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Abstract

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Keywords

Criminal law--Philosophy; Liberalism--Philosophy

IDEOLOGIES CLASHING: CORPORATIONS, CRIMINAL LAW, AND THE REGULATORY OFFENCE©

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This article explores the ideological dimensions of the current debate over the constitutional status of the regulatory offence. It contends that what animates this debate is an underlying conflict between competing liberal ideologies in which an emergent libertarian classical liberalism is increasingly undermining the dominance within legal discourse of a more statist-oriented pluralist liberalism. Moreover, it suggests that it is a debate which is closely connected to a more far-reaching ideological controversy over the future of the regulatory state. The article concludes by arguing that, within this debate, fundamental questions about the nature of corporate power and legal status are obscured, questions that a critical theory of the regulatory offence must confront.

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I. INTRODUCTION

The criminal process is often likened to a battleground, the site of a metaphorical struggle between the individual and the state.[1] Within legal discourse, the criminal law — its doctrines and procedures — is also a battleground: a terrain which resonates with the sound of ideologies clashing.[2] This paper considers the ideological dimensions of a contemporary controversy within the criminal law, the unsettled recent history and uncertain future of the regulatory offence.

As a result of recent *Charter*[3] jurisprudence, the constitutional status of the regulatory offence, in its strict and absolute liability forms,[4] has been thrown in doubt. Many commentators believe that the absolute liability offence, once the most common species of quasi-criminal regulatory law, may be destined for extinction.[5] Similarly, dire predictions are being made about the fate of its counterpart, the strict liability offence, in light of decisions which suggest that its reverse onus due diligence

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[1] See J. Griffith, "Ideology in Criminal Procedure" (1970) 79 Yale L.J. 359 at 367-71, critiquing H. Packer, "Two Models of the Criminal Process" (1964) 113 U. Pa. L. Rev. 1.

[2] B. Bragg, "Ideology" from the album *Talking with the Taxman about Poetry* (St. Laurent: Polydor, 1986).

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

[4] Terminology in this area can be confusing. One important distinction is between regulatory offences (also called quasi-crimes or public welfare offences) and so-called "real crimes." While the latter are contained, almost invariably, in the *Criminal Code*, R.S.C. 1985, c. C-46, the former, characteristically, are not and involve breaches of environmental, health and safety, motor vehicle, or comparable legislation. There are two forms of regulatory offence: absolute and strict liability. An accused charged with an absolute liability offence can be convicted upon proof of the illegal act alone, whereas an accused charged with a strict liability offence can avoid conviction by establishing, on a balance of probabilities, a defence of "due diligence," demonstrating, in other words, that the failure to comply with the law was not negligent. Finally, it should be noted that, in U.S. and U.K. usage, "strict liability" connotes what we refer to as "absolute liability." What we have come to designate as "strict liability offences" are much less common in these other jurisdictions and tend to be referred to simply as "negligence offences."

[5] For example, K.R. Webb, "Regulatory Offences, The Mental Element and the Charter: Rough Road Ahead" (1989) 21 Ottawa L. Rev. 419 at 440-47.

defence is constitutionally unsound. Some liberal criminal law theorists suggest these developments are all to the good.[6] A striking manifestation of emergent mainstream hostility to these well established regulatory forms is a recent report by the Ontario Law Reform Commission[7] which unequivocally advocates abolition of the absolute liability offence and *de facto* abolition of the strict liability offence.

Critical legal scholarship, it has been suggested, has largely neglected analysis and critique of substantive criminal law doctrine.[8] This observation is particularly apt with respect to the increasingly heated debate over the role within the criminal law of the regulatory offence.[9] With this in mind, the goal of this paper is to contribute towards a more critical understanding of this ostensibly doctrinal debate by locating its ideological bearings and contextualizing its legal discourses within broader currents of moral and political argument.

I intend to argue that what animates and structures this debate is a tension between two competing liberal visions of law and society: a classical liberalism, with roots in the Lockean libertarian tradition, and a pluralist liberalism, with considerably more positivist and utilitarian leanings, commonly associated with and more sympathetic to the modern regulatory state. While these visions share a common individualist lineage, they have distinctive orientations on a range of issues, including the respective roles of the state and the market, the nature of individual rights, the purposes of the criminal law, and, in particular, the role within the criminal law of the regulatory offence.

The paper is in four parts. Part II sketches out, in paradigmatic terms, the two competing liberal ideologies which I argue underlie and inform the contemporary Canadian debate over the role of the regulatory offence. It then elaborates and critiques

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[6] For example, A. Brudner, "Imprisonment and Strict Liability" (1990) 40 U.T.L.J. 738.

[7] Ontario Law Reform Commission, *The Basis of Liability for Provincial Offences* (Toronto: Ontario Law Reform Commission, 1990)[hereinafter *Report*].

[8] D. Nelken, "Critical Criminal Law" (1987) 14 J.L. & Soc. 105.

[9] See Kent Roach's highly critical review of the Ontario Law Reform Commission's recent report: (1990) 69 Can. Bar Rev. 802.

the continuities between these respective visions. Part III is devoted to tracing this debate from the early-1970s to the present by reference to leading cases and various law reform studies. The purpose of this Part is to describe and analyse the historical trajectory of the debate, a trajectory which suggests that the dominant position enjoyed within legal discourse by pluralist liberalism is increasingly being undermined by an emergent classical liberal discourse. In Part IV, I will offer some reflections on the debate. In particular, I will argue that submerged within this debate are crucial issues of corporate legal status and market power which classical and pluralist liberalism obscure and which necessitate a critical reassessment of the relationship between the state, the corporation, and the polity.

II. IDEOLOGICAL PARADIGMS OF THE DEBATE

Legal discourse, like political discourse, has a fluid dimension, taking place within a matrix of visions of social and political life, constantly in flux, competing to achieve discursive dominance. The extent of discursive flux within legal discourse is variable. In a recent article, Patrick Macklem suggests that the contemporary discourse of constitutional law is characterized by its heterogeneity, arguing that, as a discursive formation, it contains identifiable and competing tory, socialist, classical liberal, and pluralist liberal ideologies.[10]

Discourse within the criminal law is less fluid and variable. Dominant accounts of the criminal law have tended to construct it in paradigmatic liberal terms, as a contest between the free rights-bearing individual and the state under the rule of law.[11] Under the terms of this mythic contest, the state is rigidly proscribed from intruding upon the autonomy of the free legal subject unless it establishes, in accordance with generally applicable rules of evidence

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[10] See P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117, an article which was particularly formative to my thinking with respect to the paradigms discussed in this part of the paper. See also N. Bobbio, *The Future of Democracy* (Minneapolis: University of Minnesota Press, 1987) c. 5.

[11] Griffith, *supra*, note 1.

and procedure, that the subject freely chose to violate a clearly expressed and legally enacted rule. The dynamic inner tension within liberalism between the rights of the individual and the interests of the community is played out doctrinally within the criminal law in the form of parallel antinomies between "due process" and "crime control," "intentionalism" and "determinism," "fault" and "harm," and "subjective" and "objective" forms of *mens rea*.[12]

Two forms of liberalism dominate the contemporary debate over the role of the regulatory offence within the criminal law. I have termed them classical and pluralist liberalism.[13] In the balance of this Part, I will first sketch out the contours of these two perspectives, to put in context their respective orientations within this debate, and then critically consider their ideological common ground.[14]

A. *Classical Liberalism*

By classical liberalism, I refer to the natural rights-based social philosophy which imbues the American *Bill of Rights*.[15] According to this view, before politics or the state came the individual. To advance his quest for self-realization,[16] the individual voluntarily associated with his peers in civil society contractually creating the state. As a price of this association, he surrendered

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[12] Nelken, *supra*, note 8 at 113.

[13] These terms are borrowed from Macklem's recent piece, *supra*, note 10. The paradigms themselves parallel those set out in W. Christian, "Ideology in Canadian Politics" in J.H. Redekop, ed., *Approaches to Canadian Politics* (Scarborough: Prentice-Hall, 1978) 114 at 114-37, which the author there terms as "business liberalism" and "welfare liberalism."

[14] These paradigms are intended and should be regarded as explicative, heuristic devices, not as actual scaled-down models.

[15] U.S. CONST. amend. I-X. Its best known modern ideologists are undoubtedly F. Hayek, perhaps best known for his trilogy *Law, Legislation and Liberty* (London: Routledge & Kegan Paul, 1982), and R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974). For an unabashedly classical liberal critique of strict liability within the criminal law, see J.L. Hippard, Sr., "The Unconstitutionality of Criminal Law Without Fault: An Argument for a Constitutional Doctrine of *Mens Rea*" (1973) 10 Hous. L. Rev. 1039 at 1041.

[16] And, of course, within this vision, the paradigmatic individual is invariably a "he."

some of his natural pre-political autonomy, but retained a sphere of pure liberty into which the state was forbidden to intrude as a matter of natural right and law.[17]

As Thomas Heller puts it, the "ideological centrepiece" of this account of law and society is the "existentially free subject."[18] What defines this subject above all else is his capacity to choose: his free will. It is on this basis that he is accorded moral respect and is vested with legal responsibility.[19] Within this perspective, the market is accorded an almost magical status. Allowed to operate freely, its invisible hand will reward the efforts of its rational self-maximizing participants in accord with their skill and self-reliance. The collective result of individual pursuit of self-interest will be the maximization of the political and economic welfare of all.

The judicial role in classical liberalism is to stand above the state and politics, dispensing justice by policing the boundaries which mark out the private spheres of liberty for its citizens.[20] Within these spheres, individuals are regarded as fully sovereign: individual rights trump collective interests every time. As one author has concisely put it, within this perspective, individuals possess "an inviolability founded on justice that even the welfare of society as a whole cannot override ... the rights secured by justice are not subject to political bargaining or to the calculus of social interests."[21]

Not only does classical liberalism reject a utilitarian calculus, but it contends that the good of all is served by the scrupulous protection of individual rights. Since individual spheres do not

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[17] See, generally, A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278 and P. Monahan & A. Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) Sup. Ct L. Rev. 69.

[18] T. Heller, "Structuralism and Critique" (1984) 36 Stan. L. Rev. 127 at 175.

[19] *Ibid.*

[20] Monahan & Petter, *supra*, note 17 at 75. See also D. Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940" (1980) 3 Res. in Law & Soc. 3.

