DERBY UNIVERSITY

SCHOOL OF LAW AND CRIMINOLOGY

WILMOT LECTURE 2012

When Kevin Bampton, as Head of the School of Law and Criminology, was kind enough to invite me to become associated with Derby University, my first thought was to doubt whether I would be able to contribute anything of value to the work of the faculty. But I agreed to visit the University in order to form a view, and spent a couple of delightful days here meeting staff and students of the School of Law and Criminology. The result was that I was fully confirmed in my view that I have little or nothing to offer to the faculty; but I was so excited by its atmosphere and work that the temptation to agree to masquerade as an academic was simply irresistible. So here I am.

I hope I will be forgiven, therefore, for introducing my remarks by simply noting that it seems to me, as an outsider, that what Kevin Bampton, Joel Klaff and your colleagues have created here in really a remarkably short space of time, in institutional terms, deserves the admiration and attention of the wider academic community.

My first impressions of the Derby School of Law and Criminology were of immense dedication: of students dedicated to their studies and teachers dedicated to their students. Sir John Eardley Wilmot would be immensely proud of this atmosphere of concentrated seriousness: as he wrote to the son of a friend, John Michell, in 1780: "Whatever measure is finally resolved upon, let me advise a steady perseverance in it; for a fluctuation of purpose defeats, or at least cripples and retards, the best-concerted plans of advancement." He was not bigoted enough to think that the field of study mattered particularly, provided that it were followed with both zeal and grace: as he wrote in the same letter – "Your time is very properly disposed of, and I cannot amend it; but I think it should soon be determined whether you are to starve in the Law, or fatten in the Church: the Grecian and Roman Orators will do for either; but as you are, at all events, to speak in English, I advise you to study it intensely, and endeavour to catch the grace, as well as the arrangement of it." Excellent advice for today's electronic world, when as communication finally takes the place of thought, deployment of the English language concentrates on fitting as many half-baked concepts into as few texted letters as possible, rather than on drawing on the rich potential of our language for the expression of fine nuance.

Incidentally, since I am permitting myself this brief aside, it will be salutary to note that if there were one field of study to which Sir John was averse it was the study of politics as an academic discipline: as he wrote – "I was very glad to hear by yours of the last month, that you have renounced all politics. The benevolence of the human mind is more disturbed, and the understanding more perverted by them, than by all the other passions grouped together. It is a science to be left to the few whose business it is to profess and practise it. It is full as dangerous as children playing with gunpowder." Nowadays, of course, we have come to realise that there is nothing particularly dangerous about children playing with gunpowder.

Chief Justice Wilmot was one of those rare individuals whose dedication to the legal profession was founded on an understanding of how much he could contribute to it, and not on how much he could get out of it. In the same way, it was immediately apparent to me that the philosophy of the Derby School of Law and Criminology is a concentration on preparing students in as practical manner as possible to determine what each is able to contribute in his or her special way to a lifetime in the law.

There are, of course, few if any academic disciplines in which the preparation of students goes more quickly or more fundamentally to the heart of the preservation of civilised society. There is an ancient saying of Jewish law, found in the Mishnah in Tractate Avoth, to the effect that all the residents of a country should pray for the welfare of the State and its institutions, irrespective of their individual political, ethnic, religious or social affiliations, simply because without the power of the State "people would swallow each other alive".

Chief Justice Wilmot was never in any doubt as to the pivotal importance to society of the rule of law, and the importance of decent and honest professionals occupying themselves with its study and

administration. In sentencing John Williams for political libel aimed at inciting disobedience to the law, in August 1763, he said as follows: “Liberty can exist only under an empire of laws, made with the concurrence of the people; and therefore cannot be more dangerously wounded than by the resistance encouraged and applauded in this Paper.”; he said also in that verdict “Liberty arises out of obedience to the Laws, and a due execution of them … Resistance to the execution of a law, not only disjoints the whole frame, but tends to the immediate dissolution of all Government, and therefore is a most malignant species of High Treason.” Thereby neatly encapsulating the distinction between liberty of speech and incitement to crime, a distinction as often tested today as then.

