Criminal Law Liability and Fundamental Justice: Toward a Theory of Substantive Judicial Review

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Both in its general form and its particular content, the Canadian Charter of Rights and Freedoms is something of an enigma. In its constitutional form, it operates as an ultimate constraint on the legislative prerogative.[1] For many, this is sufficient to render the Charter problematic since, the argument goes, anything but legislative supremacy is poorly accommodated within the democratic ideal.[2] On the other hand, there are those who find nothing out of sorts in the Charter's constitutional form; the very rationale of a charter is to be found in the protection of individual rights against legislative intrusion. Rather, the objections of these latter critics relate to the Charter's particular content; specifically, they point to the fact that the Charter contains an express limitation clause and a legislative over-ride.[3] These, they suggest, are out of place in a proper charter of rights and freedoms; that is, they are a content inappropriate to its form.

Of course, how to best reconcile democracy with its constraints is a more general concern. Any democracy attracted by the features of majority rule must recognize that at the same time the majority can become a tyranny, a danger to individual rights. But recognition of this problem hardly argues for the particular solution we so often observe, namely, judicial review of legislative action. Without more argument in its favour, this solution has the appearance of merely trading the tyranny of a democratically elected majority for a worse tyranny of the judiciary, that is, for one which is unelected, unaccountable, and largely unrepresentative.

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1. Section 52 of the *Constitution Act, 1982* decrees that the Constitution of Canada, including the Charter, is the supreme law of Canada and that any law inconsistent with its provisions is of no force or effect.
2. The arguments put forward by the government of Manitoba at the First Ministers Conference on the Constitution in 1980 are typical: "[S]uch a transfer of legislative authority would amount to a constitutional revolution, entailing the relinquishment of the essential principle of Parliamentary democracy: the principle of Parliamentary supremacy." (as cited by Fairley, "Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review" (1982), 4 Supreme Court L. Rev. 217, at 232).
3. The limitation clause and the legislative over-ride are to be found in ss. 1 and 33, respectively.

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Nowhere is this solution more problematic than in cases of substantive judicial review, that is, review by the judiciary of the substantive content of legislation on its merits. Where the legislation has been explicitly passed to effect some purpose, it is one thing to argue that the legislation is being enforced without sufficient attention being given to the procedural requirements of natural justice. It is quite another, and arguably a much more sinister form of judicial review, to question the propriety of the legislation itself. In the United States, for example, the mere mention of *Lochner* v. *New York*[4] — a case in which the Supreme Court invalidated labour legislation which set maximum hours for work — is enough to send decent democrats into retreat from the very possibility of substantive review. And, more recently, the controversial decision of *Roe* v. *Wade*,[5] which ruled that legislation restricting abortion violated the same concept of "substantive due process", is singled out to show that the Supreme Court of the United States is still effectively engaged in a policy-making role at odds with elected legislators, only this time under a more liberal guise of judicial review than was the case in *Lochner*.[6]

With the relatively recent enactment in Canada of the Charter, Canadian lawyers and judges have only just begun to concern themselves with the question of whether or not s. 7 of the Charter provides substantive or merely procedural protection for deprivation of "life, liberty and security of the person".[7] However, the Supreme Court of Canada has now pronounced authoritatively that s. 7 is not limited to protections against procedural injustice only. In *Reference Re Section 94(2) of the Motor Vehicle Act*,[8] the Court struck down British Columbia legislation that made the driving of a motor vehicle while one's licence was suspended an offence of absolute liability, that is, one for which *mens rea* is not a constituent element. In coming to this result, the Court discounted the relevance of any distinction between substance and procedure for s. 7 of the Charter,[9] suggesting that this dichotomy was peculiarly bound up with the American experience and was unnecessarily confining for the Canadian courts confronting new and quite different problems of interpretation.[10] At the same time, the Court argued that it could pass judgment on the content of legislation without having to assess the wisdom of policies lying behind it.

4. *Lochner* v. *New York*, (1905) 198 U.S. 45.
5. *Roe* v. *Wade*, (1973) 410 U.S. 113.
6. See, for example, Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*" (1973), 82 Yale L.J. 920.
7. In its entirety, s. 7 of the Charter reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
8. *Reference Re Section 94(2) of the Motor Vehicle Act*, (1985), 24 D.L.R. (4th) 536.
9. *Ibid.*, at 545–546.
10. *Ibid.*, at 546. Lamer J. emphasized in particular that the U.S. Constitution had no structural analogues to the Charter's ss. 52, 33, and 1. See *supra*, notes 1 and 3.

Weighing the merits of public policy, the Court conceded, was properly a job for elected legislators.[11]

Thus, the British Columbia *Reference* decision advances the view that the courts can assess the substantive content of a piece of legislation and not just the procedural protections surrounding its enforcement, without having to resort to those questions of public policy that are more properly left to legislators. It is this claim which those opposed to judicial activism have found so implausible; legislative content and public policy are not so easily distinguished, or so the critics of the decision would argue.[12] Nonetheless, it is the purpose of this paper to provide a defence of the Court's position, at least in so far as it concerns the standard of liability appropriate to the criminal law, the issue that was at stake in the British Columbia *Reference*. The paper accepts the Supreme Court view that legitimate democratic concerns about judicial invalidation of properly enacted legislation are not something that can properly be based on a difference between the substance or content of legislation and the formal procedures surrounding its enforcement. Rather, this paper will suggest that certain substantive results rationally follow from those procedures just as any content is shaped by its form. Specifically, this paper shows that the form of the criminal law action, as a public law action against past misconduct and holding out the potential for the accused's imprisonment, requires the *mens rea* standard of liability if it is not to be conceptually incoherent. Thus, since conceptual coherence is a prerequisite for any legitimate claim, the paper, by beginning with form and proceeding to content, shows how substantive judicial review is possible without engaging in the particulars of public policy adjudication and, therefore, without upsetting the democratic ideal.

The paper first outlines the limits of any method for unravelling the meaning of the phrase "fundamental justice" based on strict interpretativism or the intentions of the constitutional framers. What follows is an argument for the possibility of law separate from politics and morality and thus for the possibility of substantive judicial review consistent with the democratic ideal. The source for this idea is in Aristotle's account of corrective justice and the abstract equality of persons that this form of justice is designed to protect. Next, the paper articulates in some detail why *mens rea* is required as the liability standard in a criminal law action. It is claimed that this is purely a formal requirement that follows rationally from recognizing that the abstract equality of corrective justice can be denied in two quite different ways. The paper then shows how the concept of an excuse can be incorporated into this framework and demonstrates more specifically how a legislative requirement that mistakes be reasonable — and not just honest — need not be constitutionally invalid

11. *Ibid.*, at 544 ("the courts are empowered, indeed required, to measure the *content* of legislation against the guarantees of the Constitution") and at 546 ("The task of the court is not to choose between substantive or procedural content *per se* but to secure for persons 'the full benefit of the Charter's protection' ... under s. 7, *while avoiding adjudication of the merits of public policy*"), *per* Lamer J. (Emphasis added.)
12. See, for example, the remarks of Rob Martin in "Charter ruling worries legal experts", *The Globe and Mail*, February 24, 1986; and the annotations of John White to the case in (1986), 48 C.R. (3d) 289, at 291–295.

if mistake is to operate as an excuse. This analysis is then applied to the facts in the British Columbia *Reference* case and to *R.* v. *Stevens*,[13] a case which is also to be heard by the Supreme Court of Canada and which involves the absolute liability offence of having intercourse with a female under the age of fourteen. Further speculations are offered about the Canadian law relating to bigamy, another absolute liability offence. After some analysis of the conceptual significance of imprisonment for the criminal law action, the paper finishes with some concluding remarks.

The Limits of Interpretativism

The problem with any attempt to avoid a more active role for the judiciary in the adjudication of constitutional law is that it may seem to confine the courts to the implausible if not impossible alternative of "clause-bound interpretivism".[14] Section 7 of the Charter is a particularly good illustration of the difficulties with this result. The unfortunate truth of the matter is that the phrase "fundamental justice" simply has no plain meaning. Nor will possible meanings resonate from the text if one merely stares at the words for a long enough period of time.

