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“Chartering” in the Shadow of *Lochner*: *Guindon*, *Goodwin* and the Criminal-Administrative Distinction at the Supreme Court of Canada

Steven Penney*

I. INTRODUCTION

The distinction between criminal and administrative wrongdoing plays a key role in Canadian public law. Though it functions somewhat differently across domains, the upshot is the same: the state is presumptively entitled, as a principle of statutory and constitutional interpretation, to more favourable procedures for establishing administrative wrongdoing than criminal offending. Conversely, people accused of administrative infractions are presumptively entitled to less protection against state power in the investigative and adjudicative process than those charged with crimes (or in many cases, regulatory offences).

The criminal-administrative distinction has a long pedigree,¹ but has taken on heightened importance since the Charter.² The entrenchment of the Charter’s “legal rights” provisions emboldened lawyers to claim the same procedural protections for persons accused of non-criminal wrongdoing that statute and common law had typically (but not universally) provided to criminal defendants. With few exceptions, these claims have failed. Despite long-standing criticism of its doctrinal

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¹ See, e.g., *Beaver v. The Queen*, [1957] S.C.J. No. 32, [1957] S.C.R. 531 (S.C.C.), varg [1956] O.J. No. 342 (Ont. C.A.); *R. v. Pierce Fisheries Ltd.*, [1970] S.C.J. No. 58, [1971] S.C.R. 5 (S.C.C.), revg [1969] N.S.J. No. 103 (N.S.C.A.); *R. v. Sault Ste. Marie*, [1978] S.C.J. No. 59, [1978] 2 S.C.R. 1299 (S.C.C.), affg 13 O.R. (2d) 113 (Ont. C.A.).

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the “Charter”].

coherence and policy justifications, the Supreme Court of Canada has repeatedly confirmed the distinction's vitality and applied it to deny Charter challenges by persons deemed to be operating in the administrative sphere. The Court has been far more willing, in contrast, to find Charter violations in the criminal context.

The Court's 2015 decisions in *Guindon v. Canada*³ and *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*⁴ did little to change this. In each case, the Court decided that persons facing substantial penalties for issuing fraudulent tax receipts and impaired driving, respectively, were not "charged with an offence" under section 11 of the Charter. They were thus not entitled to the numerous rights guaranteed by that provision, including the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" under paragraph (d). The Court in *Goodwin* did find, however, that aspects of the process violated the right to be free from unreasonable search and seizure in section 8 of the Charter.

What accounts for the Court's enduring reluctance to require administrative penalty regimes, as a constitutional mandate, to adhere to the basic procedural protections applying even to low-level criminal and quasi-criminal prosecutions? There are likely many answers. But one is the Court's admitted fear that doing so would frustrate governments' ability to regulate economic activity in the public interest.

This article's aim is to trace the origins of this fear and assess its legitimacy. The fear stems largely from a century-old decision from the Supreme Court of the United States, the infamous *Lochner v. New York*.⁵ By the second half of the last century, jurists in the United States and Canada had come to view *Lochner* as the embodiment of an almost universally derided era of constitutional law. The *Lochner* Court, in their view, used a rigid and formalist interpretation of the Bill of Rights to limit state efforts to enact and enforce progressive economic legislation. Mindful of that experience, Canadian judges interpreting the Charter in the last decades of the 20th century drew a bright line between

³ [2015] S.C.J. No. 41, 2015 SCC 41, [2015] 3 S.C.R. 3 (S.C.C.), affg [2013] F.C.J. No. 673 (F.C.A.) [hereinafter "*Guindon*"].

⁴ [2015] S.C.J. No. 46, 2015 SCC 46, [2015] 3 S.C.R. 250 (S.C.C.) [hereinafter "*Goodwin*"].

⁵ 198 U.S. 45 (1905) [hereinafter "*Lochner*"].

administrative and criminal regulation, granting the state a largely unfettered freedom in the former and imposing often exacting constraints in the latter.

Lochner-era jurisprudence is (mostly) deserving of its reputation, and some lines between administrative and criminal law are certainly defensible. But Canadian courts' fear of *Lochner* has been excessive and caused them to underestimate the threat that administrative regulation poses to individual liberty. Criminal penalties are often harsher and more stigmatizing than administrative ones, and criminal defendants typically more vulnerable, disadvantaged and disempowered than many of the persons (natural and corporate) subject to administrative regulation. But not always. Legislatures have increasingly relied on administrative and civil enforcement regimes to address forms of wrongdoing previously left to the criminal law.⁶ In many instances, the sanctions accompanying these regimes are harsh, the targets are ordinary people, and the rules protecting adjudicative fairness are weak.⁷

As currently formulated, however, the criminal-administrative distinction is ill-suited to manage this phenomenon. I focus on the test used to decide whether a person is "charged with an offence" under section 11 of the Charter, which hinges on the distinction between criminal and administrative regulation. I argue that the current test is rigid and formalistic (ironically, much like *Lochner*) and advocate for a more flexible, functional and purposive interpretation that puts a greater burden on government to justify elisions of adjudicative fairness norms.

The remainder of this article proceeds as follows. In Part II, I briefly recount the history of the *Lochner* era, including *Lochner*'s Fourth and Fifth Amendment⁸ analogue, *Boyd v. United States*.⁹ Part III examines Canadian courts' reaction to *Lochner* and relates the formation of the

⁶ See D. McLeod, "Facing the Consequences: Should the *Charter* Apply to Administrative Proceedings Involving Monetary Penalties?" (2012) 30 N.J.C.L. 59; W. Michael G. Osborne, "Raising the AMPerge: The Spread of Administrative Monetary Penalties In Canada" (2011), online: <<http://www.thelitigator.ca/2011/01/raising-the-amperage>>; R.M. Brown, "Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation" (1992) 30 Osgoode Hall L.J. 691.

⁷ See, e.g., *Doyon v. Canada (Attorney General)*, [2009] F.C.J. No. 605, 2009 FCA 152, at paras. 20-29 (F.C.A.).

⁸ U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); amend. V, cl. 3 (no person "shall be compelled in any criminal case to be a witness against himself").

⁹ 116 U.S. 616 (1886).

administrative-regulatory distinction in the jurisprudence interpreting sections 7, 8, and 11 of the Charter. In Part IV, I examine *Guindon* and *Goodwin* and propose a more expansive interpretation of section 11, arguing that such an interpretation poses no *Lochnerian* threat to the Canadian welfare state. Part V concludes.

II. THE *LOCHNER* ERA

The story of *Lochner* is well known. In 1906, the Supreme Court struck down a New York law prohibiting bakery employees from working more than 10 hours a day or 60 hours a week. The Court interpreted the Fourteenth Amendment's due process clause¹⁰ to protect employers' and employees' rights to contract freely for labour. These rights could be superseded by the state's "police" power to limit contractual freedom for the purposes of "safety, health, morals and general welfare of the public",¹¹ but only for a "fair, reasonable and appropriate exercise" of that power.¹² The New York law, the Court adjudged, did not meet this standard, its relationship to health being remote at best.¹³ Instead, it constituted an "illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best ...".¹⁴ Laws that simply imposed maximum hours without an adequate health or safety justification, Peckham J. wrote, "are mere meddlesome interferences with the rights of the individual".¹⁵

Lochner spawned more than two decades of decisions invalidating labour and other public welfare legislation on due process grounds.¹⁶ Not every exercise of the police power was struck down, but the rulings did significantly limit legislatures' capacity to insulate workers from the

¹⁰ U.S. Const. amend. XIV, §1, cl. 3 ("No state shall ... deprive any person of life, liberty, or property, without due process of law").

