Journal of Criminal Law and Criminology

Volume 59 | Issue 1 Article 2

1968

Mental Attitude Requirement in Criminal Law--and Some Exceptions

James B. Haddad

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 59, No. 1

Printed in U.S.A.

THE MENTAL ATTITUDE REQUIREMENT IN CRIMINAL LAW—AND SOME EXCEPTIONS

JAMES B. HADDAD

The author is a graduate student in the prosecution-defense training program at Northwestern University School of Law. He prepared the present paper as a "senior research" project during his senior year at Northwestern.

Many of the major disputes in substantive criminal law today concern the general requirement that for conviction a culpable mental attitude must be concurrent with the proscribed conduct, circumstances, and consequences that constitute the material elements of an offense. Perfect adherence to the rule would demand the abolition of strict-liability welfare offenses, which require no proof of mental attitude. It would put an end to the felony-murder doctrine by prohibiting the substitution of an intent to commit a forcible felony for an intent to kill. Literal compliance with the mental attitude requirement would permit the defense of mistake whenever the mistake leaves the act unaccompanied by a culpable mental attitude. Finally, it would permit the defense of drunkenness to all criminal charges, because otherwise intentionality or recklessness toward getting drunk would be substituted for intentionality or recklessness toward a more grievous harm.

It is not enough, however, to assert *a priori* that the criminal law should never dispense with the mental attitude requirement. For example, those who advocate recognition of the absolute defense of drunkenness must do more than note that failure to recognize the defense leads to punishing differently men whose only culpability was in getting drunk, but who, in their stupors, happened to cause harms varying in degrees of seriousness. The observation that certain exceptions to the mental attitude requirement have evolved over the years is merely the beginning of inquiry. Further development of the criminal law should turn upon a critical consideration of the question *when*, if ever, *should* the law in meting out punishment increase its emphasis upon harm by relaxing the usual mental attitude requirement.

This essay first explores the nature of the general requirement, defining the basic mental attitudes that support criminality and noting that they do not necessarily involve ultimate moral blameworthiness. It treats the principle of concurrence, which specifies that each material element of an offense has its own mental attitude requirement and that, for instance, intentionality toward one material element of an offense cannot be substituted for intentionality toward another material element. The essay then comments upon certain difficulties encountered in determining what mental attitude is signified by certain statutory language and in deciding to which element of a statutory offense a particular mental attitude modifier applies.

The essay then explores a few exceptions that have developed. It inquires whether the denial of the defense of mistake to a bigamy charge is justified by worthy and attainable goals that compensate for the possibility of jailing non-culpable parties. It asserts that the denial of the defense of mistake to a statutory rape charge should be evaluated in light of the history and the purpose of that offense. It condemns the widespread use of strict-liability welfare offenses on policy grounds that go beyond a mere assertion that it is always and everywhere wrong to abolish the mental attitude requirement in criminal law.

A similar analysis, not here provided, would be in order in the felony-murder and the defense-of-drunkenness debates. The ultimate questions in the felony-murder dispute, for example, will not be answered by a search for some logical rule of transferred intent (and of causation) without reflection upon what society seeks to gain by punishing as murder certain unintentional homicides, how worthy and attainable are its goals, and what is the price to be paid for a rule designed to attain those goals.

Finally, the student of criminal law muct acknowledge that sometimes society is so outraged by a harm that it punishes the person who caused the harm with little concern over his mental attitude toward the harm. Although modern societies no longer punish negligent homicide as severely as intentional homicide, they often do punish

negligent (or even non-negligent) bigamy as severely as deliberate bigamy. Society may also be too frenzied to accept the explanation that a man actually and reasonably believed his partner was above the critical age in statutory rape cases, even though the general mental attitude requirement dictates that the explanation be accepted. Similarly, in its outrage over a brutal death, society may not be sophisticated enough to appreciate that the killer's recklessness lay in placing himself in a drunken state—a not uncommon phenomenon—and was unrelated to the unfortunate harm that resulted. In such cases, the student of criminal law should recognize the process that is taking place when the mental attitude requirement is relaxed and should point out those instances where outrage untempered by reason is reflected in our penal laws. This essay does, however, suggest that, in certain instances, the Federal Constitution may prohibit the abolition of the mental attitude requirement.

