NOT PROVEN

By Colin Howard*

It is unfortunately usual to treat too superficially the arguments both for and against the doctrine of strict, or absolute,[1] responsibility[2] for minor statutory offences of the kind sometimes called "regulatory offences".[3] The object of this article is not to make yet another

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1. It is immaterial which term is used. The word "strict" is used here as conveying a more accurate impression. "Crimes of strict responsibility are those in which the necessity for *mens rea* or negligence is wholly or partly excluded. There is no indication in the authorities that other defences are excluded such as infancy and duress." (Williams: *Criminal Law: The General Part*, 238.) If there were no possible defence, "absolute" would be more accurate.
2. Strict responsibility herein means liability to conviction for a criminal offence without proof of fault in the form of intention, recklessness, or negligence.
3. No mere name can convey an accurate impression of the polyglot group of offences referred to. Perkins: *Criminal Law*, 701-702, cites the following suggestions: public torts (35 *Harvard Law Review* 462); public welfare offences (Sayre: 33 *Columbia Law Review* 55); prohibitory laws (1 Bl. *Comm.* *58); prohibited acts (*Prince* (1875) L.R. 2 C.C.R. 154, 163); regulatory offences (*Morissette* v. *United States* (1952) 342 U.S. 246, 258; Sayre: 43 *Harvard Law Review* 689, 720); police regulations (*Hammond* v. *King* (1908) 137 Iowa 548, 552; 114 N.W. 1062, 1063); administrative misdemeanours (Kirchheimer: 55 *Harvard Law Review* 615, 636; *cf.* Schwenk: "The Administrative Crime, its Creation and Punishment by Administrative Agencies" (1943) 42 *Michigan Law Review* 51, 86); quasi crimes (Stroud: *Mens Rea* 11; *Fiorella* v. *Birmingham* (1950) 35 Ala. App. 384, 387; 48 So. 2d. 761, 764); civil offences (Gausewitz: 12 *Wisconsin Law Review* 365; Perkins: *Criminal Law* 692, and 100 *University of Pennsylvania Law Review* 832). The Model Penal Code of the American Law Institute uses the term "violations": Tentative Draft No. 4, sec. 1.04 (5).

   Of these various suggestions, "regulatory offences" has been preferred in the text because the type of offence referred to is usually part of a legislative scheme for the administrative regulation of society. Sayre: (1933) 33 *Columbia Law Review* 55, 73, classifies regulatory offences into the following categories:—

   1. Illegal sales of intoxicating liquor;
      (a) sales of prohibited beverage;
      (b) sales to minors;
      (c) sales to habitual drunkards;
      (d) sales to Indians or other prohibited persons;
      (e) sales by methods prohibited by law;
   2. Sales of impure or adulterated food or drugs;
      (a) sales of adulterated or impure milk;
      (b) sales of adulterated butter or oleomargarine;
   3. Sales of misbranded articles;
   4. Violations of anti-narcotic acts;
   5. Criminal nuisances;
      (a) annoyances or injuries to the public health, safety, repose, or comfort;
      (b) obstruction of highways;
   6. Violations of traffic regulations;
   7. Violations of motor vehicle laws;
   8. Violations of general police regulations, passed for the safety, health, or well-being of the community.

   This classification is supported by an exhaustive citation of cases in an appendix, *ibid.* 84-88, but is open to the criticism that some of the

abbreviated general survey[4] of strict responsibility in the criminal law,[5] but to concentrate attention on the various arguments which have been advanced in favour of the doctrine and the refutations of those arguments. As a preliminary, the background and present scope of strict responsibility for regulatory offences will be briefly surveyed.[6]

For many centuries the criminal law developed round the concept that no man should be convicted of an offence unless not only *actus reus*, but also *mens rea*, were proved against him. This rule remains a cardinal principle of criminal responsibility at the present day.[7]

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categories are tendentiously described to conform with the title of Sayre's article, "Public Welfare Offenses": see 5 (a) and 8. It is cited here only to give an indication of the scope of the subject.

4. Every modern general text on the criminal law includes a section on strict responsibility, but see particularly the following discussions:—
Williams: *Criminal Law: The General Part* ch. 7; Hall: *General Principles of Criminal Law* (2nd ed.) ch. X—Appendix; Perkins: *Criminal Law* ch. 7 (5) (reprinted from 100 *University of Pennsylvania Law Review* 832); Edwards: *Mens Rea in Statutory Offences*; Sayre: "Public Welfare Offenses" (1933) 33 *Columbia Law Review* 55; Sayre: "Mens Rea" (1932) 45 *Harvard Law Review* 974, 1016-1026; Stallybrass: "The Eclipse of Mens Rea" (1936) 52 *Law Quarterly Review* 60; Turner: "The Mental Element in Crimes at Common Law" (1936) 6 *Cambridge Law Journal* 31, and Jackson: "Absolute Prohibition in Statutory Offences" *ibid.*, 83, (both reprinted in *The Modern Approach to Criminal Law*, ed., Radzinowicz and Turner, ch. 13 and ch. 14); Laylin and Tuttle: "Due Process and Punishment" (1922) 20 *Michigan Law Review* 614; Starrs: "The Regulatory Offense in Historical Perspective" in *Essays in Criminal Science*, ed., Mueller, ch. 9; Mueller: "Mens Rea and the Law Without It" (1955) 58 *West Virginia Law Review* 34; Hart: "The Aims of the Criminal Law" (1958) *Law and Contemporary Problems* 401; Devlin: "Statutory Offences" (1958) 4 *Journal of the Society of Public Teachers of Law* (n.s.) 206.
5. Strict responsibility is not unknown in other parts of the criminal law, for example in relation to knowledge of age of the victim in certain sexual offences, or, in some jurisdictions, in relation to material constituents of bigamy. As a general doctrine, however, it is confined to the so-called regulatory offences and it is only the general doctrine which is under discussion here. *Cf.* Hall: *General Principles of Criminal Law* (2nd ed.) 326.
6. For historical surveys relevant to the development of the regulatory offence see n. 15 below.
7. "It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression *mens rea*." (*Chisholm* v. *Doulton* (1889) 22 Q.B.D. 736, 741, *per* Cave J.) "Now the general rule of law is that a person cannot be convicted and punished in a proceeding of a criminal nature unless it can be shown that he had a guilty mind." (*Ibid.* 739, *per* Field J.) "The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed." (*Tolson* (1889) 23 Q.B.D. 168, 187, *per* Stephen J.) "To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle that the wrongful or criminal intent is the essence of crime, without which it cannot exist." (*State* v. *Blue* (1898) 17 Utah 175, 181; 53 Pac. 978, 980, *per* Bartch J.) "The general rule of English law is, that no crime can be committed unless there is *mens rea*." (*Williamson* v. *Norris* [1899] 1 Q.B. 7, 14, *per* Lord Russell C.J.) "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against

It is true that in early law there appears to have been an emphasis on the nature and degree of harm done rather than on the moral guilt of the defendant; but the consensus of learned opinion is that at no stage did the law dispense altogether with the *mens rea* concept, the early stress on physical results being no more than a phenomenon natural to a relatively primitive phase of legal development.[8] By about the thirteenth century the idea of a mental element in crime, or at least in the more serious crimes, such as homicide and larceny, was taking shape in the embryonic criminal law as a factor distinct from the mere performance of the forbidden act.[9] With the appearance in Coke's *Institutes*[10] of the maxim *actus non facit reum nisi mens sit rea* as a well-established principle of law, the now familiar distinction between the physical and mental elements in crime at common law took on its modern form.

