

THE STATUS OF STRICT CONSTRUCTION IN CANADIAN CRIMINAL LAW

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I. INTRODUCTION

Implicit in the study of the judicial process is a recognition that the methods by which judges reach legal conclusions are as deserving of scrutiny as the conclusions arrived at. The resolution of a problem of statutory interpretation, for example, often requires the weighing of competing premises and the employment of analytical techniques which are themselves more interesting and significant than the legal result their combined influence is held to imply. The Supreme Court of Canada decision in *Paul v. The Queen*¹ is illustrative, and invites a discussion of the approach to penal statutes known compendiously as "strict construction".² Where a statutory provision affecting the liberty of the subject is ambiguous, the principle of strict construction requires that the ambiguity be resolved by attributing to the provision the meaning most favourable to the accused. This article traces the development of strict construction from its origins in the benighted severity of English criminal law to its modern status in constitutional and penal theory. It is opportune first, however, to examine the context in which the principle of strict construction has recently found expression and reaffirmation in the Supreme Court.

The principal issue in the *Paul* case was the scope of the power conferred on a judge to impose consecutive sentences on an offender convicted contemporaneously of more than one offence.³ The appellant had pleaded guilty before the same judge on three different days to a total of nine charges under the Criminal Code.⁴ On his first court appearance, he pleaded guilty to one charge; on his second and third court appearances, he pleaded guilty to three and to five charges respectively. About three months after the date on which the last set of convictions was entered, the appellant was sentenced, again by the same judge, to a series of concurrent and consecutive sentences amounting to six years' imprisonment. The sentences imposed for the convictions entered on each day were to be served concurrently with the other sentences imposed on that

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¹ [1982] 1 S.C.R. 621, 67 C.C.C. (2d) 97, 138 D.L.R. (3d) 455.

² See text accompanying notes 12 *et seq.*, *infra*.

³ Statutory authority to impose consecutive sentences is provided generally in s. 645 of the CRIMINAL CODE, R.S.C. 1970, c. C-34, and also, for example, with respect to the specific offences of using a firearm during the commission of an offence (s. 83) and escape while undergoing imprisonment (s. 137).

⁴ R.S.C. 1970, c. C-34.

day, but consecutively to the sentences imposed on each of the other two days. Whether this sentence was authorized in law depended on the proper legal connotation of the phrase "before the same court at the same sittings" in paragraph 645(4)(c) of the Criminal Code,⁵ and more generally on whether Canadian courts had a vestigial power to impose consecutive sentences in addition to the specific powers conferred by statute.

In a thorough judgment, Mr. Justice Lamer for the Court⁶ held that the authority to impose consecutive sentences had been exhaustively codified by Parliament, and that there was no vestigial judicial power in this respect.⁷ The Court further held that the phrase "before the same court at the same sittings" in paragraph 645(4)(c) should be taken to mean "by the same judge, whether or not the convictions are entered or the sentences are imposed on the same day",⁸ and that the accused's appeal from sentence should accordingly be dismissed. Lamer J. canvassed carefully the relevant aids to statutory meaning in arriving at this result: the cogency of the pertinent Canadian case-law;⁹ the legislative history of subsection 645(4) of the Criminal Code and of the section's predecessors in English law;¹⁰ the state of the common law prior to statutory interventions in this area of sentencing practice and the rationale of the common law judges in establishing a power of imposing consecutive sentences;¹¹ the variable meaning of the phrase "court sittings" depending on the context in which the phrase is used;¹² and the changed practices of judicial administration since the enactment of the section (for example, the fact that contemporary Canadian courts normally sit continuously rather than in fixed "sessions", "terms" or "sittings").¹³

In reaching its conclusion, the Supreme Court also considered the proper approach to uncertainties of statutory meaning in the criminal law, and reaffirmed the principle that where a penal provision contains a reasonable ambiguity, the ambiguity should be resolved by ascribing to the provision the meaning most favourable to the accused.¹⁴ The Court conceded that the interpretation placed upon paragraph 645(4)(c), even though selected after giving due weight to the several factors mentioned above, would be acceptable only if it accorded with this approach.¹⁵

The principle of strict construction of penal statutes has been resurgent in Canadian criminal law in recent years, and its resurgence has gone largely unnoticed in the scholarly literature. In light of its reaffirmation by the Supreme Court of Canada, it is opportune to review

⁵ R.S.C. 1970, c. C-34.

⁶ Mr. Justice Lamer's opinion was concurred in by Dickson, Beetz, Estey and Chouinard JJ.

⁷ *Supra* note 1, at 664-65, 67 C.C.C. (2d) at 129-30, 138 D.L.R. (3d) at 487-88.

⁸ *Id.*

⁹ *Id.* at 624-29, 67 C.C.C. (2d) at 100-03, 138 D.L.R. (3d) at 457-61.

¹⁰ *Id.* at 635-62, 67 C.C.C. (2d) at 108-27, 138 D.L.R. (3d) at 466-85.

¹¹ *Id.* at 635-44, 67 C.C.C. (2d) at 108-12, 138 D.L.R. (3d) at 466-70.

¹² *Id.* at 629-33, 67 C.C.C. (2d) at 103-06, 138 D.L.R. (3d) at 461-64.

¹³ *Id.* at 659-62, 67 C.C.C. (2d) at 125-27, 138 D.L.R. (3d) at 483-85.

¹⁴ *Id.* at 633-34, 67 C.C.C. (2d) at 106-07, 138 D.L.R. (3d) at 464-65.

¹⁵ *Id.*

the origins of the principle, the sorts of contexts in which it has recently found expression, and the larger interests its invocation is thought to promote.

II. THE ORIGINS OF STRICT CONSTRUCTION

If a political principle which has some basis in reason receives general acceptance and can be formulated in a neat phrase, it becomes a reason in itself; its original justification is forgotten, and it is used for purposes for which it was never intended.¹⁶

With the substitution of "legal" for "political", this remark of Professor Jennings is a fitting prologue to a discussion of the origin and development of the principle¹⁷ of strict construction of penal statutes. Although the antiquity of the principle has been asserted,¹⁸ it is generally thought to have arisen in seventeenth-century England as one of various forms of judicial and administrative expedients by which charitable judges, juries, prosecutors and, in some cases, complainants, could avoid convicting, and hence avoid dispatching from this world perpetrators of remarkably minor offences.¹⁹ Far from having doctrinal pretensions, it originated as a bold judicial device that operated literally *in favorem vitae*. The oppressive penal environment that fueled its operation highlighted, as perhaps never before or since, the salient lesson that a citizen's liability to punishment, and perhaps to capital punishment, may depend on the judicial construction of statutory words.

The power of the word, and the need to understand and, having understood, to escape from the power of the word,²⁰ constituted the essential problem of the persons who, as complainants, witnesses, jurors, judges and prosecutors, were the administrators of the criminal law. It is a problem whose implications have not been lost on succeeding generations.²¹

¹⁶ I. JENNINGS, *THE LAW AND THE CONSTITUTION* 25 (5th ed. 1959).

¹⁷ Although strict construction is usually designated as "the rule of strict construction of penal statutes", it is more properly considered a general principle of the criminal law. On the elusive distinction between "rules" and "principles" of law, see R. DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 21-31 (1977), and Hughes, *Rules, Policy and Decision Making*, 77 *YALE L.J.* 411 (1968).

¹⁸ In *United States v. Wiltberger*, 18 U.S. 76 (1820), Chief Justice Marshall stated that "[t]he rule that penal laws are to be construed strictly is perhaps not much less old than construction itself". *Id.* at 95. Jerome Hall traced a form of the principle to Roman law; see J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 27 (2d ed. 1960).

¹⁹ Hall, *Strict or Liberal Construction of Penal Statutes*, 48 *HARV. L. REV.* 748, at 749-52 (1935).

²⁰ J. HALL, *THEFT, LAW AND SOCIETY* 109-10 (1935).

²¹ See, e.g., *Rowe v. The King*, [1951] S.C.R. 713, at 725, [1951] 4 D.L.R. 238, at 248 where Mr. Justice Cartwright stated, in dissent:

The effect of the amendment is, in circumstances to which it is applicable, to render a person guilty of murder who would not otherwise have been guilty of that crime and any doubt as to its meaning which remains after the application of the rules of construction must be resolved *in favorem vitae*.

