

CLARITY IN THE PENAL CODE DEFINITION OF STRICT LIABILITY

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In 2019, a new definition for strict liability was introduced to the *Penal Code* as part of the historic *Criminal Law Reform Act*. Since this provision, section 26H, was designed to clarify the law, this article explores whether it can achieve that goal. By examining the intellectual history and recent judicial practice of strict liability in Singapore, I argue that section 26H succeeds in entrenching the “formal” or “elemental” approach to the concept. This is an advancement over the legal thought of the pre-reform era, in which the compatibility of strict liability with the *Penal Code* was widely doubted. However, the usefulness of section 26H to the statutory interpretation of specific offences is questionable. Indeed, section 26H must itself be interpreted carefully, or the law may become dangerously unstable. This illustrates the elusiveness of legal clarity and the limits of criminal law reform via codification.

A historic revision of the Singapore *Penal Code*¹ was completed in 2019. At one go, more changes were made to it than possibly in its entire history.² It was certainly observed by Professor Stanley Yeo, as late as in 2004, that the *Penal Code* had remained virtually unchanged for nearly a century and a half.³ There had been amendments to specific offences, but nothing like a structural renovation. Yeo believed the latter was urgently needed in light of technical flaws in the code itself, as well as major shifts in its moral underpinnings. The standards of *mens rea* were calling to be defined. The reach of inchoate liability also needed refinement. So did the scope of defences such as intoxication and unsoundness of mind. The solution proposed by Yeo, and later by others, was to add a “General Part” to the code, which would set out every general principle of culpability and exculpation in the criminal law.⁴ Thus, the provisions of this Part would maximise the precision, accessibility, and comprehensibility of the law. They would further these reformist ideals of the drafter of the

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¹ (Cap 224, 2008 Rev Ed Sing) [*Penal Code*].

² *Criminal Law Reform Act* (No 15 of 2019) [*CLRA*].

³ Stanley Yeo, “Revitalising the Penal Code with a General Part” [2004] SJLS 1 at 1.

⁴ *Ibid*; Wing-Cheong Chan, Barry Wright & Stanley Yeo, eds, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Surrey: Ashgate Publishing Limited, 2011); Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century: A Model Code for Singapore* (Singapore: Academy Publishing, 2013).

original Indian Penal Code, Thomas Babington Macaulay. They would ‘revitalise’ an aging *Penal Code* for service in the twenty-first century.⁵

In 2019, this scholarly wish came true. Now the *Penal Code* lacks a General Part only in name. The principles of criminal responsibility are now defined more systematically than before. The new definitions also come with copious notes in the form of a 500-page Report of the Penal Code Review Committee (“PCRC”),⁶ which informed much of the amending statute, the *Criminal Law Reform Act 2019*.⁷ Stanley Yeo sat on this Committee, to be sure, and his influence on its thinking is unmistakable. Notably, the Committee’s idea of ‘clarity’—the word appears 26 times in the Report—was that it is generally preferable to codify the law than to leave it to judicial articulation. In practice, this approach entailed making substantive choices. Seeing that there were different ‘tests’ for the *actus reus* of criminal attempts, for example, the PCRC advised our lawmakers to pick one and codify it.⁸ Similarly, the Court of Appeal’s pliable formulation of the *mens rea* standard of rashness was not good enough.⁹ For the sake of clarity, a rigid definition had to be entrenched.¹⁰ Other degrees of *mens rea* received similar treatment.¹¹ For the most part, these recommendations were accepted. By ‘clarity’, therefore, the PCRC envisioned legislative decisiveness and conceptual essentialism. Clarity was thought to necessitate forgoing what the law could be, in return for certainty as to what it is. Simplicity was preferred over complexity, and abstraction over sensitivity to context.

No doubt the effects of these reforms will remain to be seen for years to come. This is because they were designed to have complex interplay with existing legislation and case law. Nowhere is this more apparent than in the new definition for strict liability in section 26H of the *Penal Code*. In this article, I argue that this provision has indeed made the law more precise, accessible, and comprehensible—but only to a degree, and only if it is interpreted charitably. By that, I mean substantial effort is needed to preserve the intent of section 26H without causing chaos in the law. For various reasons, which I shall explain, the words of section 26H are capable of supporting diametrically opposing interpretations. They can be read either to mean that the law has not changed at all, or that it has changed so much that some traditionally fault-based offences may now be strict in liability. Since neither of those outcomes is desirable (to put it mildly), a middle path must be taken.

The irony is that the most workable reading of section 26H is also unintuitive, especially for lay people, whose understanding of strict liability the section was meant to promote in the first place.¹² Thus, section 26H reveals the limits of criminal law

⁵ Stanley Yeo & Barry Wright, “Revitalising Macaulay’s Indian Penal Code” in Chan, Wright & Yeo, *ibid.*

⁶ Penal Code Review Committee, *Report Submitted to the Minister for Home Affairs and Minister for Law* (August 2018), online: Ministry of Home Affairs <<https://www.mha.gov.sg/docs/default-source/media-room-doc/penal-code-review-committee-report3d9709ea6f13421b92d3ef8af69a4ad0.pdf>> [PCRC Report].

⁷ No 15 of 2019 [CLRA]. Many other statutes such as the *Criminal Procedure Code* were also amended, but those are beyond the scope of the present discussion.

⁸ *Re the actus reus of the offence in s 511 of the Penal Code*: PCRC Report, *supra* note 6 at 194-198.

⁹ *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 (HC) at para 45.

¹⁰ PCRC Report, *supra* note 6 at 175-177.

¹¹ *Ibid* at 167-179.

¹² PCRC Report, *supra* note 6 at paras 5, 6.

reform via codification. It shows that codified definitions of legal terms can only do so much clarificatory heavy lifting before they bend or break entirely. The threat of doctrinal disruption is especially real if the codified law is highly abstract, and its abstractness belies key compromises in the drafting process. In those circumstances, the law is only clear if one is able and willing to see it in the best light. Despite the optimism of our law reformers, the link between codification and legal clarity is not so direct.

This article contains three parts. Part One will recount the intellectual history of strict liability in Singapore. It will show how section 26H banishes an old argument that strict liability cannot truly be imposed under any *Penal Code* regime where certain General Exceptions (*ie* defences) serve to “negate” *mens rea*. As that argument has always been flawed, the law is better off for its demise. Next, Part Two will discuss the mischief section 26H is intended to address. The common law approach to finding strict liability in statutory offences, which operates by rebutting a presumption of *mens rea*, was considered by the PCRC to be inscrutable and therefore unsatisfactory. Although this is a valid critique, I argue in Part Three that section 26H does not specify what, if anything, ought to replace the common law test. In fact, the provision was adapted haphazardly from foreign legislation. The result is only a partial success at clarifying the law, and one that must be handled carefully if future trouble is to be avoided. Ultimately, the general rules of statutory interpretation are now more important than ever. The doctrine of strict construction or doubtful penalisation may prove especially invaluable for stabilising the law.¹³

I. PAST AND PRESENT CONCEPTIONS OF STRICT LIABILITY

Section 26H of the *Penal Code* reads:

- (1) An offence of strict liability under this Code or any written law is one where, for every physical element of the offence, there is no corresponding fault element.
- (2) Strict liability is said to apply to a particular physical element of an offence where there is no corresponding fault element for that physical element, regardless of whether or not the offence is one of strict liability.
- (3) To avoid doubt, an offence may be a strict liability offence even though it is not so expressly described by any written law; and strict liability may apply to a particular physical element of any offence even though it is not so expressly described in any written law.
- (4) It is a defence for any person charged with a strict liability offence to prove that in committing all the acts or omissions that are physical elements of the offence, he exercised reasonable care.

¹³ To be clear, this article is not primarily concerned with the moral rightness or wrongness of strict criminal liability, though morality may factor into the doctrinal question of how the courts find strict liability in statutory offences. For more philosophical treatments of this subject, see AP Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford: Oxford University Press, 2021) at ch 13; Jeremy Horder, “Strict Liability, Statutory Construction, and the Spirit of Liberty” (2002) 118 *Law Q Rev* 458.