Looking back on this development, two propositions may be advanced. The first is that the development of *mens rea* represented the growing influence in the criminal law of ethical considerations, of morality. The second is that the law was thereby improved. Since the view taken herein is that any departure from ethical motivations in the theory or practice of the criminal law, however trivial, is against the interest of the community, it may be as well to elaborate a little on these two propositions.

As to the first, that *mens rea* is a legal manifestation of an ethical concept, it is, of course, not suggested that the law is to be identified with any particular moral code in any but the most general terms; still less that it is, or ought to be, identical with such a code. It is platitudinous that the application of a system of law depends upon the political identification of the community to which it applies; and that political identifications rarely coincide with communal divisions based on ethical or religious belief. Moreover, individual members of

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the criminal law unless he has a guilty mind." (*Brend* v. *Wood* (1946) 62 T.L.R. 462, 463, *per* Lord Goddard C.J.; repeated in *Harding* v. *Price* [1948] 1 K.B. 695, 700.) *Thomas* v. *The King* (1937) 59 C.L.R. 279; *Morissette* v. *United States* (1952) 342 U.S. 246.

8. "In seeking to determine the part played by intent in the early criminal law . . . one must guard against drawing too sweeping conclusions from evidence which is admittedly extremely meager. What the recorded fragments of early law seem to show is that a criminal intent was not always essential for criminality and many malefactors were convicted on proof of causation without proof of any intent to harm. But it also appears that even in the very earliest times the intent element could not be entirely disregarded, and, at least with respect to some crimes was of importance in determining criminality as well as in fixing the punishment." (Sayre: "Mens Rea" (1932) 45 *Harvard Law Review* 974, 982.) See generally Sayre: *op. cit.*, 975-982; Holmes: *The Common Law*, Lecture I; Wigmore: "Responsibility for Tortious Acts" (1894) 7 *Harvard Law Review* 315; Winfield: "The Myth of Absolute Liability" (1926) 42 *Law Quarterly Review* 37, reprinted in Winfield: *Select Legal Essays* 15-29; 2 Holdsworth: *History of English Law* ch. 2; 2 Pollock and Maitland: *History of English Law* 447-509; Hall: *General Principles of Criminal Law* (2nd ed.) 77-83.
9. Sayre: *op. cit.*, 988-989.
10. 3rd *Institute* 6, 107, (1641).

a group professing the same moral beliefs frequently differ over the detailed interpretation of those beliefs, and it is not practicable to reflect this degree of individual variation in a law common to all. But to admit those facts is not to deny that the criminal law should be based on moral considerations.

If we were all perfect, there would be no need for a criminal law. The reason for its existence is no doubt to keep the community in order. Yet to concede, as all do, that merely keeping the community in order is unsatisfactory as an end in itself, is to admit at the same time that the application of the criminal law must be limited by the moral sense of the community, for there is no other basis for limitation. If merely keeping the peace were the sole end of criminal law, it would be simple, and doubtless effective, to rule that anyone who did any prohibited act should be put to death. It is quite probable that the problem of illegal parking would swiftly be solved if on mere proof of *actus reus* the defendant were removed permanently from the scene. The reason why this drastically simple solution to many problems of law-enforcement is not adopted is that it would be repugnant to the moral sense of the whole community. No sane man could accept such a law, for common to all civilised communities is a profound respect for human life.

This is an ethical consideration, and its power is demonstrated by the history of the death penalty, which for two centuries has been one of steadily lessening public support.[11] Similarly, an increasing revulsion against the use of corporal punishment less than death has been a marked feature of modern penology.[12] These phenomena reflect the general opinion that an offender should not be punished beyond the requirements of the case, whatever those requirements may be thought to be. The rise of the concept of *mens rea,* which antedates both of the developments just mentioned, is similarly a reflection in the law of the related belief that unless a man is at fault he should not be punished at all.

The second of the two propositions put forward above, that the criminal law was improved by the development of its moral content through the *mens rea* concept, implies that the evolution of *mens rea* as a prerequisite for conviction has rendered the modern criminal law a more effective instrument of social regulation than its primitive forerunner. In the long run, effective law-enforcement depends upon the support of the community. It has already been observed[13] that

11. Radzinowicz: *A History of English Criminal Law,* vol. I; *Report of the Royal Commission on Capital Punishment,* 1949-1953, (U.K.) Cmd. 8932; *Report of the Commission of Inquiry on Capital Punishment,* 1959, (Ceylon) Sessional Paper XIV.
12. Tappan: *Crime, Justice and Correction,* ch. 20; *Report of the Departmental Committee on Corporal Punishment,* 1938, (U.K.) Cmd. 5684; *Report of the Advisory Council on the Treatment of Offenders,* 1960, (U.K.) Cmd. 1213.
13. *Supra,* n. 8.

as far back as the Anglo-Saxons, long before the emergence of a general theory of *mens rea*, the lawmakers deemed it advisable to accord official recognition to the distinction between intentional and unintentional wrongs. It can scarcely be doubted that a law which seeks to distinguish between just and unjust punishment is more readily obeyed, and therefore more effective, than a law which strikes in blind disregard of the *mores* of the community.

It is against this background that the rise of the modern doctrine of strict responsibility[14] for minor statutory offences must be viewed. The historical facts are well known and need not be repeated in any detail here.[15] The starting point is generally taken to be the English case of *Woodrow*[16] in 1846, in which a licensed tobacco dealer was convicted of having adulterated tobacco in his possession even though it was proved that the tobacco had been adulterated in the course of manufacture and that the dealer, who had bought it in good faith, neither knew nor had any reason to suspect the adulteration. Contemporaneously, but apparently independently,[17] the same judicial attitude towards statutory offences of a similarly regulatory nature began to manifest itself in the U.S.A.

In a little over a century this new doctrine, that *mens rea* forms no part of the definition of a regulatory offence, has gone from strength to strength. At the present day it embraces a vast area of law of immediate concern to almost every member of the community capable of incurring criminal responsibility. Sayre, writing in 1933,[18] divided regulatory offences into seven broad classes, with nine sub-classes, but even then found himself obliged to add an eighth, comprising "violations of general police regulations, passed for the safety, health, or well-being of the community", as a sort of catch-all for the unclassifiable. The draftsmen of the American Law Institute's Model Penal Code, merely by way of giving "some indication of the range"[19] of strict responsibility at the present day, cite cases from the U.S.A., England, Canada and Australia to illustrate forty-two distinct types of offences within its scope. At a United Nations seminar on the role

14. Hall, *op. cit.*, 326, regards the term "strict responsibility" as applicable even to an analysis of negligence. This, it is submitted, is confusing. As the terms "strict responsibility" and "negligence" are customarily used, while it is true that both refer to responsibility without advertence, negligence implies a defence of due care but strict responsibility does not. The customary usage will be adhered to in the text, so that strict responsibility means liability to conviction on proof of *actus reus* only, without proof of intention, recklessness or negligence.
15. The classical account is by Sayre: "Public Welfare Offences" (1933) 33 *Columbia Law Review* 55, 56-57. See also Starrs: "The Regulatory Offense in Historical Perspective" in *Essays in Criminal Science*, ed. Mueller, ch. 9.
16. (1846) 15 M. & W. 404; 153 E.R. 907.
17. Sayre: *op. cit.*, 67. He sees the American development as starting with *Barnes* v. *State* (1849) 19 Conn. 398, in which it was held that the offence of selling liquor to a common drunkard was committed even if the seller did not know that the buyer was a common drunkard (*ibid.* 63).
18. Sayre's classification is reproduced in n. 3 *supra*.
19. Tentative Draft No. 4, section 2.05, Comment 141-145.

of the criminal law held in Tokyo in May, 1960, lawyers from countries so diverse as Australia, Cambodia, China, Hong Kong, India, Indonesia, Korea, Japan, New Zealand, Philippines, Sarawak and Thailand contributed to the discussion on this subject.[20] A depth study of Wisconsin statutes in 1956[21] revealed that of 1113 statutes creating criminal offences[22] which were in force in 1953, no less than 660 used language in the definitions of the offences which omitted all reference to a mental element, and which therefore, under the canons of construction which have come to govern these matters, left it open to the courts to impose strict responsibility if they saw fit.