¹¹ *Lochner*, *supra*, note 5, at 53.

¹² *Id.*, at 56.

¹³ *Id.*, at 58-61.

¹⁴ *Id.*, at 61.

¹⁵ *Id.*

¹⁶ See, e.g., *Charles Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 U.S. 522 (1923); *Schnaier v. Navarre Hotel & Importation Co.*, 70 L.R.A. 722 (1905); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adams v. Tanner*, 244 U.S. 590 (1917). The *Lochner* Court also struck down numerous federal laws under the due process clause of the Fifth Amendment. See e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Adair v. United States*, 208 U.S. 161 (1908). See U.S. Const. amend. V, cl. 4 ("No person shall be ... deprived of life, liberty, or property, without due process of law").

rigours of the market.¹⁷ However, in the face of the Great Depression and an emerging political consensus in favour of greater social welfare and governmental intervention in the economy, the Court eventually retreated, becoming increasingly willing to justify economic regulation as a reasonable limit on contractual freedom.¹⁸ And in its 1937 decision in *West Coast Hotel v. Parrish*, it all but repudiated *Lochner*, upholding a minimum wage law for women and declaring that legislatures should have “a wide field of discretion” to regulate employer-employee relations to not only protect health and safety, but also promote “peace and good order” and “insure wholesome conditions of work and freedom from oppression”.¹⁹

Less well known is the *Lochner* era’s criminal procedure jurisprudence. The keystone case, *Boyd v. United States*,²⁰ was decided 19 years before *Lochner*. *Boyd* displayed the same natural rights-based, formalist conception of the Bill of Rights as *Lochner*, as well as the same hostility to governmental regulation of private economic activity.²¹ In 1884, the Boyd company contracted with the United States government to supply imported glass for a federal building.²² Suspecting fraud, customs officials seized one of Boyd’s shipments, brought a civil forfeiture action, and obtained a subpoena requiring Boyd to produce the invoice from a previous shipment.²³ Boyd complied, but claimed violations of the Fourth and Fifth Amendments. The Supreme Court

¹⁷ See generally Cass R. Sunstein, “*Lochner*’s Legacy” (1987) 87 Colum. L. Rev. 873; David E. Bernstein, “*Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism” (2003) 92 Geo. L.J. 1; Victoria F. Nourse, “A Tale of Two *Lochners*: The Untold History of Substantive Due Process and the idea of Fundamental Rights” (2009) 97 Cal. L. Rev. 751.

¹⁸ See generally Laurence H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, NY: The Foundation Press, 1988), §§8-5 – 8-7 [hereinafter “Tribe”].

¹⁹ 300 U.S. 379, at 393 (1937).

²⁰ 116 U.S. 616, at 617 (1886) [hereinafter “*Boyd*”].

²¹ See Akhil Reed Amar, “Fourth Amendment First Principles” (1994) 107 Harv. L. Rev. 757, at 791 [hereinafter “Amar”]; Morgan Cloud, “The Fourth Amendment During the *Lochner* Era: Privacy, Property, and Liberty in Constitutional Theory” (1996) 48 Stan. L. Rev. 555, at 579-81 [hereinafter “Cloud”].

²² See “*Boyd v. United States*” in Philip B. Kurland & Gerhard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, vol. 8 (Arlington, VA: University Publications of America, 1975), at 480-85, 506-509; Donald Dripps, “‘Dearest Property’: Digital Evidence and the History of ‘Private Papers’ as Special Objects of Search and Seizure” (2013) 103 J. Crim. L. & Criminology 49, at 95-97.

²³ The subpoena was obtained pursuant to *Act of 22 June 1874*, c. 391, § 5, 18 Stat. 187 (19 U.S.C. § 535 (2015)).

agreed and excluded the invoice as evidence against Boyd.²⁴ Applying what would later become known as the “mere evidence” rule,²⁵ it declared that the Fourth Amendment prohibited the government from taking of non-illicit property for evidentiary purposes, even if it had ample grounds for suspicion and a warrant for the seizure.²⁶ It further proclaimed that compelling Boyd to provide the invoice violated the Fifth Amendment’s self-incrimination clause.²⁷ “Compulsory discovery” or “compelling the production of . . . private books and papers”, Bradley J. wrote, is “contrary to the principles of a free government” and “cannot abide the pure atmosphere of political liberty and personal freedom”.²⁸

As William Stuntz has pointed out, though *Boyd* is considered a cornerstone of turn-of-the-century constitutional criminal procedure, during the *Lochner* era it had only a limited effect on ordinary criminal cases.²⁹ Most criminal law was (and remains) state law, and the Supreme Court did not “incorporate” the Fourth and Fifth Amendments into the Fourteenth (thereby applying them to the states) until the 1960s.³⁰ Further, on its face, *Boyd* only prohibited the seizure or compulsory production of documents.³¹ During the late 19th and early 20th centuries, police rarely sought this type of evidence during criminal investigations.³²

²⁴ *Boyd, supra*, note 20. See also *Gouled v. United States*, 255 U.S. 298 (1921), 41 S. Ct. 261 [hereinafter “*Gouled*”].

²⁵ Courts began using this phrase to describe the *Boyd/Gouled* rule in the 1930s. See, e.g., *Foley v. United States*, 64 F.2d 1 (5th Cir. 1933), *cert denied*, 289 U.S. 762 (1933); *Landau v. United States*, 82 F.2d 285, at 287 (2nd Cir. 1936), *cert denied*, 56 S. Ct. 747 (1936). See generally 8 Wigmore, *Evidence*, §2184a (McNaughton rev., 1961) (defining “mere evidence” as anything “which is neither contraband nor tools nor fruits of crime, but which consists of private documents or other chattels of the defendant wanted by the government solely for its evidential value”).

²⁶ *Boyd, supra*, note 20, at 623.

²⁷ *Id.*, at 633. The Court concluded that while the forfeiture proceeding was nominally civil in nature, for the purposes of the Fifth Amendment it was “in substance and effect a criminal one”: *id.*, at 634. In separate, unreported proceedings, the owners of the company were also convicted criminally. Though the ruling does not appear in the decision, the Supreme Court also vacated their criminal conviction. See *Dripps, supra*, note 22, at 96.

²⁸ *Boyd, supra*, note 20, at 631-32. See also *Gouled, supra*, note 24, at 303-304.

²⁹ William J. Stuntz, “The Substantive Origins of Criminal Procedure” (1995) 105 Yale L.J. 393 [hereinafter “*Stuntz*”].

³⁰ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

³¹ Later courts did, however, sometimes apply the mere evidence rule to other kinds of evidence, such as clothing. See e.g., *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958); *La Rue v. State*, 197 S.W.2d 570 (Tex. Cr. App. 1946); *Williams v. United States*, 263 F.2d 487, at 488 (D.C. Cir. 1959), *cert denied*, 365 U.S. 836 (1961); *Hayden v. Warden, Md. Penitentiary*, 363 F.2d 647 (4th Cir. 1966). See also generally Steven Penney, “‘Mere Evidence’: Why Customs Searches of Digital Devices Violate s. 8 of the *Charter*” (2016) 49:2 U.B.C. L. Rev. 485 at 492-93.

³² *Stuntz, supra*, note 29, at 423.

