

THE RESURGENCE OF *MENS REA*: III — THE RISE AND FALL OF STRICT CRIMINAL LIABILITY†

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Over the past two centuries, the criminal law's concern with the moral blameworthiness of the criminal defendant has declined drastically.¹ Criminal law, in both theory and practice, has come to be seen as merely one more method used by society to achieve social control and crime reduction; the notion that the criminal law is unique because of its moral underpinnings and its infliction of blame-bearing punishment has been diluted significantly. Perhaps the prime example of this process is the growth of so-called "public welfare offenses,"² which have been the subject of much writing and analysis.³ By the mid-twentieth century, courts were often too

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¹ The shift in the meaning of "*mens rea*" from "moral guilt" to a "much narrower and more confining approach" has been well documented. *E.g.*, Brett, *Strict Responsibility: Possible Solutions*, 37 MOD. L. REV. 417, 418-20 (1974); *see also* Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832 (1952); Perkins, *Alignment of Sanction with Culpable Conduct*, 49 IOWA L. REV. 325 (1964); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

² Because the justification of state intervention in any criminal event is the involvement of the public welfare, the phrase "public welfare offenses" is, at best, misleading. When Dean Sayre used it in his article, *supra* note 1, he obviously was aware of this incongruity. The same cannot be said, however, of Chief Justice Taft who, in *United States v. Balint*, 258 U.S. 250, 252 (1922), argued that strict liability was necessary in the drug area because "there has been a modification of this view [that *mens rea* is required in criminal prosecutions] in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement." The difficulty, of course, is that this proffered explanation is even more applicable to "real" crimes, such as rape, homicide, theft, and burglary.

³ Among the articles discussing strict liability, *see* G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* ch. 7 (1st ed. 1953); J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* ch. 10 (2d ed. 1960); R. PERKINS & R. BOYCE, *CRIMINAL LAW* ch. 7, § 5 (3d ed. 1982); Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1936); Stallybrass, *The Eclipse of Mens Rea*, 52 LAW Q. REV. 60 (1932); Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31 (1936); Jackson, *Absolute Prohibition in Statutory Offenses*, 6 CAMBRIDGE L.J. 83 (1936); Mueller, *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 34 (1944); Remington, *Liability Without Fault Criminal Statutes — Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin*, 1956 WIS. L. REV. 625; Devlin, *Statutory Offenses*, 4 J. SOC'Y PUB. TCHRS. L. 206 (1958); Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960); Starrs, *The Regulatory Offense in Historical Perspective*, in *ESSAYS IN CRIMINAL SCIENCE* (G. Mueller et al. ed. 1961); Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517 (1975); Paulus, *Strict Liability: Its Place in Public Welfare Offenses*, 20 CRIM. L.Q. 445 (1978); Peiris, *Strict Liability in Commonwealth Criminal Law*, 3 LEGAL STUD. 117 (1983).

willing, in the cases they labeled "public welfare offenses," to ignore the learning of centuries⁴ that blameworthiness was relevant to criminal stigma and punishment. Instead, as in many other areas of law, they applied a clear utilitarianism to an area where moral concerns should dominate.⁵ There were, indeed, calls for the total abolition of moral blame as a predicate for criminal liability.⁶

Within the past two decades, however, in both this country and other common-law jurisdictions, both court decisions and the rec-

⁴ There is, of course, an ongoing and unresolved dispute over whether the criminal law always required *mens rea*. Holmes argued that in the "original" criminal law *mens rea* was not required. See O.W. HOLMES, *THE COMMON LAW LECTURE II* (1881). But others have disputed Holmes. See, e.g., Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1918). Pollock and Maitland believed that early criminal law did not require *mens rea*. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 470 (2d ed. 1898); see also Sayre, *The Present Signification of Mens Rea in the Criminal Law*, HARV. LEGAL ESSAYS 399, 401 (1934); Mueller, *Tort, Crime and the Primitive*, 46 J. CRIM. L. & CRIMINOLOGY 303 (1955). As one writer has observed, however, "[t]hough the early law did not set forth criminal intent as a necessary element of criminality, an examination of the common law crimes will show that it would be impossible to commit most of them without an evil intent." Note, *The Development of Crimes Requiring No Criminal Intent*, 26 MARQ. L. REV. 92, 92 (1942); see also Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1101 (1958) ("Contrary to general belief there are no common law offenses in which *mens rea* is not required . . .").

Although I tend to favor Isaacs' argument that liability was never truly strict, the issue for our current purposes is moot. There is no debate that, by the middle of the thirteenth century, when Bracton wrote *De Legibus Anglorum*, *mens rea* was becoming necessary, and that by the beginning of the seventeenth century, it was firmly established as a *sine qua non* for criminal conviction. On the other hand, there is also little dispute that at least some fictions, such as constructive malice, and a presumption of malice in a killing, had both procedurally and substantively affected this requirement. I hope to explore the presumption of malice, and presumptions generally, at some later point. Here, however, the key point is that the common law doctrine of *mens rea* was generally accepted for at least three centuries prior to the onset of strict liability crimes, and that there is a good argument that criminal sanctions were not actually imposed without *mens rea*, even in the tenth and eleventh centuries.

⁵ See Manchester, *The Origins of Strict Criminal Liability*, 6 ANGLO-AM. L. REV. 277, 279 (1977). Manchester interprets the imposition of strict liability, as well as the acceptance of the doctrine of implied malice, as "representative of an emerging tendency towards applying in criminal law an objective standard, to which all must measure up at their peril, in place of the older subjective standard." Manchester is correct so far as he goes, of course, but as I have tried to show in the two preceding entries in this series, the move toward objectivization in the criminal law that occurred in the nineteenth century was reflected in numerous doctrinal changes, many of which have recently been challenged. See Singer, *The Resurgence of Mens Rea: I — Provocation, Emotional Disturbance and the Model Penal Code*, 27 B.C.L. REV. 243 (1986) [hereinafter Singer I]; Singer, *The Resurgence of Mens Rea: II — Honest But Unreasonable Mistake of Fact in Self Defense*, 28 B.C.L. REV. 459 (1987) [hereinafter Singer II]. Selznick notes the shift to protection of public and social interests as a "master trend" in the American legal system. See Note, *Liability without Fault: Logic and Potential of a Developing Concept*, 1970 WIS. L. REV. 1201, 1204 (citing Selznick, *Sociology of Law*, paper prepared for the International Encyclopedia of the Social Sciences, Berkeley, Cal., Apr. 1965, at 50, 57).

⁶ The most famous of these calls is from Dame Barbara Wooton, who argues that *mens rea* has "gotten in the wrong place." See B. WOOTON, *CRIME AND THE CRIMINAL LAW* 52 (1963).

ommendations of academic reform groups have slowed and possibly reversed the expansion of strict criminal liability. In England⁷ and Canada,⁸ law revision commissions have urged the abolition of strict liability crimes and the adoption of a requirement that the prosecution always be required to show at least that the defendant failed to act prudently. The Canadian Supreme Court has essentially adopted that viewpoint, although apparently placing the burden of proof on the defendant to show due care.⁹ In the United States, the Model Penal Code similarly has recommended eliminating strict liability crimes, and replacing them, if at all, with non-criminal "violations."¹⁰

This article reassesses the history of strict criminal liability and measures the impact of these recent changes and proposals. Part I revisits the beginnings of strict liability in England. Although this story has been told before, most forcefully and notably by Dean Sayre,¹¹ who argued that strict liability statutes were children of the Industrial Revolution, I believe that the first strict liability crimes in England served the function of closing a gap in tort law, and were not overly "public welfare" oriented. Indeed, in England, there was little, if any, truly strict, truly criminal, liability in the nineteenth century. In contrast, strict criminal liability did achieve a foothold in the United States during the nineteenth century. The foothold, however, was not attained in such public welfare areas as housing and food adulteration, where we now expect "strict" liability, but instead in "morals" offenses relating to sex, liquor, and the upbringing of minors. Part II looks at the process by which strict liability "criminality" spread across England and the United States in the nineteenth and early twentieth centuries, and suggests that, although England quickly rejected strict liability after a preliminary flirtation, courts in the United States ironically followed a "Victorian" sense of morality in imposing strict liability. They did so,

⁷ England established a Law Revision Commission in the mid 1960s. See WORKING PARTY, PRELIMINARY PAPER ON CODIFICATION OF THE CRIMINAL LAW: GENERAL PRINCIPLES, PUBLISHED WORKING PAPER No. 17 (May 1968) [hereinafter PUBLISHED WORKING PAPER No. 17]. Since that time, an advisory group of academics has taken essentially the same approach. See THE LAW COMMISSION, CRIMINAL LAW, CODIFICATION OF THE CRIMINAL LAW (Law Comm'n No. 143) (1985).

⁸ LAW REFORM COMMISSION OF CANADA, STUDIES IN STRICT LIABILITY (1974).

⁹ R. v. City of Sault Ste. Marie, 85 D.L.R.3d 161 (Can. 1978), commented on in Hutchinson, Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offenses Get a Home of their Own, 17 OSGOODE HALL L.J. 415 (1979); see also Re Motor Vehicle Act, [1985] 2 S.C.R. 486.

¹⁰ MODEL PENAL CODE AND COMMENTARIES § 2.05 (1985) [hereinafter MPC].

¹¹ Sayre, *supra* note 1, at 69-70.

however, not in "public welfare" offenses, but rather in instances of sexual conduct, or where liquor or minors, or both, were involved. Part III fills in the past half-century in both countries. Part IV looks at the Model Penal Code, its acceptance (or rejection) in this country, and the case law that has arisen under it. Part V touches upon the various philosophical and empirical debates over the wisdom of strict liability crimes, and argues that there is no sound reason for continuing to impose strict criminal liability. This conclusion, hardly novel in and of itself, arguably gains some force from the historical discovery here that the statements concerning the origins of strict criminal liability, particularly in England, are misleading and should lead to reexamination of this entire notion of liability.

I. THE BEGINNINGS OF STRICT LIABILITY IN THE NINETEENTH CENTURY

To the extent that there is a shared understanding of the growth of strict criminal liability, it is based on the belief that the statutes passed in the late nineteenth century, both as written and as enforced by the courts, imposed strict liability, and that they were the first "regulatory" offenses by which the legislature sought to grapple with the complexities of the Industrial Revolution. Careful perusal of the case law and statutes, however, shows that although in some instances strict criminal liability was the *prima facie* rule, in most situations a truly innocent actor could avoid criminal punishment. This result was particularly true in England, where our story begins.

A. England

1. The Tentative Non-Beginnings of Strict Liability

Sayre's classic article on the subject of strict liability offenses points to *R. v. Woodrow* as the seminal strict liability case,¹² but this

¹² *Id.* at 58 (citing *R. v. Woodrow*, 15 M. & W. 404, 153 Eng. Rep. 907 (Ex. 1846); see also Sayre, *supra* note 4, at 407. Sayre quite properly notes that there were several other "strict liability" categories prior to *Woodrow*. Thus, criminal libel cases appeared to eliminate the requirement of *mens rea*. See, e.g., *R. v. Walter*, 3 Esp. 21 (N.P. 1799).

Moreover, nuisance cases sounded in strict liability, even though the cases cited by Sayre are not apposite. Thus, in *R. v. Medley*, 6 Car. & P. 292, 172 Eng. Rep. 1246 (K.B. 1834), officers of a gas company were indicted for polluting the Thames, injuring fishing and drinking water. The defendants argued that they were unaware that their servants were in fact dumping toxic materials in the river. Judge Denman, instructing the jury, told them that "if persons for their own advantage employ servants to conduct works, they must be an-

assertion is dubious for at least two reasons. First, *Woodrow* is an exceptionally tentative decision, distinguishable on several grounds from a true strict liability case, and second, it was not cited again for fifty years, until Judge Wright, in *Sherras v. DeRutzen*,¹³ revived it, but then only to return it to limbo, if not oblivion. Nevertheless, because of the tenacity of Sayre's assertion, it is important to begin with *Woodrow* and examine carefully its claim to parentage of strict criminal liability.

The defendant in *Woodrow* was a tobacconist in Great Yarmouth.¹⁴ An excise officer seized his tobacco, having found that it was "adulterated" with sugar, molasses, and other saccharine matter, which constituted one-seventh of the total weight.¹⁵ The evidence given clearly indicated that *Woodrow* had purchased the tobacco believing it to be pure, and did not know of the adulteration, and could not reasonably have known of it, as it had occurred before

swerable for what it done by those servants." The jury conviction was upheld on appeal. *Medley*, therefore, is not a strict, but rather a vicarious, liability case. On almost identical facts, thirty years later, the court reached a similar result in *Reg. v. Stephens*, 1 L.R.-Q.B. 702 (1866). But Judge Blackburn concurred specifically to confirm that "the general rule that a principal is not criminally answerable for the act of his agent" was not changed. See also *R. v. Marsh*, 2 B. & C. 717, 107 Eng. Rep. 550 (K.B. 1824) (vicarious liability imposed for violation of "possession of game" statute). In *Criminal Responsibility for the Act of Another*, 43 HARV. L. REV. 689 (1930), Sayre cites a number of cases in which courts directly said that nuisance cases were truly tort, rather than criminal, cases. Most important is *Reg. v. Stephens*, in which Judge Mellor declared:

It is quite true that this in point of form is a proceeding of a criminal nature; but in substance I think it is in the nature of a civil proceeding. . . . [H]ere it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual without receiving some special injury could have maintained an action

1 L.R.-Q.B. at 708, 709; see also the remarks of Lush, J., in *Reg. v. Holbrook*, 4 Q.B.D. 42, 51 (1878), *retrying* 3 Q.B.D. 60 (1877). In his seminal Columbia Law Review article on strict liability offenses, *supra* note 1, Sayre also argues convincingly that cases decided prior to *Woodrow*, which were interpreted as applying strict liability principles, did not do so. His primary case is *R. v. Dixon*, 3 M. & S. 11, 105 Eng. Rep. 516 (K.B. 1814), where a verdict for placing alum in bread delivered to orphanages was upheld on what could be seen as strict liability grounds. Sayre observes that the jury actually found that the defendant baker knew that alum was being used but, believing that alum was not harmful, simply continued to use it, despite the statutory ban. Sayre cites *Core v. James*, 7 L.R.-Q.B. 135 (1871), which sustains his interpretation. In *Core*, there was no evidence that the baker knew that his servant was adulterating the bread, and the court reversed a conviction. But see *Betts v. Armistead*, 20 Q.B.D. 771 (1888), which may have overruled *Core*, and the opinion of Judge Charles in *Pain v. Boughtwood*, 24 Q.B.D. 353 (1890).

¹³ [1895] 1 Q.B. 918.

¹⁴ *Woodrow*, 15 M. & W. at 404, 153 Eng. Rep. at 907.

¹⁵ *Id.*

his purchase.¹⁶ Both the justices of the peace and the Court of Quarter Sessions dismissed the prosecution, finding that the defendant, because he made a totally innocent mistake of fact, was not guilty of a crime.¹⁷ On appeal to the Court of Exchequer, these decisions were reversed, with an instruction to convict the defendant. Intriguingly, although the court took a harsh position on the issue of the defendant's guilt, the court agreed with the Quarter Sessions Court that a mitigated penalty was proper,¹⁸ notwithstanding the fact that the statute mandated a larger fine. Thus, "at the very beginning," courts found ways to avoid placing the full brunt of strict liability on the defendant.

Several factors undermine Sayre's claim that *Woodrow* is the generating force behind strict criminal liability. First, it was a tax case, not a public health case, and all the judges treated it as such.¹⁹ An earlier act had abolished specific tax revenues on specific items used in the processing of tobacco, and instead imposed a fine on anyone who adulterated tobacco for the purpose of increasing its bulk and thereby diluting its purity.²⁰ A later amendment, which was in question in *Woodrow*, established a mandatory fine of 200 pounds upon any dealer in tobacco who was found to possess such adulterated tobacco; there was no requirement that the state prove knowing adulteration or adulteration for the purpose of diluting purity. The fine was therefore essentially a substitute for the prior excise tax, and was an indirect method of obtaining revenues for the crown that would otherwise have required a large number of tax inspectors. Unlike those instances in which the legislature, in an attempt to deal with criminal behavior, makes certain acts violative of taxing laws, *Woodrow* is the converse: the legislature, in order to capture persons who were evading taxes, made criminal certain facts that were "usually" indicative of tax evasion. In this sense, the statute is predicated on the difficulty of proof, just as a statute criminalizing possession of burglary tools allows conviction without proving intent

¹⁶ *Id.* at 405, 153 Eng. Rep. at 908.

¹⁷ *Id.* at 404, 153 Eng. Rep. at 907.

¹⁸ *Id.* at 405, 153 Eng. Rep. at 908.

¹⁹ *Id.* at 415, 153 Eng. Rep. at 912 (Pollock, C.B.) ("If this were . . . [a provision] that affected the public health . . ."); *id.* at 417, 153 Eng. Rep. at 913 (Parke, B.) ("The legislature have made a stringent provision for the purpose of protecting the revenue . . ."). The statute involved is 5 & 6 Vict., ch. 93, enacted in 1842, which amended an earlier act, 3 & 4 Vict., ch. 18. *Woodrow*, 15 M. & W. at 409, 153 Eng. Rep. at 910. The earlier statute was entitled "An Act to Discontinue the Excise Survey on Tobacco, and to Provide Regulations in Lieu Thereof." Immediately then, this is clearly a "taxing" and not a "health" statute.

²⁰ 15 M. & W. at 410, 153 Eng. Rep. at 910.

to use them for burglary. More cogently, the statute in *Woodrow* clearly was not a "public health" statute. At best, it was aimed at fraudulent sales of diluted goods — a truth-in-sale provision, not a health-protecting statute. Indeed, there is no indication or evidence that the adulteration made the tobacco less safe to consume.

Many of the arguments that would later epitomize the strict liability cases were raised by the court or counsel in *Woodrow*. Chief Baron Pollock, for example, struck the chord that those who engage in "public" businesses should expect some regulation, and expressly observed that the Act was limited to dealers in tobacco: "[F]or reasons probably very sound, and not applicable to this case only but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality."²¹ During oral argument, Baron Rolfe stressed the need for prosecutorial discretion so that only the blameworthy would be prosecuted. He noted that a section of the predecessor act allowed the excise officials the discretion not to prosecute if they believed the possession to be wholly innocent, a point relied upon also by Pollock: "If the law . . . works any hardship, it is . . . for the executive department of this branch of the revenue law to abstain from calling for the enforcement of the statute."²² Anticipating arguments that *mens rea* was too difficult to prove, Baron Parke declared that "[t]he public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge."²³ Baron Parke also referred to the provision allowing non-prosecution in some cases.²⁴

Further, it is not evident that this was a criminal proceeding, and it is surely not true, as at least one writer states,²⁵ that *Woodrow* was convicted. The precise procedural posture was that an acquittal was overturned, with directions to convict, should the defendant be retried again without being able to raise a valid defense at the next trial.²⁶ Moreover, the court certainly did not view this case as a "criminal" proceeding. Both in argument and in the opinion, Baron Pollock suggested that the defendant had an avenue of "defense": "If he is incompetent . . . [to examine the article chemically], he may take a guarantee that shall render the person with whom he is

²¹ *Id.* at 415, 153 Eng. Rep. at 912.

²² *Id.* at 416, 153 Eng. Rep. at 912.

²³ *Id.* at 417, 153 Eng. Rep. at 913.

²⁴ *Id.*

²⁵ See C. HOWARD, STRICT RESPONSIBILITY 6 (1962).

²⁶ 15 M. & W. at 406, 153 Eng. Rep. at 908.

dealing responsible for all the consequences of a prosecution."²⁷ Thus, the court saw this not as a "criminal," but strictly as a "revenue" statute. The suggestion that the defendant could effectively make himself whole by a warranty from his supplier demonstrates conclusively that the fine was seen as a civil rather than a criminal matter; a warranty that would save a person from a criminal penalty would surely contravene public policy.

That *Woodrow's* reach was short is seen by the decision in *Reg. v. Sleep*.²⁸ Sleep was an ironmonger who had been found in possession of contraband goods belonging to the state.²⁹ The goods were marked with a "broad arrow," but Sleep maintained he had not noticed the marking.³⁰ The trial jury, returning a special verdict, credited Sleep,³¹ but also concluded that his failure to find the marks was not reasonable.³² Sleep's conviction was overturned by a rather strident court, which reaffirmed, as Judge Cockburn put it, that "*Actus non facit reum nisi mens sit rea*" is the foundation of all criminal justice.³³ The court found unconvincing the prosecution's argument that the statute explicitly omitted the word "knowingly" in the possession provision in order to provide strict liability: "It is true that the statute says nothing about knowledge, but this must be imported into the statute."³⁴ The court's refusal to budge from the requirements of *mens rea* is more powerful because the three justices all indicated their belief that Sleep in fact knew of the markings; nevertheless, they felt bound by the jury's finding as to honest belief, which negated the *mens rea*.³⁵

Still another decision, almost contemporaneous with *Woodrow*, demonstrates that *Woodrow* is not the landmark decision it is often

²⁷ 15 M. & W. at 416, 153 Eng. Rep. at 912.

²⁸ 8 Cox Crim. Cas. 472 (1861).

²⁹ *Id.* at 473.

³⁰ *Id.*

³¹ Or, rather, the jury did not disbelieve him. The jury said it found the state's evidence inconclusive. *Id.*

³² *Id.*

³³ *Id.* at 477 ("Without a guilty mind, there is no crime.").

³⁴ *Id.* at 478 (Cockburn, C.J.).

³⁵ In the third edition of M. FOSTER, CROWN LAW (3d ed. 1809), Foster's nephew, the editor, reports in the appendix an anonymous case decided on the statute 9 & 10 Will. 3, ch. 41. A widow was indicted for possessing canvas marked with the king's mark, without a seller's indemnification. She proved that her husband had purchased it during an inventory sale, and had not obtained a receipt, and that she had used the material publicly since his death. Foster, who had previously taken a dim view of possession cases generally, instructed the jury that if the material came to her without fraud or deceit on her part, they should acquit, which they did. This, therefore, was not construed to be a strict liability statute. The case is discussed in FOSTER, *supra*, at 439-41.

said to be, and that the requirement of *mens rea* continued to guide court decisions. In *Hearne v. Garton & Stone*, the defendant brokers were hired by Nicholas to send encased goods to Bristol.³⁶ They, in turn, shipped the goods by the Great Western Railway. The defendants could not break into the cases to determine their contents, and were told by Nicholas the shipper that they contained gun stocks. In fact, the cases contained oil of vitriol, a dangerous flammable, which was banned from the Great Western Railway by a statute dealing explicitly with that carrier.³⁷ Prosecuted under the statute, which did not expressly require the sender to know that the contents were prohibited, the defendants raised mistake of fact as a defense.³⁸ The justices trying the case found that the defendants had "used all proper diligence to inform themselves of the fact," and acquitted the defendants.³⁹ In affirming the acquittal, the court, per Chief Justice Lord Campbell, reiterated the common law's aversion to strict liability, and stressed the *mens rea* principles of moral blameworthiness: "There was neither negligence nor moral guilt of any kind on their parts: and are they to be made the victims of Nicholas's fraud?"⁴⁰

These cases, and their repudiation of whatever strict liability hint contained in *Woodrow*, strongly suggest that strict criminal liability had no foothold in England before the middle of the nineteenth century. Only because of two new "regulatory" statutes, which were sometimes misread (or not read at all) by the courts, was the idea of strict criminal liability even able to muster support at all.

