The Supreme Court of Canada and the Doctrines of Mens Rea

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Introduction

My objective in this study is two-fold. First, I want to examine the decision-making operations of the Supreme Court in the period 1949-1969 by analyzing the reasons and votes in a sequence of related cases. Second, I want to present a critical review of the doctrinal pattern which has emerged in Canadian law in the field in which I have chosen to assess the work of the court. The family of legal problems which I have singled out involve the various excuses to criminal conviction for prohibited conduct—defences which flow from the lack of mens rea, responsibility, or blameworthiness. Because these two interests may at times diverge, the article will frequently contain material which is extraneous to one or to the other. However, I feel that any such costs are outweighed by the intellectual gains which result from an examination at the same time of a developing substantive area of law and the workings of the institution which is chiefly responsible for this development.¹

In order to examine these different factors, we must have some set of ideal standards, both as to how the courts should operate and what kind of legal system should obtain here. Such a standard will furnish both a criterion for selecting the issues to be

discussed in this way and also a basis for assessing the court's methods and results. Studies of the kind I am engaging in here require that the investigator disclose clearly the values and ideals which he brings to bear on the issue under discussion in order to aid in the critical assessment of his own findings. I intend to go somewhat beyond this demand because my concern is not simply with understanding how the court has operated and why it has selected any particular approach. Just as important is to point the way towards and perhaps help in achieving better results. It is probably impossible to separate completely these two objectives in legal philosophy.

As will become apparent in the study, the prevailing theory of judicial decision-making utilized by the Supreme Court is positivist. As is usually the case with a practical, action-oriented body, such a general philosophy is more or less tacit and unconscious. For this reason, it is probably even more effective in shaping the assumptions upon which the court operates. By legal positivism I mean a theory that individual cases should be decided by appeal to legal rules which are found in conventional legal sources and applied in accordance with their stated terms, without regard to their fitness for the purpose for which they are used. The sources can be statutory, judicial opinion, text-writer, and so on. In dealing with them the court tries to assess the authoritativeness of verbal statements which it finds and extracts. There is little or no attempt to assess or rework these statements in the light of the manifest purpose of the rule and the more basic values which the system is supposed to implement.²

What is the alternative I suggest?³ I assume that judges ought to play a collaborative role with the legislature, in developing the general policies to be implemented in the law. Because the judge is at the point of application of general rules, he may be the best reformer in certain kinds of situations. Yet, as a member of a collective body, the judiciary, one charged with administering a legal system, whose creation is the basic responsibility of a representative legislature, he cannot be completely "free-wheeling". Hence, we need a general line of delineation between the legislative and judicial responsibilities for improving the quality of our legal order.

I would suggest that legislatures are best capable of major reviews of the problems in a certain area, where the relevant, available expert knowledge is explored, a systematic programme

²This is what judges who are conventionally termed "positivist" customarily do. I would not at all suggest that such writers as Hart or Kelsen advocate the position described in this paragraph.

is implemented, compromises between important competing interests are registered, the popular acceptability of the basic scheme is monitored, and sophisticated legal techniques for implementation are devised. Courts (or like bodies) are most competent at rationally developing the implications of a scheme of social policy already adopted for society (in our day, almost always by the legislature). Within this framework of legislated values, a court can protect the claims of fairness and equality by elaborating in a coherent way the demands of these values for concrete situations to which they are applicable. The court deals with problems individually, at retail as it were, with each competing interest having no more favourable position than the relevant principles deem proper. The results of impersonal unravelling of the established policies become available to individual litigants when they really need them, after they have already been hurt.

It is obvious that the lines of judicial restraint suggested are not capable of precise, objective, and easily applicable statements. However, I believe there is a sufficient core of content that its honest acceptance by the courts would make a real difference in the scope of judicial action. And full occupation of their proper area of activity would have real benefits to society, both in the quality of judge-made law and the saving of legislative energy for more appropriate objects.

Hence, while I agree with the positivist claim that the flow of judicial decisions must be channelled within certain established, impersonal, and relatively fixed points of reference, I would argue that the source of stability within the legal order flows from certain institutionally-accepted principles. Principles are general statements of social purposes and standards which do not have specific application to individual cases, demanding one result rather than another. Instead they operate in conjunction with other principles to warrant the aptness of a new legal rule which is then applied to the facts to justify a concrete decision.

Such principles have the added dimension of weight, something that follows from the fact that they do not logically require certain results. Principles do not contradict each other and become overruled. Instead, they have greater or lesser significance or importance to the relevant audience, and gradually grow in effectiveness or fade from view. They acquire legal existence and weight when they become accepted as proper materials for legal argumentation. This occurs when the direction and accumulation of specific legal rules (statutory, judicial, or administrative) in a certain area of law suggests such a principle as the rationale for its existence and development, in the judgment of those who participate in the legal process.

Thus, not all policy statements can be characterized as legal
principles, as institutionally accepted grounds for judicial reasoning which may justify the overruling, limitation, or extension of specific rules which conflict with the rational implications of such a principle. Nor do they become legal by specific enactment, at one point of time, by an authorized body or procedure. They make their appearance over a period of time, as lawyers, judges, and scholars begin to appreciate the impact of a course of specific decisions or new rules. Their period of gestation is always characterized by uncertainty as to whether they will attain successfully the status of a legitimate tool in the judicial armoury.

Legal principles are particularly important in this view of the judicial process because they are explicitly concerned with values, with the purpose for which particular rules were enacted. Hence, they are means by which judges advert to the significance and desirability of the rules they propose to use, before applying them. Yet they maintain stability and responsibility within the system by furnishing a relatively objective and accepted standard for reasoning about the rules which are to be used.

What about the use of principle in this particular problem area of the law? Two facts are significant. First, the criminal law is largely statutory now. By convention and law criminal offences must be created by the legislature. However, legislative activity is almost invariably fragmentary and usually directed only to the specific problem of the desirability of new criminal prohibitions, perhaps with some attention to procedure. These enactments are always dependent, to a greater or lesser extent, on a substratum of specific rules relating to individual responsibility and the criminal defences. These specific rules—age, insanity, self-defence, and so on—are sometimes contained in the Criminal Code; at other times they are found only in common law decisions or authoritative texts.

Second, this is one area where the conventional theory recognizes a principle, the mens rea doctrine, as the authoritative basis for all of these specific rules. The many legal indicia of this conclusion are confirmed by the statutory provisions about the defences in the Criminal Code. Hence, this would appear to be a classic instance where the court should fulfill its role as a creative developer of the basic policies which support these defences, refashioning the established rules to conform to changing facts and insights, and extending them in directions to which their internal logic points. The legislature seems consciously to have delegated

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4 S.C., 1953-54, cc. 51, 52 as am., s. 7(2): "Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada." Italics mine.
this task to an institution which appears, on almost any standard, to be best qualified for it, if the court would accept it.

Yet this is not to suggest that a court may legitimately innovate just as it wishes in this area. Even if we are not overly concerned with the absolute restraints of judicial precedent, the court must respect the legislative will when the latter has spoken. To some extent, statutory language usually enacted on the basis of a nineteenth century perception of the mens rea problem, may have frozen the process of development and artificially precluded the judicial creation of a coherent and rational body of law in the area. Hence the Supreme Court is continually faced here with a delicate question in the theory of statutory interpretation—how clear a statement it would require from a legislature before acquiescing in a departure from the basic legal principle which animates the whole area of law, both statutory and judge-made.

I. Mens Rea and the Purposes of Criminal Punishment.

The question then arises—what are the policies which are implemented by the principle that mens rea is necessary for criminal liability? In order to understand what the court has done, as well as what it should do, we must be aware of the alternatives that are open. This requires knowledge of why mens rea should be an element in criminal guilt, in order that we formulate a standard for determining what the law ought to be, and thus might be, like. This in turn demands an enquiry into the nature of and reasons for criminal punishment.

The purpose of criminal punishment is the achievement of the object of the criminal law, which is the elimination or reduction of certain conduct considered to be harmful, or otherwise undesirable. The substantive criminal law indicates the patterns of conduct to be prohibited. In turn, these rules are dependent on some conception of the society which we want to result from the patterns of conduct proscribed. Hence, this fact that crime control is not an absolute all-encompassing end in itself requires certain limitations on the way the process is carried on, implied from the demands of a free and just society which it is our object to create.

It is important that the standards created by the substantive criminal law be enacted and stated in order that citizens be able to follow them, but this is not sufficient. The law needs to influence these decisions of private actors towards adherence to its

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5 As to which see MacGuigan, Precedent and Policy in the Supreme Court (1967), 45 Can. Bar Rev. 627.

6 I do not claim any significant innovation in this sketch of the philosophy of punishment and responsibility and have not documented in any detail my indebtedness to the recent work of such writers as Hart, Parker, Wechsler, Hall, Kadish, Wooten, and so on.
rules. Convictions, and what we do to convicted offenders, are the mechanisms for achieving this influence. Hence what we will call criminal punishment has as its purpose the various instruments which are designed to implement the substantive rules formulated by the law.

Now, in cases involving the defence of mens rea, its use is logically dependent on and preceded by a finding that the defendant has engaged in the conduct which the criminal law prohibits. In other words, the harm which the law is intended to prevent has, in objective fact, occurred and can be connected in a causal way with the defendant's action or omission. The question then is, what are the reasons which justify the conclusion that the defendant not be convicted and subjected to criminal punishment? These reasons can be grouped into two preliminary categories. The first is that, since the point of conviction is the sanction, the reasons which justify the latter would serve no such purpose in this case. Secondly, since these sanctions and the criminal law they implement are not absolute ends in themselves, they may have to yield to other countervailing policies and commitments to our society's ideals which weigh heavier in the scales. Despite the fact that application of the sanctions would serve the purpose of the sanctions in making the criminal law effective, they would be harmful to the achievement of the kind of society which the criminal law is supposed to protect.

Hence the first arguments in favour of the defences are that they exclude from the punishment system those whose conviction and sentence would not serve its specific mechanisms. The latter are usually said to include retribution, deterrence, incapacitation, intimidation and rehabilitation. These may appropriately be divided into two categories, the one relating to the individual defendant, the other to citizens and the legal system generally. We may call these categories the behavioural and the legal, the one concerned with the criminal, the other with the crime.  

7 The focus of the first approach—the behavioural—is on the individual offender as a problem, as someone who may be dangerous in the future. Hence at a minimum he may be incarcerated (or perhaps executed) so as to negate any danger from him while he is thus incapacitated. If possible, though, the correctional authorities should try to change his dangerous character, either by intimidating him, making him feel the errors of his ways and fearful of future punishment, or by rehabilitating him, changing his internal psyche so that it no longer impels him towards criminal behaviour.

The focus of the second approach—the legal—is on the criminal law as a system of rules, general standards which must be known and adhered to by those to whom they apply, in order that the policies which led to their adoption be achieved. Punishment deters by making the “economic” gains of crime marginally undesirable in terms of the risked losses. This narrow version of the theory may apply in some cases but it obviously does not in others. However, punishment, by representing the community's condemnation of certain conduct may reinforce and help define the inter-
Assuming that these are the immediate goals of punishment, how is the doctrine of *mens rea* justified in their light? In a narrow utilitarian perspective, punishment is an evil—a pain—and thus presumptively undesirable. Hence there must be countervailing gains in order to overcome this presumption and thus support the use of the sanction. Where we can isolate cases to which these countervailing gains do not apply, we must make exceptions to the incidence of punishment. For example, the fear of punishment which acts as a deterrent and thus influences general adherence to the criminal law is such a gain, but there are cases in which such fear can have no meaning.

This is especially true of criminal conduct which occurs by reason of accident or mistake because it does not make sense to threaten punishment in order to require adherence to rules one could not have complied with. The same is true of special justifications such as self-defence or necessity where we prefer conduct which is *prima facie* criminal in such exceptional circumstances, because of the greater gains to society. Even if this conduct is not preferable, on balance, we may be able to understand in cases of provocation or duress the inevitable failure of deterrence sufficiently that we do not want to impose further needless pain on a technical offender. On the other hand, it is argued that, though punishment might not have any sense in individual cases, it does help maintain the credibility of the system of general deterrence. Every new exception that is created in an institutional setting of fallible fact-finding furnishes the possibility of leakage of actual, responsible offenders. Closing up the excuses for everybody, including the *bona fide* cases, does increase the deterrent effect for would-be law breakers.

The same analysis can be made about the behavioural perspective. This assumes the judgment that an individual is dangerous and thus should be subjected to individualized official intervention and treatment. It is argued that only on proof of institutionalized standards of behaviour to which we adhere, more or less unthinkingly, and without any weighing of the marginal utility of legal and illegal alternatives.

The legitimacy of *retribution* as an independent consideration in the justification of criminal punishment is hotly disputed at present. Though the goal of exacting social vengeance from the criminal for the harm he has caused is no longer viewed with much favour, there is substantial recent interest in some subtler values which are connoted by this theory. It has been suggested that criminal punishment is necessary to implement the ideals of fairness and equality within a legal system by restoring the equilibrium in benefits and burdens which has been disturbed by the criminal offences. Retributive justice requires that we punish only those who are in breach of substantive standards of the criminal law, but that we punish all of those who do disobey, and that such punishment be meted out in some appropriate proportion to the relative seriousness of the offence. This final basis of the criminal sanction is particularly relevant to the *mens rea* issue.
The mere objective fact of causing the harm prohibited by the criminal law does not tell us anything reliable about a defendant who was thrust into an environment where he acted out of ignorance to cause an accidental harm. Yet it is obvious that this is not so in the case of certain irresponsible offenders such as the insane, the epileptic, perhaps the accident-prone. In fact, the logical thrust of the behavioural school is towards the development of prediction tables which would subject the delinquency-prone to compulsory treatment and attitude change. This leads inevitably to the position that we should dispose not only of the requirement that an individual engaged in criminal conduct responsibly, but also of the logically prior requirement that he engaged in any specific criminal conduct at all.

Although, it is true, as I have argued, that this utilitarian rationale for *mens rea* may not apply absolutely, and to all cases, it does establish a substantial *prima facie* case for the defence. It requires demonstrated, not simply hypothetical, arguments to rebut it in the ways I have suggested are possible. Even if these countervailing reasons are advanced on this level, further arguments may fill the breach. These stem from a subtler view of the general influence of criminal standards. It is unlikely that the real impact is based on the rational fear of pain. Deterrence is much more ephemeral than the theory of the rational weighing of the pleasures or gains from criminal conduct against the pains or costs of the sanctions which are risked. Instead, the leverage of the criminal law as regards the vast majority of the populace inheres in their voluntary acceptance of its dictates as morally proper, such that they do not think of the criminal alternative, or they recoil emotionally from it even where they would not likely be detected.

This analysis is probably true of the ordinary operation of the system, although there are exceptions in the case of certain "conventional" crimes or certain marginal and alienated groups. If to break the criminal law is to do something morally wrong, then the essence of criminal punishment is the expression of the community’s moral condemnation—its hatred, fear, and contempt of the conduct engaged in by the offender—and not simply to impose those unpleasant physical consequences or treatment as a result. This conventional or symbolic device serves to dramatize and reinforce the community’s moral condemnation and disavowal of the offence and its stigmatization of the offender. To single out, in a systematic way, blameless or irresponsible individuals as the objects of this "morality play" is not only parasitic and unfair, but may well be self-defeating. It results in a loss of the aura of
moral acceptability and worthiness which it is the point of criminal punishment to reinforce. It is important that society not lose sight of the distinction between harmful response by society which carries this condemnatory aura and a perhaps equally harmful societal response which is purely amoral in character.

Of course this whole argument is unacceptable to those who would advocate the elimination of punishment, in the sense of pain or hardship expressing moral blame. The behavioural view is willing to risk the loss of any general influence of punishment on other members of society who might choose to adhere voluntarily to criminal standards as a result. The individual offender, whoever he is, is a sick, albeit dangerous individual, to be treated if he is discovered, but not amenable to the individual influence of example. Although pain or hardship may be a characteristic of treatment, it is such only as an unavoidable concomitant of scientific, therapeutic measures for rehabilitation of individual cases. Even to this argument, in the areas where it may be justified, there is a third rationale for the doctrine of *mens rea*, the argument from legality and individual freedom.

What is distinctive about this last rationale is that it is not utilitarian in the direct or subtler senses of the first two. It is not concerned with the attainment of goals in the most effective and least costly fashion. Rather it is designed to protect certain values by imposing limitations on the means adopted by society in its pursuit of goals through a system of criminal punishment. As such it is comprised within the family of notions associated with justice and fairness.

There are two different foci to this argument. In a negative sense, the requirement of *mens rea* follows ineluctably from the requirement of conduct. Legal rules must point to action, to a person doing something, rather than to his status, character, and so on, if they purport to be a real restraint on official discretion. It is true that certain kinds of status may be sufficiently well-defined by their symptoms or indicia that they can be the basis of the objective application of communicable legal rules (for instance, *perhaps*, psychotics or drug addicts). This cannot be true, certainly in our present state of knowledge, of a vague generalized standard such as “dangerous” or “requiring treatment”. The latter type of standard would confer far too much discretion on officials and so we want to limit their power of intervention to cases where a person has done something.

Yet how can we define conduct except by incorporating some reference to intent or other such mental element? Take the important crimes of murder or theft, each of which prohibits conduct causing a certain consequence (death or deprivation of property respectively). I suggest that we cannot meaningfully
isolate those involved in producing the result except by reference to some standard of subjective responsibility for it. If this is not explicit, then inevitably the concept of "cause" will change from the bare but meaningful standard of "but for" to a more ambiguous criterion incorporating a tacit reference to "expectations". The same is true of many crimes which prohibit doing things with a specific intent (attempt, burglary, and so on), or without it (assault, rape, and so on). In order to implement a significant conduct limitation on the criminal process then, we must also have a doctrinal requirement of *mens rea*. If we do not have the conduct limitation we lose the restraints of legality on our official exercise of this most serious power.

The second focus of this rationale is more positive. The law makes the assumption that we are responsible choosing beings. Even if this cannot be demonstrated metaphysically, it is hard to see how, given our present psychological make-up, we can avoid acting on the assumption that this is true. Certainly this assumption must be made about the bases for the action of our officials, if not of the "objects" they purport to control. If we assume further that there are no significant differences in this respect, metaphysically or psychologically, between officialdom and those subject to the criminal law, then respect for our freedom of choice requires a social structure, including a criminal law, which supports and protects it.

The whole point of a criminal law which consists of rules, and general norms, is that it both enables and demands that individuals "self-apply" them to their proposed conduct and decide whether to obey or not. If we have no doctrinal requirement of *mens rea*, then punishment will become arbitrary—inflicted because of unintended fortuitous consequences. Obedience will be deprived of meaning and significance because apparently sufficient attempts to comply will no longer determine whether or not a person suffers the sanctions attached to non-compliance. The result will be that the sanctions will lose much of their influence and impact, or that citizens will be driven from areas of desirable but borderline conduct.

Even if these are not the effects, we impose real costs on individuals by depriving them of the chance to order their lives as much as possible on the basis of their own choice of conduct or consequence. We deprive them of the power to choose to stay out of the clutches of the criminal law. Even if we follow the behaviouralists in their quest to remove all intended connotations of pain or blame, penalty and punishment, from the criminal law, we still impose a real cost on individuals who are put through it, a real risk that the wrong "therapeutic" choice will be made. We deprive them of the sense of security, then, which is associated
with a social structure permitting us to choose and plan what our futures will be. All of this is to no purpose, either, because treatment must obviously consider the mental state of the offender at the post-conviction sentence and correctional stage. Only some of the innocent people will be accident-prone while most will prove to be ordinary, though unlucky. Yet we leave these judgments to the discretion of our officials, rather than as a requirement of viable objective standards. We make them near the end of the process, rather than at the beginning, where the ordinary unlucky person will get the benefit of exclusion from the "therapeutic experience".

Finally, the absence of a doctrine of responsibility in the criminal process denies in this very important instrument the very assumption of the society which, inter alia, the behavioural correctional authorities are trying to achieve with it. This assumption is that the members of the society are persons, individuals having human rights and concomitant obligations, whose inalienably equal character can only be accounted for by their power of free choice. Such principles as justice and equality stem from a recognition of the demand that all individuals should be free to work out their own destinies within restraints which are designed to protect the same freedom of action of their fellows. It is incompatible with this ideal that such a basic institution as the criminal law assume that there is no point in enquiring whether or not these restraints have been freely broken, before the decision to intervene crudely and forcibly in his freedom of action is warranted.

These are the complex of ideas and attitudes which coalesce in the principle that mens rea should be the basis of criminal liability. Each reason can be attacked as vulnerable in certain areas and, like all value arguments, none is certain and self-evident. However, cumulatively, they make a strong presumptive case which can and should be over-ridden only for good and adequate reasons which are responsive to each of these arguments.

Moreover these arguments apply in several different fashions. As we shall see, sometimes the court is required to decide whether "fault" shall be a condition for criminal guilt or not. On other occasions the question is simply the degree of fault that is necessary or, even more peripherally, how extensively certain doctrines or statutory provisions affecting the scope of mens rea should be interpreted. The point is that each of these strands of argument relating to responsibility are relevant in any one of these situations and that all of these problems are inextricably connected. A court which is trying to comply with the demands of the principle of mens rea must be sensitive to its demands in all the contexts in which it arises, must see the relevant analogies between these different situations and must ensure that its decisions fit together in
II. Behavioural Analysis of Supreme Court Decision-making.