An immediately pertinent feature of this provision is that it was enacted alongside sections 26A to 26G. Those sections are the product of the aforementioned effort by law reformers to implant the *Penal Code* with universal definitions of *mens rea*. Thus, section 26C tells us what a statute means if it says an act is committed “intentionally”. Section 26D does likewise for acts done “knowingly”, and so on. These definitions did not exist historically. Furthermore, sections 26A–G are intended to be read with section 22A, which codifies—also for the first time—the “elemental” paradigm of criminal law, in which each offence is understood as comprising at least one “fault element” (*mens rea*) and “physical element” (*actus reus*).¹⁴ Since this has long been established law,¹⁵ little else needs to be said here about section 22A. What is important is that strict liability is now defined as an exception to the rule. By section 26H(1), a strict liability offence is simply one that does not contain any fault element. In other words, liability may be found only upon proof of the physical element(s) of the offence.¹⁶ This ‘elemental’ definition of strict liability has been accepted for some time in England and Wales, where the criminal law remains largely uncodified.¹⁷

In Singapore, however, a view emerged in the 1960s that the idea of strict liability is theoretically incompatible with the *Penal Code*. As the argument goes, this is because the defences of accident and mistake of fact, among others, allow accused persons to plead, in effect, the lack of *mens rea*.¹⁸ Being “General Exceptions” found in Chapter IV of the *Penal Code*,¹⁹ those defences apply equally to the *Penal Code* itself as to all other offence-creating legislation.²⁰ Consequently, all offences must in principle be interpreted to require *mens rea*. Otherwise, a paradox would arise where defendants are able to disprove something that is not there. This conclusion can only be avoided, we are told, if an offence-creating provision ousts the General Exceptions either expressly or by necessary implication.²¹ Thus, the structure of the *Penal Code* is brought holistically to bear. Strict liability is defined not only by reference to the contents of offence-creating provisions, but also to the way in which the doctrine of *mens rea* infuses defence-creating provisions.²²

¹⁴ “22A.—(1) A fault element of an offence refers to any state of mind, proof of which is needed to establish liability under that offence, including but not limited to intention, wilfulness, knowledge, rashness and negligence.”

“(2) A physical element of an offence refers to any fact, proof of which is needed to establish liability under that offence, and that is not a fault element of that offence.”

¹⁵ Glanville Williams, *Criminal Law: The General Part*, 2d ed (London: Stevens & Sons, 1961) at 22.

¹⁶ s 26H(2) has the same effect for part of an offence, as some offences have multiple physical elements with different corresponding fault elements. To simplify our discussion, I shall treat s 26H(2) as functionally identical to s 26H(1), except that it operates on a more limited scale.

¹⁷ See eg Colin Howard, *Strict Responsibility* (London: Sweet & Maxwell, 1963) at 1, 6; LH Leigh, *Strict and Vicarious Liability: A Study in Administrative Criminal Law* (London: Sweet & Maxwell, 1982) at 1.

¹⁸ Bron McKillop, “Strict Liability Offences in Singapore and Malaysia” (1967) 9(1) *Malaya L Rev* 118 at 122. See ss 79 (mistake of fact), 80 (accident), 84 (unsoundness of mind) and 85, 86 (intoxication) of the *Penal Code*, *supra* note 1.

¹⁹ Now re-organised as Chapters IV and IVA.

²⁰ By operation of ss 6, 40(2).

²¹ McKillop, “Strict Liability Offences”, *supra* note 18 at 123.

²² For a similar argument in the context of India, see V Balasubrahmanyam, “Guilty Mind” in K N Chandrasekharan Pillai & Shabistan Aquil, eds, *Essays on the Indian Penal Code* (New Delhi: Indian Law Institute, 2005) at 68–90.

In the 1990s, this ‘rejectionist’ account became academic orthodoxy. Scholars in Singapore found different ways of expressing the same basic argument: that the General Exceptions introduce *mens rea* “via the back door”,²³ or that they “provide that there can be no criminal liability without proof of some form of guilty mind.”²⁴ The structure of criminal law is “fundamentally different” in code jurisdictions;²⁵ the common law concept of strict liability is “based on theoretical foundations which cannot be accommodated within the Code.”²⁶ Only Michael Hor took the tangential position that the *Penal Code* and common law could co-exist, but only if criminal liability was seen as lying on a “spectrum of strictness”.²⁷ For Hor, *mens rea* was not either present or absent in any offence. Liability for negligent conduct was also strict insofar as it involved a lower degree of culpability than intention, knowledge, and rashness. Strictness could even manifest as reverse burdens of proof: a law that required defendants to prove they were not at fault was stricter than one where the prosecution retained the normal burden of proving fault. If a statute did not refer to *mens rea*, Hor believed judges should be free to read into it any degree or permutation of strictness.²⁸

It was only necessary to interrogate the idea of strict liability because it was being applied by the courts regularly, but apparently without proper doctrinal grounding. On this, everyone was agreed.²⁹ The case law was fuelled, in turn, by a growing number of statutory offences that were silent on *mens rea*. This was and still is a global phenomenon, which dates back to the nineteenth century. Whatever “strict liability” might mean precisely, the retreat of *mens rea* has been a well-understood consequence of industrialisation and the expansion of state control over society.³⁰ Against this backdrop, the jurisprudence of strict liability was developed in late-twentieth century Singapore and Malaysia in relation to such diverse matters as immigration,³¹ food safety,³² public entertainment,³³ the importation of goods,³⁴ and the pollution of territorial waters.³⁵

The academic challenge, then, was to reconcile theory and practice. Various ideas were floated on this front, though none of them are particularly compelling. For example, M Sornarajah resorted to the maxim *communis error facit jus*. It was “too late” to excise strict liability from the law, so we should just proceed as if the General

²³ KL Koh, CMV Clarkson & NA Morgan, *Criminal Law in Singapore and Malaysia: Texts and materials* (Singapore: Malayan Law Journal, 1989) at 65.

²⁴ Chan Wing Cheong, “Requirement of Fault in Strict Liability” [1999] Sing Ac LJ 98 at 98.

²⁵ Molly Cheang, *Criminal Law of Malaysia & Singapore: Principles of Liability* (Malaysia: Professional (Law) Books Publishers, 1990) at 59.

²⁶ Sornarajah, “Defences to Strict Liability Offences in Singapore and Malaysia” (1985) 27 *Malaya L Rev* 1 at 28.

²⁷ Michael Hor, “Strict Liability in Criminal Law: A Re-Examination” [1996] Sing JLS 312 at 312.

²⁸ *Ibid* at 313, 340, 341.

²⁹ Not least Michael Hor: *supra* notes 21-27.

³⁰ FB Sayre, “Public Welfare Offenses” (1933) 33(1) *Colum L Rev* 55; Colin Manchester, “The Origins of Strict Criminal Liability” (1977) 6(4) *Anglo-Am L Rev* 277; Leigh, *Strict and Vicarious Liability*, *supra* note 17 at ch 2.

³¹ *Lim Chin Aik v The Queen* [1963] AC 160 (PC).

³² *Public Prosecutor v Teo Kwang Kiang* [1992] 1 SLR 9 (HC).

³³ *Tan Khee Wan Iris v Public Prosecutor* [1995] 2 SLR 63 (HC) [*Iris Tan*].

³⁴ *Public Prosecutor v Khoo Cheh Yew* [1980] 2 MLJ 235.

³⁵ *Jupiter Shipping Pte Ltd v Public Prosecutor* [1993] 2 SLR 69 (HC) [*Jupiter Shipping*].

Exceptions applied only within the *Penal Code*. Offences in other statutes would be governed by the common law.³⁶ This approach was rightly criticised by Michael Hor as arbitrary, since the placement of an offence in one statute or another does not always correlate with its function and purpose.³⁷ Yet, as we have seen, Hor's own solution simply defined the problem away.³⁸ To be sure, the "conceptual umbrella" of strict liability had also been expanded elsewhere in the common law world. Hor's account was not anomalous.³⁹ Recently, however, this sort of conceptual dilution started encountering normative pushback. Only the 'formal' sense of strict liability, argues Stuart P. Green—that is, the 'elemental' conception of it—avoids confusing the "total omission of *mens rea*" with "other kinds of moral deficiency in the criminal law."⁴⁰ If we conflate formal strict liability with lesser derogations from subjective fault, such as liability for negligence, we risk losing sight of the instances in which strict liability poses the most radical threat to the retributive function of criminal punishment.⁴¹

In the face of the rejectionist view—which remained in vogue, if somewhat tempered, in the run-up to the 2019 reforms⁴²—the *Penal Code* now contains a clear endorsement of strict liability. We turn, then, to section 26H. At first glance, this provision may seem too scanty to be a conceptual silver bullet. If rejectionism is correct, then the law is still broken. All section 26H would have done is to declare that something is possible, while the rest of the *Penal Code* continues to suggest it is not. Fortunately, however, the rejectionist view can be shown to be defective on its own terms. Therefore, what section 26H has actually achieved is to confirm beyond doubt that the *Penal Code* is compatible with formal strict liability.