The social importance of strict responsibility in the criminal law is therefore clear beyond argument. The question is whether it goes beyond the necessity of the case. Faced with a widespread acceptance of the doctrine by the judiciary, and the apparent acquiescence of the legislature, as evidenced by the Wisconsin study, in this judicial attitude over a range of offences which now almost certainly outnumbers offences requiring *mens rea* or negligence,[23] it is tempting to conclude that the doctrine is justified by its very success. This, indeed, appears to have been the view of Professor Sayre, who seems to have felt that since strict responsibility arose in the context of certain social conditions, it was therefore justified by those conditions.[24] Similarly, in his most recent reference to the subject, Dean Roscoe Pound adheres[25] to the view that strict responsibility for regulatory offences is based on "the social interest in the general security",[26] without,

20. United Nations Seminar on the Role of Substantive Criminal Law in the Protection of Human Rights and the Purposes and Legitimate Limits of Penal Sanctions, Tokyo, Japan, May, 1960, *Proceedings* 28-34.
21. Remington, Robinson and Zick, "Liability Without Fault Criminal Statutes" [1956] *Wisconsin Law Review* 625, 636, Table V.
22. Defined as offences rendering the offender liable on conviction to fine or imprisonment or both (*ibid.* 626, n. 2).
23. The Wisconsin study also demonstrated that by far the highest density of neutral language (*i.e.*, language omitting all reference to a mental element) in the definitions of offences was to be found in just those areas of administrative regulation of society in which modern legislatures are most prolifically active. "Such a concentration is found at the tension points of modern society; Business regulation, public health and safety, and the conservation of resources for planned futures." (*Ibid.* 636.)
24. "The decisions permitting convictions of light police offences without proof of a guilty mind came just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt; the movement also synchronized with the trend of a new sense of the importance of collective interests. . . . The interesting fact that the same development took place in both England and the United States at about the same time strongly indicates that the movement has been not merely an historical accident but the result of the changing social conditions and beliefs of the day." (*Op. cit.*, 67.) "With respect to public welfare offences involving light penalties the abandonment of the classic requirement of mens rea is probably a sound development." (*Ibid.* 84.)
25. For an earlier statement see *The Spirit of the Common Law* 52:—"The good sense of courts has introduced a doctrine of acting at one's peril with respect to statutory crimes which expresses the needs of society." (1921.)
26. I *Jurisprudence* 448 (1959).

however, demonstrating either that this social interest is best served in this way, or that the advantages outweigh the disadvantages.

Now, this opinion may be right: it may indeed be that liability to conviction without proof of *mens rea* is necessary nowadays to the efficient regulation of society. But taking into account that it is the machinery of the criminal courts which is being used for this social regulation, and that for many centuries those courts have administered a law in which the *mens rea* concept has become increasingly prominent, one is entitled to inquire what may be the reasons on which the opinion is based, and what the arguments designed to convince the reader that the modern phenomenon of strict responsibility not only is, but also ought to be.

The arguments which have been put forward are not lightly to be brushed aside. They have convinced generations of judges and many academic scholars that strict responsibility is here to stay because it serves a useful and necessary purpose in adapting the criminal law to current social pressures. Nevertheless, they have not convinced everyone. Persistent and continuing conflicts of opinion in the courts are reflected in the growing volume of mutually irreconcilable decisions, some in favour of strict responsibility, others, often distinguishable only on some trivial difference in the facts or between two similar statutes, against it.[27] Outside the courts scholars of the highest eminence are not wanting to support the view that strict responsibility entailing penal sanctions, however slight, has not been shown justified in either theory or practice.[28] Their criticisms of the arguments in favour of the doctrine are cogent. These arguments, and their refutations, are as follows.

LEGISLATIVE INTENTION

(i) *Argument*

Pride of place should certainly be given to the argument from legislative intention, according to which strict responsibility is the creation of the legislature and not the courts.

27. A perfect example, often cited, is the contrast between *Cundy* v. *Le Cocq* (1884) 13 Q.B.D. 207, and *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918. In *Cundy* v. *Le Cocq* the charge was laid under the Licensing Act, 1872, s. 13: "If any licensed person . . . sells any intoxicating liquor to any drunken person, he shall be liable to a penalty." These words were held to create strict responsibility, so that ignorance by the licensee that his customer was drunk was no defence. In *Sherras* v. *De Rutzen* the charge was laid under s. 16 (2) of the same Act: "If any licensed person . . . supplies any liquor . . . to any constable on duty . . . he shall be liable to a penalty." These words were held to imply a requirement of *mens rea*, so that ignorance by the licensee that his customer was a policeman on duty was a defence. Only the most trivial distinctions can be drawn between the two cases by reference either to the statute or to the facts. The determinative factor seems to have been that Stephen and Mathew JJ, who decided *Cundy* v. *Le Cocq*, approved of strict responsibility, whereas Day and Wright JJ, who decided *Sherras* v. *De Rutzen*, did not.

28. Glanville Williams: *Criminal Law: The General Part* 267-274; Hall: *General Principles of Criminal Law* (2nd ed.) 342-351; Hart: "The Aims of the Criminal Law" (1958) 23 *Law and Contemporary Problems* 401, 422-425.

> Most of what has been written heretofore has dealt largely with analysis and rationalization of appellate decisions. This is justified only if the court plays the dominant role in the determination of whether fault is a prerequisite of criminal responsibility.[29]

A moment's reflection will show that in this area the courts do not and cannot play the dominant role commonly credited to them. Their function is to interpret statutes, not to improve upon the actions of the sovereign legislature by inserting into penal statutes words which would improve them in point of justice.[30] If the legislature, presumably as an act of policy, creates and defines a new statutory offence of a "merely admonitory"[31] kind without inserting into the definition any words indicative of an intention that no-one should be convicted of that offence unless proved to have been at fault, then it is beyond the proper constitutional function of the courts to imply any such words in defiance of the plain statement in the statute.

Moreover, if the courts embark upon a process of modifying penal legislation in accordance with currently fashionable notions of justice, what was at the time of its enactment a clear, easily comprehensible law will come to be surrounded with quite unnecessary uncertainty, the future attitude of the courts to that and similar laws becoming unpredictable in the absence of direct authority. Indeed, failure on the part of the courts hitherto to adhere consistently to the principle that the legislature should be taken to mean only what it says has led to just that situation at the present time:

> In the present connection the courts have manifested an increasing readiness to assume the role of legislators, and to fill imagined lacunae in penal statutes by the conjectural emendations of judges. The result has been lamentable. Penal statutes have acquired appendages of judge-made law based upon the conjectures of judges as to what the legislature would have provided if it had addressed its mind to a matter, where there is nothing to suggest that the Legislature ever thought about it at all or that the appendage would have survived if it had been included as part of the bill. A fertile field of litigation has been created, multitudes of reported cases have come into existence, many of them irreconcilable, in which the common law rule has been treated as excluded or not excluded upon judge-made indicia derived from cases in which there has often been a difference of opinion as to so-called necessary implications; and no one can now be reasonably sure of the effect of a penal statute until it has been tested by prosecutions.[32]

Interference by the courts with the plain words of penal statutes is thus not merely unconstitutional but undesirable also when tested pragmatically by reference to the results to which it has led. To

29. [1956] *Wisconsin Law Review* 625.
30. *Myerson* v. *Collard* (1918) 25 C.L.R. 154, 168, *per* Higgins J.
31. [1946] *Wisconsin Law Review* 172.
32. *Turnbull* (1943) 44 S.R. (N.S.W.) 108, 110, *per* Jordan C.J.

inquire whether the doctrine of strict responsibility as worked out in the courts is justified or goes beyond the necessity of the case is therefore beside the point, for the doctrine is not primarily the work of the courts.