The orientation of this study is, or so I hope, an integrated view of the operations of the judicial process. The kinds of cases that come to the highest appellate court in the land involve sufficient importance, and sufficient ambiguity, that strongly-held attitudes are likely to be reflected in the pattern of decision-making. Behavioural analysis of the flow of decisions is likely to isolate any such attitudes and indicate their influence on the judicial choices made. It will also help determine the inter-personal influences within the court, the interest and impact each person has in the decision-making process, at least so far as can be gained from perusal of blocs, majorities and minorities, opinion-writing, concurrences, and so on.

However, I assume that courts are more than judicial voters, and that the significant aspects of judicial behaviour are not confined to their votes. Between the vote and the general reasons they give for the vote are the legal rules — the generalizations and doctrines they decide to adopt and apply to the specific case. Many different kinds of issues may coalesce in a particular case and may result in a final voting decision one way or the other. In assessing their behaviour, it is important to isolate the pattern of decisions about a particular, defined family of rules or doctrines and assess judicial attitudes to the doctrine. Such an assumption is valid if for no other reason than that the real impact of the court comes from the legal rules they establish. Only a small number of cases reach the court for specific decision and the real impact of the policies they establish comes from the application by others of the general rules they formulate.

However, the creation of rules by courts is not simply the exercise of a fiat, the enactment of specific authoritative language. Judicial development of rules is the product of reasoned opinions and this process of reasoning must be assumed to have some influence on the rules which result. Hence an integrated approach requires a systematic sustained study of the kinds of reasons which the court utilizes in this one segment of its work, this one doctrinal area. Our objective will be the characterization of the style of reasoning employed by the court, whether "formal" and positivist or "grand" and purposive. As we shall see, the court's style is overwhelmingly formal and legalistic. Although the whole trend of its opinions is thus to disguise the fact of its choice among alternatives left within the interstices of abstract doctrine, merely to decide is to make a choice, as far as the court is concerned. As we shall also see, the evidence is overwhelming that these choices
are not made randomly between different policy outcomes, by the different judges. Yet their confinement to the formalistic approach seriously limits the clarity and impact of the policy they seek to implement.

Hence I feel it is extremely useful to subject the Supreme Court decisions in this area to systematic, quantitative investigation. If patterns of behaviour do emerge, their analysis can be very helpful in understanding and assessing the court’s decision-making process. The fact that such investigations may not be a sufficient source of explanation is no reason for refusing to recognize their necessary place in any fully-integrated theory of the court’s operations. The versions which follow are very simple and very tentative but, I believe, quite suggestive of fruitful inferences. From some of my factual findings I draw no such inferences, and merely report the results as part of an ongoing study in which they will play a further role.

The first behavioural investigation to be reported concerns the use of the cumulative scale to detect attitudinal bases for judicial decisions. The theoretical and technical facets of the Guttman scale are quite complicated and have been adequately analyzed elsewhere. In the final analysis, though, their significance is quite simple. We start with a group of judges who are exposed to a series of cases with very different factual, procedural, and legal problems. When we see what the judges do with these situations, we find not a random distribution of decisions, but a coherent reproducible pattern, when they are considered from a particular dimension. If statistical criteria excluding chance are met, it becomes legitimate (though perhaps not scientifically necessary) to infer that the judges perceived these cases along this particular dimension and voted in accordance with their attitude to it. This may be true at least of those judges at either end of the spectrum who consistently vote in favour of one position, notwithstanding

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9 The reason why scalogram analysis does not demonstrate the existence and influence of judicial attitudes with scientific certainty is that it depends to a substantial extent on a circular argument. In effect, the use of a scale assumes that it is possible to infer judicial attitudes from the pattern of their votes and that these attitudes can then be used to explain this very voting pattern. The difficulty is that the judges may not have perceived their votes as expressing, the values which the behaviouralist imputes to their decision. What is lacking in most scaling up to now has been an independent test of the existence of judicial values, through interviews, questionnaires, content analysis of their opinions or non-judicial utterances, or examination of their backgrounds. Once there is such independent evidence of a judicial preference for the criminal defendant, for instance, it becomes a much more plausible explanation of a consistent pattern of votes for the defendant.
the great variety of conventional legal contexts in which it is raised.

Because my object in this article is a little different from most behavioural investigations of the judicial process, I have not limited myself to the conventional parameters of the Guttman scale. I have created two scales of the twenty-three decisions relating to *mens rea* in this area. One of the scales deals with votes for the defendant or the Crown in the case; the second deals with opinions in favour of, or against the value of *mens rea*. As will be seen, although the cases all clearly raise this issue, not all judges reach a decision about it in the course of explaining their vote. I assume that within a system of *stare decisis*, where rules become established by their statement in judicial opinions, the decision to express a favourable or unfavourable view of *mens rea* in a particular context (or the failure to speak to this issue at all) is at least as significant for criminal defendants in our legal system as the decision to vote for or against the defendant in the particular case. I also assume that judges in our appellate court perceive the authoritative significance of their decision about what they do or do not say about the legal rule at issue and that these decisions are equally indicative of their personal attitudes as are their votes.

In constructing the scales I have included all unanimous decisions, as well as the divided ones, although I have isolated the latter on the scale. Though perhaps in conflict with scaling theory, including unanimous decisions is helpful in understanding the court’s work as a whole, especially when we see differences in the way certain cases line up on the criminal defendant and the *mens rea* dimensions. Moreover, the theoretical assumptions which require exclusion of unanimous cases become somewhat strained when applied to a court which sits in panels.

What are the conclusions which can be drawn from these scales? If we compare the two, we can see several radical differences in the cases themselves. *O’Grady*, which was 7-2 for the Crown vote scale, becomes 9-0 in favour of the *mens rea* position. *Binus*, which was 5-0 for the Crown in votes, becomes 3-2 for the *mens rea* position. *King*, which was 5-0 for the defendant on the voting scale, becomes only 3-0 on the *mens rea* scale. *George*, which was 4-1 for the Crown on the voting scale is 4-0 on the *mens rea* scale. *Lemire*, which was 4-3 for the Crown on the voting scale, becomes 4-0 on the *mens rea* scale. This number of instances together should raise questions about the desirability of excluding apparently unanimous decisions from behavioural analysis.

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15 When we look at individual judges, though, the different scales do not
TABLE 1 — MENS REA VOTE SCALE

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Mr. Justice Estey, because of illness, took no part in the judgment.

(--): Inconsistent votes are in brackets.

+ Decided case in favour of defendant.

- Decided case against defendant.

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+ Decided case in favour of mens rea
— Decided case against mens rea
O Decided case on non-mens rea issue
(—) Inconsistent votes are in brackets
* Mr. Justice Estey, because of illness took no part in the judgment.
The attitudinal break-down of the judges remains unchanged, though. What are our findings? At one extreme end of the scale is Cartwright J. He voted for the defendant in every case, unanimous and divided, except Binus. As was stated above regarding this case, on the issue on which there was a divided opinion in the court he voted for the defendant (or mens rea). Of the present judges on the court, Hall and Spence JJ. appear close to Cartwright J. in attitude. Hall J. agreed with Cartwright J. in every case in which they participated, and voted for the defendant on both scales in every case except Wright, a unanimous decision in which Cartwright J. did not participate. Spence J. voted with Cartwright J. in every case in which they participated, Binus being the only case in which he voted for the Crown on either scale. On the court in the Fifties, Estey and Rand JJ. tended to agree with Cartwright J., more often than not, but were not so consistent in favour of the defendant. Locke J., a most interesting case, I will leave for later.

At the other end of the scale, Fauteux J. voted for the Crown on both scales in every divided decision. Unlike Cartwright J., though, he was ready to vote for the defendant in cases the court perceived unanimously. Taschereau J. agreed with Fauteaux J. in every case but two, and voted for the defendant in divided cases only in these two. One of these, Laroche, is explainable for reasons suggested earlier. The other, Rees, a 6-1 decision for the defendant, perhaps aptly distinguishes Fauteaux J.'s slightly more extreme attitude from Taschereau J.'s. Judson J. also voted for the defendant only once in divided cases, More (a 5-2 decision), and agreed with Taschereau J. and Fauteux J. in every other case in which either of these latter participated.

Each of these findings about the extremes is substantiated not only on the two mens rea scales but also on the general criminal law scales constructed by Professor Peck. The fact that the latter's scales have quite a different selection of cases, based on a wider area of criminal law for a shorter time period, makes this inde-

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pendent verification quite significant. The position as regards the middle judges is somewhat different, though, which is perhaps indicative of their less ideological viewpoint and less attitudinally-based voting.

Abbott J. is much more in the centre of this scale than in Professor Peck's criminal law scale. He voted for the Crown in 3-2 and 5-4 decisions for the Crown, and for the defendant in a 4-3 decision in favour of the defendant. On the mens rea vote scale he voted for the Crown five times out of eight in divided decisions and four times out of seven on the mens rea issue scale. Ritchie and Martland JJ. are to the right of Abbott J. on these scales while they were to the left on Professor Peck's scales. Of greater interest as regards the latter two is their perfect concurrence with each other, in unanimous decisions and divided ones, for the Crown or for the defendant, and on both scales, even where they do not decide on the mens rea issue. The relative position of the two is also indicated by their perfect concurrence with Judson J. on the mens rea vote scale.

Locke J., as we have said, is very interesting and unique. On Professor Peck's general criminal law scale, he was to the right of everyone except Fauteux, Taschereau and Judson JJ. On each of my scales he is to the left of everyone except Cartwright J. Yet his position there accounts for three of the six inconsistencies on the vote scale and three of the five on the issue scale, all because of votes for the Crown. He voted five times for the defendant and five times for the Crown in divided decisions on the vote scale. Most of the affirmative votes for the defendant which account for his very low break-point are very tenuous on closer analysis (see O'Grady, King and George). In King and George he did not decide about the mens rea issue at all, and he was the only judge of whom this was true more than once. Yet his vote for the defendant in Shymkowich21 was the only dissenting vote for the defendant, and only Cartwright J. showed this distinction of voting alone for the defendant on the whole scale. In conventional terms, then, he must remain where he is on the scale. It is probably correct to say, on the available evidence, that he does not appear overly influenced by the criminal defendant or mens rea attitude. Further evidence must be sought in other scales, dealing for example with criminal procedure or the substantive offences.

A third table furnishes a somewhat different type of information. The first patterns which emerge from this table concern trends of unanimous and divided decisions on the court. If we divide the court into two periods, one from 1951-1960, the other from 1961-1969, there are twelve cases in the first period

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O = opinion in majority
O = opinion in dissent
+ = for defendant

Ker joins opinion written by Kerwin J.
and eleven in the second. In the first period there is only one unanimous decision, the other eleven being divided. The unanimous decision was for the defendant, as were three of the divided cases. The other eight decisions, all divided, were for the Crown. From 1961-1969, there were eight unanimous decisions, five for the defendant and three for the Crown. The three divided decisions included one for the defendant and two for the Crown, giving a total of six for the defendant and five for the Crown.

Hence, in the Fifties, there were far more divided decisions and decisions for the Crown. In the Sixties, there was a sufficient change in trend that a large majority of the decisions were unanimous and a small majority in favour of the defendant. Though not apparent from this table, each such tendency is less pronounced if we look at decisions on the issue scale. In the first period, there were three unanimous and nine divided, a total of five for the defendant and seven for the Crown. In the second period, there were seven unanimous and four divided, six for the defendant and five for the Crown.

The table furnishes a second kind of interesting information, this time about individual patterns and blocs in opinion-writing. Cartwright J. participated in eighteen out of twenty-three possible cases and wrote fifteen opinions. He wrote eight of these for the majority of which three were concurred in and seven dissenting opinions of which three were concurred in (only Fauteux and Estey JJ. also wrote dissenting opinions which were concurred in). In the other three cases, Cartwright J. concurred in opinions with Estey J. (dissenting), Rand and Ritchie JJ. In general, Cartwright J. appears to be somewhat alone in opinion-writing, with no identifiable bloc which identifies with him, or in which he joins, notwithstanding voting agreement with Estey and Rand JJ. in the Fifties and Hall and Spence JJ. in the Sixties.

At the opposite end of the spectrum, Fauteux J. participated in twenty-one of twenty-three possible cases, and wrote ten opinions. He wrote six majority opinions, of which five were concurred in, and four dissents, of which three were concurred in. In the other eleven cases, he concurred in eleven majority opinions, not one of which was written by Taschereau J. In fact, Taschereau J., who participated in nineteen out of twenty-three cases, and wrote five opinions, three majority and two dissenting, never once attracted a concurring vote of anyone to his opinions. He himself concurred in one dissenting opinion, written by Fauteux J. and eight more were also concurred in by Fauteux J. Hence, the high degree of voting concurrence of Fauteux and Taschereau JJ. is also reflected in opinion concurrence, but the latter demonstrates the dominant character of Fauteux J. in this partnership.

Between these two extremes is the pivotal group led by Rit-
chie J. The latter sat in all thirteen cases before the court during his tenure and never once was in the minority. He wrote six majority opinions and all six were concurred in by a majority of the court. Fauteux J. concurred in Ritchie J.’s opinions three times, more than he did with anyone else. Martland J. sat in eleven out of fourteen cases, also never dissented, but wrote only one opinion, which was concurred in by a majority including Ritchie and Fauteux JJ. He concurred in six opinions of Ritchie J. and in three other cases he concurred in opinions which also were concurred in by Ritchie and Judson JJ., sat in ten out of fourteen possible cases and wrote four opinions. One of the latter (Binus) was in effect a minority decision about the legal problem. Although he concurred in three Ritchie J.’s opinions, and Ritchie J. concurred in two of his, he is not a solid member of Ritchie J.’s bloc. In two important cases, King and Binus, he did not agree with the Ritchie opinions about basic legal questions.22

Much of this information is not of great significance for the small sample from which it is drawn. The important inferences which can be drawn for immediate purposes will be drawn later. The information relating to unanimity, opinion-writing, blocs, and so on, is reported here, though, as the first of a series of investigations of the court’s work. The information may assume much greater significance later if the same patterns are reproduced in other areas of the court’s work.

The third table is concerned with another distinctive kind of information. In an effort to assess the complexity and sophistication of the court’s opinions, I used as the index the number of legal authorities cited in each opinion. I counted only the authorities cited relating to the mens rea issue. The following are the findings:

Again, much of this information is useful only if it is put in the context of a larger picture of the Supreme Court’s work. However, from this limited sample, several conclusions are quite interesting, perhaps the most significant of which are the relatively few citations per case and the substantial decrease in recent years. It is almost incredible to find that each case averaged only about six (6.3) citations, and each opinion only two (2.2). Because

22 The other judges are all somewhat unique. Abbott J. sat in ten of twenty cases and never once wrote an opinion. He dissented only once, following Fauteux J., and joined in a great variety of majority opinions from different judges. Rand J. appeared in eight of nine possible cases and wrote seven times, six in the majority. In the Fifties, there was a much greater tendency towards short separate opinions by all judges, and much less evidence of blocs from such as Estey, Kerwin, or Kellock JJ. Locke J., who participated in twelve of thirteen possible cases, was as flexible here as elsewhere. He wrote three majority opinions for the Crown and two for the defendant. He wrote two dissenting opinions for the defendant. He concurred five times, twice in dissent, three times in the majority, twice for the Crown and three times for the defendant. He concurred with Cartwright J. twice, one in dissent and one in the majority.
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the majority opinions average less than two citations, while the dissenting opinions have about three, we can help explain the substantial decrease in the Sixties. There were far more unanimous opinions in the Sixties, each case averaged less than two-thirds the number of opinions, and there was much less citation of legal authority. In the Fifties, each case averaged about ten (9.83) citations, and three (3.05) per opinion, while in the Sixties, each case averaged three (3.3) citations, and one (1.3) per opinion. The big difference lies in the dissenting opinions, which average three citations per opinion in the Fifties, but less than one (0.4) in the Sixties.

These qualitative findings are matched by the impression gained from reading the opinions themselves. That they are not a function of the simplicity of the cases and the issues they represent can easily be seen if one compares the opinions in the Courts of Appeal in the same cases or in the House of Lords on the same issue. The Supreme Court opinions are very short and sparsely-reasoned and almost all lengthier opinions consist in discussion of the facts and the judge’s jury trial. Although not one periodical article was ever cited, texts are not infrequently used as authority (thirty-two times, by comparison with 113 citations). The court’s techniques in using and assessing authorities are considered later on.

When we look at the individual judges, the same impression emerges. The relative use of precedent remains a good indicator of the complexity of reasoning and argument. Fauteaux J. has the highest average, the only close competitor being Ritchie J. though no-one approaches Fauteux J. in the quality of his opinions. Cartwright and Taschereau JJ. are somewhere in the centre. Rand J. rarely cited an opinion and this aptly indicated the contribution he made to the quality of our law. The same judgment can be made about Judson J. Later papers will deal with the general validity of these conclusions.

Several tentative conclusions appear to emerge from this analysis. Clear pro-defendant or pro-Crown attitudes appear to be reflected in the mens rea decisions of Cartwright and Fauteux JJ. respectively. Although several judges throughout the period voted regularly in support of Cartwright J. he did not have the total acquiescence, especially in opinion-concurrence, that Taschereau J. gave Fauteux J. In recent years the dominant figure appeared to be Ritchie J., who obtained the same kind of support from Martland J., usually headed the swing bloc which decided disputed cases. In recent years this bloc and the Fauteux-Taschereau JJ. duo, together with Judson J. who tends to oscillate between them, appear to have taken control in this area.

Such non-random patterns of behaviour, when perceived along
the attitudinal dimension, suggests the hypothesis that the prior law in this area left substantial room for judicial discretion and policymaking. The figures relating to citation of authority reinforce this conclusion by indicating the relative lack of concern of the court with the sources in which established law might be found. At the moment these remain hypotheses, though, and await some confirmation in detailed analyses of the court's approach to specific areas of law. These are the subject of the next major section of this article.

III. The Individual Legal Doctrines.

A. Mens Rea and Strict Liability.

Within this period of study, in three unrelated but very important decisions, the Supreme Court authoritatively established, in verbal form at least, the principle of *mens rea*. By this I mean that the court indicated that a requirement of *mens rea* was to be presumed in interpreting all statutory crimes. However, it was not to be considered an absolute requirement, because not only could the legislature explicitly exclude it, but such an exclusion could be inferred from the object or subject-matter of the legislation. Hence, the presumption is somewhat attenuated because the court not only permits the legislature constitutionally to make innocent conduct criminal but it is also prepared to make this decision itself (though disguising it as "interpretation" of what is implied).

The first decision was *The Queen v. Rees* where the defendant had intercourse with a sixteen-year-old girl whom he was told and honestly and reasonably believed to be eighteen. He was charged with "knowingly or wilfully contributing to juvenile delinquency" under section 33(1)(b) of the British Columbia Juvenile Delinquents Act. His defence was his lack of knowledge of the fact the girl was a juvenile and thus an absence of *mens rea*. The Supreme Court, in a 6-1 decision, reversed the British Columbia Court of Appeal and held this to be a good defence.

The case is important because it was the first where the Supreme Court was forced to articulate its role in the development of the notion of criminal blameworthiness. In nineteenth century English law, there were two strands of development concerning *mens rea*, neither of which had authoritatively entered Canadian law, at least so as to bind the Supreme Court. In certain traditional crimes, the requirement of *mens rea* had been somewhat eroded at least as regards knowledge of some of the elements making conduct criminal. Another category of vaguely defined statutory,
public welfare offences was interpreted as, sometimes, impliedly dispensing with the notion of fault. This case, Rees, involved the problem of *mens rea* and the traditional *mala in se*, crime.

Even more interesting is that the facts here are so closely analogous to the most celebrated of all *mens rea* cases, *R. v. Prince*. The defendant there was charged with “unlawfully” removing a girl under sixteen from the custody of her father without his consent and claimed that he had an honest and reasonable belief she was in fact 18. A variety of reasons were given by the majority for the judgment that the defendant’s beliefs about this particular element were irrelevant and he ran the risk that he was right about the age.

With this classic background, the stage was set for a clear mandate from the Supreme Court concerning its attitude towards *mens rea*. Its performance, though, was somewhat disappointing. In this case, as in the field generally, the real debate is between Cartwright and Fauteux JJ. Cartwright J. adopts a rather broad perspective on the problem, though in a very sketchy way. First of all, he refers to section 7(2) of the Code which purports to preserve all common law defences, as a prelude to his discussion of the basic maxim of the defence of mistake of fact. His citation of certain references which support the principle includes Stephen’s classic statement in *Tolson*, and he is careful to counter with another statement from Lord Goddard that the honesty and good faith of the mistake is alone critical, and that its reasonableness is purely evidentiary. He adopts certain language in *Watts and Gaunt* which creates a presumption of *mens rea*, and adds the presumption that this must apply to all the elements of the offence. There follows the same technical distinction of *Prince* and the reference to section 138(c). However, he concludes with consideration of the sense of the problem, pointing out that the critical fact here in

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26 *Supra*, footnote 24.
27 In the first three separate opinions, Kerwin, Taschereau, and Rand JJ. define the issue as a very narrow, legalistic question of statutory interpretation. The legislature has used the word “knowingly” and references in Williams, Criminal Law (1st ed., 1953), indicate that this establishes a requirement of intent as regards all the elements of the offence. The *Prince* case is distinguishable because the word used there was “unlawfully” rather than “knowingly”. To the policy argument that it is preferable to throw the risk of ignorance on the defendant, the judges’ response is simply that their job is to discover the legislature’s intent, rather than to develop its policy. Intention can be gathered only from language, no distinction between the elements of *act* and of *age* is indicated, and this lack of intent is corroborated by the statutory rape clause, s. 133(1), where Parliament did explicitly dispense with knowledge of the girl’s age.
28 In an opinion concurred in by Nolan J.
29 *Supra*, footnote 24.
30 [1953] 1 S.C.R. 505. This case is discussed in detail later on.
altering the innocence or permissibility of the defendant’s conduct is the age of the girl. He would find it strange that Parliament should want the knowledge of this key fact, and it alone, to be legally irrelevant. Hence what characterizes Cartwright J.’s judgment is not that he ignores the technical legal problems in assessing the relevant authoritative material—rather, he also sees the wider significance of the problem, that a substratum of general common law principle underlies the specific issues of interpretation, and that this background structures certain attitudes or presumptions with which the court must approach each narrow problem.

