the law; and this is just what practical considerations and the need for efficiency dictate that we cannot do. So what can we do?

One thing we could do is re-examine the whole concept of the welfare offence. The conventional wisdom about such offences is that we need them to protect the public against negligence and inefficiency in trade and that this protection is well secured by prosecuting offences in the criminal courts. In such offences, then, the prime consideration is the harm done to the public. It doesn't really matter whether or not the defendant has been at fault. Whatever his moral culpability, it has no bearing whatsoever on the damage done to the consumer.

There is a parallel argument about road accidents. If I am run down and injured, what does it matter that the driver was not negligent? Does it lessen my injuries? Does it diminish my need for compensation? Blame and negligence have no place in the law of road accidents. All that matters is that I get my compensation. In other words, the driver—or society—must be made the insurer of the victim's injuries.

What this suggests is not so much that drivers must be subject to strict liability, but that the whole subject must be removed from the area of tort. Likewise, the emphasis on harm to the public in the welfare offence discussion suggests, not that such offences should be offences of strict liability, but that they should be expunged from the criminal law. For in these cases too the main question is not "was the defendant at fault?" but "how can we prevent or undo the harm?"

Prevention of Harm

Do prosecuting offenders do it? Is it the *best* way of doing it? Practice shows that law enforcers don't necessarily think so. Basically there are two objectives: (a) to prevent harm, and (b) to undo such harm as has been done. As regards (a) law enforcers seem to rely less on prosecution and more on (1) education and (2) enforcement remedies. Admittedly education derives some—though not all—of its force from the support of criminal sanctions. On the other hand, the superiority of enforcement remedies over the ordinary criminal sanctions is striking. All that the latter can do is punish the defendant for his wrong-doing in the hope of teaching him a lesson and giving an example to others for the future. Enforcement remedies by contrast deal immediately with the harmful situation: the faulty scale can be sealed against use, the adulterated meat seized, the deceptive labels stickered and so on. Such remedies allow the inspector to concentrate on the prime objective: getting rid of the danger or harm.

But what about (b), cases where the harm has already been done? What about the store that has already sold short weight? How else can we deal with this than by the criminal law? The snag here, though, as we have seen, is that conviction only derives its full force from publicity and this is one thing it very probably will not get.

A similar problem arises in misleading advertising because there would be little point in impounding the advertisements after they have gone out and misled the public. You can seize wrong and deceptive labels even if it means putting a firm out of business. You can impound products. In other areas of life you can take analogous action, e.g. you can cut a non-payer off the telephone or the electricity. And the law tries (without success) to cut bad drivers off the road. But what can you do to cut misleading advertisers off from their advertisements?

Weapons of Enforcement

This brings us to the whole question of techniques of enforcement. While there is no doubt that the whole misleading advertising programme has all the marks of being a successful one, we were nevertheless struck by the fact that the weapons available to the law enforcers in this area are far inferior to those available to the Food and Drugs and the Weights and Measures inspectors. Indubitably part of the reason for the success of law enforcement in these areas is the power the inspectors have to take enforcement action by way of seizure, sealing, and so forth. In misleading advertising there is no real analogue.

The nearest approach is the Prohibition Order. This indeed has been highly successful and is greatly feared by all defendants. The reasons for this fear are partly that the order speaks to individuals so that whereas normally conviction results in a fine, disobedience to a prohibition order can land the directors in jail. Another reason is the extent of the order in terms of space and time. The order can be unlimited in respect of time and can affect the operations of a whole chain of stores, i.e. the total operation of a company. Our understanding was that the existence of an order against a firm really made it make sure it was careful.

Some Suggestions

This prompts some tentative suggestions.

1. Perhaps the law of misleading advertising is concentrating on the wrong party. The law and its enforcement sees as its prime target the advertiser. Special defences of good faith are afforded to the publisher, and cases against publishers seem rare. Yet could we not consider it this way? The publisher, especially a television station, radio company or newspaper makes an enormous revenue out of advertising. In other words he is hugely paid for pumping out a continuous stream of information, some of it misleading and injurious

to the public, yet he himself is saddled it seems with no responsibility whatsoever for the accuracy of its contents. Yet the freedom of the air—What Lord Thompson has called a licence to print your own money—is a uniquely valuable possession. Can it not be argued that society, in allowing a television or radio company the privilege of broadcasting, has a right to put a duty on that company to see to it that all its material, advertisements not excepted, are accurate? If we really were serious[51] about wanting to put an end to deceptive advertising, wouldn't the first step be to insist that such publishers bear absolute responsibility for advertising content?