The Mental Attitudes

Ordinarily a man may not be convicted of a crime without proof that he had a particular mental attitude toward the conduct, circumstances, and consequences that constitute the material elements of the offense (the *actus reus*). The prosecutor must present evidence or, in some cases, rely upon a rebuttable presumption arising from the defendant's actions that the particular mental attitude existed. Mental attitudes that support criminal liability are intentionality, recklessness, and, less frequently, negligence. Different mental attitudes may be sufficient as to different material elements of the same offense. For example, a rape conviction may require proof that the defendant intentionally had sexual intercourse; but, as to the non-consent of the female, the prosecution need only show that his conduct was reckless,[1] or simply negligent.[2] The requisite mental attitude must be proved beyond a reasonable doubt, and instructions to the jury that do not make this clear are fatally defective.[3]

Intentionality

An intentionality requirement is indicated by the word *knowingly* or the phrase *"with intent to."* As to circumstances that are material elements of a crime, the actor must be aware of their existence to satisfy an intentionality requirement.[4] As to conduct and results, the actor must either have a conscious object to engage in the proscribed conduct or to cause the forbidden result, or he must know that he is engaging in such conduct and know that it is "practically certain that his conduct will cause such a result".[5] For instance, if *D*, an unskilled marksman, shoots at *V* from a great distance with a weapon he knows is faulty, although he realizes the chances of killing *V* are remote, if he really desires to slay *V* with the bullet, the requisite intentionality for murder is present. In the American Law Institute's *Model Penal Code* terminology, *D* has acted *purposely* but not *knowingly*.[6] Conversely, if *D* shoots through a door to kill *V*, even though *D* would prefer not to damage the door, his awareness of the certainty that the door will be damaged satisfies an intentionality requirement according to the familiar maxim that man is presumed to intend the natural consequences of his acts. In *Model Penal Code* terminology, *D* has acted *knowingly* but not *purposely*.[7] Either mental attitude will suffice when the relevant statute calls for proof of intentionality.[8]

Recklessness

Recklessness often suffices to support criminal liability. In these cases the state satisfies its burden by establishing that the defendant acted *either* intentionally or recklessly as to the conduct, circumstances, and results that make up the offense. Treatise writers and the drafters of the *Model Penal Code* depart from the notions of reck-

[1] A. L. I. Model Penal Code §2.02, comment at 124 (Tent. Draft No. 4, 1955).

[2] State v. Dizon, 47 Hawaii 444, 390 P.2d 759, 769 (1964).

[3] United States v. Byrd, 352 F.2d 570 (2d Cir. 1965).

[4] Model Penal Code §2.02 (2) (a)(ii) & (b)(i) (Proposed Official Draft, 1962). It should be noted, however, intentionality as to circumstances is usually not required; proof of recklessness as to their existence suffices.

[5] Model Penal Code §2.02 (2) (a)(i), (b)(i), & (b)(ii) (Proposed Official Draft, 1962).

[6] The example is from Smith & Hogan, Criminal Law 35–36 (1965).

[7] *See* Williams, Criminal Law: The General Part §18 (2d ed. 1961) [hereinafter cited as Williams].