The rejectionist view rests on the invalid deduction that since the *mens rea*-negating defences in Chapter IV apply to all offences, all offences must comprise a *mens rea* element. In fact, the so-called *mens rea*-negating defences such as accident and mistake of fact do not place any burden on the Prosecution to prove *mens rea* beyond reasonable doubt (which is what it means to say *mens rea* forms part of an offence). The proper analysis is rather that if an offence does require proof of *mens rea*, then the accused may raise accident, mistake, and so on, by way of answering the Prosecution's case.⁴³ If proof of *mens rea* is not required, then those defences may still be raised, but it would fall on the accused to lead all the necessary evidence. All the Prosecution would have to do is to prevent the accused from proving their defence on a balance of probabilities. No other positive proof of a guilty mind

³⁶ Sornarajah, *supra* note 26 at 5. See also Koh, Clarkson & Morgan, *supra* note 23 at 87: "[T]he Penal Code was not drafted with the needs of a modern industrialised society with its concomitant hazards in mind. For policy reasons some offences of strict liability are inevitable."

³⁷ Hor, "Strict Liability in Criminal Law", *supra* note 27 at 338, 339.

³⁸ *Supra* note 28 and accompanying discussion.

³⁹ Douglas N Husak, "Varieties of Strict Liability" (1995) 8(2) Can JL & Jur 189 at 203, 204, 224.

⁴⁰ Stuart P Green, "Six Senses of Strict Liability: A Plea for Formalism" in AP Simester, ed, *Appraising Strict Liability* (London: Oxford University Press, 2005) at 20.

⁴¹ *Ibid.*

⁴² See below, discussion accompanying notes 62-64.

⁴³ This mechanism was confirmed in 2019 with the introduction of ss 79(2) (on mistake of fact), 79A(2) (mistake of law) and 80(2) (accident) of the *Penal Code*. An older provision that works in a similar way—*ie*, it goes towards disproving *mens rea*—is s 86(2) (on intoxication). See *Juma'at bin Samad v Public Prosecutor* [1993] 3 SLR 338.

is required.⁴⁴ Either way, the defences can be raised if the facts permit. But they cannot alter the nature of the offences to which they apply.

As a demonstration of this principle, consider the idea of consent. To establish a charge of rape, the Prosecution must prove that the accused penetrated the victim in a certain way without consent. The victim's non-consent constitutes the offence.⁴⁵ For most other offences, however, the victim's consent (or that of a third party) operates as a Chapter IV defence, which the accused bears the burden of proving.⁴⁶ In establishing a *prima facie* case, the Prosecution need not enter into this line of inquiry at all. Yet we do not say for all those offences that the defence of consent has the effect of introducing an element of the victim's non-consent "via the back door".⁴⁷ We simply say the victim's consent or non-consent does not come into play unless and until the accused decides to raise the Chapter IV defence. If this does not undermine the structure of the *Penal Code*, then neither should the co-existence of formal strict liability with defences like mistake of fact. Indeed, it is difficult to see how those defences are so special that they must be regarded as capable of ordaining the ubiquity of *mens rea*. If it is *mens rea* that makes them special, then the rejectionist logic is circular: the ubiquity of *mens rea* is called upon to prove itself.

The above counter-analysis is supported by the 1955 case of *Perera v Munaweera*.⁴⁸ Although this case was cited as authority for the rejectionist position,⁴⁹ the following is what the Supreme Court of Ceylon actually decided:

Where the definition of an offence contains words of absolute and unqualified prohibition, the prosecution need only establish beyond reasonable doubt the commission of the prohibited act, and it is not required in addition to establish that the accused acted with any specific intention or knowledge. But this does not mean that in such a case the accused is to be denied the right to plead any of the general exceptions set out in Chapter 4 of the Code.⁵⁰

This passage suggests judges in code jurisdictions saw no conceptual problem with offences that dispensed with proof of *mens rea*, even in the 1950s. The General Exceptions were not seen as precluding such formulations. It was not considered paradoxical for the law to allow the accused to raise defences that pointed to the lack of fault, even if the Prosecution was not required to prove fault. This is because the judicial thinking revolved around the procedural routes towards conviction or acquittal. It was not built on an abstract idea of strict liability.⁵¹

It is a separate question whether the courts were diligent about allowing defences in cases of formal strict liability. On this point, scholars in Singapore are correct to

⁴⁴ *Iris Tan*, *supra* note 33.

⁴⁵ *Penal Code*, s 375(1), 375(1A).

⁴⁶ *Penal Code*, ss 87, 89. Likewise for the partial defence in Exception 5 to s 300.

⁴⁷ *Supra* note 23.

⁴⁸ (1955) 56 NLR 433.

⁴⁹ Sornarajah, *supra* note 26 at 4, 5.

⁵⁰ *Supra* note 48 at 438.

⁵¹ For a Singaporean example from this era, see *Arumugam and Another v R* [1947] MLJ 45.

observe that the General Exceptions did not feature in the case law as much as they should.⁵² This was certainly true in the earlier decades; less so from the 1990s.⁵³ Nevertheless, what has been downplayed is the contemporaneous split in common-law thinking between strict and *absolute* liability. Nowadays, the latter term is often used to denote offences where the accused may *not* plead due diligence, or non-negligence, in relation to the occurrence of the proscribed situation. Where liability is ‘strict’ but not ‘absolute’, this defence is available.⁵⁴ This distinction is often called the “Canadian approach”⁵⁵ as it was adopted most notably in 1978 by the Supreme Court of Canada.⁵⁶ The law of Australia had moved earlier in a similar direction. Since 1941, defendants accused of ‘strict liability’ offences had been allowed to raise an honest and reasonable mistake of fact.⁵⁷ In England and Wales, by contrast, ‘strict’ and ‘absolute’ liability were historically used interchangeably, as the law did not recognise a general defence of due diligence.⁵⁸ The law has not changed, but what has changed is that some writers of English texts are now preferring the Commonwealth terminology for its conduciveness to law reform.⁵⁹

It must be noted, therefore, that the rejectionist argument in Singapore was originally directed against what most modern scholars would call absolute liability.⁶⁰ In that sense, the argument is sound. The *Penal Code* is indeed incompatible with absolute liability by default. The problem is that the early rendition of rejectionism was subsequently promulgated in an intellectual context where the Commonwealth usage of strict liability was gaining currency. Scholars in Singapore continued to endorse the old argument even as they began to speak of *strict* not absolute liability. Hence all the talk of *mens rea* going through back doors.⁶¹ As a further example, consider the following passage from the first edition of the influential text, *Criminal Law in Malaysia and Singapore*:

[S]trict liability offences. . . render the accused liable upon proof of the physical elements of the crime alone and where no fault is required. Since the General Exceptions in the Penal Code apply to all offences, the proper view is that these. . .

⁵² See *eg* Hor, “Strict Liability in Criminal Law”, *supra* note 27 at 328; Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 3d ed (Singapore: LexisNexis, 2018) at 182, 191, 192.

⁵³ In light of *Iris Tan*, *supra* note 33. *Cf* *Jupiter Shipping*, *supra* note 35.

⁵⁴ David Ormerod & Karl Laird, *Smith and Hogan’s Criminal Law*, 14th ed (Oxford: Oxford University Press, 2015) at 174, 175; Lorraine Finlay & Tyrone Kirchengast, *Criminal Law in Australia* (Chatswood: LexisNexis Butterworths, 2015) at 244; Don Stuart, *Canadian Criminal Law*, 7th ed (Toronto: Thomson Reuters, 2014) at 181.

⁵⁵ *Eg* Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law*, 7th ed (Oxford: Oxford University Press, 2013) at 161.

⁵⁶ *R v City of Sault Ste Marie* [1978] 2 SCR 1299 (SCC).