Boyd did have the potential, however, to thwart the enforcement of federal economic regulation.³³ And so it did — to some extent. During the *Lochner* years, courts frequently deployed the mere evidence rule to prevent the government from compelling documents and testimony in business regulation cases, including bankruptcy,³⁴ antitrust³⁵ and white-collar fraud.³⁶

As with *Lochner*, the courts did not always apply *Boyd* to prohibit governmental intrusions on property rights and individual liberty. Even in the prime of the *Lochner* era, the Court sometimes permitted government to obtain documents characterized as either instrumentalities of crime³⁷ or legally required business records.³⁸ And by mid-century, many federal courts were stretching the instrumentality exception to the point of gutting the rule.³⁹ Finally, in *Warden v. Hayden*, the Supreme Court discarded the mere evidence rule altogether.⁴⁰ Justice Brennan declared for the majority that “[t]he premise that property interests control the right of the Government to search and seize has been discredited” and that the “principal object” of the Fourth Amendment “is the protection of privacy rather than property”.⁴¹ And since privacy “is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband”, it was “wholly irrational” to distinguish between the two categories.⁴² After *Warden v. Hayden*, Fourth Amendment cases would turn not on the

³³ *Id.*, at 425-27.

³⁴ See, e.g., *In re Harris*, 164 F. 292 (S.D.N.Y. 1908); *In re Hess*, 134 F. 109 (E.D. Pa. 1905); *Potter v. Beal*, 49 F. 793 (C.C.D. Mass. 1892).

³⁵ See e.g., *Councilman v. Hitchcock*, 142 U.S. 547 (1892); *Brown v. Walker*, 161 U.S. 591, at 606-608 (1896).

³⁶ See, e.g., *Gouled*, *supra*, note 24.

³⁷ See *Adams v. New York*, 192 U.S. 585, 24 S. Ct. 372 (1904); *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74 (1927); *Abel v. United States*, 362 U.S. 217, at 237-38, 80 S. Ct. 683 (1960); *United States v. Rabinowitz*, 339 U.S. 56, at 64, 70 S. Ct. 430 (1950); *Harris v. United States*, 331 U.S. 145, at 154, 67 S. Ct. 1098 (1947).

³⁸ See *Hale v. Henkel*, 201 U.S. 43, at 74-75, 26 S. Ct. 370 (1906); *Wilson v. United States*, 221 U.S. 361, at 377-85, 31 S. Ct. 538 (1911); *Shapiro v. United States*, 335 U.S. 1, 68 S. Ct. 1375 (1948).

³⁹ See, e.g., *Gollither v. United States*, 362 F.2d 594 (8th Cir. 1966); *United States v. Guido*, 251 F.2d 1 (7th Cir. 1958); *Morton v. United States*, 147 F.2d 28 (D.C. Cir. 1945); *United States v. Boyette*, 299 F.2d 92 (4th Cir. 1962).

⁴⁰ *Warden v. Hayden*, 387 U.S. 294 (1967) [hereinafter “*Warden*“]. See also *Andressen v. Maryland*, 427 U.S. 463, at 471-73 (1976); *Fisher v. United States*, 425 U.S. 391, at 405-14 (1976).

⁴¹ *Warden*, *id.*, at 304.

⁴² *Id.*, at 301-302.

form of evidence, but rather simply “reasonableness”, which presumptively entails warrants based on probable cause.⁴³

Though *Boyd* never became as reviled as *Lochner*,⁴⁴ commentators have long denounced the mere evidence rule that it proclaimed.⁴⁵ The distinction between inadmissible mere evidence and admissible instrumentalities, critics asserted, was incoherent.⁴⁶ Even worse, the rule thwarted legitimate law enforcement efforts⁴⁷ and perversely protected wrongdoing (economic and otherwise).⁴⁸ Like *Lochner*, *Boyd* ultimately came to be viewed as a formalist anachronism, incompatible with modern conceptions of legal pragmatism, policing and economic regulation.⁴⁹ Relatedly, *Boyd* was also, as *Lochner*’s ideological cousin, a product of the Supreme Court’s revanchist hostility to the emergent welfare state.⁵⁰

⁴³ *Id.*, at 309-10.

⁴⁴ Citing the significant negative academic commentary on *Lochner* would require an article-length footnote. For a summary of leading contributions, see Sujit Choudhry, “The *Lochner* Era and Comparative Constitutionalism” (2004) 2 Int. J. Constitutional Law 1, at 4-15 [hereinafter “Choudhry”].

⁴⁵ See 8 Wigmore, *Evidence*, §§2184a, 2264 (McNaughton rev., 1961); John MacArthur Maguire, *Evidence of Guilt: Restrictions upon its Discovery or Compulsory Disclosure* (Boston: Little, Brown and Co., 1959), at §5.04; “Eavesdropping Orders and the Fourth Amendment”, Comment (1966) 66 Colum. L. Rev. 355, at 359-70; Charles T. Newton Jr., “The Mere Evidence Rule: Doctrine or Dogma?” (1967) 45 Tex. L. Rev. 526; Zechariah Chafee Jr., “The Progress of the Law, 1919-1922: Evidence III” (1922) 35 Harv. L. Rev. 673, at 699-700; John Kaplan, “Search and Seizure: A No-Man’s Land in the Criminal Law” (1961) 49 Cal. L. Rev. 474, at 477-79; William T. Rintala, “The Mere Evidence Rule: Limitations on Seizure under the Fourth Amendment” (1966) 54 Cal. L. Rev. 2099 [hereinafter “Rintala”]; David R. Manwaring, “California and the Fourth Amendment” (1964) 16 Stan. L. Rev. 318, at 327-28; “Limitations on Seizure of ‘Evidentiary’ Objects: A Rule in Search of a Reason”, Comment (1953) 20 U. Chicago L. Rev. 319, at 320-22 [hereinafter “Chicago Comment”].

⁴⁶ See Newton, *id.*, at 542-45; Kamisar, *infra*, note 48, at 916-18; Chicago Comment, *id.*

⁴⁷ See Rintala, *supra*, note 45, at 2100-101.

⁴⁸ See Yale Kamisar, “The Wiretapping-Eavesdropping Problem: A Professor’s View” (1960) 44 Minn. L. Rev. 891, at 915-16; Roger J. Traynor, “*Mapp v. Ohio* at Large in the Fifty States” [1962] Duke L.J. 319, at 331.

⁴⁹ See Amar, *supra*, note 21, at 791; Cloud, *supra*, note 21, at 560-61; William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Harvard University Press, 2011), at 198. *Boyd*, and to a lesser degree, *Lochner*, have lately been rehabilitated in some quarters of the legal academy. See generally Cloud, *supra*, note 21; Dripps, *supra*, note 22; Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, N.J.: Princeton University Press, 2004); David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (Chicago: Chicago University Press, 2011).

⁵⁰ See Cloud, *supra*, note 21, at 571-73; Thomas Y. Davies, “The Supreme Court Giveth and The Supreme Court Taketh Away: The Century of Fourth Amendment ‘Search And Seizure’ Doctrine” (2010) 100 J. Crim L. & Criminology 933, at 965.

III. *LOCHNER* AND THE ADMINISTRATIVE-CRIMINAL DISTINCTION IN CANADA

Unsurprisingly, Canadian courts' distaste for *Lochner*⁵¹ has been most evident when claimants have asserted proprietary or contractual claims under the Charter. In his concurring reasons in the *Prostitution Reference*, for example, Lamer J. rejected the notion that the right not to be deprived of "liberty ... except in accordance with the principles of fundamental justice" under section 7 contemplated economic liberty.⁵² *Lochner* and its siblings, he stressed, "have a specific historical context, a context that incorporated into the American jurisprudence certain *laissez-faire* principles that may not have a corresponding application to the interpretation of the *Charter* in the present day".⁵³ Similar sentiments have been expressed in other Supreme Court⁵⁴ and lower court opinions.⁵⁵

⁵¹ On the antipathy towards *Lochner* of the Charter's drafters and judicial interpreters, see generally Choudhry, *supra*, note 44; K. Michael Stephens, "Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter of Rights and Freedoms" (2002) 13 N.J.C.L. 183; Ian Greene, *The Charter of Rights* (Toronto: James Lorimer, 1989), at 146; Peter W. Hogg, "Canada's New Charter of Rights" (1984) 32 Am. J. Comp. L. 283, at 290 [hereinafter "Hogg"]; Patrick J. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), at 76; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (supplemented), vol. 2, loose-leaf (Toronto: Carswell, 2007), at §§ 36.4(b), 47.7(b).