Of course, the phrase "fundamental justice" is not without some history of interpretation. It is used in s. 2(e) of the Canadian Bill of Rights,[15] and in that context it clearly means, and has been held to mean,[16] that the process by which government decisions are made must be in accordance with the procedural standards of "natural justice". Moreover, this latter phrase does have a developed and accepted meaning. However, the text of s. 2(e) of the Bill of Rights clearly places the phrase "fundamental justice" within the procedural context of a fair hearing; the context for s. 7 of the Charter, on the other hand, is not so obviously limited. Thus, the Canadian Bill of Rights does not provide a very convincing starting point for asking whether "fundamental justice" in the Charter extends beyond purely procedural protections to protections requiring more substantive judicial review.[17]

However, interpretivists do not usually feel themselves bound either to a strict parsing of the phrase or to an exploration of its prior interpretive history in the courts. Instead, they argue that judges can avoid the charge of usurping the legislative power by appealing to the original intent of those who drafted the Constitution. By

13. *R.* v. *Stevens*, (1983), 3 C.C.C. (3d) 198 (Ont. C.A.). Leave to appeal to S.C.C. granted June 6, 1983.
14. This phrase is borrowed from Ely, *Democracy and Distrust* (1980), at 12–13. He uses it to distinguish a narrow form of interpretivism which requires that constitutional provisions "be approached essentially as self-contained units and interpreted on the basis of their language, with whatever interpretive help the legislative history can provide, without significant injection of content from outside the provision".
15. R.S.C. 1970, Appendix III, s. 2(e).
16. *Duke* v. *The Queen*, [1972] S.C.R. 917.
17. For this argument in greater detail, see Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" in Canadian Institute for the Administration of Justice, *The Canadian Charter of Rights and Freedoms: initial experience emerging issues, future challenges* (1983), at 25–26.

giving the various indeterminate phrases such as "fundamental justice" their meaning in this way, the judges are not legislating their own values into the law at all. Rather, they are effecting the Constitution as it was intended and approved by the original framers. If these intentions are thought to be outdated, then the proper remedy, the argument goes, is by way of constitutional amendment, not judicial review.

This method of resolving textual indeterminism, which has come to be called "originalism",[18] is effectively what the Supreme Court of Canada considered and rejected in the British Columbia *Reference*. A number of lower courts had already appealed to the Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution to help them in the interpretation of the phrase "principles of fundamental justice".[19] In particular, they had relied upon the evidence of Barry Strayer, then an Assistant Deputy Minister in the Department of Justice, who had advanced the view that the wording of s. 7 was chosen specifically to avoid the broader concept of substantive rights, which had been attributed to the phrase "due process of law" in the American Bill of Rights.[20] By appealing to the opinion of someone who was instrumental in drafting the Charter, these various lower courts had felt they had a clear mandate for not admitting substantive review possibilities into their decisions. But in the *Reference*, the Supreme Court decided that, while evidence regarding the original intent of the constitutional framers might be admissible, it should be given little weight.[21]

There are usually thought to be two kinds of problems with originalism, the pragmatic and the normative.[22] On the pragmatic side, the objection is that it is simply too difficult to ascertain the intent of any one of the drafters of the Constitution, too implausible to suggest that there was any common intent across these various drafters, and too ridiculous to think that their intent extended as far as the myriad particular problems thrown up by constitutional interpretation. The first and third of these objections seem not to be overly persuasive on the issue of whether s. 7 provides for substantive review, given the explicit evidence that we have from the proceedings of the joint committee. Nevertheless, there is something to the second objection that Barry Strayer, by himself or with others like him, does not represent the collective intent of all those framers who ultimately gave their consent to the resolution that was sent to Britain for patriation. And it was this objection that most influenced the Supreme Court to reject a heavy reliance on original intent in the

18. See Brest, "The Misconceived Quest for the Original Understanding" (1980), 60 Boston U.L. Rev. 204.
19. See, for example, *Re Mason and The Queen* (1983), 7 C.C.C. (3d) 426 (Ont. H.C.J.) and *R.* v. *Holman* (1982), 28 C.R. (3d) 378 (B.C. Prov. Ct.).
20. See the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons the Constitution of Canada*, no. 46, at 33.
21. See *supra* note 8, at 550–555.
22. Brest, *supra* note 18, canvasses most of the objections.

Reference.[23] Certainly, it seems plausible to suggest that these other framers had quite different ideas about what is meant by substantive review than did Strayer, and even that there was a majority view, different from Strayer's, incorporated into the phrase "fundamental justice" as part of the original intent. However, the point of immediate concern here is not to argue for any such alternative understanding; rather, it is only to suggest that the practical difficulties of discovering any particular understanding or intent in the framers are larger than is suggested by those courts that relied so heavily on evidence from the special joint committee. The Supreme Court was right to reject this evidence as in any way decisive on the issue of substantive judicial review.

But the normative objections to originalism are more telling. Even if we accept that Barry Strayer's account of fundamental justice does represent what all the framers, including those elected to our legislatures, originally intended by that phrase, it does not follow that those framers intended that the Courts should not use their own powers of interpretation to unravel its meaning.[24] Indeed, if anything, the reverse is indicated by the proceedings before the joint committee. The phrase "principles of fundamental justice" was chosen over the phrase "due process of law" precisely because members of the committee were concerned that the courts would interpret the latter phrase as the American courts have done, that is, in a way that admits of substantive review. But this kind of concern presupposes that the committee intended that the courts should continue their tradition of constitutional interpretation free from any direct appeal to the intent of the framers. Otherwise, the actual choice of words would not be important as long as the intent was clearly on the record. Thus, whatever intent the framers of the Charter might have had themselves for s. 7, it does not follow that they intended that the courts should appeal to that intent in their own interpretation of its constituent phrases. Rather, the original understanding of the framers — if there ever was any single such thing — seems to have been that the courts should *not* appeal to that original understanding at all. Hence, originalism, on its own terms, hardly provides a promising basis for a responsible judicial approach to substantive review. The search must begin anew.

The Possibility of Law Separate from Politics

Both clause-bound interpretation and originalism are manifestations of the fear that, if the judiciary cannot be pegged down to an interpretation of the law as it is, then it will be at large to provide its own interpretation of what the law ought to be. This free discretion by the courts to declare the law as they see fit is what presents the

23. See *supra*, note 8, at 554: "How can one say with any confidence that within this enormous multiplicity of actors ... the comments of a few federal civil servants can in any way be determinative?" (*per* Lamer J.).
24. Brest, *supra* note 18, at 215–216.

danger to the democratic ideal. It is far better, the argument goes, for issues of substantive morality to be debated in our legislatures and decided by our elected representatives.

This argument presupposes that there is no middle ground between strict interpretation and originalism on the one hand and the politics of a moral determination of the Charter's open-textured provisions on the other. However, there is an alternative view which emphasizes the possibility of law separate from politics and which claims a role for the judicial specification of such phrases as "fundamental justice" in a way that does not involve the courts in any controversial moral determinations. More specifically, this alternative view argues that there is a form of justice, capable of guiding the courts to quite specific results in the substantive law, which is devoid of any moral content. And, of course, the very moral emptiness of this account of justice, its pure formality, makes it such a promising basis for judicial review.

The source of this alternative view is to be found in Aristotle's *Nichomachean Ethics*.[25] In Book V, Aristotle distinguishes two forms of justice that are categorically different. The first of these is distributive justice, that form of justice which divides some benefit (or burden) among members of a group of persons (any number) in accordance with some particular distributive criterion. Justifications under such distributions typically take the form, "To (from) each according to his or her X", with the articulation of X (the criterion for distribution) necessary to complete the phrase. The second form of justice identified by Aristotle is corrective justice, or that form of justice which bears upon transactions, either voluntary (as in contracts) or involuntary (as in torts), between two parties. It considers the position of the parties before the transaction as equal and, if necessary, restores this antecedent equality by transferring from one party to the other a quantity that represents the extent to which this initial equality has been disturbed by the transaction.