Fauteux J.’s dissenting opinion is also a more reflective one than the first three, but curiously indifferent to the “legal” aspects of the problem. He says that an earlier maxim requiring a guilty mind for every criminal offence no longer obtains, even as a presumption. Instead one must look to the object and scope of each statutory provision, in the light of purposive and remedial views of the task of interpretation, to see how far knowledge is of the essence. The object here is to protect children against juvenile delinquency, but an honest and reasonable belief that this will not be the effects of one’s conduct would be no defence. Because it need not apply to all elements, it should not apply to the question of the child’s age. In order to serve the object of protecting the child, the accused must take the risk of the trier of fact agreeing with him about how old she actually or apparently is. Fauteux J. does not debate with Cartwright J. the established legal significance of the principle of mens rea, nor does he meet the arguments relating to the word “knowingly” and the structure of section 138(1). He simply assumes that child protection legislation is an over-riding goal which must be pursued to the exclusion of the claims of mens rea.

There are two gaps in this case. First, most of the judges treated it as simply a problem of assessing the significance of the word “knowingly”, and this kind of literal analysis would not stand them in good stead when the vagaries of statutory draftsman-ship faced them with the problem of deciding without any help from the legislature at all. Secondly, even those judges who did see the specific issue as an instance of a general, recurring problem did not address themselves at all to the policies which warrant the requirement of mens rea and the countervailing reasons for excluding it in certain cases. Even if Cartwright and Fauteux JJ. realized that the court was obliged to play an independent decision-making role in this area, one which required that they advert to arguments about why they should move in one direction or another, they give us only faint hints of that fact. This pattern carried over into the next such case in the sequence.

In Beaver v. The Queen,[31] the defendant was convicted of

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illegal possession of a narcotic drug. His defence was that he had been led to believe by a confederate that he was going to sell sugar of milk under the guise of the narcotic to another person who turned out to be an undercover R.C.M.P. officer. This rather fantastic defence was not simply disbelieved by the trial judge because he held that lack of knowledge of what one possessed could not be a defence under this Act. The decision of the Ontario Court of Appeal was reversed by the Supreme Court in a 3-2 decision, with by far the most adequate opinions in this whole area.

Cartwright J. began with the same assumptions he made in *Rees*. Mens rea must be presumed so that the innocent not be convicted, and this means actual knowledge is necessary, not just an unreasonable mistake. He accepts, though, the existence in the law of an exception for public welfare offences, but argued that this exception did not apply here, for two reasons. This was not analogous to obligations imposed on a businessman carrying on a lawful trade, that he insure the quality of his goods, for instance. Rather, the activity is one which is almost totally prohibited, and thus this is not a regulatory offence. Second, and more important, the offence carries a mandatory minimum sentence of six months imprisonment. No case could be found where a crime of strict responsibility required a jail sentence and Cartwright J. said he would require a very clear statement by Parliament before he imputed such an intention to it.

Fauteux J. joined issue on this point. Although he was willing to accept some kind of presumption of mens rea, he was not willing to confine the exceptions to “public welfare” offences of a trivial sort. He said that the scheme of the Act was to make all possession prima facie unlawful, to establish “rigid controls” against the “social evils” of the drug traffic. The enforcement sections of the Act showed the “exceptional vigilance and firmness of Parliament . . . to cope with the unusual difficulties standing in the way of the realization of its object”. He pointed to the many restrictions of substantive and procedural principles within the Code—the powers of search and seizure, the writ of assistance, the burden of proof, the minimum sentences, mandatory deportation, and so on. Because Parliament wanted the most efficient protection possible, the “narrow construction” asked for by the accused would defeat these objects, even “to reduce the whole Act to waste paper” by requiring proof of knowledge. The draconian injustice of mandatory imprisonment for innocent accuseds could be dealt with by discretionary powers, such as the Attorney General’s stay of prosecution or the free pardon available under the royal prerogative.

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32 Writing for the majority, which also included Locke and Rand JJ.
33 Whose dissenting opinion was concurred in by Abbott J.
This basic difference in attitude which emerges so clearly is probably more important than a second legalistic debate about the relationship of section 4 and section 17. Fauteux J. pointed out that section 4, by its plain, literal and grammatical meaning, absolutely prohibited possession of certain drugs, that the definition of possession must be developed in the context of this Act, and that section 17 furnishes this context. There, a rebuttable presumption of possession of drugs in one's premises was created, which could be defeated by proof of lack of knowledge by the accused. Fauteux J. asked what sense it made to require the Crown to prove actual knowledge where there was personal possession, where no words in the statute even hinted at it. How important Fauteux J. thought this argument is is interesting, in the light of his complete failure to meet an almost exactly analogous contention in Rees. He did point out that his conclusion was reached in Morelli\textsuperscript{a} by the Ontario Court of Appeal in 1931, and never changed by Parliament.

Cartwright J.'s response is somewhat disappointing. For a time he appears to be getting at the correct distinction, between possession of the drug, and the crime of being in possession of the drug. Section 17 makes the occupier guilty of the actus reus of possession if he knows of its presence on his premises, the same as if he has it in his pocket. Under sections 17 and 4 both, though, the problem remains whether someone who actually has possession in an objective sense is guilty of a crime if he is mistaken about the legally essential nature of what he possesses. Unhappily, Cartwright J. eventually finds for the accused on the grounds that "possession" is not fulfilled if there is not the requisite knowledge. Another opportunity to state a general theory of mens rea is frittered away.

On both sides, though, there is complete failure to speak to the general reasons in justification of mens rea or strict liability and, thus there is almost a total lack of real joinder of issue. Both opinions assume that there is a distinction between cases where mens rea is necessary and those where it is not, but neither purports to create any general standard for making the distinction. Nor could they intelligently formulate such a standard since at no time do they advert to the purposes or aims of either mens rea or strict liability.

Fauteux J. says that the legislature is very concerned that this legislation may effectively be enforced but he at no time says why mens rea will interfere in this effort or, if it will, how important are the marginal gains in enforcement by comparison with the losses engendered by strict liability. Cartwright J. looks at specific facets of this legislation which distinguish it from those convention-\textsuperscript{a} [1932] 3 D.L.R. 611.
ally called “public welfare” offences, carrying strict liability, but this kind of analysis must of necessity be inconclusive. Until he tells us why strict liability is necessary, we cannot know the instances in which these reasons make it necessary. Unless we know why mens rea should be a precondition to imprisonment, we cannot justify pointing to a mandatory jail sentence as the basis for our conclusion that mens rea is necessary for this offence. Cartwright J. and Fauteux J. continually refer to the question, does the legislation impliedly exclude mens rea or not? They have not sufficiently realized that it is the courts which have to make the decision about mens rea, that where the statute is silent Parliament has not already decided for them, and that they must give intelligently-founded reasons for the conclusions at which they arrive.\(^{35}\)

The third and final case in this trilogy is R. v. King,\(^{36}\) one in which the opinions appear terribly confused, perhaps because neither Cartwright J. nor Fauteux J. participated, but also symptomatic of a general decline in quality in the Sixties. The defendant was charged with driving a vehicle while his ability was impaired by a drug, contrary to section 222 and 223 of the Code. There was no doubt he had done so but his defence was that the drug was administered by his dentist, that he was unaware of its properties, and after he had begun driving its after-effects suddenly made him unconscious. The trial judge found against him, the Court of Appeal for him, and the Supreme Court agreed with the latter by a 5-0 vote.\(^{37}\)

The first opinion is that of Taschereau J. who also concurs with Ritchie J.’s opinion, which is strange because they disagree in their reasons. Taschereau J. tries to distinguish intention from mens rea, saying that one must have an act proceeding from a person’s free will. There can be no voluntary act of a driver when a doctor injects the latter with a drug of whose effects on his mind he is unaware. On the other hand, if a person voluntarily takes liquor or drugs of whose effect he is aware and then drives, lack of intention at this second point will not be a defence.

\(^{35}\) Fortunately the British Columbia Court of Appeal used Beaver, supra, footnote 31, as an authority to extend the mens rea principle to the “importing” section of Narcotic Control Act where “possession” was not in point: R. v. Boyer (1968), 4 C.R.N.S. 127.

\(^{36}\) Supra, footnote 12.

\(^{37}\) Locke J., writing and Judson J. concurring with him, did not decide on the basis of principle, but rather because they believed that the trial judge’s findings of fact precluded holding that the defendant was unaware of the properties of the drug and that it would likely impair him. Because the Crown did not appeal on this basis, though, they would dismiss its appeal. For these reasons we would have to characterize their positions as neutral concerning the question of the mental element in this kind of driving offence. The other judges, who did get to this issue of principle that had been debated at the lower level, were able to hold the defence was made out despite the ambiguous factual situation of earlier warnings, a signed release, amnesia, etc.
Taschereau J. says there can be no conviction here as an offence, because “there can be no actus reus unless it is the result of a willing mind at liberty to make a definite choice or decision”.

What Taschereau J. appears to have been getting at was a distinction between intention and voluntary act, corresponding somewhat to mens rea and actus reus respectively, one which had developed in certain recent Commonwealth cases of automatism. Automatic states of unconsciousness preclude any decision to engage in conduct at all, a much more basic defect in a person’s mental capacity than his ignorance of the circumstances or consequences of his conduct. Such defects have been held to be more comparable to forced bodily movements or spasmodic muscular reactions than to simple mistake or accident. The significance of this for our purposes is that, while mens rea offences would necessarily include some reference to this cognitive incapacity, the opposite was not true. Certain offences might be read as requiring conscious voluntary action by the defendant while not excusing such conduct because of further ignorance of circumstances or result. In fact, such had been the apparent conclusion in a recent English decision about driving legislation. This case raised this very important question in a rather different fashion, because of coalescence of two different actions in the offence, drinking and then driving. Taschereau J.’s response is not only quite inadequate, but it is also the only explicit handling of the problem in the Supreme Court.

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38 See Hart, Acts of Will and Responsibility, from Punishment and Responsibility (1968), Ch. 4.
40 Strangely enough the Supreme Court of Canada appears to have decided that automatism can be a complete excuse in the criminal law without ever having mentioned it, in the case of R. v. Bleta, [1964] S.C.R. 561. Why this is so can be gathered from the following passage from the Saskatchewan Court of Appeal decision in R. v. Hartridge (1966), 57 D.L.R. (2d) 332, at p. 348:

“I think it must be taken that both the Court of Appeal for Ontario and the Supreme Court of Canada recognized the defence of automatism in R. v. Bleta, [1964] 2 C.C.C. 190, 41 C.R. 377, [1964] 1 O.R. 485 (C.A.), and [1965] 1 C.C.C. 1, 44 C.R. 193, [1964] S.C.R. 561. In that case the accused was charged with non-capital murder. At the trial his defence was that in the course of the fight between himself and the deceased, he was knocked and pushed to the sidewalk and his head struck the pavement. As a result of the injuries so sustained, it was contended that the stabbing of the deceased was an unconscious act for which the accused could not be held criminally responsible. The jury brought in a verdict of not guilty and an appeal was taken by the Crown. The Crown based its appeal on the ground that certain evidence that had been admitted was not admissible. The Court of Appeal gave effect to this argument and ordered a new trial. A further appeal was taken to the Supreme Court of Canada, where the appeal was allowed and the verdict of acquittal restored. While the latter judgment is an authoritative pronouncement in respect to the issue upon which the appeal was decided, the restoration of the verdict of acquittal must be construed as acceptance of the defence of automatism as disclosed by the evidence.”
The offence, here, consists of the conjunction of conduct (driving) and a condition (impairment). King knowingly took the drug which caused the impairment and then voluntarily began to drive the car. However, the combination of impairment and driving occurred at a moment when King became unconscious. Though the state of automatism does seem to obtain here, it is the unintended and accidental result of voluntary action. The distinctive and confusing facet of this case is that the consequence of the earlier conduct is itself a subjective effect in the mental condition of the accused. Hence Taschereau J. was a little too hasty in saying that intention, which refers to consequences, was unimportant in this case.

Nor is this simply a matter of precise analysis since the case could have led to a more adequate understanding of the mens rea doctrine. Since it was faced with a state which fits somewhere between the excuse of involuntary conduct on the one hand and accident and mistake on the other, the court could have demonstrated the inconsistency in the policy of founding certain offences on strict liability and still requiring a voluntary act as part of the actus reus. The evil in a strict liability case is that we punish someone who cannot meaningfully be said to have chosen to break the criminal law because of his ignorance. If we are willing to do this, it is hard to see why we single out as a distinctive defect an inability to choose to act, as a result of automatism or otherwise.

The final judgment, that of Ritchie J., does not have to deal with that point because it resolves the mens rea against strict liability issue in favour of the former. The basis for this decision was quite legalistic, but probably right. However, the dangers of judicial concern for practical policy in the face of basic principle, especially when expressed in obiter dicta, is amply illustrated by the last part of his opinion. Ritchie J. seemed to establish a rebuttable presumption of the natural consequences of our conduct, one which refers to reasonable grounds for expecting impairment, ap-

The unanimous judgment of the court was given by Ritchie J. and was concurred in by Cartwright, Fauteux, Judson, Spence, Martland, and Hall JJ. Because this is a very important substantive issue, and the court's decision is decisive for it, I included this case in each of the tables, on the assumption the judges realized they were making this choice of policy and principle.

41 Concurring in by Martland J.

42 He cites the same English cases as did Cartwright J. earlier and follows Beaver in the strong presumption in favour of mens rea. Instead of trying to develop a rationale justifying and defining the exceptions, he quotes and applies a test from Halsbury, "is it criminal in any real sense?" and holds that it is, because of the great danger to others and because of the Beaver criterion of mandatory imprisonment (here for subsequent offences). He cites an Australian case in support (Proudman v. Dayman (1941), 67 C.L.R. 536), and then half-heartedly distinguishes the English precedent, Armstrong v. Clark, [1957] 2 Q.B. 391.
pealing to Holmes, *The Common Law*,\(^4^3\) for justification of an objective standard about matters of common experience which an individual must know at his peril. All of this rather dangerous language is apparently designed to head off any reliance on this decision by those who would say they voluntarily drank liquor and then drove without realizing their ability had become impaired. Although Ritchie J. speaks of a rebuttable presumption that men know the natural consequences of their conduct, he also refers to reasonable grounds for expecting impairment, and quotes Holmes to the effect that “common experience” must be known at an individual’s peril. The fact that this reasoning remains in an authoritative majority opinion in a Supreme Court decision, makes it available to a future Crown Attorney who might want to import all or most of the *D.P.P. v. Smith*\(^4^4\) objective test of *mens rea* into Canada. Ritchie J. does not refer at all to the implications for his position of *O’Grady v. Sparling*,\(^4^5\) which, as we shall see, had just laid down the standard of advertent recklessness for “criminal negligence in driving”, an offence immediately contiguous to this one in the Code. Nor does he seem aware of the medical concept of pathological reaction to alcohol or the real lay ignorance about certain drugs, and the injustice his unnecessary dicta will work in relation to them.

The lower courts of Canada have been faced with the task of translating and elaborating the implications of these cases for the vast number of statutory offences which are created. There are two important aspects to this function: first, can we articulate a standard by which we may intelligently distinguish the *mens rea* and strict liability offences; second, are these the only two alternatives to the problem of individual guilt, or is there a third and perhaps better solution for the “public welfare” offence?

It is fair to say that the intellectual case for strict liability is very debatable,\(^4^6\) but it could be argued that the principle was

\(^4^3\) (1881), p. 57.
\(^4^5\)Supra, footnote 10.
\(^4^6\)The case for strict liability depends on a set of distinct but related assumptions which, when read together, indicate pretty clearly the kind of statutory offences for which they are relevant. The purpose of the offences is the protection of the safety and welfare of a large potential group of victims. This requires the attainment of a high degree of care in performance of the activity which engenders these risks. Strict liability will help attain this higher quality of performance in several ways. If any mistake or mishap will attract liability, there will be a great incentive to take all possible steps to avoid any such mistakes or mishaps. In a negative sense, strict liability removes a possible defence which could be fraudulently used and thus enhances general deterrence by announcing to the world that no loophole exists in the legislation. Finally, because the need for such care is associated primarily with special, defined activities (driving a car, selling meat, handling certain products, etc.), the possibility of strict liability will exclude from the field of such activity those who are not confident of their
established in the fabric of the common law of criminal guilt and the Supreme Court should not have tried to root it out. However, if the judges were to continue the principle in these first cases at the Supreme Court level, they were under an obligation to make sense of it, to formulate a theory which pointed out the relevant facets of different offences for making the decision about strict liability. There are hints in the court's opinions about the significance of certain factors—mandatory imprisonment, the need for protection of public safety, the essentially civil, rather than criminal character of the offence—but there is no systematic statement of these factors in any integrated meaningful fashion.

As a consequence, it is obvious that the lower courts have had great difficulty in discerning the true path of the law in this area. It is true that where the statutes are closely analogous to those dealt with in the principal cases, little difficulty may be encountered. Yet the vast majority of these cases deal with different ability to avoid all mistakes, however blameless.

Of course, it has been argued that such a case for strict liability has not and cannot be empirically demonstrated. On the contrary, analysis might reveal a tendency towards lesser care, either because even the greatest care will be no defence, or because conviction of the innocent creates cynicism and disrespect for the dictates of the law. The response to the latter would be that administrative discretion would exclude the prosecution (and thus conviction) of those clearly without fault. Moreover, the cost of criminal conviction of even the innocents who do slip through the net of administrative judgment is very low. If they are without fault, they will be sentenced only to pay a fine, which will be small because of their innocence. These essentially regulatory offences which involve conduct creating the risk of harm, and rarely involve personal injury or property damage to a particular victim, do not carry the stigma usually associated with criminal conviction. They are not "real crimes" in the eyes of the public.

Again these arguments are not unambiguously valid. If evidence of innocence is relevant to sentence, then this contravenes the argument that proof or disproof of fault just is too great a burden in time and money for the vast bulk of regulatory offences. It introduces too much discretion into sentencing as well as prosecutions, decisions which are made by lower government officials. The use of the criminal law process necessarily attracts some of the stigma and its effects on reputation which pervades its new traditional uses. Moreover, deliberately to try to minimize this effect is to sacrifice the best instrument for implementing these standards of conduct, all for the easier imposition of relatively insignificant penalties. And if, as is often the case, the real deterrent in public regulatory offences stems from subsequent loss of licences and other such appurtenances, then the imposition of these penalties indiscriminately on the blameless and the blameworthy does raise serious problems of justice.

"Though a very sophisticated attempt was made by the County Court judge in R. v. Patterson, [1964] 1 O.R. 628.

"King is followed in Rushton (1967), 1 C.C.C. 87 and Liston (1967), 1 C.C.C. 87 (a different drug under s. 223) and McCormack (1963), 1 C.C.C. 359 (Sask. C.A.) (s. 222). Beaver was followed in Lainer (1968), 29 C.C.C. 297, Hall (1961), 131 C.C.C. 172 and Guiney (1961), 130 C.C.C. 407, the latter two dealing with possession for purposes of trafficking, and in Boyer, supra, footnote 35, which dealt with importing drugs under the same Act. Rees was used in Stundon (1962), 40 W.W.R. 656, dealing with the same section, and in Watson (1964), 51 M.P.R. 103 where a different statute (selling intoxicants to a minor) also used the word "knowingly".
regulatory offences which raise the same issue of principle. As to these, the Supreme Court's efforts have been extremely unhelpful. In several cases, they are not even cited as the lower court rests content with English or other Canadian authority. 49

Perhaps the best example of lack of guidance from the court is the use of King in driving offences. Opposite conclusions were reached in Wehage 50 and Patterson, 51 both of which dealt with the provincial highway traffic offence of driving on the wrong side of the centre line. The latter held that this was a driving offence and that the strong presumption in favour of mens rea was not rebutted. The former argued, though, that King dealt essentially with a criminal offence relating to driving. This was a provincial offence, regulating traffic for safety purposes, and mens rea is relevant only to sentence. Even in such a closely related offence, the Supreme Court gives no guidance at all, and essential ad hominem inconclusive arguments are all that are left.

Patterson was overruled by McIver, 52 where the Ontario Court of Appeal held that careless driving did not require proof of mens rea. One of the opinions (that of Porter C.J.) suggested that this offence was one of strict liability. The other opinion (MacKay J.'s), applied his distinctive theory that fault could be available as a defence if the accused proved that he committed the offence despite all reasonable care. The case was appealed by the accused to the Supreme Court which dismissed the appeal but felt the only issue of importance was the Mann 53 problem. Because it chose not to elaborate on the implications of King, our highway traffic law continues without intelligent direction from the court.