⁵² *Reference re Criminal Code (Canada) ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.), affg [1987] M.J. No. 453 (Man. C.A.), Lamer J., concurring. In his plurality reasons in the *Prostitution Reference*, Dickson C.J.C. expressly declined to decide whether liberty or security of the person "could ever apply to any interest with an economic, commercial or property component" (at para. 15, emphasis in original). See also *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at para. 150 (S.C.C.), Dickson C.J.C. ("Whatever the precise contours of 'liberty' in s. 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes."); *Bernard v. Dartmouth Housing Authority*, [1988] N.S.J. No. 283, 53 D.L.R. (4th) 81 (N.S.C.A.), leave to appeal refused (1989), 89 N.S.R. (2d) 270n (S.C.C.).

⁵³ *Id.*, at para. 60.

⁵⁴ See e.g., *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313, at 412 (S.C.C.), affg [1984] A.J. No. 616 (Alta. C.A.), McIntyre J., concurring ("It is also to be observed that the *Charter*, with the possible exception of s. 6(2)(b) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights."); *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 138-39 (S.C.C.), revg [1985] O.J. No. 2662 (Ont. C.A.), McIntyre J., dissenting ("The doctrine that prevailed in *Lochner* ... and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — has long since been discarded."); *Children's Aid: B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] S.C.J. No. 24, [1995] 1 S.C.R. 315, at 370 (S.C.C.), affg [1992] O.J. No. 1915 (Ont. C.A.) (referring to the "*Lochner* era" as a "much criticized period in which the Supreme Court engaged in substantive review of many economic and social statutes."); *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 33, [2005] 1 S.C.R. 791, at paras. 201-202 (S.C.C.), revg [2002] J.Q. no 759 (Que. C.A.), Binnie and LeBel JJ., dissenting; *Irwin*

Lochner has also been disapproved of in *Canadian Bill of Rights* cases. Though section 1(a) of the *Bill of Rights* expressly protects the right not to be deprived of the “enjoyment of property” except by “due process of law”, courts have consistently rejected challenges to legislatively authorized government takings.⁵⁶ And in finding that section 1(a) did not preclude Parliament from preventing disabled veterans from claiming interest owed to them on trust moneys held by the government, the Supreme Court noted that *Lochner* “might have cast a shadow over the recognition of substantive due process rights in Canadian jurisprudence”.⁵⁷

The negative reception of *Lochner* in Canada extended to criminal quasi-criminal law and helped shape the administrative-criminal distinction. In *R. v. Wholesale Travel Group Inc.*,⁵⁸ the appellant was charged with disseminating false or misleading advertising under the *Competition Act*.⁵⁹ Like many regulatory statutes, the Act imposed “strict liability” for violations of its prohibitions. As a consequence, the offence was deemed to be established upon proof of the *actus reus* (*i.e.*, that the advertising was objectively misleading), but permitted a defence of “due diligence” if the defendant could prove, on a balance of probabilities,

Toy Ltd. v. Quebec (Attorney General), [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 1003-1004 (S.C.C.), revg [1986] J.Q. no 1650 (Que. C.A.) (contrasting s. 7 of Charter with Fifth and Fourteenth Amendment due process clauses and asserting that economic rights not generally within scope of Charter protection).

⁵⁵ See *e.g.*, *Mathew v. Canada*, [2002] T.C.J. No. 222, at paras. 359, 460-469 (T.C.C.), affd [2003] F.C.J. No. 1470 (F.C.A.), affd [2005] S.C.J. No. 55, [2005] 2 S.C.R. 643 (S.C.C.); *Gosselin v. Quebec (Attorney General)*, [1999] J.Q. no 1365 (Que. C.A.), affd [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.); *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.*, [1989] B.C.J. No. 965, 60 D.L.R. (4th) 43, at paras. 28-29 (B.C.C.A.), leave to appeal refused [1989] S.C.C.A. No 274 (S.C.C.); *Archibald v. Canada*, [1997] F.C.J. No. 394, [1997] 3 F.C.R. 335 (F.C.T.D.), affd [2000] F.C.J. No. 857 (F.C.A.); *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General)*, [1986] 1 F.C. 274, at 314 (F.C.T.D.), affd [1986] F.C.J. No. 787, [1987] 2 F.C. 359 (F.C.A.).

⁵⁶ *Canadian Bill of Rights*, S.C. 1960, c. 44 [reproduced in R.S.C. 1985, App. III]. See *Authorson v. Canada (Attorney General)*, [2003] S.C.J. No. 40, 2003 SCC 39, [2003] 2 S.C.R. 40, at para. 51 (S.C.C.) (“The *Bill of Rights* does not protect against the expropriation of property by the passage of unambiguous legislation.”). See also generally *Manitoba Fisheries Ltd. v. The Queen*, [1978] S.C.J. No. 78, [1979] 1 S.C.R. 101 (S.C.C.), revg [1977] F.C.J. No. 165 (F.C.A.); *Wells v. Newfoundland*, [1999] S.C.J. No. 50, [1999] 3 S.C.R. 199, at para. 41 (S.C.C.), affg [1997] N.J. No. 250 (Nfld. C.A.).

⁵⁷ *Authorson, id.*, at para. 49. See also *Curr v. The Queen*, [1972] S.C.J. No. 66, [1972] S.C.R. 889, at 902 (S.C.C.), affg [1971] O.J. No. 1618 (Ont. H.C.J.).

⁵⁸ [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.), varg [1989] O.J. No. 1971 (Ont. C.A.) [hereinafter “*R. v. Wholesale Travel*”].

⁵⁹ R.S.C. 1970, c. C-23, s. 36(1).

that it took reasonable care to prevent the error.⁶⁰ The Court had previously held in criminal cases that imposing a persuasive burden on the accused (*i.e.*, a reverse onus) to establish a defence infringed the presumption of innocence in section 11(d) of the Charter, though in some cases that infringement could be justified under section 1.⁶¹ And it has since found that section 7 prohibits criminal liability (involving at least a theoretical possibility of imprisonment) on anything less than “marked departure” (*i.e.*, gross negligence) standard of fault.⁶² But in *Wholesale Travel*, it held that for regulatory or administrative infractions, legislatures could always impose a reverse onus to prove due diligence.⁶³ And it concluded that for such infractions, imposing the fault standard of ordinary negligence did not violate section 7.

Each of the majority opinions in *Wholesale Travel* emphasized the distinctiveness of regulatory offences and the social importance of easing the prosecution’s burden in proving them. And in his lengthy exposition on the criminal-regulatory distinction, Cory J. expressly invoked the history of *Lochner*. He explained:

... [M]uch government regulation is designed to protect the vulnerable. It would be unfortunate indeed if the *Charter* were used as a weapon to attack measures intended to protect the disadvantaged and comparatively powerless members of society. It is interesting to observe that in the United States, courts struck down important components of the program

⁶⁰ *Id.*, s. 37.3(2). To escape liability after proof of the *actus reus*, this provision also required the defendant to establish that it made reasonable and timely efforts to notify the targets of the advertising. The Court unanimously held that these requirements exceeded the scope of the ordinary due diligence defence and were consequently unconstitutional: *R. v. Wholesale Travel*, *supra*, note 58, at 188-95, Lamer C.J.C., dissenting, 252-53, Cory J., 255, Iacobucci J., 260, McLachlin J.