That these two forms of justice are categorically distinct, or irreducible one into the other, is clear from the two very different kinds of equality each preserves. In distributive justice, the equality is proportional; the distribution preserves the same *ratio* of benefit to criterion for each individual over which the distribution is effected. In corrective justice, on the other hand, the equality is arithmetical; the correction is to a point *quantitatively* half-way between the one party's gain and the other party's loss in the transaction. Thus, where — in the series of numbers, 9, 6, and 4 — 6 would represent a geometric mean (where the ratio 9:6 is equal to the ratio 6:4), and thus an ordering point for an intelligible distribution — in the series 8, 6, and 4 — 6 is the arithmetic mean between 8 and 4, thus only intelligible as an ordering point for corrective justice.[26] Moreover, since it is generally impossible to reduce such a

25. Aristotle, *Nichomachean Ethics*, Book V, 1129a–1138b.
26. An arithmetical example like this one is used by Aquinas to illustrate the nature of and distinction between the two kinds of means in the *Summa Theologica*, II–II, Q. 61, A. 2.

geometric series into an arithmetical one, and vice versa, it is clear that the two forms of justice must be categorically different from one another.[27]

The irreducible distinction between the forms of justice is important because it also serves to show how an essential or conceptual difference between the public and private law is possible.[28] Corrective justice, as an ordering around an arithmetic mean, necessarily involves two and only two parties. The need for at least two parties is evident from the very idea of equality as some kind of relation, but it may be less clear why only two are needed to complete that relation. However, for any given quantity (representing the actual displacement which is inherent in the transaction), a quantitative mid-point can only be intermediate to two points at a time. Thus, if corrective justice is accurately described as an ordering around an arithmetic mean, as Aristotle suggests, then, as a form of justice, it is an irreducibly private concern between those two parties who are equidistant from the mean. On the other hand, because the geometric mean of distributive justice only requires the same *ratio* for each individual between the benefit to be distributed and the criterion of distribution, and pays no regard to *quantity*, it contains no inherent limit on the number of participants who can be party to the scheme. While it is true that, as the number of participants increases, the quantity going to each participant is reduced absolutely, it is no less true that the proportions going to each can continue to be equal. Thus, the claims of distributive justice are open to a public determination in a way that the claims of corrective justice are not.

However, the public role in the determination of the claims of distributive justice goes further. Not only does distributive justice set no internal limit on the number of its participants, but also there is nothing in its form that requires it to be completed by any specific criterion for distribution. The general maxim is "To (from) each according to his or her X", but the determination of what X is to be (eg, work, need, intelligence, age, utility, etc.) is entirely open. It is this open-ended feature of

27. The proof of irreducibility is simple. Let any "arithmetic" series of three numbers be represented by x, $x+y$, and $x+2y$, so that each number is larger than the previous one by the same quantity. Then if the series of numbers is also "geometric", it will be true that

$$\frac{x+y}{x} = \frac{x+2y}{x+y}$$

or, alternatively, that

$$x^2 + 2xy = x^2 + 2xy + y^2.$$

This is only possible if $y = 0$, or if there is no difference between the numbers in the series. Thus, corrective justice, as an ordering around an arithmetic mean, is only reducible to distributive justice, as an ordering around a geometric mean, in the trivial case where there is no inequality for corrective justice to correct. An exactly analogous proof shows the general irreducibility of distributive into corrective justice.

28. The analysis in this and the following two paragraphs owes much to the recent unpublished work of E.J. Weinrib. Of special significance are his two essays, "The Intelligibility of the Rule of Law", forthcoming in Monahan and Hutchinson, *The Rule of Law: Ideal or Ideology?* and "Corrective Justice As Abstraction" (unpublished).

distributive justice that in a democracy requires its final determination by the political process. It is also, needless to say, what renders it inappropriate as the kind of justice to inform substantive judicial review.

Corrective justice is importantly different in this respect. The equality that is presupposed by corrective justice to exist before the transaction can hardly be any substantive notion of equality. It would be implausible to suggest that the two parties linked, for example, by the contingencies of an accident (the mainstay of tort) have much in common, or much to be equal in, except the transaction itself. All criteria that might sensibly be the subject matter of moral or political discourse, such as need, virtue, or merit, would as likely as not be quite unequally distributed between the two parties before the transaction that happened to link them. Thus, to make sense of the prior equality, which it is the job of corrective justice to preserve, one must abstract from those differences that inevitably distinguish persons to make them unequal and think only of what it is that unites them as equals. This can be nothing other than their equal standing within the category of personhood, that is, their equality as persons. Since this is the *only* possible conception of equality that can complete the form of corrective justice, the form is complete in itself. It requires no outside specification. In particular, it requires no moral or political determination of its parts in the way that distributive justice does. This immanent intelligibility of corrective justice makes it so very promising as a theoretical framework for substantive judicial review.

It will be objected, however, that equality of personhood is too abstract an idea to provide firm foundations for substantive judicial review. Moreover, it will be suggested that the criteria used to define further the category of personhood are as unclear and controversial as those used to defend the idea of the good person and, thus, corrective justice, as much as distributive justice, requires political debate and discussion for the final determination of its content.[29]

This objection ignores that the criterion for personhood that itself be discoverable within the transaction, since it is the transaction that throws up the very idea of a violation of equal personality which it is the business of corrective justice to correct. Thus, personhood is intelligible only within the context of action and equal personhood only within the context of action as a universal, that is, where action is self-motivating and thus free from outside interference by others. Hence, the category of equal persons, which completes Aristotle's account of corrective justice, is defined as that group of entities who have the capacity to be subjects of action where the action in turn must be compatible with a universal law of like conduct.[30] In keeping

29. Moreover, it might even be argued that the abortion debate, which has so often turned upon the criteria for personhood, is the very kind of debate that should be carried on in our legislatures. That, after all, is the source of worry about *Roe* v. *Wade*; see *supra*, text accompanying note 5.

30. *Cf.* Kant, *The Metaphysical Elements of Justice* (Ladd trans. 1965), at 34: "in applying the concept of justice we take into consideration only the form of the relationship between the wills insofar as they are regarded as free, and whether the action of one of them can be conjoined with the freedom of the other in accordance with a universal law".

with philosophical tradition, the aggregate of conditions under which such a universal law of equal freedom exists is termed Abstract Right or, simply, Right, and that term shall be employed here.[31] Whether this concept of Right, and the concept of corrective justice which preserves it, can inform the substantive law for purposes of judicial review is the subject matter of the next several sections of this paper. Thus, a complete response to the critic's claim that the equality of persons is too abstract an idea to be of much use in judicial review must await the final articulation of the argument there.

Retributive Justice and *Mens Rea*

Some will think it odd to claim that Aristotle's account of corrective justice can illuminate the criminal law. After all, is not the criminal law prosecution the paradigmatic instance of state or public law action against some particular individual and, therefore, to be contrasted with the stuff of corrective justice (namely, a private law action between two and only two parties who are equals)? Moreover, does not the public law character of the criminal law cry out for a public determination of its content by our legislators in the very way that a private law dispute does not? These questions are good ones and a proper reply requires a more specific articulation of how the theory of retribution in the criminal law is to be related to and distinguished from the subject matter of corrective justice.

That there is some connection between retributive and corrective justice is suggested in the following way. It will be recalled that Aristotle's account of corrective justice as the restoration of some prior equality could only be made coherent in the context of any given transaction if the notion of equality that was being used abstracted from the real differences that distinguish persons and so obviously make them unequal. This abstract equality between persons, of course, is merely their equality *as persons*, not any substantive equality in the kinds of persons they are. Thus, the corrective justice account begins to make sense of the fact that the rule of law is to be distinguished from the rule of people in fashioning the same rules for everyone. In tort law, for example, there is complete indifference, when judging wrongful conduct, to the particular characteristics of the parties. What matters — at least ideally — are those doctrinal categories that go only to define the nature of the transaction itself, namely, duty, cause, breach of the standard of care, and the fact of damage; it is irrelevant how rich or poor, or how well meaning or malicious the parties themselves might happen to be.[32] Moreover, the same indifference to character holds true for the criminal law. The rich and the poor are subject to the same sanctions, and their motivations, good or bad, are generally immaterial to our criminal law judgment of their conduct.[33] Thus, in this important respect, criminal law as a public law action has much more in common with the private law action in tort than it does with other state actions, which, in accordance with the requirements of distributive justice, must necessarily dole out burdens or benefits to persons according to the kinds of persons they are.