The growth of the principle of strict construction is inextricably bound up with the history of the ecclesiastical privilege known as "benefit of clergy".²² Benefit of clergy (which effectively freed the claimant from the customary death penalty for certain felonies) was originally a privilege that exempted ecclesiastics from liability under the secular criminal law and left them subject to the jurisdiction of the Court Christian. Although its English origins may be traced to the Norman Conquest,²³ its importance, for the purposes here under discussion, extended from the middle of the fourteenth to the early nineteenth century. Throughout this period, two roughly parallel developments occurred:²⁴ the privilege burgeoned from an ecclesiastical privilege into a general right, while a number of intermittent statutes were passed which severely curtailed the range of offences for which it could be claimed. Concurrent with these developments, and influenced by the innovation of transporting as an alternative to executing persons convicted of non-clergyable offences, there arose a variety of judicial and administrative practices of calculated evasion,²⁵ one of which was the approach to penal statutes known as "strict construction".

The classes of persons to whom benefit of clergy extended were marked out principally by two statutes enacted almost four centuries apart. A statute passed in the reign of Edward III²⁶ that extended the privilege to "secular clerks" was based on a literacy test, and evidently proved to be a "great stimulus to the education of the criminally disposed",²⁷ for it was normally left to the judges to make the examination for literacy. An accused's literacy acquired something of the status of an irrebuttable judicial presumption, clear evidence to the contrary notwithstanding, where the effective consequence of his being found *illiterate* was the hangman's noose. By 1706, benefit of clergy had been extended to all persons, "literate" or not.²⁸ Its wholesale extension was something of an illusory penal reform, however, for by that time the number of

²² For a more detailed account of the history of the ecclesiastical privilege known as "benefit of clergy", see L. GABEL, *BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES* (1969); W. HOLDSWORTH, III *A HISTORY OF ENGLISH LAW* 293-302 (5th ed. 1942); F. POLLOCK & F. MAITLAND, I *THE HISTORY OF ENGLISH LAW* 441-57 (2d ed. 1898).

²³ See generally L. GABEL, *id.* at 7-29.

²⁴ J. HALL, *supra* note 20, at 68-86.

²⁵ *Id.* at 87-101.

²⁶ For Clerks convicted of Treasons and Felonies 1350, 25 Edw. 3, Stat. 3, c. 4.

²⁷ J. HALL, *supra* note 20, at 72 n. 13. GABEL, *supra* note 22, at 73, relates how the literacy of one "John, son of Thomas Dennyson Trotter senior", was inquired into: On being summoned before the justices to answer to a charge of murder as well as to several indictments, the accused said he was a clerk and could not answer without his Ordinary. Thereupon the Vicar of St. Lawrence's, Appleby, as the Ordinary of the Bishop of Carlisle, handed him a Psalter. The results were extremely dubious, for John, as the record says, could neither read nor "sillabicare", yet seemed to know certain passages by rote. At this point the secular judge gave him the book upside down, but the prisoner "read" as before, in nowise disturbed by the altered circumstance. [footnotes omitted].

²⁸ An Act for repealing a Clause in an Act, entitled, An Act for the better apprehending, prosecuting, and punishing Felons that commit Burglaries, House Breaking,

offences for which it could successfully be claimed had shrunk drastically and the penalty for conviction of a non-clergyable offence was typically death or transportation.

With the rise in the number of persons who could claim the privilege and its perceived erosion of the prevailing penal philosophy of deterrence through severity²⁹ came the first of a series of statutes ousting the benefit of clergy for specified crimes.³⁰ The multiplication of non-clergyable felonies began in the reign of Henry VII and accelerated during the seventeenth and eighteenth centuries.³¹ In 1769, Blackstone wrote that there were 160 felonies that had been declared to be without benefit of clergy,³² and the number had reached 222 by the reign of George III.³³ Yet it is fairly certain that, at the time Blackstone wrote, "only a relatively small number of persons tried for non-clerg[y]able felonies were [being] actually executed".³⁴ The wide gap between the Draconian letter of the law and the changing political and penal consciousness of those charged with administering it was bridged by a series of practices which, over an extended period, came to constitute a "veritable conspiracy for administrative nullification".³⁵ Strict construction of penal statutes, and particularly of those that prescribed the death penalty, was the salient judicial contribution to this process.

Professor Jerome Hall has summarized the various techniques by which judges, juries and prosecutors collaborated to frustrate the operation of the capital penalty in England in the eighteenth and early nineteenth centuries.³⁶ The principal object of these collaborations was the law of larceny, which yielded a great many offenders and was considered by the common man, if not by the criminal law, to warrant as a penalty something less than death by hanging.³⁷

or Robberies in Shops, Warehouses, Coachhouses, or Stables, or that steal Horses 1706, 5 Anne, c. 6, s. 4. See J. HALL, *supra* note 18, at 72-86.

²⁹ Hall, *supra* note 19, at 751.

³⁰ An Act to take away the Benefit of Clergy from Servants which wilfully murder their Lords, Masters, or Sovereigns 1496, 12 Hen. 7, c. 7.

³¹ J. HALL, *supra* note 20, at 85.

³² See 4 COMMENTARIES 18 (1830):

Yet though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death.

³³ J. HALL, *supra* note 20, at 85.

³⁴ *Id.* at 85-86.

³⁵ Hall, *supra* note 19, at 751.

³⁶ See generally J. HALL, *supra* note 20, at 110-11.

³⁷ For a vivid account of the remarkable penal severity of eighteenth-century England, see Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE 17 (1975).

Apart from taking a decidedly incredulous view of statutes that prescribed the death penalty (a development which will be discussed below), the judicial techniques enlisted to avoid the operation of the death penalty ranged from granting reprieves, making various "helpful" recommendations to counsel and to the jury and, where necessary, effectively refusing to apply statutes in the face of their evident applicability.³⁸ In addition, judicial approaches to penal statutes of the period were bottomed in the vigorous presumption that "where any statute. . . has ousted clergy in any one of those felonies it is only so far ousted, and only in such cases, and as to such persons, as are expressly comprized within such statute, for *in favorem vitae et privilegii clericalis* such statutes are construed literally and strictly."³⁹

Juries, for their part, placed fictitiously low values on stolen property, often values just below that which would have rendered the offence non-clergyable, and hence, capital, returned verdicts of petty larceny where aggravated larceny was indicated, and, in extreme cases, brought in verdicts that were manifestly ridiculous.⁴⁰ Complainants, witnesses and grand juries engaged in comparable exercises of what Blackstone called "a kind of pious perjury".⁴¹

Prosecutors made known to the court and to defence counsel the defects in their cases, charged offenders with clergyable felonies where non-clergyable charges were available, and agreed to withdraw charges of non-clergyable felonies in consideration for guilty pleas to lesser, non-capital offences.⁴²

The indiscriminate penal severity that prompted these evasions also prompted, in the judicial sphere, an exceedingly narrow interpretation of statutes prescribing the capital penalty or, which often amounted to the same thing, ousting clergy, an approach which, if described today, would doubtless attract the dreaded pejorative, "mechanical". But "strict construction" in its historical sense was not synonymous with

³⁸ J. HALL, *supra* note 20, at 87-96.

³⁹ 2 M. HALE, *HISTORIA PLACITORUM CORONAE* 335 (1736 & photo. reprint 1971).

⁴⁰ See J. HALL, *supra* note 20, at 107, where the author relates a striking example of the collaboration of juries to frustrate the operation of the capital penalty:

A man was charged with stealing a pair of breeches, and the evidence being clear, the jury brought in a verdict of guilty. Just before the magistrate was about to pronounce sentence of death, the clerk informed the jurors that the offence was capital. The jurors were dismayed, and sought immediately to modify their verdict. One suggested that the word *Not* be inserted before *Guilty*; another desired the discharge of the prisoner without any formality. This being impossible, it was decided to adjourn court and consult Mr. Willard, a local counsellor of eminence. It happened that the chief baron and another judge were dining with Mr. Willard when the deputation arrived. Upon hearing the case the chief baron recommended that the best way out was to insert after the word *Guilty*, the words *Of Manslaughter*. The jurors were delighted and returned in triumph to the courtroom, where the defendant, tried for stealing a pair of breeches, was convicted of manslaughter — a verdict which, of course, would have to be set aside.

⁴¹ 4 COMMENTARIES, *supra* note 32, at 238.

⁴² J. HALL, *supra* note 20, at 99-101, 111.

what is today termed "literal" construction, for in many instances the plain words of statutes were scrupulously ignored. To interpret a penal statute strictly was to attribute to it the interpretation most favourable to the accused. A "literal" or a "liberal" approach was either employed or not depending on whether it furthered the desired avoidance of the death penalty. Sir Matthew Hale made this point explicitly in the late seventeenth century,⁴³ but the needless conflation of the two terms has continued to be a source of confusion.⁴⁴

A reasonable speculation is that the word "strict" in the phrases "strict construction" and "strictly construed" was originally employed in the now rare sense of "restricted as to extent" or "narrow",⁴⁵ to indicate that penal statutes prescribing the death penalty were to be taken to apply to the fewest conceivable number of "determinates",⁴⁶ regardless of whether this involved giving statutory words or phrases a broad or limited connotation. Avoidance of the death penalty was the desired result; the semantic conclusions required to achieve it varied depending on the nature of the terms to be construed. A few examples suffice to illustrate the semantic pyrotechnics which the cause of saving thieves and other minor miscreants from the gallows inspired.