⁶¹ See *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.), affg [1983] O.J. No. 2501 (Ont. C.A.); *R. v. Whyte*, [1988] S.C.J. No. 63, [1988] 2 S.C.R. 3 (S.C.C.), affg [1983] B.C.J. No. 2452 (B.C.C.A.); *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303 (S.C.C.).

⁶² For a limited category of very serious offences carrying a sufficiently high degree of stigma, s. 7 is violated where fault can be established by anything less than (subjective) recklessness. See *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.), revg [1984] J.Q. no 166 (Que. C.A.) (murder); *R. v. Logan*, [1990] S.C.J. No. 89, [1990] 2 S.C.R. 731 (S.C.C.), affg [1988] O.J. No. 2107 (Ont. C.A.) (attempted murder); *R. v. Finta*, [1994] S.C.J. No. 26, [1994] 1 S.C.R. 701 (S.C.C.), affg [1992] O.J. No. 823 (Ont. C.A.) (war crimes and crimes against humanity).

⁶³ The route to this conclusion varied slightly as between the two judgments in the majority. Justice Iacobucci found that the reverse onus in regulatory offences, as in criminal offences, infringed s. 11(d). He concluded, however, that this infringement was justified under s. 1, not just for the impugned *Competition Act* provisions, but for all regulatory offences. Justice Cory found that regulatory reverse onuses do not even infringe s. 11(d).

of regulatory legislation known as “the New Deal”. This so-called “*Lochner* era” is now almost universally regarded by academic writers as a dark age in the history of the American Constitution.⁶⁴

The criminal-administrative binary also plays a critical role in section 8 Charter doctrine. To be considered reasonable under that provision, searches or seizures in criminal investigations must comply with more demanding standards than those in administrative inquiries.⁶⁵ In the former, section 8 often requires warrants based on probable grounds. In the latter, authorities are frequently free to search without satisfying either of these conditions.⁶⁶ Statutory powers compelling the production of business and tax records, for example, do not generally require either prior authorization or objective grounds for suspicion.⁶⁷ The Court has also upheld powers to inspect businesses for regulatory compliance without warrants or objective grounds for suspicion.⁶⁸ To comply with section 8, investigators need only show that they acted in good faith in pursuit of legitimate regulatory objectives.⁶⁹ Broad surveillance powers, the Court has stated, are necessary for the effective regulation of industrial and economic activity.⁷⁰ Requiring warrants and

⁶⁴ *R. v. Wholesale Travel*, *supra*, note 58, at 233-34.

⁶⁵ See generally *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425 (S.C.C.), affg [1986] O.J. No. 1066 (Ont. C.A.) [hereinafter “*Thomson*”].

⁶⁶ See, e.g., *Thomson, id.*, at 506-507, La Forest J.; *R. v. Jarvis*, [2002] S.C.J. No. 76, [2002] 3 S.C.R. 757, 2002 SCC 73 at para. 72 (S.C.C.); *143471 Canada Inc. v. Quebec (Attorney General)*; *Tabah v. Quebec (Attorney General)*, [1994] S.C.J. No. 45, [1994] 2 S.C.R. 339, at 378 (S.C.C.), affg [1992] J.Q. no 292 (Que. C.A.), Cory J.; *Comité paritaire de l’industrie de la chemise v. Potash*; *Comité paritaire de l’industrie de la chemise v. Selection Milton*, [1994] S.C.J. No. 7, [1994] 2 S.C.R. 406, at 420-21 (S.C.C.), revg [1992] J.Q. no 1012 (Que. C.A.) [hereinafter “*Comité paritaire*”]; *R. v. Fitzpatrick*, [1995] S.C.J. No. 94, [1995] 4 S.C.R. 154, at para. 49 (S.C.C.); *R. v. McKinlay Transport Ltd.*, [1990] S.C.J. No. 25, [1990] 1 S.C.R. 627, at 649-50 (S.C.C.), affg [1987] O.J. No. 1130 (Ont. C.A.), Wilson J. [hereinafter “*McKinlay Transport Ltd.*”].

⁶⁷ See *Thomson, supra*, note 65; *McKinlay Transport Ltd., id.* (tax); *R. v. Jarvis*, [2002] S.C.J. No. 76, [2002] 3 S.C.R. 757, 2002 SCC 73 (S.C.C.); *R. v. Ling*, [2002] S.C.J. No. 75, 2002 SCC 74, [2002] 3 S.C.R. 814 (S.C.C.), affg [2000] B.C.J. No. 2082 (B.C.C.A.); *R. v. Fitzpatrick, id.*, at paras. 49-51; *British Columbia (Securities Commission) v. Branch*, [1995] S.C.J. No. 32, [1995] 2 S.C.R. 3, at paras. 51-64 (S.C.C.), affg [1992] B.C.J. No. 164 (B.C.C.A.). See generally Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Toronto: LexisNexis Canada, 2011), at §§3.144-3.152.

⁶⁸ See *Comité paritaire, supra*, note 66.

⁶⁹ *Id.*, at 422-23; *Thomson, supra*, note 65, at 531-32.

⁷⁰ *Thomson, supra*, note 65.

probable grounds would frustrate government's ability to protect the vulnerable and regulate in the public interest.⁷¹

Lastly, the distinction between criminal and administrative wrongdoing lies at the heart of the Supreme Court's jurisprudence on section 11 of the Charter. As noted, the adjudicative fairness rights enumerated in that provision attach only to persons "charged with an offence". The Court has interpreted this phrase to apply only to "persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted".⁷² As Justice Wilson elaborated for the majority in *Wigglesworth*, this definition encompasses both proceedings that are criminal by their "very nature" as well as those that "may lead to a true penal consequence".⁷³ Penalties "intended to promote public order and welfare within a public sphere of activity," she wrote, fall within section 11.⁷⁴ Those imposed in "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity" do not.⁷⁵

In subsequent decisions, the Court has provided further guidance on the meaning of each of these thresholds. In *Shubley* and *Martineau*, it clarified that the "criminal in nature" test refers not to the "nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves".⁷⁶ The fact that alleged wrongdoers could be prosecuted criminally, therefore, does not mean that any non-criminal proceeding

⁷¹ *Id.*, at 526. See also *McKinlay Transport Ltd.*, *supra*, note 66, at 648, Wilson J. Not all regulatory searches are exempt from the *Hunter* requirements. The Supreme Court noted in *Thomson*, for example, that prior authorization on probable grounds was required in *Hunter* because authorities could acquire sensitive personal information as well as business documents. *Thomson*, *supra*, note 65, at 520-21. See also *McKinlay Transport Ltd.*, *supra*, note 66, at 649, Wilson J.; *Baron v. Canada*, [1993] S.C.J. No. 6, [1993] 1 S.C.R. 416 at 444-45. Warrants and probable grounds are also presumptively required where the state's "predominant purpose" is to uncover evidence of "penal liability" rather than monitor regulatory compliance: see *R. v. Jarvis*, [2002] S.C.J. No. 76, [2002] 3 S.C.R. 757, 2002 SCC 73 at paras. 2, 46, 88, and 99 (S.C.C.).