Society is a fragile being, never far away from breakdown. If from time to time we witness glimpses of that breakdown – youths rioting and looting in the streets of London, or politicians using their elected office as a cloak for simple theft and fraud – we quickly remind ourselves that it is the rule of law that stands between us and those glimpses as a permanent state of affairs. It is the rule of law that is able to arrest and detain the wrongdoers, whether they are the unemployed and disaffected 16-year old who stole a pair of trainers or the former Minister of the Crown who has fiddled his expenses (as Chief Justice Wilmot wrote in his charge to the jury in the Halifax trial in 1769, “The Law makes no difference between great and petty Office. Thank God, they are all amenable to Justice, and the Law will reach them if they step over the boundaries which the Law has prescribed.”); it is the rule of law that protects the magistrates who try them and the Crown Court judges who sentence them; it is the rule of law that ensures that the victims of crime, from the owner of the shoe-shop to the tax-paying public who fund Parliamentary allowances, are able to secure their restitutionary rights, whether under contracts of insurance, under State-funded schemes for criminal compensation or from the criminals themselves and their proceeds of crime.

Perhaps the only source of consolation when the lawyer considers the fragility of ordered society today is to reflect that it has always been so. As Chief Justice Wilmot wrote to his son in 1770: “I am very sorry to tell you, that this nation is of late grown so licentious, and deals abuse out so liberally upon the characters of all ranks and degrees of men; and there is such a malignity of temper, and avidity for detraction and obloquy, as I am afraid will end in destroying that subordination to law and government, which is the true and only source of the happiness of a people”.

And yet here we still are; and if it is only law and the rule of law that has brought us through the intervening years, controlling and containing this always fragile balance of forces, it is law imposed not by a dictatorship against which citizens are constantly motivated to rebel, but by the common and tacit consent of society as a whole. The rule of law is in essence part of the social contract, justifiable only as part of the bargain between the citizen and the State, whereby the former surrenders a degree of autonomy and promises a degree of obedience to the latter, in exchange for clear benefits.

As Chief Justice Wilmot wrote in a paper on taxation in 1765, “The first principle in the system of political science is, that all political Government is founded and bottomed upon the consent of the People. Though force and violence cleared the way for many Establishments, yet intervening compact and agreement is the only solid basis of the ‘right to command,’ which is the supreme power, and of the corresponding ‘obligation to obey,’ which is the duty of the governed. That government fixes the right of declaring the will of the whole association in one or more select persons, or bodies of men, and also the right of applying the strength of the whole association to enforce obedience to it.”

As with all contracts, clarity is the essence of the arrangement. If the citizen is to be expected to observe the social contract, and to respect and support the rule of law that underpins it, then the citizen must know the terms of that contract and be able to feel that he or she is not being asked to sign a blank cheque.

In part, this is a compelling reason for there being proper arrangements made for access to the law. That not being my subject on this occasion, I will not pursue that line of thought further than simply remarking in passing that it is both startling and unacceptable that even in this electronic age the United Kingdom Government has still not made effective arrangements for communicating to the citizens the laws which they are bound to observe. Almost every other country in the world for which I have drafted laws or conducted legal training has made proper arrangements for the communication of its laws to its citizens, many of them under much greater pressure of resources than Her Majesty’s Government. It is appalling that people are expected to obey laws which they can access only in an out-

of-date (and therefore worse than useless) form, or by spending money to subscribe to one of the commercially published editions of the statutes (excellent though some of those are!). And there are distinct signs, some of which I have written about elsewhere, that the patience of the courts for this state of affairs is growing increasingly thin, and that in a number of ways they may not permit it to continue much longer. All that, however, is not the aspect of the clarity of the rule of law on which I wish to concentrate this evening.

Clarity of the law requires effective communication, but it also requires inherent coherence of the law which is to be communicated.

In Chief Justice Wilmot's days there was sometimes too great an emphasis on forms and process in the law, and this led to an inflexibility, and a multiplication of anomaly, that was of course ultimately the motivation for the liberalisation of form and procedure in the Judicature Acts. But those Acts never attempted to disturb the fundamental methods by which laws could be classified and categorised.

None of these classifications should be allowed to become rigid or inflexible, if form is to remain properly subservient to substance. But the classifications remain effective and serviceable, if nothing else as aids to clarity of thought in construing and applying the law.