To a certain extent this lack of influence is attributable, or so I believe, to a tendency in Beaver et al. to speak of the decision for or against mens rea as essentially a legislative one. The legislation

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49 This is true in Roy, MacCallum and Associates, [1967] 1 O.R. 488 under the Atomic Energy Control Act, where strict liability is found, after a rather nice analysis of the great danger, tight administrative regulation, limitation of use to a very few experts, and the conclusion that they should act at their peril. A similar conclusion was reached in Perreau (1967), 60 W.W.R. 382 and Babiak (1967), 60 W.W.R. 689 ("purple gas") and Industrial Tankers, [1968] 2 O.R. 142 (water pollution) with no reference at all to the Supreme Court trilogy. On the other hand, in Mussalem (1967), 62 W.W.R. 383 (supplying liquor to minor), V. K. Mason Construction Ltd. (1968), 3 C.C.C. 62 (construction safety) and Pierce Fisheries (1969), 4 D.L.R. (3d) 80 (selling undersized lobster), different courts all arrived at the requirement of mens rea, with no real help from the court. They cite Beaver (or Watts & Gaunt in the third case) but only to get to the English principle—essentially Sherras v. De Rutzen, [1895] 1 Q.B. 918—which they then proceed to apply as their basic reason. Pierce Fisheries was very recently reversed by the Supreme Court, by a nine-man bench, Ritchie J. writing the majority opinion, and Cartwright J. delivering a lone dissent. See (1970), 5 C.C.C. 193.

51 Supra, footnote 47.
is said to exclude *mens rea* either explicitly or implicitly, and the search is on for the legislative intent, rather than for reasons which justify a judicial decision one way or the other. Of course, this is myth and rhetoric, as is shown by a debate which was carried on in the Supreme Court, and in the lower courts, concerning the nature of *mens rea*. Although Cartwright J. had earlier insisted that *mens rea* was negated by an honest mistake with reasonableness being merely evidence of *bona fides*, Ritchie J. disagreed in *King* as we have seen. The dispute has carried over into the lower courts, with little or no reference to what the legislature might have thought.

Ritchie J.'s dictum has carried the day, without discussion, in the immediate area of impaired driving. In *Liston*, the court found reasonable and honest ignorance of the impairing effects of a drug. However, in *Rushton*, the Ritchie J. distinction resulted in conviction. Though there was no doubt of the honesty of the defendant's belief, he had not introduced any evidence to rebut the presumption that he should have known, from common experience, of the drug's effects.

What makes this development of wider interest is the suggestion that has emerged from Australian cases and literature that the best resolution of the competing interests in the regulatory offence context is the requirement that the accused disprove the presumption that reasonable care would have avoided his prima facie offence. By definition this requires the kind of care which we want under the statute; it eases the problems and costs of proving some kind of fault, while avoiding most, if not all, of the injustice of convicting the truly innocent. Unfortunately, neither Cartwright J. nor Ritchie J. spoke to this problem in their discussions of the nature of *mens rea* and neither sought to isolate the specific "public welfare" offence for the treatment of negligence.

Happily our lower courts have been aware of and have thoughtfully discussed this alternative. Unfortunately their arguments and conclusions are not terribly conclusive. In *Industrial Tankers Ltd.*, negligence is rejected and strict liability is imposed, essentially because of the uncertainty which would be created by introducing distinctions into *mens rea*. However, there is already a very confused and difficult distinction between *mens rea* and strict liability. This proposal merely suggests the substitution of negligence for the latter which can only improve the distinction. This was tacitly recognized by the judgment in *V. K. Mason Construction Ltd.* but Lieff J. finally rests on some relatively

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54 Supra, footnote 48.
55 Ibid.
57 Supra, footnote 49.
58 Ibid.
unhelpful statutory language. Hence, he does not persuade the Nova Scotia court in *Pierce Fisheries*, which has one of the best analyses of the problem in the whole of the Canadian law. This case recognizes that this is a problem of basic *principle* in the criminal law and that the arguments for strict liability are often spurious. However, it eventually comes down to legislative arguments and rejects the "half-way house" of negligence. There is insufficient recognition of the established facts of strict liability in "public welfare" offences in Canadian law, and thus no contribution to a mutation of strict liability into negligence where it does obtain. The one judge who seems perfectly aware of the implications of this "halfway house", the Australian development of it, and its importance for criminal law in this area is Mr. Justice MacKay of the Ontario Court of Appeal. He has systematically formulated his theory in opinions in *King*, *McIvor* and *McAslan* with explicit reference to the authorities. Unfortunately, the Supreme Court has never even mentioned his argument notwithstanding the fact that it has heard and decided appeals from both *King* and *McIver*. In this, as in many other corners of this area of law, what the Supreme Court would have us do remains moot.

B. *The Reach of Fault: Herein of Mistake of Fact and of Law.*

Once a court reaches the decision that the presumption of *mens rea* is not rebutted in a specific offence, it is next necessary to see whether any particular kinds of mistake are excluded from this doctrine. An example of this kind of problem is *Rees*, where it was argued that, even if *mens rea* was generally required as to the elements of the offence, this should not be true of the specific issue of the age of the victim. In the absence of clear authoritative judgment of the legislature, the rational way of deciding such a question is to consider whether the gains to be achieved by such a course outweigh the costs resulting from the narrowing of the principle.

A general, recurring, such problem is whether mistakes of law warrant the defence of lack of *mens rea*. At the common law, it was traditional to regard such mistakes as not an excuse in criminal law and section 19 of the Criminal Code codifies this position. It is obvious that the basic policies underlying the requirement of blameworthiness for criminal guilt render it *prima

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61 *Supra*, footnote 52, at p. 480.
64 *Supra*, footnote 18.
65 "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence". Section 19 of Criminal Code, *supra*, footnote 4.
facie unfair to convict someone of an offence under a statute which he did not know existed. Nonetheless, this injustice has traditionally been supported for two reasons.

First of all, it may be very difficult to make a rational decision about the presence or absence of the relevant knowledge of the criminal law. Unlike matters of fact, which are related to a specific occasion, proof or disproof of ignorance of the law might require investigation of all of the possible opportunities the defendant might have had for learning about the law in his previous life.66 Not only will the costs of avoiding this injustice be great, but also the degree of unfairness in the doctrine may be minimal. Because the criminal law represents the moral values of a community, a person who is in breach of them can and should be treated as blameworthy if he disregards them,67 even if he shows that it was impossible for him to be aware of the implementing law.68

It is probable that these considerations were in the minds of judges who created the doctrine, and only in the rare case of someone who newly entered the jurisdiction and was unaware of its mores could the defendant legitimately claim any injustice.69 In a modern administrative state with its proliferation of technical and poorly-publicized regulations, the balance may well have shifted sufficiently to warrant some re-examination of the doctrine, and an adventurous court has many legitimate legal avenues for achieving this. As regards its statutory foundation, the doctrine is presently incorporated only in the Code while most of the situations where a claim of ignorance could fairly be made arise in federal or provincial regulatory legislation which is quite unconnected with the Code. An exception has been developed in the case of offences arising under subordinate legislation which has not yet been published, in an opinion which intelligently differentiates such a law from a statute which must be enacted only after several readings in Parliament.70 Unfortunately, this has been the sole example of judicial rethinking of the basic doctrine up to now.71

This outline of the background of the doctrine is necessary in order to understand and assess the contribution made by our

67 Ibid., p. 382 et seq.
68 A classic example being R. v. Bailey (1800), 168 E.R. 651, where the law was passed while accused was on a ship on the ocean, and the offence was committed on the ship.
71 Though the U.S. Supreme Court did see the peculiar injustice in the "ignorance of the law is no excuse" doctrine in the case of omissions, in Lambert v. California (1957), 355 U.S. 225.
Supreme Court which has so far been confined to the area of “claim of right”. Somewhere between the paradigm cases of pure ignorance of law and pure ignorance of fact is the well-established common law defence of “claim of right”, especially in connection with theft and other property defences. Such a defence is required if for no other reason than that the distinction between law and fact is itself a somewhat ambiguous point on a rather shadowy spectrum. The effort of the court to give some content to the “claim of right” defence, and to limit the mistake of law exception to the basic mens rea principle in the light of relevant objectives of both doctrines can only be described as an intellectual disaster.

The two early cases where the basic issues were first raised were Watts and Gaunt and Shymkowich. Both arose out of the same factual background, the salvage of timber logs in British Columbia, and in both the Supreme Court reversed the British Columbia Court of Appeal, the second time when the Court of Appeal followed the Supreme Court’s first decision. In Watts and Gaunt, the defendants were British Columbia beachcombers who collected logs belonging to the lumber companies, and customarily received forty per cent of their value as salvage from the owner whose mark the logs bore. When the defendants recovered logs belonging to a company, one which had followed the practice for

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73 An example may best show what I mean about this inherently tenuous character of the distinction between law and fact. A person living in a jurisdiction, who has been married before, may go through another marriage ceremony and be prosecuted for bigamy. He may say that he does not know it is a crime to try to be married twice in the jurisdiction and that he thought polygamy legal. Such a defence would fail under the old rule now incorporated in section 19 of the Code. As we have seen, a person is supposed to be aware of the legal standards of conduct in the place where he lives, especially where these standards are more or less coextensive with accepted mores within the community. On the other hand, though, three other defences might be asserted: first, the defendant thought his first wife dead (mistake of fact); second, the defendant thought his first marriage ended by an out-of-jurisdiction divorce which he mistakenly believed valid (a mistake about divorce law); third, he felt his divorce was valid because of a belief he had acquired domicile where he got the divorce (a mistake about how the legal standard was to be applied to the agreed-to facts). Hence, besides distinguishing between the general standards of criminal law and the factual accounts of what has happened, we must also distinguish (1) the application of these general standards to specific cases; (2) the legal character of general rules in other areas of law, and (3) the validity of specific judgments about individual status, property rights, etc., under the latter rules, where these are necessary to the rules of criminal law. The point of the claim of right defence is to equate mistakes about civil law, where they become relevant to a criminal offence, to mistakes of fact and thus to allow them to negative mens rea. Not only is it completely unrealistic to expect ordinary citizens to be aware of the intricacies of civil law but it is also unnecessary because we have civil courts to dispose of the essentially private disputes which these cases invariably involve.

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74 Supra, footnote 30.
75 Supra, footnote 21.
five years, the company demanded possession of the logs. The defendants refused until they got the money and were prosecuted and convicted under section 394(b). The British Columbia Court of Appeal held that proof of "fraud" was not necessary under section 394(b) (as it was under section 394(a)) and upheld the conviction. The Supreme Court unanimously reversed and ordered acquittal.

Most of the judgments are short, sparse, and confused. Cartwright J. simply says that mens rea was essential here and did not obtain, without saying why. Taschereau J. said that the defendants had an honest impression the owners had tacitly consented; Rand J. held that they had a reasonable belief in the permission to salvage the logs for forty per cent. Of course, this ignores the fact that the defendants had no such impression of the owner's position after the latter's demand. Kellock, Fauteux, and Locke JJ. appear to say that the existence of the custom created a right in the defendants to retain the logs until the owners paid compensation. Of course, if this is the case, the defendants are not mistaken at all; they have committed no offence because they were perfectly within their legal rights to retain the logs. Yet, although a contractual right to compensation may arise on these facts, it is hard to see how the defendants rightfully claimed a possessory lien to enforce it.

Estey J.'s judgment, while longer, is so only because it reproduces the facts and the statute. He said that the grammatical structure and legislative history of the statute led to the conclusion that "fraud" is required for every sub-section, including section 394(b). Even if it does not, the presumption of mens rea is not excluded because he feels the nature of this offence is simply to prevent theft, and not to promote public safety, health, or morality. Estey J. approvingly cites Bank of N.S.W. v. Piper76 for the proposition that an "honest and reasonable belief in the existence of facts" may excuse. All of this ignored what should have been obvious, that at the time of the company's demand, there was no mistake about the relevant facts, the only misapprehension (if it was one at all) relating to the defendant's legal right to retain the logs on these facts. In fact, Estey J.'s judgment at one point appears to state that the defendants did have the right to a lien here, despite the whole tenor of his opinion which is concerned with mens rea in this situation.

However this situation be characterized, though, it seems obvious that the policy behind section 19 should not apply to convict the defendants. They were aware of their obligations under the criminal statutes and their doubts about an essentially private dispute concerned the proprietary and contractual rights to possession upon which the law of theft must depend. This was an obvious

area for which the common law doctrine of claim of right was designed and yet it was not even mentioned. This did not hurt the defendants, Watts and Gaunt, but it was unfortunate for Shymkowich, the accused in the next case.

In this case, a company leased a booming ground from the provincial government in the Fraser River and marked it with periodic "dolphins". Within this ground, it had a boom full of logs which was tied to the shore. The defendant went out looking for logs and saw two of them floating in the booming ground, though somewhat removed from the boom. He took them out, sold them to a third party, and was prosecuted. He claimed that he thought he was doing nothing wrong and the trial judge was willing to find he thought these logs might have floated into the booming ground from up the river. The judge also characterized the sale as essentially the assignment of the forty per cent salvage rights referred to earlier. The British Columbia Court of Appeal relied upon Watts and Gaunt to uphold the acquittal here, and the Supreme Court, by a vote of 4-1, found Shymkowich guilty of theft of the logs under section 396.

Rand J. characterized the defence as one of mistake of law and referred to Kenny and section 19 to show this would not work. He recognized that, especially in this area, the distinction between law and fact was difficult. Though he characterized ownership as "factual", albeit dependent on law, he said that one must distinguish between justifying an act as authorized by law and a bona fide belief in a property interest. Yet surely Shymkowich's mistake was simply as to the reach of the custom-founded defence already upheld in Watts and Gaunt, and this belief in turn rested upon the mistaken belief about where the logs came from. Ownership is neither a necessary nor a sufficient condition for the right to take property, and thus should not be the critical factor on which belief about the right turns. The trouble with Rand J.'s distinction is that it takes no account of the relevant policies in the area, something which is particularly unfortunate when there was no binding authority requiring him to draw the line where he did.

Estey J. also held Shymkowich guilty but for other reasons. He characterized the mistake as essentially one of fact, and then said that the accused did not have an honest and reasonable belief in a set of facts which could excuse him. He argues that only if the defendant thought they were lost or abandoned could he have a right to take them, and he could not have this belief when they were in the possession or control of the person in the boom-

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77 Taschereau J. concurring.
79 There is a direct and classic authority for this proposition—R. v. Boden (1844), 174 E.R. 863.
80 Fauteux J. concurring.
ing ground. In his reasoning, he appears to distinguish his own Watts and Gaunt decision on the grounds that that was a question of the relative rights between owner and salvager (something which is totally inconsistent with his reasoning there about mistake of fact). Yet he ignores two salient points: first, the trial judge held that the defendant believed the logs in the booming ground had drifted down the river; second, the defendant also believed he had a right to salvage someone else's drifting logs from a booming ground into which they had floated. Since Estey J. was supposed to be bound by these trial findings about the defendant's mistaken state of mind, he clearly failed to deal with the salient issue raised by this case, the continued existence of the common law colour of right defence to theft offences under the Code (a defence supported and reiterated by the very texts the majority were citing to their own purposes).

Nor can we say that this issue was not raised on appeal since it was the basis of Locke J.'s vigorous dissent. He cited the relevant texts and cases which showed that the definition of theft incorporated a negative reference to "colour of right" and concluded that this carried over into the Code. Section 19 was held inapplicable not because this was not a question of law, but because there is no offence of theft at all if items are taken or kept under a mistaken belief of one's proprietary rights to them. Surely Locke J. is right in his assumption that the civil law defining the various rights to property is too complex to justify imposing the risk of criminal prosecution on one who acts in a good faith belief in the legality of his possession. The civil courts are available and should be used for resolving such disputes.

It is fair to say that these cases, to the extent that they are significant, have badly muddied the developing law in Canada. The same court which requires a presumption of mens rea as a protection of the citizen against conviction and punishment has given no hint that it perceives any inconsistency in an extreme interpretation of the opposite presumption that ignorance of the law is no excuse. A court which perceived this inconsistency, and realized that the ignorance of the law doctrine was developed in a special historical situation might have used these cases as the starting point in the necessary task of reconciling the doctrine with the policies of the mens rea principle to the extent that this is consistent with the language of section 19. For example, the doctrine refers to "ignorance of the law" but I suppose that most of the cases which actually arise are better described as "mistake of law". They involve defendants who know of the existence of a law which makes

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82 Esp. Bernhard, supra, footnote 72.
certain conduct criminal but who are mistaken about its precise application. They have often taken reasonable steps to learn of the legality of their conduct and may have relied on the very plausible advice of lawyers before acting. Neither the purpose nor the language of the basic rule seems to require the exclusion of the defence. However, unfortunately, our courts have so far not chosen to make such a distinction and thus advance the policies of the mens rea principle.

There are two intellectually defensible attempts to come to grips with these problems in Canadian law, although their attention to principle is considerably hampered by the necessity of dealing with the authority of Shymkowich. In Pace, the accused was a cook in the R.C.A.F. who took a cake home rather than see it go into the garbage. His conviction for theft was upheld by the Nova Scotia Court of Appeal largely on the authority of Shymkowich. It appeared that the accused did not believe the cake was abandoned such that he became the "owner" of it; rather he believed that it was of no value to the owner, that the latter would not object to his taking it, and thus he acted with the honest belief that he had a right to take the cake. The court held that this defence, even if established on the facts, would not be valid in law. It followed Rand and Taschereau JJ. in Shymkowich to the effect that mistake of law was irrelevant in theft cases by reason of section 19, except where it related to ownership where it was a defence.

The leading Canadian cases are R. v. Dalley (1957), 118 C.C.C. 116 (Ont. C.A.) and R. v. Myers Cattle Company and Oliphant (1965), 3 C.C.C. 87 (Sask. C.A.). One of the best critiques of the whole problem is Brett, Mistake of Law as a Criminal Defence (1966), 5 Melbourne L. Rev. 179.

The American case, Long v. State (1949), 65 A.2d 489, has made this a defence.

The leading Canadian cases are R. v. Dalley (1957), 118 C.C.C. 116 (Ont. C.A.) and R. v. Myers Cattle Company and Oliphant (1965), 3 C.C.C. 87 (Sask. C.A.). One of the best critiques of the whole problem is Brett, Mistake of Law as a Criminal Defence (1966), 5 Melbourne L. Rev. 179.

In Pace, footnote 21. Two further cases decided by the Supreme Court itself totally ignored the complexities of the problem, and the implications of its own two precedents, and focused simply on the facts and addresses to the jury. In both Laroche, supra, footnote 17, and Lemire, supra, footnote 14, the court reversed the Ontario and Quebec Courts of Appeal respectively and found against the accuseds' claim of good faith belief in legal authority. In each case there was wrongful misappropriation of money by the accused and in both cases it was under the direction of the accuseds' superiors. The court rejected the defence on the facts, tacitly assuming (or so it seems) its general validity if the existence of the belief is supported by the evidence. As usual, it does not speak to the legal question involved when it dismisses for want of substantial injustice. No mention is made of the contrasting conclusions to be drawn from Watts, supra, footnote 30, and Shymkowich, supra, footnote 21, about whether a mistake of law could ever be a defence as the Courts of Appeal believe (again without mention of these). Of interest are the divisions in these cases, which largely conform to our pattern, though the reasons are purely fact-oriented.

In Laroche, Judson J. wrote for the majority in favour of conviction, Fauteux, Abbott, and Martland JJ. concurring. Cartwright and Spence JJ. wrote dissenting opinions, the latter one is joined in by Hall J. In Lemire, Martland J. wrote for the majority convicting the accused, with Fauteux, Abbott and Ritchie JJ. agreeing, while Taschereau and Cartwright JJ. dissented, Spence J. concurring in the latter's opinion.

(1965), 3 C.C.C. 55.
essentially a "factual" matter. Though Locke J. dissented on this point, Estey and Fauteux JJ. were neutral, and this court preferred Rand J.'s view (and rejected the text writers). The opinion is an extremely good analytical dissection of the issues and treatment of the relevant authorities, both case and textual.

A contrary conclusion was reached, a year later, by the Ontario Court of Appeal in Howson. Here the accused towed a person's car from a private lot where it was trespassing and the court agreed that Howson had a right to do so. However, the latter refused to deliver up the car until towing and storage charges were paid, as he did not have a right to do. The Court of Appeal reversed a conviction for theft, because of the defendant's bona fide and honest belief in his legal right to retain the car till the charges were paid. The court held that the theft was excused by a belief in a claim of right which was valid, even if misconceived, and whether or not the misconception related to the facts, law, or mixture of both. It read the course of authorities as defending the proposition of principle (contrary to Pace) and held that Shymkowich was not inconsistent with them. Locke J.'s opinion was held to be tacitly approved by Estey and Fauteux JJ., although not found to be substantiated on the facts (though here the court spoke of the honesty rather than the reasonableness of the mistake). The recent Court of Appeal decision in Laroche was held to be inconsistent with the Rand J. (and Taschereau J.) position, and the Ontario court felt that the Supreme Court reversal of Laroche was purely factual and thus tacitly approved the general legal principle.