It was variously held that a "colt" was not a "horse",⁴⁷ and that a statute proscribing the stealing of *horses* did not extend to the theft of *one horse only*;⁴⁸ that the misappropriation of "goods, wares and merchandise" did not extend to the wrongful conversion of mere "money";⁴⁹ that a "heifer" could not be considered a "cow" where both terms appeared in the statute in apparent contradistinction;⁵⁰ that a theft that

⁴³ 2 M. HALE, *supra* note 39, at 335, 371.

⁴⁴ Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937).

⁴⁵ 10 THE OXFORD ENGLISH DICTIONARY 1119 (1933).

⁴⁶ See Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, at 868:

Mr. W.E. Johnson, whose *Logic* is one of the most considerable of recent contributions to this much-discussed subject, has given us in his differentiation of *determinables* and *determinates* a valuable instrument for presenting the meaning of statutes. The situation described in a statute is generally a determinable; that is to say, it is a statement which involves a number of possible events or individualizations, any one of which would be correctly described by that determinable. A determinable of this sort can be made more nearly determinate by reducing the number of possible individualizations, and it becomes quite determinate when it is so expressed that there is only one.

See generally 1 W. JOHNSON, *LOGIC* 173-85 (1921). For an elaboration of Johnson's logical terms see generally 2 THE ENCYCLOPEDIA OF PHILOSOPHY 357-59 (1967).

⁴⁷ *Rex v. Beaney*, Russ. & R. 416, 168 E.R. 874 (C.C.R. 1820). See also *Rex v. Stevens*, 1 Moo. 409, 168 E.R. 1323 (C.C.R. 1834); *Rex v. Harris*, 7 Car. & P. 446, 173 E.R. 198 (Cent. Crim. Ct. 1836); *Regina v. Jeans*, 1 Car. & K. 539, 174 E.R. 928 (Assizes 1844).

⁴⁸ M. HALE, *supra* note 39, at 365. See also *Rex v. Page*, Sty. 86, 82 E.R. 550 (K.B. 1648).

⁴⁹ *Rex v. Leigh*, 1 Leach 52, 168 E.R. 129 (Cent. Crim. Ct. 1764). See also *Rex v. Guy*, 1 Leach 241, 168 E.R. 223 (Cent. Crim. Ct. 1782) and *Rex v. Seas*, 1 Leach 304, 168 E.R. 255 (Cent. Crim. Ct. 1784).

⁵⁰ *Rex v. Cook*, 1 Leach 305, 168 E.R. 155 (C.C.R. 1774). Compare *Jones v. Smart*, 1 Term. 44, 99 E.R. 963 (K.B. 1784).

occurred at about nine-thirty in the evening did not occur "at night";⁵¹ and that a "warehouse" was not necessarily a "warehouse".⁵²

A similar attitude was evidenced in the zeal with which judges of the period scrutinized indictments. An indictment charging theft of live turkeys was considered insupportable by proof that dead turkeys had been stolen;⁵³ nor was the required degree of precision attained where a "drake" had been deemed a "duck"⁵⁴ or where two mismatched stockings were presumptuously represented as a "pair of stockings".⁵⁵

With the gradual displacement in the nineteenth century of the death penalty for non-violent crimes,⁵⁶ and the consequent desuetude of the one factor that had shaped judicial treatment of penal statutes for more than a century, strict construction in its most extreme forms became unnecessary. Coincident with this development, however, there occurred a subtle change in the essence of strict construction; it became clothed in a new set of motivating principles which both broadened its potential sphere of operation and transcended its historical origins. Strict construction had achieved the durable status of a nominate principle of uncertain extent, amply satisfying Jennings' formula for doctrinal longevity;⁵⁷ it had originally received general acceptance and had been formulated in a neat phrase, its original justification had been forgotten, and it had begun to be used for purposes for which it was never intended.

Only the barest outlines of this development may be traced here. Received nineteenth-century constitutional doctrine required that parliamentary proscriptions be faithfully adhered to by the judiciary,⁵⁸ and judges showed an aspect of deference by declining to construe penal statutes more onerously than an available interpretation of them allowed. As Dicey put it, "a man may. . . be punished for a breach of the law,

⁵¹ *Rex v. Kemp*, 1 Leach 222, 168 E.R. 213 (Cent. Crim. Ct. 1780). See also *Rex v. Baynes*, 1 Leach 7, 168 E.R. 106 (Cent. Crim. Ct. 1731) and *Jones' Case*, 2 E. EAST, PLEAS OF THE CROWN 641 (1803 & photo. reprint 1972) (Eng. Assizes 1787).

⁵² *Howard's Case*, Fost. 77, 168 E.R. 39 (Cent. Crim. Ct. 1751). See also *Rex v. Godfrey*, 1 Leach 287, 168 E.R. 246 (Cent. Crim. Ct. 1783) and *Rex v. Stone*, 1 Leach 334, 168 E.R. 270 (Cent. Crim. Ct. 1784).

⁵³ *Rex v. Edwards*, Russ. & R. 497, 168 E.R. 917 (C.C.R. 1823). Compare *Powlter's Case*, 11 Co. Rep. 29a, 77 E.R. 1181 (K.B. 1610).

⁵⁴ *Rex v. Holloway*, 1 Car & P. 127 n.(b), 171 E.R. 1131 n.(b) (Assizes, 1823).

⁵⁵ *Id.* See also *Rex v. Pike*, 1 Leach 317, 168 E.R. 261 (C.C.R. 1784). The most comprehensive account of judicial approaches to English penal statutes before 1800 is contained in I L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 at 83-106, 660-98 (1948).

⁵⁶ J. HALL, *supra* note 20, at 108-11.

⁵⁷ *Supra* note 16.

⁵⁸ English courts have, of course, exercised a prerogative to hold criminal conduct that is considered *contra bonos mores* since at least the seventeenth century. On the controversy whether English courts retain a vestigial jurisdiction to create new offences, see Stallybrass, *Public Mischief*, 49 L.Q.R. 183 (1933), Jackson, *Common Law Misdemeanors*, 6 CAMB. L.J. 193 (1937), Brownlie & Williams, *Judicial Legislation in Criminal Law*, 42 CAN. B. REV. 561 (1964). In *Knulier Ltd. v. D.P.P.*, [1973] A.C. 435, [1972] 2 All E.R. 898 (H.L. 1972) the House of Lords upheld the offence of conspiracy to corrupt morals but denied the existence of a vestigial jurisdiction to widen the ambit of the criminal law.

but he can be punished for nothing else",⁵⁹ and whether the law had been breached came increasingly to depend on the meaning attributed by judges to arguably ambiguous statutory language. Developments in English and continental penal theory⁶⁰ and the increasingly held view that major innovations in the criminal law were questions of public policy properly left to the intervention of Parliament helped to promote the continued viability of the principle. That strict construction in one guise or another continues to be applied in common law jurisdictions,⁶¹ and often in the face of attempted legislative abrogation,⁶² attests to the perceived importance of the principles comprised within it.

III. THE APPLICATION OF STRICT CONSTRUCTION

A detailed description of the various semantic controversies which the principle of strict construction has been invoked to resolve is beyond the scope of this article, but it is opportune to examine at least one sort of interpretative problem to which the principle has been repeatedly applied. Section 11 of the Interpretation Act, which applies to all federal enactments, including the Criminal Code, provides that "[e]very enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".⁶³ The judicial controversy to which this section has given rise, especially within the last decade, has been the extent to which it prevails over common law principles of interpretation which lead to conclusions that, on *some* view, at any rate, are not sufficiently "fair, large and liberal".⁶⁴ In reference to the interpretation of the criminal law, the controversy has resolved itself into a contest between the arguable dictates of section 11 and the principle that the accused should receive the benefit of any reasonable ambiguity in a penal statute. Although judicial exchanges on this issue have been lively of late,⁶⁵ the principle of strict construction has emerged relatively unscathed.

Canadian courts have employed a variety of arguments in refusing to allow section 11 of the Interpretation Act to overwhelm the specific proscriptions of the Criminal Code or to efface the longstanding principle of strict construction of penal statutes. The Ontario Court of Appeal

⁵⁹ A DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (10th ed. 1959).

⁶⁰ Cf. Hall, *supra* note 44.