2. The First Non-Move Toward "Strict" Liability: The Sale of Food and Drug Act.

In 1860, in the first act dealing with sales of food and drugs, Parliament provided:

Every person who shall sell any Article of Food or Drink with which, to the Knowledge of such Person, any Ingredient or Material injurious to the Health of Persons eating or drinking such Article has been mixed, and every Person who shall sell as Pure or Unadulterated any Article of

³⁶ 2 El. & El. 66, 121 Eng. Rep. 26 (K.B. 1859).

³⁷ *Id.* at 66, 121 Eng. Rep. at 26 (citing 5 & 6 Will. 4, ch. 57(a)).

³⁸ *Id.* at 72-73, 121 Eng. Rep. at 29.

³⁹ *Id.* at 74, 121 Eng. Rep. at 29.

⁴⁰ *Id.*

Food or Drink which is Adulterated or not Pure, . . . [shall have committed an Offense].⁴¹

This was not a "pure food" act, but a consumer fraud statute. The first clause prohibits "*knowingly*" selling injurious or dangerous food, a typical criminal statute clearly requiring *mens rea*. Only the second clause, which prohibits selling the adulterated food as unadulterated, and does not by its terms require knowledge, arguably imposes strict liability. This second provision reflects the doctrine of *caveat emptor*: If the seller tells the consumer that the food is "adulterated," or that the seller does not know whether or not it is adulterated, there is no violation. Only if the vendor sells as "pure or unadulterated" or (arguably) if by his or her silence implies that the food is "pure" and "unadulterated" is the provision violated.⁴² Thus, although this statute might be construed as establishing strict liability, it is not a "health" statute, but a "truth-in-sales" statute.

Twelve years later, the Adulteration of Food and Drugs Act essentially replaced the 1860 Act.⁴³ Once again *mens rea* was required: Only those who *knowingly* or *willfully* admixed, adulterated, or sold were subject to criminal penalties.⁴⁴ The actual knowing admixer was subject to a stiff fine of fifty pounds on the first offense, and six months imprisonment for a subsequent offense.⁴⁵ A seller who knew of the adulteration was subject to a twenty pound fine and, on second conviction, to having the conviction publicized in the papers.⁴⁶ There was no penalty for a seller who unknowingly sold such items.⁴⁷ Finally, a staff of inspectors was established to

⁴¹ 23 & 24 Vict., ch. 84, § 1 (1860).

⁴² Obviously, if the seller tells the purchaser that it is pure, when the seller knows that it is not, there is fraud, and there is no need for a new statutory regulation. Paulus traces the history of the Food and Drug Act of 1860, and notes that it was initially spurred by "increasingly perceived threats to the social order, including the 1858 poisoning of about 200 people, 17 of them fatally, through adulterated lozenges . . ." Paulus, *supra* note 3, at 452. Yet, according to Paulus, the Act suffered from three weaknesses: (1) it was enforced by private plaintiff-prosecutors; (2) enforcement was not mandatory; (3) the prosecution still had to prove *mens rea*. *Id.* at 452-53. The first of these was not a weakness of the bill, but provided a method to avoid the barriers of privity. The third is hardly a barrier, and the second is inevitable in almost any prosecutorial scheme.

⁴³ 35 & 36 Vict., ch. 74 (1872).

⁴⁴ *But see* Fitzpatrick v. Kelly, 8 L.R.-Q.B. 337 (1873) (reversing a dismissal of a complaint, where there was no evidence *either* of defendant's knowledge *or* that the additive was injurious to health). In *Roberts v. Egerton*, 9 L.R.-Q.B. 494 (1874), the defendant conceded that his lack of knowledge of adulteration was irrelevant.

⁴⁵ 35 & 36 Vict., ch. 74, § 1 (1872).

⁴⁶ *Id.* § 2.

⁴⁷ *Id.*

purchase products to be analyzed by government chemists, whose employment was also authorized by the Act.

Only three years later, in 1875, Parliament further expanded its power over adulterated foods by passing the critical Sale of Food and Drugs Act.⁴⁸ On its face, this Act appeared, in some sections, to impose strict criminal liability. Thus, it was to prove to be the most important event in the perception that the notion of strict liability in the criminal law was expanding in England. For that reason it warrants close attention.

It is not clear what prompted the passage of the Act only three years after the prior one. One might argue that Parliament was persuaded in the interim that the 1872 Act had been ineffective because of its *mens rea* requirement, and therefore sought to impose strict liability. Such an argument is unpersuasive, however, because there was, after all, hardly sufficient time to determine whether the 1872 law, which was restricted to "knowing" offenses, was unable to control adulteration. Moreover, as seen below, the new Act also rarely imposed strict liability. One can only speculate as to why the new Act was enacted.

Because the 1875 Act significantly enlarged the scope of the 1872 Act, the specific provisions of the 1875 Act must be described in some detail to determine whether it in fact sought to impose strict liability upon unknowing and non-negligent sellers of "adulterated" food. If it did so, the reasons for that imposition must then be considered.⁴⁹ This parsing of the Act is tedious; yet the outlines that emerge from a careful consideration rebut the notion that strict criminal liability had been embraced.

Sections 3 and 4 of the 1875 Revision prohibited admixing any article of food or drug with the intent that the same be sold while admixed; and further provided that "No person shall sell any such article so mixed" under a penalty of fifty pounds for the first offense, and imprisonment not to exceed six months for repetition. Section 5, in turn, expressly provided that a seller subject to sections 3 and 4 would have a defense "if he [or she] shows to the satisfaction of the justice or courts . . . that he [or she] did not know" of the

⁴⁸ 38 & 39 Vict., ch. 63 (1875). The full title of the Act is "An Act to repeal the Adulteration of Foods Acts, and to make better provision for the Sale of Food and Drugs in a pure state." The change of name may itself be significant (from "adulteration" to "sales" act). The initial proposal for revision was called the Adulteration Act.

⁴⁹ Paulus reads the 1875 Act as embodying strict liability. Paulus, *supra* note 3, at 454. But he does not quote the sections, nor make the necessary clause-by-clause analysis provided here.

mixing and "could not with reasonable diligence have obtained that knowledge."⁵⁰ Thus, sections 3 and 4, which imposed severe penalties, were in fact restricted to sales of food known (or negligently not known) by the seller to be adulterated. Thus, nothing changed from the 1872 Act except the penalty.

Section 6 prohibited sales of any food or drugs which were "not of the nature, substance, and quality of the article demanded by a purchaser," but only if the sale were "to the prejudice of the purchaser." Thus, if the matter added was not injurious to health, was required for the production of the item, and was not intended to fraudulently increase the bulk, weight, or measure, or to conceal inferior quality, there was no violation, even though the defendant did not disclose the dilution of the item's purity. Section 8, however, provided that disclosure of admixing of ingredients not injurious to health and not intended fraudulently to increase the bulk, weight, or measure would also be a defense, and section 9 provided that disclosure to a purchaser that an item had been altered by abstraction would obviate conviction as well.

Even more intriguing than these early sections were two later provisions demonstrating the "non-criminal" nature of this statute. Section 25 provided that a defendant could avoid conviction by showing that he or she had purchased the article subject to a warranty that it was not adulterated or admixed. Section 28, apparently picking up on the court's dictum in *Woodrow*,⁵¹ provided that if a convicted seller successfully sued his or her supplier for breach of the supplier's warranty, the seller could collect as damages not only the typical breach of contract amounts, but also any "criminal" penalty the seller might have paid and any costs that may have been incurred. Thus, the defendant-seller would in effect be indemnified for the "criminal" sanctions.

The debate on these sections of the bill, in the House of Commons in particular, shows that many members, though willing to punish the "guilty" party, were equally anxious to require *mens rea*. Thus, Mr. Forsyth said "he thought it would be unfair to impose upon the retail dealer a penalty for selling a thing which he has purchased in good faith from the wholesale dealer."⁵² Notwithstand-

⁵⁰ This shifting of the burden of proof was a change in the bill. As they came from committee, sections 5 and 6 required full knowledge by the retailer that the goods had been adulterated. See HANSARD, Feb. 19, 1875, at 599.

⁵¹ *Woodrow*, 15 M. & W. at 411, 153 Eng. Rep. at 910.

⁵² HANSARD, Apr. 9, 1875, at 1267.

ing objections by the Solicitor General that to allow a warranty to provide a full defense might encourage collusion between retailers and wholesalers, the vast majority of the House saw the question as one of fundamental fairness to the retailer. This concern with fairness resulted in the "substitution clause" of sections 25 and 28.⁵³

The statute, therefore, clearly sought to protect both the innocent consumer and the innocent vendor, on the basis of actual or implied warranty. The Act did not appear to be "criminal" in nature, because provisions for recapture of losses by a "criminal" actor is hardly compatible with any traditional notion of "criminal" legislation. Instead, it is clear that the Act indirectly made the actual manufacturer liable to the consumer, and thereby bridged the gap that existed in contract and tort law created by the theory of "privity."⁵⁴ Moreover, the Act cannot simply be regarded as aimed at protecting the health of consumers. Some of its provisions appear more concerned with consumer fraud than with the unintended distribution of unwholesome food upon a public unable to protect itself; *disclosure* of potentially harmful additives is, after all, a total defense under sections 8 and 9.⁵⁵

Two decades passed before the first major case interpreting this Act was decided. In *Pain v. Boughtwood*, a grocer sold milk from which, without his knowledge, 28% of the original fat had been skimmed.⁵⁶ The grocer was indicted under section 9 of the Act, which, as already indicated, proscribed selling "altered" food without notice to the consumer of the adulteration. Reversing an acquittal, the appellate court held that one major purpose of the 1875

⁵³ HANSARD, May 13, 1875, at 598; *see also* HANSARD, Feb. 19, 1875, at 599-614 (arguing for protection for the retailer who purchased bona fide, and arguing that dishonesty in sales had diminished over the past two decades). Intriguingly, one argument used during the debate was that wholesalers and retailers, having entered the business, should take the risk that items were adulterated. That argument has echoes today. *See infra* note 305. The provision to allow substitution, or a warranty, was made in light of Mr. Carpenter-Garnier's observations that "although the retail dealer had at present the Common Law right of proceeding against the wholesale trader, the cost of taking proceedings was so great as practically to debar him from the exercise of that right." HANSARD, Feb. 19, 1875, at 606. English statutes have continued to provide such escape hatches. Howard cites to other English statutes, including Food and Drugs Act, § 113 (1955); Health Act, (1956 Vic.), §§ 291, 298, 300; Offices Act, § 1(6) (1960); Factories Act, 1 Edw. 8 & Geo. 6, ch. 67, § 137(1) (1937); Fertilizers and Feeding Stuffs Act, 16 & 17 Geo. 5, ch. 45, § 7(1) (1926); Merchandise Marks Act, 50 & 51 Vict., ch. 28, § 2(2) (1887). HOWARD, *supra* note 25, at 19 n.58. Significantly, however, Howard does not discuss the predecessors of these acts, which are the crux of this analysis.

⁵⁴ *See infra* note 94.

⁵⁵ 38 & 39 Vict., ch. 63, §§ 8, 9 (1875).

⁵⁶ 24 Q.B.D. 353 (1890).

Act was to settle the pre-existing controversy as to whether knowledge was relevant to conviction.⁵⁷ The proper path to avoid conviction, the court said, was not for the defendant to argue lack of knowledge, but to rely upon section 25: "In the present case the respondent ought to have provided himself with a written warranty, and then he could have handed it over to the inspector, who could have thereupon proceeded against the person *who had actually committed the fraud*."⁵⁸

This declaration makes clear that the statute's purpose was to prevent mislabeling. The court in essence was suggesting that a seller who does not insist upon and obtain a warranty from his or her supplier may be taken to have acted recklessly as to the possible alteration of the item.⁵⁹ Because section 25 gave a defense, the court said, a seller who did not use that defense may be found to have refrained from seeking a warranty because he knew (or suspected) the milk to be altered, but did not wish to press the supplier on this matter.⁶⁰ Thus framed, the case is almost one of "willful blindness," implied from the absence of a warranty. Consequently, although the case was not a ringing endorsement of a *mens rea* requirement, it clearly did not fully embrace a strict liability approach, because section 25 would be irrelevant if the statute were a strict liability offense.⁶¹

Pain and other similar cases appear to have achieved their purpose of making sellers more open in statements concerning ingredients in products that they sold. In *Spiers & Pond v. Bennett*,⁶² the sellers explicitly notified the purchaser that, though they believed the milk to be "full," they would not guarantee it.⁶³ Moreover, the sellers had obtained a warranty from their supplier that the milk "shall be new milk in good condition pure and unadulterated in the same state as when taken from the cow . . ."⁶⁴ Not surprisingly, the sellers' conviction was reversed.⁶⁵

⁵⁷ *Id.* at 355.

⁵⁸ *Id.* at 356 (emphasis added).

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ A year later, a court following *Pain* made clear the purpose of the Act: "It was passed with the object, not of punishing the [innocent] seller, but of protecting the buyer . . ." *Dyke v. Gower*, [1892] 1 Q.B. 220, 223; *accord* *Goulder v. Rook*, [1901] 2 K.B. 290.

⁶² [1896] 2 Q.B. 65.

⁶³ *Id.* at 66.

⁶⁴ *Id.* at 67.

⁶⁵ *Id.* at 73.

A final important case involving an analogous statute, and often cited as authority for strict criminal liability, is *Hobbs v. Winchester Corp.*⁶⁶ *Hobbs* involved the Public Health Act of 1875.⁶⁷ Local meat inspectors had confiscated and destroyed, as diseased, meat offered for sale by Hobbs, a butcher.⁶⁸ Hobbs sought compensation allowed by the Public Health Act to a person who sustained damage "to any matter as to which he is not himself in default."⁶⁹ Hobbs had previously been acquitted of criminal charges that he had sold unwholesome meat.⁷⁰ Notwithstanding this acquittal, the judges here denied compensation, and in dictum unencumbered by the facts of the case Judge Kennedy not only broadly construed the Act in question, but also enunciated principles of statutory interpretation that would echo for decades:

I think there is a clear balance of authority that in construing a modern statute this presumption as to *mens rea* does not exist. . . . It is impossible now . . . to apply the maxim generally to all statutes, and the substance of the reported cases is that it is necessary to look at the object of each Act that is under consideration. . . . A man takes upon himself to offer foods to the public for their consumption with a view to making a profit by the sale of them. Those foods may be so impregnated with disease as to carry death or at any rate serious injury to health to anyone consuming them. To say that the difficulty of discovering the disease is a sufficient . . . plea that he cannot be reasonably expected to have the requisite technical knowledge or to keep an analyst on his premises, is simply to say that the public are to be left unprotected and must submit to take the risk of purchasing an article of food which may turn out to be dangerous to life or health.⁷¹

Similarly, Judge Parwell stated:

Who is to take the risk of the meat being unsound, the butcher or the public? In my opinion the Legislature intended that the butcher should take the risk and that the public should be protected, *irrespective of the guilt or inno-*

⁶⁶ [1910] 2 K.B. 471.

⁶⁷ 38 & 39 Vict., ch. 55 (1875).

⁶⁸ [1910] 2 K.B. at 477.

⁶⁹ *Id.* at 478; see 38 & 39 Vict., ch. 55, § 308 (1875).

⁷⁰ [1910] 2 K.B. at 477.

⁷¹ *Id.* at 483-84 (Kennedy, J.)

cence of the butcher. The knowledge or possible means of knowledge of the butcher is not a matter which affects the public; it is the unsound meat which poisons them; and I think that the Legislature intended that the butcher should sell unsound meat at his peril.⁷²

These declarations, however, were simply wrong. First, the Public Health Act expressly provided for recovery if the seller were not "in default."⁷³ This provision clearly allowed a morally innocent seller whose meat had been confiscated to secure compensation. Second, the Court did not need even to discuss the Act's criminal provisions, because *Hobbs* had already been acquitted of criminal charges under the Act. Nevertheless, *Hobbs* has consistently been cited for the proposition that strict liability was embraced in criminal cases.⁷⁴ The writers have simply ignored the fact that this was not a criminal conviction at all, but a civil proceeding taken pursuant to statute.

Thus, neither the Sale of Food and Drugs Act nor the Public Health Act of 1875 established strict criminal liability. Any contrary reading by writers and courts is simply a misconstruction of the language of either the Acts or the decisions interpreting them. It surely cannot be said that with these Acts England passed into the twilight zone of strict criminal liability. What other sources, therefore, could be cited for this proposition?

⁷² *Id.* at 481 (Parwell, J.) (emphasis added). A precursor of *Hobbs* is *Blaker v. Tillstone*, [1894] 1 Q.B. 345, where a butcher's conviction for having unfit meat was affirmed. The defendant there admitted that the meat could be condemned even if there was no *mens rea*. Such an admission, said the court, was fatal: If one provision of the Act did not require *mens rea*, then none did. This was unquestionably seen as aimed only at protecting health, rather than at improper labeling.

⁷³ Public Health Act of 1875, 38 & 39 Vict., ch. 55, § 308.

⁷⁴ Sayre misstates the case twice, both times citing the case as one that upheld a conviction. Sayre, *supra* note 1, at 60, 81 n.26. Perkins has recently continued the misinterpretation. Perkins, *Essay: Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1078 (1983). Howard says that *Hobbs* was an error. HOWARD, *supra* note 25, at 80. He says further:

There seems to be no reason why the claim could not have been dismissed on the simple ground that since the meat was diseased and had to be destroyed, and since under those circumstances it was reasonable for the local authority to prosecute, even if unsuccessfully, the claimant had suffered no recoverable loss. To regard the decision as an authority on strict responsibility is almost entirely without warrant and merely illustrates the disadvantage of cutting off appeals from minor statutory convictions too low in the hierarchy of courts.

Id.

3. The Second Non-Move Toward Strict Liability: The (Liquor) Licensing Act of 1872

Another major statutory enactment, sometimes misconstrued to impose strict criminal liability, is the Licensing Act of 1872.⁷⁵ Containing some ninety provisions, the Act's coverage included liquor sales and consumption, and licensing of dealers, as well as specific clauses with regard to Ireland. It was clearly intended to be a blanket act — appended to the legislation is a complete table of the prior acts of Parliament that were affected, in whole or in part, by the new provisions.

For our purposes, only the first twenty-four provisions, which deal with illicit sales, offenses against public order, and adulteration, are relevant. A brief overview of the Act, however, is useful. Section 3 provides that any person "keeping" or "exposing" for sale by retail any intoxicating liquor that he or she has no license to sell is to be punished according to a scale, depending upon whether the person is a first offender or repeater. The penalty for a first offense is a fine of up to fifty pounds, or imprisonment up to one month. The provision does not expressly require knowledge.

Section 4 provides that every occupier of an unlicensed premise on which liquor is sold shall, "if it be proved that he [or she] was privy or consenting to sale," be subject to penalties. Again, no *mens rea* or knowledge is expressly stated. Section 7 provides penalties for licensees who "sell or allow any person to sell" any liquor to any person "apparently" under the age of sixteen.

Sections 12–18 describe "offenses against the public order." Section 13 penalizes any licensed person who permits "drunkenness or sells any intoxicating liquor to any drunken person." Section 14 provides that any licensed person who "knowingly permits his [or her] premises to be the habitual resort of or place of meeting of reputed prostitutes" is subject to a penalty. Section 16 provides that any licensed person who (1) "knowingly harbors or knowingly suffers" any constable on duty to remain on his premises; or (2) "supplies" any liquor to a constable, is subject to a penalty. Section 17 provides that no one shall suffer any gaming, or open, keep, use, or operate a house to be used for gambling.

Sections 19–23 deal with adulteration. Section 19 provides that "every person who mixes or causes to be mixed" any "deleterious"

⁷⁵ 35 & 36 Vict., ch. 94 (1872). The full title of the Act is "An Act for Regulating the Sale of Intoxicating Liquors."

ingredient with liquor; or who "knowingly sells or keeps or exposes for sale any intoxicating liquor mixed with any deleterious ingredient," is liable to a penalty. Section 20 provides that "every licensed person who has in his [or her] possession . . . any adulterated liquor knowing it to be adulterated . . . for the possession of which he [or she] is unable to account to the satisfaction of the court, shall be deemed knowingly to have exposed for sale adulterated liquor." Section 24 sanctions anyone who "sells or exposes for sale or opens or keeps open any premises during the time that such premises are directed to be closed"

At first glance, the legislation seems exceptionally well-drawn and clear. It appears to distinguish between those offenses that can only be committed "knowingly" (e.g., sections 14, 16, 19, and 22), and others that appear to impose what we would now call strict liability. Most noteworthy is section 19, which prohibits the "knowing" sale of adulterated liquors, though not expressly requiring that the "keeping or exposing for sale" be done knowingly, thus suggesting strict liability for these acts.

On closer inspection, however, the Act turns out to be a joy (or terror) to the teacher of statutory interpretation. Two doubts, for example, surround the interpretation that section 3 establishes strict liability. First, although the section does not explicitly require knowledge, the words "keep" or "expose" *for sale* imply knowledge, thus imposing a *mens rea* requirement. Second, because sections 20-24 all prohibit "knowing" exposure or keeping, the omission of the word "knowing" in the earlier sections seems inadvertent, and those earlier sections should be similarly interpreted. Moreover, section 20 is directed at anyone who has possession of adulterated liquor "knowing" it to be adulterated. The argument, therefore, that the absence of the word "knowingly" before a specific verb is to be construed as imposing strict liability in section 3 is weakened.

A similar problem exists with regard to section 16, which expressly places the adverb "knowingly" before each of two successive verbs, "harbors" or "suffers." This placement suggests that the failure to repeat the adverb indicates legislative intent. Furthermore, section 16(2) does not place "knowingly" in front of "supplying" a constable on duty, again suggesting that that offense can be committed without *mens rea*. A full reading of section 16, however, shows that two of the three offenses of "harboring," "suffering," or "bribing" can only be committed by one possessing knowledge. The inference, therefore, might well be that "supplying" also requires knowledge.

Just as importantly, the penalties imposed are rather substantial. Violation of section 3 (selling or exposing without a license) carries a first offense penalty of up to fifty pounds or one month in prison. Section 19 similarly imposes a penalty of twenty pounds or prison of one month, yet is limited to those who "[mix] or [cause] to be mixed" or "knowingly sell, or keep, or expose" for sale adulterated liquor. Because these actions clearly require knowledge, it is unlikely that section 3, which contains a much harsher sanction, was intended to eliminate a requirement of proof of knowledge.

Similar analysis of other provisions of the language of the Act strongly supports, but by no means conclusively demonstrates, that a requirement of knowledge and *mens rea* was inherent in virtually all the Act's sections. This interpretation is supported by section 7, the lightest penalty provision (twenty shillings), which prohibits sales to minors. Even here, the legislature has imposed this light penalty only upon sellers who sell to persons who "apparently" are under the age of sixteen. Arguably, a reasonable belief that the person was over sixteen would be a defense to this provision. It would therefore seem unreasonable to impose a much greater penalty, including imprisonment, on one who acted reasonably with regard to the other facts of the provisions, such as adulteration and deleterious substances.

This analysis may seem unduly nice, but when confronted with a statute that otherwise vitiates long-held notions of the common law, such scrutiny is justified. The question, then, is how these provisions were interpreted by the courts and whether this degree of legislative parsing was pursued by those tribunals.

Almost immediately after enactment, the courts made clear that if some person had personal knowledge, vicarious liability would be imposed upon all others. Thus, in *Mullins v. Collins*, decided two years after the statute was enacted, the court upheld a conviction of a tavern owner whose servant, in violation of section 16, had served brandy to a constable when the servant knew the constable was on duty.⁷⁶ The case thus poses an instance of vicarious, not strict, liability. In a case of vicarious liability, the issue is whether the defendant, although totally innocent of any wrongdoing (indeed of any actus at all), is to be held responsible for the acts of someone else who was in fact knowledgeable and hence morally culpable. Although the defendant may not be personally blameworthy, the

⁷⁶ 9 L.R.-Q.B 292 (1874); cf. *Avards v. Dance*, 26 J.P. 487 (1862).

case is not one where there is an absolute absence of *mens rea*.⁷⁷ In a strict liability case, however, no one, neither the defendant nor his agents, has any knowledge, or possibly even reason to inquire, about the crucial facts. Indeed, the premise of strict liability is that the defendant is held guilty no matter how careful and morally innocent he or she, or one for whose acts he or she is responsible, has been.