Long before Laws LJ's necessarily doomed attempt in Thoburn v Sunderland City Council [2002] EWHC 195 (Admin) to encourage the production of a definitive list of constitutional statutes, judges were eminently capable of recognising a constitutional flavour to an Act or provision, and of approaching and applying it in a manner which reflected its nature.

Equally, long before the Human Rights Act 1998 substituted for the eminently serviceable notions of good law and bad law – not objectively describable but instantly recognisable by all good Law Officers and those who advised them – the more definitive but infinitely less serviceable notion of compliance with the European Convention on Human Rights as interpreted by reference to a necessarily arbitrarily circumscribed set of Strasbourg precedents; long before that time the courts were eminently capable of recognising enactments that protected or encroached upon fundamental human rights, and of interpreting and applying them accordingly.

In the same way, there was until very recently a tolerably clear distinction between the criminal and the civil law. Again, it was a question of substance and not form: what mattered was not whether a particular set of words was used, but the nature of the legislative proposition that they enacted. As Chief Justice Wilmot said in a paper on taxation in 1765, "It may be said that there is a difference between a Law which hinders me from increasing my fortune twenty pounds in a hundred, and a law which takes twenty out of a hundred already gotten. It is a difference in words, but not in substance; for I have twenty pounds less in both cases than I should have had, if no such law had been made."

It is entirely consistent with the necessary pre-eminence of substance over form, for a standard set of expressions and approaches to be used in the formation of new law; and they are important in order for citizens, lawyers and judges to be able readily to identify the legislative intent behind new forms of prohibition or regulation. Although the forms themselves have changed over time, it has for centuries been accepted that the creation of a criminal offence requires clear words, invoking the concept of an offence, and a clear application of one of the available forms of criminal sanction. Although in older statutes one encounters language of prohibition without an express criminal sanction, there were standard forms of action which those provisions were able to engage implicitly.

What is indispensable is that in making provision about a class of activity the legislature must be clear and unequivocal as to what it is attempting to achieve. In this respect, civil penalties show muddled legislative thinking, and cannot be expected to be treated with a respect that they do not deserve.

In essence, the legislature in imposing a civil penalty has not made up its mind whether it is prohibiting an activity or merely taxing it. These are two entirely different kinds of law, and, as Chief Justice Wilmot expressed it in 1762, "we must not confound the modes of proceedings … We must give that energy to each, which the Constitution prescribes. In many Cases, we may not see the correspondence

and dependence which one part of the system has and bears to another; but we must pay that deference to the wisdom of many ages as to presume it".

If I want to prevent people from parking on yellow lines at certain times, then I should make it a criminal offence to do so; and if a person is caught parking at the wrong time on a yellow line, he or she should be convicted of a criminal offence. Since it is a relatively trivial offence (unless I happen to be the motorist whose life-threatening accident is caused by an accident arising from the restricted field of vision left to me as the result of the obstruction caused by unlawful parking) its triviality will be reflected by its being tried only by a magistrates' court, and, in order to improve the efficiency of justice for everyone's benefit, on the papers alone unless the defendant particularly feels the need of a hearing; and the eventual conviction is likely to avoid many of the practical undesirable consequences that attend conviction for other offences that society regards as more serious (although if the legislature is thinking clearly it should not be prohibiting any activity that does not have the potential to cause serious personal damage or social disruption).

If I do not particularly want to prevent people from parking on yellow lines, but I want to charge people for doing so in order to share out the space equitably and prevent the first comers from keeping everyone else away, then I should institute not a penalty – civil or otherwise – but a straightforward charge, enforced in the same way as any other debt. Or, better still, simply prohibit people from staying beyond a certain time, if I have the technological and other resources to enforce the prohibition in a proportionate way.

And if I don't want to regulate parking at all, but simply to ensure that those who benefit from publicly-provided facilities for it pay a contribution towards the consequent charge on public funds, then I should impose a tax, or better still a hypothecated levy.