⁶¹ See, e.g., CRAIGS ON STATUTE LAW 529-35 (7th ed. S. Edgar 1971); D. PEARCE, STATUTORY INTERPRETATION IN AUSTRALIA 138-42 (2d ed. 1981); Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, in 4 STATUTES AND STATUTORY CONSTRUCTION 1 (4th ed. C. Sands 1975).

⁶² Hall, *supra* note 19, at 752-56 and 771-74.

⁶³ Interpretation Act, R.S.C. 1970, c. I-23.

⁶⁴ See, e.g., Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business*, 17 OSGOODE HALL L.J. 1, at 18-22 (1979).

⁶⁵ See text accompanying notes 66-80 *infra*.

recently held⁶⁶ that the principle of strict construction is not inconsistent with section 11, and is therefore preserved by subsection 3(3).⁶⁷ In delivering the judgment of the majority, Mr. Justice Goodman stated:

[T]he Court should not by resorting to the provision of s. 11 of the *Interpretation Act* give an interpretation to the section which represents the Court's views as to the intention of Parliament, in substitution for the meaning of the section as disclosed by its clear wording. It is the latter meaning which must be taken as disclosing Parliament's intention.⁶⁸

The Supreme Court of Canada has affirmed this holding.⁶⁹ The British Columbia Court of Appeal, speaking through Mr. Justice Seaton, impugned the argumentative power of section 11:

It is said that s. 11 of the *Interpretation Act*. . . demands a fair, large and liberal interpretation for legislation and that it is to be deemed remedial. But which of the two possible interpretations is fair, large and liberal? I do not think the words "fair, large and liberal" inevitably lead to more persons being sent to jail for longer terms. The legislation will have a remedial effect whichever interpretation is put on these words [the words "for a second offence" in s. 236 of the Criminal Code].⁷⁰

In a similar vein, the New Brunswick Court of Appeal has adverted to the repugnance of allowing section 11 to ride roughshod over the criminal law. Mr. Justice Limerick of that Court, in disposing of an argument that the combined effect of section 11 and paragraph 27(b) of the Interpretation Act and paragraph 443(1)(b) of the Criminal Code sufficed to clothe a Provincial Court judge with the jurisdiction to issue search warrants under the Broadcasting Act,⁷¹ put the point forcibly:

Some limitation must be read into such a broad, large and liberal interpretation. . . .

It is unnecessary for the purpose of this case to determine whether the rule of interpretation contained in such a general Act, so broadly stated, is sufficient to void fundamental common-law rights by legislation, the strict construction of which would have a much different result.⁷²

⁶⁶ *R. v. Philips Electronics Ltd.*, 30 O.R. (2d) 129, 55 C.C.C. (2d) 312, 116 D.L.R. (3d) 298 (C.A. 1980), *aff'd* 62 C.C.C. (2d) 384 (S.C.C. 1981).

⁶⁷ Interpretation Act, R.S.C. 1970, c. I-23, sub. 3(3):

Nothing in this Act excludes the application to an enactment of a rule of construction applicable thereto and not inconsistent with this Act.

⁶⁸ *Supra* note 66, at 136, 55 C.C.C. (2d) at 320, 116 D.L.R. (3d) at 305. Mr. Justice Goodman, *id.* at 137-40, 55 C.C.C. (2d) at 319-23, 116 D.L.R. (3d) at 307-09, distinguished the S.C.C. decision in *R. v. Robinson*, [1951] S.C.R. 522, 100 C.C.C. 1, which implied that the former s. 15 of the Interpretation Act abrogated the common law principle of strict construction of penal statutes, on the basis of the peculiar facts of that case and also on the basis of the material change in the wording of the section effected by 1967-68, c. 7, s. 11.

⁶⁹ *R. v. Philips Electronics Ltd.*, *supra* note 66.

⁷⁰ *R. v. Tod*, [1977] 2 W.W.R. 168, at 171, 34 C.C.C. (2d) 238, at 240 (B.C.C.A.). See also *R. v. The Vessel "Westfalia"*, [1975] 2 W.W.R. 134, at 141, 21 C.C.C. (2d) 217, at 224, 54 D.L.R. (3d) 412, at 418 (B.C.C.A. 1974) (Carrothers J.A.).

⁷¹ R.S.C. 1970, c. B-11.

⁷² *Re Purdy*, 8 C.C.C. (2d) 52, at 57-58 (N.B.C.A. 1972).

Canadian courts have, to their credit, appreciated the inappropriateness of enlarging the criminal law and the institutional powers that attend it by invoking, where statutory uncertainty arises, the "remedial" provisions of section 11 of the Interpretation Act. The prudence of this approach has not, however, been unanimously espoused. In a recent series of dissenting judgments,⁷³ Mr. Justice Jessup of the Ontario Court of Appeal has gone so far as to say that several of that Court's judgments have been rendered *per incuriam* because of a failure to give due consideration to section 11 or to its equivalent in Ontario law,⁷⁴ and that this disregard "has been an affront to our Legislatures and has probably frustrated many a legislative intent".⁷⁵

Ironically, these dissenting judgments, while asserting the conclusiveness of the argument for a "fair, large and liberal" construction, themselves provide conclusive arguments against any such assertion. Each case involved a difficult point of law to which the majority devoted considerable care,⁷⁶ while in each dissent the legal issue was only superficially examined,⁷⁷ section 11 presumably rendering any closer examination unnecessary. Further, the argument from "fair, large and liberal" construction invariably compelled a conclusion disadvantageous to the accused, for example, that the Court of Appeal had the power to amend an information that omitted an essential averment, and to dismiss the accused's appeal from conviction, where the majority

⁷³ R. v. Geauvreau, 51 C.C.C. (2d) 75 (Ont. C.A. 1979), *aff'd* 66 C.C.C. (2d) 375 (S.C.C. 1982); R. v. Philips Electronics Ltd., *supra* note 66; R. v. Cheetham, 53 C.C.C. (2d) 109, 17 C.R. (3d) 1 (Ont. C.A. 1980).

⁷⁴ Interpretation Act, R.S.O. 1980, c. 219, s. 10.

⁷⁵ *Re Xerox of Canada Ltd. and Regional Assessment Comm'r Region No. 10*, 30 O.R. (2d) 90, at 95, 17 R.P.R. 72, at 80, 115 D.L.R. (3d) 428, at 433 (C.A. 1980). Mr. Justice Jessup's thoughts on the nature of "fair, large and liberal" construction also found expression in R. v. Zippili, 54 C.C.C. (2d) 481, at 486-87 (Ont. C.A. 1980); *North York Steel Fabricators Ltd. v. City of Hamilton*, 27 O.R. (2d) 456, at 464-68, 33 C.B.R. (N.S.) 266, at 275-80, 107 D.L.R. (3d) 647, at 655-59 (C.A. 1980).

⁷⁶ R. v. Geauvreau, *supra* note 73, at 84-86; R. v. Philips Electronics Ltd., *supra* note 66, at 133-40, 55 C.C.C. (2d) at 317-24, 116 D.L.R. (3d) at 303-09; R. v. Cheetham, *supra* note 73, at 112-19, 17 C.R. (3d) at 6-14.

⁷⁷ Mr. Justice Jessup's dissent in R. v. Cheetham, *supra* note 73, at 112, 17 C.R. (3d) at 6, is illustrative of the kind of superficial legal analysis to which arguments about "fair, large and liberal" construction tend to give rise. His reasons for advocating the dismissal of the accused's appeal were expressed essentially in one short paragraph:

It was further argued that the words 'second or subsequent offence' in s. 83(1)(d) mean only an offence for which there has been a previous conviction imposed prior to the commission of the second and again prior to the commission of the subsequent offences, although they were in fact subsequent to each other in point of time. It is therefore contended that the offences charged in counts 4 and 6 were not 'subsequent' within the meaning of the section. In my opinion, that argument offends the plain words of the section which effects its plain purpose. The offences were subsequent to each other at the times they were committed and it is that practice the section seeks to discourage by informing the criminal community, in advance, of the consequences.

Accordingly, I would dismiss the appeal both as to conviction and sentence.

held that such a power was extraordinary and required a clear statutory basis which was wholly absent;⁷⁸ that the accused be convicted where the majority ordered his acquittal;⁷⁹ and that the accused be liable to further consecutive terms of imprisonment where the majority held that such a sentence was, in the circumstances, illegal.⁸⁰ It would seem that a "fair, large and liberal" construction does indeed require that more people be sent to jail more expediently and for longer terms.