[21] J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 3-4, quoted in M.J. Sandel, "The Political Theory of the Procedural Republic" in A.C. Hutchinson & P. Monahan, eds, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 85 at 88 [hereinafter *The Rule of Law*].

overlap or conflict, there are no trade offs: judicial intervention is costless and benefits all by keeping the state in its proper place.[22]

The enemy of freedom, classical liberalism suggests, is the state.[23] Its proper role is strictly limited to enacting law, designed to enhance the operation of the free market, by defining and protecting property rights. Its tendency, however, is to expand beyond this role and encroach on individual liberty. It is only through the rule of law that the tyranny implicit in this inexorable tendency can be curbed. Under the rule of law, all are subject to the law equally and are accountable for their actions in the ordinary courts of the land, in particular, the state and its officials.[24] Moreover, the law, specifically judge-made law, is supreme.[25] Impartial and objective, it stands high above the fray of civil society, articulating and defending fundamental individual rights.

The judicial methodology of classical liberalism is highly formalistic. Cases are characteristically decided by the application of strict rules without explicit reference to questions of policy or interests. In the realm of tort law, this formalism is combined with a strong dose of moral individualism. Historically, the influence of classical liberalism is reflected in various doctrinal principles which allocated risk onto the victims of industrialization, deemed to be the authors of their own misfortune, through such compensation-barring devices as the fellow servant rule, contributory negligence, limited liability, and privity of contract.[26]

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[22] Monahan & Petter, *supra*, note 17 at 75.

[23] Hutchinson & Petter, *supra*, note 17 at 283.

[24] A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England, During the Nineteenth Century*, 2d ed. (London: Macmillan, 1917). See also A.C. Hutchinson & P. Monahan, "Democracy and the Rule of Law" in *The Rule of Law*, *supra*, note 21, 97 at 104-5.

[25] For Dicey, the distinction between judge-made law or, as he also referred to it, "judicial legislation," and parliamentary legislation was of crucial importance. In his view, the role of judicial legislation was to maintain the "logic or ... symmetry of the law," thus securing conditions of certainty within the law as against the ever shifting currents of parliamentary legislation. *Ibid.* at 361-67.

[26] T. Lowi, "The Welfare State, the New Regulation and the Rule of Law" in *The Rule of Law*, *supra*, note 21, 17 at 25-29.

Notions of fault and individual free will are also central to the classical liberal vision of the role and nature of the criminal law. Within this vision, the singular mission of the criminal law is a desert-based retributive one: to punish moral fault. But moral fault does not exist without free will. Accordingly, the state is forbidden to punish the individual unless it first proves that he or she freely and voluntarily chose to violate an explicit command of the law.[27] Within classical liberalism, therefore, the concept of *mens rea* is highly subjectivist.[28]

This subjective conception of *mens rea* imagines a hierarchy of culpability, which corresponds to varying degrees of intentionality. The most culpable acts are those which are intended, less culpable are acts committed recklessly, and least culpable (and not truly criminal) are acts committed negligently. The degree to which an accused can be said to have adverted to the illegal act is largely determinative of the seriousness with which the law should regard the act in issue and of the appropriate sanction upon conviction.

Accordingly, regardless of the harm that an activity may pose or inflict, classical liberalism rejects fundamentally the notion of harm-based criminal culpability (in our terms, absolute liability) and is generally hostile to negligence-based criminal culpability (strict liability).[29] It contends that while the punishment of unintended or negligent conduct may have superficial utilitarian appeal, it is unjust since such conduct is unchosen. In support of this claim, it invokes the image of the upstanding citizen who "could not have done otherwise," helplessly ensnared by the criminal law.[30]

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[27] Hippard, *supra*, note 15 at 1043.

[28] R.A. Duff, *Intention, Agency and Criminal Liability* (Oxford: Basil Blackwell, 1990) at 149-57.

[29] Perhaps the best known articulation of the classical liberal perspective on these issues is J. Hall's "Negligent Behaviour Should Be Excluded From Penal Liability" (1963) 63 Colum. L. Rev. 632. A more recent expression is R. Singer, "The Resurgence of *Mens Rea*: III - The Rise and Fall of Strict Criminal Liability" (1989) 30 B.C. L. Rev. 337.

[30] M. Kelman, "Strict Liability: An Unorthodox View" in S. Kadish, ed., *Encyclopedia of Crime and Justice*, vol. 4 (New York: The Free Press, 1983) 1512 at 1515, quoting H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at 152.

B. *Pluralist Liberalism*

Like its classical counterpart, pluralist liberalism is firmly wedded to the ideology of the subject, tending methodologically and normatively to elevate the interests of the individual over those of the collective. But in many respects, pluralist liberalism's conception of social and political life differs from that of its classical forerunner, reflecting the distinctive late nineteenth/early twentieth century social relations from which the former emerged.

Unlike its classical counterpart, pluralist liberalism is pessimistic about the capacity of the free market to spontaneously maximize the common good. The individual pursuit of self-interest, within this perspective, is seen as leading to market failure which results in costs being borne by the powerless and by communal goods, such as the environment. Thus, within this view, although the market has the capacity to enhance individual autonomy and self-realization, it also poses a threat to these values.[31]

As a result, pluralist liberalism is less hostile towards the state. In its view, the state must step into civil society to protect social interests imperilled by the market, by regulating against its excesses and assisting its victims.[32] The philosophy of modern government in the pluralist liberal conception is utilitarian: its mission is to maximize the welfare of all by carefully balancing competing individual and collective interests. It seeks to fulfil this mission through technocratic administration, under which law is developed and implemented by expert bureaucracies guided by social and natural science. While the rule of law remains a much revered, rhetorical ideal, in practice it is eroded as increasingly particularized regulation and administrative discretion become the norm.[33]

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[31] Macklem, *supra*, note 10 at 136.

[32] For a remarkably clear articulation of this perspective as a justification of the regulatory offence, see the judgment of La Forest J. in *Thomson Newspapers Ltd* v. *Director of Investigation and Research, Restrictive Trade Practices Commission*, [1990] 1 S.C.R. 425 at 502-17, 54 C.C.C. (3d) 417 at 472-83 [hereinafter *Thomson Newspapers* cited to C.C.C.].

[33] R. Cotterrell, "Feasible Regulation for Democracy and Social Justice" (1988) 15 J.L. & Soc. 5 at 12. See also F. Neumann, *The Rule of Law* (Dover, N.H.: Berg Publishing, 1986) at 282 and N. Poulantzas, *State, Power, Socialism*, trans. P. Camiller (London: New Left Books, 1978) at 218.

Within the pluralist liberal vision, political and social life is a complex matrix of interdependent and cross-cutting interests, not a simple map on which can be located well marked spheres of individual liberty. Its notion of politics is that of the zero-sum game: because politics involves choosing between conflicting interests, there are inevitably winners and losers. It is likewise in the judicial realm. Pluralist liberalism suggests that the complex and interdependent nature of social relations makes it impossible and undesirable to draw bright lines between conflicting entitlements.[34] The formalistic application of legal rules is regarded with disfavour, replaced by an approach which seeks to do justice by balancing interests and applying flexible standards.[35] In keeping with the ascendant utilitarian ethos, this approach provides a justification for giving priority to the "public interest" even at the expense of individual rights.

In tort law, the ideology of pluralist liberalism is manifested in various doctrinal and legislative developments — such as worker's compensation legislation, the rise of strict liability, *res ipsa loquitur*, and the abolition of the fellow servant rule — which purport to provide redress for hardships imposed by the adherence to formalist legal principles.[36] The importance attributed to individual fault thus declines as risk is increasingly socialized. As Lowi puts it, pluralist liberalism implies a doctrinal shift "from private blame to public interest and ... from individual responsibility to distributional balance."[37]

Pluralist liberalism also entails a reconceptualization of the criminal law. Within this perspective, while the punishment of moral

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[34] Macklem, *supra*, note 10 at 136.

[35] Horwitz contends that the first appearance in American legal theory of a "fully articulated balancing test" was in an article by O.W. Holmes, "Privilege, Malice and Intent" (1894) 8 Harv. L. Rev. 1. See M.J. Horwitz, "The Place of Holmes in American Legal Thought" in M.J. Horwitz, ed., *American Legal History* (Toronto: Faculty of Law, University of Toronto, 1989) 169 at 227. On the ideological significance of the distinction between rules versus standards, see D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685 and M. Kelman, "Interpretative Construction in the Substantive Criminal Law" (1981) 33 Stan. L. Rev. 591.

[36] Lowi, *supra*, note 26 at 26-27.

[37] *Ibid.* at 30.

fault remains a central role of the criminal law, it is not its exclusive one. Apart from its retributive function, the criminal law is conceived of as serving utilitarian functions, such as the prevention of harm through education, general and specific deterrence, and the rehabilitation of offenders. In short, pluralist liberalism represents a perceptible shift towards a more harm-based conception of the criminal law.[38]

Nowhere is this shift more evident than in the orientation within pluralist liberalism towards the regulatory offence. Pluralist liberals conceive of the regulatory offence as being an essential means of counteracting market failure, by instituting and enforcing minimum standards of conduct in the marketplace.[39] In their view, these offences are more akin to the civil than the criminal law since they generally relate to productive market conduct which is to be discouraged, not punished. Penal consequences are attached to such conduct, they suggest, for instrumental, rather than moral reasons.[40] Accordingly, pluralist liberals argue that, although regulatory offences are prosecuted in the criminal courts, they should not necessarily be subject to the traditional principles of the criminal law, particularly its *mens rea* requirements.[41]

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[38] The pluralist liberal conception of the criminal law is nicely illustrated in Paul Weiler's article "The Supreme Court of Canada and the Doctrines of *Mens Rea*" (1971) 49 Can. Bar Rev. 280 at 284. In this article, Weiler states that "the purpose of the criminal law 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." For a thoughtful consideration of the relationship between negligence and criminal law from a pluralist liberal perspective, see G.P. Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis" (1971) 119 U. Pa. L. Rev. 401.

[39] See the reasons for judgment of Carthy J.A. in *R.* v. *Ellis-Don Ltd* (1990), 1 O.R. (3d) 193 at 213-24 [hereinafter *Ellis-Don Ltd*]. For further discussion of the case, see *infra*, note 102.

[40] See Dickson J. for the court in *R.* v. *Sault Ste. Marie*, [1978] 2 S.C.R. 1299. Also see the judgment of La Forest J. in *Thomson Newspapers*, *supra*, note 32 at 478-79.

[41] The historical basis of the distinction drawn by pluralist liberals between true crimes and regulatory offences is the ancient distinction, apparently dating back to the fifteenth century, between offences contrary to natural law (*mala in se*) and those merely contrary to positive law (*mala prohibita*). The pluralist liberal position is that regulatory offences fall into the latter category because they involve acts which are proscribed "from motives of public policy and not because of their moral turpitude or the criminal intent with which they are committed." See F.B. Sayre, "Public Welfare Offences" (1933) 33 Colum. L. Rev. 55 at 65. The *mala in se*/*mala prohibita* distinction is one which, particularly within the positivist

C. *Common Ground: Continuities Within the Liberal Vision*

Despite the distinctions which can be drawn between classical and pluralist liberalisms, fundamentally they are cut from the same cloth, the latter merely an updated (though paradoxically, as I will argue, less fashionable) version of the former.