Thus we see that four times the Supreme Court has been directly faced with this important issue of principle. Never once has it adequately analysed it or seen its roots in common law and statutory history. Never once has it assessed the competing social claims which underlie the basic issue. Except for the sparsely reasoned judgment of Rand J., never once has it stated clearly the rule it proposed to adopt to deal with the issue. It is impossible not to believe that this lack of clarity results from the lack of historical, analytical, and evaluative treatment. Canadian law is left with the direct conflict between two provincial Courts of Appeal.

C. The Varieties of Fault: Herein of Accident.

The concept of mens rea, the subjective element in the commission of crime, obviously must be understood in relation to the objective requirements for this offence. These objective elements,
the events which must occur, can be divided into three categories—the conduct of the accused, the circumstances in which it takes place, and the consequences to which it gives rise. We have already talked about the nature of the mental element which relates to the first two of these categories, the conscious voluntary character of the conduct and the actual awareness or lack of mistake about the existing relevant circumstances. What we are now to deal with is the response of the Supreme Court to the third form of subjective excuse, that the consequences required for the offence were the accidental products of the defendant’s conduct.

A variety of mental attitudes towards the consequences might possibly negative the defence of accident in our criminal law. A person may want the consequences to come about and choose to act for this purpose, either as his ultimate goal, as an intermediate means which is necessary to achieve it, or as an inevitable concomitant of the successful accomplishment of his ends. In the literature any one of these attitudes would be termed “intention”, on the assumption that each is equally blameworthy. If the consequence is not intended in any one of these senses, its occurrence is accidental. However, accidents may be produced as a result of the unreasonable and careless behaviour of the defendant, conduct creating an undue risk of this harm. If so, the accident can be said to result from his negligence.

Two further distinctions are possible between different forms of accident. The person may or may not have thought about the substantial possibility of the risk occurring and have decided to run the risk in any event for his own ends. Hence the negligence, the production of the consequence, may be advertent or inadvertent. The former kind of carelessness is conventionally called recklessness.91 Another and different line may be drawn across this subdivision though, based on the seriousness of the risk. The circumstances as perceivable by the actor may indicate a very great or lesser likelihood that more or less serious harm will materialize from his conduct. His failure to adopt appropriate precautions, whether advertent or inadvertent failure, can be described then as gross or slight negligence. Gross negligence may also be called recklessness.92 Although these two distinctions are logically quite different, it should be obvious as a practical matter that the compelling character of the risk will be an important factor in the fact-finder’s inference about whether the actor consciously perceived and then ignored it.

A very substantial debate has developed in the literature about

91 See, for example, Williams, The Mental Element in Crime (1965), Ch. 1, and s. 2.02 of the American Law Institute’s Model Penal Code, Proposed Official Draft (1962).
92 See, for example, Brett, An Inquiry into Criminal Guilt (1963), Ch. 4.
when it is appropriate for the criminal law to punish defendants whose conduct has produced prohibited but unintended and accidental consequences. It is fair to say that all of the participants in this debate accept the legitimacy of extending the criminal sanction from the area of intended effects to those which are produced by advertent negligence—recklessness in this sense. The dispute is joined over the further question of whether it is appropriate also to sanction criminal conduct which inadvertently produces harmful consequences, as a result of neglect in a seriously risky situation—what we might call gross inadvertent negligence, or recklessness in a second sense.

As far as the policy debate is concerned, what is important is not the words that are used, but rather the underlying psychological states they are supposed to denote. It is easy to understand how the overlapping categories of negligence, recklessness, gross carelessness, and so on can lead to conceptual confusion. The gravaman of the real debate, though, is the question of whether criminal law should be used to stigmatize only conscious decisions to produce a risk with harmful results, or should also be resorted to as a means of deterring inattention which may be just as dangerous. I would suppose that even the adherents of the latter position would want to single out only those who are capable of meeting the objective standards of care prescribed by the law and would find offensive any strict liability for the few who are abnormally incapable of doing better. Assuming that distinction, though, the question still remains as to how attenuated the concept of fault or mens rea should be made as it is extended into the area of inadvertent accidents.

As can be seen from the foregoing, the distinctions and possibilities are numerous and complex here. I have merely indicated the nature of the main dispute without canvassing the extensive arguments that are made on both sides. The question is similar in principle to one I spoke of earlier, whether an unreasonable mistake about existing circumstances is an acceptable alternative to both mens rea or strict liability. Unlike the latter, the problem of fault in accidents has come up consistently before the Supreme Court, in a family of related cases involving driving offences. The opinions in these cases indicate a total lack of appreciation of the distinctions and arguments I have talked about. Perhaps it is most charitable to assume that the court was confused by the context in which the problem arose, the constitutional division of

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83 See Hall, Negligent Behaviour Should Be Excluded From Penal Liability (1963), 63 Col. L. Rev. 632.
authority in respect of penalizing the conduct of negligent drivers.

The first case, O'Grady v. Sparling96 involved the question of whether the Manitoba Highway Traffic Act validly made careless driving a provincial offence, in the face of the Code prohibition of criminal negligence in driving. The Supreme Court in this case, and in R. v. Stephens97 held that the provincial offence was constitutionally valid.

There were two issues in the case. First, did the provinces have the right to create such legislation at all, in the face of the constitutional allocation of exclusive legislative competence in the field of "criminal law" to the federal Parliament? Here the majority judgment of Judson J.98 held the provinces did have this right, for purposes of regulating provincial highways. The dissenting judgment of Cartwright J.99 disagreed, saying that punishment of careless driving was the exercise of the criminal law power. The next question was whether the actual exercise of the federal criminal law power to create the offence of criminal negligence on the road rendered the prima facie valid provincial legislation inoperative or whether they could each live concurrently. The same division of opinion continued to uphold the present validity of the provincial statute. It is in this second context that our own problem came to the fore as the judges attempted to discern the meanings and relative compatibility of these two provisions.

In this regard, what is of interest is that both opinions, concurred in by all the nine judges on the court, agreed that criminal negligence meant advertent negligence. Both Judson and Cartwright JJ. refer to Williams and Turner's edition of Kenny100 for the conceptual distinctions I referred to earlier. Criminal negligence, defined by the Code as the wanton and reckless disregard of the lives and safety of other persons, is now stated to mean advertent attention to these consequences. Cartwright J. agrees with Judson J. that this equation of criminal negligence under the Code with recklessness as thus defined makes it quite different from the inadvertent negligence which is sufficient for careless driving. The latter argues though that a decision by Parliament to punish only advertent negligence on the highway carries with it the negative implication that inadvertent negligence should not be punished. His theories of constitutional concurrency did not carry the day.

Of importance here is the almost inadvertent character of the

96 Supra, footnote 10.
97 [1960] S.C.R. 823. The line-up in this case was exactly the same as in the earlier decision.
98 Kerwin C.J., Taschereau, Fauteux, Abbott, Martland and Ritchie JJ. agreed.
99 Locke J. concurring.
policy decision which had been made about the basis of criminal liability for negligence. Because the court's attention is focused on the constitutionality of provincial legislation, it does not really see the policy implications for the criminal law of its interpretation of the "criminal negligence" section, one which applies to many other offences besides driving an automobile. In particular, it did not advert at all to the historical debate between common law judges and academics about the proper reach of criminal punishment. I believe the court is right in deciding that "recklessness" requires advertent foresight of consequences but it is not a sufficient reason for this conclusion that two English text writers have reached this conclusion about their own common law, and even then with some necessary qualification. What the court should have done was to relate this conclusion to the basic policies of blameworthiness in the criminal law which limit punishment to those who voluntarily choose to break the criminal law and risk the creation of prohibited harms. If the court had seized this opportunity to think about a general principle or presumption concerning the minimum kind of culpability which should normally be necessary for criminal guilt, it might have avoided the tortuous rationalizations in the rest of this sequence of decisions.\footnote{It might also have prevented the difficult to justify decision in \textit{R. v. Rogers} (1968), 4 C.C.C. 278. Apparently the Supreme Court refused leave to appeal from this case which limited its subjective interpretation of criminal negligence.}

At the time of \textit{O'Grady v. Sparling}, the only existing federal legislation was that relating to criminal negligence. In 1961, though, there was enacted into the Code a prohibition of driving "in a manner that is dangerous to the public, having regard to all the circumstances"\footnote{S. 221(4).} Of course, this would raise anew the issue of the continued viability of provincial careless driving legislation which had only been held valid vis-à-vis "criminal negligence". The question reached the court in \textit{Mann v. The Queen},\footnote{\textit{Supra}, footnote 53. The same issue was also disposed of by the same court in \textit{R. v. McIver} [1966] S.C.R. 256.} where a High Court judge had held the careless driving section inoperative in the face of the "dangerous driving" provision, because both penalized the same conduct and each was satisfied with only inadvertence as to this conduct. The Supreme Court upheld the Ontario Court of Appeal, which had reversed Mr. Justice Haines, and sustained the continued operation of "careless driving".

Cartwright J. wrote the most comprehensive decision, however defective it was. He indicated his respect for precedent by conceding the questions of provincial power he had unsuccessfully advanced in \textit{O'Grady}. The question that remained, though, was
whether there were sufficient differences between federal and provincial provisions that the latter retain independent validity. Cartwright J. was able to answer in the affirmative because he felt that "dangerous driving" required advertent disregard of the consequences, and not simply the inadvertent negligence of careless driving.

How did he arrive at this conclusion? Of course, he did not address himself to the desirability of one interpretation rather than another in the light of the established objectives of the criminal law. Instead he referred to an earlier decision of the Quebec Court of Appeal, where Casey J. had interpreted an earlier version of the dangerous driving section as requiring a "moral element" not necessary for ordinary negligence, to wit "knowledge or wilful disregard of the consequences". According to Cartwright J., Parliament must have been aware of this interpretation and intended to adopt it when they re-enacted the provision. He recognized that the earlier statute, which had been repealed, had contained the word "recklessly" which was not in the new or otherwise identical section. However, he did not find significant the omission of this very word "reckless" whose definition he had read into the "criminal negligence" section. Nor did he advert to the problem of why Parliament would want to enact a new statutory crime which was identical to one that had very recently been interpreted authoritatively by the Supreme Court itself.

Fauteux J. just asserted that the "dangerous driving" and "careless driving" provisions differed in subject-matter, legislative purpose, and legal and practical effect, and thus both could operate concurrently. Spence J., while agreeing with Cartwright J., seemed to find another kind of difference, in the kinds of conduct which satisfy both sections. Danger to other persons is not a necessary ingredient of careless driving, which may be satisfied by inconvenience to, or obstruction of, others. Ritchie J. Simply stated that the sections dealt with different subject matters, since "careless driving" would cast a wider net over conduct than would "dangerous driving". He said that Parliament by section 221(4) has not created a crime of inadvertent negligence. He did not say that Parliament intended to create a crime of advertent negligence. Judson J. in the final analysis, ended up by concurring with all of these varied and contrasting positions, except that of Spence J.

The effort up to now had been to save provincial legislation, perhaps a commendable objective in the Canada of the Sixties.

106 Abbott and Judson JJ. concurring.
107 Martland and Judson JJ. concurring.
The fall-out created in the process, though, would require further effort to make sense of the operation of the three sections, especially "dangerous driving". When persons were charged under the latter section, it would no longer be sufficient to speculate about differences between it and the "careless driving" clause. Differences there had to be because of Mann, but some specific standard had to be articulated giving precise meaning to the term "dangerous driving". Perhaps the most intensive effort was that of the Ontario Court of Appeal in R. v. Binus. There the court held that criminal negligence and dangerous driving were distinguished as advertence and inadvertence, while dangerous driving and careless driving, both involving inadvertence, were distinguished by the nature of the consequences themselves. Dangerous driving actually creates a danger to the lives or safety of the public (though not necessarily results in harm) while careless driving may be such without any risk of harm. Either one may be satisfied by inadvertent deviation from reasonable care, whether very considerable or slight.

When the case reached the Supreme Court, the conviction was unanimously confirmed, but not this reasoning. Two judges did agree with Mr. Justice Laskin's Appeal Court judgment, Judson J. holding that the inadvertent failure to exercise reasonable care is sufficient if it is in fact dangerous to the public. Cartwright J. in a two-page judgment, rejected the arguments in Laskin J.'s page opinion. He agreed that the Laskin and Judson JJ.'s position was most persuasive on the merits. However, he felt constrained to follow the binding precedent of Mann, where, or so he found, five of the seven judges had held advertent negligence necessary for "dangerous driving". Such remarks were not obiter in that case and hence had to be followed, in the absence of compelling reasons not to do so. Because he felt the charge sufficient in any case, he upheld the conviction.

Neither of Cartwright J.'s propositions appears to stand close analysis. As far as the merits are concerned, the Laskin-Judson JJ. proposal has very little to offer. It must be remembered that the federal government was enacting criminal legislation as part of the Criminal Code. Interpreting what it has done and implementing its will requires that the court look at its product from this point of view, no matter what difficulties it may have created for itself in its constitutional efforts. In this regard, the first question is whether there should be a strong presumption in favour of advertence—of conscious decision to run the risk—as

109 Supra, footnote 11.
110 Taschereau C.J. agreeing.
111 Ritchie and Spence JJ. concurring.
112 Supra, footnote 53.
a condition of criminal blame. In the light of the answer to this, the second question is whether Parliament has made a sufficiently clear statement of its will to the contrary.

If we think that "dangerous driving", read in conjunction with "criminal negligence", must be interpreted as involving only "inadvertent negligence", then the Laskin-Judson JJ. version of the latter just does not make sense, within the perspective of the criminal law. After all, we are trying to influence conduct—human behaviour—and our definitions must then refer to the situation from the point of view of the actors at the time this conduct occurs. The question as to danger, then, must not be whether it in fact existed, but rather whether the actor did or should have realized it existed while he was driving, and thus should have taken steps to have avoided it. Of course, Haines J.'s earlier judgment in Mann is then correct, that (except perhaps for some rare and trivial instances), the same question is raised for careless driving. It is because the driver should perceive danger in a situation that his failure to adopt appropriate precautions is "careless".

This does not mean that no rational distinction can be drawn between "dangerous" and "careless" driving. All that is necessary is that we drop the corollary to the Laskin-Judson JJ. opinion, that any deviation, whether slight or considerable, from the standard of reasonable care is sufficient for both offences. Obviously there are real differences in the kinds of harm which can be caused, the imminence of the risks being realized, and the indifference to the precautions which are available. We already make much the same kind of distinction in tort law between "gross" or excessive negligence and the "ordinary" variety. Surely this is a more rational distinction between "dangerous" and "careless" driving than the one that all judges in the case find "most persuasive".

I do not contend that this is the meaning of the distinction which the federal legislature "intended" in passing section 221(4). The word "dangerous" is not self-defining and a perusal of the legislative history in Hansard shows they were not quite sure what they intended but, at least, that they did not think about this point. However, the court's constitutional decision in O'Grady and Mann set an authoritative framework in which the court had to work out a rational adjustment between the three offences. If one considers the point of the whole definitional exercise—the imposition of different grades of penalty, some of which carry the stigma of the Criminal Code—this kind of differentiation at least makes sense and is not incompatible with the evidence we have of the legislative will.118

But of course Cartwright J.'s majority judgment did not accept the Laskin-Judson JJ. approach. Although it would have liked to do so, the constraints of stare decisis precluded this. Was the court really bound by this precedent in the way Cartwright J. suggested, because this is what five of the seven judges said? If we reread Mann, though, we find that only Cartwright J. explicitly said that advertent negligence was required for "dangerous driving". Spence J., who agrees with him here, suggested quite a different distinction in Mann, in fact one that was a precursor to the Laskin-Judson JJ. approach. Ritchie J.'s judgment is totally ambiguous, although he now also agrees with Cartwright J. It is hard to find the two dissenters, since the last position, that of Fauteux J., was the opinion of three judges (Abbott and Judson JJ. also). Perhaps Cartwright J. wished to include Judson J. among the five who agreed with him, since Judson J. said he did. Yet Judson J. now says he does not and writes an opinion adopting what was, in effect, the Spence J. position in Mann, the only one he did not agree with in Mann. One might conclude by saying that this is a rather tortuous way to find a precedent which obligates a majority to reach a conclusion which it feels unpersuasive on the merits.

Yet, perhaps this is all legalistic irrelevancy. The court has required, in a rather roundabout way, that criminal prosecution under the Code for improper driving requires proof of a conscious, fully voluntary effort. Good arguments can be made (although they were not made) that this is a thoroughly desirable restriction on the imposition of the stigma and condemnation inherent in criminal punishment. Perhaps, though, the inadequacy of the means utilized to reach a defensible result can return to haunt the court.

Since my writing this article the court has decided the case of R. v. Peda,114 a decision of the Ontario Court of Appeal convicting the defendant of "dangerous driving" over the dissents of Laskin J.A., in the Court of Appeal and Cartwright J. in the Supreme Court. The essence of the dispute on appeal concerned the trial judgment's direction which simply read and then paraphrased the statutory definition of the crime. Laskin J.A. and Cartwright J. held that some explicit reference to the "advertent" character of the offence was necessary. The majority in each court disagreed.

As was stated earlier, Laskin J.A. had written the opinion in Binus which held that dangerous driving could be committed "inadvertently". Naturally enough, he read the Supreme Court's Binus opinion and decided that his earlier view of the law was rendered invalid. Amazingly enough, every judge on the Supreme

Court, including Cartwright J. did not agree that *Binus* had that effect. The court did not purport to over-rule *Binus* (although, parenthetically, some judges felt they had the power to do so), because none of the judges felt that Cartwright J.'s earlier statements were a binding authority. Notwithstanding the majority status of his opinion, the fact that he eventually upheld the conviction made all statements in favour of the defendant *obiter*, because they were not necessary steps on the way to the actual decision.

Such a theory of *stare decisis*, and the *ratio decidendi* of a case is ingenious to say the least. When the highest appellate court is faced with a general legal question, one which has been raised in great depth both in argument and in the lower court decision, and then speaks very clearly to this legal question, it just does not make sense to say that its opinion is not an authoritative precedent. Surely it is irrelevant that, after making its decision on the legal question, the opinion goes on to hold that this rule does not apply for the benefit of the party which had contended for the rule itself. On this court's theory, the statements in *Hedley Byrne*, for instance, about duty of care with regard to negligent misrepresentation are merely *obiter* because the House of Lords later found the duty did not obtain in the concrete situation.

The fallacy in the court's position lies in its failure to consider the reasons for *stare decisis* itself in determining what statements in an opinion are its authoritative and binding *ratio*. Surely the demands of predictability, objectivity and fairness in legal reasoning require that Cartwright J.'s remarks in *Binus* be given the same status no matter how he evaluated the particular facts of the case. Of course, I do not doubt that the court should be able to over-rule its earlier decisions in certain cases, perhaps including this one. If it does, though, it should be aware of the significance of this step.

What did the court decide about the proper definition of "dangerous driving"? Cartwright J., while agreeing that *Binus* was not binding, stuck to his curious theory that "advertent negligence" was required by *O'Grady* and *Mann*, because the court had held there that "inadvertent negligence" was not sufficient. The majority opinion of Judson J. agreed that the section did not create a crime of "inadvertent negligence", (because of *Mann*). However, he thought that the section itself was crystal-clear in meaning; the jury instruction was perfectly adequate in simply repeating it. Presumably he means to incorporate by reference the interpretation suggested by Laskin J.A. in *Binus* and accepted

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116 Hall and Spence JJ. concurring.
117 Fauteux, Abbott, Martland, and Ritchie JJ. concurring.
then by Judson J. Whatever else might be said about the merits of this theory, it is fair to say that the section does not immediately, lucidly, and explicitly express it to a jury without elaboration.

The final opinion of Pigeon J. is even stranger, and the oddest fact is that Ritchie J. also joins in this opinion as well as that of Judson J. Pigeon J. construes *Mann* as having held that dangerous driving requires *mens rea* because it is a criminal offence and thus is different from a regulatory or statutory offence. Earlier he had agreed that *mens rea* consists of either intention or recklessness. Pigeon J. then says that "dangerous driving" cannot be committed by inadvertence, and thus agrees with the minority on this point. However, he holds that the jury instruction must refer to *mens rea* only if the evidence might support a relevant finding. Since he did not feel this was possible here, he upheld the conviction.

The oddity of Ritchie J.'s behaviour, and the importance of it, thus becomes apparent. Four judges—Cartwright, Spence, Hall, and Pigeon JJ.—clearly think dangerous driving is a *mens rea* criminal offence. From this opinion, as well as in *Binus*, Judson J. does not agree, and the same appears true of Fauteux, Abbott and Martland JJ. Ritchie J. appears to agree with both Judson and Pigeon JJ., whereas in *Binus* he agreed with Cartwright J. How lower courts will react to this situation is purely speculative. If we retreat to behaviouralism, it does appear that they can hardly go wrong if they uphold all provincial statutes and convict all defendants. At least it appears that a consistent thread in the Supreme Court decisions has been their concern to put no roadblocks in the way of control of driving behaviour. That this involves the risks of real injustice to individual defendants who can be charged with two different offences for the same conduct, and thus are subjected to coercive plea bargaining and irrational exercise of prosecutorial discretion, does not appear as yet to be of great concern to the Supreme Court.