That Parliament may effect such a result is unarguable, but that such a result may be deduced from a vague, twenty-six-word directive contained in a general interpretation act is a startling *non sequitur*. Indeed, the exaggerated claims made for section 11 and like provisions are grounded in an argument of vitiating circularity. The "objects" of an enactment are inferred from the words used in that enactment, and yet the disputed meaning of those words is somehow suggested by "objects" of the enactment, independently arrived at.⁸¹ Although an undoubted purpose of the Criminal Code is to punish crime, the logically and, for judicial purposes, crucially prior questions are *Who is a criminal?* and *How may he legally be punished?* At least in Canadian law,⁸² the answers to these questions are to be found in the precise texts of the Criminal Code and of other statutes. Where the definition of a crime or the sanction for a punishment is unclear, it is incumbent on Parliament to speak more clearly in the future, not on the courts to supply the alleged deficiency by presuming to effect debatable Parliamentary "objects". These considerations are part of the motivating force which sustains the principle of strict construction in Canadian criminal law.

IV. THE LOGIC OF STRICT CONSTRUCTION

It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know

⁷⁸ R. v. Geauvreau, *supra* note 73.

⁷⁹ R. v. Philips Electronics Ltd., *supra* note 66.

⁸⁰ R. v. Cheetham, *supra* note 73.

⁸¹ Cf. MacCallum, *Legislative Intent*, in ESSAYS IN LEGAL PHILOSOPHY 237, at 240 (R.S. Summers ed. 1968). See also SIR R. CROSS, STATUTORY INTERPRETATION 161-62 (1976). The author states that "exhortations to the courts to adopt 'large and liberal' interpretations beg the question as to what is the real intention of the legislature, which may require in the circumstances either a broad or a narrow construction of language". For the New Zealand experience with a comparable legislative provision, see Burrows, *The Cardinal Rule of Statutory Interpretation in New Zealand*, 3 N.Z.U.L.R. 253 (1968-69).

⁸² See text accompanying note 109-13 *infra*. For the English position in light of the House of Lords decisions in Shaw v. D.P.P., [1962] A.C. 220, [1961] 2 All E.R. 446 (1961) and Knüller (Publishing, Printing and Promotions) Ltd. and D.P.P., [1973] A.C. 435, [1972] 2 All E.R. 898 (1972), see SMITH AND HOGAN, CRIMINAL LAW 234 *passim* (4th ed. 1978).

that some Act of Parliament requires it in express terms, and not, at most, by implication.⁸³

That the common law principle of strict construction of penal statutes is firmly entrenched in Canadian criminal law is unarguable. Discussion of its various aspects has been deferred to this point in order to demonstrate how the criminal law *does* give rise to genuine uncertainties of meaning, and how those uncertainties can generate issues of criminal policy out of all proportion to the narrow semantic choices posed. Canadian courts have for the most part appreciated the dilemma of statutory ambiguities and have, where these ambiguities have appeared in penal statutes, sought to curb their propensity for expanding the scope of the criminal law. The implicit refusal of our courts to accept this potential (and unintended) enlargement of their powers has been conscientious and salutary, if not unanimous.⁸⁴

The principle of strict construction has both a descriptive and a referential aspect. The former concerns the conditions of semantic uncertainty that need to be fulfilled before the principle may appropriately be invoked. Fittingly, the clearest statement of those conditions has been provided by the judge who has long been the principle's most consistent Canadian exponent. Mr. Justice Martin of the Ontario Court of Appeal stated recently:⁸⁵

This court has on many occasions applied the well-known rule of statutory construction that if a penal provision is reasonably capable of two interpretations that interpretation which is the more favourable to the accused must be adopted. . . . I do not think, however, that this principle always requires a word which has two accepted meanings to be given the more restrictive meaning. Where a word used in a statute has two accepted meanings then either or both meanings may apply. The court is first required to endeavour to determine the sense in which Parliament used the word from the context in which it appears. It is only in the case of an ambiguity which still exists after the full context is considered, where it is uncertain in which sense Parliament used the word, that the above rule of statutory construction requires the interpretation which is the more favourable to the defendant to be adopted. This is merely another way of stating the principle that the conduct must be clearly brought within the proscription.

Of course, the decision whether "it is uncertain in which sense Parliament used the word", allows a certain leeway for the predilections of the interpreter. Nor, seemingly, is it always unarguable which of two possible interpretations redounds most favourably to the accused.⁸⁶ The remark that the best indication of the character of a civilization is the personality of its judges is, in this sense, highly apt.

⁸³ *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at 115, 19 C.C.C. (2d) 257, at 262, 51 D.L.R. (3d) 259, at 264 (1974) (Dickson J.).

⁸⁴ See note 94 *infra*.

⁸⁵ *R. v. Goulis*, 60 C.C.C. (2d) 349, at 351, 20 C.R. (3d) 360, at 365, 37 C.B.R. (N.S.) 290, at 294 (Ont. C.A. 1981).

⁸⁶ See, e.g., *R. v. Weber*, 52 C.C.C. (2d) 468, at 472-73 (Ont. C.A. 1980).

The referential aspect of strict construction concerns the various factual-normative contexts⁸⁷ to which the principle has been held to extend. When one examines these contexts, one finds that they are the practical correlates of an overriding presumption: the state must sanction, in clear and express terms, any interference with the liberty of its citizens occasioned in its name.⁸⁸ The starkest manifestation of the coercive power of the state is the criminal law, and it is scarcely coincidental that the principle of strict construction has been invoked to render less obtrusive statutory provisions relating to the elements of the offence,⁸⁹ the defences open to the accused,⁹⁰ the procedural and evidentiary obligations of the

⁸⁷ HALL, *supra* note 18, at 46. It has long been supposed that taxation statutes are also subject to the principle of strict construction. Even so, judicial approaches to taxation statutes historically were grounded in different considerations than those which motivated their approaches to penal laws, namely, the defence of the landowner's purse rather than the saving of the miscreant's life. See generally E. DRIEDGER, *THE CONSTRUCTION OF STATUTES* 148-51 (1974).

⁸⁸ Cf. S. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 99 (4th ed. 1980).

⁸⁹ The cases in this note and in notes 90-93 either explicitly cited and followed the principle of strict construction, or adopted the approach dictated by it without expressly so stating. *R. v. Geauvreau*, 35 O.R. (2d) 388, 65 C.C.C. (2d) 316 (C.A. 1982); *R. v. Groulx*, 67 C.C.C. (2d) 382 (Que. C.A. 1982); *R. v. Philips Electronics Ltd.*, *supra* note 66; *R. v. Goulis*, *supra* note 85; *R. v. Watson*, [1981] 1 W.W.R. 760, 58 C.C.C. (2d) 447 (Man. C.A.); *Re Bluestein*, 58 C.C.C. (2d) 208 (Que. C.S. 1981); *Re Coutu*, 61 C.C.C. (2d) 149 (Que. C.S. 1981); *R. v. Desjatsnik*, 64 C.C.C. (2d) 408 (Que. S.P. 1981); *R. v. McLaughlin*, [1980] 2 S.C.R. 331, 113 D.L.R. (3d) 386; *R. v. Seymour*, 52 C.C.C. (2d) 305 (Ont. C.A. 1980); *R. v. Old Cabin Crafts Soc'y*, 25 A.R. 594, 14 Alta. L.R. (2d) 364, 57 C.C.C. (2d) 344 (C.A. 1980); *R. v. Baril*, [1979] 2 S.C.R. 547, 96 D.L.R. (3d) 577; *R. v. Geauvreau*, *supra* note 73; *R. v. Dungey*, 51 C.C.C. (2d) 86 (Ont. C.A. 1979); *Re Quiring*, [1979] 1 W.W.R. 183, 6 C.R. (3d) 289 (B.C.S.C. 1978), *rev'd* [1979] 2 W.W.R. 381, 46 C.C.C. (2d) 51 (B.C.C.A.); *R. v. Gourgon* (No. 1), 9 C.R. (3d) 313 (B.C.S.C. 1979); *R. v. Forest*, 49 C.C.C. (2d) 126 (Ont. Dist. C. 1979); *R. v. Kentish*, 23 O.R. (2d) 746, 96 D.L.R. (3d) 706 (Cty. Ct. 1979); *R. v. Johnston*, 20 A.R. 524, 52 C.C.C. (2d) 57 (Q.B. 1979); *R. v. R.M. Lowe Real Estate Ltd.*, 40 C.C.C. (2d) 529 (Ont. C.A. 1978); *R. v. Dudak*, [1978] 4 W.W.R. 334, 41 C.C.C. (2d) 31, 3 C.R. (3d) 68 (B.C.C.A.); *R. v. Roach*, 48 C.C.C. (2d) 405 (Ont. Cty. Ct. 1978); *R. v. Santa*, 42 C.C.C. (2d) 471 (Ont. Prov. Ct. 1978); *R. v. Maciel*, 35 C.C.C. (2d) 291, 26 Chitty's L.J. 71 (Ont. C.A. 1977); *R. v. Mansour*, 36 C.C.C. (2d) 493, 25 Chitty's L.J. 284 (Ont. C.A. 1977); *R. v. Celebrity Enterprises Ltd.* (No. 2), 42 C.C.C. (2d) 478 (B.C.C.A. 1977); *R. v. Popovic*, [1976] 2 S.C.R. 308, 25 C.C.C. (2d) 161, 62 D.L.R. (3d) 56 (1975); *R. v. Santeramo*, 32 C.C.C. (2d) 35, 36 C.R.N.S. 1 (Ont. C.A. 1976); *R. v. Greene*, 11 Nfld. & P.E.I.R. 322, 33 C.C.C. (2d) 251, 74 D.L.R. (3d) 354 (Nfld. C.A. 1976); *R. v. Nabis*, [1975] 2 S.C.R. 485, 18 C.C.C. (2d) 144, 48 D.L.R. (3d) 543 (1974); *R. v. Jewell*, 22 C.C.C. (2d) 252, 28 C.R.N.S. 331 (Ont. C.A. 1974) *leave to appeal denied* 22 C.C.C. (2d) 252 n. (S.C.C.); *R. v. Bryden*, [1974] 5 W.W.R. 368, 19 C.C.C. (2d) 65 (Alta. S.C.); *R. v. Clark*, [1973] 3 W.W.R. 666, 11 C.C.C. (2d) 370 (Alta. C.A.); *Winnipeg Film Soc'y v. The Queen*, [1964] S.C.R. 280, 44 D.L.R. (2d) 126; *R. v. Krakowec*, [1931] Ex. C.R. 137, *rev'd* [1932] S.C.R. 134.