It is the muddled thinking represented by the oxymoronic civil penalty that rightly attracts the contempt of the citizen. Law-abiding drivers do their utmost to evade parking fines; people who would not dream of evading the smallest debt properly incurred or of infracting the slightest criminal injunction properly enacted, will happily engage in evasion of what they instinctively appreciate as a law that is somehow distasteful and improper. The citizen who sees a dishonest attempt to levy a tax behind a purported exercise of traffic regulation considers himself or herself a more honest citizen than those who imposed the "stealth tax", when he or she successfully evades it.

The muddled thinking behind civil penalties has led to their being the source of considerable secondary confusion of a dangerous kind. In particular, it is common for arrangements for civil penalties to include what may be described as a discount for early settlement. This can also be described as a penalty for seeking justice, since in many cases the lower sum is available only to someone who does not choose to assert the right to challenge the imposition of the penalty through some kind of adjudicator. The implication is clear: justice has to be paid for. If you want your relations with the Executive authority to be quick and cheap, then pay up and shut up: if you insist on justice being done, then be prepared to pay for it. Chief Justice Wilmot would, I am convinced, have spoken vociferously against an arrangement that subordinates justice to efficiency. The courts today have shown willingness to uphold access to justice as the fundamental underpinning of the rule of law, and to strike down, for example, court fees that have the effect, if not the intention, of making the Royal Courts of Justice as open as the Ritz hotel.

By the use of two examples I may be able to demonstrate the depth and breadth of the damage done by the creation of a hybrid class of non-criminal penalties.

My first example is so technical that at first sight it may seem of relatively little importance; but on examination it clearly presents a potential for significant Governmental abuse.

The European Communities Act 1972 gives necessarily wide powers for Ministers of the Crown to make subordinate legislation for the purpose of giving effect to obligations of the United Kingdom arising from membership of what is now the European Union. As is well known, the power under section 2(2) of the 1972 Act is broad enough to permit Ministers, in effect, to do by secondary legislation anything that could be done by an Act of Parliament. Orders and regulations under section

2(2) may be subject to either negative or affirmative resolution procedure and therefore at best will have a cursory scrutiny in both Houses and, at worst, will have effectively no substantive scrutiny whatsoever.

In order to place some safeguards upon this power, therefore, the 1972 Act imposes some conditions and limitations on what may be done under it. In particular, although an Order or regulations may provide for a new criminal offence and may amend an existing criminal offence, they may not create a new criminal offence which is punishable by a fine greater than the statutory maximum on summary conviction. The statutory maximum presently stands at £5000.

The 1972 Act makes, of course, no provision whatsoever for the size of civil penalty that may be imposed by regulations or an Order under section 2(2), simply because when the 1972 Act was passed this particular hybrid had not been invented. Nor would John Fiennes, the venerable draftsman of the 1972 Act, have been able to conceive that the Government would invent, or would be allowed to invent, such a monstrous creation.

The result is that recent statutory instruments made under the 1972 Act have provided for the imposition of civil penalties well in excess of the maximum fine that could be imposed. To give a particularly egregious example, the electronic Communications and Wireless Telegraphy Regulations 2011 (S.I. 2011/1210) provide for a civil penalty not to exceed £2 million. Technically, these regulations and Orders are entirely intra vires. Is it, however, conceivable that Parliament in 1972 intended Ministers to be able to impose penalties of millions of pounds without parliamentary scrutiny when they were not prepared to allow them to impose a maximum fine of greater than a few thousand? The absurdity of the situation becomes even more stark when one considers that at least, in the case of a criminal penalty, the case will go before the courts, whereas in the case of the imposition of a civil penalty, it will be an executive function of a single body – in many cases in reality a single quite junior individual – who will be entirely responsible for imposing the penalty, or, in reality, the fine.

It is not conceivable that Parliament would have intended such use to have been made of the 1972 Act had the possibility being drawn to their attention at the time, and I see this simply as early illustration of the fact that civil penalties have been allowed to develop in a way that would not and should not have been contemplated by those with a clear grasp on the distinction between the criminal and civil law.