How then is the peculiar public law character of the criminal law to be explained? More specifically, how does it relate to the abstract equality of corrective justice, which seems to make sense of the indifference shown by both the private and criminal law to individual character traits? The answer lies in realizing that the abstract equality of Right, which it is the business of corrective justice to preserve or reinstate, can be denied in two quite different ways. Consider, for example, the facts of *R.* v. *Shymkowich*.[34] A beachcomber, after removing two logs from a logging company's booming ground, was charged with theft. In his defence, he claimed that he believed that the two logs had drifted into the boom and that, as drifting logs, he had a right to salvage them. If one accepts the beachcomber's story, it seems that the case only involves a mistake about entitlements, that is, a confusion as to where the line is drawn between the rights of the company and the rights of the beachcomber. The beachcomber by his action is not denying that the company's rights are relevant. Rather, he accepts that the company has rights but disputes that they extend to the two logs in question.[35] The appropriate response by the logging company is a private action against the beachcomber's conversion of the two logs.

However, if we do not accept the beachcomber's story as true, the character of his transaction and our response to it is changed. Then it seems that he has intentionally stolen the logs and is rightly charged and convicted with theft. His actions amount to more than a denial that the company has rights to those logs; instead they amount

31. See, for example, Hegel, *The Philosophy of Right* (Knox trans. 1967); and Kant, where *Recht* has been translated by Ladd not as Right but as Justice.
32. *Cf.* Aristotle, *supra* note 25, at 1132a: "But the justice in transactions between man and man is a sort of equality indeed, and the injustice a sort of inequality; not according to that kind of proportion, however, but according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury."
33. See, for example, the discussion in Parker, *An Introduction to Criminal Law* (1983), at 160: "When a defendant is indisputably shown to be the criminal, evidence of motive is immaterial. Motive relates to a consequence ulterior to the *mens rea* and *actus reus* and, adopting this criterion, motive is irrelevant to criminal responsibility." Also see Hall, *General Principles of Criminal Law* (1960), at 93, where questions regarding motive are deemed to be questions about the character of the accused and thus immaterial to an assessment of his or her conduct.
34. *R.* v. *Shymkowich*, [1954] S.C.R. 606.
35. In *The Philosophy of Right*, *supra* note 31, at paras. 84 and 85, Hegel rightly concludes that such a dispute should be settled civilly, not criminally: "Each person may look upon the thing as his property on the strength of the particular ground on which he bases his title. It is in this way that one man's right may clash with another's.

"This clash which arises when a thing has been claimed on some single ground, and which comprises the sphere of civil suits at law, *entails the recognition of rightness as the universal and decisive factor, so that it is common ground that the thing in dispute should belong to the party who has the right to it*. The suit is concerned only with the subsumption of the thing under the property of one or the other of the parties — a straightforward negative judgment, where, in the predicate 'mine', *only the particular is negated*." (Emphasis added.)

to a denial of the relevance of rights altogether.[36] Since the infringement is of rights in general, or of the category of Right, correction of the transgression is more than just the private affair of those (no matter how many) whose particular rights have been infringed. The state, as guardian of the category of Right, and not just some private individual, must take public action against the thief.[37]

But recognition of the public law nature of the criminal law action can take us further. For a thief to deny the category of Right, he or she must engage that category *as a category*, that is, conceptually. This means that the thief's denial of Right must be cognitive, involving conscious or advertent wrongdoing. Thus, the public law form of the criminal law action not only makes sense of, but, more strongly, positively requires subjective *mens rea* on the part of the accused. Anything less cannot explain why the state, as guardian of the category of Right, is a party to the action. That is, anything less cannot explain the public law nature of criminal law.[38]

The contrast between the criminal law and the private law of tort is illuminating in this respect. In the law of tort, liability turns on the objective standard of reasonableness precisely because it is a private law action between two equals. Any other standard would do violence to that equality. For example, a subjective liability standard, which might take into account the special incapacities of the defendant, operates too much in favour of the defendant and ignores the equal right of the plaintiff to conduct his or her affairs free of another's interference, no matter how subjectively faultless that interference might be. On the other hand, the standard of strict liability judges the defendant's conduct too harshly in its attempt to protect, and provide compensation for, the plaintiff. The only liability standard that makes sense of the equal standing of *both* parties to the private law tort action, never focusing on one to the exclusion of the other, is the objective standard of reasonableness, a standard intermediate to strict and subjective liability.[39] Thus, where in the

36. Again, *cf.* Hegel, *supra* note 31, at para. 95: "The initial act of coercion as an exercise of force by the free agent, an exercise of force which infringes the existence of freedom in its concrete sense, *infringes the right as right, is crime — a negatively infinite judgment in its full sense, whereby not only the particular (i.e. the subsumption under any will of a single thing) is negated, but also the universality and infinity in the predicate 'mine'* (i.e. my capacity for rights). ... This is the sphere of criminal law." (Emphasis added.)
37. *Ibid.*, at para. 220: "Instead of the injured party, the injured *universal* now comes on the scene, and this has its proper actuality in the court of law. It takes over the pursuit and the avenging of crime ... and is transformed into the genuine reconciliation of Right with itself, i.e. into punishment."
38. Thus, of the four categories of *mens rea* identified in the Model Penal Code, only actions done "purposely", "knowingly", or "recklessly", and not those done "negligently" are sufficient for a criminal law prosecution. This seems to accord with the views of the Law Reform Commission of Canada. See its *The General Part — Liability and Defences* (1982), Working Paper No. 29, at 25.
39. For this argument in greater detail, see Weinrib, "Liberty and Community in the Theory of Private Law" (unpublished). That the objective standard of reasonableness was the appropriate standard for a negligence action was decided in *Vaughan* v. *Menlove* (1837), 132 E.R. 490. The content of the objective standard was spelled out in detail by Judge Learned Hand in *U.S.* v. *Carroll Towing Co.* (1947) 159 F. 2d 169 (2nd Cir. Ct. of Appeals). For an argument that shows how this standard and its content is to be linked to the concept of Right, see Weinrib, "Toward a Moral Theory of Negligence Law" (1983), 2 J. of Law and Phil. 37.

criminal law action the public law form determines that the standard of liability must be subjective and cognitive — since that is the only kind of wrongdoing that can make sense of the state as a party — in tort law the private law form of the action determines that the standard of liability must be objective and noncognitive, since anything else does conceptual violence to the essential equality of a private law action.[40] In this way, we can derive the two different standards for retributive and corrective justice respectively while at the same time recognizing the essential connection of each with the concept of Right.[41]

This account of the subjective liability standard in the criminal law should be contrasted with an account provided by H.L.A. Hart in his essay, "Negligence, *Mens Rea*, and Criminal Responsibility".[42] Among other things, Hart is concerned to show in this essay that the use of a negligence standard in the criminal law is not inconsistent with the subjective determination of criminal responsibility. The latter, he suggests, is required if punishment is to be "morally tolerable".[43] Hart concedes that, if negligence is admitted into the criminal law in its objective form, then some individuals will be held liable, even if they could not have helped their failure to comply with the objective standard: "In *such* cases, indeed, criminal responsibility will be made independent of any subjective element."[44] However, Hart argues that negligence could be subjectively determined, with the application of the standard taking into account the particular capacities of the accused. Under such a regime, Hart suggests, there would be no breach of the "morally tolerable".

