CANADIAN CRIMINAL LAW: A TREATISE. By Don Stuart. Carswell, 1982. Pp. liii, 602. ($80.00)

Dr. Don Stuart has written a substantial book on the criminal law of Canada, and is to be congratulated on the prodigious industry and stamina he has shown. Substantial though the book is, it treats only of the general principles of criminal law and does not attempt to deal systematically with specific crimes; there is, however, significant discussion of aspects of particular crimes.

Dr. Stuart does not merely concern himself with what the law *is* but also, and at some length, with what the law *ought* to be. I find it convenient to take the issues separately.

The Law As It Ought To Be

Dr. Stuart says, with reference to Professor Cross's well-known aphorism, that he is not in total bondage to the subjectivist bug.[1] However, it is clear throughout that he has a preference for the subjectivist approach, that is, that the sanctions of the criminal law should normally be visited only on those who intend or know, foresee or are wilfully blind, that their conduct will bring about the elements of a criminal offence. He accepts that negligence is "another form of fault" though here he favours Professor Hart's test which requires account to be taken of the accused's physical and mental capacities in the assessment of negligence.[2] I am not at all sure how Dr. Stuart stands on "absolute" liability. He is rightly critical of *R. v. Sault Ste. Marie*[3] for failing to articulate precise criteria for distinguishing offences of absolute liability from those of strict (*i.e.*, based on negligence) liability,[4] but assuming that an offence is correctly classified as absolute, he does not seem to see any objection in principle to it.

Now I am an unashamed subjectivist, bitten by the bug so long ago that the iron (or poison, as some might say) has eaten into my soul. So I would like to take issue with Dr. Stuart on what the basis of criminal liability ought to be.

I am against absolute liability full stop. As Dr. Stuart points out, research in this area indicates that prosecutions are commenced only where the relevant authority is satisfied that the defendant is at fault.[5] My experience in a large university with massive obligations under our Health and Safety at Work legislation[6] amply bears this out. The inspectors have neither the desire nor the need to take refuge in absolute

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[1] P. 244.

[2] P. 185.

[3] 13 O.R. (2d) 113, 30 C.C.C. (2d) 257, 70 D.L.R. (3d) 430 (C.A. 1976), *aff'd* [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 21 N.R. 295.

[4] P. 161.

[5] P. 157.

[6] Health and Safety at Work etc. Act 1974, U.K. 1974, c. 37.

liability. Having talked the matter over with them, we both *know* what the problem is, and our problem then is to find the money to put it right. They put the frighteners on us only when they think we are dragging our feet. Another point is that even where the offence is punishable only by fine, the court needs to make some assessment about fault in deciding whether to give an absolute discharge, at one end of the scale, or, to impose the maximum fine, at the other. Fault must condition our attitude to punishment if we are to act as rational beings. Absolute liability is about as necessary to the criminal justice system as two holes in the head.

Nor am I any more sympathetic to the imposition of criminal liability for negligence. Liability for negligence arises in two broad ways. The first is where negligence is of the essence of the offence. Careless driving provides the most obvious example. Most careless driving arises from errors of judgment about such things as speed, distance and road-signs. Quite how it helps to improve a driver's capacity not to make such errors by depriving him of, say, 50 or 100 dollars has never been obvious to me. If the offence of careless driving were to be abolished, is it to be assumed that we would all drive with gay abandon? The suggestion is ludicrous; we all drive as safely as we may in order to preserve our own skins or (even more important to many) to preserve the skins of our cars.

The other form of liability arises via the mistake of fact "defence". This is much more insidious and much more unruly. Here we are concerned with the situation where the crime requires, or is said to require, *mens rea* as to what is variously described, in England at least, as the essential feature of the crime, or the material element, or the prohibited act. Thus, if murder is taken as an example, the defendant must be proved to have intended to kill a human being — this being identified as the prohibited act. If, then, the defendant honestly thinks he is killing an orang-utan but the "orang-utan" turns out to be a picnicker in the woods, the defendant is entitled to an acquittal however unreasonable his belief may have been. It must be proved that the defendant intended to kill a human being and an intention to kill an orang-utan, though he is quite a close relative of ours, just will not suffice. If, on the other hand, the defendant intends to kill a human being but raises some excuse, such as self-defence or duress, it is commonly said on both sides of the Atlantic that it is entirely apt that a mistake as to the facts constituting self-defence or duress must be *reasonably* entertained by him. This distinction which is accepted by Dr. Stuart[7] is one of respectable antiquity. The ancient Greeks appear to have drawn it. A trial was held at the Palladion to determine whether a killing was intentional and at the Delphinion if the accused admitted that the killing was intentional but raised a lawful excuse for the killing.

