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0521590809 - Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK

Peter Cartwright

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Consumer Protection and the Criminal Law

Law, Theory, and Policy in the UK

To what extent should criminal law be used to protect the consumer? In this important new study Peter Cartwright evaluates the role of criminal law sanctions in consumer protection from an economic and social perspective. The author examines the rationales for protecting consumers, and considers the role that legal techniques play in fulfilling these. He then evaluates the interests that consumer law protects, such as physical integrity and economic interests. In addition, he analyses the nature of criminal law doctrines such as strict, corporate, and vicarious liability, and suggests that such doctrines require re-evaluation in the light of the reality of the corporate entity.

This study will be of interest to academics, undergraduate and post-graduate students, and practitioners.

PETER CARTWRIGHT is a senior lecturer in the School of Law at the University of Nottingham. He specialises in consumer protection, criminal law, and banking regulation. His publications include *Consumer Protection in Financial Services* (1999), as well as many articles.

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Frontmatter

[More information](#)

To Sue, Emma, and Joe

Contents

<i>Preface</i>	<i>page</i> ix
<i>Acknowledgements</i>	xii
<i>List of abbreviations</i>	xiii
1 Consumer protection rationales	1
2 Techniques of regulation	40
3 The role of criminal sanctions in consumer protection	63
4 The use of the criminal law	87
5 Consumers and safety: the protection of physical integrity	126
6 The protection of economic interests	156
7 The enforcement of regulatory consumer law	212
8 Conclusions	244
<i>Index</i>	250

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Frontmatter

[More information](#)

Preface

Consumer protection law and criminal law have both received considerable analysis from academic lawyers. The role of legal intervention with the aim of protecting the consumer has come in for scrutiny in a number of seminal works, many of which concentrate upon the role of consumer law in the marketplace. The role of criminal law has also been discussed by a large number of leading commentators, with particular attention being paid to the boundaries of criminal sanctions, and particular concern being addressed to increasing criminalisation. Against this background, it is surprising that so little has been written about the role of criminal sanctions in the protection of the consumer. The criminal law has been the prime technique used by successive post-war governments to implement consumer policy in the UK. Intervention in the civil law to protect the consumer has been less frequent, although a number of important examples of this exist. Strict liability regulatory offences, tempered by statutory defences, remain the paradigm of UK consumer protection law.

This book aims to be the first major monograph to examine the role of criminal sanctions in the protection of the consumer. Although focusing on the UK, much of the analysis in this work is relevant wherever matters of consumer policy are being considered. The book provides a critique of regulatory consumer law, by examining the objectives of consumer policy, the role of criminal law in society, and the extent to which consumer protection is an appropriate topic with which criminal law can deal. The book seeks to achieve its aims in the following ways. First, it investigates the justification for having consumer protection laws, and considers the regulatory techniques available to fulfil consumer policy objectives. Although much of the traditional analysis of consumer protection law has focused on its economic role in correcting market failure, it will be argued that the social objectives of consumer law should be given greater attention. Secondly, the book examines the role, and the use, of criminal law in society, with particular reference to the concept of the regulatory offence. There has been considerable concern from liberal criminal justice scholars at what is perceived as over-criminalisation in general, and it is

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0521590809 - Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK

Peter Cartwright

Frontmatter

[More information](#)

x Preface

largely in the regulatory field that the increase in criminalisation has been witnessed. It will be argued that while there is merit in these concerns, criminal law should retain its central function in the protection of the consumer. Rather than a policy of decriminalisation, what is needed is a reassessment of the ways in which regulatory crime operates, with particular attention being focused on the categories of defendant to whom the law applies, and the techniques by which they are held responsible.

The book next examines the law on the basis of the interests that it aims to protect. The two principal interests of concern here are physical safety and economic interests. Where physical safety is at issue, the prime aim of the law is relatively clear. It is concerned to ensure that consumers are not harmed by unreasonably dangerous products. But this simple assertion obscures a plethora of more complex matters. Product safety regulations are a way in which invidious barriers to trade may be erected under the guise of consumer protection. The legislation which contains the majority of the UK's consumer product safety law is based upon a European Directive aimed primarily at facilitating the free movement of goods. It is vital that the role of the criminal law in product safety is assessed against this economic background. Product safety law also provides a useful illustration of the social justification for intervention to protect the consumer. Although it is possible to explain much consumer product safety law on economic grounds of market failure, such as information deficits and externalities, it is also important to consider the extent to which social goals justify intervention. Where consumers' economic interests are being considered more difficulties arise, in particular because the objectives of intervention are less obvious. Should intervention address information deficits that might lead consumers to make inappropriate decisions, or try to ensure that transactions are fair? If the latter, are we concerned with substantive or merely procedural fairness? The law of contract has had to grapple with these issues for some time, but they also have implications for criminal law. For example, quality regulation has generally been viewed as the domain of the law of contract, but the criminal law may also have a role to play here, such as in ensuring that consumers receive goods of acceptable quality. It is perhaps in the area of economic interests that administrative sanctions could have an increasingly important role, and the role of such sanctions in fair trading law is considered in this context.

Consumer law will only achieve its objectives if it is enforced effectively. Considerable empirical research has been undertaken on the strategies adopted by enforcement agencies, most of it concluding that enforcement authorities such as trading standards officers favour compliance to deterrence strategies. Although there have been criticisms of this approach, there appear to be benefits to a strategy which emphasises the primacy

Cambridge University Press

0521590809 - Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK

Peter Cartwright

Frontmatter

[More information](#)

Preface

xi

of securing compliance, provided prosecution is utilised where informal enforcement fails. The ‘tit for tat’ strategy favoured by Ayres and Braithwaite bears many similarities to the approach found in the UK and chapter 7 argues that it may be the most appropriate strategy for enforcement authorities to adopt.

The book’s discussion of the role of criminal sanctions in consumer protection will reveal the wide variety of roles that criminal law plays in society, from stigmatising immoral conduct to improving trading standards. Criminal sanctions play an important part in protecting consumers by discouraging unacceptable conduct and providing a sanction where that discouragement fails. Many of the objections to the use of criminal law in consumer protection appear premised upon a view of the criminal law as something which should deal only with wicked conduct. However, it will be argued that the regulation of anti-social, harmful, and undesirable conduct is equally the criminal law’s business. This is not to suggest that the law is not in need of reform. It will be argued throughout this book that we need to address several important issues, such as the use (and abuse) of corporate and vicarious liability, the relationship between criminal law and other legal forms, and the role of enforcement authorities. It is only in so doing that we will be able to construct a regulatory consumer law which is fit for the twenty-first century.

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Frontmatter

[More information](#)

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PETER CARTWRIGHT
Edwalton
31 October 2000

Abbreviations

AC	Appeal cases
Adm LJ	<i>Administrative Law Journal</i>
All ER	All England Law Reports
B&S	Best and Smith Reports
BTLC	<i>Butterworths Trading Law Cases</i>
Br J Criminology	<i>British Journal of Criminology</i>
Cal LR	<i>California Law Review</i>
CLJ	<i>Cambridge Law Journal</i>
CLP	<i>Current Legal Problems</i>
CMLR	<i>Common Market Law Review</i>
Consum LJ	<i>Consumer Law Journal</i>
Cr App R	Criminal Appeal Reports
Crim LR	<i>Criminal Law Review</i>
DLR	Dominion Law Reports
Econ J	<i>Economic Journal</i>
EHRR	European Human Rights Reports
F2d	Federal Reporter
FTC	Federal Trade Commission
Harvard LR	<i>Harvard Law Review</i>
HL Debs	House of Lords Debates
ICR	Industrial Cases Reports
ITSA MR	<i>Institute of Trading Standards Administration Monthly Review</i>
JBL	<i>Journal of Business Law</i>
JCLC	<i>Journal of Criminal Law and Criminology</i>
JCMS	<i>Journal of Common Market Studies</i>
JCP	<i>Journal of Consumer Policy</i>
J Legal Stud	<i>Journal of Legal Studies</i>
JP	Justice of the Peace
J Pol Econ	<i>Journal of Political Economy</i>
KB	King's Bench
Law and Pol Q	<i>Law and Policy Quarterly</i>

Cambridge University Press
0521590809 - Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK
Peter Cartwright
Frontmatter
[More information](#)

xiv Abbreviations

LGR	Local Government Reports
LMCLQ	<i>Lloyds Maritime and Commercial Law Quarterly</i>
LQR	<i>Law Quarterly Review</i>
LR	Law Reports
LSG	<i>Law Society Gazette</i>
Mich LR	<i>Michigan Law Review</i>
MLR	<i>Modern Law Review</i>
M&W	Meeson & Welsby Reports
NILQ	<i>Northern Ireland Legal Quarterly</i>
NLJ	<i>New Law Journal</i>
OJ	<i>Official Journal</i>
OJLS	<i>Oxford Journal of Legal Studies</i>
QBD	Queen’s Bench Division
QJEcon	<i>Quarterly Journal of Economics</i>
RTR	Road Traffic Reports
SI	Statutory Instrument
Sol J	<i>Solicitors’ Journal</i>
Stra	Strange’s King’s Bench Reports
Sup Ct Rev	<i>Supreme Court Review</i>
Tr LR	Trading Law Reports
Tulane LR	<i>Tulane Law Review</i>
U Chicago LR	<i>University of Chicago Law Review</i>
U Penn LR	University of Pennsylvania Law Reports
Wash ULQ	<i>Washington University Law Quarterly</i>
Wash ULR	<i>Washington University Law Review</i>
Wisc LR	<i>Wisconsin Law Review</i>
WLR	Weekly Law Reports
Web JCLI	<i>Journal of Current Legal Issues</i>
Yale LJ	<i>Yale Law Journal</i>