As a draftsman of law for the Government, when deciding where to draw the line between quibbles of a technical nature that I should preserve as a source of private righteous indignation and matters that were worth making a nuisance of myself over, a test that I applied increasingly often was that of asking myself whether a Government that wanted to subvert the rule of law in some way would find a useful opportunity in the provision that I was creating. Clearly, the use of the novel form of a civil penalty in order to evade the checks and balances that have been developed in our criminal law over centuries, is exactly the kind of tool that facilitates despotism; and the incorporation of this technique into instruments under section 2(2) of the 1972 Act is a clear instance of form being preferred over substance in order to evade clear limitations on Ministerial power attached by Parliament when the power was delegated.

One possible distinction between provisions providing for what is described as a civil penalty and criminal offences is that the latter class necessarily and clearly involves and implies disapprobation by the public of the behaviour concerned, whereas the former does not necessarily do so.

The problem is, of course, the word necessarily.

Civil penalties are found in situations where some element of disapprobation of the conduct is clearly at least part of the underlying policy. Equally, they are sometimes found in situations where it is at least possible that the policy is not to condemn the behaviour but merely to reflect incidental or consequential loss caused to others by it. In reality, however, the situation is simply confused.

To give one other brief technical example before coming to what I described as the more human story, in the Police (Conduct) Regulations 2012 (S.I. 2012/2632) a list is set out in Schedule 2 of the

standards of professional behaviour expected of police officers. Under the sub-heading of "Discreditable conduct" one finds the following statement of expected behaviour by the police: "Police officers report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice". If civil penalties are clearly non-judgmental and do not express disapprobation of the behaviour concerned, then why should police officers be expected to disclose them to their employer? One notes, for example, that the provision does not require them to disclose incidence of debt, including civil debt that may have been found against them in the course of truly civil proceedings. And, of course, we are all familiar with being required to fill in forms in the course of which we are required to disclose any previous criminal convictions: and we are equally familiar with the qualification frequently appended to that requirement, to the effect that it does not require us to disclose convictions for traffic offences or the imposition of penalties. But if a civil penalty is sufficiently a cause of opprobrium, or indicative of disapproval, to require disclosure by a serving police officer, why is it not imposed through the processes, and subject to the checks and balances, of the criminal law?

My second example is of a human story where one can easily sympathise with the emotions and sentiments expressed but which, again, shows the possibilities for abuse that are now inherent in the lack of a distinction between the criminal and the civil law. However readily one understands it as a matter of emotion, however, as a matter of jurisprudential analysis, or of the proper machinery of government, it was on its face an entirely extraordinary event. The Attorney General of the time, Baroness Scotland of Asthal was found to have employed as a domestic assistant an immigrant worker who did not possess the required permission to work in the United Kingdom. In particular, she failed to comply with regulations requiring her to obtain a copy of the worker's passport before employing her; had she done so, of course, the lack of the right to work in the United Kingdom would have been apparent. Inevitably, she was called upon to resign as Attorney General when her breach of the relevant regulations became public. In explaining her decision not to resign, she said "This is a civil penalty, just as if you drive into the city and you don't pay your congestion charge or you overpay. It's not a criminal offence. I made an administrative technical error …"

One entirely and instinctively sympathises with the sentiment expressed: the action complained of does not feel "criminal" by any natural measure of the term. And yet it was a prohibition, not a mere tax on behaviour or regulation of how to behave; and it was breached. As one of the Law Officers responsible for the protection of the rule of law and the promotion of respect for the rule of law within the United Kingdom, Lady Scotland was second to none. Her answer, that everybody knows this was merely a technical infraction and that it did not imply any kind of culpability of the kind associated with criminal behaviour, was entirely consistent with her reputation for honesty and integrity; but it once again shows how the law has been allowed to bring itself into disrepute by the adoption of forms that do not clearly reflect the reality; and by a failure to identify the policy as a matter of legislative classification before rushing into legislation.

