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"The Oracle of the Criminal Code"

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"THE ORACLE OF THE CRIMINAL CODE"

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Last spring's publication of Paul Weiler's book on the Supreme Court had been impatiently awaited in legal circles already familiar with his earlier works. Chapter 4 of *In the Last Resort* deals with criminal law and provides, to a certain extent, a synthesis of his writings on the judicial decision-making process, as applied to the doctrine of *mens rea.*

At the beginning of the book, Professor Weiler expresses concern that the cases which he has chosen to discuss may appear biased. In the area of criminal law this fear is unjustified. His previous studies on *mens rea,* as well as the importance of the cases with which he deals, justify proceeding with this selective analysis. Weiler first discusses the latitude given to the Supreme Court in deciding whether an offence requires some type of culpable intention or instead constitutes an offence of strict liability. To this end he compares the cases of *Beaver*[1] and *Pierce Fisheries*[2]. He then continues with a critical analysis of the Supreme Court's contribution to the development of the doctrine of *mens rea* within three precise areas of criminal law. He begins with the defence of intoxication, commenting on the case of *George*;[3] then moves on to *Carker*[4], which defines the defense of duress; and ends with a critique of *Trinneer*,[5] a case concerning the guilt of an accomplice to an armed robbery which ends in the death of the victim. In fact, Weiler groups these three themes under two titles: common law defences (intoxication) and interpretation of the Criminal Code (duress and felony murder). This approach allows him to better apply his analysis of the substantive criminal law to the theory that he develops with regard to the scope of the judicial function. Weiler brings chapter 4 to an end by resuming his commentary on the legal reasoning of the Supreme Court in tort and criminal law.

In his preface, Weiler clearly sets out his objective: to apply to various branches of the law his conception of the role which the courts (and more particularly the court of last instance) ought to take in the fashioning and evolution of Canadian law. It is this theory, more than particular comments on any given case, which the reader is asked to appreciate. Weiler presents his arguments in a style that is clear, incisive and at times even vehement. If the text is concise, it is never obscure or ambiguous. The effect is to make it impossible for the reader to avoid the questions that Weiler raises; in fact, the force of his reasoning makes it difficult to avoid his conclusions as well.

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[1] *Beaver* v. *The Queen,* [1957] S.C.R. 531.

[2] *R.* v. *Pierce Fisheries Ltd.,* [1971] S.C.R. 5.

[3] *R.* v. *George,* [1960] S.C.R. 871.

[4] *R.* v. *Carker,* [1967] S.C.R. 114.

[5] *R.* v. *Trinneer,* [1970] S.C.R. 638.

Weiler's initial focus for discussion is the Supreme Court's contribution to the distinction between *mens rea* and strict liability, and it is probably this section of Chapter 4 which lends itself most to controversy. In comparing the cases of *Beaver*[6] and *Pierce Fisheries*[7], Weiler praises the pragmatic attitude of the Supreme Court, which has led to a reasonable result: a person accused of illegal possession of narcotics can always raise as a defence the fact that he did not know the nature of the substance found in his possession, while a person accused of possession of lobsters below the regulatory size cannot be acquitted just because he was not aware of the presence of "illegal" lobsters in his traps. For this person, the offence is one of absolute liability. While Weiler may agree with the result reached by the Court, he nevertheless deplores the Court's failure to elaborate, in any meaningful way, the rules and principles upon which it founds its distinctions.