However, when you think about it, the only thing that is rationally respectable about the distinction is its antiquity. Let us take the case where a son, erroneously thinking that his father is about to kill his

[7] *See, e.g.*, pp. 232, 376, 380.

mother, shoots and kills the father. Dr. Stuart takes the view, and he is not alone in this, that the son acts with *mens rea* because, presumably, he intends to kill a human being.[8] What may excuse him, according to Dr. Stuart, is that he has an acceptable *motive* (*i.e.*, his motive of preserving his mother's life) and it is not, in his view, inapt for the law to insist that there be reasonable grounds for the existence of the motive. With respect (an expression which always prefaces putting the boot in), this seems to me to confuse *intention* and *mens rea*. The *mens rea* of murder is *not* an intention to kill a human being; it is an intention to kill in circumstances that amount in law to murder, albeit that no knowledge of law is required. The son who kills unreasonably believing that his father is about to kill his mother, does not intend to bring about a *penalized* consequence. Surely we would not say of the hangman carrying out the sentence of the court that he has the *mens rea* of a *murderer*. He intends to kill right enough if anyone does, but we cannot categorize him as a murderer who happens to have an excuse for murder. He is not a murderer because he lacks *mens rea*.

The point is not unimportant and I'll labour it with another example. Suppose that A and B, police officers, are on the lookout for an escaped criminal known to be dangerous and that for this purpose the officers have been armed.[9] They believe that they see the criminal draw up at some traffic lights in his car and challenge him. Just then they hear what they think is a shot though this subsequently turns out to be the report of a tire blow-out and they respond by shooting at, and killing, the driver, who is an innocent citizen on his way to work. On the traditional analysis, supported by Dr. Stuart, the police officers are guilty of murder if their belief, though honestly entertained, turns out to have been unreasonable in the circumstances. But to say that they have *mens rea* seems to me to be a perversion. Their intention is manifestly to uphold the law and not to destroy it. That the mistake is tragic is obvious. That the victim, or his next of kin, should be compensated is plain. That the police should look again at their procedures in the use of firearms is transparent. That the officers concerned should be convicted of murder because of their unreasonably formed view is simply daft.

All this so far is on what the law *ought* to be in relation to culpability for crime. On such a matter Dr. Stuart is as entitled to his views as I am to mine. But, as it seems to me, Dr. Stuart is often an objectivist masquerading in the clothing of a subjectivist. He is against constructive crime. Apart from the lunatic fringe, aren't we all? And yet Dr. Stuart can write:

> Conduct may fortuitously result in more or less serious consequences depending on the circumstances in which it arises. If D violently assaults V outside the emergency ward of a city hospital, V might owe his life to prompt medical treatment. The same act in a rural area remote from medical facilities

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[8] P. 376.

[9] This supposition is based on an incident which occurred in London, December 1982, and has resulted in one officer being charged with attempted murder and another with grievous bodily harm.

> might result in death and criminal responsibility for murder. Running a red traffic light will usually not cause a death. By chance it might. The same act of assault may injure one person but not another. The implicit rationale of the law is that we should distinguish in advance between criminal responsibility for acts equally dangerous or reprehensible on the basis of the harm that is actually caused. This is reflected in the creation of higher maximum penalties for more serious consequences, particularly death. We work backward from the harm actually caused and suggest that the more serious consequence will dictate a more serious response in the normal case. We have to reflect reality and discount the factor of chance when it comes to deciding the question of guilt. Of course when it comes to choosing the appropriate sanction the factor of chance might well be taken into account. In this area the law is pragmatic.[10]

But if we are to make someone liable for chance consequences of his acts, what is this but constructive crime? If neither of the above motorists adverted to the risk of death, it seems to me entirely unjust that the one may be fined just a few dollars while the other may be sent to prison. How does this differ from the rules which govern constructive murder which Dr. Stuart is at pains to descry? One robber shoots to frighten and the bullet lodges harmlessly in the ceiling; another shoots with like intent but the bullet ricochets and kills. In the latter context Dr. Stuart thinks we should not work back from the death but in the former he appears quite content that we should do so. I am not sure what Dr. Stuart means by "pragmatic" in the above quotation. I am not a great supporter of pragmatism any more than I am a supporter of "policy" — another expression to which Dr. Stuart gives great weight. The trouble with me is that I'm an old fashioned, black-letter lawyer. People like myself believe in principle and impartiality rather than pragmatism and policy. It may be, of course, that I belong to a dying breed, but I am going to be carried out kicking and screaming for a system of criminal justice that is utterly humane and completely consistent.

The Law As It Is

I begin here by asking, as I asked in reviewing Mewett & Manning's *Criminal Law*,[11] what is the status of the Canadian Criminal Code?[12] What is the "right" approach to its interpretation? How far is it permissible to pass via subsection 7(3) into the bran-tub of the common law? Whose common law? I did not think that Professor Mewett and Mr. Manning provided me with satisfactory answers to these questions, nor do I think that Dr. Stuart has done so.