While pluralist liberalism is less suspicious of the state than its forerunner, like classical liberalism, it pictures the state as being exterior to and an emanation of a pre-existing private civil society. Within this shared vision, individual liberty and private property are antecedent to the state, the latter a freely willed contractual creation of rights-bearing individuals. The role of the state, mandated by these liberal presuppositions, is to protect the pre-political property rights and individual liberties of its creators and their heirs. What is concealed by this private/public dichotomization of the relationship between the state and civil society is that property rights and individual liberties — in capitalist society, in any event — do not precede, but rather are defined and created by state power.[42] Property, in its manifold modern forms, is wholly dependent on the state for its recognition and enforcement under law. Similarly, in the absence of the state, it is impossible to contemplate the notion of individual liberty. Like property, it too derives its existence directly from the state; for example, freedom of contract presupposes state enforcement of "voluntary agreements." Thus conceived, it is fallacious for the courts to suppose — when defining spheres of individual liberty or balancing individual rights versus collective interests — that what is at stake is whether or not the state ought to "intervene." The state, as Monahan and Petter aptly point out, is already there: the real issue is for whose benefit is its power to be exercised.[43]

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tradition, has been rigourously criticized, most notably by Bentham. See J. Bentham, *A Comment on the Commentaries and a Fragment on Government*, J. Burns & H.L.A. Hart, eds (London: Athlone Press, 1977) at 384-89. See also "The Distinction between Mala Prohibita and Mala in Se in Criminal Law" (1930) 30 Colum. L. Rev. 74.

[42] Cotterrell, *supra*, note 33 at 10.

[43] *Supra*, note 17 at 76.

Classical and pluralist liberalism also share a distinctive proprietary notion of liberty. This liberal notion of liberty guarantees a negative liberty in the property of the self: a freedom from state interference with one's person and property.[44] This partial and limited notion of liberty ignores and tends to obscure many of the most intractable and prevalent sources of inequality and oppression within modern society. It offers freedom from the state, but not from market forces, corporate power, racism, sexism, or other forms of ostensibly private domination.[45] For its part, pluralist liberalism is not completely oblivious to the oppressive potential of private power. Ultimately, however, its restrictive notion of liberty as a claim against the state significantly constrains it from providing redress, at least through the legal system, for the harms occasioned by the exercise of such power.

Moreover, both liberalisms are characterized by a deep and abiding commitment to the ideology of the rule of law. Within classical and pluralist liberalism, the rule of law, as crystallized in the notion of "a government of laws not men," is regarded as one of the great accomplishments of the western liberal bourgeois revolutions. To the extent that the concept implies equality of treatment for the powerful and the powerless and represents a bulwark against privilege and arbitrariness, it is an accomplishment which ought not to be dismissed or belittled.[46] And yet, like the liberal notion of liberty, it too is a partial, limited concept which promises much more than it delivers. The rule of law presumptively treats all legal subjects — individuals, corporations, or otherwise — as equals. In a society in which all such subjects were roughly equivalent in terms of market power, the rule of law would, in theory, serve to reinforce this equivalence. Under conditions in which market power is

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[44] On the concept of the "spatial self" within liberal theory, see M. Warren, "Liberal Constitutionalism as Ideology" (1989) 17 Pol. Theory 511.

[45] As Bowles and Gintis have recently put it, "Liberalism's fault lies not in overstating the possibilities for human freedom, but in failing to identify the roots of domination - those which lie in economic dependency and patriarchal authority chief among them - and in elevating a radically individual conception of autonomy to the detriment of a conception of community which might form the basis of democratic empowerment." See S. Bowles & H. Gintin, *Democracy and Capitalism* (New York: Basic Books, 1986) at 176.

[46] E.P. Thompson, *Whigs and Hunters* (Middlesex: Penguin, 1977) at 258-69.

unequal, particularly where economic life is dominated by large corporate entities, the tendency of the rule of law is overwhelmingly to reinforce these inequalities. Thus, the significance of the rule of law, as Neumann attempted to demonstrate, lies less in its refusal to recognize the special claims of the powerful than in its wilful blindness to the need for special protection for the powerless and special control of the powerful.[47]

And finally, a defining feature of both liberalisms is an impoverished notion of the most powerful actor within contemporary capitalism, the modern business corporation. During the late eighteenth and for much of the nineteenth century, within political and legal discourse, the corporation was broadly regarded as a fictional entity created by a grant or concession of state power and hence inherently vested with a public nature.[48] As the importance of the corporation as a vehicle of capital accumulation grew during the heyday of economic liberalism in the latter part of the nineteenth and early twentieth century, this conception was contested and ultimately supplanted. The corporation became, within the newly dominant liberal discourse, a natural entity, the

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[47] Neumann, *supra*, note 33 (as cited by Cotterrell).

[48] The dominance of the concession theory of the corporation during much of the nineteenth century was the product of a confluence of a variety of factors, including the then common requirement, upon those wishing to carry on business as a corporation, to obtain a "special charter" from the state (which would typically stipulate restrictions on the type of activities the enterprise could lawfully conduct) as well as the public-oriented nature of the activities (*i.e.*, transportation and utilities) engaged in by early corporations. As the significance of the corporation as a vehicle of capital accumulation grew and state restrictions on corporate formation and activity lessened, a more privatized, personified conception of the corporation began to achieve dominance. On theories of the corporation, see, generally, M.J. Horwitz, "*Santa Clara* Revisited" (1985) 88 W. Va. L. Rev. 173; G.A. Mark, "The Personification of the Business Corporation in American Law" (1987) 54 U. Chi. L. Rev. 1441; W.W. Bratton, Jr., "The New Economic Theory of the Firm" (1989) 41 Stan. L. Rev. 1471; and D. Millon, "Theories of the Corporation" (1990) Duke L.J. 201. With respect to Anglo-Canadian developments, the literature is much sparser. See L.C.B. Gower, *The Principles of Modern Company Law*, 4th ed. (London: Stevens & Co., 1979) at 205-13; M. Stokes, "Company Theory and Legal Theory" in W. Twining, ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) 155; and R.W. Baumann, "Liberalism and Canadian Company Law" in R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 75.

private product of entrepreneurial initiative and a quasi-individual in the eyes of the law. [49]

While I do not suggest that the respective postures of classical and pluralist liberalism towards the corporation are identical, ultimately, for similar reasons, neither comes to terms with the realities of corporate power. Classical liberalism all but ignores the corporation, imagining a world populated by individuals and the state, subsuming the corporation unreflectively within the former category.[50] Pluralist liberalism, on the other hand, recognizes the economic and political significance of groups – including the corporation – within modern social life, but tends to regard the latter as an essentially benign force, attributing the various ills of capitalist society to market failure rather than to relations of power sheltered and promoted by the corporate form.[51] In short, by virtue of their shared private, personified conception of the corporation both liberalisms obscure its status "as a forum of social power ... and as a terrain of class conflict."[52]

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[49] Horwitz argues that the decision of the U.S. Supreme Court in *Santa Clara Co.* v. *Southern Pacific Railroad*, 118 U.S. 394 (1886), in which a corporation was for the first time held to be entitled to constitutional rights under the 14th Amendment, is not the watershed decision historians have often considered it to be. He argues that the process by which the privatized natural entity conception of the corporation - which underpins its treatment as a rights-bearing legal subject for constitutional purposes - gained ascendency was a complicated one and further that this conception did not achieve dominance within legal discourse until some twenty years after *Santa Clara* was decided. See Horwitz, *ibid.*

[50] This is true even of modern-day classical liberals such as Hayek. His lengthy three volume tract, *Law, Legislation and Liberty*, *supra*, note 15, published in stages during the 1970s, barely mentions the corporation, and where it does so, it is in admiring terms. See vol. 3, "Political Order of a Free People" at 77-83. See also Roberta Romano's discussion of Hayek and the modern minimal statists in "Metapolitics and Corporate Law Reform" (1984) 36 Stan. L. Rev. 922 at 944-45.

[51] This blindness of pluralist liberalism to the dominant economic and political role played by the corporate capital within western liberal democracies has of course provoked spirited critiques even from scholars well within the liberal tradition. In the 1950s and 1960s, many of these liberal critics could be grouped into what has been termed the elite theory school, which took much of its inspiration from the work of C. Wright Mills. More recently, this critical liberal tradition has been continued by the so-called neo-pluralists, including Galbraith, Lindblom, and Lowi. See, generally, P. Dunleavy & B. O'Leary, *Theories of the State: The Politics of Liberal Democracy* (Basingstoke, Eng.: Macmillan, 1987).

[52] Bowles & Gintis, *supra*, note 45 at 16.

III. THE REGULATORY OFFENCE: AN OVERVIEW OF THE CONTEMPORARY DEBATE

A. *The Pre-Charter Era*

Prior to the 1970s, the status of the traditional absolute liability-based regulatory offence within the criminal law was relatively uncontroversial in Canadian legal circles. When it first emerged in the late nineteenth century, there was some judicial resistance to the notion of imposing punishment without proof of *mens rea*, but absolute liability soon took root.[53] With the rise of the modern regulatory state in the post-World War II era, absolute liability-based regulatory offences proliferated in a wide range of areas, including worker health and safety, consumer protection, market practices, environmental protection, and transportation.[54]

The first sustained critique of the regulatory offence in the Canadian context came in 1974 in a working paper prepared by the Law Reform Commission of Canada (the "Commission") entitled *Criminal Law: Strict Liability*.[55] One of the main premises adopted by the Commission was that there was a meaningful purposive distinction to be drawn between real crimes and regulatory offences. The purpose of the former, it asserted, was to punish conduct which

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[53] The historical development of the modern regulatory offence is described in Sayre, *supra*, note 41. See also C. Manchester, "The Origins of Strict Criminal Liability" (1977) 6 Anglo-Am. L. Rev. 277; and Singer, *supra*, note 29. Although, in his influential article on the subject, Sayre emphasized the novelty of this development, a strong argument can be made that the modern regulatory offence is essentially a modern statutory cousin of the common law crime of public nuisance, which, like the absolute liability regulatory offence, rendered criminal conduct injurious to public health, safety, or convenience without regard to the intention of the accused. Indeed, *R.* v. *Stephens* (1866), 1 Q.B. 702, generally regarded to be one of the most important landmarks in the development of the modern regulatory offence, was a case involving a nuisance indictment.