Opponents of "judicial activism" or, more simply, of the position that Weiler espouses in favour of the adoption of a more creative role by the Supreme Court, will find here their first target for attack. The Court has always assumed that it was the responsibility of Parliament, not the courts, to decide whether or not an offence should be a crime in the traditional sense or an offence of strict liability. Mr. Justice Cartwright made the following statement in his dissenting opinion in *Pierce Fisheries*:

> 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.[8]

He was clearly in the same state of mind when he wrote the majority opinion in *Beaver*. As he says, Parliament would be entirely within the scope of its authority in making heroin possession an offence of strict liability, thus making it of no consequence whether the accused knew that the substance in his possession was heroin or sugar of milk. However, it would be necessary for Parliament to express clearly its intention to do away with the requirement of *mens rea*. In this search for the legislature's intention, the Supreme Court's task is severely restricted by the absence of any coherent legislative policy on the subject. Weiler, in his earlier writings, had identified this tendency in the Supreme Court to consider the distinction between *mens rea* and strict liability as being an essentially legislative, rather than judicial function.[9] While he does not resume the debate on the allocation of powers between the legislature and the court in this chapter, it is still fairly evident that Weiler would like to see an improvement in the contribution that the judicial branch makes to the elaboration of a viable doctrine of strict liability. Soon after the publication of *In the Last Resort* the Law Reform Commission of Canada published its *Studies on Strict Liability*.[10] This document expresses a preference for the adoption of a legislative solution to the prob-

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[6] *Supra*, note 1.

[7] *Supra*, note 2.

[8] *Id.* at 12.

[9] P. Weiler, *The Supreme Court of Canada and the Doctrines of Mens Rea* (1971), 49 Can. B. Rev. 280 at 315.

[10] (Ottawa: Information Canada, 1974).

lem of strict liability. The controversy over the allocation of powers in the creation of strict liability offences has to be resolved before the Supreme Court can be blamed for the confusion that exists in this area of the criminal law.

It is interesting to compare the two systems for classifying offences in Canadian criminal law. The first is now of statutory origin; the second, to the extent that it can be described as a system, is a judicial creation. Statutory criminal law is comprised of three categories of offences: indictable, summary conviction and mixed or hybrid, in which the Crown has a discretion as to the method of proceeding. Each section of the Criminal Code creating an offence specifies into which of the three categories the crime falls. This is equally true for all federal laws containing provisions which create offences. In addition, it is clear that this legal classification carries with it important procedural consequences, determining the right of arrest, availability of interim release mechanisms, selection of the trial court, severity of sentence, limitation periods, and so on. Of course, one could hardly say that this system is beyond criticism, and it could do with reform, even in a substantial way. Nevertheless, the attribute of certainty which the system possesses is its most important characteristic.

Parallel to this statutory system of classification of offences there is a judicial classification which was set out in *Beaver* and *Pierce Fisheries*: "genuine crimes" on the one hand and offences of strict liability on the other. This classification is much more fundamental and substantial than the preceeding one, since it determines not only a procedural mechanism, but also a system of liability. As Weiler emphasizes, there is considerable room for judicial creativity in the task of defining the exact dimension of each of these types of criminal responsibility. What appears unfortunate is that the Court should still find itself "classifying offences" when the legislature should clearly express its intention if it wishes to create an unpopular "no fault crime". Very recently, the Supreme Court involved itself once more in this pragmatic exercise of classifying offences, coming to the conclusion that leaving the scene of an accident, contrary to the provisions of the Ontario *Highway Traffic Act*, constituted an offence of strict liability.[11] Of course, one could reproach the Court for its failure to engage in an in-depth analysis before reaching this decision. Numerous criteria could have been used to illustrate the distinction, such as the severity of the penalty, the constitutional authority of the legislative body involved, the stigma attached to a conviction in these circumstances, the purpose of the legislation, and the relative difficulty of proving a guilty intention. However, had the offence been properly identified by the legislature, the Court might have addressed itself more adequately to the real legal issue raised by the case — that is, the availability of a defence of mistake of fact against a strict liability offence.