⁷² *R. v. Wigglesworth*, [1987] S.C.J. No. 71, [1987] 2 S.C.R. 541, at 554 (S.C.C.), affg [1984] S.J. No. 204 (Sask. C.A.) [hereinafter "*Wigglesworth*"].

⁷³ *Id.*, at 559.

⁷⁴ *Id.*, at 560.

⁷⁵ *Id.*

⁷⁶ *R. v. Shubley*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3, at 18-19 (S.C.C.), affg [1988] O.J. No. 57 (Ont. C.A.) (emphasis in original) [hereinafter "*Shubley*"]; *Martineau v. Canada (Minister of National Revenue)*, [2004] S.C.J. No. 58, 2004 SCC 81, [2004] 3 S.C.R. 737 (S.C.C.), affg [2003] F.C.J. No. 557 (F.C.A.) (quoting *Shubley, id.*) [hereinafter "*Martineau*"].

against them triggers section 11.⁷⁷ If the proceedings to enforce the prohibition and impose a penalty lack the conventional *indicia* of a criminal prosecution (such as summons or arrest, the laying of an information, or a trial in a court of criminal jurisdiction), they will be considered administrative.⁷⁸

The true penal consequence test will always be satisfied by the possibility of imprisonment.⁷⁹ It may also include a fine or other monetary penalty, but only, as the Court explained in *Martineau*, one that “by its magnitude” is imposed to redress “a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness” of a discrete regulatory or disciplinary regime.⁸⁰

IV. GUINDON AND GOODWIN

In *Guindon*, a lawyer was assessed a penalty of over a half million dollars under the *Income Tax Act* for issuing charitable tax receipts based on false statements.⁸¹ She successfully argued at the Tax Court of Canada that she was “charged with an offence” under section 11 of the Charter and was thus entitled to the rights set out in that provision. The Federal Court of Appeal reversed, however, and that reversal was upheld by the Supreme Court of Canada.⁸²

Writing for the majority, Cromwell and Rothstein JJ. looked first to the nature of the proceedings, examining both the legislative scheme and the features of the process leading to the assessment. The scheme was designed, they explained, to capture persons who help to prepare false tax information and are either culpably aware of their actions or grossly negligent.⁸³ Penalties for such conduct, they concluded, “promote

⁷⁷ *Id.* See also *Martineau, id.*, at paras. 30-32.

⁷⁸ See *Martineau, supra*, note 76, at para. 45.

⁷⁹ *Wigglesworth, supra*, note 72.

⁸⁰ *Martineau, supra*, note 76, at para. 60 (emphasis in original).

⁸¹ R.S.C. 1985, c. 1 (5th Supp.), s. 163.2(4) (“Every person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person ... that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for a purpose of this Act is liable to a penalty in respect of the false statement.”).

⁸² The disposition of the appeal was unanimous, but three of the seven judges on the panel declined to deal with the s. 11 issue, holding that: (i) Ms. Guindon failed to comply with the notice requirement for constitutional challenges under the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2; and (ii) there were no grounds for the Court to exercise its discretion to hear the challenge despite this failure. See *Guindon, supra*, note 3, Abella and Wagner JJ., concurring.

⁸³ *Id.*, at paras. 53-61.

honesty and deter gross negligence, or worse, on the part of preparers, qualities that are essential to the self-reporting system of income taxation assessment”.⁸⁴ The process employed to determine liability, they noted, involved an audit, an opportunity for the individual to make representations, a recommendation by the auditor to a review committee, a provisional decision by that committee, a further opportunity for representations, a final decision, a right of appeal to the Tax Court, and in default of payment, a civil collection action.⁸⁵ This process, they asserted, stood in sharp contrast to the process for determining criminal sanctions under the Act, which required the laying of an information and a trial in a court of criminal jurisdiction.⁸⁶ They accordingly concluded that the scheme was not “criminal in nature”.⁸⁷

In addressing the “true penal consequence” test, Cromwell and Rothstein JJ. confirmed that the possibility of imprisonment always triggers section 11.⁸⁸ They also reiterated that a monetary penalty will do so only when “it is, in purpose or effect, punitive”, considering the “magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty”.⁸⁹ While there is no fixed upper limit on the magnitude of the penalty, they wrote, to remain within the administrative realm the penalty must not be “out of proportion to the amount required to achieve regulatory purposes”.⁹⁰ That said, large penalties may be justified to deter “non-compliance with the administrative or regulatory scheme”⁹¹ and ensure that “the penalty is not simply considered a cost of doing business”.⁹² They concluded that the scheme at issue, which involved a

⁸⁴ *Id.*, at para. 62.

⁸⁵ *Id.*, at paras. 66 and 90.

⁸⁶ *Id.*, at para. 67. See also *Martineau*, *supra*, note 76, at para. 45.

⁸⁷ *Id.*, at para. 73.

⁸⁸ *Id.*, at para. 76.

⁸⁹ *Id.*, at 76. See also *Canada (Attorney General) v. United States Steel Corp.*, [2011] F.C.J. No. 726, 2011 FCA 176, 333 D.L.R. (4th) 1, at paras. 76-77 (F.C.A.), leave to appeal refused [2011] S.C.C.A. No. 364 (S.C.C.) [hereinafter “*United States Steel Corp.*”].

⁹⁰ *Id.*, at para. 77.

⁹¹ *Id.* See also *id.*, at para. 79.

⁹² See also *Lavallee v. Alberta (Securities Commission)*, [2010] A.J. No. 144, 2010 ABCA 48, 474 A.R. 295 (Alta. C.A.), affg [2009] A.J. No. 21 (Alta. Q.B.), leave to appeal refused [2010] S.C.C.A. No. 119 (S.C.C.); *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, [2013] O.J. No. 3748, 2013 ONSC 5315 (Ont. S.C.J.); *United States Steel Corp.*, *supra*, note 89, at para. 77; *Rowan v. Ontario Securities Commission*, [2012] O.J. No. 1375, 2012 ONCA 208, at para. 49 (Ont. C.A.), affg [2010] O.J. No. 5681 (Ont. S.C.J.).

maximum penalty of \$100,000 plus the individual's gross compensation for each violation, "reflects the objective of deterring" the type of misconduct targeted and did not therefore trigger the application of section 11.⁹³

*Goodwin*⁹⁴ involved challenges under sections 11 and 8 of the Charter to British Columbia's Automatic Roadside Prohibition ("ARP") scheme.⁹⁵ That scheme permitted police to administer an "approved screening device" ("ASD") demand to determine a driver's blood alcohol concentration. If the ASD revealed a reading above certain threshold, the driver's licence would be immediately suspended for a period between three and 90 days and monetary costs and penalties imposed up to a maximum of \$4,000.⁹⁶ Drivers could ask the Superintendent of Motor Vehicles to review these penalties, but this review was restricted to the questions of whether the applicant was the driver, the ASD registered the designated threshold, or the driver unlawfully failed or refused to provide a sample.⁹⁷

Applying the framework established in *Wigglesworth*, *Martineau* and *Guindon*, the Court unanimously (and somewhat summarily) dismissed the claim that drivers subject to these penalties were "charged with an offence" under section 11 of the Charter.⁹⁸ It was "evident", Karakatsanis J. wrote, that the proceedings used to impose the penalties were "of an administrative nature" and "not criminal".⁹⁹ "The proceedings

⁹³ *Guindon*, *supra*, note 3, at para. 88.

⁹⁴ *Supra*, note 4. The legislation was also (unsuccessfully) challenged on division of powers grounds.

⁹⁵ *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, ss. 94.1-94.6. As discussed, *infra*, the Act was amended in several relevant ways between the time the actions in *Goodwin* were initiated and the Supreme Court of Canada's decision.