⁵⁷ *Proudman v Dayman* (1941) 67 CLR 536 (HCA). See also *He Kaw Teh v R* (1985) 157 CLR 523 (HCA). And for the same rule in New Zealand, *R v Strawbridge* [1970] NZLR 909 (CA).

⁵⁸ Howard, *supra* note 17 at 2; J LJ Edwards, *Mens Rea in Statutory Offences* (London: Macmillan and Company, 1955) at 244-250. This usage was criticised by T Brian Hogan, *Criminal Law Without Fault* (UK: Leeds University Press, 1969) at 7, 8.

⁵⁹ Thus, what the law is shades into what the law ought to be. See *eg* Ormerod & Laird, *supra* note 54 at 174, 175; Ashworth & Horder, *supra* note 55 at 160, 161.

⁶⁰ This is abundantly clear in McKillop, “Strict Liability Offences”, *supra* note 18.

⁶¹ *Supra* note 23.

are not offences of strict liability unless the particular statute expressly ousts the application of the General Exceptions.⁶²

Tellingly, these references to ‘strict liability’ were corrected to ‘absolute liability’ in the second edition of the text.⁶³ But the third and latest edition continues to argue that “there should be no criminal liability without fault in Penal Code jurisdictions unless th[e] General Exceptions [of mistake, etc.] are excluded.”⁶⁴ So, the ghost of rejectionism continues to haunt academic accounts of the law. Offences and defences remain conflated. Specifically, there is an equivocation in the use of the word ‘fault’: it is used simultaneously to mean having *mens rea* and not having a defence, or not having an excuse or justification for one’s conduct. As other scholars have argued, these two senses of ‘fault’ are not coterminous.⁶⁵ Admittedly, what differs in form as regards proof of negligence or non-negligence may amount to the same thing in substance. But this is why it is all the more vital to distinguish ‘formal’ from ‘substantive’ strict liability, so as to be clear what aspect of the law is being discussed.⁶⁶

Again, these conceptual slippages have muddied legitimate critiques of the case law. When the courts in Singapore started allowing defences to offences of formal strict liability, they drew seemingly at random from the *Penal Code* and common law. By the mid-2000s, scholars observed that two ‘streams’ had emerged in judicial reasoning.⁶⁷ In one set of cases, Canadian-style due diligence was imported either explicitly or implicitly.⁶⁸ Whatever their normative merits, those judgments were rightly criticised as ungrounded in the *Penal Code*.⁶⁹ The other stream comprised judgments that stayed faithful to the *Penal Code*, and particularly to mistake of fact.⁷⁰ Scholars pointed out that the need for “good faith” in that defence—by which the accused must have formed their mistaken belief with “due care and attention”⁷¹—was not identical to Canadian due diligence. The latter was (and is) more lenient, as one can be duly diligent in doing something without making a mistake of fact.⁷² It also bears mentioning that subsequent judicial efforts to ‘merge’ the two streams were not universally well-received. Some scholars believed the courts were merely paying lip service to the *Penal Code* while applying the common law in substance.⁷³

⁶² Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 1st ed (Singapore: LexisNexis, 2007) at 75.

⁶³ Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2d ed (Singapore: LexisNexis, 2012) at 87.

⁶⁴ Yeo, Morgan & Chan, *Criminal Law in Malaysia and Singapore*, 3d ed, *supra* note 52 at 182.

⁶⁵ Winnie Chan & AP Simester, “Four Functions of Mens Rea” (2011) 70(2) Cambridge LJ 381 at 381, 382.

⁶⁶ RA Duff, “Strict Liability, Legal Presumptions, and the Presumption of Innocence” in Simester, ed, *Appraising Strict Liability*, *supra* note 40.

⁶⁷ Michael Hor, “Managing Mens Rea in Singapore” [2006] 18 Sing Ac LJ 314 at 359.

⁶⁸ *Eg MV Balakrishnan v Public Prosecutor* [1998] 2 SLR 846 (HC); *Chng Wei Meng v Public Prosecutor* [2002] 2 SLR 566 (HC); *Tan Cheng Kwee v Public Prosecutor* [2002] 3 SLR 390 (HC).

⁶⁹ Hor, “Managing Mens Rea in Singapore”, *supra* note 67 at 361.

⁷⁰ *Eg Public Prosecutor v Teo Eng Chan* [1988] 1 MLJ 156; *Iris Tan*, *supra* note 33.

⁷¹ *Penal Code*, s 79(1) read with s 26B (formerly ss 79 and 52 respectively).

⁷² Yeo, Morgan & Chan, *Criminal Law*, 3d ed, *supra* note 64 at 190, 191.

⁷³ *Ibid* at 193, 194; *cf* Hor, “Managing Mens Rea in Singapore”, *supra* note 67 at 361. See *Comfort Management v Public Prosecutor* [2003] 2 SLR 67 (HC) at para 31.

Either way, the law was unclear. There was no consensus on the type of defences available in cases of strict liability.

But the point, as we can see, is that these astute observations got entangled with the distinct question of the coherence of a *Penal Code*-compliant idea of strict liability. Thus, the source of legal uncertainty was not only judicial: it was also academic. Scholars in Singapore critiqued the law as if their own ideas stood above the fray. On the contrary, those ideas have always been an integral part of the legal landscape. They are just as historically contingent and prone to conceptual instability as any court judgment.

It follows that section 26H has clarified the law not only in terms of the rules, but also how the rules are spoken about. Sections 26H(1)-(2) have put everyone literally on the same page as to the formal definition of “strict liability”. No longer do we have to worry about what else the term could mean. To reinforce this paradigm, the issue of defences is addressed separately in section 26H(4), which recasts Canadian due diligence as a defence of ‘reasonable care’. This sub-section does not apply unless sub-section 1 or 2 is already engaged. Thus, the elements of offences and defences are statutorily disambiguated.

A lingering question is whether other defences can be raised under the new regime. The answer must be “yes”, even though mistake of fact has been made obsolete by section 26H(4), so that at least is a moot point. The same is true of the defence of accident, as it also calls for proof that the accused had acted with “proper care and caution”. Other defences, by contrast, have not been caught up in the conceptual turmoil discussed above. Prior to the *CLRA*, the academic position, which is surely correct, was that anyone charged with a strict liability offence should be allowed to raise infancy, duress, and necessity.⁷⁴ Beyond the General Exceptions, defendants should also have recourse to automatism, that is, to the argument that the *actus reus* was committed involuntarily (irrespective of *mens rea*).⁷⁵ There is no reason to think any of this has changed.

II. THE COMMON LAW PRESUMPTION OF *MENS REA*

We turn now to the avowed purpose of section 26H. According to the PCRC, a codified definition of strict liability would facilitate the interpretation of statutory offences without the need for judges to make ad hoc rulings:

It is not desirable or reasonable to expect the public to wait for each. . . offence (and there are many such offences, many of them regulatory in nature) to be interpreted in court before they have certainty in how to comply with them.⁷⁶

The Committee’s concern stemmed from a perception that the ‘balancing test’ used in such cases was too complicated and dissociated from ‘the words’ of each offence.

⁷⁴ Yeo, Morgan & Chan, *Criminal Law*, 3d ed, *supra* note 64 at 561, 562. Unsoundness of mind is more contentious owing to a remark by Choo J in *Public Prosecutor v Han John Han* [2007] 1 SLR(R) 1180 (HC) at para 6.

⁷⁵ Yeo, Morgan & Chan, *ibid.* See *Public Prosecutor v Yong Heng Yew* [1996] 3 SLR(R) 22 (HC).

⁷⁶ PCRC Report, *supra* note 6 at 191.

As a result, the law was obscure. It was “not possible” for lay people to tell how the courts would rule.⁷⁷

As the Committee noted, the common law “test” for *mens rea* is laid out in *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong*.⁷⁸ The issue there was whether a law that forbade building contractors from deviating materially from any approved building plan was only violated if a contractor had actual or constructive knowledge of the ‘materiality’ of the deviation. A deviation was material if it was likely to cause personal injury or property damage. The appellants argued that proof of knowledge was required, but the Judicial Committee of the Privy Council opined that liability was strict for this part of the *actus reus*. In other words, it was still essential for the accused to have known of the deviation—just not that it was material. Speaking for the Judicial Committee, Lord Scarman gave the following now famous statement of the law:

In their Lordships’ opinion, . . . (1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is “truly criminal” in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.⁷⁹

These propositions synthesised various lines of reasoning in earlier cases, which consistently upheld a commitment to *mens rea*.⁸⁰ The rules only became more structured and emphatic over time because judges had to justify every decision either to resist or succumb to pressure to slacken that commitment. The pressure, of course, has always come from the enforcement of imprecise legislation governing myriad social and economic activities. At its core, the common law approach has not changed since 1895. In the oft-cited case of *Sherras v De Rutzen*, Wright J decided that the presumption of *mens rea* is “liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.”⁸¹ The Privy Council in *Gammon* restated this principle in a way that has become authoritative because it provides detailed guidance without compromising normative abstraction.