[54] By the mid-1960s, cracks in the doctrine started to appear as courts began to attempt to mitigate the perceived harshness of the absolute liability principle by developing a defence of reasonable mistake of fact. See *R.* v. *McIver*, [1965] 2 O.R. 475 (C.A.) and *R.* v. *V.K. Mason Ltd*, [1968] 1 O.R. 399 (H.C.). See also G.L. Peiris, "Strict Liability in Commonwealth Criminal Law" (1983) 3 Legal Stud. 117 at 124-31.

[55] Law Reform Commission of Canada, *Criminal Law: Strict Liability* (Working Paper No. 2) (Ottawa: Information Canada, June 1974). Note that this is also cited by some as *The Meaning of Guilt: Strict Liability.*

violated fundamental social values, while the latter existed to promote standards of care in the marketplace.[56] Notwithstanding this distinction, however, the Commission argued that the latter rationale — in effect, harm prevention — was not a sufficient basis to justify punishment under the criminal law unless the accused was afforded an opportunity to explain or justify his or her conduct.[57]

In short, the basis of the Commission's critique of the existing absolute liability form of the regulatory offence was procedural fairness, that it was unjust to convict without permitting a full answer and defence. In reaching this conclusion, it explicitly rejected the argument that absolute liability was objectionable on the ground that it unjustifiably interfered with individual liberty. In its opinion, "the gain in terms of prevention of harm, promotion of high standards of care and protection of the public welfare" outweighed autonomy concerns, particularly in light of the unlikelihood that conviction for such an offence would entail anything more than a relatively light fine.[58]

In formulating its proposals for reforming the regulatory offence, the Commission adopted a purposive, interest balancing approach. Proceeding from its premise that regulatory offences should promote standards of care in the marketplace and contending that such offences were characteristically committed negligently, it concluded that the appropriate standard of proof should be that of negligence.[59] Because of concerns about prosecutorial efficacy and means of knowledge, the Commission recommended that this burden ought to be borne by the defendant. Accordingly, it recommended that regulatory offences provide for a "due diligence" defence which would entitle the accused to an acquittal upon establishing reasonable care on the balance of probabilities.[60]

In making these proposals, the Commission explicitly noted concerns that the creation of a due diligence defence "made it too

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[56] *Ibid.* at 5-8, 31-33.

[57] *Ibid.* at 21-25.

[58] *Ibid.* at 22.

[59] *Ibid.* at 32-33.

[60] *Ibid.* at 34.

easy" for some defendants, in particular, large corporations. These concerns, it promised, would be specifically addressed in a pending Commission report.[61] This latter report, *Criminal Responsibility for Group Action*, was published in 1976.[62] In it, the Commission weighed arguments for and against extending to corporations the benefit of its 1974 recommendation that negligence be made the minimum standard of culpability for regulatory offences. Militating against extending a due diligence defence to corporations, in its view, were difficulties prosecutors would encounter in meeting reasonable care defences put forward by corporate accused, particularly in the case of large diffuse organizations.[63] In addition, it noted concerns about the increased cost and efficiency of regulatory prosecutions in general. The countervailing and ultimately decisive argument for the Commission, however, was one of fairness: the proposition that, like an individual, a corporation should be given an opportunity to explain or justify impugned conduct.[64]

In arriving at this conclusion, the Commission contended that the provision of a due diligence defence to corporations had the advantage of "shifting to a public forum the adjudication of standards by which corporations are to be guided ... [providing the public] insight into corporate activities ... [and promoting] a gradual raising of standards of care."[65] Reflecting perhaps the tentativeness of its views as to the advisability of the proposed reform, the Commission recommended that the defence be extended for a trial period so that its impact upon law enforcement could be assessed before any permanent changes were made.[66]

In 1978, two years after these recommendations were made, the Supreme Court, presaging the activist stance it was later to

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[61] *Ibid.*

[62] Law Reform Commission of Canada, *Criminal Responsibility for Group Action* (Working Paper No. 16) (Ottawa: Information Canada, 1976).

[63] *Ibid.* at 27.

[64] *Ibid.* at 27-28.

[65] *Ibid.* at 28.

[66] *Ibid.*

adopt under the *Charter*, introduced the due diligence defence into Canadian law in *R.* v. *Sault Ste. Marie*.[67] The issue in *Sault Ste. Marie* was whether the offence of causing water pollution, contrary to a provincial statute, required proof of fault. Dickson J., writing for the court, approached the issue by drawing a distinction between regulatory offences and the criminal law proper. In his view, the former were

> not criminal in any real sense, but are prohibited in the public interest ... Although enforced as penal laws through the utilization of the machinery of the criminal law ... [they] are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application.[68]

In considering the merits of the *mens rea* issue, Dickson J. stated that regulatory offences "lie in the field of conflicting values."[69] To decide the issue, he adopted an explicit interest balancing approach in which he weighed the social interest in maintaining and enforcing standards of public health and safety against the individual interests of the accused. In his opinion, the principal utilitarian arguments in support of absolute liability were twofold: its deterrent effect in the promotion of high standards of care and the exigencies of law enforcement. On balance, he concluded these arguments were unconvincing when balanced against, as he put it, "the generally held revulsion against punishment of the morally innocent" which he suggested was associated with punishment without fault.[70]

Accordingly, while recognizing that the absolute liability offence was "firmly embedded in ... Anglo-American and Canadian jurisprudence," Dickson J. proposed that a common law presumption against absolute liability be created, in the process, establishing a new half-way house between *mens rea* and absolute liability offences: the strict liability offence.[71] In contrast to its absolute liability

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[67] *Supra*, note 40 [hereinafter *Sault Ste. Marie*].

[68] *Ibid.* at 357.

[69] *Ibid.* at 362.

[70] *Ibid.* at 363.

[71] *Ibid.* at 363, 373-74.

counterpart, the strict liability offence would afford the opportunity to advance a defence of due diligence, entitling an accused to an acquittal upon establishing, on the balance of probabilities, a lack of negligence.

The advantages of this new approach over a traditional criminal *mens rea* model, in Dickson J.'s opinion, were not only that it would relieve the Crown of the virtually impossible task of proving "wrongful intention," but that it would impose on an accused, who in the "normal case ... will have knowledge of what he has done to avoid the breach," the obligation of coming forward with evidence on the issue of reasonable care.[72] This latter onus was, in his view, particularly appropriate where the accused was a "large and complex corporation."[73]

With the exception of some lonely environmentalists who contended that the new regime made it too easy for corporate offenders, in legal circles, *Sault Ste. Marie* was widely applauded both for its judicial methodology and the substantive reforms it initiated.[74] Its quintessentially pluralist liberal interest balancing approach, with its overt attention to policy and values, was seen as a significant advance from the muddy formalism which had long characterized the law in the area. As one commentator put it, the decision represented "a genuine attempt to satisfy and reconcile the cogent demands of ... manifold conflicting values and interests."[75]

In the period following *Sault Ste. Marie*, absolute liability offences rapidly fell into disfavour with courts and regulators. Employing its presumption against absolute liability, courts generally read due diligence defences into ambiguous provisions, while most new legislation was drafted on the strict liability model.[76] To the extent that the absolute liability offence remained in use, it was

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[72] *Ibid.* at 373.

[73] *Ibid.*

[74] See, for example, A.C. Hutchinson, "*Sault Ste. Marie, Mens Rea* and the Halfway House" (1979) 17 Osgoode Hall L.J. 415 at 425; Webb, *supra*, note 5; and M.I. Jeffery, "Environmental Enforcement and Regulation in the 1980s: *Regina* v. *Sault Ste. Marie* Revisited" (1984) 10 Queen's L.J. 43.

[75] Hutchinson, *ibid.* at 437.

[76] Webb, *supra*, note 5 at 435-39.

generally limited to motor vehicle regulation and by-law enforcement.[77]

B. *Charter Days: A Revival of the Debate*

The battle between pluralist and classical liberalism over the constitutional status of the regulatory offence has developed slowly. The first skirmish in the Supreme Court of Canada came in 1985 in *Reference Re Section 94(2) of the Motor Vehicle Act*.[78] At issue was whether a provision of the B.C. *Motor Vehicle Act*[79] violated section 7 of the *Charter*. Under this provision, it was an absolute liability offence to operate a motor vehicle while prohibited from driving, punishable by a mandatory penalty of seven days imprisonment.

Writing for the majority, Lamer J. held that the provision violated section 7 and could not be saved under section 1. In his view, what rendered the offence unconstitutional was the manner in which it combined absolute liability with mandatory imprisonment. In these circumstances, where "administrative law chooses to call in aid imprisonment through penal law," section 1 would rarely justify an otherwise unconstitutional provision.[80] Accordingly, the decision implied that offences which carried a potential term of imprisonment must afford a defence of due diligence, elevating, in such circumstances, the presumption against absolute liability introduced in *Sault Ste. Marie* into a constitutional requirement.

To this extent, the Court attributed an absolute character to the rights protected under section 7, but, in other respects, its decision was carefully limited. The Court explicitly refrained from deciding the constitutionality of absolute liability in the absence of possible imprisonment. And, more importantly, the decision was careful to leave open the issue of corporate liability. In this latter

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[77] *Ibid.*

[78] (1985), 23 C.C.C. (3d) 289 [hereinafter *Re B.C. Motor Vehicle Act*]. To date, it is still the only decision of the Supreme Court to specifically address the constitutionality of the regulatory offence.

[79] R.S.B.C. 1979, c. 288.

[80] *Re B.C. Motor Vehicle Act*, *supra*, note 78 at 313.

regard, Lamer J. suggested that corporate accused may be unable to invoke section 7 to challenge absolute liability on constitutional grounds and that, in any event, different considerations would be applicable to corporations under section 1.[81]

Until recently, the most significant appellate level case to consider strict liability under the *Charter* was a 1989 decision of the Ontario Court of Appeal, *R.* v. *Wholesale Travel Group Inc.*[82] This was a prosecution under the *Competition Act*[83] against a corporate accused and one of its officers on charges of false advertising. Upon conviction, the latter accused was potentially liable to a term of imprisonment under the legislation. The *Act* contained a due diligence provision, but stipulated that, as a precondition to relying on this defence, an accused was required to demonstrate that a prompt retraction of the impugned representation had been made.