This distinction was not lost on the court in *Mullins*. Although unnecessary to the decision, each of the three judges indicated that the statute (or at least this provision) would not be construed as imposing strict liability: had the servant not known, they suggested, the defendant would not be liable.⁷⁸ This dictum was followed in later cases.⁷⁹

⁷⁷ As early as 1730, English courts had rejected the application of vicarious liability to "true crimes." See *R. v. Huggins*, 2 Ld. Raym. 1575, 92 Eng. Rep. 518 (K.B. 1730); see also W. PALEY, *PRINCIPAL AND AGENT* 195-96 (1st ed. 1812); Sayre, *Criminal Responsibility for the Act of Another*, 43 HARV. L. REV. 689, 723 (1930) ("the criminal law has never accepted the doctrine of *respondeat superior* . . ."). Perkins cites many instances of what he calls the "civil offense," (often referred to as strict criminal liability) involving vicarious liability, but he agrees that in these cases the employee had the requisite *mens rea* for liability. Perkins, *Alignment of Sanction with Culpable Conduct*, 49 IOWA L. REV. 325, 356 nn.192-99 (1964).

The difference is often not noted even in the literature. One of the exceptions is Manchester, *supra* note 5, at 281 n.6, who notes that many of the nuisance cases are really cases of vicarious, rather than strict, liability. See also L. LEIGH, *STRICT AND VICARIOUS LIABILITY* 18 (1982).

The distinction, though an important one, is rarely observed by courts. One exception is *State v. Beaudry*, 123 Wis. 2d 40, 365 N.W.2d 593 (1985). In *Beaudry*, the court carefully distinguished between strict and vicarious liability in a case where the defendant, who was not present at the time an employee kept her tavern open after one o'clock, was found vicariously liable. As the court noted, "under strict liability the accused has engaged in the act or omission; the requirement of mental fault, *mens rea*, is eliminated. . . . Vicarious liability, in contrast . . . dispenses with the requirement of *actus reus* . . ." *Id.* at 48, 365 N.W. 2d at 597.

⁷⁸ 9 L.R.-Q.B. at 293.

⁷⁹ See, e.g., *Crabtree v. Hole*, 43 J.P. 799 (1879) (upholding conviction where servant knew); *Bond v. Evans*, 21 Q.B.D. 249 (1888); *Commissioners of Police v. Cartman*, [1896] 1 Q.B. 655; *Coppen v. Moore*, [1898] 2 Q.B. 306; cf. *Cundy v. LeCoq*, 13 Q.B.D. 207 (1884) (issue was whether defendant had to know person he served was "intoxicated"; court held no). *Contra Somerset v. Wade*, [1894] 1 Q.B. 574. (although servant knew, evidence unclear as to whether he was in position of authority). See also *Kearley v. Taylor*, 65 L.T.R. 966 (1889).

In *Brown v. Foot*, 64 L.T.R. 649 (1892), however, the defendant had expressly put up signs around his shop saying that each of his employees was to present a sample of the milk he was selling, and that anyone caught adulterating the milk would be immediately fired. Defendant's employee sold milk that he had adulterated without, and against, the defendant's consent. The defendant was held guilty nevertheless, and fined two pounds. In discussing the issue, however, Judge Hawkins declared that "[t]he magistrate does not put it that it is a criminal act on the part of the master, but the penalty is inflicted . . . for the purpose of making people exercise care in selling articles which they have no right to adulterate." The

The most important opinion interpreting this Act is *Sherras v. DeRutzen*, where the court overturned a conviction of a tavern owner who personally served a constable when the constable was on duty.⁸⁰ Section 16 made it an offense to "supply" liquor to any constable on duty.⁸¹ The defendant was convicted, although all reasonable appearances were that the constable was not on duty. In reversing the conviction, Judge Wright revived the notion that "[except in rare cases] . . . there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offense."⁸² More importantly, however, Wright attempted to restrict strict liability crimes to three categories: (1) Where the acts are "not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty"; (2) public nuisances; (3) "Cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right."⁸³

Although Wright's categorization of cases might have been a slight exaggeration, the categorization is initially useful. Several prior cases involving gaming and poaching seem to fit his third category, and to hold together in some cognizable fashion. Those cases showed that, although a defendant's mere honest belief that he or she had permission or a claim of right to hunt, fish, or otherwise use the lands would be insufficient for a defense,⁸⁴ a

case and discussion seem to focus more on the desirability of *vicarious* liability than strict liability. Furthermore, there is the statutory interpretation argument: In other sections Parliament had said that mistake of fact was a defense; in the section in question there were no such provisions. Some cases reversed a conviction where there was no proof that either the servant or defendant knew of the adulteration. See *Bosley v. Davies*, 1 Q.B.D. 84 (1875); *Somerset v. Hart*, [1894] 2 Q.B. 360. In non-licensing Act cases, however, the rule of *respondent superior* was not applied. See, e.g., *Massey v. Morris*, [1894] 2 Q.B. 412.

In *Davies v. Harvey*, however, 9 L.R.-Q.B. 433 (1874), the defendant's partner sold a bed to a poor house of which the defendant was a guardian. A statute provided that no person could sell items to a house of which he was guardian. The court upheld a conviction, but there was virtual agreement that this was not a "crime." Thus, the prosecutor himself argued that "[t]o constitute a crime there must be a *mens rea*, but this is an offense committed in carrying on a trade . . . [and] is like the case of a nuisance. . . ." *Id.* at 437. And Judge Lush concurred by noting that "[t]he section does not make the supplying of goods a crime, but prohibits it by a penalty."

⁸⁰ [1895] 1 Q.B. 918.

⁸¹ 38 & 39 Vict., ch. 55, § 16 (1872).

⁸² [1895] 1 Q.B. at 922.

⁸³ *Id.*

⁸⁴ *Cornwell v. Sanders*, 3 B. & S. 206, 122 Eng. Rep. 78 (K.B. 1862); *Watkins v. Major*, 10 C.P.D. 662 (1875); *Hargreaves v. Diddams*, 10 L.R.-Q.B. 582 (1875).

reasonable belief would suffice.⁸⁵ Although even this was a change from the general rule that an honestly held claim of right would be a defense to at least some crimes,⁸⁶ the cases clearly show that these offenses did not impose strict liability.

These categories, however, are ultimately not helpful, because it is difficult to know what is not criminal "in any real sense," or whether a particular prosecution is "really only a summary mode of enforcing a civil right." Nevertheless, *Sherras* made its point — the general requirement of *mens rea* was still alive in England, even in regulatory provisions.

4. The Move Toward Strict Liability: Miscellaneous Cases

In a miscellany of cases involving diverse statutes, English courts reached differing results with regard to imposing strict liability. For example, in *Reg. v. Bishop*, an honest and reasonable failure to recognize a boarder's mental instability was held irrelevant under a prosecution for receiving a lunatic into a boarding house.⁸⁷ On the other hand, in *Nichols v. Hall*, a more important case because it dealt with the public health and is therefore clearly a "public welfare" case, *mens rea* was required.⁸⁸ The statute involved required the possessor of a diseased animal to give notice to the police constable "with all practicable speed."⁸⁹ The court held that a cattle owner who brought diseased cattle into the country, but who had not been shown to know of the disease, could not be convicted under a statute prohibiting such import. The court stated:

It has been contended . . . that the Act is aimed at the prevention of a great public evil, and that if it is necessary to prove knowledge it will be difficult or impossible to give effect to its provisions, and many cases were suggested in which the statute and orders might be evaded. There are two answers to this argument. First, this is a penal enactment, and we are bound, . . . , whatever the consequences, to construe it strictly. I do not deny that in construing the enactment we are entitled to take into consideration its object and the surrounding circumstances, but I do not

⁸⁵ *Dickinson v. Eadd*, 111 L.T. 379 (1914).

⁸⁶ An honestly held claim of right is a defense to a "specific intent crime." See *Brown v. State*, 28 Ark. 126 (1873); *State v. Newkirk*, 49 Mo. 84 (1871); see also *Reg. v. Downes*, 1 Q.B.D. 25 (1875); *Cotterill v. Penn*, [1936] 1 K.B. 53; *Horton v. Gwynne*, [1921] 2 K.B. 661.

⁸⁷ *Reg. v. Bishop*, 5 Q.B.D. 259 (1880).

⁸⁸ 8 L.R.-C.P. 322 (1873).

⁸⁹ The Contagious Diseases (Animals) Act, 32 & 33 Vict., ch. 70 (1869).

find any such ambiguity in its terms as would entitle us to strain the language for the purpose of giving effect to the alleged object. . . . [W]ith regard to the supposed consequence of our decision, viz., the facility with which the order may be evaded, the answer is, that Lords of the Privy Council have it in their power, under the Act, to make what order they may think expedient. They can so frame their orders as to prevent all doubt on the subject and obviate the possibility of evasion: our duty is only to construe the order according to the plain import of the language used without regard to the consequences.⁹⁰

Again, strict liability was eschewed in what could easily be characterized as a public health case.

In another case involving safety, the court held that the normal requirement of *mens rea* applied. Thus, the crown would have to prove that a defendant knew that lamps used in a mine were unsafe; the statute should not be construed as imposing strict liability.⁹¹

Even this short summary of nineteenth century English cases involving so-called "strict liability regulatory crimes" shows that the easy categorization of these decisions and statutes is misleading, and that the English courts — in contrast to their American counterparts — were far less tolerant of an argument that a statute should be construed as imposing "strict" criminal liability. In the first place, many of these statutes themselves made it clear that they were essentially aimed at affecting the law of civil, rather than criminal, liability. Such provisions as those in the bellweather Food and Drug Act of 1875, which permitted the defendant totally to exonerate herself by demonstrating a warranty from the seller,⁹² clearly reflect an attempt to allow the defense of "no *mens rea*." Similar provisions that allowed the "prosecutor" (who at this time in England was frequently the private injured party) to recover the fine⁹³ again

⁹⁰ *Hall*, 8 L.R.-C.P. at 326-27.

⁹¹ *Dickenson v. Fletcher*, 9 L.R.-C.P. 1 (1873).

⁹² See *supra* note 53 discussing section 25 of that Act. See also *Fertilizers & Feeding Stuffs Acts*, 56 & 57 Vict., ch. 56, § 3(3) (1893). The *Adulterated Bread Act*, 6 & 7 Will. 4, ch. 37, §§ 12, 13 (1836), allowed a vicariously liable employer to sue the errant employee for the amount of the fine if the bread were adulterated without the employer's knowledge.

⁹³ Thus, for example, *The Betting Act*, 16 & 17 Vict., ch. 119, § 9 (1853), provided that "One Half of every pecuniary Penalty which shall be adjudged to be paid under this Act shall be paid to the Informer. . . ." See *Hawke v. Mackenzie*, 66 J.P. 712 (1902); see also 56 Geo. 3, ch. 53 (1816); 6 & 7 Will. 4, ch. 37, §§ 17, 27 (1836); 9 & 10 Will. 4, ch. 41, § 2 (1839).

suggest an attempt to avoid the niceties of "privity" doctrine.⁹⁴ Not surprisingly, perhaps, this niggardly attitude toward actual strict criminal liability led rather quickly in most areas to the recognition of a defense of due care.⁹⁵

Importantly, the courts did not see special magic in a statute that touched upon public health or welfare. Statutes dealing with adulterated or diseased food were interpreted to require *mens rea* just as were statutes dealing with "morals" offenses, such as the Licensing Act. It is difficult indeed to see any "trend" in English cases, much less a full embracing of the notion of strict liability. If anything, both the decisions and the statute reflect a strong adherence to traditional criminal law notions; even where liability was imposed in a "strict" sense, the defendant was allowed either a defense of "no knowledge" through a warranty, or the right to later recovery from the knowledgeable actor. These escape routes do not speak of strict liability.⁹⁶

⁹⁴ The privity doctrine provided that only a party in immediate contractual privity with another could sue for a defect in the product sold, if that product injured him or her in some way. Thus, a purchaser of a cart could sue only the cart dealer, not the manufacturer, even if it were the manufacturer's negligence which resulted in the injury to the consumer. *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

The privity story is well-known and need not be repeated here. See E. LEVI, *INTRODUCTION TO LEGAL REASONING* 8-27 (1948). The point is that the legislatures, rather than abolish the privity doctrine, provided the private consumer with some (though probably not full) compensation in areas where the common law courts were still precluding suit. This view changes, of course, throughout the next century. Some would even suggest the pendulum has swung too far the other way.

⁹⁵ See *infra* notes 108-09, 172-205 and accompanying text. A concern about punishing only the morally blameworthy while protecting the consumer may also explain the statutory provisions allowing a defendant to substitute another in his or her stead in certain "regulatory" criminal proceedings. See Truck Amendment Act, 50 & 51 Vict., ch. 46, § 12(2) (1887); Shops Act, 14 Geo. 6, ch. 28, § 71(6) (1950); Factories Act, 1 Edw. 8 & 1 Geo. 6, ch. 67, § 137 (1937). See generally G. WILLIAMS, *supra* note 3. See also *supra* note 53.

⁹⁶ Of course, the most famous instances in which strict liability was imposed in nineteenth century England were not these cases, but the "sexual activity" cases, most notoriously bigamy cases. *E.g.*, *Reg. v. Bennett*, 14 Cox Crim. Cas. 45 (1877); *Reg. v. Gibbons*, 12 Cox Crim. Cas. 237 (1872); *Reg. v. Turner*, 9 Cox Crim. Cas. 145 (1862). But even here, the courts were split, and the actual results unclear. Early cases appeared to say that a "mere" bona fide belief in the spouse's death, whether reasonable or not, would be a defense, *Turner*, 9 Cox Crim. Cas. 145, whereas later cases appeared to require that the belief be at least reasonable. In *Bennett*, for example, the defendant merely sought to show that he had been told by someone that his first wife was dead. The exclusion of this evidence was upheld, because the evidence would not show reasonableness. In *Reg. v. Horton*, 11 Cox Crim. Cas. 670 (1871), the defendant, convicted by a jury where his belief was unreasonable, was sentenced to three days imprisonment. The watershed case was, of course, *Reg. v. Prince*, 13 Cox Crim. Cas. 138 (1875), where a series of opinions, each differing in rationale, but virtually all commanding a majority of the court, held that a reasonable mistake as to age would not be a defense to a charge of abducting a girl under sixteen. The lead opinion, by Judge Denman,

That it was not solely because only a fine was imposed that the courts found the acts to be "non-penal" may be inferred from *Lee v. Dangar, Grant & Co.*⁹⁷ In *Lee*, the court was faced with a statute that subjected to a substantial fine any official who demanded certain fees to which he or she was not entitled. The defense raised was a mistake of fact and law, but the distinction did not detain the court at all.⁹⁸ Instead, the court quickly found that, whether or not the acts specified were labeled as "criminal," the statute was a "penal" statute because there was "punishment."⁹⁹ This, said the court, required proof of *mens rea*.¹⁰⁰ Because the sheriff had not had *mens rea*, the fine was not collectible.

The *Lee* court did not explore the difference between an act "in the nature of a crime" (requiring *mens rea*) and those which were not of such a "nature." The only references are to "summary process," which clearly applies to the kinds of statutes about which we have been concerned, and to the term "offense" used in the statute. Nevertheless, *Lee*, decided in the middle of the maelstrom, singularly demonstrates that the courts were ready, when necessary, to simply ignore the strict liability cases.

Finally, the distinction between strict and vicarious liability can serve to distinguish at least some of the cases in which a defendant employer was held liable when he or she personally had no knowledge of the incriminating fact, but his or her servant did. Although vicarious liability is in a real sense "strict," its application in these cases is one more indication that the courts did not see these cases as criminal, for they often emphasized that the general principle against vicarious liability was not infringed by a decision applying such liability in a "non-criminal-type" offense.¹⁰¹

was the most damning. In a case decided after *Prince*, however, Judge Denman distinguished a bigamy case by arguing that "the thing done [in the bigamy case] was not unlawful" and agreed that a reasonable belief in a spouse's death would be a defense. *Reg. v. Moore*, 13 Cox Crim. Cas. 544, 546 (1877). In any event, whatever strict liability was imposed in these cases was short-lived — *Reg. v. Tolson*, 23 Q.B.D. 168 (1889), clearly allowed a defense of reasonable mistake in bigamy cases, and *Prince* became obsolete when Parliament amended the statute to require knowledge, thereby again affirming the importance of *mens rea* and general disenchantment with strict liability. See Criminal Law Amendment Act, 48 & 49 Vict, ch. 67 (1885). For a review of the American reaction to *Prince*, and the adherence to a strict liability view even after *Tolson*, see Singer II, *supra* note 5, at 471.

⁹⁷ [1892] 2 Q.B. 337.

⁹⁸ *Id.* at 349.

⁹⁹ *Id.* at 351.

¹⁰⁰ *Id.* at 354.

¹⁰¹ Manchester, *supra* note 5, argues that vicarious liability entered the criminal law fifty years prior to strict liability.

An important aspect of these cases was the use of the doctrine of *in pari materia*, where the defendant was charged under a provision that did not require that the violation be done "knowingly," but where other provisions of the same statute did so require. Thus, in *Parker v. Adler*, the court contrasted the section under which the prosecution was brought (where the word "knowingly" was absent) with the preceding section of the Act (which allowed two defenses, actual lack of knowledge and reasonable lack of knowledge), and concluded that knowledge was not required.¹⁰² Similarly, in *Betts v. Armstead*, the defendant seller of adulterated flour was acquitted on the grounds that the alum in the flour must have been there when he bought it, and that he was therefore unaware that the flour was adulterated.¹⁰³ Although this acquittal was reversed on appeal, Judge Cave took special pains to note that other sections of the Act in question required "knowingly," and that the omission in the provision at hand therefore must have been significant. A concurring opinion by Judge Smith further noted that when the word "knowledge" was present, the penalty was much higher; thus, the absence of a "knowledge" requirement in the section in issue, which carried a much lower penalty, was significant.¹⁰⁴ In contrast to *Betts* and *Parker* stands the opinion of Judge Day in *Sherras* that the absence of "knowingly" only shifts the burden of proof and does not dispense entirely with the relevancy of knowledge.¹⁰⁵ This, of course, is also what *Marsh*¹⁰⁶ held, and what, by implication, *Hearne*¹⁰⁷ found.

One can reconcile these cases, perhaps, by adopting a position that where the Legislature clearly indicates that it did not intend to allow a *mens rea* defense,¹⁰⁸ that intention will stand, but in the absence of such a clear declaration, a mistake of fact will be, at least, a defense on which the defendant will carry the burden of going forward. This latter interpretation, of course, is still inconsistent with the bedrock notions of *mens rea*, which would require the prosecution to demonstrate *mens rea* beyond a reasonable doubt in

¹⁰² [1898] 1 Q.B. 20. But see *Bosley v. Davies*, 1 Q.B.D. 84 (1875), where the court concluded the omission of knowingly was "probably unintentional." *Id.* at 87.

¹⁰³ 20 Q.B.D. 771 (1888); *accord* *Reg. v. Forbes & Webb*, 10 Cox Crim. Cas. 362 (1865); see also *Cundy v. LeCoq*, 13 Q.B.D. 207 (1884); *Bond v. Evans*, 21 Q.B.D. 249 (1888).

¹⁰⁴ 20 Q.B.D. at 773.

¹⁰⁵ *Sherras v. De Rutzen*, [1895] 1 Q.B. 918, 921.

¹⁰⁶ *R. v. Marsh*, 2 B. & C. 717, 107 Eng. Rep. 550 (K.B. 1824).

¹⁰⁷ *Hearne v. Garton & Stone*, 2 El. & El. 66, 121 Eng. Rep. 26 (K.B. 1859).

¹⁰⁸ *Betts v. Amstead*, 20 Q.B.D. 771 (1888).

its case in chief. Even so, such a compromise leaves *some* ground for *mens rea* by allowing the defendant to raise mistake.

In short, the English cases in even the late nineteenth century did not embrace strict liability. Some statutes expressly created defenses, and others were read to imply such a defense. To a significant degree, the cases involved situations of vicarious, rather than strict, liability. Moreover, the generally accepted view that these statutes were aimed at protecting the health of the consumer is overstated. Many of these statutes and provisions proscribed mislabeling, not adulteration per se. Many of the provisions in the Food and Drug Sales Act, for example, were concerned with informing the consumer of possible additives, not proscribing the additives themselves. Furthermore, a substantial number of cases under each of the acts differentiated the situation on the basis of the facts involved.

Still, by the beginning of the twentieth century, part of the bar believed that strict liability applied in all "regulatory" instances. This can be seen by the fact that defense counsel were not arguing that *mens rea* was an element to be proved by the prosecutor, but, following *Sherras*, that at least the defendant could defend by showing a lack of knowledge.¹⁰⁹ If strict liability were not the law, at least the full protection afforded by *mens rea* appeared somewhat diluted.

B. *The American Experience in the Nineteenth Century*

If English courts were wary of construing statutes to impose strict criminal liability, courts in the United States were far less reticent. Yet the myths¹¹⁰ about strict liability crimes and their development in this period are overstated. First, the vast majority of statutes and cases had nothing to do with public health or welfare; at least a half of the cases in the nineteenth century dealt not with housing, food, consumer protection generally, or other "regulatory" measures as such, but with control of liquor and protection of minors. Second, a number of courts continued to require full knowledge on the part of the defendant even in these kinds of offenses, and a sizeable number allowed reasonable mistake as a defense. Thus, the story of the "explosion" of strict criminal liability during the latter part of the nineteenth century is exaggerated, at best.

¹⁰⁹ E.g., *Hobbs v. Winchester Corp.*, [1910] 2 K.B. 471, 474-75.

¹¹⁰ See Sayre, *supra* note 1.

1. The Scope of Strict Liability

The road to strict criminal liability in America was rocky indeed. Perkins¹¹¹ cites *Barnes v. State*¹¹² as the "first" American strict liability decision.¹¹³ In fact, however, *Barnes* is at best inapposite and indeed more appropriately seen as an anti-strict liability decision. *Barnes* was charged with selling liquor to a person addicted to alcohol. In fact, *Barnes*' employee, and not *Barnes* personally, had sold the liquor, contrary to *Barnes*' express directions. Nevertheless, *Barnes* was convicted by the trial court.

The case thus raised not a question of strict, but of vicarious, liability.¹¹⁴ Had *Barnes*' conviction been affirmed, the case would only stand for the proposition that an employer can be held liable for the knowingly criminal acts of his or her employee, even if the employer has issued contrary instructions. But the startling point, given Perkins' citation to the case, is that *Barnes*' conviction was overturned by the court on appeal, on the very ground at issue here. Although the court did suggest that other Connecticut statutes imposed strict criminal liability,¹¹⁵ the court held that, under the statute involved in *Barnes* (a liquor statute of the kind later interpreted to impose strict liability), there could be no criminal liability without at least personal recklessness on the part of the defendant.¹¹⁶

The statute involved in *Barnes* was typical of a nineteenth century focus on liquor and its regulation. By 1900, at least twenty-five states had enacted statutes forbidding the sale of liquor generally¹¹⁷

¹¹¹ Perkins, *Ignorance and Mistake in the Criminal Law*, 88 U. PA. L. REV. 35 (1939). Sayre also cites *Barnes* as the first strict liability case. Sayre, *supra* note 1, at 63. It is, of course, not that, but rather, a vicarious liability case.

