[10] The supposed sympathy of American courts to criminal defendants is limited to procedural protections such as the exclusionary rule, restrictions on station-house interrogation, and the right to counsel. . . .

[11] Shortly after the delivery of this lecture, the Michigan Supreme Court held in People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980), that the intent to commit a felony other than homicide is no longer sufficient to establish the malice required for murder. This decision may have a far-reaching impact.

[12] Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

[13] People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

[14] People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

[15] People v. Satchell, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971).

[16] For a more general account of this development, see Fletcher, *supra* note 6, at 344–47.

[17] *Deuteronomy* 21:1–9.

[18] For a further development of this issue, *see generally* Fletcher, *supra* note 6.

[19] Regina v. Prince, L.R., 2 Cr. Cas. Res. 154 (1875).

[20] *See, e.g.*, Conn. Gen. Stat. Ann. § 53a–67 (West Supp. 1981); La. Rev. Stat. Ann. § 14:80 (West Supp. 1981); N.Y. Penal Law §§ 15.20(3), 130.25(2) (McKinney 1975).

[21] 420 U.S. 671 (1975).

[22] *Exodus* 21:23–25 (an eye for an eye).

[23] *See generally* J. Langhein, Comparative Criminal Procedure: Germany (1977).

[24] See Fletcher, *supra* note 6, at 736–58 (German approach to mistake of law), 818–29 (German theory of necessity as an excuse).

# *Strict Liability: An Unorthodox View*

MARK KELMAN

## *What Is Strict Liability?*

One cannot understand what strict liability in the criminal law means—much less understand why it is so generally considered anomalous and morally objectionable by the commentators—without first considering how a defendant's blameworthiness, or mental fault (mens rea), is usually assessed and, more particularly, the usual relevance of a defendant's mistakes in determining blameworthiness.

It is perhaps easiest to understand the criminal law's scheme if one focuses on an example where the law is not implicated at all: a child admits to his parents that he has hurt his younger sister, fully aware that hurting her is precisely the sort of untoward result that the parents would want him to avoid. In their blaming and punishing practices, most parents would differentiate between situations in which the child truthfully informed them: (1) "I hit her on purpose, in order to harm her"; (2) "I took actions that I knew would harm her although that was not my aim"; (3) "I was reckless as to whether she would be harmed; that is, I was subjectively aware that I was taking high risks that she would be hurt without any corresponding benefits to my activity"; (4) "I was not subjectively aware that I was risking harm, but a reasonably prudent person would not have acted as I did, not have acted with a negligent disregard for the risk of harm"; and (5) "Although I know I caused harm, I neither did it on purpose nor knew it would happen, nor was I aware of a risk it would happen; moreover, the ordinary reasonable person would not have been aware of the risk either."

Essentially, courts or legislatures must decide, in each instance, whether it is a sufficient excuse for a defendant to argue, as to each element of his

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offense, "I did not act intentionally" (that is, with purpose or knowledge), "I did not act recklessly," or "I was not negligent." Where the legal system deems it insufficient to exculpate the defendant on the ground that he was neither intentional, reckless, nor negligent in causing a particular aspect of the proscribed harm, the defendant is said to be strictly liable as to a particular element of an offense.

The excuses that defendants offer can invariably be described in terms of mistaken perceptions. A statute proscribes the sale of adulterated milk; the defendant admits that he sold milk which was in fact adulterated. As to one element of the offense—an element that will rarely be contested, that is, whether or not he sold the milk—he admits that he acted with purpose. But as to the generally crucial and controversial element of the offense—whether the milk was adulterated or not—he could claim that he mistakenly believed the milk was wholesome. Even if fact finders accept that the defendant genuinely did mistakenly believe the milk was unadulterated, the defendant would not necessarily be exculpated. Even if the crime requires recklessness as to this element, the defendant would be convicted if he had been subjectively aware of an unreasonable risk that the milk was adulterated. If the defendant need only be negligent as to this element, conviction would be easier: if the reasonably prudent milk seller had been aware of the unreasonable risk that the milk was adulterated, it would not help the defendant to have been subjectively unaware of this risk. Finally, if the statute is construed as a strict-liability statute (in the sense that with regard to the element of the offense in which mistakes are generally pleaded, even a reasonable mistake will not be forgiven), the mistake would simply be irrelevant.