Despite its strong pedigree, the common law approach has long carried a stain of arbitrariness. Twenty years before *Gammon*, a differently constituted Privy Council noted in *Lim Chin Aik v The Queen*—an appeal from the State of Singapore—that

⁷⁷ *Ibid* at 190.

⁷⁸ [1985] AC 1 (PC) [*Gammon*].

⁷⁹ *Gammon, ibid* at 14.

⁸⁰ *Brend v Wood* (1946) 175 LT 306 (HL); *Lim Chin Aik v The Queen* [1963] AC 160 (PC); *R v Warner* [1969] 2 AC 256 (HL); *Sweet v Parsley* [1970] AC 132 (HL).

⁸¹ [1895] 1 QB 918 at 921 [*Sherras*].

“many of the cases” in which the presumption of *mens rea* had been applied were “not easy to reconcile.”⁸² For example, *Sherras* concerned the conviction of the owner of a pub for serving alcohol to a police constable on duty. The English High Court quashed the conviction on the basis that guilty knowledge was essential to the offence, and such knowledge could not be proved.⁸³ Yet the same court had affirmed the conviction of another publican, eleven years earlier, for serving alcohol to a drunk person even though he could not have known the person was drunk.⁸⁴

In Singapore, the adoption of *Gammon* by the courts did not improve things, at least in the academic perception. There was, specifically, a feeling that the case law was driven by arbitrary notions of social concerns. Thus, it was socially concerning for a disqualified driver to drive a car,⁸⁵ but apparently not for a civil servant to disclose documents governed by the *Official Secrets Act*.⁸⁶ The latter offence was not even an issue of ‘public welfare’, which the High Court all but equated with ‘public safety’.⁸⁷ As much as such oddities may indicate, in one scholar’s opinion, a poorly calibrated judicial sense of proportion,⁸⁸ the better point has been made that *Gammon* itself is rather to blame for accentuating artificial categories.⁸⁹ In fact, an examination of the cases as a whole suggests Singaporean judges have not tended to compare vastly different social concerns. Local precedents are cited for their endorsement of *Gammon*, but not typically for how the *Gammon* test is modulated by context. For example, the dangers of tainted food to public health⁹⁰ played no part in the evaluation of the social concernment, say, of insider trading⁹¹ or commercial sex with minors.⁹² A notable exception to this trend is embodied in a line of cases on various forms of unlicensed driving.⁹³ Being factually similar as a group, those cases prove the rule that most other cases are connected via *Gammon*, but not to one another in any meaningful way.⁹⁴

On the other hand, a recent case suggests that direct comparisons may be made for substantively analogous offences, even to the exclusion of the *Gammon* test. In *Public Prosecutor v Lieu Yong Liang*,⁹⁵ liability was found to be strict for the offence of hindering a public officer in the performance of their duties under the *Environmental Public Health Act*.⁹⁶ This was done solely on the authority of *Foo Siang Wah*

⁸² [1963] AC 160 (PC) at 172.

⁸³ *Sherras*, *supra* note 81.

⁸⁴ *Cundy v Le Cocq* (1884) LR 13 QBD 207.

⁸⁵ *Chng Wei Meng*, *supra* note 68.

⁸⁶ *Public Prosecutor v Phua Keng Tong* [1985-1986] SLR(R) 545 (HC).

⁸⁷ *Ibid* at para 20. See also *Public Prosecutor v Bridges Christopher* [1998] 1 SLR 162 (HC).

⁸⁸ Hor, “Managing Mens Rea”, *supra* note 67 at 364, 365.

⁸⁹ Yeo, Morgan & Chan, *Criminal Law*, 3d ed, *supra* note 64 at 187, 188.

⁹⁰ *Public Prosecutor v Teo Kwang Kiang* [1992] 1 SLR 9 (HC).

⁹¹ *Public Prosecutor v Ng Chee Kheong* [1999] 4 SLR 56 (HC).

⁹² *Leu Xing-Long v Public Prosecutor* [2014] 4 SLR 1024 (HC).

⁹³ Including the causing of vehicles to be driven by others without licence. See the cases cited *supra* notes 68 and 73, and also *Public Prosecutor v Muhammad Syahmi Bin Mohd Johan* [2020] SGDC 287.

⁹⁴ See also *Public Prosecutor v Yue Mun Yew Gary* [2012] SGHC 188, where in ruling that the presumption of *mens rea* was not displaced for the offence of incitement to violence in s 267C of the *Penal Code*, the High Court examined a collection of speech-related offences (“comparable provisions which proscribe free expression”), but not other categories of offences.

⁹⁵ [2019] SGDC 171.

⁹⁶ (Cap 95, 2002 Rev Ed Sing), s 82(a) [EPHA].

Frederick v Public Prosecutor.⁹⁷ In the opinion of the District Judge, *Frederick Foo* stood for the rule that “the *Penal Code* offence of obstructing a public servant [in section 186] and [an] analogous offence under the *Prevention of Corruption [Act, section 26(b)]* both required *mens rea* and were not strict liability offences.” Accordingly, the District Judge in *Lieu Yong Liang* “adopted a similar approach and proceeded on the basis that the [EPHA] offence was not one of strict liability” either.⁹⁸ On appeal, the High Court agreed with this analysis. At no point was *Gammon* mentioned.⁹⁹ Nor was it mentioned in *Frederick Foo*. Instead, what the court did in that case was to use the explicit element of *mens rea* in the *Penal Code* offence to find the same *mens rea* in a “substantively similar offence[.]”.¹⁰⁰ Since this analogy was extended in *Lieu Yong Liang*, we may infer that the side-lining of *Gammon* is sometimes capable of becoming self-sustaining.

Other cases from recent years give a wider impression of patchy judicial engagement with *Gammon*. A positive example is *Public Prosecutor v Jurong Country Club*.¹⁰¹ In that case, the High Court observed that it was a strict liability offence for an employer to fail to pay their share of an employee’s contribution to the Central Provident Fund (“CPF”).¹⁰² Although the case did not turn on this issue, the court gave a thorough explanation of why the presumption of *mens rea* ought to be displaced. The details of this explanation are not presently important. Suffice to say the *Gammon* factors were applied assiduously and intelligibly. Specifically, it is easy to see how strict liability in the offence oiled the wheels of a vital Singaporean institution. On the flouting of the CPF rules by employers, it had been said in Parliament (as the court noted) that “the CPF scheme is a ‘key conduit’ through which the Government channels financial assistance to more economically vulnerable Singaporeans.”¹⁰³

By contrast, *Gammon* played a smaller and clumsier role in the extraordinary case of *Public Prosecutor v Chinpo Shipping Company (Private) Limited*.¹⁰⁴ At issue was a subsidiary regulation forbidding the transfer of any asset “that may reasonably be used to contribute to the nuclear-related, ballistic missile-related, or other weapons of mass destruction-related programs or activities of the Democratic People’s Republic of Korea”.¹⁰⁵ This regulation was enacted to bring Singapore in compliance with a United Nations (“UN”) Resolution.¹⁰⁶ The question in *Chinpo* was whether the offence required proof of knowledge that an asset might be put to

⁹⁷ [1999] 1 SLR(R) 996 (HC) [*Frederick Foo*].

⁹⁸ *Supra* note 95 at para 24.

⁹⁹ *Public Prosecutor v Lieu Yong Liang* [2020] 4 SLR 1106 (HC).

¹⁰⁰ *Supra* note 97 at para 54. At the time, s 186 of the *Penal Code* provided that “[w]hoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished. . .” (Cap 224, 1987 Rev Ed Sing). This section was later amended, but the phrase “voluntarily obstructs” was retained. “Voluntarily” is defined in s 26A, formerly s 39.

¹⁰¹ [2019] 5 SLR 554 (HC).

¹⁰² *CPF Act* (Cap 36, 2013 Rev Ed Sing), s 58(b).