(ii) *Refutation*

The objection to the view that unless the definition of a statutory offence includes a specific reference to a mental element it is to be presumed that the legislature did not intend such an element to form part of the offence, is that it arbitrarily and artificially limits the legal context by reference to which the meaning of the words actually used must be discovered.

> Every criminal statute is expressed elliptically. It is not possible in drafting to state all the qualifications and exceptions that are intended. One does not, for instance, when creating a new offence, enact that persons under eight years of age cannot be convicted. Nor does one enact the defence of insanity or duress.[33] The exceptions belong to the general part of the criminal law, which is implied into specific offences . . . where the criminal law is codified . . . this general part is placed by itself in the code and is not repeated for each individual crime. Now the law of *mens rea* belongs to the general part of the criminal law, and it is not reasonable to expect [the legislature] every time it creates a new crime to enact it or even to make reference to it.[34]

Since there is no doubt that in reference to nearly all[35] statutory crimes other than regulatory offences the courts do without hesitation imply the general part of the criminal law, including the doctrine of *mens rea,* unless expressly excluded by the definition of the offence in question, the adoption of a different and intellectually unimpressive mode of interpretation for regulatory offences must be justified on grounds other than legislative intention as gathered from the literal words used.

This contention is strongly reinforced by the conclusions reached in the 1956 depth study of Wisconsin statutes already referred to.[36] The first five of these conclusions were as follows:—

(1) A large percentage of criminal statutes in Wisconsin do not expressly require proof of fault for conviction.[37]
(2) There is no statute which expressly provides for liability without fault.
(3) There is practically no information available as to what the legislature actually intended when a particular statute was passed.

33. The applicability of the general defences to a criminal charge to an offence of strict responsibility is outside the scope of this article.
34. Glanville Williams: *Criminal Law: The General Part* 270.
35. Not all: see n. 5 *supra.*
36. [1956] *Wisconsin Law Review* 625.
37. "In this study, 'subjective fault' requires in general that the actor be aware of the nature of his conduct or of the harmful results which he has caused or the danger which he has created." (*Ibid.* 628. See also Table V at 636.)

(4) Criteria proposed by courts and analysts for determining whether fault is required fail to explain adequately the pattern found in current criminal statutes in Wisconsin.
(5) The dominant characteristic of the criminal statutes of Wisconsin is their ambiguity on the issue of the requirement of fault.

The importance of the Wisconsin study to the general problem of strict responsibility in the criminal law can hardly be over-estimated. In this article the conclusion will be reached that all of the arguments hitherto put forward in favour of imposing strict responsibility for regulatory offences are either demonstrably wrong or else, and this is the important point in relation particularly to legislative intention, rest upon unproved assumptions. A dominant characteristic of nearly all factual assertions so far made in discussing this part of the law has been the total absence of evidence either in support or in refutation.

From this point of view, attention is particularly directed to conclusions (2), (3) and (5). If it is accepted, as it reasonably may be, that Wisconsin statutes are typical of the general pattern of legislation in this field, then the argument that strict responsibility is merely the application by the courts of a clearly expressed legislative intention must be rejected as inconsistent with the only available evidence. Not only is there no statute which in terms imposes responsibility without fault: there is practically no information available as to what the legislature did intend, and the obvious source of such information, the statutory wording itself, is vitiated by ambiguity. Ambiguity brings the court back to where it started in the search for a meaning; in which case no reason can be gathered from the *legal* implications of the statutory words why the general part of the criminal law, including the doctrine of *mens rea,* should not be implied into penal sections in accordance with the usual rule. If no justification for abandoning the usual rule is to be found by reference to the purely legal implications of the statutory words, such justification must be sought outside the statute.

One further comment may be made on the argument from legislative intention as presented herein. Responsibility for the present, and continuing, judicial conflict on how best to ascertain the intention of the legislature, with consequential confusion in the law, was placed at the door of those who have tried to read *mens rea* requirements into minor penal statutes instead of following the simpler course of literal interpretation.[38] It can now be seen that, if anything, the contrary is the case: confusion and doubt have been spread, not by those who have tried to adhere to well-established principles of the criminal law, but by those who, for reasons which are inadequate so far as the law

38. It is just another oddity of this very odd part of the law that strict construction of penal statutes, normally a valuable safeguard for the defendant, here results in a formidable extension of criminal responsibility.

itself is concerned, have displaced the traditional canons of construction without providing a coherent and acceptable doctrine in their stead. Moreover, it is not the case that the present confusion, which all agree to be undesirable, can be effaced only by adopting the literal approach. Any approach would produce order, although not necessarily justice, so long as it satisfied the tests of comprehensibility and consistency.

HISTORY

(i) *Argument*

If the argument from legislative intention is accepted, it absolves the courts from the charge of creating unnecessary injustice. It does not, however, on any view dispose of the further question whether strict responsibility, whoever invented it, is defensible on its merits as a measure of social protection. The first line of defence on this issue is the argument from history. According to Sayre,

> The interesting fact that the same development took place in both England and the United States at about the same time strongly indicates that the movement has been not merely an historical accident but the result of the changing social conditions and beliefs of the day.[39]

To the fact of original temporal coincidence may now be added the equally impressive fact of geographical distribution which has already been commented upon.[40] When a socio-legal phenomenon arises with apparently independent spontaneity in two different societies at the same stage of development, flourishes rapidly in those societies, and then spreads with equal success to other countries in response to similar social pressures, it is idle to inquire whether the phenomenon in question serves a useful purpose. Unless its utility were considerable, its appearance would be neither so inevitable nor so widespread.

(ii) *Refutation*

The short answer to the argument from history is that it is at best an explanation and not a justification. To sustain this view is not necessary to maintain, contrary to the apparent fact, that strict responsibility for minor regulatory offences owed its original appearance in *R.* v. *Woodrow*[41] to nothing more impressive than accident. The truth of the matter is that no-one knows *why* the doctrine appeared when it did, or at all; we only know *how* it appeared.

Sayre conjectured[42] that strict responsibility grew up as,

> The not unnatural result of two pronounced movements which mark twentieth century criminal administration, i.e., (1) the shift of emphasis from the protection of individual interests which marked nineteenth century criminal administration to

39. 33 *Columbia Law Review* 67.
40. See n. 20 *supra.*
41. (1846) 15 M. & W. 404; 153 E.R. 907.
42. 33 *Columbia Law Review* 67-70.

> the protection of public and social interests, and (2) the growing utilisation of the criminal law machinery to enforce, not only the true crimes of the classic law, but also a new type of twentieth century regulatory measure involving no moral delinquency.