2. This by no means entails that publishers would be subject to strict liability regulations in the criminal law, however. What it does mean, or could mean, is something far more effective. For the procedure appropriate to deal with deceptive or misleading advertising may well not be criminal proceedings at all. For consider the case of a television commercial repeated ad nauseam and totally misleading. Surely the only adequate remedy for this is something that will wholly undo the harm by completely removing the false impression that the advertisement has created in the minds of the public. And the step that will do this is certainly not that of criminal prosecution. It can only be something by way of counter-advertisement. In other words the suggestion is that where a publisher has (whether with or without fault) published misleading advertisements, he be bound to publish denials together with the true facts in such manner as will most effectively counter the wrong impression created.
3. Of course much scope for argument would arise as to what would be enough to be effective, and one can imagine publishers making token denials and leaving it at that. But the law already has an example to follow. We already have the law of libel and the remedy whereby the defendant has to issue an apology in terms demanded by the plaintiff or else required by the court. What is suggested here is that a misleading advertising branch could set up a monitoring section to scrutinize the accuracy of advertisements partly on a sample basis and partly following up consumer and competitor complaints, and could also settle the terms, manner and so forth of the denial or counter-advertisement required.
4. So far as the actual advertiser is concerned, to some extent the responsibility of the publisher would have its undoubted repercussion on him too. But he too could be required to issue counter-advertisements.
5. A further possible penalty for both publisher and advertiser (though of a non-criminal kind) could be to be debarred from advertising. Again the law provides an example. Vexatious litigants can be debarred from the right to bring actions in the courts, not so much

because they are at fault as because they are (perhaps without any malice on their part) simply wasting everyone's time. An advertiser or publisher who is simply misleading everyone (even with the best intentions) could surely be reasonably debarred for a time at least from being able to advertise his products within a prescribed area.

6. How far this sort of technique could operate in regard to Weights and Measures and Food and Drugs cases which are at present dealt with by prosecution is an obvious question. We merely remark here that in view of the dissatisfaction referred to earlier with the lack of publicity in Food and Drugs convictions a far more effective remedy in cases of short weight or sale of adulterated meat might be, not conviction and fine, but a "civil law" court order that an announcement (paid for by the defendant) be published to broadcast wide the fact of the violation.
7. The only remaining function for the Criminal law here would be of supporting enforcement. The publisher, advertiser or trader who flouts the seizure, sealing or order to "counter-advertise" is wilfully disobeying authority. With him the ordinary criminal law can rightfully deal.

Abolition of the Welfare Offence

These suggestions are only tentative. There will undoubtedly be a myriad of objections. But they are advanced as a starting-point. What is claimed is that (a) this sort of approach would be far more effective than the use of the criminal law; (b) it would rid us of the eternal problem of strict liability in welfare offences: it may be unjust to punish the innocent, but it can't be unjust to force a person to put right things for which he is responsible and from which he is deriving revenue; and (c) it will leave the criminal law free to deal with those matters for which it is far better fitted—the investigation and punishment of what Devlin refers to as *mala in se* and what Lady Wootton terms *mala antiqua,* what it has traditionally always dealt with. For it seems to be the case that, whether the criminal law is really any use or not, it is only likely to be of use when employed against conduct indulged in by a small minority (which is why anti-drug laws are unlikely to serve any purpose), against conduct generally accepted as grievously wrong such as murder, and against crimes with victims. Professor Morton spoke wisely when he stressed the notion of the criminal trial as a morality play where vice is triumphed over by justice. This is criminal law at its best. But the quick turnover of welfare offence prosecutions in lower courts hardly qualifies as any sort of spectacle let alone a morality play. In our view it robs the criminal law and process of one of its most valuable assets—the stigma—and shows that strict liability (which is quite acceptable in the non-punitive context of civil and quasi-administrative enforcement) has no place in the criminal law.

Recommendations

These suggestions, we repeat, are tentative and advanced to start discussion. Our recommendations, however, are as follows:

1. The law should clearly state whether the liability imposed is strict or not. The present situation whereby it is often not known what the position is till a court decides is too time-wasting and productive of uncertainty to be tolerated. Consideration should be given to the possibility of exacting some general provisions to the effect that criminal liability is never strict unless the statute or section expressly says so.
2. In view of the evident problems facing law enforcers in the areas studied if the law were altered, we do not recommend either that the law be altered or that it be not altered, but that if the Commission on consideration feels that the law should be changed in this area the Commission should, before making any recommendation, engage in a dialogue with the Department of Consumer and Corporate Affairs in an attempt to devise a workable solution.
3. Before making any general recommendation that strict liability be abolished, the Commission should discuss the effect of such abolition with law enforcers in the major areas involved.