The second part of Professor Weiler's analysis is much less controversial than the first. At this point he deals with various judgments in which the Court has discussed the nature of *mens rea* in offences which require *mens rea* as an essential element. Weiler shows in a very convincing fashion that

[11] *Hill* v. *The Queen* (1974), 14 C.C.C. (2d) 505 (S.C.C.).

the allocation of functions between the legislative and judicial branches imposes on the courts, and more particularly on the Supreme Court, the burden of elaborating the doctrine of *mens rea*. In 1954 Parliament enacted that common law offences were abolished, but that all the principles of the common law that created a justification or an excuse to an act or a defence to a charge would continue to be in force, unless they were inconsistent with any Act of Parliament. Weiler suggests that *mens rea* is an established judicial principle, from which the courts must draw rules applicable to a particular situation. The way in which the Supreme Court discharges this function can alternate between two operational models: adjudication of disputes or policy-making. Weiler criticizes the Court for confining itself to deciding disputes, without making use of that judicial creativity appropriate to the elaboration of policy.

In order to illustrate his theory Weiler very judiciously chooses three areas in which the principle of *mens rea* has been applied, generating each time a set of rules appropriate to the circumstances. The first subject for discussion is the Supreme Court's contribution to the elaboration of the defence of drunkenness, a common law defence that emanates directly from the principle of *mens rea*. Weiler does little more than repeat the criticisms that he has already put forth elsewhere on the subject of the distinction between specific and general intention, except to emphasize once more the Court's failure to adopt an explicit and satisfactory policy for the criminal law on the question of intoxication. In this area, the Court is, in effect, perfectly free to reflect upon any of the alternative policies that the principle of *mens rea* offers in order to come to some determination as to the extent to which drunkenness can eliminate or reduce criminal responsibility.

The second focus of Weiler's analysis is the defence of duress. One could have expected a milder criticism of the Supreme Court's lack of creativity in the interpretation of a codified defence, contained as it is in an explicit statutory provision. However, that is not the case. Even in the first paragraph Weiler asks:

> How rigidly should the Supreme Court read and apply the century old language of the Code where it seems to work an injustice in a novel case?[12]

A reading of Weiler's criticism of the *Carker*[13] case leaves an impression that the author deplores the result of the Court's decision more than the method of reasoning which brought it about. In effect, he criticizes the Court for failing to look to s. 7 of the Criminal Code and the common law in order to widen the scope of s. 17 of the Code, which contains the defence of duress. More than anything else, it seems, he condemns the Court for upholding Carker's initial conviction.

Compulsion by threats is a codified defence; compulsion by natural necessity is not. If Carker had acted out of natural necessity (for example, in order to attract the attention of his guards because they had forgotten to bring him food), the Court would have had a clear duty to address itself to the doctrine of *mens rea* in order to decide if his conduct should be excused

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[12] *In the Last Resort* at 109.

[13] *Supra*, note 4.

in law. Compulsion by threats is the subject of a statutory provision and the test intended by the legislature is an objective one. The important question is not whether Carker succumbed to threats which *he* could not resist; it is whether he gave way to threats which the *legislature* considered irresistible; that is to say, threats of immediate death or bodily harm, caused by a person present. In the same way the defence of duress is inadmissible with regard to certain offences, such as murder, treason, and robbery. Carker had damaged a toilet fixture in his prison cell, after being told to do so and threatened by another inmate who was trying to organize a riot. Section 17 of the Criminal Code restricts the availability of the defence of duress to cases where the accused has acted under "compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offense is committed". Clearly, we have here an example of a statutory limitation on the doctrine of *mens rea* which the Court is bound to respect.

When Weiler declares that only a hypocritical society would condemn an accused man for having succumbed to threats which none of us would have been able to resist, one's thoughts can just as easily, if not more easily, turn to the executive power as to the Supreme Court. After all, the legislature has allowed the courts to have reference to the defences of the common law "*except* in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada".[14] The executive has much more flexibility than the courts, as the Crown need not institute proceedings. The victim, in this instance the government of British Columbia, had no unquestionable right to obtain judicial reparation for its smashed toilet fixture. The Attorney-General and his agents have an almost total discretion when it comes to deciding whether or not to prosecute, to stay proceedings or to withdraw the charge.