Even taken at the level of an explanation this account fails to convince, for on his own showing Professor Sayre believed that the general "growth of a distinct group of offences punishable without regard to any mental element dates from about the middle of the nineteenth century";[43] that "the conscious beginning in England of the movement to do away with the requirement of *mens rea* for petty police offences" began with *R.* v. *Stephens*[44] in 1866;[45] and that "the new doctrine became firmly established in Massachusetts" also in the 1860's.[46]

It may be, of course, that Sayre's contentions in this regard can be reconciled by reading him as meaning that conditions which emerged in the nineteenth century persisted in the twentieth century, although this is not what he said. Even so, and even if it be accepted without further demonstration that the two movements he mentions did in fact influence the rise of strict responsibility, as opposed to being merely contemporaneous therewith, his findings do not help the cause of strict responsibility at the present day. In the first place, it does not follow that *because* there has been a shift of emphasis from private right to public interest, *therefore* the public interest in the context of the regulatory offence is best served, or even satisfactorily served, by abandoning the requirement of fault as a pre-requisite for conviction. No more does it follow, what is implied by the mere juxtaposition of private right and public interest, that there is any necessary conflict between the two. Evidence, as usual, is lacking.

The importance of the contention that the machinery of the criminal law is being utilised to carry out work for which it was not originally designed is that it underpins the justification for abandoning *mens rea* on the ground that there is no time to inquire into states of mind. This argument will be dealt with next. It is pertinent to observe at this point, however, that once again it is at least doubtful whether the assertion that the criminal courts were not intended for the administration of minor regulatory offences is supportable. Sayre himself conceded[47] that punishment of those obstructing the King's highway was among the early functions of the criminal law. What is the basis of a parking offence if not obstruction of the public highway?[48] The true problem seems to be that the courts nowadays have too much work

43. *Ibid.* 56.
44. (1886) L.R. 1 Q.B. 702.
45. 33 *Columbia Law Review* 59.
46. *Ibid.* 64.
47. *Ibid.* 69.
48. Cynics may answer that the object of parking offences is indirect taxation.

to do, not that they are being presented with work outside their traditional function.[49]

NECESSITY

(i) *Argument*

Proponents of strict responsibility recognise, of course, that the argument from history comes to an end with history. The world at any given time is composed entirely of relics of the past. Even if the historical argument is accepted as far as it goes, it might be maintained that however inevitable the doctrine may have been in bygone times, strict responsibility at the present day is an unjust anachronism standing against the mainstream of development of the criminal law. This contention calls forth the argument from necessity, whereby it is asserted that owing to the great pressure of work upon the minor criminal courts nowadays, it has become impracticable to inquire into *mens rea* in each prosecution for a regulatory offence.

> Criminal courts are today swamped with great floods of cases which they were never designed to handle; the machinery creaks under the strain. . . . The numbers of such cases are rapidly increasing. . . . It is needless to point out, that swamped with such appalling inundations of cases of petty violations, the lower criminal courts would be physically unable to examine the subjective intent of each defendant. . . .[50]

Unless the machinery of law-enforcement in this area is to break down altogether, some simplification of the process of prosecution must be found. The obvious step to take is to jettison the requirement of a guilty mind, for this requirement is inappropriate to petty violations of the kind in question.[51] It is all very well for the theoretician to argue from moral doctrines appropriate to serious criminal guilt. Let him watch a minor criminal court working hard against time, trying to dispose of its business against ever-increasing odds in the discharge of its duty to protect the day-to-day interests of the community: then he will become aware of the true nature of the problem. There is simply no time for *mens rea*.

(ii) *Refutation*

It is to be conceded that even if one disagrees with the view that regulatory offences are outside the traditional business of the criminal

49. It is in fact entirely clear that at least from Tudor times many of the duties of justices of the peace have been purely regulatory in nature. For a recent general survey see Osborne, *Justices of the Peace, 1361-1848, A History of our Magistracy during Five Centuries.* See also I Holdsworth *History of English Law* (7th ed., revised by Goodhart and Hanbury) 285-298; Starrs, "The Regulatory Offense in Historical Perspective" in *Essays in Criminal Science* (ed., Mueller) ch. 9.
50. Sayre: 33 *Columbia Law Review* 69.
51. "The ready enforcement which is vital for effective petty regulation on an extended scale can be gained only by a total disregard of the state of mind." (Sayre: *op. cit.*, 70.)

courts,[52] the argument from necessity is not thereby invalidated, for it may still be true that pressure of work prevents *mens rea* inquiries. However, when this argument is stripped of historical trappings it stands revealed in all its immoral simplicity. In no other context has the contention been solemnly advanced that if the law takes up too much time, the courts are entitled to jettison such part of it as they find tedious to administer.

It may be said that this is unfair exaggeration; that the true conflict here is not between justice and injustice but between competing methods of achieving substantial justice; that the question is whether the public interest is better served by the speedy disposal of what are, after all, minor offences which the defendant would probably like to face up to and forget about as soon as possible, or by a meticulous inquiry into the perhaps largely theoretical question whether the defendant can properly be said to have been at fault. If the latter, why not introduce the whole panoply of judge and jury instead of mere summary justice?

There are a number of objections to this plausible rationalisation of the present state of affairs. The first is that, no matter how the argument is presented, the courts have no power to achieve speed of administration at the expense of substantive law. It is no answer to this point to say that since strict responsibility is undoubtedly with us, the courts must now have such a power as far as regulatory offences are concerned, whatever the constitutional position may have been before the doctrine appeared. Certainly strict responsibility is with us. But the question now under discussion is not whether strict responsibility is with us, but whether its continued existence can be justified by reference to the argument from necessity in so far as that argument rests on the simple fact that the courts have too much work to get through. It is submitted that it obviously cannot be: the courts do not have, and at no relevant time[53] have had, any power to modify the law to facilitate the flow of judicial business.

The second objection to the argument from necessity is that the courts in fact do have regard to the moral blameworthiness of the defendant, for they take it into account in deciding on the appropriate sentence. It is not the case that the maximum sentence is invariably imposed on conviction of a regulatory offence, or indeed the minimum sentence or any other fixed proportion of the possible.[54] If automatic

52. See n. 49 *supra*.
53. This reservation is made to allow for the possibly imperfect differentiation in early times between the legislature and the judiciary. *Cf.* Richardson and Sayles: "Parliaments and Great Councils in Medieval England" (1961) 77 *Law Quarterly Review* 213 and 401.
54. It is true that the court cannot take blameworthiness into account where there is a fixed statutory penalty, as commonly with a fine for a parking offence; and that in this situation abandonment of *mens rea* may result in saving of time. But this consideration still fails to meet the objection that the courts have no power to do any such thing. Moreover, the great majority of regulatory offences do not carry fixed penalties.

maxima are not imposed, it follows, unless anyone be hardy enough to argue that the amount of the sentence for a regulatory offence is a matter of chance inclination by the court, that some criterion must be used to determine the sentences which are actually imposed. The point need not be laboured that this criterion is customarily the court's estimate of the gravity and anti-social significance of the defendant's behaviour in the circumstances charged. Moreover, the defendant is entitled to address the court in mitigation of sentence as much for a regulatory offence as for any other offence. Since the court's time can be and frequently is, taken up by *mens rea* considerations for one purpose, it is singularly unconvincing to argue that the court is unable to take it into account for another purpose in the same case.

The third, and concluding, objection to be made to the argument from supposed necessity is that it is misconceived. The considerations adduced in support show one thing and one thing only: that there should be an improvement in the administration of petty criminal justice, either by creating more courts of the same kind as already exist to cope with the increased volume of work, or by transferring the trial of regulatory offences to a new structure of courts or administrative agencies altogether.[55] This demonstration has nothing to do with *mens rea.*

IMPLEMENTATION

(i) *Argument*

One of the main planks in the argument from necessity was the contention that the requirement of a guilty mind is inappropriate to minor regulatory offences. In its expanded form this contention is the argument from implementation, which is closely related to the argument from legislative intention and runs as follows.