[8] The *Model Penal Code* drafters kept knowledge separate from purpose in defining the requisite mental attitudes toward circumstances, conduct, and results, although they conceded that rarely is one attitude insufficient where the other attitude will support a conviction. Model Penal Code §2.02, comment at 125 (Tent. Draft No. 4, 1955). In fact they could not illustrate with an example where it would make a difference. They mentioned specific-intent crimes, which do require that the actor act purposely. But the reference is inapposite when we are discussing mental

lessness found in the *Restatement of Torts*[9] and in the criminal case law by emphasizing the actor's conscious advertence to risk,[10] instead of finding recklessness without advertence so long as there is a gross deviation from a reasonable-man standard.[11] The *Model Penal Code*, while requiring gross deviation, considers the deviation from the viewpoint of an actor who knew only what the defendant knew and not what he should have known; it finds recklessness only where the defendant actually knew of the risks and not where he merely should have known of them.[12] The arguments over imposing criminal punishment for gross negligence under the rubric of "recklessness" are similar to the arguments over imposing penalites for ordinary criminal negligence and do not warrant separate treatment.[13]

attitudes toward material elements of an offense. The conscious object in specific-intent crimes refers to conduct or results that are not material elements of the offense. *See infra* p. 8. It is submitted that whenever intentionality as to a material element is called for, courts will be satisfied with the presumption that man intends the natural consequences of his acts. In short, they will not require that the defendant have acted purposely as long as he acted knowingly. If a distinction between acting knowingly and acting purposely should ever be crucial, a jury might have some difficulty in grasping the difference. Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608, 622–623 (1963).

[9] RESTATEMENT (2d) OF TORTS §500 (1965).

[10] WILLIAMS §24; SMITH & HOGAN, CRIMINAL LAW 37 (1965). Hall is most insistent on this point because he believes that criminal liability should not be imposed absent advertence. Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632 (1963).

[11] The annotations under almost every manslaughter statute yield cases that hold that criminal liability may be imposed where defendant should have adverted to the possibility of harm but did not. *See, e.g.*, Chandler v. State, 79 Okl. Cr. 323, 146 P.2d 598 (1944); People v. Mason, 198 Misc. 452, 97 N.Y.S.2d 462 (Steuben County Ct. 1950), *appeal dismissed*, 306 N.Y. 857, 118 N.E.2d 914 (1954). Judges ignore Hall when he says that recklessness "is no more a degree of negligence than is intention." HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 128 (2d ed. 1960) [hereinafter cited as HALL].

[12] MODEL PENAL CODE §2.02 (2)(c) (Proposed Official Draft, 1962).

[13] One of the few differences is that a gross-negligence standard might have a general deterrent effect of less force than a mere negligence standard, but of more effect than a standard that required actual advertence. On a retributive theory, punishment of gross negligence, and not of negligence, would mean that only those people most insensitive to society's values or least able to conform to those values would be punished criminally.

Negligence

Negligence was first used as a basis of criminal liability in the law of homicide,[14] and is still used more frequently in that area than in others. It is a mental attitude upon which criminality is not often predicated.[15] There is a trend away from its use in the criminal law.[16] To merit criminal sanctions negligence must be of a more serious sort than the minimum negligence upon which tort liability may be based.[17] The *Model Penal Code* says negligence exists when a defendant's failure to perceive substantial and unjustified risks indicated gross deviation from ordinary care.[18] Even where the law permits convictions for negligently caused harms, juries sometimes refuse to convict unless something more than negligence is proved.[19]

Because a person can be negligent without ever adverting to the possible harm, negligence is of an order different from intentionality and from recklessness, as it is defined by modern writers, who note that negligence is not even a state of mind in the same sense as are intentionality and recklessness.[20]

Punishment of a person who was unaware of the dangerousness of his behavior or who caused harm because he lacked the capabilities of the mythical reasonable man reflects an unsophisticated sort of retribution that focuses on the harm done rather than upon the actor's state of mind. On the other hand, it is possible that frequent criminal punishment of negligent deeds could raise the general standard of care in a community. The issue is whether the goal of general deterrence justifies punishing individual instances of negligence, which, by definition, are morally innocent.[21] Hall has

[14] Perkins, *Alignment of Sanction with Culpable Conduct*, 49 IOWA L. REV. 325, 359 (1964).