The initial issue to be decided was whether the corporate accused was entitled to raise and rely on *Charter* arguments put forward under sections 7 and 11(d) by its co-accused. The Court held that, while it was settled law that a corporation could not seek declaratory relief under section 7 of the *Charter*, it was open for a corporate accused to challenge the constitutionality of a law under which it was being prosecuted.[84] Following *R.* v. *Big M Drug Mart*,[85] the Court stated that this conclusion was based on the principle that "no one can be convicted ... under an unconstitutional law," a principle inherent, in its view, in the concept of the supremacy of the Constitution.[86]

To the extent that the *Act* imposed a positive duty on an accused as a condition precedent of putting forward a defence of

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[81] *Ibid.* at 314.

[82] (1989), 73 C.R. (3d) 320 (Ont. C.A.) [hereinafter *Wholesale Travel*]. A decision was rendered by the Supreme Court on 24 October 1991. See *infra*, note 148. Recently, another significant decision on strict liability under the *Charter* has been rendered by the Ontario Court of Appeal. See *Ellis-Don Ltd*, *supra*, note 39. I will consider this decision in some detail later in this paper. See *infra*, section III.C. at 731-35.

[83] R.S.C. 1985, c. C-34.

[84] *Wholesale Travel*, *supra*, note 82 at 335.

[85] [1985] 1 S.C.R. 295.

[86] *Ibid.*

due diligence, the Court had no difficulty in concluding that the offence was tantamount to an absolute liability offence punishable by imprisonment, and accordingly, applying *Re B.C. Motor Vehicle Act*, was unconstitutional under section 7.[87] Having reached this conclusion, the Court proceeded to make a further, far more significant ruling. Writing for the majority, Tarnopolsky J.A. held that, even if the provision imposing the duty to retract were severed, the legislation offended the presumption of innocence protected by section 11(d) by imposing a reverse onus on an accused to establish due diligence.[88]

This conclusion was based on a textual analysis of a contradictory line of Supreme Court of Canada authority in the criminal law area, which included *R.* v. *Whyte*,[89] the decision ultimately relied on by Tarnopolsky J.A. in his majority reasons. *Whyte* involved a challenge to a *Criminal Code* provision which imposed on an accused, found in the driver's seat of a vehicle while impaired, an onus of proving on the balance of probabilities that he or she did not enter the vehicle intending to set it in motion. The accused in *Whyte* argued that imposing this burden upon him to establish a lawful excuse infringed his *Charter* right to be presumed innocent. The Supreme Court agreed, but held that this infringement was justifiable under section 1 in light of the social interest in controlling impaired driving.

Without considering the appropriateness of following a decision arising squarely within what is normally considered to be the realm of the criminal law (*i.e.*, impaired driving) in the regulatory context, Tarnopolsky J.A. held that *Whyte* was decisive

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[87] *Ibid.* at 337.

[88] *Ibid.* at 339-45.

[89] *R.* v. *Whyte*, [1988] 2 S.C.R. 3, 42 C.C.C. (3d) 97 [hereinafter *Whyte* cited to C.C.C.]. This line of authority includes *R.* v. *Holmes*, [1988] 1 S.C.R. 914 [hereinafter *Holmes*] and *R.* v. *Schwartz*, [1988] 2 S.C.R. 443 [hereinafter *Schwartz*]. Both *Schwartz* and *Holmes* suggest the presumption of innocence does *not* apply to defences; only *Whyte* suggests that it does. Moreover, in contrast to *Whyte*, the final case of the trio (*Schwartz*) involved a quasi-criminal regulatory provision. Commentators suggest that these decisions cannot be reconciled and that we must wait for the Supreme Court to set things straight. See, for example, I. Weiser, "The Presumption of Innocence Under Section 11(d) of the *Charter*" (1989) 31 Crim. L.Q. 318.

and dispositive of the case before him.[90] On this basis, the majority in *Wholesale Travel* concluded that, by imposing an onus on an accused to prove due diligence, the strict liability *Competition Act* offences with which the appellants had been charged were unconstitutional. Since the Crown made no attempt to justify the challenged provisions under section 1, the provisions were struck down.

The decision of the majority in *Wholesale Travel* marks a departure from the dominant pluralist liberal discourse exemplified in *Sault Ste. Marie*, a discourse which informs Lamer J.'s approach in *Re B.C. Motor Vehicle Act*. In the tradition of *Sault Ste. Marie*, Lamer J.'s latter judgment maintains a clear distinction between regulatory offences and real crimes. The approach adopted is one of interest balancing, and there is an explicit appreciation of the unique problems associated with the regulation of corporate actors. These defining features of the pluralist liberal approach are absent from *Wholesale Travel*. The majority judgment unreflectively applies criminal law jurisprudence in the regulatory context. Its approach is highly formalistic and text-based, and its conclusion, concerning the standing of corporations to seek *Charter* relief, is premised not on policy considerations, but on an abstract conception of the rule of law.

These differences between the judgments in *Re B.C. Motor Vehicle Act* and *Wholesale Travel* are, in my view, ideological in origin, reflecting an underlying tension between pluralist liberal and classical liberal conceptions of the role of the regulatory offence within the criminal law. To a large extent, the classical liberal perspective which informs *Wholesale Travel* is unarticulated, discernible only by deconstructing its methodology. In the debate over the regulatory offence which has ensued since *Wholesale Travel*, however, this classical liberal perspective has been elaborated in more full blown terms. In the section which follows, I will examine two significant recent elaborations of this perspective: a report of the Ontario Law Reform Commission on provincial offences and the decision of the Ontario Court of Appeal in *R.* v. *Ellis-Don Ltd.*

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[90] *Wholesale Travel*, *supra*, note 82 at 343-45.

C. *Pluralist Liberalism Challenged: The Debate Heats Up*

Prompted no doubt in part by the decision in *Re B.C. Motor Vehicle Act*, in 1988 the Ontario Law Reform Commission commenced a project designed to assess the implications of the *Charter* for regulatory administration and enforcement. The resulting report, entitled *The Basis of Liability for Provincial Offences*,[91] was published in early 1990. The principal recommendations made in the *Report* can be summarized as follows:

> 1. Abolition of absolute liability for provincial offences and adoption of the principle that liability for such offences be based on some minimum requirement of fault; and
> 2. Elimination of the reverse onus due diligence defence and its replacement by a regime under which, once the *actus reus* was proven, an accused would be presumed negligent until some evidence of reasonable care was adduced. Once the trier of fact determined that this rebuttal evidence was sufficient to raise a reasonable doubt as to reasonable care, the Crown would thereafter be required to prove the negligence of the accused beyond a reasonable doubt.[92]

The *Report* proceeded from the premise that the criminal law cannot legitimately countenance punishment without moral fault. The *Report* took this proposition to be self-evident and uncontestable. In its words, it was "mandated ... by the dictates of justice."[93]

As framed by the *Report*, therefore, the question of whether to retain absolute liability in the regulatory context was a moral one which dictated its own conclusion: absolute liability was without legal justification since it was morally wrong to convict an accused of an offence, no matter how minor or trivial, without proof of fault. In the face of this moral imperative, the *Report* concluded that the standard utilitarian arguments favouring retention of absolute liability should be rejected out of hand.[94]

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[91] *Supra*, note 7. The Commissioners responsible for the *Report* included a number of leading judicial and academic figures, such as Rosalie Abella, Richard Simeon, and Robert Prichard. The chief consultant to the Commission was Queen's University law professor Don Stuart.

[92] *Ibid.* at 41-51, 53.

[93] *Ibid.* at 1.

[94] *Ibid.* at 42-45.

In its consideration of strict liability, the *Report* contended that the scope of an accused's *Charter* rights should not depend upon the traditional distinction between real crimes and regulatory offences since, according to the *Report*, many regulatory offences were "serious both in terms of penalty and stigma."[95] Accordingly, the position adopted in the *Report* was that the individual rights protected within the criminal law must be given equal protection in the regulatory context. In its view, rights were rights; their content had nothing to do with the context in which they were asserted.

Applying this principle, the *Report* concluded — relying heavily on *Whyte* and *Wholesale Travel* — that the strict liability due diligence defence violated the presumption of innocence under section 11(d). Against the backdrop of this serious breach of individual rights, the *Report* contended that practical concerns such as access to the means of knowledge were not "a satisfactory rationale for shifting the onus."[96] In this regard, the *Report* made the rather bewildering argument that, if real crimes could be prosecuted effectively without the benefit of a reverse onus, so too could regulatory offences.[97] The *Report* also emphasized that regulatory offences involved activities which the state sought to regulate not prohibit, implicitly suggesting that worthwhile productive market activity was discouraged by strict regulation.[98]

As a result, the *Report* recommended that the reverse onus be eliminated and replaced by a regime under which, in conformity with the presumption of innocence, the onus of proof would remain at all times on the Crown. Under this new regime, once the Crown established the commission of a wrongful act, in order to avoid conviction, it would be necessary for an accused to raise a reasonable doubt as to whether due diligence had been exercised in all of the circumstances. The *Report* suggested that an accused could accomplish this without calling evidence, simply by eliciting favourable answers relevant to the issue from Crown witnesses. And

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[95] *Ibid.* at 47.

[96] *Ibid.*

[97] *Ibid.*

[98] *Ibid.* at 45.

once the matter was put in doubt, the Crown could only obtain a conviction upon proving negligence beyond a reasonable doubt.[99]

Having made this radical and procedurally bemusing proposal,[100] the *Report* made note of the argument that its reforms might prove inappropriate to the regulation of large corporations in the environmental, health and safety, and financial contexts, particularly where the issue involved consideration of complex internal systems only familiar to the accused organization or its employees. The *Report*'s response was that it disagreed with this suggestion, contending that the presumption of innocence was "a fundamental right that ought to apply to both individuals and institutions."[101]

The most recent development in the ongoing debate over the status of the regulatory offence is the decision of the Ontario Court of Appeal in *R.* v. *Ellis-Don Ltd.*[102] The case arose as a result of the death of a construction worker at a work site. The general contractor, Ellis-Don Limited, and one of its supervisors were later charged under the Ontario *Occupational Health and Safety Act*[103] with failing to take safety precautions which could have prevented

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[99] *Ibid.* at 48.

[100] The *Report*'s proposals would require that the *mens rea* of regulatory offences effectively be proven on a criminal reasonable doubt standard. The threshold requirement on an accused to rebut negligence, applying their test, is essentially that of raising evidence to the contrary. In criminal law, this traditionally has been a very low hurdle. In effect, it amounts to any evidence supporting the position of the defence which the trier of fact is not prepared explicitly to disbelieve. Moreover, once the trier of fact decides, after the Crown has called evidence, that such a reasonable doubt exists, one wonders what, if anything, the Crown will be able to do to eliminate that doubt.

[101] *Ibid.* at 48.