¹¹² 19 Conn. 398 (1849).

¹¹³ Manchester argues that *Commonwealth v. Mash*, 48 Mass. (7 Met.) 472 (1844), was the first American strict liability case. Manchester, *supra* note 5, at 283. *Mash* involved a charge of bigamy, and held that a reasonable mistake of fact was no defense. See *supra* note 96.

¹¹⁴ The difference between vicarious liability, where the act of another who had the requisite *mens rea* is imputed to the defendant, and strict liability, where the *mens rea* of any actor is irrelevant, has already been noted. See *supra* note 77.

¹¹⁵ The three statutes cited dealt with seduction of a female under the age of twenty-one, adultery, and selling liquor to a minor. 19 Conn. at 403. These, of course, soon became the typical "strict liability" crimes, but they were not involved in this case. That discussion was therefore clearly *obiter dictum*, and there had been no cases upholding such strict liability.

¹¹⁶ The court stated: "[T]he master is never liable criminally for acts of his servant, done without his consent, and against his express orders." *Id.* at 407.

¹¹⁷ The statutes are cited in these cases: *State v. Carl*, 89 Ala. 93, 8 So. 156 (1889); *State v. Schaefer*, 44 Kan. 90, 24 P. 92 (1890); *State v. Compton*, 95 Ala. 25, 11 So. 69 (1892);

or to minors.¹¹⁸ The cases on sales to minors turn out to be the critical decisions that establish strict liability, although not as overwhelmingly as believed. In at least three states, Alabama, Ohio, and Michigan, the courts adhered to the common law requirement that the prosecution show the defendant actually knew the purchaser was underage,¹¹⁹ and in at least another two — Georgia and Indiana — some decisions allowed as a “defense” a reasonable mistake as to age.¹²⁰ But in thirteen states, courts held that no matter how careful or reasonable the defendant (or the defendant’s servant) had been, liability was absolute if the purchaser turned out to be a minor.¹²¹

State v. Moulton, 52 Kan. 69, 34 P. 412 (1893); State v. Lindoen, 87 Iowa 702, 54 N.W. 1075 (1893).

¹¹⁸ See *infra* notes 119–21.

¹¹⁹ Adler v. State, 55 Ala. 16 (1876); Faulks v. People, 39 Mich. 200 (1878); Miller v. State, 3 Ohio St. 476 (1854). Indiana wavered. The cases first held that even an unreasonable mistake as to age was a defense if honestly held. State v. Kalb, 14 Ind. 403 (1860); Brown v. State, 24 Ind. 113 (1865). Soon, however, the cases appeared to change to a requirement that the mistake be reasonable. Rineman v. State, 24 Ind. 80 (1865). A later case appeared to return to *Kalb*, by announcing that “a sale of intoxicating liquor to a minor under the belief, entertained in good faith, that he was an adult, is not within the statute.” Goetz v. State, 41 Ind. 162, 164 (1872). Later cases appeared to require reasonableness. *E.g.*, Payne v. State, 74 Ind. 203 (1881); Hunter v. State, 101 Ind. 241 (1884); Kraemer v. State, 106 Ind. 192, 6 N.E. 341 (1886). Intriguingly, the equivocation and ultimate change in Indiana law parallels a similar change in Indiana with regard to mistake of fact in self-defense. See Singer II, *supra* note 5, at 466.

¹²⁰ Alabama, like Indiana, had mixed decisions. See, *e.g.*, Bain v. State, 61 Ala. 75 (1878); Marshall v. State, 49 Ala. 21 (1873). See *supra* note 119. In Stern v. State, 53 Ga. 229 (1874), the court allowed reasonable mistake of fact in a case charging the defendant with allowing a minor to play billiards without his parents’ consent.

¹²¹ Below are examples of where a court held a storekeeper strictly liable for the age of a minor purchaser:

Arkansas: Redmond v. State, 36 Ark. 58 (1880); Edgar v. State, 37 Ark. 219 (1881) (purchasing minor himself believed he was adult at time of purchase);

Connecticut: State v. Kinkead, 57 Conn. 173, 17 A. 855 (1889);

Illinois: Farmer v. People, 77 Ill. 322 (1875); State v. McCutcheon, 69 Ill. 601 (1873);

Indiana: State v. Clottu, 33 Ind. 409 (1870);

Iowa: Jamison v. Burton, 43 Iowa 282 (1876);

Kentucky: Ulrich v. Commissioner, 69 Ky. 400 (1869) (confusing, short opinion without facts);

Maryland: Carroll v. State, 63 Md. 551, 3 A. 29 (1885);

Massachusetts: Commonwealth v. Finnegan, 124 Mass. 324 (1878);

Missouri: State v. Bruder, 35 Mo. App. 475 (1880);

New York: Perry v. Edwards, 44 N.Y. 223 (1871);

South Dakota: State v. Sasse, 6 S.D. 212, 60 N.W. 853 (1894) (conviction upheld even though defendant obtained an affidavit from purchaser that he was over twenty-one);

West Virginia: State v. Cain, 9 W. Va. 559 (1876); State v. Gilmore, 9 W. Va. 641 (1876);

Wisconsin: State v. Hartfiel, 24 Wis. 60 (1869).

Michigan first embraced the subjective test, see State v. Faulks, 39 Mich. 200 (1878), but then equivocated, People v. Roby, 52 Mich. 577, 18 N.W. 365 (1884). Although *Roby* is often cited as a leading case on strict liability, it is in fact a mistake of law case. The defendant

Still another set of cases dealt with sellers who argued that they (and their agents) did not know that the item they sold was "intoxicating." One of the first cases appears to be *Commonwealth v. Hallett*, where the defendant sold "plantation bitters," and argued that he believed in good faith that the item was not "intoxicating" under the law.¹²² The court, in a two sentence decision, peremptorily rejected the contention, declaring that "the defendant had no right to sell intoxicating drinks, even if he sold them in good faith as a medicine," and upheld the trial court's exclusion of evidence relating to defendant's good faith. Similarly, the defendant in *Gourley v. Commonwealth* sold "Malt Mead," an item allegedly new to the area, and argued that it was not intoxicating, and that even if it were, the defendant did not know that it was.¹²³ Although the conviction was reversed on the grounds that the state failed to prove that the malt was intoxicating, the court in dictum declared that "[i]f the liquor or beverage is one that will intoxicate, it is wholly immaterial that the accused believed that it would not or that in good faith he bought it as a non-intoxicant, or that he was ignorant of its quality or ingredients."¹²⁴ Similar results occurred where the item was hard cider.¹²⁵

In some ways, these "intoxicating substance" cases appear inapposite to the issue at hand. First, the question of whether an item is "intoxicating" is, at best, a mixed question of fact and law. Indeed in *State v. Schaefer* the court held as a matter of law that hard cider is "liquor."¹²⁶ If that view is taken, then these cases are instances of

Roby opened his bar on Sunday to clean it. A stranger walked in and was served liquor. Roby was charged with violating a statute prohibiting a bar from being open *for any purpose*, and the court found that being "open" for purposes of cleaning violated the statute. Still, the court in *Roby* used the language of strict liability. Again, Michigan was one of a few states to use a subjective standard in other areas of mistake of fact. See *Singer II*, *supra* note 5, at 485 n.151. I have found no instance of a court in this period moving from strict liability or an objective position to a subjective position. What movement there was clearly appears to have been away from subjectivism.

¹²² 103 Mass. 452 (1869). Many of the "strict liability" cases are found in Massachusetts; these early cases were cited by many other courts for the general validity of strict liability provisions. See *supra* note 121, *infra* note 124.

¹²³ 140 Ky. 221, 131 S.W. 34 (1910).

¹²⁴ *Id.* at 227, 131 S.W. at 36; see also *Sizemore v. Commonwealth*, 140 Ky. 338, 131 S.W. 37 (1910); accord *Compton v. State*, 95 Ala. 25, 11 So. 69 (1892); *Carl v. State*, 89 Ala. 93, 8 So. 156 (1890); *State v. Lindoen*, 87 Iowa 702, 54 N.W. 1075 (1893); *State v. Moulton*, 52 Kan. 69, 34 P. 412 (1893); *State v. Eaton*, 97 Me. 289, 54 A. 723 (1903); *Commonwealth v. Goodman*, 97 Mass. 117 (1867).

¹²⁵ See, e.g., *Hill v. State*, 19 Ariz. 78, 165 P. 326 (1917); *State v. Valure*, 95 Iowa 401, 64 N.W. 280 (1895); *State v. Schaefer*, 44 Kan. 90, 24 P. 92 (1890).

¹²⁶ 44 Kan. 90, 24 P. 92 (1890); see also *Commonwealth v. Boynton*, 84 Mass. (2 Allen)

mistake of law, rather than mistake of fact, and the unhappy doctrine that mistake of law is no excuse can explain them without reference to strict criminal liability and mistake of fact doctrine. On the other hand, some courts faced with this mistake cited the "sale to minors" cases, and applied them without asking whether a distinction could be drawn between a hard fact, such as age, and a "mixed" fact, such as "liquor" or "intoxicant."¹²⁷ Surely the cases are fairly read as imposing strict liability in yet another area of liquor regulation.¹²⁸ Other cases and statutes were aimed at protecting minors from other sins, particularly from being present in billiard halls.¹²⁹

The liquor and minor regulation cases are paradigms of the decisions rendered by the courts in other arenas during the last part of the nineteenth century. The courts stressed all the themes that have been used by supporters of strict liability since that time: (1) it is difficult to prove actual knowledge; (2) it is necessary for the public good that perpetrators not be allowed to escape the law; (3) the "small fine" involved sufficiently dilutes the stigmatic effect of conviction to allow some loosening of the common law's requirement of *mens rea*. Additionally, courts enunciated strains of both legal positivism and judicial restraint.¹³⁰ Thus, in a typical case involving charges against a driver of a truck for illegally transporting intoxicating liquor in a dry city without a permit, the court rejected the contention that to hold the defendant guilty was a violation of due process because the container was closed and he could not possibly have known its contents:

160 (1861). In *Boynston*, the court upheld the rejection of evidence going to defendant's good faith that he did not believe the beer he was selling was "intoxicating" within the meaning of the law by citing "[t]he salutary rule, that every man is conclusively presumed to know the law . . ." (emphasis added).

¹²⁷ But see *Hill v. State*, 19 Ariz. 78, 165 P. 326 (1917). In *Hill*, the court speciously treated the defendant's mistake of fact argument as though he were arguing that he did not know that he was selling cider, not that he did not know that cider was an "intoxicating beverage."

¹²⁸ The desire to "protect" minors also reached, of course, to prohibiting their marriage at any early age, and criminally prosecuting those who married them. See *Sikes v. State*, 30 Ark. 469 (1875) (due diligence in ascertaining ages properly denied as a defense); *Smyth v. State*, 13 Ark. 696 (1853); cf. *Beckham v. Nacke*, 56 Mo. 546 (1874) (civil penalty awarded to parent of minor who was married underage); see also *Reg. v. Prince*, 13 Cox Crim. Cas. 138 (1875).

¹²⁹ See, e.g., *Commonwealth v. Emmons*, 98 Mass. 6 (1867); *Stern v. State*, 53 Ga. 229 (1874). *Emmons* disallowed any evidence of reasonableness, holding the defendant strictly liable, whereas *Stern* allowed a defense of due diligence as to age.

¹³⁰ See, e.g., *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910). For a case much like *Mixer*, see *Commonwealth v. Olshefski*, 64 Pa. D. & C. 343 (Montour County Ct. 1948). Compare *Hearne*, 2 El. & El. 66, 121 Eng. Rep. 26 (1859).

While the rule may seem harsh at first sight . . . this raises not a question of judicial construction, but of legislative policy, with which the courts cannot interfere so long as no constitutional guaranty is infringed. . . . Taking into account the magnitude of the evils arising from the use of intoxicating liquors and the manifest struggle of the Legislature by successive enactments to regulate its transportation . . . , an exemption ought not to be read into the statute contrary to what seems to be a deliberate legislative purpose based upon grounds of public policy.¹³¹

Similarly, the court in *State v. Clottu* announced:

It may be possible to conceive of legislation so plainly beyond the scope of governmental power, or so flagrantly in conflict with natural right, that the courts may set it aside as unwarranted, though no clause of the constitution can be found prohibiting it. But the cases must be rare indeed; and whenever they do occur the interposition of the judicial *veto* will rest upon such foundations of necessity that there can be little or no room for hesitation.¹³²

These cases do not merely illustrate the move toward strict liability; in a significant way, they were the movement. Of the cases cited by Sayre in his copious appendix,¹³³ thirty percent decided before 1900 dealt with liquor directly, and at least another ten percent concerned either the transportation of liquor or corruption of minors. This heavy concentration of cases in the liquor control area is in striking contrast with the English statutes, which, as we have just seen, were much more concerned with consumer injury and deception, and with regulating commercial enterprise.¹³⁴ Perhaps it is not surprising that American legislatures did not seek to regulate enterprise at this point, and were less anxious than their English counterpart to fill the privity gap.¹³⁵ Still, in this country

¹³¹ *Mixer*, 207 Mass. at 146-47, 93 N.E. at 251-52.

¹³² 33 Ind. 409, 410-11 (1870) (emphasis in original). This was dictum, however, because the jury in the case had actually acquitted the defendant, and the case was brought up on a reserved question for the court.

¹³³ Sayre, *supra* note 1, at 84-88.

¹³⁴ Indeed, in one case where a defendant, charged with selling alcohol, sought to introduce a warranty from his seller that cider contained no alcohol, it was held that the trial court properly excluded the warranty. See *Beiser v. State*, 9 Ala. App. 72, 63 So. 685 (1913). Compare the discussion of *Woodrow*, *supra* notes 26-34 and accompanying text. Manchester is one of the few writers to note the distinction between the motivation behind strict liability in this country and in other countries, particularly England. Manchester, *supra* note 5, at 282.

¹³⁵ See *supra* note 94 and accompanying text.

the recorded cases in the nineteenth century do not support the view that strict liability crimes are "children of the industrial revolution." If anything, strict criminal liability, to the extent that it existed during this time period, was the child (or parent) of the prohibitionist movement, aided and abetted by anticompetitive forces who sought to limit markets, and in particular the dairy market. If *caveat emptor* was no longer the dominant strain in either contract or criminal law, neither had the protectionism reflected by England's "strict" criminal liability statutes yet sprouted in American soil.

Yet, although it is easy today to dismiss these liquor regulations as a trivial concern, the matter under regulation probably was then seen as crucial to controlling criminal behavior. After all, as Professor Perkins had reminded us, those who supported these statutes "truly believed that those who manufactured or sold intoxicating liquor . . . were wicked, immoral persons who should be punished. . . . [T]he whole purpose of these statutes was to eliminate and punish what was regarded as immoral behavior. . . . The Prohibition offenses were clear *mala in se* — true crimes."¹³⁶ In short these statutes were supported, and possibly enacted, on moral grounds. The strict liability reading given them by a number of courts did in fact bode to invade other provinces of morally-based criminal liability.

But the extension to industrial offenses did not occur during the nineteenth century. Again, looking at Sayre's list of cases, his "adulterated foods" category is limited exclusively to dairy products, primarily oleomargarine and milk.¹³⁷ In light of the economic battle that was raging over oleomargarine at the time,¹³⁸ it is probably

¹³⁶ Perkins, *supra* note 74, at 1075.

¹³⁷ Many of the first cases involve "adulterated" milk, which may simply mean "diluted" milk. See *Commonwealth v. Flannelly*, 81 Mass. 195 (15 Gray 1860) (*mens rea* required); *Commonwealth v. Warren*, 160 Mass. 533, 36 N.E. 308 (1894) (*mens rea* not required). A typical milk adulteration case is *People v. Kibler*, 106 N.Y. 321, 12 N.E. 795 (1887), in which the court held that no intent was necessary to violate the statute. An earlier case, *People v. Cipperly*, 101 N.Y. 634, 4 N.E. 107 (1886), had reached the same conclusion, but did so in the face of a statutory provision that a sale would be "presumptive evidence of a willful intent" to violate the statute. That gave rise to an argument, rejected in *Cipperly*, that a willful intent was necessary. After *Cipperly*, however, the legislature had amended the statute repealing that phrase, so there was no doubt that the legislature did not intend to require *mens rea*.

¹³⁸ See *infra* note 144. Moreover, at least two of these statutes essentially replicated the English statutes, cited *supra* notes 36 and 43, by allowing any person to bring the complaint, and providing that the complainant would receive at least part of the fine. See *State v. Rogers*, 95 Me. 94, 49 A. 564 (1901) (complainant gets one-third of fine); *Commonwealth v. Weiss*, 139 Pa. 247, 21 A. 10 (1891) (complainant gets entire fine).

much more accurate to read these statutes as economic protectionism than as advanced signs of consumer protection.

One of the more interesting stories of strict liability criminal statutes involves the attempt by farmers and dairyfarmers who, in the words of Lawrence Friedman, "conducted a vendetta against 'butterine' and oleomargarine both on the state and national levels."¹³⁹ Although these statutes prohibited the sale of oleomargarine, like their English counterparts they usually were cast not in terms of public health, but in terms of fraudulent packaging. Thus, for example, the sale of oleo in Maine was allowed, "provided it is not made in imitation of yellow butter and the true character of it is openly designated and published."¹⁴⁰ These statutes were frequently interpreted as imposing strict and vicarious liability against both the employee who sold the foods and the owner of the store.¹⁴¹ The typical arguments in favor of strict liability were marshalled with the usual frequency. Thus, the court in *State v. Rogers* said:

The protection of the community against the extensive and skillful frauds practiced in the adulteration of articles

¹³⁹ L. FRIEDMAN, *HISTORY OF AMERICAN LAW* 400 (1973).

¹⁴⁰ Maine statute as quoted in *State v. Rogers*, 95 Me. 94, 49 A. 564 (1901); *accord* 1899 Pa. Laws 136 (allowing sale so long as the oleo is "free from coloration or ingredients that cause it to look like butter, and in a separate and distinct form, and in such manner as will advise the consumer of its real character . . . [and if it is] marked and distinguished on the outside of each tub, package or parcel thereof, in a conspicuous place, by a placard with the word 'oleomargarine' or 'butterine' . . . in plain, uncondensed gothic letters not less than one inch long . . ."). New Hampshire's unique statute initially required that the oleo be colored pink, 1885 N.H. Laws 68, but later provided for sales upon proper disclosure, 1895 N.H. Laws 115, § 3. The earlier statute was upheld in *State v. Marshall*, 62 N.H. 549, 15 A. 210 (1888), against a challenge that the coloring requirement was intended *not* to inform the public, but to humiliate the seller. In *State v. Ryan*, 70 N.H. 196, 46 A. 49 (1900), the court held that the sale provision of this statute was a strict liability crime. New York required letters in plain Roman type at least one-half inch in length in durable paint. 1882 N.Y. Laws 215. New Jersey required a card "at least six inches long, at least four inches wide, and the printing thereon shall be in letters at least of the size known as two-line English." 1887 N.J. Laws 149. Massachusetts initially prohibited only fraudulent sale of oleo, but in 1891 prohibited its sale entirely. *See* 1891 Mass. Acts 58, *cited in* *Commonwealth v. Huntley*, 156 Mass. 236, 30 N.E. 1127, 1127 (1892). On the same day, however, the legislature also enacted another statute entitled "An Act to Prevent Deception" in the sale of imitation butter. The court in *Huntley* held that the latter statute did not repeal the earlier one, and that the earlier, which provided essentially strict liability, was within the legislature's constitutional power.

¹⁴¹ *E.g.*, *Commonwealth v. Weiss*, 139 Pa. 247, 21 A. 10 (1891) (court properly refused instruction that jury could convict only if defendant knew that the item sold was not genuine butter); *State v. Ryan*, 70 N.H. 196, 46 A. 49 (1900) (same); *accord* *State v. Newton*, 50 N.J.L. 534, 14 A. 604 (1888). *But see* *Meyer v. State*, 134 Wis. 156, 114 N.W. 501 (1908). The *Meyer* court, faced with a defendant who acknowledged that he was aware that he was selling oleo, refused to decide whether *mens rea* was necessary. In the leading dairy state, such a reluctance, particularly in light of some of the other decisions, is striking.

of food is a matter of such general importance, and proof of the defendant's knowledge of the adulteration is in a majority of instances a matter of such extreme difficulty, that it is deemed reasonable as well as competent for the legislature to require the seller of such articles to take upon himself the responsibility of knowing that they are not adulterated.¹⁴²

Similarly, the court in *Groff v. State* declared: "To hold that the proprietor should be held liable only when the sale was made in his presence, or with his knowledge or consent, would be to prepare a way of easy escape."¹⁴³

Although these statutes appeared to be health statutes, and are frequently referred to as such, they were in fact regulations of deceptive practices, clothed in quasi-criminal liability.¹⁴⁴ Moreover, at least some of the American cases echo the theme found in England that although the statutes were cast in criminal garb, they were truly civil.¹⁴⁵ Indeed, in *In Re Jacobs*¹⁴⁶ the New York Court of Appeals invalidated a law dealing with adulteration of milk or cream on the ground that the law was not confined to unhealthful substances, but prohibited sale of any compound, however wholesome or valuable.¹⁴⁷ Another indication of the civil nature of the statutes,

¹⁴² 95 Me. 94, 102, 49 A. 564, 567 (1901); see also *Fox v. State*, 94 Md. 143, 50 A. 700 (1901).

¹⁴³ 171 Ind. 547, 550, 85 N.E. 769, 770 (1908).

¹⁴⁴ E.g., *Meyer*, 134 Wis. at 161, 114 N.W. at 503: "It is established . . . that the oleomargarine in question is a healthful food product. . . . It being conceded that the product contains no ingredient injurious or dangerous to health, . . . it must follow that this police regulation respecting the manufacture and sale relates, not to the public health, but to . . . the prevention of frauds or imposition." See also *Newton*, 50 N.J.L. at 537, 14 A. at 606:

If the sole basis for this statute were the protection of the public health, this objection [that oleo is healthful] would be pertinent. . . . But . . . this provision is not aimed at the protection of the public health. Its object is to secure to dairy men and to the public at large a fuller and fairer enjoyment of their property, by excluding from the market a commodity prepared with a view to deceive those purchasing it.

In upholding Pennsylvania's statute, however, the Supreme Court construed it as a health, rather than a deception, statute. *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

¹⁴⁵ Many courts articulated this view. E.g., *State v. Gray*, 85 Vt. 99, 101, 81 A. 450, 451 (1911) ("The action for its violation, though criminal in form, is in substance more particularly civil in nature") Others describe these as "not crimes in substance," see, e.g., *Reg. v. Zora*, 12 C.C.C.2d 479, 480 (Alta. Sup. Ct., App. Div. 1973); *Reg. v. Slegg & Slegg Forest Prods. Ltd.*, 17 C.C.C.2d 149, 155 (B.C. Prov. Ct. 1974); *R. v. Malhotra*, 57 C.C.C.2d 539, 541 (Man. Prov. Ct. 1980), or as "not crimes," *Reg. v. Chapin*, 45 C.C.C.2d 333, 340 (Can. 1979).

¹⁴⁶ 98 N.Y. 98 (1885); see also *People v. Marx*, 99 N.Y. 377, 2 N.E. 29 (1885).