However, Hart's accounting for a form of negligence which is morally permissible within the criminal law fails to explain why such an accounting is not more generally

40. It is worth nothing that certain theoretical approaches to the private law, such as, for example, deterrence or compensation theories in the law of tort, also undermine the essential equality of the two parties in a private law action. Deterrence theory focuses on the defendant to the exclusion of the plaintiff; indeed, as one deterrence theorist has put it, "that the damages are paid *to the plaintiff* is, from an economic standpoint, a detail": Posner, *Economic Analysis of Law* (1977), at 143 (emphasis in the original). Compensation theory, on the other hand, can make little sense of the defendant's role in the action, and is more naturally supportive of overall social insurance schemes funded through general tax revenues than it is of the private law of tort.
41. The equal standing of the parties in a private law action extends beyond the objective liability standard that is used, and embraces certain procedural requirements as well. For example, the burden of proof easily shifts from one party to the other as each makes a new factual claim raising a different legal issue. Moreover, each claim need only be proved on a balance of probabilities; anything more or less would be unfair to one of the parties. By contrast, in the criminal law, where the exclusive focus of concern is always on the accused, it is reasonable to impose a greater and more constant burden of persuasion on the state. After all, the state has no stakes in the action, or at least no stakes symmetrical to those of the accused. In this respect, it is also interesting to observe that historically, as the criminal law action has become less and less perceived as a private matter, the burden of persuasion and proof has more and more been allocated to the prosecution. On this, see Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases" (1968), 77 Yale L.J. 880, and his *Rethinking Criminal Law* (1978), at 519–38.
42. Hart, "Negligence, *Mens Rea* and Criminal Responsibility", in his *Punishment and Responsibility* (1968), at 136–157.
43. *Ibid.*, at 152.
44. *Ibid.*, at 154.

relevant. His intuitions about what is "morally tolerable" presumably derive from some single source of moral convictions that should also explain the use of the objective standard of negligence where it is most at home, namely, in the law of tort. But why, *morally*, should a subjective element be so very essential in the criminal law action for petty theft, whereas the objective standard of negligence is sufficient grounds for the defendant's liability to the point of bankruptcy in the law of tort? Hart seems simply to assume that the criminal law has a moral component that the law of tort has not. Without any firm indication of what that is, it is small wonder that Hart has the freedom to admit a subjective element of negligence into the criminal law.

However, not just any such subjective element will do. Rather, as argued earlier, what is required to make sense of the criminal law as state action is some categorical or conceptual denial of Right, that is, some cognitive element in the criminal wrong. Such an element is, of course, subjective to the accused; it cannot be enough that, hypothetically, some reasonable person might have adverted to the category of Right. But it is subjective because it is at first cognitive, not *vice versa*. Hart, on the other hand, forges the connection between the cognitive and the subjective in the reverse direction. Not surprisingly, he concludes that the cognitive need not follow from the subjective if the subjective is at first required; negligence, properly interpreted, will do. But such an argument fails to comprehend why the subjective element is required in the first place. Moreover, it fails to appreciate what is distinctive about the criminal law.

Excuses, Reasonableness, and Substantive Equality

Before proceeding to a discussion which does admit the possibility of using an objective standard in the criminal law, it is worthwhile pausing to summarize the argument so far. The paper began with the observation that judicial review of the substantive criminal law is problematic in a democracy. What is required is an account of such review that minimizes the need for judicial determination of the moral content of such open-ended Charter phrases as "fundamental justice". Without such an account, it would seem that an unelected, unaccountable, and largely unrepresentative judiciary is in a position to enforce its own moral views over the declared intentions of our legislators.

The paper then suggested that there was some middle ground between the impossibility of strict interpretativism and the unacceptability of unconstrained moral policy making by the judiciary. This was to be found in Aristotle's idea of corrective justice, an idea which necessarily required for its completion an abstract account of equality between persons *qua* persons, rather than a more substantive account based upon the kinds of persons they might happen to be. This abstract equality of personhood, together with the set of conditions making it possible, was termed Abstract Right or simply Right, and it was deemed that, among other things, it was the business of the state to act as guardian to this category of Right.

It was then argued that wrongful violations of Right could occur in two quite different ways. First, a wrongdoer could infringe upon an instance of the category by a mistaken or accidental crossing of the boundary between specific entitlements. In such a situation, it would be the business of the particular rights-holder whose boundary had been crossed to seek his or her own remedy in a private law action. Since such an action is one that takes place between equals, and in particular between two abstractly equal persons, the standard of liability appropriate to the action is the one which focuses on neither party to the exclusion of the other, but rather recognizes the equal standing of each. This standard is the objective standard of reasonableness that we typically observe in a negligence action.

Second, a wrongdoer could knowingly or advertently infringe the equality of Right by denying it conceptually, or as a category. In this situation, it is the state, as guardian of the category, that must respond. The standard of liability in this action must be one that makes sense of the state as a party. Thus, an objective standard of reasonableness, as a standard between equals, will not do. But nor will Hart's more subjective negligence standard. While subjective negligence can make sense of the fact that there is only one party, the accused, who has stakes in the action (and thus not two equals whose stakes are symmetrical and opposed, as in the determination of liability for an alleged tort), such a standard cannot account for why the state has brought the action in the first place. To make sense of that, this paper has argued that only a cognitive standard of wrongdoing, or *mens rea*, will suffice.

In the process of making these arguments, the paper has already remarked on the close affinity between the abstract equality which exists before both corrective and retributive justice and the idea of law as a system of general rules applied in each case without any attention being given to the particular characteristics of the parties involved. The argument has also been that this rule of law ideal is as true of the criminal law as it is of tort. Yet in the criminal law an action against an accused is not complete until the judge has also considered any excuses or justifications the accused might offer for his or her violation of the rules. Moreover, these types of considerations certainly do seem to take us beyond the abstract generalization of rules to an accounting for the particular circumstances of the case. The questions posed at this point are not typically about what the rules are or whether they have been violated, but rather about whether the accused is appropriately to be held accountable for any violations that have occurred.

It is tempting to think that what goes on at this stage of the criminal law action is the filling in of what must inevitably be only a skeletal outline of the offence in the rules.[45] On this view, the accused is not offering a genuine defence at all but only a denial that, under a true or reasonable interpretation of the rules and the offences defined therein, he or she really has done nothing wrong. While this is a plausible

45. This is Paul Robinson's account of justifications, for example. See his "A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability" (1975), 23 U.C.L.A. L. Rev. 266.

account for justifications, it will hardly do for excuses. Excuses, unlike justifications, presuppose wrongdoing; someone need only be excused *after* a determination has been made that he or she has engaged in wrongful conduct. In this way, Robinson has noted: "a successful defence of excuse represents a legal conclusion that although the act was wrong, liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him."[46] Thus, where justifications focus on the propriety of the *act* and might plausibly be construed as a necessary supplement to a system of general rules, excuses concern the particular *actor* and whether or not it is appropriate that he or she be blamed or punished for the rules' violation.[47]

The attention that excuses give to the particularities of the accused may suggest that they are out of place in the criminal law, based as it is on the protection of abstract equality or Right. After all, the law of tort also assumes the Right to exist before the corrective justice it manifests, and nowhere in the law of tort is the concept of excuse admitted as a defence. All defences in tort law, such as consent or voluntary assumption of the risk, operate as justifications, effectively denying that a tort has been committed at all.[48]

However, an example should help to show that excuses are an essential ingredient in the criminal law action.[49] Suppose that Dan, reasonably but mistakenly, believes that Allan is attacking him. In self-defence, he uses force against the innocent Allan to the point of endangering Allan's life. Allan, unable to inform or convince Dan of his mistake, seeks to defend himself by using force against Dan. Thus, we have two individuals attacking one another in what appears to each, quite reasonably, as self-defence. What should the legal response be? Ignoring the difficult issues of proportionality in the defensive measures chosen, it seems clear that Allan can claim his act is justified an an act of self-defence. However, self-defence is only available against unlawful or wrongful conduct by the aggressor.[50] This suggests that Dan's conduct cannot itself be justified, since justifications go to show that the conduct in question is not really wrongful. Nor can Dan escape liability by suggesting that his mistake negates *mens rea* since, again, without *mens rea* his conduct would not be unlawful and Allan's response to it would not be justified as self-defence. Thus, the only solution which coherently allows for what appears to be the most reasonable result here is the one that admits Dan's mistake as an excuse. Since an excuse would presuppose Dan's wrongdoing, it would allow for Allan's act of justified self-defence.