¹⁰³ *Supra* note 102 at para 100.

¹⁰⁴ [2016] SGDC 104 [*Chinpo*].

¹⁰⁵ *United Nations (Sanctions — DPRK) Regulations 2010*, regulation 12(b), enacted under the *United Nations Act* (Cap 339, 2002 Rev Ed Sing). Reg 12(b) has since been amended, but we may ignore the updated wording for present purposes.

¹⁰⁶ No 1874, S/2009/301.

the forbidden purposes. The District Judge decided there was no such requirement. *Gammon* was applied perfunctorily in that some of the right language was used. After citing Lord Scarman's remarks on issues of social concern, the District Judge observed that the preamble of the UN Resolution expressed the Security Council's "gravest concern" over a nuclear test conducted by North Korea. The concomitant sanctions were therefore of 'public concern', being of 'global concern'. Strict liability under domestic law would "encourage greater vigilance and due diligence" against breaches of sanction.¹⁰⁷

Note the rapid slippage from "social" to "global". In a few short sentences, the court drifted, in effect, from social regulation to geopolitics. Unlike in *Jurong Country Club*, there was nothing to suggest that Parliament or the government had considered the social dangers of Singaporean complicity in the development of North Korean nuclear weaponry. The risk of violating international law is a different matter. Even unethical conduct is not precisely what *Gammon* contemplates. Indeed, it is revealing that when *Chinpo* went on appeal, and the finding on strict liability was upheld, the High Court focused on the "natural and ordinary meaning" of the regulation. The need for vigilance was reiterated in passing, but no further reference was made to *Gammon*.¹⁰⁸ It seems, therefore, that the same conclusion would have been reached without *Gammon*. The Prosecution also argued, and the District Judge agreed, that there was strong corroborating evidence in the form of foreign legislation *in pari materia* with the Singaporean regulation. An Australian law was particularly instructive as it specified explicitly that the relevant offence was "an offence of strict liability."¹⁰⁹

The running theme in these cases is that the viability of the *Gammon* test is highly dependent upon the subject matter of each offence. At best, each successful use of the test provides some guidance for a limited range of similar offences. Yet *Gammon* is apparently superfluous if an offence is similar enough to another for which the required *mens rea* is not in doubt. And, in the worst cases (as where rogue nuclear powers are involved), the subject matter of the offence is so incongruous with the contextual paradigm of *Gammon* that the test is virtually reduced to window dressing. Not only was the PCRC right, therefore, to criticise the *Gammon* test for tending to operate far beyond the letter of the law, the test itself was proving increasingly paradoxical in recent years.

III. THE EFFECT OF SECTION 26H

The question boils down to whether section 26H has fixed anything. With its help, can a lay person easily tell if a statutory offence contains a fault element? Firstly, it must be emphasised that the lay perspective, which the PCRC placed on a pedestal, is merely a fiction. It is a useful guide for drafting, but illogical if taken too far. This is because the lay person must still understand, when reading a statute, that its meaning is partly governed by a general provision in the *Penal Code*. They must

¹⁰⁷ [2016] SGDC 104 at paras 122-126.

¹⁰⁸ *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 (HC) at paras 48-55.

¹⁰⁹ [2016] SGDC 104 at para 120.

then search the *Penal Code* for the right provision. That means having to be aware of at least one of the terms ‘fault element’, ‘physical element’, and ‘strict liability’. Since those terms are also new to the *Penal Code*, the lay person has no reference point—unless, of course, they are already conversant with the idea of *mens rea*, in which case they are not really a lay person. The reality is that section 26H defines, but it does not educate. It cannot help anyone who has no inkling of its doctrinal significance.

A. *The Problem*

Having said that, section 26H is problematic even if we embrace the fiction of the lay person. Its problem is that the true nature of its intervention cannot be ascertained from its words. To appreciate the magnitude of this ambiguity, and then to decide how best to deal with it, we might regard the possible interpretations of the provision as lying on a spectrum. At one end, section 26H is merely descriptive, or declaratory. Like section 22A, it does no more than to confirm judicial practice, and to smooth out any conceptual unevenness therein (of the kind discussed above, in Part One). At the other extreme, section 26H displaces the common law outright. *Gammon* and its progeny are overruled, and the interpretation of offence-creating provisions cannot go beyond their bare words. As we shall see, neither of these positions is viable in totality. But each has something to commend it.

The descriptive interpretation may be termed the Obtuse View, for it flies in the face of the PCRC Report. In this view, sections 26H(1)-(2) are read plainly as setting out what strict liability is, but not how or where it should be found. Those sub-sections specify what label must be put on the result of any effort at statutory interpretation; they say nothing about the form the effort must take. To be sure, section 26H has to be read with section 22A(1), which classifies “intention, wilfulness, knowledge, rashness and negligence” as fault elements. But that was already trite law, and section 22A(1) clarifies anyway that fault elements are “not limited” to those terms.¹¹⁰ Moreover, section 26H(3) states that “strict liability may apply. . . even though it is not so expressly described”. For the obtuse interpreter, this confirms that the task of checking whether an offence contains fault elements is not reducible to the identification of particular adverbs. Since none of this breaks new ground, the only substantive effect of sections 26H(1)-(2) must be to serve as a prerequisite for the defence of reasonable care in section 26H(4)—they prevent the defence from being raised against non-strict liability offences. For its part, section 26H(4) confirms that the defence is available, given that the legal community did not always think it was. Apart from that, the law is unchanged.

The obtuse interpreter will not be dissuaded by the rule on purposive interpretation.¹¹¹ They may rejoin, firstly, that the PCRC Report is not the only extrinsic material with bearing upon the meaning of section 26H. There is also the Parliamentary debate on the *CLRA*. In moving the relevant amendment, the Senior Parliamentary Secretary at the Ministry of Home Affairs stated briefly that the new

¹¹⁰ *Supra* note 14.

¹¹¹ *Interpretation Act* (Cap 1, 2002 Rev Ed Sing), s 9A(1).

provision would ‘clarify’ the law. He said nothing about amending it.¹¹² If the common law was meant to be displaced in any way, then surely such an important point would have been discussed. For argument’s sake, we might also consider, at a stretch, that the PCRC Report is not unequivocal. For all its criticism of *Gammon*, the Committee chose not to recommend the codification of a “default fault element” for statutory offences with ambiguous *mens rea*. We shall return shortly to this topic, but for now, the Committee recognised the need for “nuanced deliberation about the policy purpose of various criminal offences.” Ideally, such deliberation would occur as part of a “full and careful review of all offence-creating legislation.” But in the meantime, the “nuanced” task of aligning the *mens rea* of each offence with its policy purpose must fall to judges. The Committee did not wish to “skip over” this interim solution.¹¹³ In that sense, the recommendation upon which section 26H was drafted was not inspired by a desire to curtail judicial discretion.

In direct contrast with the Obtuse View is what I will call the Naïve View. This view takes the PCRC’s impatience with *Gammon* at face value. It posits that under sections 26H(1)-(2), strict liability is found simply in the absence of *explicit* fault elements. Section 22A(1) does not preclude this reading because all it does is to say its enumeration of *mens rea* terms is not exhaustive. Apart from the terms stated in section 22A(1), the *Penal Code* defines “dishonestly”, “fraudulently”, and “voluntarily”.¹¹⁴ Other adverbial terms of *mens rea* may appear in other statutes. As for section 26H(3), it says strict liability “may” apply without express description only in the sense that it permits this reading of offence-creating provisions. It does *not* say the reverse is also true: that fault elements may be present without express description. Indeed, they may not. In the Naïve View, it is still sections 26H(1)-(2), interpreted purposively, that rule out implicit *mens rea*. Harsh as it is, this is the only interpretation that the lay person would find perfectly clear. Finally, on the apparent discrepancies in the extrinsic material, the naïve interpreter will argue that they do not relate to “the very point” of whether the *Gammon* test has been abandoned.¹¹⁵ The Court of Appeal has ruled that not every utterance in Parliament or elsewhere is relevant merely because it “could potentially touch on the purpose of the legislative provision in question”.¹¹⁶ The threshold for relevance is higher than that. In our case (says the naïve interpreter), only the remarks of the PCRC on *Gammon* pertain directly to the meaning of sections 26H(1)-(2). It is illegitimate to read any more into the extrinsic material.