¹⁴⁷ New York subsequently amended its statute, to recast it in terms of mislabeling. That act was upheld in *People v. Arensberg*, 105 N.Y. 123, 11 N.E. 277 (1887). But see *State v.*

and thus their non-health goal, is the method of collection of the fine. Thus, for example, Pennsylvania,¹⁴⁸ New Hampshire,¹⁴⁹ New York,¹⁵⁰ and Maine¹⁵¹ statutes, like their English counterparts,¹⁵² provided that the suit could be brought by any person, and that the fine would be payable, in whole or in part, to that person. Indiana went even further, providing, as did some English counterparts,¹⁵³ that a dealer could obtain exoneration by establishing a "guarantee, signed by the wholesaler, jobber, agent or other party . . . from whom he [or she] purchased such article."¹⁵⁴ Again, protection of the purchaser¹⁵⁵ as purchaser, rather than as consumer for health reasons, appears to have informed these statutes.¹⁵⁶ Finally, the penalties involved reflect the non-criminal nature of the offense. Indiana provided for a fine of "not less than \$10.00 nor more than \$30.00" for the first offense, with the amount increasing for subsequent acts;¹⁵⁷ New Jersey provided for \$100 for the first offense, and \$200 for every subsequent offense.¹⁵⁸

In fact, one could make a strong argument that the myth that the nineteenth century blossomed in strict liability criminal statutes is simply not true. Instead, a fairer reading of the cases shows that, in a few isolated areas, almost all of which were the obvious targets of specialized political forces (what today would be called one-issue interest groups), there were decisions favoring the imposition of criminal liability without requiring *mens rea*.¹⁵⁹

Addington, 77 Mo. 110 (1882). In *Addington*, the court upheld a statute that prohibited all sale of oleo, even where the defendant argued that the item was properly and clearly marked.

¹⁴⁸ See 1899 Pa. Laws 136. An earlier version, 1885 Pa. Laws 25, was applied in *Commonwealth v. Weiss*, 319 Pa. 247, 21 A. 10 (1891).

¹⁴⁹ 1885 N.H. Laws 68.

¹⁵⁰ 1882 N.Y. Laws 215, § 5.

¹⁵¹ ME. REV. STAT. ANN. tit. 128, § 3 (1895).

¹⁵² See *supra* notes 91-93 and accompanying text.

¹⁵³ See, e.g., the discussion, *supra* notes 41-55 and accompanying text, of the Food and Sales Act of 1875, as well as of other English statutes allowing substitution of defendant.

¹⁵⁴ 1907 Ind. Acts 104, § 6.

¹⁵⁵ In a number of states, state agents enforced the statutes. E.g., *Carter v. Camden Dist. Court*, 49 N.J.L. 600, 10 A. 108 (1887) (suit brought by state dairy commissioner). It is, of course, likely that some of these suits could have been brought by competitors.

¹⁵⁶ Missouri, on the other hand, simply forbade the sale entirely. 1881 Mo. Laws 120 (providing for a \$1000 fine, or a year in prison, or both).

¹⁵⁷ 1907 Ind. Acts 104, § 10.

¹⁵⁸ 1886 N.J. Laws § 84. New Hampshire provided for a fine of \$50 for the first offense, and \$100 for every subsequent offense. 1885 N.H. Laws 68. Interestingly, the fine was *lowered* in 1895 to \$25-50 for the first offense and \$50-100 for subsequent offenses. 1895 N.H. Laws 115, § 4. A major exception to the minor penalties was Missouri, which provided for a fine of \$1000 and up to one year imprisonment. 1881 Mo. Laws 120, § 1.

¹⁵⁹ Those decisions were followed by a large number of American courts. When *Prince*

Unlike the situation in either mistake of fact¹⁶⁰ or provocation,¹⁶¹ the writers during the nineteenth century were of little assistance on the question of strict liability, because they simply did not recognize that the criminal law itself had changed. Instead, their treatises speak of specific "crimes" or "offenses" in which the courts have imposed strict liability. There is no recognition from Wharton, Bishop, or others that a new trend had been set in the criminal law which might be worth considering. Perhaps this myopia is not surprising, in light of these writers' general approach to simply restating, sometimes with substantial error,¹⁶² the law as it stood. Although some jurists noted the trend,¹⁶³ not until Sayre's article¹⁶⁴ was there any real awareness that a new kind of criminal offense might have been established. Thus, Sayre's article became enormously influential, and its own mistakes were perpetuated for many years to come.

II. THE TWENTIETH CENTURY EXPERIENCE

It is widely believed that the twentieth century has seen the explosion of strict liability "crimes" ranging from traffic violations to intense regulation of competitive businesses.¹⁶⁵ Undoubtedly, there are reported cases dealing with a range of areas of activity in which courts have upheld what they believe to be strict criminal liability.¹⁶⁶ But even after strict liability had been accepted, some courts were reluctant to continue the trend. In *State v. Williams*, for example, a defendant truck driver was charged with transporting undersized fish.¹⁶⁷ He was charged despite the fact that the fish were in closed and iced boxes. In a highly similar case some forty

was decided, the rule that even a reasonable mistake as to the age of a consenting female was not a defense was rapidly established. See Sayre, *supra* note 1, at 67-76. There has been a slight erosion of that harsh doctrine in this country in the past twenty years, but the general rule continues to be strict liability. As Sayre argues, however, these lines are *sui generis*, and "are not to be confused with the class of offenses under discussion." Sayre, *supra* note 1, at 73.

¹⁶⁰ See Singer II, *supra* note 5, *passim*.

¹⁶¹ See Singer I, *supra* note 5, *passim*.

¹⁶² See Singer I and II, *supra* note 5, *passim*.

¹⁶³ E.g., *Tenement House Dep't of City of New York v. McDevitt*, 215 N.Y. 160, 168, 109 N.E. 88, 90 (1915) (Cardozo, J.); see also *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 32-33, 121 N.E. 474, 477 (1918) (Cardozo, J.).

¹⁶⁴ Sayre, *supra* note 1.

¹⁶⁵ See *United States v. Morrissette*, 342 U.S. 246, 253-56 (1952).

¹⁶⁶ A long, but by no means exhaustive list can be found in MPC, *supra* note 10, § 2.05.

¹⁶⁷ 94 Ohio App. 249, 115 N.E.2d 36 (1952).

years earlier, distinguishable only on the basis that the item was alcohol, a Massachusetts court had convicted the defendant.¹⁶⁸ Yet the Ohio court held that the trial court should have admitted defendant's contention that he did not know and could not reasonably have known of the contraband, and thus reversed his conviction.¹⁶⁹

In another case, a conviction for permitting an unlicensed driver to drive the owner's car was reversed because the owner proved that he neither knew nor had reason to know that the borrower did not have a license.¹⁷⁰ And a statute that provided for 1-3 years of imprisonment for certifying that a notarized paper was properly sworn was construed as requiring *mens rea* even though the court concluded that the statute was "*mala prohibitum*."¹⁷¹

These decisions, however, may be random, and explicable either on the basis of specific facts, or the specific statutes involved. Still, over the last thirty years there appears to have been a marked movement away from strict liability criminality throughout the common law world. This movement has had several highlights: (1) the decisions in England and Canada essentially to allow the defendant to demonstrate non-negligence; (2) the promulgation and adoption of the Model Penal Code in this country.

A. *The Twilight of Strict Liability in the Commonwealth*

As already discussed,¹⁷² England never embraced strict liability criminality to the degree that American courts did. First, the courts generally presumed *mens rea* was required. Even if this were not the case, most Commonwealth courts had already established the basic principle that even if the prosecutor's case in chief could sound in strict liability, a defendant could prove lack of negligence as a defense.¹⁷³ This principle, in addition to the numerous "third-party" provisions of many of the otherwise strict liability statutes,¹⁷⁴ clearly diminished the impact of the idea. The refusal to embrace strict liability criminality also accounts for the many cases where the courts

¹⁶⁸ *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910).

¹⁶⁹ *Accord Commonwealth v. Olshefski*, 64 Pa. D. & C. 343 (1948).

¹⁷⁰ *People v. Irving*, 24 Misc. 2d 37, 203 N.Y.S.2d 531 (N.Y. Sup. Ct. 1960); *see also State v. Wetmore*, 121 N.J. Super. 90, 296 A.2d 92 (Monmouth County Ct. 1972).

¹⁷¹ *Noble v. State*, 248 Ind. 101, 223 N.E.2d 755 (1967).

¹⁷² *See supra* notes 91-93 and accompanying text.

¹⁷³ *See supra* notes 91-93 and accompanying text.

¹⁷⁴ *See supra* notes 52-53 and accompanying text.

construed statutes narrowly, thereby requiring *mens rea* where it was not obvious that the legislature intended it to be required.¹⁷⁵

The position, of course, is not limited to the statutes. As already suggested,¹⁷⁶ law revisions commissions in both Canada and England have endorsed the abolition of strict liability crimes. In May 1968, a working paper of the English Law Commission's Working Party on Codification of the Criminal Law announced its intention to consider whether "the purposes for which such offenses are enacted could be achieved by other means than through the machinery of the criminal law."¹⁷⁷ The Commission considered placing such offenses in a "lower or less serious category than 'crimes,'" through the use of devices such as prohibition, or a defense of due diligence. The Canadian Law Reform Commission has even urged the total abolition of strict liability offenses.¹⁷⁹ We will briefly review the current position of "strict" criminal liability in some Commonwealth countries.

1. Australia

The key case in Australia, which apparently allowed a defendant to raise a "reasonable mistake" doctrine as a defense to strict liability, is *Proudman v. Dayman*.¹⁸⁰ The High Court of Australia refused special leave to appeal a decision of an intermediate appellate court imposing strict liability upon a defendant who lent her car to a person who, without her knowledge, did not have a driver's license. The Court, however, split on the issue of whether the defendant should be allowed to demonstrate that she was not negligent because she did not know that the person driving her car did not have a license. The case has been construed however, as allowing such a defense, and this appears to be the current position of that court.¹⁸¹

¹⁷⁵ *Sweet v. Parsley*, [1970] 1 All E.R. 347 (H.L. 1969); *Proudman v. Dayman*, 67 C.L.R. 536 (Austl. 1941).

¹⁷⁶ See *supra* notes 1-3 and accompanying text.

¹⁷⁷ PUBLISHED WORKING PAPER NO. 17, *supra* note 7, at 17.

¹⁷⁸ This is the basic approach of the MPC, see *supra* note 10, § 2.05, and *infra* note 205.

¹⁷⁹ LAW REFORM COMMISSION OF CANADA, *STUDIES IN STRICT LIABILITY* (1974).

¹⁸⁰ 67 C.L.R. 536 (Austl. 1941); see Fisse, *Probability and the Proudman v. Dayman Defense of Reasonable Mistaken Belief*, 9 MELB. U.L. REV. 477 (1974).

¹⁸¹ The case is extensively discussed in a series of articles by Fisse and Rose, *infra* note 187. See also Note, *Mens Rea in Statutory Offenses*, 16 AUSTR. L.J. 91 (1942). *Proudman* is also discussed in Brett, *supra* note 1, at 423-27. He notes first that the often cited opinion of Judge Dixon, which is used as establishing the "halfway house" referred to, was at best a minority concurrence, because all the judges affirmed the conviction, some finding that *mens*

Although recognizing that the position of the Australian High Court is not pellucid, Professor Howard argues that the Court has increasingly embraced the "reasonable mistake" doctrine, saying that "it is safe to say that the reasonable mistake rule is now well established in the common law of Australia, the only problem remaining being its further definition and refinement."¹⁸² He also argues that the Court has embraced this approach even where a statute could be read as requiring *mens rea*, thus solidifying the position of the rule, even if at the same time extending strict responsibility negligence to areas where it ought not belong. Professor Howard argues further that it is not enough, under the Australian rule, for the defendant to be *ignorant* of a fact¹⁸³ — the defendant must be *mistaken* as to a fact, citing, *inter alia*, *Pelham v. Harris*.¹⁸⁴ In *Pelham*, the court rejected the "reasonable mistake" defense by saying that that issue was not properly before the court: "the appellant does not appear to have applied his mind to the question whether his questioner was an authorized person; on the contrary there is nothing in the evidence to lead one to think he had any doubt about it."¹⁸⁵

rea was not necessary, and others concluding that the defendant had not shown an absence of negligence. *Id.* at 424. He then declares that Dixon's proposition was that (1) *mens rea* is to be presumed to be required of all crimes; (2) where the statute is a "public welfare" offense, that presumption is lessened, but not removed, unless from the words, context, or subject matter of the statute the clear intent of the legislature to abandon *mens rea* is obvious. *Id.* Brett also notes that based on the language on the burden of proof, the conviction should stand. *Id.* at 424-25. Notwithstanding this, Brett notes that Dixon's opinion does not declare that the burden of proof rests on the defendant, but only that the burden of production may shift. *Id.* This, says Brett, was particularly important because only seven years earlier Dixon had expressly placed the burden of *proof* on the defendant in a similar situation. *Id.* (citing *Mather v. Musson*, 54 C.L.R. 100 (Austl. 1943)).

¹⁸² HOWARD, *supra* note 25, at 86-87.

¹⁸³ *Id.* at 88.

¹⁸⁴ [1944] S.A. St. R. 224.

¹⁸⁵ See also *Foster v. Aloni*, [1951] V.L.R. 481 (because defendant was asleep while offense occurred, he could not have had mistaken belief as to offense); *Green v. Sergeant*, [1951] V.L.R. 500 (defendant never bothered to inquire about relevant fact and therefore was ignorant of the facts, not mistaken about it); *Gherashe v. Boase*, [1959] V.R. 1. Howard, however, argues that each of these cases could be seen as involving culpable ignorance, and therefore fit within the rule of "reasonable mistake," because the ignorance was unreasonable. HOWARD, *supra* note 25, at 92. Howard declares that *Proudman* itself was unclear on the resolution of the issue. *Id.* at 61. He does not note later cases that essentially clarified *Proudman* as requiring a showing of non-negligence by the defendant. Howard summarizes the Australian rule as follows:

If D is charged with a regulatory offense, although P does not have to prove *mens rea* or negligence as a prerequisite for conviction, it is nevertheless open

Professor Peiris suggests that Australian law has not merely accepted the half-way house of inadvertent criminality, but has also accepted "a general or prima facie rule that reasonable mistake of fact is a ground for exoneration in common law offenses and statutory offenses. . . . The central theme pervading the development of Australian law is the resolute curtailment of doctrines of criminal liability independent of fault."¹⁸⁶ Indeed, he asserts that Australian courts "to a greater extent than the courts of any other Commonwealth jurisdiction show reluctance to draw the inference that criminal liability irrespective of a guilty mind was intended by the legislature."¹⁸⁷ Thus, true strict liability appears to be virtually dead in Australia.

2. England

As in Australia, the common law in England has moved dramatically away from strict criminal liability. A good example can be found in *R. v. Pheko*.¹⁸⁸ The defendant, owner of a house, believed that two men who were in the house were squatters and had no right to be there. The owner threatened the squatters with a beating or death if they did not leave.¹⁸⁹ Unknown to him, however, the squatters had sublet the premises from a former tenant, who had not informed the owner of the sublet.¹⁹⁰ To the defendant's argument that his lack of knowledge as to their legal status was a defense, the trial court responded that the statute imposed strict liability, assuming that his actions could be considered as "calculated to interfere with the peace or comfort of the residential occupier

to D in most or all cases to defend himself by proving affirmatively that he committed the culpable act or omission owing to a reasonable mistake of fact of such a nature that, had the facts been as he believed, he would be innocent.

Id. at 85.

¹⁸⁶ Peiris, *supra* note 3, at 131.

¹⁸⁷ *Id.* at 132. Professor Fisse has provided an extensive look at vicarious responsibility in "regulatory offenses" in Australia. Fisse, *The Elimination of Vicarious Responsibility in Regulatory Offenses*, 42 AUSTL. L.J. 199, 250 (1968). To this, Professor Rose responded, Rose, *Vicarious Liability in Regulatory Offenses*, 44 AUSTL. L.J. 147 (1970), prompting a further exchange, Fisse, *Vicarious Responsibility in Regulatory Offenses*, 44 AUSTL. L.J. 601 (1970); Rose, *Vicarious Liability in Statutory Offenses*, 45 AUSTL. L.J. 252 (1971). In his 1968 article, Fisse observes that *Proudman* has been responsible for a "marked decline" in strict liability prosecutions and convictions. Fisse, *supra*, at 253.

¹⁸⁸ [1981] 2 All E.R. 84 (C.A.).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 87.

...¹⁹¹ Because the defendant's threats no doubt had this effect, the defendant was convicted. On appeal the Court of Appeals reversed, requiring a showing of scienter because conviction would impose both stigma and potentially severe punishment (the statute provided a possible two year prison term).¹⁹² The court quoted Lord Diplock's opinion in a related matter, in which he said that "the climate of both parliamentary and judicial opinion has been growing less favorable to the recognition of absolute offenses over the last few decades ..."¹⁹³ The court found a halfway station, however, declaring in considered dictum that even under this statute, the mistake had to be reasonable in order to exonerate.

Again, in *Warner v. Metropolitan Police Commissioner*, the House of Lords held that strict liability would not apply to a charge of possessing a narcotic.¹⁹⁴ The prosecutor would be required to show that the defendant knew that he possessed something. Said Lord Wilberforce: "I am strongly disinclined to place a meaning [upon this Act] which would involve the conviction of a person consequent upon mere physical control, without consideration, or the opportunity for consideration, of any mental element [of the crime]."¹⁹⁵

The opinion, however, appeared to leave open whether the decision would apply to a case where the defendant knew he possessed *something*, and his mistake of fact went to the nature of what was possessed.¹⁹⁶ Only one year later, however, the House of Lords imposed a strong requirement of *mens rea* where a defendant was charged with owning a house where drugs were used. The House

¹⁹¹ *Id.* at 86.

¹⁹² *Id.* at 92.

¹⁹³ *R. v. Sheppard*, [1980] 3 All E.R. 899.

¹⁹⁴ [1968] 2 All E.R. 356 (H.L.).

¹⁹⁵ *Id.* at 391.

¹⁹⁶ See R. SEAGO, CRIMINAL LAW 78 (1981). Seago bases his argument in part on the fact that the Misuse of Drugs Act, passed in 1971, after *Warner*, provided an affirmative defense of lack of knowledge. This argument, however, does not address the actual holding of *Warner*, which spoke in strong terms against strict liability whenever serious penalties were involved. Thus, there may be some tension between the implications of *Warner* and the 1971 statute. Technically, however, the discussion was dictum, because the conviction was affirmed on the grounds that the error was in this case harmless. Peiris suggests that "strict liability" crimes are governed by *City of Sault Ste. Marie*, discussed *infra* note 198, but that there remain some "absolute" liability crimes that are truly absolute, in that there is no defense such as insanity. In this latter category, he includes "inaccurate advertising of commercial products, verification of the roadworthiness of vehicles, ecology, with particular reference to preservation of fauna and marine resources such as the Pacific salmon fisher and depleting lobster beds, and other aspects of environmental law including the discharge of industrial effluent into rivers and streams and pollution of the ocean." Peiris, *supra* note 3, at 130.

held that the statute should be interpreted to require the prosecution to demonstrate *mens rea*.¹⁹⁷

Again, although the evidence is not irrebuttable, the clear trend in England is to remove whatever vestiges of strict liability remain.

3. Canada

The most recent demonstration of Commonwealth disfavor with strict liability is the decision of the Canadian Supreme Court in *R. v. City of Sault Ste. Marie*.¹⁹⁸ In this case, the court held that a corporation charged with the otherwise strict liability offense of polluting water could raise as a defense that its actions were not negligent, and its mistake of fact was reasonable. Although not totally abolishing strict liability, the decision effectively adopted the recommendation of the Canadian Law Reform Commission¹⁹⁹ that strict liability be restricted as much as possible.²⁰⁰

¹⁹⁷ *Sweet v. Parsley*, 1970 App. Cas. 132 (H.L. 1968). Still, English law has been said to be unsettled. Seago notes that England has not taken the "halfway position" in offenses of strict liability that Canada and Australia have taken. SEAGO, *supra* note 196, at 83.

For an overview of English law on strict liability, see Peiris, *supra* note 3. There are still signs of strict liability. Thus, for example, in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 (H.L.), the House of Lords treated the offense of "causing polluted matter to enter a river" as a regulatory offense and dispensed with the requirement for *mens rea*. Although the defendants had taken great care to prevent the pollution, they were nevertheless convicted.

In some instances, however, courts have strained statutory interpretation principles to impose a conviction. In *Grade v. Director of Public Prosecutions*, [1942] 2 All. E.R. 118 (K.B.), for example, the defendant director of a play was held to have "presented" parts of a play thought to be undesirable even though the parts in question had been added in his absence, contrary to his instructions. The case is criticized in Fisse, *The Elimination of Vicarious Responsibility in Regulatory Offenses*, *supra* note 187, at 202, and in G. WILLIAMS, *supra* note 3.

For a review, though somewhat distended, of the English "sexual activity" cases, see Weigall, *Mens Rea and Bigamy*, 16 *Austl. L.J.* 3 (1942). Howard notes that one reason for the unhappy state of English case law is that the English courts, bound by a rigid doctrine of precedent, have also found ways to distort the precedent, rather than overrule it, and therefore there is more conflict in English law than in other common law courts. HOWARD, *supra* note 25, at 82. He also points out that "[i]f there is no possibility of rectifying error, there is almost inevitably a tendency to excessive caution in introducing innovation." *Id.* at 83.

¹⁹⁸ 85 D.L.R.3d 161 (Can. 1978); see also Hutchinson, *supra* note 9; Wasik, *Shifting the Burden of Strict Liability*, 1982 *CRIM. L. REV.* 567. Peiris notes *City of Sault Ste. Marie*, but suggests that in both Nova Scotia and Manitoba there is some contrary authority. Peiris, *supra* note 3, at 125 (citing *R. v. Gillis*, 18 C.C.C.2d 190 (N.S.C.A. 1974); *R. v. Brydon*, 21 C.C.C.2d 513 (Man. C.A. 1974)).

¹⁹⁹ See *supra* note 179.

²⁰⁰ The "halfway house" adopted in *Sault Ste. Marie* was suggested by many, but one of the more influential scholars was Professor Howard. Howard, *Strict Responsibility in the High Court of Australia*, 76 *L.A.R.* 547 (1960). It was first embraced in a judicial opinion by Lord

Even more recently, in a major decision, the Canadian Supreme Court held that "absolute liability," which does not allow a defendant to present evidence of good faith mistake, and other defenses, violates the Canadian Charter of Rights and Freedoms of the Constitution, at least where imprisonment is a possible punishment.²⁰¹ Said the Court, per Judge Lamer: "[A]bsolute liability in penal law offends the principles of fundamental justice. Those principles are, to use the words of Dickson, J., to the effect that 'there is generally held revulsion against punishment of the morally innocent.'"²⁰²

Thus, England, Canada, and Australia appear to have adopted essentially identical positions in these areas. First, even regulatory statutes tend to be read as requiring *mens rea*, and therefore requiring the prosecutor to prove recklessness or a higher state of mental awareness. But even if a statute is read as permitting conviction on a *prima facie* showing of the *actus reus*, all these jurisdictions now permit the defendant to avoid conviction by proving lack of negligence.²⁰³

B. *The American Experience and the Model Penal Code*

Because the Model Penal Code ("MPC") is one of the most vigorous proponents of subjective liability as the predicate for criminal sanctions,²⁰⁴ its position on strict liability is scarcely surprising.²⁰⁵

Reid in his opinion in *Sweet v. Parsley*, 1970 A.C. 132 (H.L.). Lord Reid thought that that position had been accepted by the High Court of Australia in a number of cases, as Professor Howard had argued. For another discussion of these and other Australian cases, see the series of articles by Fisse and Rose, *supra* note 187, and Brett, *supra* note 1.

²⁰¹ *Re Motor Vehicles Act*, [1985] 2 S.C.R. 486. (Can.)