46. *Ibid.*, at 275.
47. This distinction between justifications and excuses, and its importance, has been accepted and much discussed by the Supreme Court of Canada. See *Perka et al.* v. *The Queen* (1984), 14 C.C.C. 384 (S.C.C.).
48. The defence of contributory negligence also operates as a claim that a tort has not been committed by alleging that the plaintiff is the author of his or her own misfortune.
49. This example is borrowed from Fletcher, "The Right and the Reasonable" (1985), 98 Harv. L. Rev. 949, at 972.
50. S. 34(1) of the Canadian Criminal Code begins: "Every one who is *unlawfully* assaulted without having provoked the assault is *justified* in repelling force by force". (Emphasis added.)

In this way, both attackers could be freed of criminal law liability.

The example also serves to show why excuses are not appropriate in tort. In tort, unlike in the criminal law, the action is to determine which of two parties is finally to pay the costs of damage that has already occurred. There is no sense, therefore, in which both parties can "get off". Hence, to admit any excuse for wrongdoing, while this may be fair to the defendant, is to provide small comfort to the plaintiff. In this way, excuses are out of place in the private law action which, as a manifestation of corrective justice, must recognize the equal standing of both parties. However, in the criminal law response to the Allan versus Dan debacle, there would be two independent state actions against each accused. Since the fortunes of one are in no way connected to the fortunes of the other, it is quite possible that each can be found not guilty. For this reason, excuses can have a role in the criminal law that they cannot have in tort.[51]

Yet the question remains as to whether the apparent necessity of excuses can be incorporated into the criminal law action without doing conceptual violence to the abstraction from particularity, which retributive justice, as interpreted here, seems to require. For, if the concept of excuse cannot be so accommodated, then its apparent necessity within the criminal law action renders suspect the overarching framework based on Abstract Right that has so far been developed. And without this framework, we are back to the possibility of substantive judicial review where the substance is imposed on the criminal law action from the outside. Such outside considerations would in turn require their final determination by our elected legislators, lest the judiciary be thought of as usurping the democratic ideal. A court would not, for example, be able to declare as unconstitutional, or contrary to "fundamental justice", any objective standard of reasonableness in a mistake of fact defence if such a standard had been properly legislated. Such determinations would properly fall to legislatures and be beyond the reach of judicial review.

Fortunately, however, there is an account of excuses which it does seem possible to incorporate into the retributive justice framework. Moreover, it is an account that makes sense of the fact that the criminal law action, while it begins as an action on the part of the category of Right, must end as an action on the part of all persons who, as rights-holders, are empirical instances of that protected category. It must end this way for the sake of conceptual coherence because, without instances, a category is

51. The excuse of necessity has been much discussed in tort, especially in the context of the American case, *Vincent* v. *Lake Erie Transportation Co.* (1910), 124 N.W. 221 (Minn. S.C.). In that case, a ship owner was forced to pay for damages caused to a dock at which it had taken refuge during a storm, suggesting the defence of necessity was to no avail. However, in a Canadian case, *Munn* v. *M/V Sir John Crosbie*, [1967] 1 Ex. Ct. R. 94, on comparable facts, the defendant was held not liable. But even here the defence was not one of necessity, but rather that the dock owner had assumed the risk of damage during a storm by inviting the ship to dock there.

empty and so not genuinely a category at all.[52] The shift from a judgment of wrongdoing, which the concept of excuse necessarily presupposes, to a consideration of excuses and whether or not the accused should be punished for that wrongdoing, marks a shift from the prior categorical level, or the level of abstract understanding, to the empirical level, where not only is the category actualized in its instances but also where understanding must take into account the practicalities of action. It is this latter shift from the understanding of action in the abstract to an understanding of action in its circumstances, where the latter form of understanding is the one appropriate to persons as the concrete instances of Right, which allows the retributive justice framework to incorporate what is now a standard account of excuses.

Consider, for example, the excuse of necessity as it has been applied to the following well-known hypothetical:[53]

> X is unwillingly driving a car along a narrow and precipitous mountain road, falling off sharply on both sides. The headlights pick out two persons, apparently and actually drunk, lying across the road in such a position as to make passage impossible without running them over. X is prevented from stopping ... by suddenly inoperative brakes. His alternatives are either to run down the drunks or to run off the road and down the mountainside.[54]

Suppose that the driver decides to run over and kill the two drunks in order to save his own life. Both George Fletcher and Herbert Packer, on considering the case, agree that a humane court must acquit. Both also remark on the fact that the grounds for acquittal must be an excuse, not a justification, since the balance of advantage would appear to favour the loss of one rather than two lives. However, what is most interesting is that both Fletcher and Packer agree on the grounds for the excuse. Packer remarks that "no honest judge or juror could say that confronted with the same dilemma he would have done otherwise" and then goes on to say that "the law that exacts more of an individual then its framers could give under the same circumstances is simply hypocritical".[55] Fletcher argues that the excuse of necessity "appeals to our sense of compassion for human weakness in the face of unexpected,

52. *Cf.* Weinrib, *supra* note 28, at 9, where he uses the word "form" instead of "category", and the word "content" instead of "instance": "Form and content are thus correlative and interpenetrating. If any content were formless, it would lack the very determination which would render it a something rather than nothing in particular, a content rather than an indeterminate existent. If a form, on the other hand, were without content, it would not be a form *of* anything and therefore not a form at all. ... [F]orm is to be regarded as the content itself under the aspect of its intelligibility."
53. The hypothetical originates in Kadish and Paulsen, *Criminal Law and Its Processes* (1969), at 544, and is discussed in Fletcher, "The Individualization of Excusing Conditions" (1974) 47 So. Calif. L. Rev. 1269, at 1279–1280; and in Packer, *The limits of the Criminal Sanction* (1968), at 117.
54. Fletcher, *supra* note 53, at 1279.
55. Packer, *supra* note 53, at 117–118.

overwhelming circumstances",[56] and then later explains what he means by compassion: "Compassion ... is always expressed among persons on an equal plane; it is not the forfeiture of a right or power, but the recognition that there is no basis in the facts for claiming a right or power over the object of compassion."[57] Thus, for both Packer and Fletcher, the excuse of necessity is admitted as an expression of our equality with the accused; in X's circumstances any one of us would likely have done the same. Since the accused's conduct, considered now in its circumstances, does not involve any denial of X's equality with us, our right to punish X in the name of preserving that equality is removed.

It must be admitted, of course, that this account of equality based on compassion for the accused in these circumstances is not the same abstract equality that we saw earlier as essential to the completion of corrective and retributive justice. However, it is an account of equality appropriate to the actual instances of the category of Right that must, after all, eventually find themselves in the world in some real set of empirical circumstances. Thus, it is only the completion of the abstract equality of Right with the concrete equality of action as it takes place in the world. Moreover, consideration of the particularities of circumstance *after* having come to a proper judgment of the action in the abstract, as is done with excuses which presuppose wrongdoing, does not do conceptual violence to Right. We can *judge* a person's conduct wrongful and yet decide not to *act* on that judgment by punishing that person without in any way denying the Right as a category (ie, conceptually). In fact, as the analyses of Fletcher and Packer suggest, a complete *realization* of the equality that wrong denies *requires* us, as instances of the category of Right, *not* to punish the accused if he or she has only done in the circumstances what we would have done ourselves. Punishment in the face of such a finding, rather than manifesting our equality with the accused, has the appearance of inequality, and is, therefore, positively unjust within the egalitarian framework of retribution.

Our duty not to punish the accused in such circumstances naturally correlates with his or her right not to be punished and, therefore, also points to the inadequacy of executive clemency, rather than excuse, as the proper method for finally avoiding this unjust punishment. Unlike the excuse, which expresses compassion between equals, an act of executive clemency is an expression of mercy. It is expressed by a superior to an inferior and only when the superior has the right to subject the inferior to the sanction.[58] It would be incoherent for the judiciary, therefore, to conjoin a finding of conditions sufficient to excuse with a request that the executive grant clemency.