⁹⁰ An aspect of the principle of strict construction is that any uncertainty concerning whether a particular defence is open to the accused should be resolved in the accused's favour. See, e.g., *R. v. Riddle*, 48 C.C.C. (2d) 365, 100 D.L.R. (3d) 577 (S.C.C. 1979); *R. v. Howson*, [1966] 2 O.R. 63, 55 D.L.R. (2d) 582 (C.A.). See more generally *R. v. Parmiter*, 34 Nfld. & P.E.I.R. 444, 64 C.C.C. (2d) 491 (Nfld. S.C. 1981); *R. v. Phinney*, 33 N.S.R. (2d) 266, 49 C.C.C. (2d) 81 (C.A. 1979); *R. v. Kirzner*, [1978] 2 S.C.R. 487, 18 N.R. 400, 81 D.L.R. (3d) 229 (1977); *R. v. Santeramo*, *supra* note 89; Criminal Code, R.S.C. 1970, c. C-34, sub. 7(3).

Crown,⁹¹ the extent of police powers,⁹² and the legal limits of punishment.⁹³ Each of these represents either an actual or a conceptual point of contact between the accused citizen and the state. Although Canadian courts have not been entirely consistent in their application of the principle to the contexts referred to above, their omissions in this regard have evinced less a subtle renunciation than a failure, and, in some cases, perhaps an

⁹¹ See, e.g., R.an, Geauvreau, *supra* note 83; R. v. Burns, 60 C.C.C. (2d) 187 (B.C.S.C. 1981); R. v. Chabot, [1980] 2 S.C.R. 985, 55 C.C.C. (2d) 385; *Re Chapelle*, 52 C.C.C. (2d) 32 (Ont. H.C. 1980); Cloutier v. The Queen, [1979] 2 S.C.R. 709, 99 D.L.R. (3d) 577; R. v. Dwyer, 47 C.C.C. (2d) 1, 97 D.L.R. (3d) 385 (S.C.C. 1979); R. v. Larose, [1979] 1 S.C.R. 521, 43 C.C.C. (2d) 481, 92 D.L.R. (3d) 322 (1978); R. v. Mudryk, [1979] 1 S.C.R. 97, 14 A.R. 405, 42 C.C.C. (2d) 448 (1978); R. v. Boylan, [1979] 3 W.W.R. 435, 46 C.C.C. (2d) 415, 8 C.R. (3d) 36 (Sask. C.A.); R. v. Farr, 48 C.C.C. (2d) 518, 5 M.V.R. 185 (Ont. Cty. Ct. 1979); R. v. Noble, [1978] 1 S.C.R. 632, 17 N.R. 555, 80 D.L.R. (3d) 69 (1977); R. v. Morgan, 43 C.C.C. (2d) 550 (Que. C.S. 1978); R. v. Tod, *supra* note 70; *Re Sutherland*, 38 C.C.C. (2d) 252 (Ont. Cty. Ct. 1977); R. v. Preston, [1976] 4 W.W.R. 324 (B.C.S.C.); R. v. Le Sarge, 26 C.C.C. (2d) 388 (Ont. C.A. 1975); R. v. Colling, 27 C.C.C. (2d) 408 (Ont. Cty. Ct. 1975); R. v. Henri, [1972] 6 W.W.R. 368, 9 C.C.C. (2d) 52 (B.C.C.A.); R. v. Gordon, 8 C.C.C. (2d) 132 (B.C.C.A. 1972); R. v. Wilmot, [1941] S.C.R. 53, 74 C.C.C. 1 (1940).

⁹² Colet v. The Queen, 57 C.C.C. (2d) 105, 119 D.L.R. (3d) 521 (S.C.C. 1981); R. v. Murphy, 43 N.S.R. (2d) 278, 58 C.C.C. (2d) 56 (C.A. 1981); Ramia v. Burgess, 38 N.S.R. (2d) 200, 53 C.C.C. (2d) 384 (C.A. 1980); R. v. Dedman, 55 C.C.C. (2d) 97, 118 D.L.R. (3d) 425 (Ont. H.C. 1980); R. v. Walker, 48 C.C.C. (2d) 126 (Ont. Cty. Ct. 1979); R. v. Erikson, 39 C.C.C. (2d) 447 (Ont. Dist. C. 1978); *Re Goodbaum*, 38 C.C.C. (2d) 473, 1 C.R. (3d) 152 (Ont. C.A. 1977); *Re Purdy*, 8 C.C.C. (2d) 52, 28 D.L.R. (3d) 720 (N.B.C.A. 1972).

⁹³ R. v. Moore, 33 C.R. (3d) 97 (S.C.C. 1983), *aff'g* 4 C.C.C. (3d) 206, 33 C.R. (3d) 99 (Ont. C.A. 1983); Truscott v. Director of Mountain Institution, 4 C.C.C. (3d) 199, 33 C.R. (3d) 121 (B.C.C.A. 1983); R. v. Oswald, 57 C.C.C. (2d) 484 (B.C.C.A. 1981); R. v. Skolnick, 59 C.C.C. (2d) 286, 9 M.V.R. 316 (Ont. C.A. 1981), *aff'd* 68 C.C.C. (2d) 385, 138 D.L.R. (3d) 193 (S.C.C. 1982); *Re Dunlop*, 57 C.C.C. (2d) 300 (B.C.S.C. 1981); Microwave Cablevision Ltd. v. Harvard House Capital Ltd., 28 B.C.L.R. 393, 123 D.L.R. (3d) 761 (S.C. 1981); R. v. Dobson, 58 C.C.C. (2d) 425 (Ont. Prov. Ct. 1981); R. v. Thomas (No. 2), 53 C.C.C. (2d) 285 (B.C.C.A. 1980); R. v. Cheetham, *supra* note 73; R. v. Nedridge, 54 C.C.C. (2d) 304, 17 C.R. (3d) 14 (Ont. C.A. 1980); *Re Regina and Pacquette*, 53 C.C.C. (2d) 281 (Alta. Q.B. 1980); Carr v. A.G.B.C. (No. 2), [1979] 3 W.W.R. 226, 46 C.C.C. (2d) 1 (B.C.C.A.); *Re Stanton*, 49 C.C.C. (2d) 177 (Ont. H.C. 1979); *Re Grenier*, 41 C.C.C. (2d) 371, 4 C.R. (3d) 293 (Ont. H.C. 1978); Longpré v. The Queen, [1978] 2 F.C. 749 (Trial D.); R. v. Tod, *supra* note 70; R. v. Paul, 1 C.R. (3d) 173 (Ont. H.C. 1977), *but note rev'd* 39 C.C.C. (2d) 129 (C.A.); R. v. Piché, [1976] 5 W.W.R. 459, 31 C.C.C. (2d) 150 (Sask. Q.B.); R. v. Blacquière, 24 C.C.C. (2d) 168 (Ont. C.A. 1975); *Ex parte* Carlson, 26 C.C.C. (2d) 65 (Ont. C.A. 1975), *leave to appeal denied* 26 C.C.C. (2d) 65n. (S.C.C.); R. v. Dwyer, [1975] 4 W.W.R. 54, 23 C.C.C. (2d) 129 (B.C.S.C. 1974); *Ex parte* Krachan, 24 C.C.C. (2d) 114 (Ont. H.C. 1975); *Ex parte* Spice, 23 C.C.C. (2d) 141 (Ont. H.C. 1975); Skitt v. Solicitor General of Canada, [1976] 1 F.C. 556, 29 C.C.C. (2d) 392 (Trial D. 1975); Marcotte v. Deputy Attorney General of Canada, *supra* note 83; *Ex parte* Le Heinsworth, 21 C.C.C. (2d) 26 (Ont. H.C. 1974); *Ex parte* Kolot, [1973] 6 W.W.R. 527, 13 C.C.C. (2d) 417 (B.C.S.C.); *Ex parte* Dodge, [1972] 1 O.R. 753, 6 C.C.C. (2d) 93 (H.C. 1971); *Re Associated Commercial Protectors Ltd.*, [1971] 1 W.W.R. 478, 16 D.L.R. (3d) 478 (Man. C.A. 1970); R. v. Provincial Ct. Judges, *Ex parte* McGowan, 1 C.C.C. (2d) 351, 12 C.R.N.S. 235 (B.C.S.C. 1970); R. v. Neil, 119 C.C.C. 1, 11 D.L.R. (2d) 545 (S.C.C. 1957); *Re Kissick* (No. 4), 5 W.W.R. (N.S.) 475, 103 C.C.C. 161 (Man. C.A. 1952).