## *The Historical and Modern Operation of Strict Liability*

The maxim "actus non facit neum nisi mens sit rea" (a harmful act without a blameworthy mental state is not punishable) dates back to 1641 (Coke, p. 107). There have long been pockets in the criminal law, however, where the defendant has not been allowed to excuse his harmful behavior by pointing to the fact that if the circumstances were actually those that he reasonably but mistakenly believed were present, he would not have violated criminal sanctions in taking the steps he took. Most prominently, in "morals crimes" that predate the regulatory state (bigamy, adultery, and statutory rape), and in the felony-murder area, the fact that an offense was not committed intentionally, recklessly, or negligently has traditionally not been a defense (*Commonwealth v. Mash*, 48 Mass. (7 Met.) 472 (1844) (holding that a person can be convicted of bigamy although he reasonably but mistakenly believes his first wife to be dead); cf. *Regina v. Tolson*, 23 Q.B.D 168 (1889) and *Commonwealth v. Elwell*, 43 Mass. (2 Met.) 190 (1840) (defendant can be convicted of adultery although he might reasonably believe he is having sexual relations with an unmarried woman)).

To some extent, however, a modern reader of these early strict-liability cases is likely to find them somewhat ambiguous. Most nineteenth-century judges seemed to believe that if mens rea, or blameworthiness, is requisite, the defendant must be subjectively aware of wrongdoing. Thus, the significant line for these judges was between blameworthy subjectively grounded liability (what in the late twentieth century would be called intention combined with recklessness) and faultless objectively grounded liability (what in the late twentieth century would be called strict liability *combined with* negligence, where a subjectively unaware defendant is held to the standards of a reasonable person). Today, the law is far more prone to view the relevant line between fault and blamelessness as that between liability grounded in the defendant's deviance from the behavior of a normal blameless citizen (intentional wrongdoing, recklessness, or abnormal inattention or inadvertence, represented by the sort of gross negligence required for criminal liability) and liability that will be imposed even on the defendant who behaves reasonably, like the average person (strict liability). Nonetheless, most modern practitioners and theorists tend to interpret these early cases as upholding strict liability and, as a practical matter, a court would almost certainly feel constrained to overrule the older cases to justify excusing someone who made a non-negligent mistake.

In the felony-murder area, the most significant pocket of strict liability, a defendant who kills another person during the perpetration of a felony may be punished as severely as an intentional killer, even if the killing was not negligent (*People v.*

*Stamp*, 2 Cal. App. 3d 203 . . . (1969) (although the victim dies of an unforeseeable heart attack during the course of an armed robbery, no finding need be made that the defendant should have been aware of that risk of death)). The fact that a felon is strictly liable for a death once he is committing one of a large number of statutorily enumerated or judicially described "dangerous" felonies is certainly controversial, but it has long been the law in most jurisdictions.

Generally, however, when commentators focus on strict-liability offenses, they are concerned not with moral crimes or felony-murder but with the public welfare or regulatory offenses that grew up in England and America with industrialization. Justice Robert Jackson described the trend toward strict criminal liability in his well-known opinion in *Morissette v. United States*, 342 U.S. 246, 253–256 (1952):

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful . . . mechanisms. . . . Traffic . . . came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities . . . called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm. . . . Such dangers have engendered . . . detailed regulations which heighten the duties of those in control of particular industries, trades, properties, or activities that affect public health, safety, or welfare. . . .
>
> While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same. . . . Hence, legislation applicable to such offenses does not specify intent as a necessary element.