It is the duty of the courts, having decided what a statute means according to its plain words, to use their best endeavours to implement the legislative purpose thus revealed. Clearly the object of regulatory offences is to enforce compliance with the statutes to which they belong. The duty of the courts is therefore to facilitate rather than obstruct this enforcement. It is the fact that in the vast majority of regulatory prosecutions, it would be impossible for the prosecutor to produce evidence of the state of the defendant's mind at the relevant time. What hope has the prosecutor of proving that a man who exceeded the parking limit in a restricted area intended to do so, or did so with knowledge of all the relevant facts? None whatever. Therefore, for the courts to require such proof would amount to nullifying the legislation they are supposed to be enforcing. That is one reason why *mens rea* is inappropriate to regulatory offences. There are two others.

55. Sayre: *op. cit.*, 69; Glanville Williams: *Criminal Law: The General Part* 273; Hall: *General Principles of Criminal Law,* (2nd ed.) 359.

The first relates to the penalty. If a man is charged with an offence, such as murder, which carries a long term of imprisonment, or death, on conviction, it is entirely proper that care should be taken to ensure that the act he is accused of committing was no accident or excusable error. But the punishment for a regulatory offence is light, often almost trivial, such as a small fine. Its object is not to deal with a formidably dangerous enemy of society[56] but to administer a sharp rebuke to an ordinary citizen who has lapsed a little in his standards of public responsibility. A searching inquiry into his precise state of mind when lapsing is out of all proportion to the demands of the occasion.

The second remaining argument on the inappropriateness of *mens rea* is that the authorities, partly out of a natural sense of fairness and partly because they are too busy to do otherwise, do not prosecute except in clear cases. This means that conviction is virtually a foregone conclusion in regulatory offence prosecutions. To prolong the process by requiring proof of *mens rea* is an irresponsible waste of time and trouble.

(ii) *Refutation*

The argument from implementation rests on three assertions: that proof of *mens rea* by the prosecutor in the normal case would be impracticable, and that to require such proof would therefore nullify the legislation; that the penalty on conviction of a regulatory offence is too slight for conscientious inquiry into moral guilt to be reasonably proportionate to the seriousness of the question at issue; and that the authorities in fact prosecute only in clear cases where *mens rea* can be taken for granted.

The objection to the first of these assertions is twofold. In the first place, the mere fact that the prosecution may find its task of establishing guilt difficult is of itself no reason for depriving the defendant of his customary safeguards.

> No doubt prosecutors would have their tasks made easy if no defence were possible; but the desirability (if it be desirable) of such a state of affairs has not yet been recognised as a principle of interpretation of statutes.[57]

Secondly, it does not follow that even if proof of *mens rea* is impossible in certain types of cases, the only solution is to go to the other extreme by denying the mental state of the defendant any relevance to the question of responsibility at all. There are plenty of possibilities between these alternatives. For example, there would be nothing discernibly detrimental to the administration of justice in relieving the prosecutor of the task of proving *mens rea*, or any lesser degree

56. Although it may be quite rational to regard those who fail to comply with food and drug regulations as a considerable social menace. *Cf.* Ross: *Sin and Society* (reference from Hall, *op. cit.*, 331, n. 23).
57. *Hunt* v. *Maloney* [1959] Qd. R. 164, 171, *per* Stanley J.

of fault, but leaving it open to the defendant to exculpate himself by establishing the absence of *mens rea* on the balance of probability.[58]

The assertion, in effect, that the penalty on conviction of a regulatory offence is too slight to be worth worrying about is entirely without foundation. There is overwhelming evidence not only that strict responsibility is applied in cases where the possible penalty includes a very large fine, or even imprisonment, but also that such penalties actually have been imposed after conviction on a strict responsibility basis.

One of the most conspicuous examples is the leading case of *United States* v. *Balint*[59] in which the Supreme Court of the United States applied strict responsibility to section 2 of the Anti-Narcotic Act of 1914 which made it an offence, *inter alia,* to sell narcotics otherwise than in accordance with the terms of that section. The maximum penalty on conviction was five years' imprisonment or a fine of $2,000 or both. In an English case, *Chajutin* v. *Whitehead,*[61] strict responsibility was applied to an offence of possessing an altered passport contrary to the Aliens Order, the effect being that the defendant was convicted without proof that he knew of the alteration. The punishment imposed was deportation, a result which might well have been even more serious for the defendant than a heavy fine or imprisonment. In another English case, *Sorsky,*[62] the question was whether conspiracy to commit an offence of strict responsibility was itself such an offence. After a confused discussion, which started from the premise that *mens rea* need not be proved against the defendant but ended inconclusively, the Court of Criminal Appeal upheld the conviction. The sentence imposed was imprisonment for twelve months, a fine of £1,000 and liability for one half of the costs of the prosecution. In the Australian case of *Brown* v. *Green,*[63] *mens rea* was held excluded from the offence of a landlord receiving from a tenant a rent in excess

58. This point has already been conceded in some legislatures by the introduction of statutory defences enabling D to escape liability for some particular offence by proving the fault of a third party, or that he took all reasonable precautions, or that he took a warranty from a vendor that material sold complied with statutory standards. For recent examples see Food and Drugs Act, 1955 (Eng.), s. 113; Health Act, 1956 (Vic.), ss. 291, 298, 300; Offices Act, 1960 (Eng.) s. 1 (6). The idea is not at all new: Factories Act, 1937 (Eng.), s. 137 (1); Fertilisers and Feeding Stuffs Act, 1926 (Eng.), s. 7 (1); Merchandise Marks Act, 1887 (Eng.), s. 2 (2). For an interesting variation by way of a defence of impracticability see Mines and Quarries Act, 1954 (Eng.), s. 157.

59. (1922) 258 U.S. 250; 42 Sup. Ct. 301.

60. Sayre, *op. cit.,* 81, could justify the decision "only on the ground of the extreme popular disapproval of the sale of narcotics"; in other words, only on the ground of popular prejudice. He gives some other striking American decisions at 80-83.

61. [1938] K.B. 506.

62. (1944) 30 Cr. App. R. 84.

63. (1951) 84 C.L.R. 285. The question whether reasonable mistake of fact would have been an answer to the charge was left open as there was no evidence of such a mistake.

of the amount lawfully chargeable, the maximum penalty for which was a fine of £250 and imprisonment for six months.

These are but four examples from a multitude. It is not possible, consistently with the evidence which for once is available on a strict responsibility point, to argue that conviction of a regulatory offence cannot have serious consequences in terms of penalty. Moreover, it is obvious that in such cases as the foregoing, the damage of conviction does not end with the formal punishment.[64] It has been pointed out[65] that one of the most serious consequences of an error of justice in strict responsibility offences of the order now under discussion is the moral obloquy, not to mention highly material disadvantage, of merely going on record as convicted. It is not infrequently, and quite properly, enacted that conviction of a certain number of offences against the liquor licensing laws results in automatic loss of the defendant's trading licence.[66] Even more familiar are laws that conviction a certain number of times under the motor traffic legislation results in automatic disqualification from driving.[67] A business reputation may be impaired, and certainly will not be enhanced, by conviction for some trading offence; an example would be a pharmacist convicted of failing to keep a proper record of the disposal of dangerous drugs in his possession.[68] To bring about secondary consequences of this kind without giving the accused person the opportunity to defend himself underlines the absurdity of defending strict responsibility on the ground that the penalty is small.