D. *Presumed and Constructive Intent*.

Up to now, the facet of *mens rea* which involves intention of, or advertence to, the consequences has been considered in the context of cases where the consequences did not occur. The driving offences we have been talking about penalized conduct which (knowingly or unknowingly) created the *risk* of certain harms resulting. The cases with which this section is concerned dealt with situations where the harm did result—the consequence of death—and the question is whether the defendant should be held responsible for it. The assumption in each is that the statute does not permit strict liability and some form of *mens rea* is required. The issues raised concern the existence of presumptions or other special rules for imputing the required *mens rea*
to the defendant, such special doctrines being especially prevalent in the criminal law of murder.

What makes this area of our concern so noteworthy is the presence of the greatly discussed and heavily criticized House of Lords decision in *D.P.P. v. Smith.* This case held that, in the English law of capital murder, the defendant's guilt was satisfied by conduct on his part causing death where a reasonable man would foresee it causing grievous bodily harm. In effect, murder can be committed by a stupid person's inadvertent negligence. Now, as was said earlier, we must make inferences about intent or advertence from conduct, as well as from credible statements of the actor on the stand. The question is whether such conduct should create a presumption, rebuttable or irrebuttable, of the existence of the necessary mental state? Should the trier of fact be forced to decide simply on the basis of the objective character of the conduct or should he be allowed to believe or disbelieve verbal protestations about the accused's intent?

The question arises in two separate contexts in Canadian law. The first is the review of jury charges concerning factual inferences of intent and how far it is proper to speak of presumptions here. The second is the interpretation and elaboration of the Canadian law of constructive murder, committed in the course of certain named offences. Conceptually the two are distinguishable. The first speaks in terms of presuming or imputing an actual intent while the second imputes legal responsibility for the consequences without regard to whether there was any *mens rea* at all. However, if the doctrines of presumption are extended as far as they are in *Smith,* then, as a practical matter there is no real difference in their operation.

The effect of the Supreme Court's conception of its role—its default on the job of being a supreme appellate court of Canadian criminal law—is amply illustrated here. An early case, *Wu v. The King,* did use the language of presumption of intention of the natural consequences of one's acts. The main modern case, *Bradley,* directly and explicitly poses the issue, but the court never...
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seems to consider it a significant legal problem, and does not mention Wu, or, indeed, any relevant precedent. Finally, as was stated earlier, Ritchie J. in King, in an obiter discussion of the effect of impairment from the voluntary consumption of alcohol, did speak of the objective character of mens rea with reference to mistake. Not only did he not mention Smith,\(^{122}\) the very recent English cause célèbre, but he did not perceive the relevance of Bradley or O'Grady, which went in the opposite direction in defining mens rea with reference to accident.\(^{123}\)

The second doctrine in this area, normally called "constructive murder", involves the interpretation of the Code's provisions which incorporate and define the common law of murder during the commission of offences. Using a wide variety of mental states, the Code enunciates different kinds of conduct which will lead to a conviction of capital murder if death results from the accused's committing one of a series of indicated offences. The typical case in which death results involves the commission of robbery, and this gave rise to four Supreme Court cases in this area.

the natural consequences of one's acts and the accused was convicted. This was affirmed by the Court of Appeal and by the Supreme Court of Canada, the latter by a majority of four to three. All of the judgments treated the case as involving only narrow factual issues of the proper interpretation of the evidence and the compatibility of the jury charge with the evidence. The tacit assumption of all appears to be that speaking of a presumption of intent is incorrect if it purports to be any more than an aid in discovering the actual intent of the accused. (This is the interpretation of this case by Beck and Parker, The Intoxicated Offender—A Problem of Responsibility (1966), 44 Can. Bar Rev. 563, at p. 605 et seq., and Ryan, The Objective Test of Criminal Liability (1960-61), 3 Crim. L.Q. 305, at p. 320 et seq.). No reasons are given in favour of this conclusion, no cases are cited in support of it, and no clear statement is made about it. All the discussion is directed to the question of whether, notwithstanding the erroneous charge, any substantial wrong or miscarriage of justice occurred.

As regards this focus of the case, what is important for our purposes is that the lineup of judges on this narrow issue of judgment aptly reflects our general attitudinal conclusions. Fauteux J. writes one majority opinion, Locke J. another and narrower one for the same conclusion. Cartwright, Rand and Nolan JJ. each wrote opinions, all making the same points, that knowledge of the skull fracture was critical and had to be brought home to the accused. The jury's function of deciding this was usurped by the trial judge and by the court majority here.\(^{124}\) Supra, footnote 44.

\(^{122}\) The real maker of Canadian law in this area has been the Ontario Court of Appeal. In R. v. Gianotti (1956), 23 C.R. 259, it held that there was no presumption of law that a person intends the natural consequences of his lethal acts. This case, which deals with the authorities and issues, was followed in later cases, in Ontario (R. v. Ortt, [1969] 1 O.R. 461) and British Columbia (R. v. Carter (1966), 56 W.W.R. 65). In fact, in the final case (Ortt), the court went farther to disapprove of all language of presumption here, even factual, because of the suggestion of an onus on the accused. With eminent good sense, it told trial judges to speak to judges in terms of "reasonable inferences" about intention from "natural consequences of acts". It is to be hoped that this attitude will also be reflected in the Supreme Court.
Although none of the cases advert to this kind of argument it is pertinent to inquire what purpose might motivate legislative creation of constructive murder. After all, if a person is committing an offence (or attempting to do so), he will be subject to some punishment. The imposition of a further capital penalty for accidental death which results may reflect legislative condemnation of particularly wicked conduct or the desire for vengeance on behalf of the deceased. More charitably, it evidences great concern for deterrence of peculiarly dangerous methods of committing offences, especially the use of guns or stopping the victim’s breath. \(^{124}\)

The first case, decided by the pre-1949 court, *King v. Hughes* \(^{125}\) reversed unanimously a conviction of capital murder where a gun was discharged accidentally in a struggle with the storeowner during a robbery. The lack of a voluntary act in discharging the pistol precluded a murder conviction following inevitably. As a result of this case, the federal Parliament enacted (the present) section 202(d) which the court in *Rowe v. The King* \(^{126}\) interpreted as involving strict liability for death occurring because of the use of a gun in a robbery.

Of interest in the second case is the apparent reversal of attitude to the extension of constructive murder. Only Cartwright J., in dissent, holds that the general principle of *mens rea* in murder should be considered over-ruled by Parliament, only when and so far as appears clearly necessary from its language. All the others, in judgments written by Kerwin \(^{127}\) and Kellock JJ., hold that “flight” includes a situation over one hundred miles from the robbery while no pursuit at all was in progress. Rinfret, Kerwin and Taschereau JJ. had concurred in the narrower interpretation of the section in *Hughes*. I do not deny that their view of “flight” as involving simply the subjective appreciation of the accused is a viable reading of the language. It is obvious, though, that this is not inevitable and nowhere do they attempt to meet Cartwright J.’s mention of principle with anything more than dictionaries, certainly not with any practical arguments.

The final two cases in this sequence, *Cathro v. The Queen* \(^{128}\) and *Chow Bew v. The Queen* \(^{129}\) again come down to a difference about the evidence and the significance of the trial judge’s charge to the jury. All of the judges appeared to agree about the general

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\(^{124}\) See discussion in Edwards, Constructive Murder in Canadian and English Law (1960-61), 3 Crim. L.Q. 481, at p. 506.


\(^{127}\) Rinfret C.J., Taschereau, Estey, and Fauteux JJ. concurring.


\(^{129}\) [1956] S.C.R. 124. See discussion of these cases in Ryan, *op. cit.*, footnote 1, at pp. 82-84.
issues of law, the relationship of the constructive murder sections to the provisions defining parties to such an offence. The question which divided the court was again the narrow question of how this general set of doctrines should be applied to the facts of one case.130

E. Capital Murder—"Planned and Deliberate".

The problems presented by these cases are exactly the opposite of those raised in the earlier section. Instead of dealing with doctrines which weaken the protection afforded by the normal requirements of mens rea, the court here was forced to deal with statutory language intended to add a further degree of blame-worthiness to the elements of the offence. Section 202A was enacted in 1961 to formulate a distinction between capital and non-capital murder, the point of the distinction being to indicate which homicides were or were not to be subject to capital punishment—

130 Both defendants participated in the same robbery in which the store owner was killed. However, each was tried separately and the relevant evidence which became part of the record was different. Each was convicted at trial, the convictions were both upheld by the British Columbia Court of Appeal, but the Supreme Court reversed Cathro's conviction while upholding Chow Bew's verdict. Cartwright J. was in favour of reversal in both cases, Fauteux, Taschereau and Locke JJ., approved the conviction. The swing votes were Rand and Kerwin JJ., while Estey J. who joined in the majority in Cathro, was ill by the time Chow Bew was decided.

The pattern of law which emerged from the cases is a relatively clear resolution of some difficult problems of integrating different sections. Section 202 (then s. 260) dealt with the responsibility of either of the accused on the assumption that either committed the killing himself. Death was as a result of strangulation and liability would then be based on negligence about grievous bodily harm. The defence of both, though, was that the other caused the death and thus each could be guilty of constructive murder only if section 21 (then s. 69) came into play so as to impute responsibility to him for the consequences of this conduct. The dissenting opinion in Cathro, by Fauteux and Taschereau JJ. was willing to find him, on his own evidence, a party under section 21 because of his actual participation in the conduct which caused death. The majority held that this was factually ambiguous and the jury should have been more adequately instructed about liability merely from participation in a robbery.

In Chow Bew there was no evidence at all about what went on during the same robbery, although evidence harmful to the accused had already been considered in Cathro. Rand and Kerwin JJ. apparently changed their minds about the necessity of instructions detailing the different results which would flow from different ways in which the robbery might have occurred. They were unwilling to give Chow Bew the right to have a jury decide whether Cathro committed the murder in the way Cathro had attributed to Chow Bew in his own trial. Cartwright J. said that, notwithstanding the lack of evidence, this question should be put to the jury. How much this kind of disagreement about the judge's role reflects differences in attitudes about mens rea and constructive murder is moot. The division does occur along the behavioural indications of attitude, though, including, especially, the voting pattern in Rowe. Moreover, it is obvious that greater concern for the jury's role, and relative non-use of the "substantial wrong or miscarriage of justice" test for assessing charges to the jury, would be favourable to the accrued on appeal even though the desirability and importance at trial of precisely correct trial charges may be very debatable.
hanging. Assuming that culpable homicide is murder, whether intended under section 201, or constructively under section 202, it becomes capital if the jury also finds that it was “planned and deliberate” (or falls into two other categories irrelevant for our purposes). Of course, this legislative language, although indicating to some extent Parliament’s will, is not automatically self-defining for all purposes. In its short-lived span of six years (capital murder was further narrowed in 1967 by dropping these kinds of homicide), the Supreme Court was faced with several problems to which the language spoke only obliquely.

The first, and most interesting, of these cases was More v. The Queen, where the court reversed a Manitoba Court of Appeal judgment that had upheld the conviction of the accused for capital murder. The accused had murdered his wife and unsuccessfully attempted to commit suicide, all because he thought she would be unhappy when she learned of his financial difficulties. There was substantial evidence of planning of the murder, of steps taken over a period of several days leading up to its commission, and then further steps taken after it and before the suicide attempt. The defendant claimed, though, that the trial judge had inadequately instructed the jury about evidence of psychiatrists that he was suffering from a depressive psychosis resulting in an impairment of his ability to reach decisions. He disclaimed any defence of insanity and asked that this evidence be related only to the question of capital murder.

Cartwright J., in a short two-page judgment said that “deliberate” adds something to the requirement of “intention: and that this medical evidence is relevant to the question. Though this testimony would not satisfy the ‘insanity’ requirements of section 16, the latter is relevant only to the question of intention and murder, not deliberateness and capital murder”. He added that he wished these remarks confined to the specific facts of this case. Judson J., whose opinion only discussed the evidence, agreed with Cartwright J. about the law.

Fauteux J.’s opinion seems almost directed to another case, because he finds a debatable and intellectually challenging problem, one worthy of more than just a conclusion. In trying to give meaning to the word “deliberate” he looked at both English and French dictionaries and reached the conclusion that some reference to a time element was intended. He concludes that Parliament wished to exclude all impulsive murders from the capital category. However, a murder may be planned, and not impulsive, notwithstanding the fact that it is irrationally motivated as the result of

131 Supra, footnote 9.
132 Abbott, Judson, Ritchie, and Hall JJ. concurring.
133 Taschereau C.J. agreeing.
the accused's irresponsibility and mental impairment. To make the latter factors relevant, in this mitigated way, is to introduce a form of diminished responsibility, analogous to the recent English experiment. However, the Canadian Parliament, which must have been aware of the latter, did not choose to do this explicitly. It should not be presumed that Parliament would change fundamental rules of criminal responsibility and insanity unless this is clearly expressed, and he cites an American text[^1] to show that this result is inconsistent with general principles.

It seems clearly true to me that Fauteux J. is right about the significance of the innovation the majority are making in this case. Surely if a person was perfectly sane, and planned to kill someone and make elaborate preparations and took steps over an extended period of time, he could not claim exemption here because he finally committed himself only at the last minute. Yet this appears to be the kind of use to which the majority wishes this evidence put, as Cartwright J.'s cautionary remarks indicate. This is unfortunate, because Fauteux J.'s position, however more sophisticated than the others, is not free from difficulties.

As is typical of his opinions, Fauteux J.'s very intelligent arguments are within a very narrow compass, flowing from its origin in a dictionary. He does not advert to the whole point of the legislative exercise, to single out a category of offenders for whom this harshest of penalties is to be reserved. When we look at the question from this perspective, what is wrong with the conclusion that a person whose responsibility is impaired should not be included in this category? The phrase "planned and deliberate" indicates the legislative judgment that rational and cold-blooded murders, which usually are for gain, require this extra deterrence. It is true that it thus excludes the less rational, impulsive, situational kind of homicide but should not this same objective require exclusion of those who murder as a result of impairment of their reasoning faculties? The language Parliament used does not seem to preclude it.[^2]


[^2]: A year later, a somewhat similar case arose in McMartin v. The Queen, [1964] S.C.R. 484, where the evidence was supposed to show that the accused might act impulsively, unpredictably, dangerously, and without provocation. All of the judges agree with Ritchie J., including Fauteux J., and Taschereau J., that the evidence is admissible for the capital murder issue, simply citing a passage from Cartwright J. in More as an authority. When a question appears clearly decided, an earlier dissenter will accept the precedent rather than adhere to his former position. Of greater interest, though, are Cartwright J.'s own doubts about the nature and strength of the More precedent, doubts which he expressed in The Queen v. Mitchell, [1964] S.C.R. 471.

Here the accused had won an appeal in the British Columbia Court of
F. Drunkenness and Criminal Guilt.

The case of *R. v. George* is the leading Canadian authority in the very complex and difficult area of intoxication and the criminal offender. It illustrates quite clearly the typical, even exclusive mode of reasoning adopted in our Supreme Court. Consideration of its impact and subsequent treatment in our lower courts of appeal amply demonstrates the deficiencies of such a process of decision-making, either in establishing authoritative legal rules for the country or in imparting any trace of rational quality and principle into the rules that flow from the institution.

George was accused of robbery and acquitted at trial because the judge concluded that the evidence of his intoxicated state created a reasonable doubt of his intention to steal money from the victim of his violent blows. The Crown appealed on the basis that common assault was an included offence and the trial judge should have convicted George for this offence. At the Supreme Court level this contention was upheld by a majority of four to one. The dissenter, Locke J., did not address himself to the question of drunkenness and *mens rea*, since he felt the Crown should not be able to raise the issue of included offences for the first time at the appeal level.

The majority judgments of Fauteux and Ritchie both start with the assumption that the House of Lords decision in *Beard* is the *locus classicus* of our law. I do not deny that such a conclusion is legally defensible but I would assert that it is not inevitable. There is no statutory mention of drunkenness as a defence under the Criminal Code and thus no statutory requirement of *Beard*. Section 7(2) of the Code speaks of the preservation of the common law defences but our Code was enacted long

Appeal on the grounds that the trial judge had not sufficiently directed the jury on the independent significance of evidence of drunkenness and provocation to the question of capital murder. The majority judgment of Spence J. (Taschereau C.J., Fauteux, Martland, and Ritchie J.J. concurring), extends the logic of the *More* opinion to its widest reach, again its only reasons being the short quotation from Cartwright J.’s opinion in *More*. While Fauteux J. continues to concur in the extension of the position he earlier disapproved of, Cartwright J., who originally proposed it, now has his doubts. He said there were special facts in *More*, not present here, which likely differentiated the two. However, he would not make a final decision about this point because he was able also to uphold the appeal on a third evidentiary ground. Yet this is a rather strange attitude to take, since the majority was deciding the general legal question even if he was not, and their conclusions would prove binding in later cases even if he disagreed. Cartwright J.’s decision to withhold the arguments he might make, though, is something which is symptomatic of his conception of his role as adjudicator of specific disputes, rather than appellate court developer of Canadian law.

136 *Supra*, footnote 13.
137 Taschereau J. concurring.
138 Martland J. concurring.
139 *[1920] A.C. 479.*
before *Beard*, and the drunkenness defence had undergone several historical mutations up to then.\(^{140}\)

There is no reason to suppose the process had to stop at *Beard* for Canadian purposes, and there exists some decisional authority for regarding a specific Canadian law as legitimate.\(^{141}\) The growth of the common law, both in Canada and England, in respect of the defence of automatism shows the capacity for judicial development of the basic principles of the criminal law of excuses.

There was a good "legal" reason for treating this question as closed in Canada, though, but this reason was not mentioned in the *George* opinion. The Supreme Court of Canada had already, in *McAskill v. The King*,\(^{142}\) decided that the *Beard* rules were the Canadian law of drunkenness as a criminal defence. As is usual, though, in *George*, the court treated its own precedents as irrelevant, while viewing the English case as something akin to Holy Writ. If the latter is a little exaggerated, the analogy to a statutory enactment is not. A passage from *Beard* is extracted, out of context, and treated as an exhaustive statement of the common law defence, to be interpreted in accordance with the specific language used. The court does not see its task as the analysis of this language within the context in which it was used, as a step in the elaboration of a common law principle to be used in the solution of a social problem, only one instance of which occurred in *Beard*.

The significant issue raised by the language in *Beard* was the distinction between general and specific intent. Does this distinction have any real content? If it does, should it be part of our law?\(^{143}\) The issue was clearly posed in the questions of law presented to the court, since the first asked whether evidence of drunkenness "was relevant not only to the specific or special intent" but also to "the ordinary *mens rea* which is a constituent of all crimes". The response of the court was, to say the least, ambiguous.

Both Fauteux and Ritchie JJ. cited *Beard* and made a distinction between intention in the sense of awareness or knowledge of what was done and intention in the sense of the ulterior purpose or objective for which conduct is undertaken. This could be said to define the distinction between general and specific intent and only the latter could be rebutted by evidence of intoxication. Yet, after holding that only the second intent was excluded by the judge's acquittal for robbery, both judges seemed to treat the relevance of intoxication to the first kind of intent as a problematic

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\(^{140}\) Especially as regards the validity of the *Beard* statements about proof.

\(^{141}\) As we shall see for both insanity and provocation.


\(^{143}\) The best discussion is Beck and Parker, *op. cit.*, footnote 121.
issue of fact. Though Fauteux J. suggested it might be metaphysically impossible to be so drunk as not to know one is assaulting (applying force to) another, both held, as a matter of fact, that there was such knowledge here despite the intoxication. The conviction for assault followed only after this latter conclusion.

The ambiguity showed up in two subsequent lower court cases, Vandervoort and Boucher. The first difficulty stemmed from the inadequacy of the analytical distinctions made in George. The opinions in the latter contrasted awareness of our action or conduct (making it voluntary) and desire of or advertence to the consequences which are the objective of our conduct (making it intentional). As we have seen, though, there is the further issue of the awareness of the circumstances which make conduct (or its consequences) criminal, which may fail by reason of ignorance or mistake. For instance, in the Rees situation, a person may have intercourse with a girl who is in fact under the age of sixteen and want to introduce evidence of his intoxication to support his claim that he was unaware of this factual circumstance. Each of these two provincial appellate cases raised the question of whether drunkenness could be used to negate awareness of a girl's refusal to consent to intercourse when the offender is charged with rape. Boucher held that rape does not require a specific intent and thus drunkenness is no defence. Vandervoort disagreed. Both relied on Beard as interpreted by George.

However, this analytical inadequacy is not the major defect of the court's effort in George, since they might well respond that the distinction they made was sufficient for their own purposes. What is objectionable and inexcusable is their total failure to examine the reasons which justify the rule that is being adopted on the face of the opinion. Though the court should not be required to formulate, once and for all, a complete pattern of doctrine for all the cases which might arise in this area, it should indicate what it believes to be the underlying sense of the basic assumptions it is adopting, so as to give some direction and guidance to the lower courts who will have to elaborate its efforts, at least at first instance. Instead the court treats this as an area where all the decisions have already been made in Beard, a conclusion it does not substantiate, and assumes that its task is merely to follow these judgments which are already part of our law.

How should a more adequate opinion have been written?

144 (1961), 130 C.C.C. 158 (Ont. C.A.).
The first question to be considered by the Supreme Court is whether drunkenness, as such, should be a defence to criminal conduct, either totally (as duress or insanity) or partially (as provocation). We know that the usual effect of the consumption of alcohol is the breaking down of inhibitions and the lessening of our control over our emotions and impulses. The result may well be that we do things in our drunken condition which we would not do if we were sober. The problem for the law is whether we should punish the offender later, when he is sober, especially when it is the first and probably last time when it will occur. Should we excuse completely, or partially, or even require that the judges take drunkenness into account as a mitigating factor in the sentence?