⁹⁶ More specifically, if the reading was 0.08 (milligrams of alcohol / litre of blood) or higher, the licence would be suspended for 90 days; if between 0.05 and 0.08, the licence would be suspended for three, seven, or 30 days, depending on whether it was the driver's first, second, or subsequent infraction, respectively. In addition, depending on the length of the suspension and other factors, the driver's vehicle could also be impounded. See *Goodwin*, *supra*, note 4, at paras. 11-12; *Motor Vehicle Act*, *supra*, note 95, ss. 215.41-215.46.

⁹⁷ *Goodwin*, *supra*, note 4, at para. 12. The scheme was later amended to: (i) require "that a police officer inform a driver of her right to request and be provided a second ASD test, and, where two samples are provided, the lower of the two results is the basis for a driving prohibition"; (ii) allow driver's to challenge the accuracy of the device; and (iii) require police to provide the Superintendent with information relating to the calibration of the ASD. See *Goodwin*, *supra*, note 4, at para. 13.

⁹⁸ *Goodwin*, *supra*, note 4, at paras. 39-47, Karakatsanis J. and para. 91, McLachlin J., dissenting.

⁹⁹ *Id.*, at para. 43.

are initiated by the drivers themselves”, she added, and there are no “prosecutions” or “criminal records” involved.

Nor, in her view, were the consequences imposed on drivers “truly penal”.¹⁰⁰ While the suspensions were “meaningful”, they were directly related to the “regulatory terms and conditions under which a person may be licensed to drive”.¹⁰¹ And while the financial burdens were “significant”, the fine was capped at \$500, with the remaining costs connected to remedial programs (including ignition interlock devices) “incidental to the scheme’s objective of getting drivers and vehicles off the road”.¹⁰²

The Court did find, however, that the lack of a meaningful opportunity to challenge the reliability of an “over 0.08” reading violated section 8 of the Charter and could not be saved by section 1. The absence of the kinds of safeguards subsequently added by the legislature (such as requiring police to inform drivers of their right to request a sample from a second device and allowing the Superintendent to assess the device’s accuracy) meant that the scheme was “unreasonable” under section 8 and failed the “minimal impairment” branch of section 1.¹⁰³

I do not take a position on whether people facing the administrative penalties at issue in *Guindon* and *Goodwin* should be entitled to any of the particular rights set out in section 11 of the Charter. I do claim, however, that the Supreme Court’s construal of “charged with an offence” is too restrictive. A more expansive interpretation would allow courts to place meaningful limits on legislatures’ ability to impose administrative penalties without complying with basic tenets of adjudicative fairness. If compliance with these principles is truly incompatible with regulatory efficacy, governments can justify infringements of section 11 rights under section 1 of the Charter. This is how many other Charter rights are interpreted,¹⁰⁴ and there is little reason to think that under such an approach Canadian courts would suddenly attempt a Lochnerian dismantling of welfare state regulation. On the

¹⁰⁰ *Id.*, at para. 45.

¹⁰¹ *Id.*, at para. 46.

¹⁰² *Id.*

¹⁰³ *Id.*, at paras. 64-85.

¹⁰⁴ See *e.g.*, the jurisprudence regarding ss. 2, 9, 10(b), 11(d), and 15 of the Charter, in which the courts have interpreted the rights expansively while affording legislatures considerable latitude to infringe under s. 1 in prescribed circumstances. See generally Hogg, *supra*, note 51, c. 38. Other Charter rights, notably sections 7, 8, and 12, are almost never justified under section 1 because each contains an internal limitation permitting courts to balance individual liberties against state interests without resort to section 1. See Hogg, *supra*, note 51, §38.14.

contrary, a more flexible reading of section 11 would give Canadians confidence that, regardless of the legislature's chosen means of enforcement, they will be assured a minimal level of adjudicative fairness in contesting substantial state-imposed penalties.

But why precisely is the current approach too restrictive? Consider first the "criminal in nature" test. Curiously for a component of a constitutional right, it is wholly (and I mean *wholly*) positivistic. It provides no check whatsoever on a legislature's ability to deny adjudicative fairness to those facing governmental sanctions. The test simply asks the reviewing court to examine and describe the enforcement procedure dictated by the legislature. If that process includes the conventional elements of a criminal or quasi-criminal prosecution (*e.g.*, arrest and summons powers, the laying of an information, trial in a court of criminal jurisdiction), it is "criminal in nature"; if not, it is administrative. End of story.

Put differently, the Court has enlisted a method of *statutory* interpretation (*i.e.*, divining legislative purpose or intent) to determine the scope of what should be a *constitutional* limit on governmental power. The quantum of deference inhering in this approach is literally infinite, exceeding even the minimal "rational basis" standard that eventually replaced *Lochner*.¹⁰⁵ The only effect of the "criminal in nature" test, therefore, is to signal to legislatures that if they wish to evade the strictures of section 11, they must avoid the accoutrements of the criminal process in designing enforcement procedures.¹⁰⁶

In theory, the "true penal consequence" test is not entirely devoid of normativity. In practice, however, it imposes a virtually unattainable bar on rights claimants. The only way for non-carceral sanctions to trigger section 11 protection is to be "out of proportion" to regulatory objectives, which may include large, deterrence-oriented fines.¹⁰⁷ Deterrence, however, is also one of the most important aims of criminal sanctioning.¹⁰⁸

¹⁰⁵ See Tribe, *supra*, note 18, at §8-7.

¹⁰⁶ The Court has rightly rejected such positivistic constitutional review in its section 8 jurisprudence. See *R. v. Tessling*, [2004] S.C.J. No. 63, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 42 (S.C.C.), revg [2003] O.J. No. 186 (Ont. C.A.); *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36 at 46 (S.C.C.), affg [1987] O.J. No. 267 (Ont. C.A.).

¹⁰⁷ See cases cited *supra*, notes 89-93. See also *Re Cartaway Resources Corp.*, [2004] S.C.J. No. 22, 2004 SCC 26, [2004] 1 S.C.R. 672, at paras. 55-61 (S.C.C.), revg [2002] B.C.J. No. 2115 (B.C.C.A.).

¹⁰⁸ See *Criminal Code*, R.S.C. 1985, c. C-46, s. 718(b). See also generally Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001), at 43-46; Clayton C. Ruby, Gerald Chan & Nader R. Hasan, *Sentencing*, 8th ed. (Markham, ON: LexisNexis Canada, 2012), at 7-15.

In almost any realm of commercial or financial activity, large fines or monetary penalties will at least sometimes be necessary to deter infractions. If section 11 can be evaded simply by diverting to such (legitimate) objectives, administrative penalty schemes will almost never fall within the provision's scope. Indeed, in an overwhelming proportion of cases, courts have found that the monetary penalties imposed or available were justified on deterrence grounds and were thus not penal consequences.¹⁰⁹

The penal consequence test should therefore be reformulated to impose some kind of bright-line limit on monetary penalties. The quantum could vary according to prescribed circumstances, such as whether the penalty would be imposed on an individual or a corporation. In addition, it could be based on a relative rather than absolute value, such as a fixed percentage of the maximum fine for any parallel penal offence.¹¹⁰ However the limit is calculated, if it were exceeded, section 11 would apply, and the failure to afford any of its protections would constitute a *prima facie* infringement.