[15] *Id.* MODEL PENAL CODE §2.02 (3) (Proposed Official Draft, 1962) and ILL. REV. STAT. ch. 38, §4-3 (b) (1965) both dictate that recklessness be the minimum attitude that will support conviction where a statute is silent on the matter.

[16] HALL, *supra* note 10, at 634.

[17] People v. Hoffman, 162 Misc. 677, 294 N.Y.S. 444, 446 (Ct. Gen. Sess. 1937); State v. Bast, 116 Mont. 329, 151 P.2d 1009, 1012–13 (1944).

[18] MODEL PENAL CODE §2.02 (2)(d) (Proposed Official Draft, 1962).

[19] KALVEN & ZEISEL, THE AMERICAN JURY 324–28 (1966).

[20] HALL 114; WILLIAMS §14. For this reason the term *mens rea* is avoided in this essay. Although some writers equate *mens rea* with any mental attitude upon which criminal liability is predicated, Hall and Williams define *mens rea* to exclude negligence.

[21] Blameless conduct is often punished because the law does not take account of motive; but usually this

argued vigorously against punishing negligent conduct, noting the difference between raised eyebrows and tort judgments and the imposition of a jail sentence.[22] But even the drafters of the *Model Penal Code* found his position "too far out of line with existing law and present thinking for inclusion" in the *Code*.[23]

The Principle of Concurrence

The General Rule

Generally a mental attitude toward a material element of one offense may not be replaced by a qualitatively similar mental attitude toward a material element of the same or of a different offense. Stated less abstractly, this means that if *D*, intending to kill *V*, recklessly damages property with his gunfire, he must be acquitted of any malicious damage charge that requires proof of an intention to damage property. The intent to murder will not suffice in the place of an intent to damage property because different material elements are involved.[24] Conversely, an intent to kill *V* with a bullet in his head will support a conviction for intentionally killing even if the fatal bullet enters *V*'s heart because the material element is "killing," and because the law is unconcerned with the manner of the killing.[25] Similarly, if *D*, intending to shoot *V*, recklessly kills *B*, he is guilty of intentionally killing a human being. The critical material element is "a human being". The law is violated so long as *D* kills some human being with the intent to kill a human being. This last example illustrates the principle of "transferred intent".

In the case of conduct, the principle of concurrence requires that the state of affairs which make up the material elements of the crime be causally connected to conduct that is a manifestation of the requisite mental attitude. For instance, *D*, lying in ambush with intent to kill *V*, toys with a gun, reckless to the safety of people in the vicinity. The gun discharges and kills *V*, who, unknown to *D*, has just appeared. *D* should not be convicted of intentionally killing *V* since *V*'s death was not the product of *D*'s intentionality. *D* is guilty only of reckless homicide.

Rigid adherence to the principle of concurrence has shaped the development of the criminal law, especially the law of theft. At common law *D* could be convicted neither of conversion nor of larceny when, with knowledge of true ownership, he decided to keep property that he had taken as a bailee or in the mistaken belief that it was his own. The requisite criminal intent was neither temporally nor causally related to the taking of, or trespass against, the property of another, which are material elements of those crimes. Therefore, the crimes of embezzlement and larceny by bailee were developed to fill the void, with the material element of "keeping" replacing the element of "taking" so that there would be a proscribed harm concurrent with the belated criminal intent.[26]

Some Exceptions

Occasionally society is so outraged by a harm and the surrounding circumstances that it combines the mental attitude toward one course of conduct with the material elements of a more serious offense and imposes the more severe penalty. For instance, if *D*, intending to commit a forcible felony, unintentionally kills *V* in the course of the felony, he may be convicted of murder. Similarly, the intent to commit a misdemeanor may be combined with a death unintentionally caused to make *D* guilty of manslaughter. When drunkenness prevents *D* from entertaining any of the requisite criminal mental attitudes, his intent or recklessness in getting drunk, in some jurisdictions, is sufficient to hold *D* criminally liable for the harms he causes while drunk. Further, if *D*, intending to kill *V*, carries out his plan, believes he has succeeded, and disposes of the "body", reckless to the fact that *V* is alive and only slightly wounded, and negligent to the fact that the manner of disposition will probably kill a living human being, society will demand that *D* be convicted of intentionally killing *V* even though *V*'s death was not the product of *D*'s intentionality.[27]