Summary of Conclusions and Recommendations

Conclusions

1. In Misleading Advertising offences the Director and his staff tend in practice not to prosecute a defendant who is behaving honestly and has no moral fault.

2. In Weights and Measures the Department tends in practice not to prosecute a defendant unless it believes him to be at fault. He will be believed to be at fault if the offence was self-evidently wilful; if it is not self-evidently wilful but there is evidence that the defendant acted deliberately, or the defendant has already been warned.

3. In Food and Drugs the same tendency can be seen at work.

4. The suggestion that strict liability be replaced by negligence offences with reversed onus does not commend itself to those involved with enforcing these three areas of law. Those concerned with Misleading Advertising saw insuperable objections. Those concerned with Food and Drugs objected with equal force. Those concerned with Weights and Measures were not so firmly opposed. The basic objections to such a change in the law were that the defendants could always produce sufficient evidence of due care—rigged if necessary—to be acquitted, so that law enforcement would be impossible.

Recommendations

1. The law should always state clearly whether or not strict liability is being imposed.

2. No recommendation is made that strict liability be abolished in the three areas studied. At the same time no recommendation is made that it should be retained. Recommended that if the Law Reform Commission wished to recommend abolition, they should prior to such recommendation engage in prior discussion with the law-enforcers involved.

3. Such discussion in all relevant areas should also precede any general recommendation by the Law Reform Commission to abolish strict liability.

4. Consideration should be given by the Law Reform Commission to the problem of (1) economic fraud and (2) the welfare offence, with a view to discovering the best means of dealing with these two problems.

NOTES

1. e.g. J. U. J. Edwards, *Mens Rea in Statutory Offences,* in Cambridge Studies in Criminology, (Nendeln/Liechtenstein: Kraus Reprint, 1968), H. L. A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), C. Howard, *Strict Responsibility* (London: Sweet & Maxwell, 1963).
2. B. Wootton, *Crime and the Criminal Law* (London: Stevens, 1963).
3. H. L. A. Hart, *Morality of the Criminal Law* (Jerusalem: Magnes Press, 1969) 14.
4. *Ibid.*
5. Reported by Smith and Pearson in *The Value of Strict Liability,* [1969] Crim L. Rev. 5.
6. *Strict Liability and the Enforcement of the Factories Legislation* (1961), English Law Commission Published Working Paper No. 30.
7. Other areas considered were: Fisheries, Customs, Excise and Transport.
8. Cohen, *Misleading Advertising and the Combines Investigation Act* (1969), 15 McGill L. J. 622.
9. *Ibid.*
10. *Ibid.*
11. As was said in another case, "Shall we indict one man for making a fool of another?"
12. R.S.C. 1970, c. C-23.
13. *Ibid.*
14. Mr. Justice David Henry of the Supreme Court of Ontario was formerly the Director of Research, Combines Investigations Act.
15. *Supra,* note 8 at 624.
16. An excellent discussion of the law relating to misleading advertising is found in Quinlan, *Combines Investigation Act—Misleading Advertising and Deceptive Practices* (1972), 5 Ottawa L. Rev. 277.
17. [1965] 2 O.R. 628, [1966] 1 C.C.C. 220.
18. [1972] O.R. 327, 6 C.C.C. (2d.) 277. In *R.* v. *Imperial Tobacco Products Ltd.* (1971), 4 C.C.C. (2d.) 423, 5 W.W.R. 409, the Appellate Division of the Alberta Supreme Court took the same view. This latter case has been followed by the New Brunswick Court of Appeal in *R.* v. *J. Clark & Son Ltd.,* [1973] N.B.R. (2d.) 394. The whole question of *mens rea,* however, has been argued in the Supreme Court in *R.* v. *Alberta Giftwares,* judgment pronounced May 7, 1973 (not yet reported), but the Supreme Court found it necessary to decide whether *mens rea* is an essential ingredient of section 37.
19. Throughout this study references to departmental policy describe that policy insofar as it emerged either in written material or in discussion with departmental personnel. It should be emphasized, however, that this study paper in no way purports to speak for the Department.
20. Departmental Newssheet, June, 1972, p. 3.
21. These index books, like their counterparts in Weights and Measures and Food and Drugs, contain only simple outline entries. For detailed information, therefore, it is necessary to search the files.
22. We did not consciously distinguish at the outset cases under s. 37(1) and cases under s. 37(2). In fact, however, all the cases studied in our sample fall under s. 37(1).
23. Both are denoted in this study paper by the term "compliance".