During the year that I spent teaching Canadian criminal law I attached considerable importance to the Code. I kept telling the students to read it with great care. This did not make me very popular with them since they found it a dull read and much preferred reading about the endless follies of mankind in the cases. I would have been equally unpopular with Dr. Stuart, it seems, for he takes me to task in a memorable foot-

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[10] Pp. 96-97.

[11] A. MEWETT, M. MANNING, CRIMINAL LAW, 1978.

[12] R.S.C. 1970, c. C-34 (*as amended*).

note for paying attention to the actual wording of the Code. He calls it "a classic example of the follies of mechanistic approaches".[13] None of this cavilling literalism for Dr. Stuart. The Code, as he says is "a Code in name only"[14] — whatever that means. Dr. Stuart prefers the cavalier approach. Thus, of section 19 (mistake of law) he says: "Our courts, faced with the reality of a suspect section 19 rule, should boldly attempt to reduce its ambit and by-pass it."[15] To a workaday mechanic like myself this seems somewhat bold. However, Dr. Stuart's approach does have its advantages. A word that you do not like, such as "corruptly", may simply be regarded as "incapable of definition".[16] Presumably the judge who is trying the charge of bribery may on this view discharge the jury and take a day out fishing.

Personally, I prefer the view expressed by Lord Radcliffe in *Chandler v. D.P.P.*,[17] where he said that it is the lawyer's function, when construing a statute, "to attribute meanings to words and to observe relevant distinctions between different words",[18] and that they cannot escape from this duty merely by saying that a particular work has no very "sharply defined context".[19] Admittedly the Canadian Criminal Code is far from a perfect instrument. Admittedly it has suffered in the process of amendment over the years. But it is still surely the *primary* source of the criminal law. It is not open to the courts to re-write it. My advice to Canadian lawyers is that, until something better comes along, they should make the best of it and, within the constraints of proper construction, to strive to put the most sensible and harmonious interpretation on its provisions.

Turning to specific issues it seems to me to be frequently the case with Dr. Stuart's book that his impatience with the existing state of the law, whether the Code or case-law, gets in the way of a proper exposition of it. He states that "it seems futile for criminal law to enter the unfathomable depths of the philosophical debate as to the meaning of 'intent' ".[20] While I agree with Dr. Stuart that there is no need to explore the definition of intent if the crime may be committed with a wider state of mind, the Code contains a plethora of offences which may be committed only intentionally and your criminal lawyer needs to know what it means however philosophically irksome the task may be. He criticizes the courts for failing to articulate a consistent meaning of recklessness.[21] I have some sympathy for the courts because I think that, applying ordinary principles of interpretation, recklessness is used in the Code in two senses. Mind, Dr. Stuart can trump my ace here by making words mean what he wants them to mean. Thus he has his own definition of

[13] P. 133, n. 118.
[14] P. 6.
[15] P. 267.
[16] P. 140.
[17] 46 Cr. App. R. 347, [1962] 3 All E.R. 142 (H.L.).
[18] *Id.* at 370, [1962] 3 All E.R. at 149.
[19] *Id.*
[20] P. 124.
[21] P. 130 *passim.*

recklessness (a perfectly sensible one in itself) which he is prepared to impose whatever the context in which it appears. He criticizes the "planned and deliberate" murder provision.[22] No doubt many people would like to see the back of this provision but, while it is there, the function of the lawyer is not to throw up his hands in despair but to assign it a meaning. Its meaning matters very much to those who are charged with "planned and deliberate" murder. Is it good enough to say that the substitution of "dishonesty" for "fraudulent" would be "comprehensible and wise"?[23] Whichever word is used, if the English experience is anything to go by, there are considerable difficulties in determining their meaning. His discussion of mistake of law is coloured by his impatience with the law/fact distinction and by his dislike of the rule that ignorance of the law is no defence. Once more, he is entitled to his impatience and his dislike but once more, I emerged from his discussion with no clear idea of what the law is.

I have said enough to indicate that there are many matters on which the author and I do not see eye to eye but that is not necessarily any skin off Dr. Stuart's nose. I think that Dr. Stuart has not maintained a sufficiently clear distinction between the *ought* and the *is*, and that what Dr. Stuart thinks the law ought to be infiltrates his view of what it is. In saying that, I am far from saying that an author may not express his own views: indeed he *ought* to do so. Where Dr. Stuart and I part company, I think, is on the extent to which it is permissible to fashion what I regard as the primary source — the Code — after your own liking. That Code is in need of radical overhaul but that job is one for the Law Reform Commission and not for the courts. For the time being I would stick with it and stick much closer to its language than Dr. Stuart seems prepared to do. The difference between us is one of approach. We may both enter the maze but while I would try to find an authorized exit, Dr. Stuart would be prepared to hack his way out through the bushes.

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[22] P. 144.
[23] P. 140.
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