Viewing the mens rea requirement as depending entirely upon what the legislature intended, courts have tended to interpret public welfare offenses as implying strict liability—at least so long as penalties for violation are mild, the legislative history and language of the statute imply an intention to dispense with traditional fault categories, and the harm to the public done by the action is relatively severe (*United States v. Balint*, 258 U.S. 250 (1922); *United States v. Dotterweich*, 320 U.S. 277 (1943)).

## *The Traditional Critique of Strict Liability*

Although the courts have been relatively free in interpreting these sorts of legislative enactments as implying strict liability, the commentators have been remarkably uniform in attacking the propriety, and sometimes even the constitutionality, of imposing imprisonment rather than fines, when the defendant is not at least negligent. The Model Penal Code expresses this consensus position: its Section 2.05 mandates that only "violations" can be interpreted as strict-liability offenses. Violations can be punished only by a fine, forfeiture, or other civil penalty, and none of the disabilities based on conviction of a criminal offense can follow from conviction of a violation.

The arguments against punishing persons who have not at least made unreasonable mistakes about the circumstances in which they have acted harmfully fall into two broad classes: those believed to flow from theories of just punishment, and those believed to flow more directly from ideals of fairness.

Most commentators on the criminal law justify the infliction of punishment either because of its deterrent effect, or because of the need to exact retribution. Strict retributionists believe that the criminal deserves punishment because of his proved immoral conduct, regardless of the impact of punishment on his own or others' future conduct. Strict utilitarian-deterrence theorists believe that the criminal should be punished so as to diminish the number of future criminal acts, because each of these acts would be perceived as more costly by the criminal himself and other would-be criminals if punishment is imposed. Many commentators are utilitarians in terms of general justifying aim, but retributionists in terms of punishment distribution: they believe that the general justification of the social practice of punishment is

to reduce the number of harmful incidents, but they also believe that it is inappropriate to punish a particular person, even if that would serve to reduce the number of crimes, unless he is blameworthy.

The strict retributionists and the distributive retributionists claim that punishing someone who has not intentionally, recklessly, or negligently caused the sorts of harms that are proscribed is unjust. Harm-causing conduct is generally an index of a morally flawed character, but when that conduct is accidental and when the actor neither was nor should have been aware that he was inflicting socially proscribed results, there is no reason to believe that he is anything worse than unlucky, and no reason to single him out for disapproval. (A fourth strand of theorists, the incapacitationists, stress only the need to isolate dangerous persons from nonimprisoned potential victims. They may oppose strict-liability crimes for the parallel reason that there is no particular reason to think that the non-negligent actor is especially prone to be dangerous in the future just because he has inflicted harm.)

Many deterrence-oriented theorists believe that it is inefficacious to punish people unless they are subjectively aware that they are causing harm, that is, unless they act intentionally or recklessly, since in the absence of such subjective awareness it is difficult to argue that someone can decide not to harm after weighing the benefits of causing harm against the costs the state will impose. But at least in the case of negligence-based liability, some deterrence-oriented theorists sense that whereas an actor may be unaware of the risks he poses at the moment he is causing harm, the imposition of liability will generally tend to make people more attentive and less prone to be unaware. In the case of strict-liability offenses, the argument is often made that the defendant is already behaving as well as can be expected and cannot be induced to be more careful.

The final argument slides into a conceptually separable fairness argument against the imposition of strict liability, an argument that is blatantly unfair—a sort of Kafkaesque nightmare—to punish people who have done all we would expect to avoid criminality, but who simply happen to cause harm. H. L. A. Hart's words are typical:

> The reason why . . . strict liability is odious . . . is that those whom we punish should have had, when they acted, the normal capacities . . . for doing what the law requires and abstaining from what it forbids. . . . The moral protest is that it is morally wrong to punish because "he could not have helped it" or "he could not have done otherwise" or "he had no real choice" [*Punishment and Responsibility* (Oxford: Clarendon Press, 1968, p. 152)].

The vision of punishing a hapless, choiceless defendant is perhaps the most powerful buttress of the argument against strict liability.