Certainly it was not Weiler's intention to put our institutions on trial in order to determine who is responsible for a miscarriage of justice. It is probably true that, "in the last resort", it is the Supreme Court which always has to come to a decision. It is possible that the words "immediate" or "present" have a totally different meaning when applied in the context of imprisonment. But unless the Court was prepared to say that "immediate" meant "as soon as possible" and "present" meant "in the same geographical ensemble, although without any possibility of physical contact", it seems that it was impossible to excuse Carker's behaviour.

The final part of Chapter 4 deals with the case of *Trinneer*,[15] in which the Supreme Court dealt with a charge of murder laid against the accomplice to an armed robbery which ended with the victim's death. In *Trinneer* the Court had engaged in a line of reasoning that could have led to a defensible result. One could say that s. 213 of the Criminal Code punishes the result, not the risk. Just as the essential element of manslaughter is found in the death of the victim, so in examining s. 213 one can conclude that the offence is completed when there is (as in *Trinneer*) a robbery and an infliction of bodily harm. The *nature* of the offence is determined when death results

[14] R.S.C. 1970, c. C-34, s. 7(3) (emphasis added).

[15] *Supra*, note 5.

therefrom. By the use of s. 21 of the Code one can be a party to manslaughter if two people form an intention in common to assault another. Then if one of them carries out the plan and the victim dies, both are guilty of manslaughter. The assailant need not have known, for example, that the victim had a weak heart and that even a slight blow might bring on death. Any person who assaults another is presumed to know that if the death of the victim results from the blows, even if the death was neither intended nor foreseen, the offence becomes manslaughter. According to *Trinneer*, the accomplice is equally guilty of manslaughter. He agreed to the assault. As soon as it was inflicted, the offence had been committed. Its nature, manslaughter rather than assault, or felony murder rather than robbery, was determined by the victim's death. Thus, the accomplice should have known that, if the victim died *accidentally* as a result of the assault committed, he would become a party to manslaughter. The offence — manslaughter or felony murder — is foreseeable in law, if not in fact.

What Mr. Trinneer — and the Canadian jurists — did not know was that if the victim had not died, the wrongdoer could have been found guilty of attempted murder. It is this point, clearly the implication of a subsequent Supreme Court decision,[16] which is difficult to harmonize with *Trinneer* — although the Court considers *Lajoie* analogous. If a person inflicts bodily injury on another in the commission of a robbery, but death does not result therefrom, he is guilty of attempted murder since if death had resulted therefrom, he would have committed murder. This leaves the door open to the worst extravagances, including, it seems, to the concept of attempted manslaughter and the abolition of all the felonies listed in s. 213, since they all become attempted murders. The Supreme Court avoided the theory of the result, barely outlined in *Trinneer*, in order to return to a theory of risk.

Weiler proposes an explanation for *Trinneer* — purely speculative in his own opinion, since the Court satisfied itself with a very formal and legalistic judgment. Weiler suggests, in effect, that the Court's decision rests on the intuitive belief that the accomplice should be just as responsible as the principal actor if he knew that the latter was going to attack the victim with a weapon. One can postulate that if Weiler had had the chance to integrate *Lajoie* with his own analysis he would have rejected even this interpretation. It is rather difficult to rely on common sense in order to explain how one can attempt to do what one has not foreseen.

In criticizing *Trinneer*, Weiler played the prophet. The Supreme Court became involved in an exercise of strict statutory interpretation from which it risked not being able to free itself except by resort to the fundamental principle of *mens rea* in order to overturn its own decisions.

This lengthy commentary carries the risk of perpetuating the myth that civil lawyers are completely opposed to any concept of judicial creativity and that they accord an inordinate value to legislative instruments. *In the Last Resort* presents a brilliantly sustained thesis; its value is only increased by the reflection and reactions that it engenders.

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[16] *Lajoie* v. *The Queen* (1973), 33 D.L.R. (3d) 618; 10 C.C.C. (2d) 313 (S.C.C.).