is a problem of definition and administration: how to convict the thousand immoral thieves and yet acquit the one who stole for the best of reasons? *See infra* p. 9. On the other hand, liability for mere negligence, by definition, *always* involves morally blameless conduct.

[22] Hall, *supra* note 10, at 641.

[23] Perkins, *supra* note 14, at 361.

[24] This is an updated version of Reg. v. Pembliton, [1874] 12 Cox Crim. Cas. 607, All E.R. 1163.

[25] This example and some of the following are borrowed from Smith & Hogan, Criminal Law 41–42 (1965).

[26] Hall 186–87.

[27] *See* Jackson v. Commonwealth, 100 Ky. 239, 38 S.W. 422, 1091 (1896); Thabo Meli v. Reginam, [1954] 1 All E.R. 373. The writers (except for Hall 189) and the judges, in order to do "justice," resort to the loose sort of fiction that was not tolerated in

The Specific-Intent Exception

Crimes of specific intent require an additional mental attitude which is unrelated to the material elements of an offense in any dimension other than time. They violate the principle of concurrence in that this mental attitude has no corresponding material element. While intentionally, recklessly, or negligently engaging in the conduct that, when coupled with the requisite mental element, constitutes the offense, the actor has the conscious object of engaging in certain other conduct or achieving a certain result that is not a material element of the offense. For example, the proscribed harm of common law larceny (breaking and entering a dwelling house at night) must be accompanied by the conscious object of committing larceny or some other felony. But that other harm need not actually occur since its occurrence is not a material element of the offense, as is the breaking and entering.

Attempt is the most widely prosecuted specific-intent crime. Under modern attempt statutes[28] a substantial step toward a violation of a penal law must be intentionally, recklessly, or negligently taken; and it must be accompanied by the conscious object of engaging in conduct that is criminal, and not just of engaging in that substantial step. Common-law conspiracy illustrates that the conscious object in specific-intent crimes need not always be the engagement in an activity or the achievement of a result that is itself criminal. There the specific-intent requirement might be satisfied by the conscious object of engaging in conduct that is immoral but not independently illegal; the crime may be committed without the attainment of the immoral object.

A specific-intent requirement may serve to increase the grade of the offense, as when assault with intent to kill is punished more severely than simple assault. This may explain why the intent to get drunk cannot replace a specific intent even in those jurisdictions that substitute the intent to get drunk for intent as to a material element of the offense.[29] But by preventing the formation of a specific intent, drunkenness may require acquittal, rather than a reduction of the charge, when larceny or forgery is alleged.[30]

More Exceptions to Follow

Subsequent parts of this essay[31] explore exceptions to the principle of concurrence found in offenses which do not require that the actor have any particular mental attitude toward certain material elements of the crimes. For example, most states allow conviction for statutory rape even though the defendant was not even negligent in arriving at his mistaken belief that the material element of "under age" was not present. Similarly, many states permit conviction for possession of narcotics even though the defendant reasonably believed that the substance he possessed was not a narcotic, that is to say, even though he lacked intentionality, recklessness, and negligence toward a crucial material element of the offense. "Strict liability" is the generic adjective for crimes that call for no proof of the defendant's mental attitude toward one or more of the material elements of the offense.