Beard concluded that such a result was inconsistent with the common law and should not be part of our legal system, and this was concurred in by our court in MacAskill. Such a judgment is rationally defensible, especially in the light of the intellectualistic assumption of other criminal defences such as insanity which presume the deterrent effect of awareness of the criminal sanction even in such a condition. However, Beard holds that drunkenness, just as insanity, is an excuse when it is so advanced that it excludes the possibility of knowledge, and thus of voluntary choice, in the circumstances. When our court in George recognized that drunkenness may be a defence by excluding intent, it should have appealed to the reasons for requiring mens rea and shown how drunkenness affected them. Of course, since we have seen that the court does not give any reason for the requirement of mens rea when it explicitly sets out to require it (in Beaver and O'Grady, and their respective progeny), we can understand, if not excuse, the omission in George.

If we try to repair this omission, the question arises why the Boucher theory of the George defence is a rational one, a question I suggest is a relevant prerequisite to making the theory part of our law. Do Boucher and Resener assume that ignorance or mistake about the existence of consent is no defence to rape even for the sober accused? Surely they would not when the very existence or absence of consent is the critical factor in making the conduct illicit. If this is a defence for a sober person, should it not also be a defence for one who is equally ignorant, but due to his 'intoxication'? Otherwise we clearly punish a person for a crime he at no time chose to commit, simply because of his drunkenness. There are some cases where we admit the impropriety of this course, those cases where there is a "specific

146 This would be totally inconsistent with the theory of Cartwright J. in Rees.
intent” (whatever this means outside of its historically anachronistic, procedural context). But all of the reasons which justify it there require it also for “general intent” crimes.\(^\text{148}\)

Hence the basic objection to *Boucher* is that it does not make sense to acquit the person whose drunkenness prevents his choosing to commit theft, while convicting another whose drunkenness prevented his choosing to commit assault or rape. Of course, all of this assumes that we believe the accused's story on the facts but it does not appear any more credible that the intent for theft can be “metaphysically” excluded by drink while the intent for rape or assault cannot be. Putting the question to the jury probably allows the latter to apply a standard of “substantial impairment”, analogous to that used in insanity cases, which speak of “appreciation” and thus obtain much of what is sensible and desirable in a defence of drunkenness *per se*.

Of course, none of this kind of analysis is manifested in any of the opinions in this area. All of them follow the stylistic lead of the court, though in a much more sophisticated way. What is apparent, though, is that a failure to consider the wider implications of what one is doing—one's purposes and policies—may be directly responsible for inadequate performance of a court's legal, direction-giving functions.

G. *Provocation and Duress*.

These two defences share certain important characteristics. Unlike almost all of the other examples we have discussed, they do not affect *mens rea* because of lack of knowledge or foresight of some kind and, instead, focus directly on our powers of choice. Duress, when it legally obtains, is held to vitiate completely any meaningful ability to choose to obey the criminal law while provocation affects this same power sufficiently to reduce the degree of offence for which one can be convicted. Second, each of these defences is given a somewhat detailed definition in the Code which thus may be taken to have frozen the process of common law development in fixed language whose limits the courts must respect. Because our Code was originally drafted at a time when legal appreciation of the significance of this kind of defence was substantially under-developed, the court's attitude towards its own role becomes very important.

Not only was provocation defined by a statutory provision, but the area was further structured by several Supreme Court precedents prior to this period as well as English decisions interpret-
The critical problem which is raised by the statutory section, considered by most of these decisions, and at the heart of academic criticism of its present scope, is the threshold requirement that legal provocation must be such as would deprive the "ordinary" or "reasonable" man of self-control. English cases defining the ambit of the defence have elaborated on this requirement and deemed irrelevant the accused's mental deficiency, \textsuperscript{149} unusual pugnacity, \textsuperscript{150} intoxicated state, \textsuperscript{151} or a deformity such as sexual impotence. \textsuperscript{152} For reasons to be mentioned later on, most commentators suggest that this tendency misses the whole point of the defence.

Taylor\textsuperscript{153} was the chief decision in the area because it indicated the distinctive character of the Canadian law, in the light of our statute and the earlier Supreme Court cases. Kerwin J. traced the common law antecedents and the legislative history of the section (founded in Stephens' Draft Code) to show the innovative character of section 203, and especially the ability of a purely verbal insult to amount to legal provocation. A second question was raised about the relevance of drunkenness to either of the two facets of the defence. Unfortunately, all the judges assumed it was obvious that the "ordinary man" does not drink to the extent that his self-control in the face of insults might be impaired. That this is not obvious is amply indicated by the existence of some authority for the proposition that drunkenness which causes an

\textsuperscript{149} R. v. Lesbini, [1914] 3 K.B. 116.
\textsuperscript{153} [1947] S.C.R.
unreasonable mistake is relevant to provocation.\footnote{Taylor is important, though, for its holding that all subjective elements are relevant to the second question, whether the provocation in fact caused loss of control. Kellock\footnote{Taschereau J. concurring.} and Estey JJ. show how the \textit{Beard} limitation on the use of drunkenness does not apply to this specific issue since that case dealt with the effect on intention. Although provocation may affect fault or blameworthiness, in a wider sense, it does not exclude intention. Rather, it assumes intention and \textit{prima facie} guilt and then shows how this was created in a situation of passion induced by the wrongful act of the accused.\footnote{It operates to mitigate guilt in a limited way, in a specific context, by reducing murder to manslaughter. Curiously, Kerwin J.\footnote{Fauteux J. also joined with Rand J.} whose opinion is so adequate on the first problem of the nature of "wrongful act or insult", is unresponsive to the Estey analysis about drunkenness.} It operates to mitigate guilt in a limited way, in a specific context, by reducing murder to manslaughter. Curiously, Kerwin J.\footnote{Who agrees with Rand J.'s opinion.} whose opinion is so adequate on the first problem of the nature of "wrongful act or insult", is unresponsive to the Estey analysis about drunkenness.

The three cases in the present period did raise some significant legal questions for decision, but the court does not effectively use them as the occasion for building up a more comprehensive theory of provocation and \textit{mens rea}. Tripodi,\footnote{Rinfret C.J. concurring.} essentially, is a very narrow case dealing with the application of the general requirement of "suddenness" which, obviously, must be at the heart of a passion-provoked crime. Although it is relatively analogous in its facts to \textit{Taylor} (reiteration by a wife of adultery already known to the defendant), Kellock\footnote{Locke J. concurring.} and Taschereau JJ.\footnote{Cartwright and Abbott JJ. now join in the dissent of Estey J.} now decided against the accused to help form the majority.\footnote{It may be that such a code is recognized in \textit{Bagaladi} as a mitigation of the law's severest sanction, but it has no place in the law of this country. Any abatement of the consequences of such an act can here come only from the executive. I cannot imagine any encroachment on the inviolability of the individual more dangerous than that such a palliation should be countenanced by the courts.\footnote{At p. 447.}} Estey and Kerwin JJ. are now in the minority.\footnote{\textbf{1955}} Although the case is essentially a decision about the facts, both majority and dissent set the case in the context of the statute and do refer to the precedents in its history, especially \textit{Taylor}. It is perhaps the best example of Rand J.'s distinctive style—very abstract, rather sparsely reasoned, little analysis of the cases, but a clear statement of the rule adopted, and a very pithy argument at the end.\footnote{His effort here is much better than in \textit{Shymkowich}, as is the dissent of Estey J.}
Not too much can be said about *Salamon*, except that it definitely shows the intransigence of Cartwright J. The majority judgment of Fauteux J.\(^{164}\) dismissed the appeal from conviction first, because there was no error in the charge about drunkenness and provocation and, second, because the defence of provocation was unavailable to the accused as the aggressor. Locke J. says the same thing in a concurring opinion. Cartwright J. after belabouring the charge in order to find a technical error, orders a new trial without even mentioning the obvious problem of law which was one of the main bases of the majority. A very good argument could be made that one ought not to require a wrongful act of the deceased\(^{165}\) to justify use of provocation for mitigation, but the legislature has enacted that this is required. A defensible argument might be made that even this legislative demand does not exclude original or continuing aggression by the accused which provoked the victim’s wrongful act. The defendant can still have lost control over his emotions and behaviour and perhaps warrants the mitigation provided by the defence. It should be obvious, though, that the argument must be made.

The final case, *Wright*,\(^{166}\) is treated by the court as raising a very narrow and very obvious point. Fauteux J.\(^{167}\) ordered a new trial after an acquittal on the grounds of the judge’s failure to inform the jury of the “objective” character of the first test. He should tell the jury that the defendant’s character, background, temperament, idiosyncracies, or drunkenness, are all irrelevant as a matter of law to first test. All of this is very easy and authoritative, established in the precedents, and it is a wonder that the trial judge missed it. On the other hand, there are grave difficulties in the logic of a purely objective test which pays no attention to the subjective characteristics of the accused. Fauteux J. does here cite a passage from *Bedder*\(^{168}\), which shows how the notion of a standard, excluding a purely blind rage, requires some form of objective test. However, he leaves the desirability of this English standard completely unexplained and seems totally unaware of how severely it has been criticized. Moreover, as can be seen from its great elaboration in negligence, the “reasonable man” acts in a context which must share many of the characteristics of the defendant in order that it be meaningful.\(^{169}\) If the subjective knowledge of the accused is relevant,\(^{170}\) why not other features, such

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\(^{164}\) Tashereau, Abbott, Martland, and Judson JJ. concurring.

\(^{165}\) Actual or apparent, as is shown in *R. v. Manchuk*, *supra*, footnote 153.

\(^{166}\) *Supra*, footnote 16.

\(^{167}\) Judson, Ritchie, Hall, and Pigeon JJ. concurring.

\(^{168}\) *Supra*, footnote 152.

\(^{169}\) One might compare the sophisticated treatment of the analogous problem in tort law in Seavey, Negligence—Subjective or Objective (1927), 41 Harv. L. Rev. 1.

\(^{170}\) As it was in *Manchuk*, *supra*, footnote 153.
as his relationship with the victim (which is apparently excluded by *Wright*)? One cannot evaluate, or even talk sensibly about, a wrongful act or insult without viewing it in a situation. The court missed a real opportunity to begin the difficult task of drawing lines between the permissible subjective features of the "ordinary man", and those which are to be excluded.  

*Wright* is an interesting development for two reasons. First, the decision is unanimous against the accused, the first in this area. Second, Cartwright J. does not sit, also a first, and perhaps the explanation for the former proposition. Each of these precedents was duplicated in *Carker*, the only decision in the period raising the issue of duress. The defendant lost unanimously in an opinion of Ritchie J. which reversed the British Columbia Court of Appeal's reversal of his conviction. The defendant was charged with damaging public property, the plumbing fixtures in his cell, during a prison riot and proposed to prove both that he had been threatened with a knife in the back if he refused to join in and also that the background in this prison made the threat credible. The Supreme Court agreed with the trial judge's ruling that this evidence was irrelevant because it could not amount to a defence under section 17 of the Code.

The British Columbia Court of Appeal had disagreed with the trial judge for three reasons: first, it might fulfill the requirements of section 17; second, if it did not, the section is not an exhaustive definition of the common law defence of duress which attempts to implement the policy of the criminal law that prohibited conduct must be fully free and voluntary; third, the requirement that the specific offence be committed "wilfully" might be negatived by this evidence even if it did not satisfy a general defence of duress. One can suspect that the court's view of the case was heightened by the fact that the defendant received a one-year jail term from the trial judge who had rejected the evidence.

The Supreme Court's response to these arguments was very sparsely reasoned, although each of its conclusions is quite plausible. The third argument about the relevance of the term "wilfully" was wrong because it was defined by section 371(1) as including the accused's knowledge that his acts will probably cause damage. However, the court did not cite its own *Dunbar* decision which

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171 One might compare the definition for the defence stated by the Model Penal Code, s. 201.3: 

"(1) Criminal homicide constitutes manslaughter when: . . . (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."


173 Taschereau C.J., Fauteux, and Martland JJ. concurring.

had already held that evidence of duress affected only the motive which led to prohibited conduct and would not exclude intentional awareness of the commission of the offence. Hence the court dismissed a chance to clarify the precise character of duress as an excuse which affects our ability to choose and not our intellectual awareness of the fact we are choosing to disobey the criminal law.\footnote{175}

As regards the interpretation of section 17, probably the court was right in holding there was no threat of \textit{immediate} harm by a person who was \textit{present} when the offence was committed by the accused. The latter was in a locked cell here and the anonymous threat, however realistic it was, could only be implemented some time in the future. The court was able to distinguish the \textit{Subramanian} case,\footnote{176} relied on by the Court of Appeal, both on the facts and by the language of the relevant provisions. Unfortunately, again the court proceeds on the narrowest and most legalistic grounds. It does not advert at all to the obvious purposes of the statutory language which is to deny the excuse where it is possible to inform the legal authorities in the interim and thus require that the actor take the risk that their protection will be successful. Only in the light of such a purposive elaboration of the section will the decision give successful guidance to lower courts in different fact situations.

The most significant facet of the opinion is Ritchie J.'s bold assumption that section 17 \textit{codifies} and \textit{exhaustively defines} the common law rules and principles respecting a legal defence of duress. He does not even advert to the possibility that the court can and should have a role under section 7 of the Code in developing this defence further in the light of its purposes and those of the related justification of “necessity”. If we view the common law as a process of rational elaboration of basic legal principles, and not simply as a static collection of specific legal rules, it would not appear totally implausible to hold that the process of common law development under section 7 can still continue even after the legislature has intervened under section 17 to give a certain degree of assured protection to an accused.\footnote{177} Especially in the light of the demonstrated inadequacies of the section 17 formulation in implementing the logic of the basic principle of criminal blameworthiness,\footnote{178} it is doubly unfortunate that the issue was not con-

\footnote{175} Which would have required that it deal with the important later English case of \textit{R. v. Steane}, [1947] 1 K.B. 997 (C.C.A.).


\footnote{177} The drafting history of the section is quite consistent with this point of view; see Coolican, Comment (1967), 5 Osgoode Hall L.J. 78.

\footnote{178} As good an alternative definition as any is the Model Penal Code effort in s. 2.09:

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offence because he was coerced to do so by the
sidered worthy of argument in the *Carker* opinion.\textsuperscript{179}

IV. Legal Reasoning and the Supreme Court.

I hope it is apparent from the foregoing analysis that the personal attitudes and reasoning styles of our Supreme Court judges do play a paramount role in determining the results of the cases they decide. The behavioural analyses indicated that some of the judges, at least, were primarily influenced by their attitudes to the substantive issues before them. Moreover, these same judges, Cartwright and Fauteux JJ., tended to participate in more of these cases, to write more of the judgments in them, and to attract more concurrences in their opinions. Though they were, on occasion, willing to respect a binding precedent recently decided, the necessity for this was rare. It is fair to say that, in every area of our concern—strict liability, degrees of *mens rea*, mistake of law, drunkenness, provocation, constructive murder and duress—the basic decisions were made in this period, by this court, and without it being, or seeing itself to be, bound to decide one way or the other. It had choices to be made and it made them, largely in accordance with the attitudes of one of its two influential and partisan contenders in the area.

I assume, then, that the court here, as indeed anywhere in its work, is rarely totally confined by an easy-to-recognize, authoritative, legal rule. These rules may shape and control the boundaries of decision and they may furnish the criteria which indicate how the court should solve the difficult problems with which it is left. However, they do not objectively and impersonally and obviously determine the final legal rule the court produces. We have seen how significant are the attitudes of both the partisans and the "swing" men on the court in influencing these conclusions and we have also seen something of the substantive content of the rules produced. What I propose now is to gather together all of the

\textsuperscript{179} Supra, footnote 172. Under facts quite analogous to the convictions in *Dunbar* and *Carker*, the common law principle of duress was used to excuse the defendant in *A.-G. v. Whelan*, [1934] Irish Rep. 518 (C.C.A.).
evidence available in this area of its work so as to portray the process of legal reasoning which mediates between attitude and product.

The most evident dimension for analysis is the quality of the judges as lawyers. A compelling conclusion in this regard is that the court is little interested in or concerned with general legal questions. In many cases it totally disregards important general questions of legal principle in order to concentrate on the manipulation of the facts (or the jury charge) in the particular case. Even where it does see the necessity of adventing to the general problem, it rarely feels the question worth any lengthy detailed analysis. The most immediate evidence for this last proposition is the length of judgment which is devoted to the general issue. We might compare the Ontario Court of Appeal judgment in *Binus* with that of either Cartwright or Judson JJ., the several British Columbia Court of Appeal judgments in the intoxication area with those of Fauteux and Ritchie JJ. in *George*, the Ontario Court of Appeal opinions in *King* with those of Taschereau and Ritchie JJ., or even the dissent of Fauteux J. in *More* with the majority judgment of Cartwright J. In each case, the former perceives a real legal problem, worthy of extensive intellectual grappling. The latter judgments perceive and explicitly advert to the same problem but they assume that the answer is obvious and really worthy of no more than the statement of a conclusion. The one judge on the court who is rarely in the latter category is Fauteux J.

As a result, the Supreme Court customarily ignores all, or almost all, of the relevant precedents in an area. Perhaps the best way of realizing that a problem *is* complex is to be made aware of the variety of decisions in different jurisdictions—in Canada, England, Australia, the United States, to name only those with the same legal tradition as our own—and thus to see that alternative answers are possible because different courts have gone in different directions. Our court never cites American or Australian precedents in this area, does not feel bound by lower court Canadian decisions nor by English decisions. Interestingly enough the same attitude carries over to its own precedents which it often fails to cite though theoretically it is bound by them. Perhaps its attitude to its earlier precedents is a function of its lack of concern for the legal value of the decisions it is making.

When the court does rely on a precedent, again it has a distinctive style in its approach. Customarily it picks a passage

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180 E.g., Bradley, supra, footnote 121, Shymkowich, supra, footnote 21.
181 E.g., Morelli in Beaver, supra, footnote 34.
182 E.g., the provocation cases.
183 Its view of precedent in the Mann, supra, footnote 53, Binus, supra, footnote 11 and Peda, supra, footnote 114, sequence is perhaps the epitome of this attitude.
out of the opinion, without regard to its context, and uses this as the statement of a general legal rule to be applied in the instant case. Perhaps the classic instance of this is the adoption of the passage from *Beard* in *George*, but the same is true in *Beaver, Watts and Gaunt*, and so on. The court is rarely aware of the ambiguity of such general language—of how it takes on colour and greater clarity from the factual situation and the rest of the opinion. A classic instance of this is the use of Cartwright J.'s language in *More* by Spence J. in *Mitchell*, to extend the reach of the former rule far beyond what Cartwright J. says, in *Mitchell*, that he intended. Yet Cartwright J. himself is one of the great offenders in this regard, perhaps most flagrantly in his use of the passage from *Loiselle* in the very different *Mann* context. One of the few good analyses, and then distinguishing of, precedent occurs in the provocation cases where the common law precedents are not considered decisive in interpreting our statute.

The court's attitude towards the authority of these legal sources, especially textual, is much the same. The court never uses Canadian periodical writings, only twice refers to American texts and really uses only two English texts, Williams on *Criminal Law* and Turner's edition of *Kenny*. These it uses as it does precedents, as the source of an authoritative passage stating a rule, not as a reference for the authority of a rule which it states itself. It never cites these texts to show that alternatives are available in the common law, or as the source of arguments favouring one alternative as more desirable and compatible with principle than another.

Finally, the court is very deficient in making analytical distinctions and then clarifying the meaning of the rules which it proposes to adopt and use. The very important question of *mens rea* and unreasonable mistake of fact has been left totally confused by the efforts of Cartwright J., Estey J. and Ritchie J. I am not here criticizing the fact of disagreement since, obviously, there is room for it on such a basic issue. However, none of the judges seems to realize that there is a distinction here, that there are

185 Fauteux J. refers to Weihofen, *op. cit.*, footnote 134, in *More, supra*, footnote 19, and Ritchie J. to Holmes in *King, supra*, footnote 12. L.Q. 27, 407. It was not mentioned in any of the Supreme Court cases in the driving area and I find it impossible to believe that consideration of this work would not have enhanced the quality of reasoning in these decisions.


188 In *Rees, supra*, footnote 18 and *Beaver, supra*, footnote 31.


190 In *King, supra*, footnote 12.
others who disagree, and that it is necessary to make an argument in favour of the position that he adopts. Similarly, the court does not ever explicitly deal with the distinction between voluntary act and intention or the distinction between intention as to consequences and mistake as to circumstances though these have long been current in the literature, including writers such as Williams and Turner whom the court often does cite.

All in all, the court, at least in this area of the law, does not appear to fare too well in an assessment of its "legal" ability, except for Fauteux J. It might be argued that this is not too important since the inevitable "openness" of the issues which reach it demands more the quality of statemanship, awareness of practical consequences, and intelligence of attitude for their adequate resolution. Hence the second dimension for our evaluation of the court, both from its opinions and from its results, concerns its performance as a developer of criminal law policy.

It is apparent from its opinions that the court does not see itself as a purely passive instrument of positive law. Quite often it adverts to the specific consequences or the relevant practical factors in its decisions. This is most often true of Fauteux J. and occasionally of Cartwright J. or Rand J. However, even Fauteux J.'s efforts seem, upon reflection, to be lacking in persuasiveness, however much an improvement they are on his fellow judges.