## *Arguments for Strict Liability*

**Arguments made by judges.** Generally speaking, the explicit arguments made by judges interpreting statutes as imposing strict liability are rather weak, far weaker than they need be.

Often, the judges implicitly acknowledge the critics' contention that the imposition of strict liability is obviously unjust, but they stress that the legislature was centrally interested in eradicating a certain harm and had chosen to err on the side of injustice to the individual. For example, in *Balint*, Chief Justice William Howard Taft wrote that "Congress weighed the possible injustice of subjecting an innocent seller [of opium] to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided" (254). This argument seems puzzlingly incomplete, however: if the deterrence-oriented critics of strict liability are right in asserting that punishing the non-negligent will not effectively reduce the incidence of harm, then one is violating one's principles against punishing the innocent without gaining corresponding benefits.

A better argument made by judges is that the imposition of strict liability—is justified on the ground that proof of states of mind is administratively burdensome. Judge Oliver Wendell Holmes, in *Commonwealth v. Smith*, . . . 44 N.E. 503, 504 (1896), noted that it may be reasonable for the legislature conclusively to presume malice when harm is caused, because "actual knowledge [is] a matter difficult to prove."

Finally, judges often argue that the strictly lia-

ble defendant, although unaware that the conduct he is engaging in violates the explicit prohibitory norm that the legislature has announced, is perfectly aware of violating more general moral norms which are not specifically legally proscribed. Thus, for example, the strictly liable statutory rapist may not have reason to be aware that he is having sexual relations with a girl below the age of consent, but he is aware that he is engaged in the morally, if not legally, condemned act of fornication with a young person. Once the defendant engages in immoral activity, so the argument goes, he cannot justly complain if the activity turns out to be illegal as well (*Regina v. Prince*, L.R. 2 Cr. Cas. Res. 154 (1875)).

Generally speaking, the dominant view in the Anglo-American legal culture is that it is arbitrary and unreasonable to punish the person who is unlucky enough to have in fact had intercourse with an underage girl when one does not punish those who have intercourse with girls who seem no older. Similarly, most commentators believe there are "legal process" reasons to avoid the imposition of strict liability in these circumstances: if the legislature views sexual relations with overage girls as illicit, the court should force it to outlaw such relations explicitly, and not just to make them risky, so that opponents of such morals legislation will have the opportunity to address their concerns squarely.

On the other hand, proponents of the claim that even a reasonable mistake as to the victim's age is no defense could make the following argument: if the legislature were unconstrained by the difficulties of administering vague standards, the statutory rape law it would enact would state, in effect, "Don't have intercourse with innocent girls." Because it is feared that there is inadequate social consensus on how to apply the descriptive term *innocent* to particular cases, the legislature selects an exact age of consent and avoids inconsistant or prejudicial jury verdicts and excessive prosecutorial discretion. Some men may be lucky enough to escape prosecution because the innocent girls they have sexual relations with happen to be overage according to the administrable rule. They are beneficiaries of our desire to restrain arbitrary, biased, and excessive state power, as are the beneficiaries of evidentiary exclusionary rules, who may be acquitted although guilty of an offense because society wants to deter the police from gathering evidence in a fashion that is generally abusive of private rights. But there is no necessary reason to acquit the defendant who in fact cause. the legislatively proscribed harm and can be convicted without excessive state discretion.

**Some alternative arguments for strict liability.** A strong case could be made that proponents of strict liability have far too readily conceded the anomaly of strict criminal liability. In essence, the key to seeing strict liability as less deviant in the criminal justice system is to dissipate the powerful metaphoric picture of the defendant as "hapless victim" and to see the real policy fight as a rather balanced one over the relative merits and demerits of precise rules (conclusive presumptions) and vague, ad hoc standards (case-by-case determinations of negligence).