unwillingness, to carry it to its logical conclusion.⁹⁴

Although the principle of strict construction has displayed remarkable vitality and is now considered to be a corollary of parliamentary sovereignty and penological fairness,⁹⁵ it has not been without its critics. One writer thundered that strict construction "has completed the degradation of the substantive criminal law" and has been "equaled in futility

⁹⁴ In the following cases, there was arguably an opportunity for the application of the principle of strict construction, but that opportunity was not taken up by the court:

The Elements of the Offence

Budget Car Rentals Ltd., 31 O.R. (2d) 161, 20 C.R. (3d) 66, 121 D.L.R. (3d) 111 (C.A. 1981); R. v. Ehresman, 58 C.C.C. (2d) 574, 121 D.L.R. (3d) 505 (B.C.C.A. 1980); R. v. Lemire, 57 C.C.C. (2d) 561, 20 C.R. (3d) 186 (B.C.C.A. 1980), *leave to appeal denied* 57 C.C.C. (2d) 561n. (S.C.C.); R. v. Sagliocco, [1978] 3 W.W.R. 193, 39 C.C.C. (2d) 514 (B.C.C.A.); R. v. DiPaolo, 43 C.C.C. (2d), 4 C.R. (3d) 121 (Ont. C.A. 1978); Johnson v. The Queen, 34 C.C.C. (2d) 12, 37 C.R.N.S. 370 (S.C.C. 1977); R. v. Eccleston, [1975] 5 W.W.R. 141, 24 C.C.C. (2d) 564 (B.C.C.A.); R. v. Black & Decker Mfg. Co., 15 C.C.C. (2d) 193, 43 D.L.R. (3d) 393 (S.C.C. 1974); Côté v. The Queen, [1975] 1 S.C.R. 303, 18 C.C.C. (2d) 321, 49 D.L.R. (3d) 574 (1974); Lafrance v. The Queen, 13 C.C.C. (2d) 289, 23 C.R.N.S. 100, 39 D.L.R. (3d) 693 (S.C.C. 1973); R. v. DiLorenzo, [1972] 1 O.R. 876, 6 C.C.C. (2d) 30 (H.C.); Gordon v. The Queen, [1961] S.C.R. 592, 131 C.C.C. 1; R. *ex rel.* McTavish v. Langley, 29 W.W.R. 315, 23 D.L.R. (2d) 285 (Alta. C.A. 1959); Rowe v. The Queen, [1951] S.C.R. 713, 100 C.C.C. 97; Simcovitch v. The Queen, [1935] S.C.R. 26, 63 C.C.C. 70, [1935] 1 D.L.R. 769; and L'Ass'n St. Jean-Baptiste v. Brault, 30 S.C.R. 598, 4 C.C.C. 284 (1900).

The Defences Open to the Accused

Priestman v. Colangelo, [1959] S.C.R. 615, 30 C.R. 209.

The Procedural and Evidentiary Obligations of the Crown

R. v. Scott, 14 Alta. L.R. (2d) 227, 56 C.C.C. (2d) 111 (C.A. 1980); R. v. Leguilloux, 51 C.C.C. (2d) 99, 11 C.R. (3d) 289 (B.C.C.A. 1979); *Re Zaduk*, 24 O.R. (2d) 362, 98 D.L.R. (3d) 133 (C.A. 1979); Morris v. The Queen, [1979] 1 S.C.R. 405, 43 C.C.C. (2d) 129 (1978); R. v. Hamm, [1977] 2 S.C.R. 85, 28 C.C.C. (2d) 257 (1976); R. v. McGloan, [1976] 2 S.C.R. 842, 25 C.C.C. (2d) 498 (1975); and R. v. George, [1960] S.C.R. 871, 128 C.C.C. 289.

The Extent of Police Powers

Moore v. The Queen, [1979] 1 S.C.R. 195, 90 D.L.R. (3d) 112 (1978); and Priestman v. Golangelo, *see Defences Open to the Accused supra*.

The Legal Limits of Punishment

Nicholson v. The Queen, 64 C.C.C. (2d) 116, 24 C.R. (3d) 285, 130 D.L.R. (3d) 577 (S.C.C. 1981); R. v. Weber, 52 C.C.C. (2d) 468 (Ont. C.A. 1980); R. v. Constant, [1978] 3 W.W.R. 673, 40 C.C.C. (2d) 329, 5 C.R. (3d) s-19 (Man.C.A.), *leave to appeal denied* 40 C.C.C. (2d) 329n. (S.C.C.); *In re Zong*, [1975] F.C. 430, 22 C.C.C. (2d) 553 (Trial D.); R. v. Burnshine, [1975] 1 S.C.R. 693, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 584 (1974); Turcotte v. The Queen, [1970] S.C.R. 843, 12 D.L.R. (3d) 466; Paton v. The Queen, [1968] S.C.R. 341, 68 D.L.R. (2d) 304; Klippert v. The Queen, [1967] S.C.R. 822, 2 C.R.N.S. 319, 65 D.L.R. (2d) 698; and Smith v. The King, [1931] S.C.R. 578, [1931] 4 D.L.R. 465.

⁹⁵ Cf. HALL, *supra* note 18, at 38 *passim*.

only by the disgraceful pyrotechnics with which the procedure is carried on in a *cause célèbre*".⁹⁶ In weighing these criticisms, however, one must distinguish the considerations that sustain the principle from those that do not; often the antipathy towards its continued judicial espousal proceeds from arguments that refute the latter while failing to deal convincingly with the former.

The principle of strict construction is only marginally sustained by the argument that a citizen is entitled to fair notice of the boundaries of the criminal law.⁹⁷ Although this is doubtless highly desirable, the plain truth is that Canadian criminal law has, notwithstanding its substantial codification, become regressively complex, and that it cannot be understood apart from its judicial interpretation. Even the most perspicacious reader of the Criminal Code could be forgiven for failing to appreciate that he could be convicted of breaking and entering by walking through an open doorway,⁹⁸ of obstructing justice by failing to identify himself in circumstances where he had neither a statutory nor a common law duty to do so,⁹⁹ or of using a firearm during the commission of an indictable offence in circumstances where he did *not* use a firearm.¹⁰⁰ That a citizen, especially one with criminal propensities, has a reliance interest in the static state of the criminal law, which a judicial failure to construe an ambiguous provision in his favour might disappoint, scarcely recommends itself as an argument in support of the principle,¹⁰¹ as its critics have been at pains to point out.¹⁰²

A related counter-argument is that a distinction should be drawn between that part of the criminal law which merely concedes legal effect to received notions of morality, and that part which is concerned with regulating behaviour that is not consciously directed against the interests of others. Statutory proscriptions of the former kind should, it is argued, be construed "liberally", while those of the latter kind should be construed "strictly".¹⁰³ This argument, based on the problematic distinction between behaviour *malum in se* and behaviour *malum prohibitum*, is unsound.

First, although a rough coincidence between positive law and received morality is apparent in the paradigmatic criminal law, for example, the various offences concerning assault, homicide and theft, in other of its domains, for example, morals offences, whether or not the proscribed behaviour is "consciously directed against the interests of others" can scarcely be answered by appealing to received morality, for it is the very content of the latter which is in issue.¹⁰⁴ The whole reason for having a

⁹⁶ Hall, *supra* note 19, at 760.