Unfortunately for the Naïve View, it is mired in difficulty. Specifically, it offers nothing to help judges navigate the grey area between the presence and absence of *mens rea*. As inscrutable as the common law may be, it is still preferable to a doctrinal vacuum. If the Naïve View is correct, then section 26H might extend to crimes for which strict liability would be deeply unfair. Delicate questions would then be raised as to whether Parliament intended to go so far. For example, the offence of kidnapping

¹¹² *Parliamentary Debates Singapore: Official Report*, vol 94 (6 May 2019) (Speech of Mr Amrin Amin).

¹¹³ PCRC Report, *supra* note 6 at 192, 193.

¹¹⁴ In ss 24, 25, 26A respectively.

¹¹⁵ *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 (CA) at para 70.

¹¹⁶ *Ibid*; *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (CA) at paras 52, 53. For a discussion, see Benny Tan, “Statutory Interpretation in Singapore—Another Ten Years On: A Synthesis of Current Law and Review of Developments” (2021) *Sing Ac LJ* 1 at 15.

from lawful guardianship is committed by “[w]hoever takes. . . any minor under 16 years of age. . . out of the keeping of the[ir] lawful guardian. . . without the consent of such guardian”.¹¹⁷ In 2006, the High Court ruled quite rightly that the kidnapper’s motive is irrelevant, but it was not disputed that the taking has to be intentional.¹¹⁸ This may seem like an obvious point—how can one kidnap negligently, much less without any kind of guilty mind?—but the words of the offence are ambiguous. By contrast, it is clear that I do not commit theft unless I take someone’s possession intentionally and dishonestly.¹¹⁹ It is conceivable, then, for the driver of a school bus to ‘take’ a child, say, as part of a group of children, without giving it any thought. The Naïve View cannot explain why this driver has not committed kidnapping—why the word ‘takes’ implies *mens rea*.

In some cases, the naïve interpreter of section 26H can possibly make do by calling upon the ordinary meaning of more specialised terms of *actus reus*. Consider the class of offences that may be committed “against the President’s person”, specified in section 121A of the *Penal Code*.¹²⁰ Anyone is guilty who “plans the death of or hurt to or unlawful imprisonment or restraint of the President”—but with what *mens rea*? Ordinarily, ‘planning’ means thinking and making conscious decisions about something. It is necessarily an intentional act. Any other interpretation is clearly untenable. So, the Naïve View survives on this occasion.

But most verbs fall somewhere between ‘plans’ and ‘takes’ in their connotation of *mens rea*. A famous example is from *Sweet v Parsley*,¹²¹ where the issue was whether a landlord had “permit[ted] [her] premises to be used for the purpose of smoking. . . cannabis”, contrary to the United Kingdom’s *Dangerous Drugs Act 1965*. For Lord Diplock, “the word ‘permits’ . . . in itself connotes as a mental element. . . knowledge or grounds for reasonable suspicion. . . that the premises will be used. . . for [the illegal] purpose and an unwillingness. . . to prevent it.”¹²² For Lord Wilberforce, on the other hand, support for the same conclusion was not found in the word “permits” per se, but in analogous legislation with more discernible *mens rea*.¹²³ Similarly, in a Singaporean case on the duty of a management corporation to ‘maintain’ public toilets, the degree of fault implied by the word ‘maintain’ could not be determined linguistically.¹²⁴ The High Court decided that the issue had to be approached normatively, and with reference to previous cases in which similar industrial duties were held to require proof of negligence. The “strong public interest” of public hygiene, said Yong CJ, had to be weighed against the onerousness of the duty imposed on the managers of public toilets. Strict liability was too onerous; negligence liability was acceptable.¹²⁵

This brings us to another problem with the Naïve View: how does section 26H interact with decided cases on the fault elements of specific offences? Does it

¹¹⁷ *Penal Code*, s 361.

¹¹⁸ *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR(R) 40 (HC) at paras 59-61.

¹¹⁹ *Penal Code*, s 378.

¹²⁰ These are equivalent to offences of treason in other Commonwealth countries.

¹²¹ [1970] AC 132.

¹²² *Ibid* at 165.

¹²³ *Ibid* at 160, 161.

¹²⁴ *Management Corporation Strata Title Plan No 641 v Public Prosecutor* [1993] 1 SLR(R) 568 (HC).

¹²⁵ *Ibid* at paras 11-17.

reinforce or overrule those cases, or does that depend on whether the *Gammon* test was used? No answer can be found in Hansard or the PCRC Report. Nevertheless, the Naïve View is clearly caught between a rock and a hard place. Remember: the lay understanding of the law is supposed to be paramount. If the decided cases are still good law, then much of the law is still divorced from the words on the statute books. Yet if some or all of the pre-reform cases have been overruled, then the lay person is now in an even worse position to predict judicial practice. Such is the difficulty with the Naïve View that the Obtuse View seems impeccable by comparison, though it is clearly not. If section 26H leaves the *Gammon* test untouched, that means Parliament has legislated in vain, and we are generally obliged to avoid such interpretations.¹²⁶

B. *Diagnosis*

How did this frustrating situation arise? Section 26H resembles a provision in the *Criminal Code Act 1995* of the Commonwealth of Australia (the “Australian Code”),¹²⁷ which states:

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
 - (a) there are no fault elements for any of the physical elements of the offence; and
 - (b) the defence of mistake of fact . . . is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
 - (a) there are no fault elements for that physical element; and
 - (b) the defence of mistake of fact . . . is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.¹²⁸

The PCRC reported that this provision inspired its recommendation.¹²⁹ A nearly identical formulation also appeared in a “Model Code for Singapore”, which was proposed by local academics in 2013 and consulted by the PCRC.¹³⁰ There is therefore no doubt about the origin of section 26H, but only how and why it differs in construction.

It turns out that the difference is twofold. First, the provisions in the Australian Code and Singaporean Model Code are both accompanied by separate provisions on

¹²⁶ *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (CA) at paras 38, 71.

¹²⁷ No 12 of 1995, *ie*, the Code governing federal crimes as opposed to state crimes.

¹²⁸ *Ibid*, s 6.1.

¹²⁹ PCRC Report, *supra* note 6 at 191.

¹³⁰ *Ibid* at viii; Chan, Yeo & Hor, *supra* note 4 at 139.

“default” fault elements. Under the Australian Code:

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.¹³¹

As mentioned, the PCRC declined to recommend the same model for the *Penal Code*. As a result, section 26H has to serve a function that its counterparts do not: on top of telling us what to do with offences of strict liability, it has to guide our interpretation of statutory offences that are silent on fault. The fact that the same words must convey two distinct functions is what makes it so difficult to find a sensible interpretation for the section. To put it differently, the PCRC made a mistake by recommending a truncated adaptation of the Australian legislation. In focusing on the drawbacks of a default fault element, the Committee either overlooked or ignored the ramifications of omitting such a provision.

The other facet of the novelty in section 26H is that it reverses the conditional language in its Australian counterpart. Notice that the Australian Code specifies (in section 6.1(1)(a)) that *if* an offence-creating law provides for strict liability, *then* that offence has no fault elements. This construction is consistent with the purpose of the regime, which is to place the onus on the legislature to make ‘specific provision’ for strict liability. If specific provision is not made, the default fault elements (in section 5.6(1)) kick in.¹³² Singapore’s section 26H(1) turns this logic on its head by specifying that *if* an offence-creating law has no fault elements, *then* that offence is one of strict liability. In Singapore, therefore, the question to ask in statutory interpretation is whether an offence-creating law provides for a fault element, and not whether it provides for “strict liability” in so many words. And since there are no default fault elements, no onus is placed on the legislature to clarify its intention. So, if an offence-creating law is ambiguous as to fault, then section 26H(1) begs the question.¹³³

We may never know if this logical reversal was deliberate. Perhaps the PCRC wanted to push ahead with a recommendation despite an internal disagreement over the question of default fault elements. All things considered, there is ample evidence that we are looking at an unfortunate result of the banal compromises inherent in

¹³¹ *Supra* note 127, s 5.6. The provision in the Singaporean Model Code is similar, but it specifies a fault element of knowledge for physical elements consisting of circumstances or results. It also includes a mechanism for extrapolating an explicit fault element in an offence to every physical element of the offence where it is unclear how the fault element is meant to apply: Chan, Yeo & Hor, *supra* note 4 at 113.