56. Fletcher, *supra* note 53, at 1280.
57. *Ibid.*, at 1283n.
58. *Ibid.*

Such a conjunction both asserts and denies the accused's right not to be punished in the same breath.[59]

Having found a place for excuses within the framework of retributive justice, it remains to emphasize one point: the accused's behaviour in the circumstances must be reasonable. We cannot preserve the notion of even an empirical equality of instances if we take the particularization of concern for the accused so far as to deny the possibility of equality at all. Hence, it is not what we would do as saints that counts, nor what we would do if we were exactly like the accused and not at all like ourselves. Rather, it is what a reasonable person might have done. Only this objective standard preserves the possibility of equality among us all.

Reasonable and Honest Mistake

The reasonableness requirement derived here holds true for all excuses that the accused might offer. Not only must the accused show a reasonable reaction to the adversities of necessitous circumstance, he or she must also make reasonable errors if he or she seeks to use the defence of mistake as an excuse. In this respect, the argument offered here differs significantly from that provided by Herbert Packer.[60]

Packer considers the case of *People* v. *Young*,[61] a case in which the accused came upon a struggle between a teen-aged boy and two older men. The accused attacked the two men as a would-be rescuer of the boy and, in the fight, the leg of one of the men was broken. The injured man thereupon drew a gun and announced that he was a policeman engaged in an arrest of the boy for disorderly conduct. Charged with assault, the accused argued the defence of mistake. The courts were sharply divided on the issue but eventually held that the excuse was inadequate. Packer makes it clear that his response to the case would have been different:

> In retributive terms, the answer is equally clear in the other direction: if there was no blameworthiness inherent in the defendant's faulty perception of the situation, his conduct was no more reprehensible than it would have been had he been correct in seeing the two middle-aged men as aggressors and the boy as their innocent victim.[62]

59. In *The Queen* v. *Dudley and Stephens* ((1884), 14 Q.B.D. 273), a case in which the two accused, while shipwrecked, allegedly killed and ate a cabin boy so that they could survive, the Court convicted while recommending the Queen's clemency. The Court recognized that the standards it was requiring of the accused were ones "which we could not ourselves satisfy", but it was reluctant to allow such "compassion for the criminal to change or weaken in any manner the legal definition of the crime". Such reasoning fails to appreciate that the very idea of an excuse, based on compassion, presupposes wrongdoing and thus in no way undermines the definition of the wrong.
60. Packer, *supra* note 53, at 120–121.
61. *People* v. *Young*, 210 N.Y.S. (2d) 358, rev'd., (1962) 11 N.Y. (2d) 274.
62. Packer, *supra* note 53, at 121.

This response makes it clear that Packer believes that any honest mistake on the part of the accused, no matter how unreasonable, would be sufficient as an excuse. But, as the arguments in the preceding section show, this undermines the egalitarianism of the very "retributive terms" upon which Packer claims to base his argument. The better view is the one that would require such a mistake not only to be honest but also reasonable.

Reasonableness is not required, of course, if the mistake is not offered as an excuse, but goes instead to a constituent element of the offence as it is defined in the rules. The paradigmatic case is the taking of another's umbrella thinking it is one's own. Here, as in *Shymkowich*,[63] the accused's claim is really that this conduct amounts only to a mistake over the boundaries of title, not to the denial of title itself. Without the requisite *mens rea*, therefore, it is inappropriate for the state to take action. Moreover, it is sufficient that this mistake actually negate *mens rea*, that it be honest. There is no additional requirement that it be reasonable. At this early point in the criminal law action, we have not moved from a consideration of the category of Right to a consideration of the equality that must hold between instances of that category in excuse. We might say that the accused's invocation of mistake is non-inculpatory rather than exculpatory and, therefore, that reasonableness is not yet relevant.

This should not suggest that it is an easy task always to know where we are in the criminal law action, that is, whether mistake is being offered as an excuse that presupposes wrongdoing or as a negation of *mens rea* and thus as a denial of wrongdoing altogether. Mistake as to consent in sexual intercourse, which has been the subject of much publicized litigation in both Canada and the United Kingdom,[64] is probably one such difficult case. If the offence of sexual assault is *defined* as having intercourse without the woman's consent, then a mistake as to her consent is a mistake about a constituent element of the offence and need only be honest, not reasonable. However, if her consent operates as a justification for what is otherwise unlawful or wrongful conduct, then the defence of mistake about her consent only begins to operate once the elements of the offence are in place. Under such an interpretation, the mistake must be reasonable as well as honest.

It is tempting to think that it is overly prudish today to judge sexual intercourse as a *prima facie* wrong unless it is justified by consent. Thus, one is inclined to include non-consent within the definition of the offence of sexual assault so that this form of forceful intercourse is immediately and categorically distinguished from the consensual kind. However, the argument in favour of viewing consent as a justification to what is otherwise suspect (because assaultive) conduct can be given a more modern flavour. The more seriously one takes the sexual autonomy of men and

63. See *supra* note 34 and the discussion in the text accompanying it.
64. See *Pappajohn* v. *The Queen*, [1980] 2 S.C.R. 120, and *D.P.P.* v. *Morgan* (1975), 61 Cr. App. R. 136 (H.L.).

women, the more seriously one must take the possibility that that autonomy is being infringed.[65] This may lead us so far as to judge certain types of conduct as *prima facie* wrongful unless justified by consent. Certainly this seems a plausible approach in the very cases where belief in consent is most problematic.[66] On the other hand, in those cases where it is normal to expect consent, it is as likely as not that a belief in that consent is going to be reasonable as well as honest in any event.

These remarks are relevant to the case of *R.* v. *Stevens*,[67] now before the Supreme Court of Canada. In that case, the accused challenged his conviction for having sexual intercourse with a female under fourteen on the basis that s. 146 of the Criminal Code, which makes his belief as to her age irrelevant, was contrary to "fundamental justice". On the arguments advanced in this paper, the accused's argument is straightforwardly correct. It is incoherent and, therefore, unjust for the state to proceed against the accused in a criminal law action as if mistake were not relevant at all. However, what is less clear is how the legislation needs to be redrafted to remedy this situation. Since the age restriction in s. 146 operates as a statutory bar to consent, the question that must be answered is whether, when it is present, consent is a justification or, when it is absent, it is a constituent element of the offence. As argued earlier, it is consistent with the former interpretation to require the accused's mistake as to the female's age to be reasonable as well as honest; however, if the latter interpretation is the correct one, then any legislation requiring an objective standard of reasonableness would be fundamentally unjust and, therefore, contrary to s. 7 of the Charter. Certainly, in cases of statutory rape, where the woman alleged to be consenting is inevitably young and likely to appear so, it is tempting to choose the former interpretation. A man intending to have intercourse with such a young woman should be on notice that his conduct might be wrongful and so should make reasonable efforts to avoid error about the legal efficacy of her apparent consent. Merely honest mistakes, if unreasonable in the circumstances, would not serve to elevate the accused to the status of an equal with his accusers. Thus, such mistakes should not serve to excuse him from punishment.