H. L. A. Hart's argument that the defendant convicted of a strict-liability offense "could not have helped" committing the crime depends on the use of a rationally indefensible narrow time frame in focusing on the defendant's conduct. *Whenever* one thinks about criminality, one has available narrow time-frame interpretations of the relevant data—in which one learns all one can about the appropriateness of punishment by looking at some alleged criminal *incident*. One also has available broader time frames in which one incorporates data about the defendant's general personal history (as in the insanity defense), the "history" of the incident (as in the defenses of duress, entrapment, and provocation), or the defendant's conduct subsequent to the incident (as in the defense of abandonment of an attempt). It may well be the case that if one looks only at the precise *moment* at which harm is consummated, the strictly liable actor may seem powerless to avoid criminality, but it is invariably the case that the actor could have avoided liability by taking earlier steps which were hardly impossible. Chief Justice Warren Burger made precisely this point in upholding a strict-liability interpretation of statutes proscribing the shipment of adulterated drugs, on the ground that the parties who were held strictly accountable could refuse to take "responsible" managerial positions if they were afraid they would not be able to prevent violations.

> *Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission . . . the Act imposes not only a positive duty to seek out and remedy violations when they occur

> but also, and primarily, a duty to implement measures that will insure violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, *but they are no more stringent than the public has the right to expect of those who voluntarily assume positions of authority* in business enterprises whose services and products affect the health and well-being of the public that supports them [*United States v. Park*, 421 U.S. 658, 672–673 (1975)].

It is significant to note that only by constructing the underlying material in the strict-liability situations with a very narrow time frame that the distinction between liability predicated on negligence, and strict liability, maintains its practical import in many critical situations.

An example is the familiar problem of "reasonable" (non-negligent) mistakes as to the victim's age in the statutory rape setting. Is one's view of a "reasonable" belief to be ascertained solely by reference to perceptions available to the defendant during the purportedly illegal seduction (she "*looked*" sixteen or "she told me she was sixteen"), or does one require that some checks prior to seduction be taken, such as checking birth certificates or asking parents? Of course, if one is hostile to statutory rape laws in general, it is perfectly reasonable to negate them by defining negligent perceptions in terms of the girl's physical appearance—that is, in terms of judgments which can be made at the narrow time-framed moment of the allegedly criminal incident. But it is hardly conceivable that a defendant ought to attract serious sympathy as someone unable to avoid crime when he has certainly had the opportunity to check on the legal appropriateness of his companion as an object of sexual desire.

If one really cared about using statutory rape laws to protect the chastity of the young, one would have to insist that people take steps to avoid mistakes of age, not simply that they refrain from sexual relations once they believe or know that the girl is underage. It is difficult to imagine that a strict-liability interpretation ensnares many defendants who have taken extensive steps to avoid mistakes: for example, in *People v. Hernandez*, . . . 393 P.2d 673 (1964), the much-heralded California case overturning the imposition of strict liability as to the victim's age in the statutory rape context, the defendant had known the prosecutrix for several months before they had sexual relations, but the court chose to focus instead on how mature the prosecutrix appeared.

Once one dissipates the opponent's rhetorical move—the image of the hopelessly ensnared, powerless victim of state power—one can come to see the proper debate in the area rather differently than it has been seen. As a "policy" matter, the legislative decision whether to condemn a defendant only where negligence is shown, or to condemn wherever harm is caused, is nothing more than the outcome of a perfectly traditional balance of interests between strict, easily applied rules and vaguer, ad hoc standards.

If the legislature enacts a negligence standard so that, for example, a manufacturer is liable for shipping adulterated food only if he acted unreasonably, or a liquor license holder is liable for selling to underage customers only if he screened customers unreasonably, two rather poor, although different, sets of bad consequences can result. If the negligence standard is defined vaguely, so that each jury is simply instructed to determine whether the particular defendant was reasonable, jury verdicts will be inconsistent, unpredictable, and biased. Moreover, if the particular jury equates reasonable behavior with ordinary behavior, an entire industry may free itself of responsibility by uniformly acting less carefully than the legislature would like.