²⁰² *Id.* at 514 (quoting *R. v. City of Sault Ste. Marie*, 85 D.L.R.3d 161 (Can. 1978)).

²⁰³ See HOWARD, *supra* note 25, and Peiris, *supra* note 3, for exhaustive treatments of Commonwealth law.

²⁰⁴ The MPC adopts subjectivity in a number of provisions. *E.g.*, § 2.04(1). Although it sometimes fails to embrace total subjectivity, *e.g.*, section 210.1, which imposes a "reasonableness" kind of requirement on provocation and emotional reaction, *see* Singer I, *supra* note 5, at 291, the Code nevertheless substantially altered the objectivization that the nineteenth century had wrought. Not all states have followed the Code down these paths, however, even when they have adopted much of the Code. *See* Singer II, *supra* note 5, at 505.

²⁰⁵ The doctrine of "subjectivism," which requires that the defendant be subjectively malevolent, has constantly been at odds with the trend, particularly rampant in the nineteenth century, and of which the present topic is only indicative, to "objectify" the criminal law by holding a defendant guilty of a crime if he did not act as a reasonable person. The topic is obviously far too broad to cover here. The primary spokesperson for objectivity was Justice Holmes. O.W. HOLMES, *supra* note 4; *see* Wells, *Swatting the "Subjectivist Bug,"* 1982 CRIM. L. REV. 209. The Code is exceptionally schizophrenic here. In the bulk of its "general part" provisions a defendant is exonerated if his or her mistake was honest, even if unreasonable. *See also* MPC, *supra* note 10, § 2.04(a). In the sentencing provisions of the Code, however,

In some ways the position of the Code is more critical, and in others less so, of strict liability provisions than the Commonwealth approach. But in its basic tenet, the Code is vigorously anti-strict liability, providing that there are no strict liability "crimes" within the Code, only strict liability "violations":

The [*mens rea*] requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to (a) offenses which constitute violations, unless the requirement involved is included in the definition of the offense . . . (or) a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.²⁰⁶

The critical distinction is that imprisonment is available for crimes, but is forbidden under the Code for violations.²⁰⁷ As the Code commentary puts it, "[c]rime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. *This is too fundamental to be compromised.*"²⁰⁸ One might disagree with the Code's line drawing here: it is certainly arguable that the imposition of a heavy fine, plus the determination that a defendant has committed a "violation," might connote condemnation and thereby stigmatize the defendant. Still, the essence of the position is patent: no significant stigma, and certainly no loss of freedom, should be imposed on a person who is not at least negligent, as that term is defined by the Code. Moreover, the Code's "negligence" requires more than

this subjectivist-retributivist approach is totally jettisoned in favor of a "multi-purpose" view of the criminal sanction. See MPC, *supra* note 10, § 7.01 *et seq.*

²⁰⁶ MPC, *supra* note 10, § 2.05. MPC § 1.04(5) defines a "violation" as follows:

(5) An offense defined by this Code . . . constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code that now provides that the offense shall not constitute a crime.

Howard correctly notes that section 2.05 of the Code is ambiguous in the term "plainly appears" and, moreover, that that phrase recognizes the possibility of strict liability crimes: "Any change in the present law would therefore depend upon the weight the courts were willing to give the term 'plainly appears.'" HOWARD, *supra* note 25, at 178. He argues, further, that these words are unlikely to move courts from practices in which they have already engaged, and that "it is difficult to believe that in any such case the decision would have been different had the court been required to say that such a meaning not merely appeared, but appeared 'plainly.'"

²⁰⁷ MPC, *supra* note 10, § 1.04(5).

²⁰⁸ *Id.* § 2.05 (comment) (emphasis added).

tort negligence, which appears to be the Commonwealth standard.²⁰⁹

The application of the Code is made problematic by the fact that it does not, on its face, apply to all statutory offenses, but only to those actually defined within the Code. To crimes defined by the Code itself, the requirements of *mens rea* clearly apply, and no strict liability crimes are permitted. As to offenses defined in other statutes (such as pollution, gaming, etc.), the Code accepts strict liability crimes, but only if the legislature has clearly endorsed criminal liability. This dichotomy — compelled by the fact that the American Law Institute could not draft hundreds of statutes paralleling those of every jurisdiction — has caused some confusion and difficulty. When faced with a statute outside the Code that purports to establish a strict liability "crime," courts have the following options: (1) declare the statute invalid; (2) construe the statute as requiring *mens rea*; (3) construe the statute as establishing a strict liability "violation"; (4) apply the statute as establishing a strict liability crime, and simply tolerate the tension between this section and the Code's provisions. As noted below, courts have had significant difficulty determining which path to pursue.

The Code's commentary lists nine states that have adopted, in whole or substantial part, the provision on strict liability. In addition, Alaska has emulated those statutory formulations. The case law is mixed as to the success of the provisions, as a brief survey of some of these states will show.

Oregon adopted the Code, including the strict liability provision, in 1971.²¹⁰ Its interpretation of the provision has been relatively straightforward. In a number of cases, the Oregon courts have held that in the absence of a clearly worded legislative intent to create a strict liability crime, a provision outside the Code will be construed as establishing a strict liability violation. Thus, in *McNutt v. State* a statute prohibiting a person from removing any material from the beds or banks of a watercourse was interpreted as creating a strict liability violation, rather than a strict liability crime, and the defendant punished accordingly.²¹¹

²⁰⁹ *Id.* § 2.02(4) (negligence as a gross deviation of an acceptable standard of care).

²¹⁰ See Note, *Strict Liability and Criminal Sanctions: The 1971 Revisions to the Oregon Criminal Code*, 13 WILLAMETTE L.J. 365 (1977).

²¹¹ 295 Or. 580, 668 P.2d 1201 (1983). Consistent with section 2.05(2)(b) of the Code, however, the court declared in dictum that if the state alleged and proved negligence, the defendant could be imprisoned. *Id.* at 586, 668 P.2d at 1205; accord *State v. Pierre*, 30 Or. App. 81, 566 P.2d 534 (1977) (holding that where a state statute provides no *mens rea* requirement in a securities law violation, only a fine, and not imprisonment, can be imposed).

When a statute is construed to allow only a "violation," the Oregon cases have been confused whether, to comply with *McNutt*, a conviction for a strict liability "crime" should be reversed or whether simply the punishment should be reduced to that applicable to "violations." Thus, for example, in *State v. Von Eil Eyerly*, the trial court interpreted the statute as requiring *mens rea*, and accordingly sentenced the defendant to a prison term.²¹² When the Oregon appellate division overturned the interpretation, construing the statute as imposing a strict liability *violation*, and not a *crime*, it did not reverse the conviction, but merely remanded for resentencing as a violation.²¹³ In *State v. Cho*, however, the Oregon Supreme Court, in finding that a statute prohibiting as a Class A misdemeanor the purchase or sale of certain parts of game animals was a *mens rea* offense, reversed not merely the sentence, but the conviction as well.²¹⁴ The court did not explain why it did not follow its approach in *McNutt*, which provided that where the state fails to prove *mens rea* in a regulatory offense, it may be treated as a strict liability violation.

A fascinating decision is *State v. Blanton*,²¹⁵ in which the defendant was convicted of the Class A felony, distributing marijuana to a minor three (or more) years younger. The trial court had essentially held that there was strict liability as to both the "age" and the "three years younger" elements of the offense. The appeals court, in modifying, held that even though the statute was arguably silent on the point, the state would be required to demonstrate *mens rea* with regard to each fact because each was a material element of the offense.²¹⁶

In a major case, however, the court interpreted a statute as establishing a strict liability *crime*, punishable by a prison term. In *State v. Buttery* the defendant was convicted of driving with a suspended license.²¹⁷ The defendant argued that the state was required

²¹² 37 Or. App. 399, 587 P.2d 1039 (1978).

²¹³ *Accord* *State v. Emmich*, 39 Or. App. 769, 593 P.2d 1281 (1979); *see also* *State v. Holt*, 65 Or. App. 776, 672 P.2d 375 (1983). In *Holt*, the court construed a statute prohibiting the "illegal killing of a buck deer" as establishing a strict liability violation.

²¹⁴ 297 Or. 195, 681 P.2d 1152 (1984).

²¹⁵ 31 Or. App. 327, 570 P.2d 411 (1977), *aff'd en banc*, 284 Or. 591, 588 P.2d 28 (1978).

²¹⁶ The court did not have to deal with a defendant who acts knowingly with regard to one aspect, but not to the other. Thus suppose a nineteen year old seller knows that the purchaser is a minor, but believes that the purchaser is seventeen when the purchaser is really fifteen. Because the defendant knows the purchaser was under eighteen, could he or she be said to be acting recklessly as to how much under eighteen the purchaser is? *See also* MPC, *supra* note 10, § 2.04(2), discussed *infra* at note 229.

²¹⁷ 293 Or. 575, 651 P.2d 1075 (1982).

to demonstrate that she knew that her license had been suspended, and that failure to prove this *mens rea* would, at best, allow the state to punish her act as a strict liability "violation." In a lengthy opinion discussing the legislative history of the provisions, the Oregon Supreme Court held that the legislature had intended it to require the defendant, not the state, both to raise and prove the lack of knowledge and, therefore, the state established a *prima facie* case merely on the evidence that the license had in fact been suspended.²¹⁸ The interpretation was supported by an explicit statutory provision declaring the offense to be strict liability.

The problems of interpreting section 2.05 of the Model Penal Code in Oregon have also plagued the decisions in Alaska. In *Beran v. State*, for example, the Board of Fisheries argued that it had been authorized by statute to impose prison sentences for strict liability infringements of its regulations.²¹⁹ The appeals court held, however, that although the Board could establish strict liability *violations*, it had no statutory or constitutional power to establish strict liability *crimes*.²²⁰ Noting that the Alaskan legislature had adopted the Model Penal Code, the court purported to apply the general approach adopted by the Code.²²¹ Similarly, in *Reynolds v. State*, the court held that a statute prohibiting fishing in restricted waters would require *mens rea* before conviction, particularly because the penalty was a possible one year imprisonment, \$5000, or both.²²²

In *Beran*, as in some of the Oregon cases, an appeals court was faced with the issue of the remedy to be applied when a trial court applies as a strict liability *crime* a statute later interpreted merely to create a strict liability *violation*. The Alaska court chose to enforce the regulatory scheme, but only as permitting convictions for violations, arguing that the legislative history indicated a desire to regulate the fishing waters rather than to punish nefarious actors.

The most famous case from the Alaskan Supreme Court on this issue is *Speidel v. State*.²²³ Prosecuted under a specific Alaskan

²¹⁸ *Accord* State v. Taylor, 28 Or. App. 815, 561 P.2d 662 (1977). *But see* State v. Williams, 144 Ariz. 487, 698 P.2d 732 (1985) (holding that if the defendant reasonably believed his license was not suspended because he sent a letter requesting a hearing concerning the suspension, he could not be convicted of driving while his license was suspended).

²¹⁹ 705 P.2d 1280 (Alaska Ct. App. 1985).

²²⁰ *Id.* at 1285-86.

²²¹ *Id.* at 1289-90. The court did not discuss the fact the the legislature had not expressly dealt with the effect of the Code on non-Code statutes. One implication, inferentially rejected by the *Beran* court, is that the legislature did *not* intend the presumption against liability *crimes* to apply to non-Code statutes.

²²² 655 P.2d 1313 (Alaska Ct. App. 1982).

²²³ 460 P.2d 77 (Alaska 1969).

statute dealing with failure to return a rented motor vehicle, the defendant argued that the statute required *mens rea*. The trial court disagreed, and so instructed the jury. The conviction was reversed on appeal, the Alaska Supreme Court declaring: "To make such an act, without consciousness of wrongdoing or intention to inflict injury, a serious crime, and criminals of those who fall within its interdiction, is inconsistent with the general law."²²⁴

The Alaskan decisions have been less clear in the area of sexual crimes. In *State v. Guest* the court, following the California case of *People v. Hernandez*,²²⁵ held that a reasonable mistake as to the consenting minor's age would be a defense to a charge of statutory rape.²²⁶ Several years later, however, in *Bell v. State* the appellate division held that a reasonable mistake of age was not a defense to a charge of promoting prostitution of someone under the age of sixteen.²²⁷ *Bell* can be distinguished from *Guest* on the grounds that the former involves only a mistake as to the degree of a crime for which a defendant is guilty²²⁸ and that the Alaska legislature had not adopted the Code's provision as to the effect of mistake in such a situation.²²⁹ The court did not, however, focus extensively on that distinguishing factor.²³⁰

²²⁴ The technique of requiring *mens rea* by analogizing to common law offenses is not limited to MPC cases. See, e.g., *City of Seattle v. Gordon*, 54 Wash. 2d 516, 342 P.2d 604 (1959). In *Gordon*, the court construed a city ordinance requiring a person to stop a car when signaled to do so by a police officer. The court held that this was the statutory equivalent to the common law crime of resisting arrest, and therefore required *mens rea*. Thus, a defendant who did not know that the person attempting to stop him was a police officer had a defense to the charge. Similarly, in *People v. Bridges*, 620 P.2d 1 (Colo. Ct. App. 1980), the court held that because engaging in a riot was a common law offense, the Colorado statute should be so interpreted, and *mens rea* required, even though the statute was silent on the issue. See also *People v. Washburn*, 197 Colo. 419, 593 P.2d 962 (1970) (construing a rental equipment statute much as *Speidel* did).

²²⁵ 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).

²²⁶ 583 P.2d 836 (Alaska 1978).

²²⁷ 668 P.2d 829 (Alaska Ct. App. 1983).

²²⁸ The Alaska statutes penalized promoting prostitution generally.

²²⁹ MPC § 2.04(2) provides that if one believes he or she is committing a crime, but because of a mistake of fact is committing a greater crime, then that person is guilty of the lesser crime. Thus, if I believe that I am stealing a nickel when in fact I am stealing a rare coin worth thousands of dollars, I am guilty only of petty, rather than grand, larceny. This problem was raised as early as the *Prince* case, which resolved the issue the other way. Even Lord Brett, who dissented from the holding in that case, agreed in dictum that in such a case mistake would be no defense, and that the actor would be guilty of the greater crime.

²³⁰ A possible explanation is the difficulty of proving *mens rea* as to age. In *Nelson v. State*, 387 P.2d 933 (Alaska 1964), the court upheld as a strict liability statute a statute prohibiting the killing of a bear under the age of two, arguing that it was simply too difficult for the state to prove (or even disprove) the defendant's mental state with regard to the age of the bear. This result, however, is inconsistent with *Guest*.

The case law in Oregon, and to a lesser extent in Alaska, demonstrates that the Code's distinction between violations and crimes has been quite useful in assuring that penalties that are typically thought of as "criminal" are not in fact assessed except where there is *mens rea*. If not an actual repudiation of strict liability criminality, these decisions surely march in that direction.²³¹

These cases also demonstrate the importance of the Code's statutory interpretation guidelines, which require the legislature to be explicit about any attempt to impose strict criminal liability.²³² Only in *Buttery* did the court find a strict liability *crime*, and that was due to the presence of a clear statutory provision establishing lack of knowledge as an affirmative defense. In a full *mens rea* world, of course, the prosecution should have to prove notice. But the Code's approach has at least put the onus on the legislature to articulate its goal in imposing strict criminal liability.

The Code's interpretative approach also undercuts one of the theoretical legs of strict criminal liability — legal positivism. By essentially mandating that statutes be construed to require *mens rea*, the Code rejects the notion espoused by nineteenth century courts that, constitutional limitations aside, the legislature's goals should always be paramount.²³³ At the very least this language of the Code elevates the judiciary to a co-equal branch in determining the parameters of the criminal law.²³⁴

The influence of this aspect of the Code is equally visible in state legislation that embraces strict liability concepts. Thus, the

²³¹ Another good illustration of the Code's impact is found in the Ohio decision *State v. McGhee*, 468 N.E.2d 400 (Ohio Mun. 1984), a typical sale to minors case. Noting that prior to the adoption of the Code, the Ohio courts had construed such offenses to be strict, see *State v. Buttery*, 95 Ohio App. 236, 118 N.E.2d 548 (1983), the *McGhee* court concluded that the case law had been totally overruled, and that the state was now required to prove at least recklessness with regard to the age of the consumer. A similar position was hinted at in *State v. Beaudry*, 123 Wis. 2d 40, 365 N.W.2d 593 (1985). There, the court upheld a tavern owner's liability where the bartender clearly knew the customer was under age. Recognizing that the case involved vicarious, and not strict, liability issues, the court nevertheless said that it wished to distinguish strict liability from vicarious liability, *id.* at 49 n.6, 365 N.W.2d at 597 n.6., at least suggesting that if the question had been one of strict liability, a different result might have ensued.

²³² MPC, *supra* note 10, § 2.05.

²³³ See, e.g., *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910).

²³⁴ Of course, because the Code must be enacted by the state legislature before taking effect, one could argue that the legislature has merely waived or delegated its power by enacting it.

Illinois Vehicle Code provides: "It is a violation of this chapter for . . . a person to buy, receive, possess, sell or dispose of a motor vehicle . . . if the manufacturer's identification number thereon has been removed or falsified, *and such person has no knowledge that the number is removed or falsified.*"²³⁵ Similarly, the Colorado legislature has made drunken drivers strictly liable for injuries they inflict by explicitly so stating: "If a person operates or drives a motor vehicle while under the influence of any drug or intoxicant and such conduct is the proximate cause of the death of another, he commits vehicular homicide. *This is a strict liability crime.*"²³⁶ Also in Colorado: "If a person operates or drives a motor vehicle . . . and . . . is the proximate cause of a serious bodily injury to another, he commits vehicular assault. *This is a strict liability crime.*"²³⁷ This salutary trend toward express declarations by legislatures is likely to continue.²³⁸

One of the most interesting stories of the move from strict liability to a requirement of *mens rea* is found in the history of acts prohibiting the possession of narcotics. In 1914, Congress enacted the Narcotic Act of December 17, 1914 (the Harrison Act),²³⁹ which provided for criminal liability for those who possessed or sold certain narcotic drugs. In *Balint v. United States*,²⁴⁰ the Supreme Court appeared to hold that one could violate this statute without *mens rea* as to the quality of the item possessed.²⁴¹ Thereafter, a number of states enacted statutes similar to the Harrison Act, none of which appeared on its face to require knowledge on the part of the defendant. In 1932, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Narcotics Drug Act, which was patterned after the Narcotics Act of December 17, 1914, apparently as interpreted by *Balint*. This uniform model, soon emulated by many states, did not specify "knowing" as an element of the crime of possession. Al-

²³⁵ ILL. REV. STAT. ch. 95 1/2, para. 4-102(d)(4) (Smith-Hurd 1971) (emphasis added). The legislature also penalized, more stringently, the *knowing* receiving, stealing, etc., of such a car. See *People v. Brown*, 98 Ill. 2d 374, 457 N.E.2d 6 (1983).

²³⁶ COLO. REV. STAT. § 18-3-106(1)(b)(I) (emphasis added).

²³⁷ *Id.* § 18-3-205(1)(b)(I) (emphasis added).

²³⁸ The failure of a statute to articulate strict liability (or not to do so) has been severely criticized in many opinions. See, e.g., *R. v. Turnbull*, 44 N.S.W. St. R. 108 (1943), noted in Note, *Mens Rea in Statutory Offenses — Construction of Statutes*, 18 AUSTL. L.J. 201, 201 (1944).

²³⁹ 38 Stat. 785 ch. 1 (1914) (repealed 1970).

²⁴⁰ 258 U.S. 250, 254 (1922).

²⁴¹ See *infra* notes 281-87 and accompanying text.

though a few states followed this interpretation,²⁴² the majority of jurisdictions concluded that knowledge of the possession and knowledge of the narcotic nature of the substance were both required for conviction of possession.²⁴³

Following the enactment of the Uniform Controlled Substances Act of 1970²⁴⁴ the Commissioners altered their statute, and provided that it is "unlawful for any person *knowingly* or *intentionally* to possess a controlled substance,"²⁴⁵ thus requiring knowledge for the first time. As of 1987, fifty states and two territories had adopted this Act.²⁴⁶ Even those jurisdictions that had not enacted the Act had all ruled that possession required knowledge.²⁴⁷

The enactment of the Model Penal Code and its subsequent interpretation to restrict, if not abolish, strict liability crimes, the growing movement among courts in interpreting the common law to require *mens rea*, and the Commonwealth experience in permitting mistake of fact to act as a defense all reflect a movement towards a rejection of strict criminal liability. There is by no means a landslide toward this position, yet courts increasingly are adopting this view. We turn next to the issue of whether strict liability is a viable doctrine, and if so, whether it is constitutional.

²⁴² See *Broic v. State*, 79 So. 2d 775 (Fla. 1955); *Jenkins v. State*, 215 Md. 70, 137 A.2d 115 (1957); *Commonwealth v. Lee*, 331 Mass. 166, 117 N.E.2d 830 (1954); *State v. Larkins*, 3 Wash. App. 203, 473 P.2d 854 (1970).

²⁴³ *Carroll v. State*, 90 Ariz. 411, 368 P.2d 649 (1962); *People v. Gory*, 28 Cal. 2d 450, 170 P.2d 433 (1946); *Mickens v. People*, 148 Colo. 237, 365 P.2d 679 (1961); *People v. Mack*, 12 Ill. 2d 151, 145 N.E.2d 609 (1957); *State v. Nicholosi*, 228 La. 66, 81 So. 2d 771 (1955); *State v. Young*, 427 S.W.2d 510 (Mo. 1968); *State v. Hood*, 89 Mont. 432, 298 P. 354 (1931); *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967); *Wallace v. State*, 77 Nev. 123, 359 P.2d 749 (1961); *State v. Reed*, 34 N.J. 554, 170 A.2d 419 (1961); *State v. Giddings*, 67 N.M. 87, 352 P.2d 1003 (1960); *People v. Pippin*, 16 A.D.2d 635, 227 N.Y.S.2d 164 (1962); *State v. Haynes*, 25 Ohio St. 2d 264, 267 N.E.2d 787 (1971); *Gonzales v. State*, 157 Tex. Crim. 8, 246 S.W.2d 199 (1951).

²⁴⁴ 21 U.S.C. § 841 (1970).

²⁴⁵ 9 UNIFORM LAWS ANNOTATED 1-9 (Master ed. Part II 1988).

²⁴⁶ *Id.*

²⁴⁷ *Davis v. State*, 501 P.2d 1026 (Alaska 1972); *State v. Donovan*, 116 Ariz. App. 209, 568 P.2d 1107 (1977); *State v. Colcord*, 109 N.H. 231, 248 A.2d 80 (1968). *But see* *State v. Cleppe*, 96 Wash. 2d 373, 635 P.2d 435 (1981) (defendant need not know that he has possession of drug to be guilty of crime of possession); *State v. Bailey*, 41 Wash. App. 724, 706 P.2d 229 (1985). *See also* *State v. Rippley*, 319 N.W.2d 129 (N.D. 1982). In *Rippley*, the court interpreted the state's "possession and delivery of drugs" statute as imposing strict liability. The court noted that the North Dakota legislature had removed adverbs of knowledge in its 1975 revision. *Id.* at 133. It also cited *Balint. Id.* at 132. The English position is less clear. *See supra* note 194 and accompanying text for a discussion of *Warner* and the Misuse of Drugs Act.

III. STRICT CRIMINAL LIABILITY — A CRITIQUE

A. *The Alleged Justifications for Strict Liability*

The discussions of the purported justifications for strict liability, and the repudiation of those justifications, are legion.²⁴⁸ Briefly, the defense of strict liability crimes rests on several grounds: (1) only strict criminal liability can deter profit-driven manufacturers and capitalists from ignoring the well-being of the consuming public; (2) the inquiry into *mens rea* would exhaust courts, which have to deal with thousands of “minor” infractions every day; (3) the imposition of strict liability is not inconsistent with the moral underpinnings of the criminal law generally because the penalties are small, and conviction carries no social stigma; (4) the legislature intended to create strict liability, and can constitutionally do so.²⁴⁹ I will discuss each of these briefly.

1. The Argument from Deterrence

The argument that only strict criminal liability can effect true safety in an industrial society, or at least motivate highly regulated businesses to act responsibly, may have been the moving force behind English statutes and decisions embracing “strict liability” in the nineteenth century. But even then, as already seen, England did not actually adopt strict liability.²⁵⁰ And it is clear that in this country, the initial concern was not with massive industrial change, but with morals offenses (if one leaves aside the dairy products cases of the later nineteenth century).²⁵¹ Howard repudiates the argument from deterrence by noting:

The assertion that a potentially inefficient or thoughtless member of society will more effectively mend his ways if

²⁴⁸ See *supra* notes 3 and 5.

²⁴⁹ Seago responds to the first three of these reasons stated in the text as follows: The prosecution often finds it extremely difficult to prove the *mens rea* of a murder charge, but rarely is the argument advanced that therefore murder should be a crime of strict liability. . . . It is not very comforting for a butcher, who relies on his reputation, to know that the court is sorry for his conviction and has awarded only an absolute discharge. The fact remains that he has been convicted. . . . This [deterrence argument] has always appeared to be taking a sledge hammer to crack a nut.

SEAGO, *supra* note 196, at 85–86.

²⁵⁰ See *supra* notes 109–10 and accompanying text.

²⁵¹ See *supra* notes 115–21 and accompanying text.

he knows that no excuse will be allowed . . . is no more than an assumption for which no evidence can be produced in support. . . . It is scarcely maintainable that the vast majority of regulatory offense defendants have any thoughts on the matter at all until they are prosecuted.²⁵²

Sanford Kadish similarly argues that strict criminal liability for the purposes of regulating business is not merely undesirable, but also self-defeating, and urges that civil sanctions be employed instead: "Civil fines, punitive damages, injunctions, profit divestiture programs or other varieties of non-criminal sanctions would thus appear to offer equivalent possibilities of enforcing the regulatory scheme. Indeed, these alternatives might enhance the possibilities, since proof and evidentiary requirements are more onerous in criminal prosecutions than in civil suits."²⁵³

Moreover, to the extent that the deterrence arguments may have carried some weight during the early part of this century, they clearly are inapplicable now.²⁵⁴ Extensive government regulation of virtually every business generally protects the public as well as can reasonably be expected. To the extent that this is not true, strict tort liability allows private suit.²⁵⁵ In this light, then, the marginal deterrence gained by strict criminal liability, particularly when the penalties are light and do not generally entail imprisonment, seems minimal indeed.²⁵⁶ As Professor Peiris puts it: "There is no empir-

²⁵² HOWARD, *supra* note 25, at 24-26.

²⁵³ Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 442 (1963).

²⁵⁴ Paulus argues that in nineteenth century and early twentieth century America and Canada, "the overall abuses resulting from the industrial revolution could only be curbed by a compulsorily enforced criminal law which suspended the requirement of *mens rea*. . . . [S]trict liability interpretations . . . served to ameliorate harsh abuses and to equalize to some extent certain disadvantages suffered by those without access to civil litigation." Paulus, *supra* note 3, at 451. Paulus argues further: "Perhaps today in Britain the criminal law strict liability provisions would be no longer necessary . . . but . . . strict liability was a *necessary* invention to suppress practices at first defined as detrimental to the general consumer only, but then also as detrimental to producers and vendors of foodstuffs and drugs." *Id.* at 460. Yet, as this paper has sought to demonstrate, this was not true at all in America, where strict criminal liability was first introduced in morals cases, not in cases where the Industrial Revolution was involved. Although the argument is much stronger in Great Britain, there was little showing that the prosecutor-plaintiffs did not have "access" to the civil court, but only that civil doctrines then extant did not allow recovery in the absence of privity.

²⁵⁵ "Strict tort liability" is *really* strict, and does not actually require negligence. Of course, the movement to insinuate negligence standards into the tort area strongly suggests that there is a repugnance, even in the area of compensation, to totally ignoring the mental state of the defendant.

²⁵⁶ Sayre argued that only deterrence could justify strict criminal liability, and that true

ical evidence that acquittal of a defendant on the ground of absence of *mens rea* is less effective in terms of deterrence than the meting out of punishment, ostensibly nominal in nature, to accused persons whose conduct in no way exposes them to moral censure."²⁵⁷

Moreover, the empirical data seem to show that, in practice, there is no such thing as strict criminal liability when governmentally regulated industries are involved. As early as 1956, Frank Remington demonstrated that, although there were numerous strict criminal liability statutes on the books in Wisconsin as well as elsewhere, these statutes were rarely enforced as written; prosecutors generally invoked strict liability proceedings only after they were convinced that the defendants involved were at least negligent, if not more culpable.²⁵⁸ Albert Reiss has concluded that these agencies, which are more concerned with preventing harm than with punishing offenders, implement a "compliance" program that is dominated by a co-operative style of regulatory enforcement rather than one aimed at deterring violations.²⁵⁹

Similar recent studies have revealed the same pattern. A study in England in 1970 showed that the governmental agency charged with inspecting factories (analogous in some ways to OSHA in the United States) did not actually proceed against companies on a strict liability basis, although the statute both provided for and had been interpreted as providing for such prosecution.²⁶⁰ Only after several warnings had been issued, and apparently ignored by the factory, was criminal prosecution even contemplated. Even then, indications of compliance usually aborted the criminal prosecution. The same

strict liability that resulted in imprisonment would be unwise policy and possibly unconstitutional. Sayre, *supra* note 1, at 78-79. See discussion *infra* notes 267-69 and accompanying text.

²⁵⁷ Peiris, *supra* note 3, at 141. There is, however, some question as to whether even a "conviction" of a "minor" offense might not bring moral stigma. See *infra* notes 275-79 and accompanying text.

²⁵⁸ Remington, *supra* note 3. After an exhaustive review of the literature, Richardson, in *Strict Liability for Regulatory Crime: The Empirical Research* 1987 CRIM. L. REV. 295, 301, concludes that in England there is almost never prosecution without some prior history of violation.

²⁵⁹ Reiss, *Selecting Strategies of Social Control Over Organizational Life*, in ENFORCING REGULATION 23 (K. Hawkins & J. Thomas eds. 1984).

²⁶⁰ Carson, *Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation*, 33 MOD. L. REV. 396 (1970); Carson, *White-Collar Crime and the Enforcement of Factory Legislation*, 10 BRIT. J. CRIMINOLOGY 383 (1970); see also K. LIDSTONE et al., PROSECUTIONS BY PRIVATE INDIVIDUALS AND NON-POLICE AGENCIES (ROYAL COMM'N ON CRIM. PROCEDURE, RESEARCH STUDY NO. 8 1980); LAW COMMISSION, STRICT LIABILITY AND THE ENFORCEMENT OF THE FACTORIES ACT (WORKING PAPER NO. 30, 1970).

pattern emerged in studies of water pollution control agencies,²⁶¹ as well as other agencies.²⁶² As a recent summary of these findings puts it, "'moral culpability,' regarded as a broad form of *mens rea* . . . is the other usual requirement of [the factory inspectorate]."²⁶³ A recent and thorough exploration of all the literature on empirical data concludes: "[I]t is now widely recognized that the specialized agencies commonly entrusted with the enforcement of regulatory codes apply notions of fault when exercising their prosecutorial discretion and rarely proceed in the absence of 'negligence' in the very least."²⁶⁴

Empirical research in Canada similarly concludes that governmental agencies in that country do not enforce "public welfare offenses" as written, but remain ready to prosecute those corporations who, having been notified of violations, continue to ignore the warnings of the agencies.²⁶⁵ This appears to be true in American jurisdictions as well.²⁶⁶

Thus, in these countries, as well as in the United States,²⁶⁷ the actual enforcement of strict liability statutes in the public welfare realm, as opposed to those areas where there was strict liability in the nineteenth century, has increasingly become based upon some kind of *mens rea*.²⁶⁸ In light of these data, it is perhaps not surprising

²⁶¹ K. HAWKINS, *ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION* (1984); G. RICHARDSON, *POLICING POLLUTION: A STUDY OF REGULATION AND ENFORCEMENT* (1982).

²⁶² See also Kloss, *Criminals at Work*, 1978 CRIM. L. REV. 280.

²⁶³ Sanders, *Class Bias in Prosecutions*, 24 HOWARD J. 176 (1985). Sanders argues that in non-industrial regulation, where statutes establish strict liability, police are ready to enforce the regulations as written. He then argues that this demonstrates a class bias against the working class and in favor of the wealthy. *Id.* at 187. But see L. LEIGH, *supra* note 77; Peiris, *supra* note 3.

²⁶⁴ Richardson, *supra* note 258, at 296.

²⁶⁵ LAW REFORM COMMISSION OF CANADA, *STUDIES ON STRICT LIABILITY* (1974).

²⁶⁶ See Austen, *Sanctions in Silhouette: An Inquiry Into the Enforcement of the Federal Food, Drug and Cosmetic Act*, 51 CALIF. L. REV. 38 (1963); Rissman, *Criminal Intent Under the Federal Food, Drug and Cosmetic Act*, 7 FOOD DRUG COSM. L.J. 498 (1952).

²⁶⁷ See *supra* notes 170-72 and accompanying text.

²⁶⁸ A requirement that the defendant know of the violation and thereafter refuse to alter it is, at best, based upon negligence, and possibly even upon recklessness (the defendant having misjudged the seriousness of the risk of law violation). Whether negligence should be the basis for criminal liability at all is another issue; at the very least, these data show that if negligence is considered *mens rea*, there is a "*mens rea*" issue involved. According to Paulus, the empirical evidence is not so persuasive, Paulus, *supra* note 3, at 448-49; but his conclusion is, at best, weak. Thus, citing both the study of Smith and Pearson, *The Value of Strict Liability*, 1969 CRIM. L. REV. 5, and Carson, *Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation*, 33 MOD. L. REV. 396 (1970), Paulus declares that the use of strict liability "facilitates" the work of regulatory commissions. *Id.* But whether such "facilitation" is necessary to the actual operation of the regulation is the question. Yet even he concludes:

that recent attempts at law reform have endorsed the abolition of strict liability criminality and the adoption of a "negligence" standard that would allow a defendant to prove, sometimes by a preponderance of the evidence, that he or she was not negligent, and acted as a reasonable person.²⁶⁹

2. The Argument from Expedition

The second argument for strict criminal liability is efficiency — that it would simply take those courts faced with the areas in which strict criminal liability is now imposed too much time to inquire into *mens rea*, even into negligence, in every case. Thus, proponents point to the overwhelming numbers of regulatory offenses, including traffic and parking offenses, that face the courts daily and in which there is rarely if ever time for a substantial concern with *mens rea*. Perkins, for example, says that:

[t]wo assumptions have been made, both seemingly correct: (1) The impressive group of governmental regulations, federal, state and local, cannot be effectively enforced without the aid of penalties; (2) because of important differences between violations of these penalty-

whenever studies have been made investigating the workings of strict liability, the persons involved in the administration of public welfare offenses . . . have stressed that strict liability generally does not penalize offenders who are not clearly guilty. In other words, the personnel . . . rarely prosecute unless they find an element of fault or *mens rea* present in the offense. But the *availability* of strict liability prosecutions greatly facilitates their work.

Id. at 449 (emphasis in original). Later, he concludes that these same studies show "that the use of strict liability to prosecute morally blameless offenders is very rare." *Id.* at 461. Additionally, Paulus states: "A perusal of available statistics clearly showed that the possibility of a conviction . . . helped to ensure purer food and drugs for the whole British population." *Id.* at 455. Again, however, the method by which this "help" was "ensured" is not clear. The author cites data showing that the percentage of "adulterated" food apparently declined from 19% in 1878 to 5% in 1930. *Id.* That this was *caused* by the presence of strict liability, however, is not demonstrated; it is surely possible that (1) the meaning of "adulteration" changed, or (2) better manufacturing methods provided greater security and protection. Furthermore, Paulus does not (and cannot, in all fairness) demonstrate that strict *criminal* liability was necessary to achieve these ends, assuming they were achieved. All he can show is that in the presence of strict criminal liability provisions, adulteration declined.

Of course, there may be some pressure, in extraordinary cases, to proceed even on a strict liability basis. As Richardson put it, "There is some evidence that agencies . . . are prepared to prosecute the 'big case' even in the absence of blameworthiness." Richardson, *supra* note 264, at 302 (citing K. HAWKINS, *supra* note 261, at 202).

²⁶⁹ See LAW REFORM COMMISSION OF CANADA, *supra* note 8; ENGLISH LAW REFORM COMMISSION, WORKING PAPER #17, FIELD OF INQUIRY (1985). See also the discussion of cases *supra* notes 165-203 and accompanying text.

clauses on the one hand, and true crimes on the other, the former require greater strictness in their enforcement.²⁷⁰

And another commentator has declared: "Because of the nature of these offenses, it would be almost impossible to secure conviction if the state were required to prove the criminal intent of persons who violated the law."²⁷¹ But Lord Brett has responded:

The argument . . . must be based on speculation rather than established fact, for the alternative has not, so far as I know, been tried. But in any event, it is an argument of expediency, akin to that on which the rulers of totalitarian states base their Draconian practices. I believe that we should base our practices on considerations of justice, morality and humanity.²⁷²

Brett is clearly right. The Perkins position that strict liability is desirable because it is more efficient fails to note that (1) courts often look to *mens rea* in assessing the penalty to be imposed, and (2) if the situation clearly requires a failure to make such an inquiry, the solution is not to distort the criminal process, but to label such offenses by some other nomenclature, thereby removing any notion that the offense is criminal. This latter path, of course, is the one taken by the Model Penal Code.²⁷³ The suggestion, often found in the literature, of making these offenses "regulatory" or "administrative," echoes this concern.²⁷⁴

3. The Argument from Triviality

A third argument for supporting strict criminal liability is that the penalties imposed, indeed possibly constitutionally mandated,²⁷⁵ are so small that they can be ignored as criminal punishments. This argument attempts to gain strength by noting that such small pen-

²⁷⁰ Perkins, *supra* note 77, at 332 (footnotes omitted).

²⁷¹ Note, *The Development of Crimes Requiring No Criminal Intent*, 26 MARQ. L. REV. 92, 93 (1942); see also Note, *supra* note 5, at 1202.

²⁷² Brett, *supra* note 1, at 438.

²⁷³ MPC, *supra* note 10, § 205; see discussion *supra* note 206.

²⁷⁴ To the argument that strict liability is necessary to avoid inquiry into *mens rea*, Howard argues that the pursuit of expediency at the cost of justice is undesirable. HOWARD, *supra* note 25, at 16-19. He also notes that judges do in fact consider *mens rea* while sentencing. Finally, he suggests that if there is some real necessity, either more courts should be created or the matters could be transferred to a new court system or administrative agency.

²⁷⁵ See *infra* note 268 and accompanying text. See also *Commonwealth v. Koczwar*, 397 Pa. 575, 155 A.2d 825 (1959).

alties do not carry with them the usual criteria of criminal penalties, such as social stigma.²⁷⁶

Two responses are possible. First, it is not clear that even small penalties will not carry the social stigma that "true crimes" carry. Again, recall Lord Brett's observations that crimes involving imprisonment create a feeling of "guilt, disgrace, a record . . . [and] are not lightly imposed on one's fellow man. . . . Your society regards gaol as a disgrace, and puts it on a totally different footing from payment of a fine."²⁷⁷ In other words, the stigmatic effect of a finding of guilty on the defendant is a substantial penalty, even if no loss of freedom is actually imposed. Thus, Brett affirms that the basis of the criminal law is the moral code by which we live, breach of which incurs the infliction of a moral stigma not to be inflicted in any other situation.

More importantly, that proponents of strict liability criminality must, in effect, resort to arguing that no one "really" considers these offenses as "crimes" demonstrates the weakness of the position. There is, of course, always the question of whether the defendant can in fact spread the loss. But Professor Fisse argues that "even if [the defendant] is in such a position clearly there should be no conviction since the distribution of fines to consumers would be quite contrary to the public interest, and would nullify the deterrent effect upon [the defendant] which conviction is designed to achieve."²⁷⁸ Furthermore, Professor Howard says:

Although the idea of constructive crime is repugnant in any context, there is no doubt that much of the force of the arguments which can be directed against constructive murder in particular comes from its being undifferen-

²⁷⁶ The contention that it is the social stigma imposed by the state that differentiates criminal punishment from other kinds of sanctions is hardly new. See Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958). For an elaboration of this argument, focusing on recent Supreme Court cases, see Singer, *Legal and Ethical Limits for Prediction: Accent on the Offense*, in THE PREDICTION OF CRIMINAL VIOLENCE 55 (1987).

²⁷⁷ Brett, *supra* note 1, at 436. Paulus argues, without any substantiating data, that a conviction under a strict liability provision does not stigmatize:

[T]he strict liability provisions helped to sufficiently stigmatize law-breakers to prevent offenders from repeating their actions, but not to the extent that a moral stigma became attached to their person. . . . Stigmatization as a result of a prosecution is minimal, because the magistrates and judges use their own discretionary judgments to minimize any effects of a conviction.

Paulus, *supra* note 3, at 458-59. The author does not, however, elaborate on the methods by which this stigma is reduced, nor explain how discretionary judgments can minimize the effects of a conviction.

²⁷⁸ Fisse I, *supra* note 187, at 206.

tiated from intentional murder in terms of punishment otherwise than by executive clemency. If constructive murder were made a comparatively trivial offense, a misdemeanor punishable with a small fine or a short term of imprisonment, it would become much less objectionable. . . . There is a difference between saying that no one should be exposed to a long term of imprisonment without proof that he intended to commit the crime charged, and saying that because he is not liable it should therefore not be necessary to prove such an intention. . . . The first proposition works positively in favor of the defendant whereas the second works positively against him. . . . Since the first does not entail the second, the first should be accepted and the second rejected on the ground that the first is just and the second is unjust.²⁷⁹

Thus, the argument from triviality is suspect both because it ignores justice and because it can be turned back upon itself: If the penalties are so trivial, they will be inefficacious.

4. The Argument from Legislative Intent

a. Generally

Early decisions of the courts in this country often regaled the reader with the legislative history, usually prolonged, of failed efforts to stem the criminal activity by requiring *mens rea*.²⁸⁰ The opinions then concluded that the legislature intentionally removed all words requiring *mens rea* so as to facilitate the conviction of those whom they believed to be deserving of punishment (i.e., to have *mens rea*) but who could not be proved to be so deserving. Thus, the absence of such *mens rea* words as "willfully" or "knowingly" was seen as a sign that the legislature purposely sought to inflict strict criminal liability upon the defendant.²⁸¹

Not even all the early courts, however, were willing to accept this view. Thus, in *Sherras v. DeRutzen*, Judge Day eschewed the argument, finding instead that the absence of such a word suggested at best a desire to shift the burden of proof, or even the burden of going forward, to the defendant.²⁸²

²⁷⁹ HOWARD, *supra* note 25, at 30-31.

²⁸⁰ E.g., *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910).

²⁸¹ E.g., *Reg. v. Prince*, 13 Cox Crim. Cas. 138 (1875).

²⁸² [1895] 1 Q.B. 918, 920-21.

This view is manifestly correct. First, legislatures are notoriously careless in drafting legislation. Their indiscriminate use of multiple *mens rea* adverbs²⁸³ mocks the argument that the absence of a *mens rea* term was thoughtful, much less intended.²⁸⁴ Second, the position that the absence of *mens rea* words connotes a purposeful desire to abolish *mens rea* ignores the general salutary maxim that any statute in derogation of the common law should be construed narrowly. When the statute established, or purported to establish, a criminal offense, the maxim needs to be applied more, not less, rigorously.

In dealing with those cases in which the absence of the word "knowingly" has led the court to conclude that the statute is one of strict liability, Professor Howard declares:

This myopic mode of statutory construction purports to be a method of discovering the intention of the legislature which is thereby credited with an ineradicable passion for creating intellectual puzzles entitled to about the same measure of respect as a parlour game. . . . It is incredible that any legislature should choose to express itself on such an important question as *mens rea* with such minute obscurity.²⁸⁵

The Code's position here is unassailable — to be sure that a legislature *wants* to try to impose strict liability, we should require the most explicit statement possible to that effect.

b. Constitutionality

A number of commentators have argued that strict criminal liability is unconstitutional on the grounds that due process demands a requirement of *mens rea*, at least before imprisonment is imposed. Thus, Professor Saltzman argues:

²⁸³ See Remington, *supra* note 258.

²⁸⁴ Indeed, that was the basic approach used in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). Of course, where there is clear legislative intent, the constitutional issue arises. See, e.g., *State v. Robinson*, 239 Kan. 269, 718 P.2d 1313 (1986) (legislature expressly rejected a provision allowing a defense if the defendant had "reasonable cause" to believe the child was of the age of 21); *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910); *People v. Cipperly*, 101 N.Y. 634, 4 N.E. 107 (1886); HOWARD, *supra* note 25, at 9–28. While reviewing and rejecting all the arguments in favor of strict liability, Howard discusses in detail the argument that legislative intent to create statutory strict liability is clear, but demonstrates that that view is untenable.

²⁸⁵ HOWARD, *supra* note 25, at 63.

A constitutional rule against strict criminal liability . . . requires only that the defendant be given an opportunity to litigate his culpability respecting each element of the offense. It thus operates on the offense, as the legislature defines it, and does not disturb the legislative choice except to the extent the legislature wants to both designate some fact as an element and wants to make irrelevant defendant's culpability as to that fact.²⁸⁶

Relying on a potpourri of cases, Saltzman concludes that

[p]ersonal autonomy is a value that underlies the doctrine of *mens rea*. Limiting criminal liability to the blameworthy means that people are held "responsible" for what can be reasonably expected. It leaves men free from fear of restrictions . . . so long as they choose to act reasonably, in view of the law's prohibition.²⁸⁷

Unfortunately, he limits this argument to those strict liability crimes allowing imprisonment as a punishment.²⁸⁸

It is sometimes said that the United States Supreme Court has upheld as constitutional strict criminal liability statutes. More careful writers, however, have noted that none of the decisions from that Court actually sustains liability, although several contain language strongly supportive of the idea. The first, and perhaps the most frequently miscited, case is *Balint v. United States*.²⁸⁹ Balint was indicted for the sale of various drugs. The indictment did not allege that he knew the items he was selling and possessing were drugs. Balint demurred, arguing that he could not be convicted unless it were alleged that he knew the nature of the items. The trial court

²⁸⁶ Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law and Due Process*, 24 WAYNE L. REV. 1571, 1621 (1978).

²⁸⁷ *Id.* at 1627. Professor Hippard had also argued that strict criminal liability violates the Constitution. Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039 (1973).

²⁸⁸ Saltzman cites the following as among those who criticize strict liability for being unjust: Laylin & Tuttle, *Due Process and Punishment*, 20 MICH. L. REV. 614 (1922); Sayre, *supra* note 1; Hart, *supra* note 276; MPC, *supra* note 10.

²⁸⁹ 258 U.S. 250 (1922). This statement does not include *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910). The defendant there, reasonably believing that it had a valid permit to do so, cut down timber on state property. The state thereupon filed a *civil* suit to recover, pursuant to the statute, double or treble the timber's value, depending on whether the taking was merely "casual and involuntary," or "willful." The Supreme Court sustained the imposition of double damages, in the absence of any showing of *mens rea*, precisely because the Court concluded that the double-damage penalty was not criminal or penal in nature; in fact, the Court avoided a double jeopardy issue by so ruling. *Shevlin-Carpenter* may be a "strict liability" case, but it is *not* a criminal case.

sustained the demurrer, and the government appealed directly to the Supreme Court, which reversed. The *holding* of *Balint* is thus crystalline: In a prosecution under the act in question, the indictment need not allege that the defendant knew the nature of the items possessed or sold. That holding says nothing about whether knowledge (or lack of it) is relevant, or if so, upon whom the burden of proof lies. It is a mere pleading case.²⁹⁰ One might expect the same result where an indictment fails to allege sanity, or lack of duress, or lack of necessity, etc., even if the prosecution has to carry the burden of proof once the issue has been satisfactorily raised. In short, *Balint* simply goes to the issue of burden of production, not burden of proof, and says nothing regarding the ultimate effect of such a mistake of fact.²⁹¹ Notwithstanding *Balint's* holding, the opinion by Mr. Chief Justice Taft teems with language that supports strict liability.²⁹²

²⁹⁰ Richard Wasserstrom, in *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 721, 732 (1960), and Mr. Justice Douglas, in *United States v. Freed*, 401 U.S. 601 (1961), both misread *Balint* as a case where the defendant was convicted. Intriguingly, the point has not always been ignored by the Supreme Court. In *United States v. Wisenfeld Warehouse Co.*, 376 U.S. 86 (1964), the trial court, as in *Balint*, dismissed the indictment. The Court said:

[w]hatever the truth of this claim [of mistake or powerlessness] it involves factual proof to be raised offensively at a trial on the merits. We are here concerned only with the construction of the statute as it relates to the sufficiency of the information, and not with the scope and reach of the statute as applied to such facts as may be developed by evidence adduced at trial.

Id. at 91-93. Ironically, however, the Court cited *Balint* in an early section of the opinion, where it announced that:

[i]t is settled law in the area of food and drug regulation that a guilty intent is not always a prerequisite to the imposition of criminal sanction. . . . In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger.

Id. at 91.

A number of cases have recognized that the rule that it is not necessary to aver knowledge in the indictment does not mean that knowledge is irrelevant. Most have held that the defendant thereafter carries the burden of proof, by a preponderance, of showing lack of knowledge. See *R. v. Ewart*, 25 N.Z.L.R. 709 (1905); *State v. Hinkle*, 129 W. Va. 393, 41 S.E.2d 107 (1946). See generally Mueller, *supra* note 3, at 63.

²⁹¹ That is not to suggest that the mere willingness to require the defendant even to raise the issue of knowledge may not have been a significant break from earlier days. But it surely does not mean that the issue of knowledge is irrelevant.

²⁹² *Balint*, 258 U.S. at 251-53. To rationalize his support of strict liability the Chief Justice stated:

Many instances of this are to be found in regulatory measures in the exercises of what is called police powers where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of crimes as in the cases of *mala in se*. . . . Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.

Nor do the cases of *United States v. Dotterweich*²⁹³ or *United States v. Park*,²⁹⁴ both instances where corporate executives were determined to be criminally liable for acts of their subordinates, hold that strict liability is constitutional. Aside from the fact that *Dotterweich* involved vicarious and not strict liability, the Court's limited certiorari grant in that case did not include the issue of the constitutionality of applying either strict or vicarious liability to the defendant. Again, however, Justice Frankfurter's opinion for the Court vigorously endorsed strict liability, at least in the situation at hand.

Park is further still from strict, or even vicarious, liability. There, the defendant, president of Acme Corporation, knew that his Philadelphia warehouses had been found inadequate by the Food and Drug Administration (FDA), yet he never removed the persons who supervised sanitary conditions at his Philadelphia warehouses. When directly informed by the FDA that his Baltimore warehouse was similarly inadequate, he turned over the clean-up to *these same persons*. This alone might suggest negligence, or even recklessness.²⁹⁵ Moreover, the Court's opinion, by Mr. Chief Justice Burger, skirts the issue of strict liability, often speaking in terms of a "highest standard of care."²⁹⁶ Indeed, the concurring opinion of Mr. Justice Stewart stresses that "this is the language of negligence and I agree with it."²⁹⁷

Id. at 252-54.

²⁹³ 320 U.S. 277 (1943).

²⁹⁴ 421 U.S. 658 (1975).

²⁹⁵ The Model Penal Code provides definitions of "recklessly" and "negligently" as follows:

(2) Kinds of Culpability Defined

c) Recklessly.

A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the material element [prohibited result] exists or will result from his conduct. The risk must be of such a nature and degree that . . . its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe

(d) Negligently.

A person acts negligently . . . when he should be aware of the substantial and unjustifiable risk that the material element [prohibited result] exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it . . . involves a gross deviation from the standard of care that a reasonable person would observe

MPC, *supra* note 10, § 2.02(2).

²⁹⁶ 421 U.S. at 671 (citing *Smith v. California*, 361 U.S. 147, 152 (1959)).

²⁹⁷ 421 U.S. at 679 (Stewart, J., concurring).

Professors Abrams²⁹⁸ and Brickey²⁹⁹ have debated the reach of *Park*. Abrams argues that *Park* is best understood as incorporating a culpability standard of extraordinary care, whereas Brickey contends that "the Court did not intend its reference to blameworthiness in this passage to connote any requirement of a culpable mental state" ³⁰⁰ But both agree that it is not a true strict liability holding. Indeed, in light of the fact that Park personally knew that the executives to whom he delegated cleaning up his Baltimore warehouse had already been dilatory in cleaning up his Philadelphia warehouse, it could be argued that Park was not merely negligent, but reckless.³⁰¹

Two recent cases from the Supreme Court also seem to endorse strict criminal liability, but they have similarly been misread. In *United States v. Freed*, the Court reversed a dismissal of an indictment on the grounds that the prosecutor did not have to allege knowledge of the government regulation requiring registration.³⁰² The case was in the same procedural posture as *Balint*, and therefore stands for no final proposition on the relevance of *mens rea*. Yet it has often been misconstrued as endorsing the constitutionality of conviction without a showing of *mens rea*, a misconception encouraged by some broad and unconsidered dictum by Mr. Justice Douglas. In *United States v. International Minerals & Chemical Corp.*, the Court upheld a conviction of a corporate carrier who sought to demonstrate that it was totally unaware of an ICC regulation requiring registration of a route before transporting dangerous chemicals through Manhattan.³⁰³ The Court, in an opinion by Mr. Justice Douglas, again used language that suggested *mens rea* was not necessary for conviction of "minor" regulatory offenses, but it avoided an unequivocal statement, and certainly did not *hold* to that effect. Moreover, as Mr. Justice Brennan suggested in dissent, the case could be characterized as one of mistake of law. Although the ancient maxim *ignorantia legis neminem excusat* clearly imposes strict

²⁹⁸ Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses — A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463 (1981).

²⁹⁹ Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses — Another View*, 35 VAND. L. REV. 1337 (1982).

³⁰⁰ *Id.* at 1364.

³⁰¹ Saltzman, discussing *Park*, suggests that it "reflects some loosening of the dogma of *Balint* and *Dotterweich*." Saltzman, *supra* note 286, at 1610. Saltzman adds that Powell's opinion "can be read as suggesting something near to negligence as the correct measure of liability." *Id.* at 1612.

³⁰² 401 U.S. 601 (1971).

³⁰³ 402 U.S. 558 (1971).

criminal liability, it has never been fully challenged in the Supreme Court,³⁰⁴ and has always been seen as *sui generis*. There is no substantial basis, then, for citing *International Minerals* as support for a more general proposition that *mens rea* is not constitutionally required.³⁰⁵

The latest word on this issue from the Supreme Court is *United States v. United Gypsum Co.*, where the Court held that a defendant could not be convicted under the Sherman Act unless it were shown that he or she knew that the actions would have the probable consequence of affecting competition.³⁰⁶ This holding did not require the prosecution to prove that the defendant *intended* to affect competition. Nevertheless, the Court quoted Mr. Justice Jackson's well known epithet from *Morrisette v. United States*³⁰⁷ that the idea of blameworthiness and *mens rea* "is no provincial or transient notion" in the criminal law.³⁰⁸ As the Court itself noted, this was a reaffirmation of blameworthiness as a predicate to criminal liability. The Court also declared, in tune with the Model Penal Code,³⁰⁹ that Congress is presumed to have acted against the common law backdrop requiring *mens rea*. Unless the legislature speaks clearly in favor of strict liability, said the Court, the statute will be interpreted to require *mens rea*. On the other hand, the Court, citing *Shevlin-Carpenter*³¹⁰ where a *civil* penalty was imposed, said that "strict liability offenses are not unknown to the criminal law." The Court

³⁰⁴ But see *Lambert v. California*, 355 U.S. 225 (1957).

³⁰⁵ Saltzman agrees that there may be some fairness in cases such as *Freed* and *International Minerals*: "The disparity between the defendant's lack of fault and the condemnation of conviction is less [T]here is a sense in which the defendant assumed the risk" Saltzman, *supra* note 286, at 1582. Saltzman later states: "The statutes could be characterized as reflecting a legislative judgment that a reasonable person in the business could avoid [the prohibited act]." *Id.* at 1584. Saltzman, however, fails to consider whether it is fair, or utilitarian, to impose such a risk upon those entering into legal pursuits. See Wasserstrom, *supra* note 290. One could just as easily suggest that anyone who carries a gun "assumes the risk" that it will accidentally discharge, or that a person selling drugs "assumes the risk" that there will be inadvertent mislabeling. In short, Saltzman's concession may concede the entire issue.

Saltzman specifically argues that "*Freed* could stand for the proposition that Congress intended to authorize ten years imprisonment of a person who possessed an unregistered firearm, although the person reasonably believed it was registered. It could also be said to stand for the proposition that such liability raises no constitutional question worth discussing." *Id.* at 1606. He does not make anything, however, of the procedural posture of the case, except to note it.

³⁰⁶ 438 U.S. 422 (1978).

³⁰⁷ 342 U.S. 246, 250 (1952).

³⁰⁸ 438 U.S. at 436-37.

³⁰⁹ See *supra* notes 203-05 and accompanying text.

³¹⁰ See *supra* note 289.

also cited *Balint* and *Dotterweich* as examples of strict criminal liability, but, intriguingly, did not cite *Park*.

These sketchy remarks on the Supreme Court opinions and the requirement of *mens rea* support Herbert Packer's remark of twenty-five years ago that "*mens rea* is not a constitutional requirement, except sometimes."³¹¹ At the very least, they suggest that the Court has never upheld a strict criminal liability conviction, whether or not the party has raised the issue. The Supreme Court's decisions, then, simply do not resolve the issue of the constitutionality of strict liability.³¹²

B. The Failure of Strict Liability

The utilitarian arguments supporting strict criminal liability fall of their own weight. They are either repudiated by the empirical evidence, are self-contradictory, or are specious. There is no evidence that strict criminal liability deters. Indeed, there is a good argument that it affirmatively encourages criminal behavior, or at least dilutes the moral threat that the criminal law has historically carried. Thus, Dean Kadish puts it:

The more widely the criminal conviction is used for this purpose, and the less clear the immorality of the behavior so sanctioned, the more likely would it appear that the criminal conviction will not only fail to attain the immediate purpose of its use but will degenerate in effectiveness for other purposes as well.³¹³

³¹¹ Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (1962).

³¹² Saltzman analyzes *Balint*, *Dotterweich*, and other cases, and concludes that the opinions do not support the view that strict criminal liability is constitutional. Saltzman, *supra* note 286, at 1592-97. A number of cases have held statutes unconstitutional insofar as they are applied in a strict liability manner. See, e.g., *Speidel v. State*, 460 P.2d 77 (Alaska 1969) (strict criminal liability for failure to return a rented motor vehicle would be unconstitutional); *People v. Estreich*, 272 A.D. 698, 75 N.Y.S.2d 267, *aff'd*, 297 N.Y. 910, 79 N.E.2d 742 (1948) (strict criminal liability for receipt of stolen goods unconstitutional); *City of Seattle v. Ross*, 54 Wash. 2d 655, 344 P.2d 216 (1959) (no strict liability for being in a place where narcotics are unlawfully used or kept); see also *State v. Prince*, 52 N.M. 15, 189 P.2d 993 (1948); *State v. Lisbon Sales Book Co.*, 21 Ohio Op. 2d 455, 182 N.E.2d 641 (1961); Note, *Mens Rea and Felony Violations Under the Sherman Act*, 11 LOY. U. CHI. L.J. 161 (1979) (commenting on *United States Gypsum Co.*).

³¹³ Kadish, *supra* note 253, at 445-46. Similarly, Professor Howard has declared: "[I]t can be plausibly argued that strict responsibility, by inducing an understandable cynicism, is more likely to produce a lowering of standards than a raising of them. Especially is this the case with the defendant who has taken every care to avoid transgressing the law." HOWARD, *supra* note 25, at 26. Richardson also suggests that the traditional stigma attached to criminal sanctions is lost upon the corporate board as a group. Richardson, *supra* note 258.

There is certainly no evidence that the *criminal* aspect of strict liability, particularly if the potential punishment is limited to fines and not imprisonment,³¹⁴ has any significant marginal deterrence over strict tort liability. Further, there is no reason to believe that calling the fine "criminal," rather than "regulatory" or "administrative," enhances its deterrent value. In this vein, the calls by many for moving all strict liability crimes to civil status reflect both a normative and a utilitarian cast.³¹⁵

Finally, as I have argued elsewhere, there is something inherently wrong with any system that relies upon discretionary judgment by *any* individual, whether prosecutor, judge, or other functionary, to decide questions of justice as to whether to proceed or not against a specific individual.³¹⁶ Although our system does generally allow such discretion, the discretion there is to be exercised based upon a judgment of the strength of the facts of a particular case, not upon the presence or absence of blameworthiness. If, as the empirical data seem to indicate, blameworthiness is an inherent part of the discretionary system, then it should become an explicit, rather than a tacit, aspect of that system. To do otherwise mocks the notion of a rule of law, and puts responsibility for justice in the hands of those whose prime, and perhaps exclusive, duty it is to move the system forward. As Leigh has put it: "One cannot readily assume that because studies show that prosecutions are not commenced unless the offender was at fault, blamelessness is therefore adequately catered for by prosecutorial discretion."³¹⁷

These criticisms, however, are themselves all utilitarian in nature. They suggest, falsely, that *if* strict criminal liability were shown to be efficacious, the bulk of objections to the concept would dissipate. But the predicate for all criminal liability is blameworthiness; it is the social stigma which a finding of guilt carries that distin-

³¹⁴ See *infra* notes 273-79 and accompanying text.

³¹⁵ E.g., Kadish, *supra* note 253; Perkins, *supra* note 1; HALL, *supra* note 3. Even Professor Paulus, a staunch defender of strict liability because of its alleged effects in protecting the consumer, ultimately concludes that deterrence "can be achieved by transferring public welfare offenses from criminal to civil statutes, . . . [but only if there are] high civil penalties; otherwise the fines are simply included as 'part of doing business,' and consumer protection lags." Paulus, *supra* note 3, at 463. And he rejects the "halfway house" adopted by other systems: "[I]t is my opinion that a separate code of 'civil offenses' requiring negligence would not solve the problem." *Id.* at 466 (emphasis in original).

³¹⁶ Singer, *On Classism and Dissonance in the Criminal Law: A Reply to Professor Meir Dan-Cohen*, 77 J. CRIM. L. & CRIMINOLOGY 69 (1986).

³¹⁷ LEIGH, *supra* note 77, at 85.

guishes the criminal from all other sanctions. If the predicate is removed, the criminal law is set adrift, to be treated like any other set of legal rules. The unique character of the criminal determination disappears.³¹⁸ For this reason, the willingness by some otherwise harsh critics of strict liability to allow strict criminal liability so long as imprisonment is not involved is misguided.³¹⁹ If there is a stigmatization brought by the finding of criminal guilt,³²⁰ that stigmatization occurs whatever the punishment; the degree of punishment may enhance the stigma, but it does not create it.

Yet it is clear that the concerns that allegedly spawned strict criminal liability, and particularly the fear of overwhelming the courts with searches for *mens rea* in such "trivial" crimes as traffic violations, are not specious. Two alternatives have presented themselves: (1) the "halfway house" of negligence, with or without a shift of the burden of proof adopted by a number of the Commonwealth countries;³²¹ (2) removing the label "criminal" from these conducts, and either calling the sanction "civil" or "administrative" or, as the Model Penal Code would have it, a "violation" rather than a crime.

The halfway house of negligence at first has much appeal. Thus, Professor Leigh declares that "in general, we have arrived at a regime of fault which, based on statutes, exculpates the diligent and careful defendant."³²² And Professor Saltzman argues that, "although negligence is cast in objective terms, its actual application

³¹⁸ Defenders of strict liability are forced to argue that there is no stigma imposed by strict criminal liability. Thus, Paulus argues, without any substantiating data, that a conviction under a strict liability provision does not stigmatize. He states, "The strict liability provisions helped to sufficiently stigmatize lawbreakers to prevent offenders from repeating their action, but not to the extent that a moral stigma became attached to their persons . . ." Paulus, *supra* note 3, at 458. Paulus continues, "[S]tigmatization as a result of a prosecution is minimal, because the magistrates and judges use their own discretionary judgments to minimize the effects of a conviction." *Id.* at 459. The author does not, however, discuss the methods by which this stigma is reduced, and does not explain how "discretionary judgments" can minimize the effects of a conviction. *See id.* at 461. But see Samuels, *Strict Liability: A Serious Problem*, THE LAW SOCIETY'S GAZETTE 289 (May, 1969) ("The operation of stigma is capricious").

³¹⁹ E.g., Saltzman, *supra* note 286.

³²⁰ This is a tenet of faith among criminal law scholars. Like all faiths, it is subject to dispute, but not to disproof. Yet there are disturbing signs that, at least for a large variety of crimes, the stigmatizing effect of a criminal conviction may either be minimal or non-existent. Worse yet, there is the possibility that in some cases, the conviction may enhance the stature of the criminal among his or her peers. This paper, however, is not the place to explore that issue.

³²¹ See *supra* notes 198-200 and accompanying text.

³²² LEIGH, *supra* note 77, at 103.

in a particular case presents the opportunity for a personal assessment of the defendant's blameworthiness."³²³

But that kind of defense, if it is that, merely betrays the weakness of the compromise, for proponents are comfortable only by arguing that negligence actually involves, either hypothetically or in practice, a search for blameworthiness. Fitting negligence into the procrustean bed of blameworthiness, however, is a Herculean task indeed, at least unless it is made clear that "negligence" as used here is the equivalent of "recklessness" as used elsewhere in the criminal law.³²⁴ If the tort standard of negligence is either meant or understood, the jettisoning of blameworthiness is apparent.³²⁵ As Professor Howard declares: "negligence is excluded from *mens rea* because negligence includes a reference to some material degree of inadvertence, whereas inadvertence to a relevant fact or state of affairs can never amount to *mens rea*"³²⁶ Many, including Lord Brett, have rejected this compromise as both undesirable and immoral.³²⁷

Intriguingly, the "last resort" of the defenders of strict criminal liability has this same effect: it is the argument, adopted by Justice Douglas in *Freed*,³²⁸ that the defendant has been "reckless" by going into a business or conduct that he or she knew, or should have known, was likely to be regulated and risky. Thus, Professor Wasserstrom argues that participating in activities in which there is a high risk of danger to the public generally is sufficient *mens rea* for criminal liability. Leaving aside the question of whether this means that those who engage in such actions, but whose actions do not eventuate in harm should nevertheless be punished for the mere act of engaging in that conduct, the patent unfairness of defining the mere act of engaging in lawful activity as negligence because there is a risk of harm seems sufficient to rebut this move.

In short, the attempt to defend strict liability, or even to move it to the area of (defendant-producing) negligence, fails. If the criminal law is based upon moral blameworthiness and retribution, only recklessness is a sufficient floor for criminal liability.³²⁹ That

³²³ Saltzman, *supra* note 286, at 1582. Many others also support the halfway house. See, e.g., Samuels, *supra* note 318; Howard, *supra* note 200.

³²⁴ Arguably, this is the effect of the Model Penal Code. See discussion *supra* note 295.

³²⁵ See Singer 11, *supra* note 5, at 502.

³²⁶ HOWARD, *supra* note 25, at 36.

³²⁷ Brett, *supra* note 1.

³²⁸ See *supra* notes 301-02 and accompanying text.

³²⁹ Professor Steven Nemerson, while still a student at Columbia Law School, supported

was recognized centuries ago, and has been the underlying premise of our criminal law, with some exceptions,³³⁰ ever since. It is a sound premise, and one to which we should adhere.

V. STRICT CRIMINAL LIABILITY — AN EPILOGUE

Strict criminal liability is dissonant with the basic premise of criminal liability — that only a morally blameworthy defendant should be stigmatized, much less imprisoned. That premise has sustained us through many centuries. Only in the nineteenth century did that view begin to alter, as objectivization of the criminal law took on the aegis of utilitarianism and legal positivism. Even then, however, both courts and legislatures were slow to adopt the view that the criminal law could, or should, reflect society's growing concerns with serious problems raised by industrialization. The first fifty years of strict criminal liability, both in this country and in England, were extremely tentative, and were not powered by the engine of these concerns. Only in the twentieth century, as those concerns grew, did the courts embrace, even partially, the premise of strict criminal liability. Even then, the repugnance for imposing criminal sanctions for what were essentially non-criminal acts led

strict liability on the (alleged) basis of retribution. Note, *Criminal Liability Without Fault, A Philosophical Perspective*, 75 COLUM. L. REV. 1517 (1975). He argued for strict liability on the basis that it will deter potential offenders from trying to fake an excuse, and that this does not necessarily infringe retributivist views: "[I]f liability without fault statutes were promulgated for offenses in which the vast number of violations were in fact committed by people who were at fault, the general correlation between punishment and blameworthiness would be retained." *Id.* at 1543. This, of course, ignores the moral ignominy of blaming those who are in fact not guilty; the argument rests on a statistical basis, and founders on the shoals of individual distributive justice. Again:

In a system of laws where liability without fault covers relatively few activities and is promulgated for offenses which are generally committed by blameworthy people, this particular harmful consequence of strict liability is approximately counterbalanced by similar disutile consequences of laws which recognize all excuses, and is therefore not decisive against absolute liability.

Id. at 1545.

Nemerson's essential argument, however, is that even if the retributivist is against undeserved suffering, and that if strict liability can prevent undeserved suffering by potential victims, the undeserved pain felt by some innocent defendants may be outweighed. This, however, confuses "suffering" with "punishment," and weighs the inponderables — the future victims — with the very real present innocent defendants. Furthermore, though the "suffering" involved here is inflicted by criminals, the punishment is inflicted purposely and knowingly by the state. See *id.* at 1563-65.

³³⁰ As the two previous pieces in this series have sought to show, much of the change in the criminal law came about, as did strict criminal liability, during the nineteenth century, probably as an indirect, and possibly even direct, result of the influence of the utilitarian school of philosophy.

the courts of the Commonwealth to adopt a "halfway house" of negligence, and led the Model Penal Code in this country to jettison entirely the notion of strict liability criminality.

Those instincts are correct. Recent developments, both here and in other countries in which the common law has informed the law's growth, have demonstrated that there is a continuing resistance to strict criminal liability, and that we may soon find that the criminal law has been restored to its primary, indeed its only, focus — imposing social stigma on those who knowingly, purposely, or recklessly act in disregard to social and moral duties. Unless blameworthiness is to be repudiated as the predicate for criminal liability, this trend should be encouraged, and the "subjectivist bug"³³¹ allowed to regain its rightful position in the criminal law.

³³¹ Wells, *supra* note 205.

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