[102] *Supra*, note 39. The full name of the decision is *R.* v. *Ellis-Don Ltd*; *R.* v. *Morra*; *R.* v. *Indal Furniture Systems, Division of Indal Ltd and Brill*; *R.* v. *Helmer Pederson Construction Ltd.* These appeals were jointly heard as they raised the common issue of the constitutionality of section 37(2) of the *Occupational Health and Safety Act*, S.O. 1978, c. 83, which created a statutory due diligence defence with respect to charges laid under the *Act*. Following oral argument, the Court dismissed on the merits the *Indal* and *Pedersen* appeals, while reserving judgment on the constitutional issue and on the merits of the *Ellis-Don Ltd* appeal. In written reasons released on 3 December 1990, the Court allowed this latter appeal both with respect to the constitutional argument advanced and on the merits, in the result ordering a new trial. On 13 June 1991, the Supreme Court granted the Crown leave to appeal.

[103] *Ibid.*

the accident. Under the *Act*, the offences charged were strict liability in nature, imposing a statutory onus on an accused to establish due diligence.

The constitutional issue on appeal was whether this reverse onus was justifiable under section 1, since the panel hearing the appeal considered itself bound by the conclusion reached in *Wholesale Travel* that the due diligence defence violated the presumption of innocence. In the result, the majority (Galligan and Houlden JJ.A.; Carthy J.A. dissenting) held that the reverse onus provision could not be saved.

In considering this issue, all three judgments in the case applied the test set out in *R.* v. *Oakes*.[104] In *Oakes*, the Supreme Court of Canada established a two part test for determining the validity of legislation under section 1. Only the second arm of this test has relevance for our present purposes.[105] It requires that to be saved under section 1, an impugned provision must be rationally connected to the broader objectives of the legislation, be the least intrusive means to achieve those objectives, and affect the individual rights of the accused only in proportion to the social importance of those objectives.

In Galligan J.A.'s opinion, the reverse onus provision failed to satisfy *Oakes* because it impaired the individual right in question, the presumption of innocence, in a more intrusive manner than was necessary to accomplish the objectives of the *Act*.[106] In his view, by requiring an accused to disprove negligence, the *Act* permitted conviction to occur even where the trier of fact might have a reasonable doubt as to the accused's guilt. There was no compelling justification, in his opinion, for this departure from the standard of proof applicable in serious crimes. In his words:

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[104] [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321 [hereinafter *Oakes* cited to C.C.C.].

[105] The first arm of the test in *Oakes* is whether the objective of the impugned legislation is sufficiently compelling to justify the overriding of a constitutionally protected right or freedom. None of the members of the panel hearing *Ellis-Don Ltd* considered this aspect of the test to be problematic for the Crown, which for the purposes of the inquiry under section 1, has the onus of establishing that the legislation is justifiable within the *Oakes* test on a balance of probabilities.

[106] *Ellis-Don Ltd, supra*, note 39 at 204.

> I am seriously troubled about how it could be said that the objective of this Act is so pressingly important that a risk should be taken of convicting someone who might be innocent. Important as the protection of workers' health and safety in the workplace may be I am unable to say that it is more important than protecting innocent citizens from homicide. Yet the law does not permit the conviction of a person charged with murder if the court has a doubt about his guilt.[107]

In a concurring judgment, Houlden J.A. concluded that the reverse onus provision failed to satisfy the *Oakes* test on several grounds. Like Galligan J.A., he emphasized the fundamental nature of the right enshrined in the notion of the presumption of innocence, as protected in section 11(d), and the possibility of injustice inherent in the notion that an accused could be convicted where there was a reasonable doubt as to his or her guilt.[108] In his opinion, not only did the impugned provision impair the right to be presumed innocent in an overly broad manner, but the nature of the impairment was out of proportion with the objectives of the *Act*. On this latter point he adopted, in whole, the recommendations of the *Report* with respect to the reform of the strict liability offence.[109]

In dissent, Carthy J.A. offered a spirited and vigourous defence of strict liability in unmistakably pluralist liberal terms. Before proceeding to a consideration of the *Oakes* test, he undertook a purposive historical review of the regulatory offence and of worker health and safety legislation. In his opinion, it was essential to maintain a purposive distinction between real crimes and regulatory offences. While the former merely punish breaches when they occur, the latter, he argued, were part of an ongoing regulatory process designed to achieve social objectives, in the present case, the promotion of safety at work.[110] Regulation of this kind was necessitated by market forces. As he put it, "where there is necessarily a dependence on profits, measures are needed to assure that workers' safety is not forgotten."[111] Accordingly, in his view,

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[107] *Ibid.* at 202.

[108] *Ibid.* at 208.

[109] *Ibid.* at 211-12. It is revealing to note that counsel for Ellis-Don on the appeal, Earl Cherniak, was also one of the five Commissioners responsible for the *Report*, *supra*, note 7.

[110] *Ellis-Don Ltd*, *ibid.* at 215-16.

[111] *Ibid.* at 220.

significantly different considerations applied when assessing the constitutionality of regulatory legislation than arise in the criminal law context.

Applying the *Oakes* test, Carthy J.A. adopted an interest balancing approach informed by these considerations. In the course of upholding the *Act* under section 1, he made several observations worthy of note. Under the least intrusive means aspect of the test, he argued that advocacy of a reasonable doubt standard of individual protection from conviction amounted to, in effect, proposing that there be *no* intrusion on the right protected by section 11(d).[112] Moreover, to move from a reverse onus to a criminal standard of proof would, in his opinion, make it virtually impossible to enforce safety legislation due to the reluctance of workers to come forward and testify for the Crown and the latter's inability to document a lack of reasonable care without access to reliable documentation.[113]

On the issue of proportionality between the measure adopted and the broader objectives of the *Act*, Carthy J.A. pointed out that although the potential penalties set out in the legislation included imprisonment, no one had ever been sent to jail under the *Act* and that its deterrent effect was financial.[114] He also considered it relevant to justifying the legislation under section 1 that the *Act* precluded workers from suing their employers for tortious conduct and, accordingly, the "deterrent effect of that common law right is in a sense replaced by this regulatory statute which applies the same test of conduct to the employer."[115]

In upholding the reverse onus provision, he stated in conclusion: "All rights and freedoms, once declared, tend to appear absolute. Section 1 provides a means of restraint and balance against that extreme to meet society's greater needs. Safety in the workplace is such a need."[116]

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[112] *Ibid.* at 221.

[113] *Ibid.* at 221-22.

[114] *Ibid.* at 223.

[115] *Ibid.* at 224.

[116] *Ibid.*

The decision in *Ellis-Don Ltd* is significant both in practical and theoretical terms. At a practical level, if followed, it effectively abolishes strict liability, eliminating for all intents and purposes any meaningful procedural distinctions between the prosecution of regulatory offences and "serious" crimes. At a theoretical level, the decision is suggestive of the extent to which the assumptions and approach characteristic of pluralist liberalism are under attack. The majority decision in *Ellis-Don Ltd*, as with the analysis and recommendations set out in the *Report*, reflect an emergent rights-based anti-statism which departs unequivocally from the essentially pro-regulatory orientation of pluralist liberalism. The pluralist liberal vision of the role and nature of the regulatory offence, as reflected in the work of the Law Reform Commission of Canada in the mid-1970s and articulated by Dickson J. in *Sault Ste. Marie*, is now being seriously challenged.

IV. REFLECTIONS ON THE DEBATE

It has been suggested that the *Charter* can be regarded as symbolic of the pluralist liberal vision of the relationship between the individual and the community.[117] There is much to be said for this thesis, particularly to the extent that the *Charter*, unlike the American *Constitution*, explicitly invites the judiciary to balance individual rights against the interests of "a free and democratic society." Ironically, however, as I have tried to argue, an analysis of the *Charter* debate over the role of the regulatory offence suggests that pluralist liberalism is in decline, its discursive foil, a newly invigorated classical liberalism, rapidly gaining force.

This recent challenge to the dominant pluralist liberal conception of the regulatory offence is closely related to broader social and political developments. For well over a decade, pluralist liberalism has been on the defensive. The influence of its underlying utilitarian faith in the ability of the state to successfully balance competing social and individual interests has waned, replaced by an ascendant rights-based ethic, which seeks to restore the

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[117] Macklem, *supra*, note 10 at 142.

unquestioned primacy of the individual.[118] The modern regulatory state, which pluralist liberalism helped to create and ideologically sustain during the post-World War II period, has been under siege. The Right has aggressively sought its dismantling through privatization and deregulation.[119] And, even on the Left, the statism characteristic of the pluralist liberal vision has fallen into disfavour, in the wake of demands for democratization and decentralization of state power.[120]

Seen in this context, the debate over the role of the regulatory offence within the criminal law is, at a more fundamental level, a debate about the role of the regulatory state within civil society. We have arrived at the end of a period dominated, within legal discourse, by a pluralist liberal conception of that latter role; the Dicksonian vision of the state is now being profoundly contested.[121] As this liberal consensus crumbles, we can expect increasingly to hear the sound of ideologies clashing.[122]

Obscured by this rising din are crucial issues relating to the actual and potential role of the regulatory offence in controlling and influencing the exercise of corporate power. As Hutchinson has

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[118] For further discussion of the waning influence of utilitarianism, see Sandel, *supra*, note 21 at 89 and H.L.A. Hart, "Between Utility and Rights" (1979) 79 Colum. L. Rev. 828.

[119] The type of state favoured by the neo-conservatives (or perhaps more accurately "neo-liberals"), responsible for appropriating and reviving the discourse of classical liberalism, is both minimal *and* strong. While these neo-liberals seek to deregulate and re-privatize economic life on the basis of their often declared aversion to state control over civil society, they also seek, in certain key respects, to increase state control over civil society by such means of restrictions on trade union activity and heightened surveillance and demobilization of internal dissent. While superficially these themes may seem incongruous, they are linked by a free market logic which seeks to protect the individual from the tyranny of collectivist threats. See J. Keane, *Democracy and Civil Society* (London: Verso, 1988) and Bobbio, *supra*, note 10 at 114-16.

[120] See, for example, Keane, *ibid.*; D. Held & C. Pollitt, eds, *New Forms of Democracy* (London: Sage Publications, 1986); and P. Resnick, *The Masks of Proteus: Canadian Reflections on the State* (Montreal: McGill-Queen's University Press, 1990).