⁹⁷ Cf. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 91 *passim* (1968).

⁹⁸ Johnson v. The Queen, *supra* note 94.

⁹⁹ Moore v. The Queen, *supra* note 94.

¹⁰⁰ Nicholson v. The Queen, *supra* note 94.

¹⁰¹ Cf. H. PACKER, *supra* note 97, at 84-85.

¹⁰² See, e.g., Hall, *supra* note 19, at 760 *passim*.

¹⁰³ *Id.* at 764 *passim*. But cf. G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART 575 (2d ed. 1961).

¹⁰⁴ See generally H. HART, LAW, LIBERTY AND MORALITY (1963).

statutory criminal law is that it approximates better to a regime of democratically agreed-upon proscriptions, interpreted objectively by an independent judiciary. The above proposal, assuming the utility of the distinction on which it is founded, would empower the courts to determine what kind of behaviours are more worthy of the criminal sanction than others. It would, in the process, subvert the essential reason for putting the criminal law on a statutory basis.

Second, the argument falsely implies that the terms "strict" and "liberal" are descriptive of the kinds of semantic conclusions reached and are useful in contrasting the sorts of policy considerations that each approach tends to promote.¹⁰⁵ For example, Professor Livingston Hall has stated:

The public is already impatient with the refined, and for practical purposes unnecessary, distinctions embodied in the penal codes. To make Hauptmann's conviction for murder in the first degree turn on whether the window in the nursery was open or shut, with the law until comparatively recently unsettled if the window were partially open, does not commend itself to the average man. Strict construction of such statutes has completed the degradation of the substantive criminal law in his mind, equaled in futility only by the disgraceful pyrotechnics with which the procedure is carried on in a *cause célèbre*. An attitude of liberal construction goes far, on the other hand, to make the law appear rational.¹⁰⁶

Hall's argument founders for several reasons, not the least of which is intellectual dishonesty. When one advocates strict construction of penal statutes, one at least makes it clear what one is arguing *for*, namely, that the accused should receive the benefit of the semantic doubt. Opponents of this view, however, invariably obscure the issue by contrasting "strict" construction, with its imputed overtones of mechanical jurisprudence, with "liberal" or "purposive" construction, with its intimation of benevolent rationality. It is never made clear, presumably because an argument so phrased would be too brutal for most persons to accept, that a "liberal" or "purposive" approach conduces to more persons being sent to jail more expediently and for longer terms.¹⁰⁷ It has always seemed to this writer both curious and calculating that a "liberal" approach to penal statutes has come to mean, by implication if not by express avowal, that progressively more individual freedom be taken away in supposed furtherance of the common weal.

There is another sense in which the argument for a "liberal" or "purposive" interpretation of penal statutes, in its unarticulated connotation referred to above, proceeds from a misleading premise. It falsely assumes that, because the criminal law has been rendered statutory, the opportunities for judicial enlargement of its scope by way of interpretation are minimal, and accordingly, that resolution of uncertainties in the accused's favour constitutes an exercise of judicial obstructionism. Although the Supreme Court of Canada renounced the power

¹⁰⁵ Cf. HALL, *supra* note 18, at 46.

¹⁰⁶ *Supra* note 19, at 760.

¹⁰⁷ See text accompanying note 70 *supra*.

to create new common law offences in 1950,¹⁰⁸ and although such power was in any event abrogated by statute five years later,¹⁰⁹ the preceding sections of this paper have shown that judicial expansion of the criminal law and of attendant police powers is not foreclosed by these developments. That a pronounced shift in penal policy may be occasioned by a dubious interpretation of a single statutory word or phrase in context,¹¹⁰ or by a conclusion concerning the applicability of one enactment to another,¹¹¹ is clear from these pages, and it is arguable that the Supreme Court of Canada alone has, advertently or not, effected such shifts more often than one cares to contemplate.¹¹²

An appreciation of this makes it easier to recognize, if not to define in advance, the sorts of constructional problems in the criminal law that call for a workmanlike judicial interpretation on the one hand, and those that hold out the opportunity for substantial judicial innovation on the other. Such recognition, in turn, helps to delineate more clearly the respective roles of the judiciary and the legislature in the shaping of criminal policy and, correspondingly, to mark out the prudential limits of judicial innovation where the criminal law is concerned.¹¹³ The principle of strict construction in Canadian law has operated to sustain the separation of functions between Parliament and the courts¹¹⁴ by manifesting a judicial refusal to assume effectively a legislative role in the domain of the criminal law. Some of our most able jurists have affirmed explicitly this attitude of conscientious self-denial.¹¹⁵ In company with the pre-

¹⁰⁸ *Frey v. Fedoruk*, [1950] S.C.R. 517, 97 C.C.C. 1, [1950] 3 D.L.R. 513. See Professor Willis' comment on the implications of this decision in 28 CAN. B. REV. 1023 (1950).

¹⁰⁹ The Criminal Code, R.S.C. 1970, c. C-34, s. 8, first enacted by S.C. 1953-54, c. 51, s. 8, provides, *inter alia*, that no person shall be convicted of an offence at common law.

¹¹⁰ See the author's LL.M. thesis, *Penal Statutes and Fidelity to Law: Some Strictures on Strict Construction* (unpublished, Osgoode Hall Law School, 1982).

¹¹¹ *Id.*

¹¹² See, e.g., *Johnson v. The Queen*, *Moore v. The Queen*, *Nicholson v. The Queen*, and *Morris v. The Queen*, *supra* note 94.

¹¹³ Cf. Brownlie and Williams, *Judicial Legislation in Criminal Law*, 42 CAN. B. REV. 561 (1964).

¹¹⁴ See generally Burin, *The Theory of the Rule of Law and the Structure of the Constitutional State*, 15 AMERICAN U.L. REV. 313 (1966). H. PACKER, *supra* note 97, at 93, stated the point well:

Devices are needed to ensure that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits. Both the working out of the devices and the decision about what limits are tolerable are functions that fall to the courts. It is, of course, no accident that they fall to the courts; neither, however, is it the result of any omniscient lawgiver's deliberate plan. It is, very simply, an institutional necessity. The legislature cannot do the job, because the job may be operationally defined as the work left over after the legislature has done its job. Those who enforce the law cannot do the job because no man may be the judge in his own case.

¹¹⁵ The statement by Cartwright J. (as he then was) in *Frey v. Fedoruk*, *supra* note 108, at 530, [1950] 3 D.L.R. at 544, is illustrative:

In my opinion, this power has not been held and should not be held to exist in Canada. I think it is safer to hold that no one shall be convicted of a

sumptions of *mens rea*¹¹⁶ and of the non-retroactivity of penal laws,¹¹⁷ and with doctrines such as *res judicata*,¹¹⁸ the principle of strict construction is essentially a manifestation of judicial attempts, more than indifferently successful, to prevent the criminal law from becoming arbitrary.

V. CONCLUSION

It is perhaps inevitable that a legal principle such as strict construction should have evolved within a system of justice grounded morally in respect for the individual and formally in the written word. For it is a truism that sharp legal consequences turn on soft verbal distinctions; the sharpness of those consequences, both for the accused and for the criminal law generally, is often far more compelling than the statutory sanction is clear. We seem to understand the basic principles of criminal law better than we understand the language in which its directives are framed, and it is not surprising that, where the latter is uncertain, the former should be summoned in aid.

crime unless the offence with which he is charged is recognized as such in the provisions of the *Criminal Code*, or can be established by the authority of some reported case as an offence known to the law. I think that if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declarations should be made by Parliament and not by the Courts.

See also the statement by Rand J. in *R. v. Neil*, *supra* note 93, at 7, 11 D.L.R. at 551, and the statement by Martin J.A. in *R. v. Jewell*, *supra* note 89, at 255, 28 C.R.N.S. 331, at 335.

¹¹⁶ Cf. E. DRIEDGER, *supra* note 87, at 154-58.

¹¹⁷ Cf. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, MINNESOTA L. REV. 775 (1936). The Constitution Act, 1982, arts. 11(g) and 11(i), and the Interpretation Act, R.S.C. 1970, c. I-23, ss. 35 and 36 give statutory, and, in the case of the Canadian Charter of Rights and Freedoms, constitutional force to this presumption. The complexity of operation of this principle, and the tenuous distinction between procedural and substantive enactments is well elucidated in Driedger, *Retroactive Retrospective Reflections*, 56 CAN. B. REV. 264 (1978).

¹¹⁸ See generally M. FRIEDLAND, *DOUBLE JEOPARDY* (1969).