In the British Columbia *Reference* situation,[68] the accused's alleged mistake concerns the suspension of his driver's licence. Thus, it is a mistake about his authority to drive. That one needs such authority suggests that the mere act of driving is *prima facie* unlawful unless one is justified as a licensed driver. Interpreted in this way, the subject matter of the accused's mistake is a justification and not a

65. Such an argument appears in Fletcher, *Rethinking*, *supra* note 41, at 706. Fletcher maintains some doubts, however, as to whether consent should be viewed as a justification in this context.
66. In *D.P.P.* v. *Morgan*, *supra* note 64, for example, the accused claimed to have been convinced by the victim's husband that the victim's resistance to intercourse was feigned. Surely, in the context of ostensibly forced intercourse, it is not too much to suggest that the conduct is *prima facie* wrongful.
67. See *supra* note 13.
68. See *supra* note 8.

constituent element of the offence. Thus, he must take all reasonable steps to avoid error; just any honest mistake won't do. Moreover, this analysis of the case seems to accord with the approach taken by the British Columbia Court of Appeal. What concerned the Court of Appeal most was that the British Columbia *Motor Vehicle Act* had created an offence of absolute liability "giving the defendant no opportunity to prove that his action was due to an honest and reasonable mistake of fact".[69] Having already referred to the tripartite categorization of offences outlined by Dickson J. in *Sault Ste. Marie*, the Court of Appeal continued:

> Rather than placing the burden to establish such facts on the defendant and thus make the offence a strict liability offence, the legislature has seen fit to make it an absolute liability offence coupled with a mandatory term of imprisonment.[70]

Thus, the Court of Appeal implied that a strict liability standard, allowing for a due diligence defence on the part of the accused, would *not* be constitutionally suspect under s. 7 of the Charter. This conclusion is in keeping with the analysis developed in this paper, at least in so far as the authority to drive is properly construed as a justification.

Since the defence of mistake developed as a doctrine around the offence of bigamy,[71] it is interesting to speculate on how the courts might react to the relevant Criminal Code provisions now in place if they were to adopt the analysis presented in this paper. Section 254(2)(a) of the Code, for example, holds that no person commits bigamy by going through a form of marriage if that person believes in good faith and on reasonable grounds that his or her spouse is dead. Subsequent cases have held that a mistake as to the dissolution or nullity of a prior marriage must also be both honest and reasonable.[72] In his annotations to *Martin's Annual Criminal Code 1985*, Edward Greenspan has argued that it should be sufficient that the mistakes here be honest, that they should not also have to be reasonable. He supports this claim by referring to the cases of mistake about consent in sexual intercourse, cases which have held that the mistake need only be an honest one. However, he makes no reference to the possibilities of a constitutional challenge.[73]

At first blush, a Charter challenge to the reasonableness requirement might appear problematic since marriage, as much as driving, is a licensed activity. Hence, a mistake about the validity of one's prior marriage licence is a mistake about one's authority or one's justification to remarry, and it is arguable, therefore, that such mistakes should be reasonable if they are to excuse. However, there is an air of the unreal in this argument. Unlike in driving, where the activity has some standing

69. *Reference Re Section 94(2) of the Motor Vehicle Act* (1983), 4 C.C.C. 243, at 251 (B.C.C.A.).
70. *Ibid.*
71. See, for example, *R.* v. *Tolson* 23 Q.B.D. (1889).
72. See *R.* v. *Woolridge* (1979), 49 C.C.C. (2d) 300 (Sask. Prov. Ct.) and *R.* v. *Haugen* (1923), 41 C.C.C. 132 (Sask. C.A.) on dissolution and nullity, respectively.
73. Greenspan, *Martin's Annual Criminal Code* (1985), at s. 254 annotations.

independent of its authorization, being married is only possible if one has a valid licence. Thus, a mistake as to the validity of one's prior licence seems to be more closely connected to the definition of the offence of being married twice. For this reason, and on the basis of the arguments provided in this paper, it should be sufficient that a mistake as to the validity of one's prior marriage be honest, not that it also be reasonable. Moreover, an analogous argument would suggest that s. 254 of the Criminal Code, which explicitly requires a mistake about the death of one's previous spouse be reasonable as well as honest, is contrary to the requirements of fundamental justice in s. 7 of the Charter.

The Significance of Imprisonment

To this point there has been no mention of that single feature of the criminal law action which appears to be most essential to it conceptually, namely, the possibility of imprisonment as the final sanction against the accused. Yet in the *Reference* decision, the impugned British Columbia legislation coupled the absolute liability offence with a mandatory term of imprisonment, and it was the *combination* of these two features that most troubled the Supreme Court and influenced it to find a violation of s. 7 of the Charter.[74] Lamer J. in particular was careful to leave open the question whether an absolute liability offence that did not also involve imprisonment as a possible sanction would be violative of s. 7.[75] This suggests that a proper account of the principles of fundamental justice — at least if it is to explain the Supreme Court's current position on substantive review as articulated in the *Reference* decision — must make imprisonment, and not the absolute liability standard on its own, a central feature of its explanation.

To see that imprisonment is central to a coherent account of the criminal law action, it is worthwhile to consider how one might interpret an absolute liability offence which only provided for a fine, and not imprisonment, as its sanction. While such a fine, payable to the state, might be termed "penal" or even "criminal", it could just as easily be characterized as a tax levied on the activity subject to the absolute liability standard. And, interpreted in this way, there seems to be nothing incoherent in the state setting about to collect the tax by way of a public law action. Indeed, the

74. See *supra* note 8, at 559: "I am therefore of the view that the combination of imprisonment and of absolute liability violates s. 7 of the Charter." (*per* Lamer J.); and at 573: "I believe that a mandatory term of imprisonment for an offence committed unknowingly and unwittingly and after the exercise of due diligence is grossly excessive and inhumane. ... I believe, therefore, that such a sanction offends the principles of fundamental justice embodied in our penal system" (*per* Wilson J.).
75. *Ibid.*, at 560.

oddity would be if the tax were collected in some other way, for example, by way of a private law action initiated by some individual.[76] Moreover, there does not seem to be any requirement that a tax only be levied on activities consciously or voluntarily entered into; we quite commonly tax citizens simply because of their status, for example, because they are citizens, or because they are residents, rich, or dead. Thus, it is not conceptually incoherent and, therefore, not contrary to the principles of fundamental justice, to base state action against an "accused" on an absolute liability standard; if the action is designed only to collect a fine, it can as easily be characterized as the collection of a tax as it can the imposition of a criminal sanction.

However, a term of imprisonment obviously cannot be characterized as a tax. Unlike a fine, a prison term represents a state restriction on the liberty of the accused. As such, it can only be used in reaction to the accused's conduct if that conduct manifests a denial of liberty, or the aggregate of conditions which makes liberty possible (ie, the Right). But, again, the denial of liberty *qua* liberty requires that the accused engage liberty as a category in his or her conduct, that is, that the accused *consciously* deny the Right. Thus, a state action against the accused on the basis of past misconduct, at least when it holds out the possibility of a term of imprisonment, requires *mens rea* in the standard of liability. Moreover, this conclusion accords with the Supreme Court's position as articulated in the British Columbia *Reference*.

Conclusion

This paper has attempted to articulate a purely internal or conceptual account of the criminal law action. Under such an account, the judge is only required to discover and make explicit those factors which are already implicit in the transaction that he is being asked to judge. The judicial enterprise, therefore, is one of cognition, or understanding, not creation. No factors are introduced into the action from the outside. Of course, equality has played an essential role throughout the discussion, but it has only been the equality which rationality requires between particulars, that is, the equality which each instance shares with other instances of the same category. In turn, the category of personhood, and thus the equality of persons within that category, has been the particular focus of our concern because the intelligibility of action entails a subject prior to and in control of what would otherwise only be movement. Action, of course, is the starting point for the judicial enterprise since without action there is no transaction and, therefore, nothing to judge. Thus, judicial cognition proceeds from action to the person to the category of persons in their abstract equality. Finally, the enterprise is completed with a return to concrete persons judged as equals in their particular circumstances, the stuff of which excuses are made.

76. Ernest Weinrib (in conversation) has made the point that strict liability effectively operates as a tax on the defendant and, therefore, that it is anomalous to have this tax enforced privately by the plaintiff within the context of a tort action.

The conceptual account being offered, therefore, is to be contrasted with those that emphasize the moral component of the criminal law. However attractive these moral accounts might happen to be on their own terms, they share one significant disadvantage in comparison to the account presented here: by offering moral arguments for the criminal law, they expose the judiciary to a necessary defence of its own judgments against any alternative moral determinations which might have been made by our elected representatives in our legislatures. But in a representative democracy such as defence is not possible. Thus, such theories are effectively precluded from providing any serious arguments for substantive judicial review.