There are several reasons for this. First, the court never seems to realize, consciously, that it has an independent law-making role to play in this whole area. It is obvious that the court is making policy in this area, and that judicial attitudes are significantly affecting the policies that result. However, the court never expresses awareness of these facts. Only rarely does it speak of section 7(2) and the preservation of the common law, or the failure of the legislature (especially outside the Code) to speak to the issues of mens rea. It does not draw the inference that these gaps necessarily require that it play a collaborative role in developing our criminal law.

Because the court sees no general role for itself in this area, the obvious corollary is that it has articulated no general philosophy about what the doctrines of mens rea shall be like. There are only faint hints of the reasons for the doctrinal protection of mens rea (usually in quotations from English judges) and only slightly

191 Though it was raised directly by King, supra, footnote 12 and Bleta, supra, footnote 40.
192 Which was so important to the drunkenness issue.
193 See his opinions in Rees, supra, footnote 18, Beaver, supra, footnote 31, More, supra, footnote 19 and the provocation cases.
194 As in Rees and Beaver, ibid.
195 In Tripodi, supra, footnote 158.
196 Carker, supra, footnote 172, amply demonstrates this.
more explicit are the competing reasons for excluding it in specific cases, wholly or in part. There is some verbal attachment to the notion of legislative purpose (especially by Fauteux J.) but rarely does even Fauteux J. come to grips with what the legislative purpose likely is, or why it might require limitation of mens rea. Never once, in any one of these twenty-four cases, do the judges try to look at the sense or purpose of the precedent which they cite. The court often blindly follows passages extracted from opinions or texts and just as often totally ignores relevant precedents of the same authority as the former. What they do not do, though, is to search in a precedent (or a series of them) for a rule with practical significance for a type-situation, one which they choose to follow for this reason.

In my opinion, perhaps the greatest deficiency in the court's activity as a policy maker, is its failure to see the area as an integrated whole. The court does not perceive that the various doctrinal areas I have discussed compose a family of related problems, with several strands or themes of principle running throughout. As a result, the court never once cites a case in one doctrinal area as a relevant aid in resolving problems which arise in another conceptually distinct area.

What are the consequences of this? A court does not have the facilities to make law in the comprehensive "all-at-once" framework available to a legislature. Instead it proceeds piece by piece, step by step, as different cases come before it. Yet the incidence of litigation can never bring many cases within a very specific area before the court over even an extended period of time. As a result, judicial law-making in an adversary process is apt to be disjointed, unreasoned, and incoherent, as a court deals only with a very specific question whose immediate boundaries limit what the court sees as significant in the problems.

Yet there is a remedy for these deficiencies which enables a court to take advantage of its peculiar position as an adjudicator of specific practical disputes in order to build, in an incremental fashion, a coherent rational body of law. This remedy is the technique of seeing in each specific case an instance of a general principle, a practical test of a more or less philosophical theory of the competing values which the whole area of law ought to protect. Within such a framework the reasons which are given for deciding whether a particular crime requires mens rea are vitally important for deciding which of the various alternative forms of mens rea should be preferred (and vice versa). Arguments from each of these areas are of prime significance in determining what

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197 As I suggested in discussing More, supra, footnote 19.
198 As he advocated in Rees, supra, footnote 18 and Beaver, supra, footnote 31; compare R. v. Lim Chin Aik, supra, footnote 70.
the court should do about such distinctive questions as duress, provocation, automatism, and intoxication. Each instance of the latter enables the court to see a new facet of the whole problem, to re-examine as much as is necessary the developing philosophy of mens rea as a whole, and to test the desirability of the apparent direction of this philosophy by its application to a concrete issue.

Such a theory of judicial policy-making requires the court to see that judges have an independent role to play, one for which their institutional characteristics fit them better than any other body. Such a role requires that they think about the real, practical consequences of what they are doing and ask whether this is really what they ought to be doing. Because this process is explicit, it is conducive to the development of a shared principle, in whose articulation many members of the court collaborate over a period of time—indeed many courts over this period of time—a principle which is founded on reasons which are open to criticism and change and which is tested and evaluated in all of the concrete situations to which it is relevant.

Of course, this is an ideal which I have stated for the judicial process, and every court must fall short of it to some extent in its performance. Unfortunately, it is apparent that our Supreme Court does not perceive at all that this is the ideal to which it should strive and thus, of necessity, it must fall far short of even what it is capable of doing. By and large, the court does not see major legal questions involved in the cases before it and does not see that the general issues it deals with are complex and difficult. The court proceeds as if the decisions were already made for it, by the legislature or by courts, though perhaps the answers are stated in texts. This is indeed paradoxical since the decisions have not been made, and the attitudes of the judges determine the results they themselves produce. But it is a fact that the court believes it does not choose, and that it acts on this belief, and that this also determines, in as important a way as the substantive attitudes themselves, the products of Supreme Court decision-making.

When we look at the court as a policy-making or law-developing body, we cannot really hold the significance of this effort to be exhausted in the votes of the judges in the cases before them. Very few criminal law cases come to court, few of those which go to court are contested, even fewer of these are appealed, and only an infinitesimal minority reach the Supreme Court. If the court is to play an important role as a national law-maker, it cannot rely on the specific decisions it makes in its own cases as any index of its effectiveness. Rather, it must formulate general standards which all of the other decision-makers in the process, especially the lower court judges, are able and willing to follow themselves.

It is on this dimension that the court has failed most dismally.
As we have seen, the court has often limited its focus to the specific facts of individual cases, rather than the general legal question these cases raise. It does not try clearly to formulate a precise legal rule, to have the majority of the judges in a case join in an opinion which accepts this rule as the minimum basis for the decision, to set this rule in the context of developing precedents in this field, and then to re-use and build upon it in subsequent cases. The court has not tried to formulate general directive principles and establish them in Canadian law, with explicit reference to their justifying reasons.

As a result, the most paradoxical conclusion of this whole study is that the Supreme Court has had very little influence on the course of Canadian law in this area. This is extremely strange if our assumptions are correct (1) that the court in this period has spoken to almost every major question of mens rea not just once, but several times; (2) that the previous law left much of these issues quite open to judicial innovation; (3) that the court itself chose to innovate in accordance with preponderant judicial attitudes, and (4) that there is no evidence of lower court unwillingness to accept the results of the Supreme Court’s value attitudes. It is hard to believe that the results of this twenty years of effort, and twenty-five or so major decisions, has had little or no independent impact on our Canadian law. Yet the conclusion appears inescapable.

The decisions on fault versus strict liability are sometimes mentioned, sometimes not: followed in one direction by one court, in another direction by another court. Sherras v. De Rutzen is much more important than Rees, Beaver, or King. The decisions on mistake of law are not only not influential, they are rarely mentioned. The real decision on the presumption of intent is that of the Ontario Court of Appeal in Gianotti. Drunkenness is still governed by Beard (though somewhat muddied by George), while Bleta is a non-decision as regards automatism. The court did not really say anything more than the statute in the constructive murder area (except in Rowe), and what it did say as to the problem of degrees of mens rea in driving offences has been impossible for anyone to follow. There are exceptions to all of this, here as elsewhere, in the provocation area where the court does seem to have adopted a policy, formulated a rule to implement it, given the reasons for the rule, followed the rule themselves, and seen it influence lower court decisions substantially. This last exception, though, proves by contrast the general comments I

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199 This failing is most graphically demonstrated in the Mann-Binus-Peda sequence which has caused Laskin J.A., perhaps the most perceptive Canadian judge, to fail twice in trying to follow the court’s tortuous path.
200 Supra, footnote 49.
201 Supra, footnote 123.
would make about the court's efforts in the whole area of mens rea.

Conclusion

As I have cautioned several times in the course of this article, we must be careful about attributing too much significance to the patterns of behaviour which appear in this small sample of the court's work. If this is true, then, we must be doubly cautious about the validity of any speculation which seeks to explain these patterns. In the face of these warnings, though, I would suggest certain tentative hypotheses whose adequacy will be tested in future treatment in the same way as other samples of the court's decision-making.

In an earlier article I have suggested that judicial decision-making at the appellate court level can be understood on a dimension which ranges from "adjudication" through to "policy-making". By this I mean that courts can conceive of their role as primarily oriented either to the adjudication of individual disputes or to the setting of general policies for the society. The Supreme Court appears to me to be at the extreme end of the adjudication side of this spectrum. It obviously does not concern itself explicitly with policy considerations which might influence creative innovations that it could make in our law. However, it does not even feel it important to state clearly the legal rules and principles which it feels are part of our law and which it applies to the immediate case. Instead, the thrust of its activity appears to consist in the settlement of concrete disputes as they come before it, with little or no regard to the general type problem each appears to present.

If this orientation in our Supreme Court does in fact obtain, it raises several serious questions, both as to why it has so developed and also as to the constitutional significance it has. As regards the first, we can speculate about the jurisdiction of the court, especially the appeal as of right above a certain monetary amount. As regards the second, we might wonder about the value of a second appeal for purposes of doing justice in a concrete dispute. Do we need a national Supreme Court if it does not conceive of its primary functions as the clarification and elaboration of our legal systems in the light of basic principles and community values? Should a court with the orientation that ours appears to have, be given the task of administering an entrenched Bill of Rights which controls either federal or provincial legislative power? These are vitally important questions but I would not pretend to deal with them until a later time and with further documentation.

EPILOGUE

The research for and writing of this article was basically completed in the early fall of 1969. The period under review, then, was from 1949 to the middle of 1969. Since then two further interesting cases have appeared in the reports dealing with the general problem of mens rea and the criminal defences. Rather than incorporate them into the body of the article and rework the latter, I thought it would be interesting to treat them as subsequent data with which some of the emerging hypotheses might be tested.

The details of one of these cases, R. v. Peda203 have been recounted earlier, as the last in the sequence dealing with the degrees of blameworthiness in driving offences. The second case, R. v. Borg204 deals with the problem of the defence of insanity, the only such case to reach the court in this whole period. Moreover, it is concerned with the most critical problem in this whole defence, to wit, the extent to which the legal definitions of insanity incorporated in section 16 of the Code could be stretched to embrace our deepening psychological understanding. At the time the McNaghten rules were first established, it appeared appropriate to conceive of mental disability in purely intellectual terms, but over a hundred years of debate have amply demonstrated this no longer to be true. The McRuer Royal Commission suggested that certain subtle variations in the language of our Code, especially the use of the word "appreciate", gave legal warrant to a wider view of mental disability, embracing such categories as neuroses or psychopaths.205 Borg was the first case to ask the Supreme Court if this, indeed, were true.

If we look at this problem in terms of basic principle, then a strong presumption should operate in favour of extension of the insanity defence. The whole point of mens rea as a requirement of criminal guilt is that the defendant has chosen to commit an offence or, at least, that he has been able to choose not to do so. Although such an ability to choose can be affected indirectly by lack of knowledge, it also can directly be rendered inoperative. We recognize this fact in a more or less limited fashion in the defences of duress, necessity, or provocation. If modern psychology tells us that psychic disability can function primarily with respect to our control over our decisions and actions, then the reasons behind the insanity defence demand its extension. Yet this

203 Supra, footnote 114.
204 (1969), 4 C.C.C. 262.
is peculiarly an area where the practical considerations inherent in the administration of a criminal justice system may require limitation on the logic of blameworthiness. We may be very doubtful about the claims of modern psychiatry to isolate a mental defect which leaves our reasoning powers unimpaired. Some psychiatrists have seemed to suggest that the very fact of criminal behaviour is a sufficient reason for inferring the existence of some sociopathic disability. The qualms these claims create may become particularly important at the level of a jury trial where we ask the layman to distinguish between an impulse which was not resisted and an impulse which could not be resisted. The interpretation of section 16 in Borg logically involved some reference to these competing considerations which have been so much discussed in recent literature and case law.

Borg had killed a R.C.M.P. policeman as well as two women. He had purchased a rifle and called the R.C.M.P. to come to his home before opening fire. His only defence was insanity. Although the Alberta Court of Appeal was divided in reversing a conviction for capital murder, it was unanimous in accepting the legitimacy of a possible insanity verdict from the jury. The only question which either of their opinions dealt with was the adequacy of the judge's charge in raising the issue of legal insanity for the jury and explaining the possible ways in which the evidence might support the defence. The majority opinion of the Supreme Court, written by Cartwright J., held that the adequacy of the judge's charge was irrelevant because insanity could not be a defence here.

Amazingly enough, the opinion does not indicate clearly whether this is because the mental disability was insufficient in law or because there was inadequate proof that the disability in fact was operative at the time of the killing. Either interpretation of the opinion appears defensible to this reader and it is

206 The essential passages in the Cartwright J.'s opinion (concurred in by Fauteux, Abbott, Martland, Judson, Ritchie and Pigeon JJ.) are the following. He quoted the critical passage in the jury charge:

"Now I must tell you that at law a so-called irresistible or uncontrollable impulse of itself is not a defence within the meaning of this Act unless that uncontrollable or irresistible movement or impulse stems from the existence of insanity as defined here, and when one looks to the reasonable rationality of it, it becomes so obvious why it is that a mere irresistible and uncontrollable impulse is not a defence. Because everybody would get such impulses with respect to any offence. The man who breaks a jeweller's window to steal a diamond, has an irresistible impulse to do it, and, therefore, is acquitted on the ground of insanity if one is guided by this mere proposition of irresistible impulse. It must be, as this section says, and I repeat it to you:

'For the purpose of this section a person is insane when he is in a state of natural imbecility', now, there is no suggestion of that here—
indeed astonishing that the court did not appreciate the importance of clarifying the basis of its conclusion. No legal authorities were cited at all with reference to the insanity issue.

Nor could it be said that the court simply did not advert to the wider significance of this case. In a meticulous dissenting opinion, Hall J. who was joined by Spence J., not only went over the evidence and jury direction in some detail, but also spoke explicitly to the question noted earlier. Unlike the majority opinion, he did cite some legal authorities, referring especially to the Brown case, which allowed a limited use to medical testimony about irresistible impulse as evidence of a "disease of the mind". More important, although he did not mention the McRuer Royal

'or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong'.

(At pp. 277-278 of the Supreme Court decision.)

He then recited the most favourable view of the psychiatric evidence from the point of view of the accused:

"(i) that Borg was suffering from a disease of the mind called a psychopathic state and that he fitted into the classification of the aggressive, anti-social, impulse-ridden type of personality; (ii) that he had very few healthy coping mechanisms or ways of defending himself against impulses such as a homicidal or sexual ones; (iii) that this lack of impulse control is chronic; (iv) that a major characteristic of this impulse type of personality is being emotionally unbalanced by the illness, that the moral issues cannot be differentiated, that he does not have the moral ethical part of his mind functioning most of his life but 'most important of all he can have normal cognitive functioning', (v) that the impulse is so powerful his judgment is impaired but he can still have intellectual functioning, (vi) that the effect of alcohol is unpredictable; it can wipe away any controls or it might even calm him; it is impossible to say, (vii) that Borg hates authoritarian figures and under the influence of his anti-social impulse driven, aggressive impulses, he can kill, (viii) that if the force of the impulse cannot be resisted 'at that moment', and this is a symptom of what he suffers from—an impulse—psychotic state—an irresistible impulse when he neither reasons nor deliberates, (ix) that the irresistible impulse is both a symptom of the disease of the mind and the disease itself, (x) that he operates sometimes with normal intellect, sometimes with a little better than normal intellect, and sometimes like a little boy.

(At pp. 269-270.)

The substance of his disposition of the case is expressed in the following passage:

"It appears to me that the effect of Dr. Spaner's evidence is that, in his opinion, at the time of the shooting Borg may have been acting under an irresistible impulse such as the doctor had described. There is no evidence that Borg himself had that view and the portions of his statements and of the answers read to the jury far from suggesting anything in the nature of an impulsive action indicate a careful and deliberate plan which it took him some hours to carry out. The actions and statements of Borg after the shooting indicate that he was well aware of what he had done and that it was wrong. The evidence taken as a whole falls far short of being sufficient to satisfy the onus of proof on the balance of probabilities which rests on the defence when insanity is alleged."

(At p. 270.)

Commission, he did use the argument about the difference between section 16 of the Code and the McNaghten rules which inheres in the word "appreciate". The jury might have found that the impulse affected the defendant's moral sense and that this precluded an appreciation of the nature and quality of the act. His opinion would offer substantial scope to the insanity defence, something which only a fictional view of McNaghten can ever do. The majority does not respond to this challenge.

The case does raise a nice jurisprudential point. As noted earlier the 1956 Royal Commission recommended that there be no changes in section 16 because of a belief that our insanity defence could be given an expansive reading which would include legitimate cases of true inability to control one's behaviour. A dissenting minority of the Commission had reservations about the legal defensibility of this confident interpretation of McRuer J. The minority explicitly said that if the Supreme Court of Canada gave a contrary and narrow interpretation to section 16, it should be amended. Should a court use as a reason for its conclusion this advice by a Royal Commission to the legislature which the latter appears to have relied upon? Whatever be the answer to this question, it is indeed unfortunate that the court has left us quite in the dark about whether section 16 does require amendment to keep it abreast of developing psychological knowledge.

With this review of the Borg decision, what do these two cases confirm or refute in our earlier hypotheses? The most intriguing fact is the presence of Cartwright J. as the author of a decision in Borg in favour of the Crown and against the defendant in this area, and this is a hotly contested case where the lower court was reversed. In fact, this may well be the best evidence there is that the narrower factual theory for the Borg majority opinion is correct. If judicial behaviouralism ever became a legitimate technique in interpreting precedents, this might be a good place to use it. Other than this anomaly, all other votes were predictable with Hall and Spence JJ. dissenting in Borg, and Cartwright, Hall and Spence JJ. dissenting together in Peda. The blocs hold together and it is noteworthy that the mens rea position is continuing to lose ground.

When we turn away from substantive attitudes and look at the process of legal reasoning, divergences also appear. In Borg, the majority opinion cites no authorities and simply ducks the important questions. The dissent cites two cases and the statute, but only to reach conclusions, with no discussion of either their desirability or how they might be applied with any real significance. In Peda, on the other hand, the opinions do deal in some

208 McRuer Report, op. cit., footnote 205, p. 48 et seq.
detail with the relevant authorities in the court's own precedents, O'Grady, Mann and Binus. Each opinion-writer spells out the reasons why he feels legally justified in reaching a certain result. However, as I stated earlier, the majority judgment of Judson J., which finds the question still open about the state of mind necessary for "dangerous driving", still leaves us totally uninstructed in the reasons why his interpretation of the legislature's wishes is most sensible.

Our general conclusions about the court's attitude towards its role are similarly confirmed. Not one of the five different opinions in these cases evinces even the slightest hint that the court realizes it is making law for Canadian society. There is not even a phrase which indicates a reason why the court might prefer one rule to another as a better means of implementing preferred values. To the extent that any opinion adverts to the question of which legal rule is to be authoritative, the whole process of argument is directed to finding a rule in the authorities, statutory or decisional. It is especially ironic, then, that the only clearly established rule, that established by Binus, was the only authority treated as open to review.

This lack of concern for policy is understandable though not justifiable in our positivist legal tradition. What is distinctive about the Supreme Court as an appellate body is its relative lack of concern for law—for either the formulation or clarification of the legal rules which it uses to decide cases. This is manifest in both majority opinions. We do not know whether Borg is decided on a narrow factual ground or as the result of a legal rule which defines the insanity defence in a new area. As the result of terribly unrealistic view of precedent, the court in Peda deprives us of a relatively established rule, and then fails to furnish a majority for any substitute when Ritchie J. joins in two contradictory opinions.

As usual, the court is much more concerned with deciding the concrete, individual case, perhaps in the way it thinks best in the concrete situation. Only a very few such cases can get to this highest appellate court, though, and the court can only influence the course of decisions in the lower courts, if it states a rule which they are able to follow. No such rule has been supplied for each of these very important situations and thus each will have to return to the court at some time in the future. It is doubly unfortunate that the court's failure to think seriously about its role in each of these problem areas will deprive the subsequent court of any real consideration on which it might build. We have had three attempts at elaboration of the "dangerous driving" provision and the court has not even begun to consider the real issues it will raise. In this, as in almost every other respect, Peda and Borg
confirm our findings about the work of the previous twenty years. Sometime after I completed this article, the Supreme Court of Canada decided the case of R. v. Trinneer, [1970] S.C.R. 638 which in effect over-ruled the cases of Cathro and Chow Bew, supra, footnotes 128-129. This case also came from the British Columbia Court of Appeal, and the latter court followed the two earlier Supreme Court decisions (which had incidentally over-ruled the British Columbia Court of Appeal in Cathro), in holding that reasonable foresight of death occurring in a joint robbery was necessary for the conviction of the one who did not himself inflict the bodily injury causing death. The Supreme Court, in a unanimous opinion written by Cartwright C.J., reversed the British Columbia Court of Appeal and restored a conviction on the grounds that reasonable foresight of an injury was sufficient. This extension of the felony murder rule and consequent restriction on the principle of mens rea was not linguistically required by the relevant sections, or so I believe, and was accomplished with little reference to the decided authorities or the implications for the criminal law process of the step the court was taking. The retreat from the mens rea principle is proceeding apace. Even more recently, the decision in R. v. Pierce Fisheries, accentuated this trend by upholding a conviction under the federal Fisheries Act on the basis of strict liability. See supra, footnote 49.
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