24. "No fault—no prosecution" is of course verbal shorthand and, as such, liable to mislead. The hypothesis is that there is a correlation, not between absence of fault and non-prosecution, but between absence of *judged* fault (i.e. judged, or believed, by the Branch) and non-prosecution.
25. These 71 cases are drawn from the total 200 and include the 23 prosecuted mistake cases (see chart 4 on p. 112) and 27 non-prosecuted mistake cases (see chart 6 on p. 114).
26. A further element in s. 37(1) is that the statement in question must be one that purports to be a statement of fact. So a further *actus reus* defence will be: (5A) this does not purport to be a statement of fact at all.
27. On vicarious liability see also *J. Clark & Son Ltd. supra,* note 18.
28. *R.* v. *Allied Towers Merchants Ltd.,* [1965] 2 O.R. 628.
29. *Supra,* note 18.
30. Contrast with p. 81 where the number at the beginning of the period is given as 1,767.
31. Though contests are not, strictly speaking, products, nevertheless offering prizes to competitors in a contest is a frequent mode of promoting a product. For that reason contests are included in tables 4 and 5.
32. R.S.C. 1970, c. C-23.
33. R.S.C. 1970, c. W-7.
34. R.S.C. 1970, c. C-23.
35. R.S.C. 1970, c. F-27.
36. [1933] 4 D.L.R. 491.
37. R.S.C. 1927, c. 212.
38. R.S.C. 1970, c. F-27.
39. [1972] 4 W.W.R. 373, rev'd [1973] 6 W.W.R. 350.
40. R.S.C. 1970, c. H-3.
41. R.S.C. 1970, c. H-3.
42. R.S.C. 1970, c. F-27.
43. As regards acts of this third category evidence of wilfulness may include previous warnings, but the offence is then to be prosecuted without further warning.
44. R.S.C. 1970, c. W-7.
45. R.S.C. 1970, c. W-7.
46. R.S.C. 1970, c. F-27.
47. *Ibid.*
48. R.S.C. 1970, c. C-23, see page 81.
49. R.S.C. 1970, c. F-27.
50. *Supra,* note 39.
51. Not that the Department is not very serious, nor has its programme been without success, to judge from discussions with our Consumer Association of Canada.

Strict liability in law

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Contents

I

Introduction

One in twenty-five rates pretty high as a chance in a lottery or sweepstake. 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 900,000[2] 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 hyprocrisy: 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 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.

II

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,*[33] 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 Regulations[41] 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.

III

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 *means 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 Act[62] 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 torpedoes 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.

IV

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 inebriated[77]—where mistake of fact was no defence.

Nor was England alone in her move away from the pristine purity of *mens rea.* France[78] 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 hoccery" 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 liability[84] 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.

V

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 unalike. 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 Act[105] 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. Ll. 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 fist 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 possesion 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 emendet,* 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 nineteen 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 blameworthy, 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); *Treeves 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. *Vantandillo,* 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 independant 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.

	Occurrences	*Documents*
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
Total	125	107

93.

	Occurrences	*Documents*
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
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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I

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 Aristotle[2] and much to Judaeo-Christian tradition. It was championed by Blackstone[3], by certain nineteenth century judges[4] and more recently by Devlin[5]. And it has been attacked by Bentham[6], Goodhart[7] and more recently by Barbara Wootton[8].

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 Paper[9]. 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-on[12]. 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 law[13]. 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 mistaken[14]. 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 to 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.

III

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 consequences[16]? 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 power[17] or as penal offences created by virtue of Parliament's intrinsic general power to enforce laws made under its jurisdiction over Weights and Measures[18].

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 consequences[22]. 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 jurisdiction[23].

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.

IV

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 it[29]: 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.

V

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 Tax[44] 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 courts[45] 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 enactement 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.

VI

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. *Nichomachean 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	20¼%

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. *Westminister 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

Contents

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 froms 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' contention[13] 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 subjectively 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 statutes[15] fifty-two[16] times: of these, twenty-six[17] 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 Act[18] 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 Act[19] and the Proprietary and Patent Medicine Act[20], 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 Woodrow[21] 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 Yuen[22] 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 Act[23] and the Proprietary and Patent Medicine Act[24], even where an accused who did exercise reasonable care is not convicted, there are provisions[25] 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 undersized 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 expedious 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 environment[52], 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 based 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.E. 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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