[121] This is particularly evident in the Court's recent decisions on mandatory retirement which hinge to a large extent on competing conceptions of the role of the modern state. A pluralist liberal conception of that role is articulated in the judgment of Wilson J., while the reasons of Sopinka J. reflect a much more limited classical liberal perspective. See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

[122] Bragg, *supra*, note 2.

recently argued, this might well be considered the century of the corporation.[123] The pervasive and increasingly concentrated nature of corporate power within contemporary Canadian society is beyond dispute.[124] Today, our collective political and social life is shaped as much by the ostensibly "private" decisions made in corporate boardrooms here and abroad as by the decisions of public representatives and officials. The anti-democratic implications of these developments has been referred to by one critic as amounting to a "refeudalization" of the public sphere.[125]

The debate within liberalism over the regulatory offence is largely oblivious to these realities. Effectively ignored is the simple truth that the harmful activities which this legal form is supposedly intended to punish and deter, particularly those of a serious nature — such as improperly transporting hazardous goods, carelessly disposing of toxins, creating hazardous working conditions, and forming combines — are overwhelmingly carried on via the corporate form.[126] Moreover, because of the complex nature of these very activities, difficulties associated with proof of causation and the often inscrutable inner workings of the corporate form, prosecution of the regulatory offences involving corporate accused are particularly daunting and will become immeasurably more so if the decisions in *Wholesale Travel* and *Ellis-Don Ltd* are eventually upheld.[127]

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[123] A.C. Hutchinson, "Mice Under a Chair: Democracy, Courts and the Administrative State" (1990) 40 U.T.L.J. 374 at 379.

[124] See, for example, J. Niosi, *The Economy of Canada*, trans. P. Williams (Montreal: Black Rose Books, 1978) and J. Niosi, *Canadian Capitalism*, trans. R. Chodos (Toronto: Lorimer, 1981).

[125] J. Habermas, *Strukturwandel der Offentlichkeit* (Darmstadt: Luchterhand, 1962) at 233, cited in Warren, *supra*, note 44 at 528.

[126] The obvious exceptions to this proposition being motor vehicle and firearm regulation.

[127] If, as these decisions propose, the burden for proving negligence in regulatory offence prosecutions is shifted to the Crown, it will have serious implications for the ability of the Crown to enforce regulatory legislation involving corporate accused. This is not only because of the practical difficulties which would likely be encountered by state authorities in obtaining sufficient evidence of corporate negligence without running afoul of the *Charter* guarantees relating to search and seizure and self-incrimination, but also due to the doctrinal requirements imposed by the "identification theory" of corporate *mens rea*. Under this doctrine, for the purposes of establishing the corporate *mens rea* necessary to obtain a criminal

Classical liberalism simplistically collapses the debate over the regulatory offence into a relatively straightforward matter of individual rights. Proceeding from the premise that the criminal law exists to punish moral fault, it considers the regulatory offence as an essentially illegitimate attempt by the state to advance utilitarian social policy objectives in blatant disregard both for the true purpose of the criminal law and the basic inviolability of individual rights. To the classical liberal, it matters not that the actors which are the primary subjects of these regulatory initiatives are corporate entities, since within this perspective the corporation is regarded, for all intents and purposes, as a private rights-bearing legal subject.

While pluralist liberalism does not conflate the individual and the corporation to the same degree as classical liberalism, it shares with the latter an underlying commitment to the notion of the corporation as an essentially benign or neutral private entity organized to advance useful economic ends and capable, at least in the criminal law context, of bearing individual rights.[128] Where pluralist liberalism departs from its classical counterpart is in its notion of the criminal law. Rejecting the moral-centred essentialist classical vision, it perceives the role of the criminal law as having a significant prophylactic harm-based dimension. Thus, pluralist

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conviction, only the intentions of those officials who could be said to constitute the "directing mind and will of the corporation" are legally relevant. See *Canadian Dredge & Dock Co.* v. *R.*, [1985] 1 S.C.R. 662. Application of this doctrine in the regulatory context would mean that, even if the Crown could clearly prove negligence on the part of company employees in connection with the infraction, the corporate accused would escape conviction unless the Crown could also establish that the employees had sufficient authority within the organization to qualify as its directing mind and will.

[128] The ambivalent but ultimately privatized notion of the corporation within contemporary liberal discourse has led to curious and contradictory results in recent *Charter* jurisprudence. Thus, while corporations have been denied the right affirmatively to challenge regulatory legislation under section 7 of the *Charter*, once they have been charged with an offence under regulatory legislation, they are immediately transformed into full-fledged constitutional litigants and accorded "individual" rights. See *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927 at 1004, where the Supreme Court (per Dickson C.J.C., Lamer and Wilson JJ.) held that where there are "no penal proceedings pending" against it, a corporation has no standing to seek declaratory *Charter* relief under section 7, thus distinguishing *R.* v. *Big M Drug Mart*, *supra*, note 85, in which a corporation charged with violating Sunday closing legislation was permitted to invoke section 2(a) of the *Charter* (freedom of religion). With respect to section 15, see *R.* v. *Paul Magder Furs Ltd* (1989), 49 C.C.C. (3d) 267 (Ont. C.A.), leave to appeal refused 51 C.C.C. (3d) vii; and *Edmonton* v. *A.G. Alberta*, [1989] 2 S.C.R. 1326, per La Forest J. in dissent.

liberals regard the regulatory offence as reflecting an appropriate balancing of the social interest in regulating the potentially harmful effects of market activity against the individual rights of those being regulated. For pluralist liberals, therefore, the present debate over the regulatory offence is essentially about defining the appropriate limits of state regulation in the marketplace, not imposing constraints on corporate power.

Thus far, the debate over the role of the regulatory offence within the criminal law has been a debate carried on within liberalism. Although spirited and punctuated at times by sharp differences of opinion, arguably it could be said that it is a debate within an ideology, not between ideologies.[129] Regardless of one's preferred characterization, it is a debate which critical legal theory has to date largely neglected. While, in Canada and elsewhere, critical theorists have long been concerned about corporate crime and punishment, much of the work that has been generated has sought to explain the prevalence of harmful corporate activity from what might be termed an "external" perspective,[130] often employing sociological methodology.[131] Within this literature, the failure of the legal system to take corporate crime seriously is comprehended as a product of constellations of economic and political power, which have militated against the enactment and enforcement of regulatory regimes which would threaten or in any way fetter the dominant

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[129] Christian, *supra*, note 13 at 124.

[130] Alan Hunt makes the distinction between "internal" and "external" perspectives within legal theory. He argues that conventional theorists (*e.g.*, Dworkin and Hart) adopt the former approach, focusing on legal doctrine for its own sake without reference to law's broader social role or implications. In contrast, those concerned with these broader questions (in Nelken's words, "the contextualizers," *e.g.*, Cotterrell and Carson) have, he contends, tended to adopt an external perspective, largely eschewing consideration of legal doctrine. In his view, one of the distinctive features of critical legal studies is that, unlike the contextualizers, it does "battle with liberal theory" on the latter's terrain by "taking doctrine seriously," while attempting to maintain a critical distance. See A. Hunt, "The Critique of Law: What is 'Critical' about Critical Legal Theory?" (1987) 14 J. L. & Soc. 5 at 10-13. See also Nelken, *supra*, note 8.

[131] C. Goff & C. Reasons, *Corporate Crime in Canada* (Scarborough, Ont.: Prentice-Hall, 1978); L. Snider, "Corporate Crime in Canada: A Preliminary Report" (1978) 20 Can. J. Crim. 142; L. Snider, "Towards a Political Economy of Reform, Regulation and Corporate Crime" (1987) 9 Law & Pol. 37; W.G. Carson, "Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation" (1970) 33 Mod. L. Rev. 396; and W.G. Carson, "The Conventionalization of Early Factory Crime" (1979) 7 Int. J. Soc. Law 37.

interests of capital. This tradition has contributed much to our understanding of the political economy of corporate crime. However, with a few notable exceptions,[132] from a critical perspective, consideration and critique of the form and content of the criminal law doctrine and of the liberal ideological discourses by which such doctrines are sustained has been lacking. As the debate over the future of the regulatory offence gains momentum – alongside a broader debate over the future of the regulatory state – critical theory cannot afford to stand on the sidelines. As John Keane has recently argued:

> Neo-conservative ideologues and policymakers have promoted a discussion about the limits of state-administered socialism with which democrats of all persuasions have no choice but to engage ... The rich, if historic, vocabulary of neo-conservatism (freedom of choice, individual rights, freedom from state bureaucracy) can be neither confidently neglected nor left unquestioned.[133]

To the extent that critical theorists have considered the ideological roots of the criminal law, the overriding tendency has been to attack its individualist preoccupation with moral fault and to advocate a more harm-based conception of culpability. Proposals of this kind have been made in the context of feminist critiques of the *Criminal Code* provisions governing crimes against women, most notably with respect to the issue of the relationship between *mens rea* and sexual assault.[134] Likely, the most provocative and certainly

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[132] Deserving of inclusion within this category by virtue of their respective (and distinctive) attempts to grapple with the ideological dimensions of criminal law doctrine are Thompson, *supra*, note 46; D. Hay, "Property, Authority and the Criminal Law" in D. Hay *et. al.*, eds, *Albion's Fatal Tree* (New York: Pantheon Books, 1975) 17; H.J. Glasbeek "Why Corporate Deviance is Not Treated as a Crime: The Need to Make 'Profits' a Dirty Word" (1984) 22 Osgoode Hall L.J. 393; Kelman, *supra*, note 35; and N. Sargent, "Law, Ideology and Corporate Crime: A Critique of Instrumentalism" (1989) 4 Can. J.L. & Soc. 39.

[133] The equivocal term "state administered socialism" in Keane's usage merely refers to the Keynesian welfare state. See *supra*, note 119 at 10.

[134] T. Pickard, "Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime" (1980) 30 U.T.L.J. 75 and T. Pickard, "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*" (1980) 30 U.T.L.J. 415. See also S. Box, *Power, Crime, and Mystification* (London: Tavistock, 1983). More recently, in their intervenor's factum in *R.* v. *Butler* (argued 6 June 1991 in the Supreme Court of Canada), the Women's Legal Education and Action Fund sought to uphold the obscenity provisions of the *Criminal Code* against a *Charter* challenge explicitly on a harm-based, as opposed to a morals-based approach, submitting that the impugned provisions should be read so as to advance and protect the equality of women.

far reaching harm-based proposal is that of Donald Galloway who, with a view to "rationalizing" the criminal law, has advocated a new model of criminal culpability under which all regulatory and criminal offences would be designated as either "harm offences" or "attitude offences," a categorization which would, in the former case, dispense with the *mens rea* requirement altogether.[135]

One of the few recent attempts to articulate a harm-based conception of the regulatory offence is offered by Monahan and Petter.[136] They argue that, in addition to the traditional criminal law purposes of deterrence and punishment, the regulatory offence also serves "as a means of allocating social costs and of redefining social responsibilities."[137] According to this view, the distinguishing feature of the regulatory offence, and what justifies its treatment as category *sui generis*, is its capacity to visit upon polluters and other wrongdoers the social costs of their actions. Moreover, they contend that the regulatory regimes governing such activities represent a form of "social contract" under which corporations which engage in potentially harmful enterprises must be taken to have agreed to bear "a predetermined measure of responsibility if any social harm results from their activities."[138]

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[135] Galloway's proposal is both more sophisticated and (perhaps) facetious than this description might imply. See D. Galloway, "Why the Criminal Law is Irrational" (1985) 35 U.T.L.J. 25.