The following passage of the judgment of the Court of Appeal in R. v Hamer [2010] EWCA Crim 2053 shows that as well as citizens and politicians, the courts are also having to grapple with the confusion caused by the disintegration of this once-well-understood distinction: '' . . . it appears that the use of the term 'justice' has produced a confusion, as the delivery of justice implies the admission or determination of guilt and not the mere issuing of a notice of a penalty based on reasonable suspicion. It is correct to describe Fixed Penalty Notices and PNDs as punishment for suspected offending, or a deterrent, as they plainly do deter. However, it seems to us to cause confusion, and may well have caused confusion in the present case, by the assumption that the issue of such a notice is some form of 'swift, simple and effective justice' which it is not in the ordinary sense of these terms. It is quite clear that the issue of a notice is not a conviction. It is not an admission of guilt nor any proof that a crime has been committed. The scheme of the Act makes that clear. Any person reading the form would plainly understand that it is not to be regarded as a conviction and will not be held against him save in the respect mentioned. It seems therefore clear, both as a matter of the statutory scheme and as a matter of what a person accepting such a notice would reasonably be led to believe, that he was not admitting any offence, not admitting any criminality, and would not have any stain imputed to his character.'' The only part of that judgment with which one is tempted to disagree is that anything is clear.

Although mindful of the hour and the need to leave plenty of time for people to disagree with me, I wish to offer another technical but important way in which the present legal structure is ill-equipped to reflect or deal with the increasing failure to observe a clear distinction between civil and criminal proceedings.

For well over a quarter of a century, the Rehabilitation of Offenders Act 1974 has established the fundamental principle that people are entitled to be given a second chance, and that this right is to be protected against the operation of human prejudice. As a result, former criminals have a statutory right to tell half-truths in various circumstances, by suppressing the fact of spent convictions. When the concept of a civil penalty was first suggested, there was, of course, no similar concept of rehabilitation built into it, because it was never intended that it should imply the kind of culpability that might attract the kind of prejudice against which the Act is designed to protect. Now that civil penalties are used to cover a much wider sphere of action and omission, however, it is clearly more than time that the Government looked at the implications for the civil penalties system of the concept of rehabilitation of offenders.

For example, it is absurd that if I committed a crime twenty years ago I am not required to disclose that fact to a potential employer in certain circumstances, in case he or she should be unfairly prejudiced against me; but faced with an open question about past liability for civil infractions I will not be protected to the same extent. Looked at the other way, of course, the Rehabilitation of Offenders Act contains important exceptions and conditions which are designed to protect society against the potential suppression of certain kinds of offence. Because many forms of questioning do not specifically mention civil penalties – either because those who designed the questionnaire were unaware of their existence or because they do not, unlike criminal offences, form a single system to which it is convenient to refer – in many situations a person will be asked about and forced to disclose even spent convictions without being asked about or forced to disclose past activity that was made the subject of a civil penalty and which could, depending on context, be of as much or greater relevance to the person's suitability for the purpose for which he or she is being screened as past criminal offences.

Sometimes, when one wants to work out how to begin to extricate oneself from an undesirable position, a useful starting point is to ask how did one get there in the first place. A little discussion of how civil penalties came about in different contexts may lead us to form some suggestions as to how we might reverse a damaging trend while still achieving the legitimate purposes that may have led to it.

There is no one single cause of the move towards civil penalties, but reflection on recent policy in the formation of legislation enables one to identify a range of causes, some more legitimate or desirable than others. As with a surprising number of facets of legislation, the growth of international conglomerate business is partly responsible for the perception that traditional criminal offences were insufficiently effective. It has always, of course, been a little ridiculous to think of a corporation becoming liable for a fine on the standard scale for committing an offence. Charging Sainsbury's supermarket £60 by way of a fine when a delivery driver breaches a traffic regulation may seem farcical when taken against the backdrop of the size of Sainsbury's annual accounts. For many years, however, in the formation of legislative policy it was argued that a standard scale fine was not regarded as a financial disincentive even for most individuals, and that in the case of corporations with an image to protect, the reputational damage done by a criminal conviction was alone sufficient to exercise an effective deterrent. To some extent, of course, that remains the case.

A number of environmental offences continue to be highly effective despite being the only method of enforcing a particular piece of regulation against large corporations. The finding that a multinational company has polluted a local beauty spot from one of its factories is likely to do considerable damage to the company's reputation and, therefore, at least potentially, to its business: the risk is sufficient, at least, for the reputational damage to have a deterrent effect that is probably greater than the normal deterrent effect of a standard scale fine on an individual. Proportionality, therefore, is reasonably served by having the same criminal offence apply to individuals and corporations.

Instructions to provide for civil penalties in relation to environmental regulation began, however, to speak of the cost to the public purse of remedying damage caused by behaviour in breach of the regulatory provision. Pollution of a river is a serviceable example. While the reputational risk may deter many of the largest corporations from breaching a regulation which is technically enforced only

by the sanction of a standard scale fine, the policy arguments began to focus increasingly on those corporations – often the middle sized ones – which are not deterred and which continue to pollute rivers. As we all know, politicians are largely powered by headlines: and it does not take Private Eye's Number Crunching columns to expose the apparent absurdity of millions of pounds' worth of damage from being punished by the imposition of a £5000 fine. It is a short step from there to justifying the use of a civil penalty which is capable of being measured by the authority which is responsible for remedying the breaches. And then the outraged citizen receives considerable satisfaction from seeing the Environment Agency's books balanced by a £50,000 penalty imposed to fund a clear-up operation.

But the Environment Agency is not a court. In order to be fair, never mind in order to be compliant with the European Convention on Human Rights, it will be necessary for a penalty of this kind to be challengeable through an independent court or tribunal, a process which may deter the regulatory authority from imposing an appropriate penalty in the first place. It is not, after all, only the ordinary citizen who suffers from the uncertainties of litigation. And it was never necessary to go down this uncertain and therefore potentially under-used path in order to achieve an effective penalty for crimes that cost the public large sums of money. Indeed, the statute book already has plenty of examples of criminal offences which are likely to be committed by large corporations, and for which the maximum fixed fine is in the order of tens of thousands of pounds; or where conviction on indictment brings an unlimited maximum fine. A more creative use of prosecution and sentencing policies in relation to corporate crimes could recover for the public purse the sums expended in response to the crime.

Of course, fines do not go directly into the pockets of a particular regulatory authority, and a little more creative government accounting is therefore required. But if the fundamental purpose was to find a way of penalising a corporate criminal to a degree that is commensurate with the corporate crime, it was not necessary to abandon the traditional concept of the criminal offence.

It is not only the size of international conglomerates that has been perceived as a challenge to the efficacy of traditional criminal law. Their international nature has posed new challenges for legislation and law enforcement in a number of ways, even before the advent of computers. And this has in recent years been exacerbated by the impossibility of knowing, for example, where a particular offence is committed, if the means by which it was committed consist of a computer operated in one country, through a server operated in another, belonging to a company incorporated in a third country, through a subsidiary resident in a fourth country, relying on a variety of communication channels operated in a range of other countries, and finally impacting on a number of computers located in a number of other countries. Here too, the challenge of finding a person in the United Kingdom to prosecute for a particular crime with an international flavour has often defeated traditional legislation and traditional prosecution practice and procedure. Civil penalties can have an attraction in this respect, in that provided a cooperation has sizeable assets in this country, a regulatory authority can impose a penalty and enforce it against them, without having to go through the tedious necessity of proving to the criminal standard of proof that an offence has been committed at all, and less still the necessity of proving where the offence has been committed.

The obvious example is the field of competition law, where infractions are more often than not of an international nature in one way or another, and where the perceived loss to the consumer is by definition incalculable, but is certainly unlikely to be effectively compensated for by a traditional criminal fine, to say nothing of the lack of any effective deterrent.

Massive civil penalties imposed on a civil burden of proof by an administrative body that is publicly accountable only in the most roundabout of methods, or through the unwieldy and uncertain mechanisms of administrative law, offer in one sense an attractive and easy solution to the multiple public costs of regulatory breaches of this kind. But if the regulatory body is cautious in the light of possible litigation then the penalties fail to achieve their purpose; while if it is robust or aggressive in its approach to the imposition of penalties through confidence that the balance of tactical advantage lies with it, the result is an unjust imposition of what are in effect massive criminal penalties without any judicial involvement or any of the other safeguards of the criminal justice system.

At the heart of all these unsatisfactory developments is the same lack of clarity of purpose that taints so much legislation today, much of which is framed and passed in too great a haste to allow anyone to form a clear view of what it is intended to achieve. Rapidly conferring power to impose a penalty is

sufficient for the Minister to issue a press release to the effect that he or she has solved the problem: but, as Chief Justice Wilmot said in 1762 in his judgment in the case of the election of a Dissenter to the office of Sheriff, "… punishment is not the end of the Law; it is a consequence of it; and in the exposition of a Law, great care must be taken not to mistake the consequence of a Law for the end of it".

So how has this increasing muddle emerged? In great part it is simply one aspect of a trend towards not allowing those whose expertise lies in fashioning and developing the law to get on with the job without undue interference, whether from politicians or administrators. This is simply a small part of an increasing notion that those whose business and expertise it is to handle the administration of government, lawyers and administrative civil servants alike, should take a back-seat and allow the elected politicians to do precisely as they like, acting through special advisers and other agents who can be relied upon not to challenge or question.

But whatever legitimacy elected politicians may gain from the ballot box, they do not by osmosis upon election suddenly acquire the knowledge and expertise that comes from years of experience of framing and administering the law. As Chief Justice Wilmot put it in the Halifax trial: "The Secretaries of State are not bred to the Law …".

When legal and other civil servants stopped feeling comfortable about turning to Ministers, accepting their policy but criticising their proposals for implementation, and explaining forcefully how the social policy set by Ministers could and could not properly be achieved, it was inevitable that the law would become increasingly full of error and infelicity. So far have we moved in this direction that a power conferred by the Equality Act 2010 to make consequential and incidental provision by statutory instrument was exercised in the Equality Act 2010 (Consequential Amendments, Saving and Supplementary Provisions) Order 2010 (SI 2010/2279) so as to correct errors in the Act and this was blithely explained in the Explanatory Note as being a proper use of an incidental power on the grounds that "The amendments to the Act are supplementary to commencement, in that they give full effect to one of the main purposes of the Act, namely to harmonise and restate equality law. The amendments achieve that by making minor corrections and by updating certain references to reflect recent amendments to some of the current equality provisions.'' The proposition that the making of ''minor corrections'' is a legitimate use of a power to make consequential and incidental provision is perhaps a surprising reflection of the low expectations we apparently have of the quality of primary legislation upon Royal Assent.

Worse than this, in its consultation on a General Anti-Avoidance Rule for tax law the Government are proposing that one limb of the definition of abuse should be that the tax-payer has exploited a deficiency in the law. So when the law-makers get it wrong it is now officially not just to be treated as inevitable, but citizens are expected to know better than the legislature what it intended to do, and if they do not supply its deficiencies for it they will be punished accordingly, although of course with what is in effect a civil penalty and not through the criminal justice system; perhaps in case the judges are slower than the Government would like in blaming the citizen, rather than the legislature, for defects of legislation.

It is not too late for Governments to move away from the concept of civil penalties and back towards a clear distinction between regulation and prohibition. And if we do not, it is possible that higher authorities will do it for us. The confused thinking at the heart of the notion of civil penalties has not gone unnoticed in Europe, in particular: it has been established for a number of years that the European Court of Human Rights will not take on trust from the United Kingdom legislature, by reference to the forms used, whether a matter is a question of civil rights or criminal law. Our own domestic courts, following the European jurisprudence as directed by Parliament, have concluded in a number of instances that an ostensibly civil penalty is in fact a criminal charge for the purposes of Article 6(1) of the European Convention on Human Rights – see, in particular, the rules discussed in Han v. Commissioners of Customs and Excise [2001] 1 W.L.R. 2253 C.A..

Once the confusion in our legislative thinking is being noticed and remedied by courts at home and abroad, it is clearly more than time for our own legislative policy to get a grip, and to re-establish a clear distinction between civil rights and regulation and the imposition of criminal offences.

At a time when the rule of law has perhaps never been more fragile, or society in greater need of the security and safety that the law when properly formed and administered is capable of offering, law-makers of all kinds need to re-establish clear and effective distinctions that will enhance the reputation of the legal system and thereby strengthen the salutary and necessary rule of law. As Chief Justice Wilmot put it in 1762 in the Dissenting Sheriff case, and with this I will conclude, "… we must take the whole system together, and consider all the several parts as supporting one another, and as acting in combination together, to attain the only end and object of the Laws – the safety and security of the people".

Thank you.