The test should also be satisfied by sanctions imposing any substantial constraint on liberty, such as the imposition of solitary or close confinement for a breach of custodial disciplinary rules,¹¹¹ or even the suspension or revocation of a licence, as in *Goodwin*.¹¹² Such penalties can cause considerable social, financial and psychological harm and should not be levied without a presumptive constitutional entitlement to basic adjudicative fairness.¹¹³

If the penal consequences test were interpreted in this manner, many administrative penalty regimes would come under the protection of section 11. In some of these cases, granting certain section 11 rights could unduly diminish the state's ability to regulate in the public interest. But this consequence should not be assumed; governments should be required to demonstrate it. Imposing a justification requirement in section 11 cases would be far from radical, and far from Lochnerian.

¹⁰⁹ See Christopher D. Bredt & Laura Pottie, "Room to Grow: Application of the Charter's Procedural Rights in an Administrative Setting" (2005) 30 *Advocates' Q.* 137, at 150. For one of the very few exceptions, see *Thow v. B.C. (Securities Commission)*, [2009] B.C.J. No. 211, 2009 BCCA 46 (B.C.C.A.), varg 2007 LNBCSC 617 (B.C. Sec. Com.).

¹¹⁰ See Todd L. Archibald, Kenneth E. Jull & Kent W. Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Toronto: Canada Law Book, 2005) (loose-leaf), c. 15.

¹¹¹ See *Shubley*, *supra*, note 76, Cory J., dissenting.

¹¹² *Supra*, note 4.

¹¹³ See John Swaigen, *Regulatory Offences in Canada: Liability & Defences* (Toronto: Carswell, 1992), at xxxix, 215.

After all, a vast quantity of regulatory law is enforced (by legislative choice) through quasi-criminal procedures and punishments.¹¹⁴ There is little evidence that the application of section 11 to these processes has emboldened wrongdoers, gutted enforcement, or induced the collapse of any regulatory regimes. Requiring the state to justify elisions of basic adjudicative fairness norms is one thing; striking down maximum hours, workplace safety, and minimum wage laws as violations of economic due process is another.

The weakness of the Supreme Court of Canada's application of the administrative-criminal distinction to section 11 law is further illustrated by the section 8 analysis in *Goodwin*. As mentioned, there the Court found that denying drivers a meaningful chance to challenge the reliability of the ASD reading violated section 8. While the Court's policy objective was laudable — imposing an entitlement to basic adjudicative fairness — the use of section 8 to achieve that objective was frankly bizarre. The right to be free from unreasonable search or seizure has always been interpreted to limit the state's capacity to invade privacy to investigate and prosecute wrongdoing.¹¹⁵ It plays no role in fostering adjudicative accuracy. Indeed, successful section 8 applications often lead to the exclusion of reliable evidence under section 24(2) of the Charter, a consequence at odds with the goal of accurately determining the factual basis of the state's allegations.¹¹⁶ Section 8 is not concerned with the *ex post* reliability of adjudication on the merits, but rather the *ex ante* accuracy of investigative officials' predictions of wrongdoing.¹¹⁷ Section 8 presumptively requires warrants and probable grounds, for example, not to ensure adjudicative accuracy but prevent unjustified investigative intrusions into privacy.

¹¹⁴ See Rick Libman, *Libman on Regulatory Offences in Canada*, loose-leaf (Salt Spring Island, B.C.: Earls court, 2002), at 1-2; P.J. Fitzgerald & T. Elton, "The Size of the Problem", in Law Reform Commission of Canada, *Studies on Strict Liability* (Ottawa: The Commission, 1974), at 43.

¹¹⁵ See generally *Hunter v. Southam (sub nom. Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.)*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 159 (S.C.C.), affg [1983] A.J. No. 715 (Alta. C.A.).

¹¹⁶ See Mike Madden, "Empirical Data on Section 24(2) under *R. v. Grant*" (2010) 78 C.R. (6th) 278; Mike Madden, "Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of *R. v. Grant*" (2011) 15 Can. Crim. L. Rev. 229; Thierry Nadon, "Le paragraphe 24(2) de la Charte au Québec depuis *Grant*: si la tendance se maintient!" (2011) 86 C.R. (6th) 33; Ariane Asselin, "Trends for Exclusion of Evidence in 2012" (2013) 1 C.R. (7th) 74.

¹¹⁷ See generally Steven Penney, "Standards of Suspicion" (2016) 64 Crim. L.Q. — [forthcoming].

Justice Karakatsanis's majority judgment in *Goodwin* appears oblivious to these tenets. Under the impugned British Columbia legislation, police could issue an ASD demand in the same circumstances as they could under the *Criminal Code*.¹¹⁸ The Code permits, and courts have upheld under section 8, ASD demands when police reasonably suspect impairment.¹¹⁹ The invasion of privacy occasioned by an ASD demand under the provincial law, in other words, is no less justified than under the *Criminal Code*. The *ex ante* probability of wrongdoing in each case is the same.

Of course, the consequences of a failed ASD test differ under the two regimes. Under the Code, a failed test gives police probable grounds to arrest and issue a demand for a (more accurate) breathalyzer test, the results of which are admissible at trial to prove liability (the ASD reading is not admissible for this purpose).¹²⁰ Under the British Columbia Act, in contrast, police were required to issue the driving prohibition when they had probable grounds to believe, based on the ASD reading, that the driver was impaired.¹²¹ The ASD result was thus considered directly in determining liability.

But this difference should not be relevant to section 8. Indeed, under the Code a failed ASD test results in much more privacy-invasive consequences (*e.g.*, arrest, continued detention, further takings of bodily samples) than under the provincial law. All of the concerns raised by Karakatsanis J. relate to adjudicative accuracy, not privacy. Indeed, they fall naturally within the parameters of the right to a "fair and public hearing" in section 11(d) of the Charter. But since she excluded the regime from the scope of section 11, this option was not available. Instead, the manifest unfairness of the situation compelled her to impose adjudicative norms by other means. Unfortunately, these norms fit awkwardly with section 8's language and purpose and do considerable violence to the conceptual coherence of the jurisprudence. One can only hope that future courts will ignore this unfortunate analysis.

¹¹⁸ *Motor Vehicle Act*, *supra*, note 95, s. 215.41(3)(a).

¹¹⁹ *Criminal Code*, s. 254(2)(b); *Goodwin*, *supra*, note 4, at para. 97, McLachlin C.J.C., dissenting.

¹²⁰ See generally *R. v. Bernshaw*, [1995] S.C.J. No. 87, [1995] 1 S.C.R. 254 (S.C.C.), revg [1993] B.C.J. No. 2213 (B.C.C.A.); *R. v. Yates*, [2014] S.J. No. 233, 2014 SKCA 52 (Sask. C.A.), revg [2013] S.J. No. 432 (Sask. Q.B.).

¹²¹ *Motor Vehicle Act*, *supra*, note 95, at s. 94.1.

V. CONCLUSION

Canadian courts were right to be skeptical of *Lochner*, but the fear that it fostered has become anachronistic. Early on, some commentators on the left predicted that the Charter would be used by *Lochner*ian judges to dismantle the Canadian welfare state.¹²² Just as with concerns from segments of the right that the Charter would gut legislative supremacy,¹²³ these predictions have proved inaccurate. The state's involvement in the economy and regulation of enterprise is alive and well, and judges have exhibited little appetite for resisting it.

Unfortunately, the doctrinal structures that emerged out of the fear of *Lochner* continue to hamper the development of a more nuanced, pragmatic and protective framework for assuring adjudicative fairness in administrative penalty schemes. *Guindon* and *Goodwin* represent missed opportunities to transform the crude criminal-administrative binary into a flexible continuum capable of achieving a better balance between individual and collective interests.

¹²² See e.g., Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Revised Edition (Toronto: Carswell, 1994); Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda" (1987) 45 *The Advocate* 857; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

¹²³ See, e.g., F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).