[136] *Supra*, note 17 at 96-98. See also Goff & Reasons, *supra*, note 131, cited in Sargent, *supra*, note 132. Notably, however, even among academics who voice serious concerns about the dangers of corporate power and the need for more effective regulation and prosecution of corporate crime, there is considerable disagreement about the role of the regulatory offence. Advocating a desert-based retributive approach to corporate sanctioning, Kip Schlegel argues that strict liability statutes hamper the growth of "sound corporate criminal law" by debasing the moral currency of the criminal law. Because, in his view, the criminal law is a "condemnatory instrument," it should only be used to sanction immoral behaviour. Although proposing an expanded notion of what constitutes immoral corporate wrongdoing, he argues that where the activity is "unwanted yet morally neutral," and the object is to redistribute social costs, civil or administrative remedies are more appropriate. See K. Schlegel, *Just Deserts For Corporate Criminals* (Boston: Northeastern University Press, 1990) at 53-90.

[137] Monahan & Petter, *ibid.* at 96.

[138] *Ibid.* It should be noted, however, that this conception of the regulatory offence remains well within the pluralist liberal paradigm. In effect, the authors propose, in keeping with the logic of a pluralist liberal position, that the regulatory offence be conceived of as a market corrective mechanism through which full social cost of negative externalities associated with a harmful activity can be imposed on the party undertaking that activity. The underlying

These challenges to the moral-based notion of the criminal law embedded within classical liberalism serve an important corrective function, particularly in light of its increasing dominance within legal discourse. For classical liberals to suggest that the exclusive mission of the criminal law is to enforce morals is no more accurate or legitimate than it is for them to claim that the purpose of contract law is to enforce promises.[139] While there is little to be achieved by reviving the well rehearsed philosophical debate between the moralists and the positivists concerning the nature of the criminal law,[140] critical theory can usefully respond to the classical liberal position by attempting to undermine the essentialism of its claims through elucidating their historical contingent nature.[141] Within the context of the current controversy over the regulatory offence, this point could be developed, for example, by illustrating the historical affinities between legal form and the social function of the modern regulatory offence and the common law crime of public nuisance. An endeavour of this type would, in my view, quite effectively rebut the suggestion, implicit in the classical liberal critique, that the regulatory offence is a recent invention of an overbearing modern welfare state.[142]

But critical theory must be also prepared to challenge, both within the context of the regulatory offence debate and beyond, the privatized, personified notion of the corporation which informs contemporary liberal legal discourse. To this end, much work has

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purpose of the regulatory offence, within this view, is not to punish or proscribe outright harmful activity, but rather to attach to it a higher price-tag.

[139] See C. Fried, *Contract as Promise* (Cambridge: Harvard University Press, 1981).

[140] The literature produced by this debate is immense. A summary of the writing on the subject is found in L. Fuller, *The Morality of Law*, rev'd ed., (New Haven: Yale University Press, 1969) at 187. See also H.L.A. Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963); P. Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965); J.M. Junker, "Criminalization and Criminogenesis" (1972) 19 U.C.L.A. L. Rev. 697; and J.H. Bogart, "Punishment and the Subordination of Law to Morality" (1987) 7 Oxford J. L. Stud. 421.

[141] A valuable contribution along these lines which considers the development of the notion of *mens rea* within a framework of broader ideological and material developments is made by P. Goldman in "Law, Ideology and Social Causality" (1987) 12 Queen's L.J. 472.

[142] See *supra*, note 53.

been done of late within American legal scholarship.[143] This growing literature has amply demonstrated the historical contingency of the privatized notion of the corporation and Horwitz, in particular, has contributed valuable insights into the relationship between its emergence in the early twentieth century and the needs of a rapidly expanding capitalist economy in which increasingly the corporation was the key player. In the American context, the consequences of assimilating the corporation to the status of a natural person have been profound, not only by tending, within political discourse, to insulate the corporation from state regulation, but by serving as an explicit (but more often implicit) justification for according to it a wide array of constitutional entitlements. As a result, corporations have been able to resist, with considerable success, various regulatory initiatives.[144]

What this suggests for critical theory, I would argue, is the need to articulate a counter-hegemonic notion of the corporation which emphasizes its unique status within, and correlative accountability to, the polity. To this end, the traditional conception of the corporation as having a significant public dimension, arising both from its social impact and from the state's constitutive role, must be revived and energized. In advocating this position, I do not mean to argue that the dominant essentialist private conception of the corporation merely be replaced by an essentialist public one. Nor do I propose a return to the nineteenth century view of the corporation as a purely fictional being, existing only in the contemplation of the law. What I do suggest, however, is that both for the purposes of considering the constitutional status of the corporation in the criminal-regulatory context and for other more

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[143] *Supra*, note 48.

[144] During the post-*Lochner* period until the late 1930s, this was accomplished chiefly through the doctrine of "substantive due process" which enabled corporations, regarded judicially as "persons" for the purposes of the 14th Amendment, successfully to challenge redistributive and regulatory legislation. In more recent times, as this doctrine fell into disfavour, corporations have managed to resist regulatory efforts by carving out new constitutional protections for themselves under the *Bill of Rights* relating to free speech (1st Amendment), privacy (4th Amendment), and due process (5th Amendment). See particularly J.J. Flynn, "The Jurisprudence of Corporate Personhood" in W.J. Samuels & A.S. Miller, eds, *Corporations and Society: Power and Responsibility* (New York: Greenwood Press, 1987) 131 and C.J. Mayer, "Personalizing the Impersonal: Corporations and the Bill of Rights" (1990) 41 Hastings L.J. 577.

far-reaching projects,[145] it is crucial to reimagine the corporation in more public terms than we have become accustomed.

This proposal may be less ambitious than it might seem. It is not only the legitimacy of the modern regulatory state which has of late been undermined, a similar fate has befallen the modern business corporation, as is evidenced by expensive recent efforts undertaken by the corporate sector to rehabilitate its collective image.[146] The transformative possibilities presented by this corporate legitimacy crisis should not be exaggerated, but neither should they be entirely discounted. Moreover, despite the hegemony of the privatized notion of the corporation within liberal discourse, a competing public conception has never entirely disappeared.[147] In American jurisprudence, for example, there remains a strong and relatively modern undercurrent of authority which has denied to corporations various constitutional rights relating to the regulatory process — such as protections relating to search and seizure and self-incrimination — on the basis of precisely such a vision. Thus, in 1950, the U.S. Supreme Court rejected a claim advanced by a corporate defendant that it had been subjected to an unreasonable search and seizure and denied due process in the following terms:

> [C]orporations can claim no equality with individuals in the enjoyment of a right to privacy ... They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favours from government often carry with them an enhanced measure of regulation ... Even if one were to regard the request for information in

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[145] In particular, the agenda of the "participationists" who seek to democratize the corporation and its role within the market. See C. Pateman, *Participation and Democratic Theory* (Cambridge: University Press, 1970); R. Mason, *Participatory and Workplace Democracy* (Carbondale: Southern Illinois University Press, 1982); and K.E. Klare, "Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform" (1988) 38 Cath. U.L. Rev. 1. For a discussion of the participationist perspective within a broader context of theories of the corporation, see Romano, *supra,* note 50.

[146] H.J. Glasbeek, "The Corporate Social Responsibility Movement: The Latest in Maginot Lines to Save Capitalism" (1988) 11 Dalhousie L.J. 363.

[147] For example, in *Thomson Newspapers, supra*, note 32 at 540-46, L'Heureux-Dubé J. explicitly invoked such a notion in concluding that corporations, as "creatures of the state," have limited rights under section 8 with respect to economic information sought by the state for regulatory purposes. In adopting this analysis, she departed from the approach adopted by the balance of the bench, both in this case and in its companion, *R. v. McKinlay Transport Ltd*, [1990] 1 S.C.R. 627, 55 C.C.C. (3d) 530 at 547. See *infra*, note 148.

> this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behaviour is consistent with the law and the public interest.[148]

As we approach the end of the first *Charter* decade, the question of corporate constitutional rights, particularly within the criminal and regulatory context, remains an open one. The current dominance within legal discourse of liberal ideology, whether in its classical or pluralist guise, may provide to some little reason for optimism that the evolution of *Charter* jurisprudence on this question will do other than enhance the already powerful role of the corporation within contemporary society. Nonetheless, the ideological grip of these visions on the legal imagination is by no means total. What the present debate over the regulatory offence offers for critical theory is an opportunity to challenge the hegemony of these visions.

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[148] *U.S.* v. *Morton Salt Co.*, 338 U.S. 632 at 652 (1950) [hereinafter *Morton*], as cited in H.M. Friedman, "Some Reflections on the Corporation as Criminal Defendant" (1979) 55 Notre Dame Lawyer 173 at 193. See also *Hale* v. *Henkel*, 201 U.S. 43 (1906), where the court, in a similar context, rejected an attempt by a corporation to invoke the privilege against self-incrimination under the 5th Amendment. More recently, however, the U.S. Supreme Court has ignored *Morton Salt* and expanded corporate privacy rights under the 4th Amendment, employing a purposive approach focusing on the nature of the property interest in question (*i.e.*, commercial premises versus dwelling houses) rather than on the nature of the party advancing the claim. See, for example, *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1977) and Mayer, *supra*, note 144. This is precisely the approach adopted in *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97, in which the court was seemingly content to ignore the fact that the defendant seeking protection from state regulators had "assets of over one billion dollars and fifteen thousand employees." See M. Mandel, "Rights, Freedoms and Market Power" in D. Drache & M.S. Gertler, eds, *The New Era of Global Competition* (Montreal: McGill-Queen's Press, 1991) 127. More recently, in *Thomson Newspapers* and *McKinlay Transport Ltd*, the court, with the notable exception of L'Heureux-Dubé J., has continued to conflate corporate and individual accused in its analysis of section 8. See *supra*, note 147.

After this article went to press, the Supreme Court of Canada rendered judgment in *R.* v. *Wholesale Travel* (unreported, 24 October 1991). In it, a divided Court upheld the constitutionality of the strict liability offence and its reverse onus due diligence defence by a bare 5 to 4 margin.