It is possible that some might wish to transfer the more obviously indefensible examples of injustice in this part of the law to the category of regrettable but necessary sacrifices for the common good, confessing the undesirability of individual injustice but avoiding the obvious inference on the ground that it is outweighed by the benefit to the general public interest. This is the last of the arguments made out in

64. A point overlooked in the not infrequent judicial statements that where the defendant is morally innocent, the penalty should be merely nominal (e.g. *Parker* v. *Alder* [1899] 1 Q.B. 20, 26; *Hobbs* v. *Winchester Corporation* [1910] 2 K.B. 471, 485). In *Duncan* v. *Ellis* (1916) 21 C.L.R. 379, the High Court of Australia went so far as to penalise the successful prosecutor in costs.

65. Glanville Williams: *Criminal Law: The General Part* 267-268. It is this consideration which has led the framers of the American Law Institute's Model Penal Code to adopt the new term "violation" for an infraction of penal law which ought not to carry the moral stigma of conviction for crime; Tentative Draft No. 4, section 2.05, comment 140; Tentative Draft No. 2, section 1.05, comment 9. See also Gausewitz: "Reclassification of Certain Offenses as Civil instead of Criminal" (1937) 12 *Wisconsin Law Review* 365; Conway: "Is Criminal or Civil Procedure Proper for Enforcement of Traffic Laws?" [1959] *Wisconsin Law Review* 418; Perkins: "The Civil Offense" (1952) *University of Pennsylvania Law Review* 832 (reprinted in *Criminal Law* 692-710).

66. For example, Licensing Act, 1953 (Eng.) s. 120 (3); Licensing Act, 1958 (Vic.), s. 142; Licensing Act, 1932-1960 (S.A.), s. 77 (2).

67. For example, Road Traffic Act, 1960 (Eng.), s. 104 (1) (b); Transport Act, 1949 (N.Z.), s. 41; Road Traffic Act, 1934-1959 (S.A.), s. 38a (1)a.

68. For example, Poisons Act, 1934 (N.Z.), ss. 18, 19; Poisons Act, 1952-1956 (N.S.W.), s. 12; Poisons Act, 1958 (Vic.), s. 9.

favour of strict responsibility. As such, it will be dealt with in its proper sequence. It is pertinent to observe at this point, however, that even if attention is thereby focused on the many regulatory offences, such as parking infringements, which undoubtedly do carry only an almost nominal sanction, the argument from the slightness of the penalty is not helped. There is no necessary connection between liability to conviction and extent of punishment. It is a pernicious and unsound doctrine that liability to conviction should be decided with one eye on the possible consequential punishment.

If it be thought that to exclude questions of punishment from questions of liability to conviction is too theoretical for the practical world, where both judges, magistrates and jurymen are likely to be affected in their deliberations by the probable consequences of their decisions, then it ought at least to be conceded that such considerations should influence the criminal law only in favour of the defendant, never against him. It is one thing to say, "If this man is convicted, a long sentence of imprisonment hangs over him; therefore let us be careful to ensure that every possibility of erroneous conviction is reduced to a minimum." It is quite another to say, "If this man is convicted, he will suffer at most a small fine which he can well afford to pay; let us therefore not worry too much about whether he deserves to be convicted at all." *As such,* the slightness of the penalty for a regulatory offence, even where the penalty indeed is slight, provides no ground whatever for abandoning the safeguards normally available to a defendant in criminal proceedings. It is only when slightness of penalty is linked with some other consideration, such as the need for speed in the administration of justice, that the argument wears even an appearance of plausibility.

Another consideration which may be conveniently interpolated here relates to the removal from the defendant to a regulatory offence charge in some jurisdictions of safeguards other than *mens rea* which are normally available to him in criminal proceedings. The usual rule of criminal law is that one is not responsible for the acts of another in the absence of such agreement or acquiescence in the actions of that other as would ground liability as principal in the second degree,[69] accessory before the fact, or conspirator; in other words, in the absence of an appropriate *mens rea.*[70] It follows that if the *mens rea* requirement upon which this limitation of criminal responsibility is based is removed, there is no reason for not applying the doctrine of *respondeat superior.*[71] This is indeed the case: the defendant to a

69. Or, of course, as principal in the first degree acting through an innocent agent or in pursuance of a common purpose.
70. *Huggins* (1730) 2 Ld. Raym. 1574; 92 E.R. 518. For a general discussion of vicarious responsibility in the criminal law see Sayre: "Criminal Responsibility for the Acts of Another." (1930) 43 *Harvard Law Review* 689.
71. *Mousell Bros.* v. *L. & N.W. Rly.* [1917] 2 K.B. 836.
R. v. *Australian Films Ltd.* (1921) 29 C.L.R. 195.

regulatory offence charge is not protected by the rule excluding vicarious responsibility from other parts of the criminal law.[72] Another safeguard denied him in the U.S.A.[73] is the requirement elsewhere in the criminal law that the case for the prosecution be proved beyond reasonable doubt. The American rule in regulatory offence cases is that no more than the balance of probability need be proved against the defendant.[74]

It is not clear why, when the defendant to a regulatory offence charge already has his position drastically weakened by the initial denial to him of the *mens rea* requirement, with the logical consequence that he is thereby incidentally exposed to vicarious responsibility for the wrongful acts of others, he should be put in a yet more hopeless situation by easing the normal standard of proof on a prosecutor. It is, however, clear that the damage done by the doctrine of strict responsibiltiy is not confined to abrogation of *mens rea.* These additional liabilities to conviction which now go with that doctrine should also be borne in mind when evaluating its use to the community.

The third assertion upon which the argument from implementation relied was that the authorities prosecute only in cases of clear fault, so that denial of the *mens rea* requirement is a theoretical rather than a practical injustice. The first answer to be made to this contention is that, even if it is the fact that the authorities prosecute only in clear cases, this is no argument for modifying the substantive law. A guess may be hazarded that the police normally prosecute more serious offences only in cases which they think to be pretty clear for the good reason that both pressure of work and public relations militate against the opposite course; yet no-one has been heard to argue that *mens rea* should be dropped from the definition of petty larceny, either on this ground or on the ground that the offence is trivial.[75] It is entirely improper to argue that the discretion of minor executive officials should replace the safeguards of substantive law, however slight the offence.

The second answer to the assertion is that, as with all other assertions in support of strict responsibility for which relevant evidence is available, it is demonstrably contrary to fact. The law reports abound

72. The rule is the same in the U.S.A. See Perkins: *Criminal Law* 696, n. 18.
73. The courts have made no corresponding departure from principle in the British Commonwealth, although it is becoming common for the burden of proof of exculpation to be removed to the defendant by statute. See n. 58 *supra.* But see also n. 74 *infra.*
74. This appears to be a consequence of the general American tendency to regard regulatory offences as civil rather than criminal proceedings. There is an analogy with the English rule imposing strict responsibility for public nuisances. For American authority see Perkins: *Criminal Law* 696, n. 21. In one Australian case, *Jackson* v. *Butterworth* [1946] V.L.R. 330, a taxation prosecution was held to be a civil proceeding for burden of proof purposes.
75. *Cf.* Mannheim: (1936) 18 *Journal of Comparative Legislation* 90.

with judicial crocodile tears shed in cases where the convicted defendant was admitted on all sides to be entirely without moral fault.[76] This consideration has not prevented the authorities from prosecuting in these cases.[77]

DETERRENCE

(i) *Argument*

The penultimate argument put forward by the defenders of strict responsibility is that strict enforcement of regulatory statutes is a peculiarly effective deterrent to potential wrongdoers of the kind envisaged by this legislation.

> Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals.[78]

If a person knows that any error of judgment or failure to prevent prohibited acts on his part at all will lead to conviction, he is going to be as careful as it is humanly possible to be, more careful than if he knows that an excusable misfortune may be excused.

(ii) *Refutation*

The assertion that a potentially inefficient or thoughtless member of society will more effectively mend his ways if he knows that no excuse will be allowed for failure to achieve the statutory standard of behaviour than if he knows merely that a standard of care is exacted which is high but not perfect, is no more than an assumption for which no evidence can be produced in support. No-one has ever carried out a controlled experiment whereby the incidence of a particular regulatory offence in a defined area was exactly measured under both a *mens rea* and a strict responsibility régime, police prosecuting practice remaining constant throughout the experimental period. This being so, the fact is that we have no idea what the social effect of strict responsibility has been. There is simply no relevant knowledge.[79]

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76. The English law reports are particularly rich in convictions of innocent people. For three recent examples see *Slatcher* v. *Smith* [1951] 2 K.B. 631; *Towers* v. *Gray* [1961] 2 W.L.R. 553; and *Strong* v. *Dawtry* [1961] 1 W.L.R. 841. The English courts were also responsible for the most celebrated instance of arbitrary injustice in this whole field of law; *Larsonneur* (1933) 24 Cr. App. R. 74.
77. *Cf.* Conclusion 8 in the Wisconsin study referred to above: "Though they have the power, administrators as a rule refrain from applying the criminal sanction unless they believe the offender to have been at fault. However, we know too little about the actual criteria employed by administrators in applying this type of criminal statute." [1956] *Wisconsin Law Review* 626.
78. Roscoe Pound: *The Spirit of the Common Law* 52, quoted by Devlin J. in *Reynolds* v. *Austin* [1951] 2 K.B. 135, 149.
79. "May I add that I have never seen any evidence which supports the rationalisations made in support of such liability in penal law, especially that it actually raises standards and protects the public." (Hall: "The Three Fundamental Aspects of Criminal Law" in *Essays in Criminal Science,* ed. Mueller, 159, 163.)

This familiar state of affairs, however, does not preclude argument from general principles or by analogy from information in other fields. As far as information from other fields is concerned, the only conclusion to be drawn from what has been discovered so far about our assumptions in regard to deterrence is that where they are not based upon exact information they are almost invariably wrong. The most conspicuous examples are capital and corporal punishment, both of which have been shown to have no significant effect upon the rate of incidence of the crimes for which they have been imposed.[80] This should make us very hesitant to assert dogmatically that strict responsibility is self-evidently an effective deterrent in any field. We should become even more cautious when we remember that still less is there evidence of the effectiveness or otherwise of measures lying between the extremes of strict responsibility being imposed on the defendant and full *mens rea* being required to be proved by the prosecution, such as putting the burden of self-exculpation by disproving *mens rea* on the defendant.

Argument from general principle leads similarly to the conclusion that there is no ground for the belief that strict responsibility is a peculiarly effective deterrent. It must be admitted that if there is any substance in the deterrence theory at all, there must be knowledge on the part of the person aimed at that his actions may have either the threatened result or some similar consequence. It is scarcely maintainable that the vast majority of regulatory offence defendants have any thoughts on the matter at all until they are prosecuted.[81] Moreover, the present uncertainty about the range of the regulatory offences would render the best-informed defendant's opinions unreliable. General deterrence may therefore be dismissed as a serious argument.

Special deterrence confined to the particular defendant has no more substance. It is true that conviction on a strict responsibility basis may make the individual defendant more careful in future, but this possibility alone does not justify strict responsibility. In the first place, it applies only where the defendant has in fact been less careful than he might have been. It cannot make any improvement in a man who is shown to have taken all reasonable, or even all possible, care to prevent the proscribed occurrence.[82] Secondly, even where the defendant has been inefficient or thoughtless, there is no reason to

80. See nn. 11 and 12 *supra*.

81. Where, as is often the case, a regulatory offence affects a particular branch of trade or industry, a certain amount of publicity will be given to decisions of the courts through trade journals. There is also the general public awareness that wrongdoing is likely to infringe the criminal law. To this extent it may be argued that general deterrence can be operative, but there is no evidence that some doctrine less drastic than strict responsibility might not be as effective in this respect, as in others. *Cf.* Hart: "The Aims of the Criminal Law" (1958) 23 *Law and Contemporary Problems* 401, 423.

82. As in *Parker* v. *Alder* [1899] 1 Q.B. 20; *Duncan* v. *Ellis* (1916) 21 C.L.R. 379. See also the cases cited in n. 76 *supra*.

suppose that his conduct in future cannot be improved by some method less unintelligently drastic than making it clear to him that in the instant case he would have been punished even if he had been very careful. Indeed, it 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.

On the question of punishment it is interesting to note here one of the more conspicuous of many inconsistencies between the arguments in favour of strict responsibility. It was argued that the purpose of the regulatory offences was not to punish so much as to put pressure on the thoughtless and careless. But if the penalties imposed were normally as slight as it is sometimes maintained that they are, the pressure applied would be singularly gentle; and if it were indeed true that they were scarcely worth worrying about, they would be for all purposes, practical or theoretical, quite ineffective. It cannot be argued at one and the same time that a given punishment is a significant social regulator but too insignificant to produce consequences worth worrying about.

PUBLIC INTEREST

(i) *Argument*

Finally, the possibility of injustice in the particular case has to be faced. This the defenders of strict responsibility concede to be an evil, but they regard it as a necessary and not a very great evil. The necessity arises out of a conflict between the public interest and the interests of individuals.

> All criminal law is a compromise between two fundamentally conflicting interests, that of the public which demands restraint of all who injure or menace the social well-being and that of the individual which demands maximum liberty and freedom from interference.[83]

Where regulatory statutes are concerned it is clear that in any such conflict the interest of the public must prevail, for by definition such statutes are designed to promote the well-being of the community at large, not merely the well-being of the community through the protection of some individuals in it. The nature of the conflict has already been demonstrated: the importance of general deterrence as against the claim of the individual to have his subjective fault proved; the importance of the speedy administration of law in a multitude of cases as against the desire of each individual defendant to have the charge against him investigated at length. Moreover, the slightness of the penalty reduces to a minimum the discomfort of being sacrificed for

83. Sayre: (1933) 33 *Columbia Law Review* 55, 68.

the common good. Indeed, where it is clear that the defendant is entirely without fault, penalty may be remitted altogether.

(ii) *Refutation*

> It is becoming increasingly recognised that strict liability has no place whatever in the criminal law; indeed, that it smacks of barbarism to punish people despite the fact that there is no reason for blaming them at all.[84]

At the last ditch the proponents of strict responsibility seek to meet this objection to their views by pointing to a supposed conflict between the interests of individuals and the interest of the public at large, maintaining that this conflict must be necessarily solved by subordinating the individual, even if this entails injustice.

There is no need to answer the contention at length. It is apparent from the foregoing discussion of other arguments that no such conflict of interest has been demonstrated because it has not been proved that strict responsibility is a necessary instrument of social regulation. There is no evidence whatever that less drastic methods would fail to achieve the same ends as are aimed at by the doctrine of strict responsibility.

CONCLUSION

The inescapable conclusion is that strict responsibility in the criminal law is objectionable because it envisages the punishment of innocent people; is not justified by any of the arguments which have been put forward in its favour; and is supported by none of the available evidence.

84. Hall: *Essays in Criminal Science*, ed. Mueller, 159, 162.