¹³² This is the Australian government’s own interpretation of the law: Australian Government Attorney-General’s Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (Sydney: Australian Institute of Judicial Administration, 2002) at 87, 119, online: Australian Government Attorney-General’s Department <<https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners>>. See also Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law*, 3d ed (Pymont: Thomson Reuters, 2010) 214.

¹³³ Likewise for s 26H(2), which corresponds to and reverses the logic of the Australian s 6.1(2)(a).

committee work. Certainly, no blame can be attached to anyone for this state of affairs, any more than the messiness of the common law can be placed at the feet of any judge. But the point here has been to understand the complicating effects of codification, just as we have explored the similar tendencies of judicial practice and academic discourse. What connects the *CLRA* to the deeper background of the law is perhaps that ‘clarity’ can be remarkably elusive. At least, clarity in conceptual or semantic terms—in terms of what strict liability is, or ought to be—is typically achievable only in part, and not without cost to doctrinal integrity. When the law has a history of complexity, it does not become clear simply because someone (even Parliament) wills it so. In those circumstances, legal clarity is a process—an ongoing intellectual and professional conversation—in which a question is raised as soon as another is answered. Accordingly, the *Penal Code* definition of strict liability is best seen as part of that process. It is a milestone in the pursuit of clarity, but not nearly a definitive answer to everything.

C. A Possible Solution

The persistence of complexity is precisely why we must be cautious and pragmatic moving forward. The task at hand is as follows: we need an interpretation of section 26H that (1) is logical and grammatical; (2) reflects its legislative intent as much as possible; and (3) is reasonably transparent to lay people. These objectives are interconnected, and they all relate to the extent to which section 26H should be deemed to have displaced the common law. In other words, section 26H needs to be interpreted in a way that gives it every chance of being useful for as long as it is in force.¹³⁴ With that in mind, I propose that the following be accepted as true statements of the current law:

- (1) *There is no longer a presumption that every offence has a fault element, but neither is there a presumption that offences without explicit fault elements are strict in liability.* Section 26H, specifically sub-section (3), requires the courts to approach each statute and subsidiary regulation from a position of neutrality. Specifically, an offence is not more (or less) likely to contain a fault element merely because it is (or is not) “truly criminal” in nature, or because it pertains (or not) to a matter of social concern. Under section 26H, there are no such categories, but only an implicit instruction for judges to look to the intrinsic and extrinsic indications of the meaning of a provision. The indications will vary from provision to provision. Thus, the substantive rules of the *Gammon* test are discarded. What remains is a general requirement of purposive interpretation. As Lord Morris observed in *Sweet v Parsley*, “The question must always be—what has Parliament enacted?”¹³⁵
- (2) *If a court had ruled before section 26H came into force that an offence is or is not strict in liability, the decision stands.* For reasons of certainty and

¹³⁴ To avoid doubt, s 26H came into effect on 1 July 2020. It was one of the last sections of the amended *Penal Code* to come into effect, alongside ss 3(b), 25, and the rest of s 26: *Criminal Law Reform Act 2019 (Commencement) (No 2) Notification*, No S 520, Government Gazette (26 May 2020).

¹³⁵ [1970] AC 132 (PC) at 153.

transparency, Parliament did not intend for section 26H to dislodge settled law. Competent courts may still overrule or depart from prior authority on a case-by-case basis, but they should do so for other reasons than the blanket effect of section 26H, for there is no such effect. For example, a court may decide that a word in a statute has been misconstrued. But the question of whether an offence carries strict liability should not be reopened on the sole basis that a previous court applied a now defunct common law test. This reasoning is supported by my observation (above, in Part Two) that the judicial use of *Gammon* was inconsistent prior to the *CLRA*. It would create too much uncertainty to say that some pre-reform decisions have been overturned but others have not.

- (3) *An offence may be ruled to be strict or not strict in liability by analogy to offences in decided cases.* This principle is a corollary of the two principles above. Under section 26H, it is still perfectly legitimate for the courts to consider the subject matter of any offence for the purposes of treating like cases alike. As we have seen, some pre-reform cases have already clustered into subject-matter categories irrespective of the more artificial distinctions in *Gammon*. There is no reason why this cannot continue. Over time, strands of abstraction may possibly re-emerge in the case law. The courts may decide, for example, that offences of obstructing public officers will not typically be strict in liability. They already came close in *Frederick Foo* and *Lieu Yong Liang*. Such outcomes of analogical reasoning can only be a positive development. They will not violate section 26H as long as the courts stop short of rediscovering a *Gammon*-style presumption of *mens rea*. This, I think, will strike a balance between a code-led and court-led regime. Code or no code, judges cannot be prevented from developing rules and categories, many of which lay people (and indeed lawyers) will scarcely be able to anticipate. This is not a failing but a necessary feature of the law.
- (4) *Should all else fail, the principle of strict construction or doubtful penalisation may be applied to preclude convictions without proof of mens rea.* It is well accepted that if the meaning of an offence-creating provision remains unclear despite a court's best efforts at interpreting it purposively, then the provision should be construed in favour of the accused.¹³⁶ In cases involving section 26H, that means strict liability should not be found. To be sure, strict construction has only benefitted the accused in one Court of Appeal case in recent years.¹³⁷ This is true to its nature as a tool of last resort. It is worth considering, nevertheless, whether this principle might see more action in the context of strict liability. If it does, that would suggest section 26H has failed to clarify the law. Further amendments in line with the Australian Code or Singaporean Model Code might then be a more stable long-term solution. In the meantime, we might regard strict construction as a watered-down version of a codified set of default fault elements. Both doctrines are supposed to trigger in times of uncertainty. But strict construction requires

¹³⁶ *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 (CA).

¹³⁷ *Kong Hoo (Pte) Ltd and another v Public Prosecutor* [2019] 1 SLR 1131 (CA). As noted by Benny Tan, "Statutory Interpretation in Singapore", *supra* note 116 at 12.

more uncertainty: it calls upon judges to take more interpretive steps before it will trigger. In extreme cases, the accused will be protected either way. In most other cases, however, strict construction will give judges a freer hand to seek the kind of ‘nuanced’ outcomes envisioned by the PCRC and Parliament.¹³⁸

There remains a possible concern that this interpretation of section 26H does not accord *mens rea* its traditional place at the heart of the criminal law. The idea that criminal liability should presumptively accompany a guilty mind is arguably still important in a symbolic way, even if it has not been a reliable predictor of judicial decisions for some time. Yet if Parliament has decided to suspend that tradition—and it seems it has—then that should really be the end of the matter. Nothing would disturb legal certainty more than the judicial skirting around of the will of the legislature. It is, in my opinion, better for the traditionalists among us to trust that what Parliament can do, it can also undo or redo. Should another opportunity arise to amend section 26H, it may well be strategic to put the doctrine of default fault elements back on the table. For my part, however, I think the contingency of *mens rea* is a reasonably tolerable proposition, and the four guidelines proposed above would ensure almost as much fairness in the law for much less political capital.

IV. CONCLUSION

The objective of this article has been to explore the effects of section 26H of the *Penal Code* on the theory and practice of strict liability. As I have argued, the least that can be said for section 26H is that it clears up some historical infelicities of terminology. When a concept governs much of the law in a code jurisdiction, but has meant different things to different people, it is certainly better for it to have a codified definition. Now that section 26H has cemented the ‘elemental’ view of strict liability to the exclusion of what I have called the ‘rejectionist’ position, further comment on the law and proposals for reform can at least be reduced partly to a debate over statutory construction. As an intellectual anchor in that general sense, the value of section 26H is quite apparent.

On the other hand, it will take a determined judiciary and criminal bar to make section 26H work properly in the courtroom. It cannot be over-emphasised that the most straightforward interpretations of the section are either somewhat unappealing (as in the conservative, Obtuse View) or utterly destructive (as in the radical, Naïve View). Those interpretations should be resisted, but so must the temptation to take an entirely passive approach to the issue. By that, I mean the eventuality that the *Penal Code* definition of strict liability is cited simply to tick a box, and to support whatever conclusion is reached by other means. That, if nothing else, would probably precipitate a reversion to the pre-reform era of doctrinal confusion. As we have seen, the problem is that the wording of section 26H makes its proper interpretation an uphill battle. Nevertheless, this is a battle that needs to be fought.

¹³⁸ See above, discussion accompanying note 113.