On the other hand, the legislature (or a court or administrative body "interpreting" the legislature) might *predefine* what constitutes "reasonable care," setting out a precise series of steps that the defendant must take to be found non-negligent. The problem, of course, is that this centralized command may be imperfectly tuned to the precise circumstances of each potential defendant. The defendant might know a cheaper, more effective way of averting harm. But, of course, it may be in the defendant's selfish interest to adopt the preordained non-negligent technique, even if it will cause more harm.

For example, if a liquor license holder faces a $100 fine for each violation of the sale-to-minors proscription, under strict liability he would adopt the system best suited to his particular circumstances (System A), which costs $400 to implement and which would result in five violations. (The net private *and* social cost is $900.) In a regime of negli-

gence, however, he might adopt instead the system the legislature has preordained as nonnegligent (System B), although it costs $600 to implement and will result in ten violations. If it is assumed that he is certain he will be found nonnegligent using System B and that he is fairly certain that his System A (although in fact better in his circumstances at avoiding the socially feared result) will be judged negligent by juries, given a preordained description of reasonable care, then he will adopt B. Although B's social cost is $1,600 rather than $900, B's private cost will be only $600, whereas System A will cost him $900. (Nothing here turns on the cost being one of fines: if, for example, a person were jailed whenever he had violated the "no sales" act more than five times, the defendant in a negligence system would adopt the high-harm but no-violation preordained nonnegligent system, although it was both more costly and harmful.)

Switching to strict liability—essentially making a conclusive presumption that causing harm is blameworthy—has its costs, too, which "policy" analysts would readily note. Like all conclusive presumptions, it is bound to be inaccurate in particular situations: there will doubtless be cases where someone is blamed who, on closer analysis, society would not have wanted to blame. But that is true in the "rule-like" form of negligence too, where society demands that actors take predefined steps even though others who take different steps may have behaved at least as carefully.

It is possible that someone might be condemned simply because he failed to take the steps he had been ordered to take. But it is to be suspected that few would feel comfortable in condemning someone who could honestly claim that he so strongly shared the legislative goal of minimizing the incidence of some proscribed harm, such as sales of liquor to minors, that he had taken steps which were designed to, and in fact did, lower the incidence of that harm. Not only will the "rule-like" form of negligence be unjust when it occasionally condemns these especially good citizens, but even worse, it may frequently induce socially irrational behavior. The standard-like form of negligence should also, according to the prevailing supposition about vague statutes, convict some innocents too, but it may convict innocents for *bad* reasons (such as the race prejudice of juries) rather than for *no* reasons, that is, the accidental overinclusiveness of the conclusive presumption.

## Conclusion

The uniformity of commentators' opposition to imprisoning persons whom fact finders, focusing on their particular cases and unaided by presumptions, have not explicitly found negligent, reckless, or intentional makes it seem at least plausible that strict liability will disappear as a significant criminal law category. For the time being, however, defendants remain unable to plead their mistakes in public welfare offenses and a number of traditional morals crimes.

The uniformity of commentators' hostility results less from reasoned consideration of the actual issues than from a misleading rhetorical ploy which implies that the strictly liable defendant was unable to avoid criminality, and from a failure to take account of perfectly standard liberal legalist arguments against ad hoc standards. The root of this blindness to the case for strict liability is most likely the desire to reassure oneself that only the blameworthy are punished; obviously, the most significant attack on the claim that society is punishing only the wicked comes from general determinists who see criminality as grounded in adverse socioeconomic conditions. One way of blocking out the degree to which we are all more or less drawn to the determinists' position is to show how ultrasensitive we are to punishing the blameless, without paying much heed to how blamelessness is defined. The ritual attack on strict-liability crime, then, is largely an exercise in mutual flattery of our moral solemnity and deflects attention from the serious charges of moral inadequacy.

## Study Questions

1. Supreme Court Justice Frank Murphy, dissenting in a case holding the president of a drug company strictly liable for some mislabeling infractions said: "It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing . . . [I]t is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge"