

NOT PROVEN

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It is unfortunately usual to treat too superficially the arguments both for and against the doctrine of strict, or absolute,¹ responsibility² 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* 892, 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

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

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 1; 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).

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 responsibility¹⁴ 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

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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.

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.

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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.

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 all³⁵ 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.)

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 conjectured⁴² 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.

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.)

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* 278; Hall: *General Principles of Criminal Law*, (2nd ed.) 359.

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.

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 *respondere 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. *Moussell Bros. v. L. & N.W. Rly.* [1917] 2 K.B. 836.
R. v. Australian Films Ltd. (1921) 29 C.L.R. 195.

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.)

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.