Intent Versus Motive

Except where the principle of concurrence is violated, criminality today depends upon the actor's mental attitude (intentionality, recklessness, negligence) toward the material elements of an offense. It does not depend upon proof of an ultimate moral blameworthiness, if it ever did.[32] For this reason it is commonly said that proof of motive—the force that created the requisite mental attitude[33]—is unimportant in the criminal law. "A crime may be committed from the best of motives and yet remain a crime."[34] "An act performed for a laudable or even a religious motive may constitute a crime."[35] "The mother who kills her imbecile and suffering child out of motives of

the development of the law of larceny: *D*'s activities are all one course of conduct, and the time of the wrong is insignificant. Williams §65, at 174. The case does differ from the ambush hypothetical in that there *D* never manifested his intentionality, and he might have changed his mind before so manifesting it. However, this merely justifies punishment for attempt in the body-disposition case and not in the ambush hypothetical. But on the analysis of the judges and most of the writers, the ambush case should also support a conviction for intentional killing.

[28] *See, e.g.*, Ill. Rev. Stat. ch. 38, §8-4 (1965).

[29] *See, e.g.*, Roberts v. People, 19 Mich. 401 (1870).

[30] Alden v. Montana, 234 F. Supp. 661 (D. Mont. 1964), *aff'd sub nom.* Ellsworth v. Alden, 345 F.2d 530 (9th Cir. 1965).

[31] *See infra* p. 11.

[32] Sayre, *The Present Significance of Mens Rea in the Criminal Law*, in Harvard Legal Essays 399, 412 (1934).

[33] In State v. Logan, 344 Mo. 351, 126 S.W.2d 256 (1939), the court observed that it is difficult to imagine a criminal act that does not involve some desire beyond the act itself. *See generally* Williams §21.

[34] Williams §14, at 31.

[35] Sayre, *supra* note 32.

compassion is just as guilty of murder as is the man who kills for gain, since each intentionally takes another human life."[36] "An accused can steal to prevent his family from starving or kill to rid the community of a menace, but the laudatory qualities of the design do not absolve him from the application of the criminal law."[37] A prosecutor who violates a wiretapping statute is not saved by his commendable motives.[38] Nor, at this writing, does the gambler who fails to pay his federal gambling tax out of fear of incriminating himself with state authorities have a good defense because criminality "does not depend upon a determination of predominant motivation".[39]

If proof of motive were essential for conviction, administrative difficulties would be multiplied. The state would be required to prove the *why* of the crime, and the jury would be "compelled to analyze the psyche of each defendant" and judge whether it was malignant.[40] For this reason, Hall suggests[41] that when a crime is committed from commendable motives leniency in sentencing is a better remedy than acquittal:

> Mitigation is, of course, very much in order in such cases, but full exculpation would not only contradict the values of penal law; it would also undermine the foundation of a legal order.[42]

Despite administrative difficulties, motive sometimes does play an important role in the criminal law. In cases depending upon circumstantial evidence, proof of motive may establish an antecedent probability of defendant's committing the offense.[43] Under modern obscenity statutes[44] and cases[45] bad motive has an even greater evidentiary value, to the point that proof of bad motives seems essential for conviction.[46] Criminal libel convictions often depend upon proof of a bad motive or an evil heart. When statutory words like *wilfully* and *maliciously* are used, proof of a bad motive is sometimes required, a phenomenon to be subsequently discussed.[47] The defense of "necessity" on occasion wins acquittal rather than pardon following conviction.[48] The previously discussed administrative difficulties increase with each new exception that makes criminality depend upon motive. Ideally, proof of a bad motive should never be required for conviction.[49]

Statutory Problems

Numerous Modifiers

The use of a few categories to characterize distinct mental attitudes relevent to all statutory offenses represents an ideal that few American jurisdictions have achieved. The economical systematization in this area represents one of the *Model Penal Code's* finest achievements.[50] Unfortunately, most legislatures use a multitude of words such as *maliciously*, *corruptly*, *wantonly*, *wilfully*, *feloniously*, and *unlawfully*. The problem of determining what mental attitude is described by such words is illustrated by the two examples that follow.

The word *malice* formerly, and occasionally today, required proof of a bad motive or purpose, an evil mind or a wicked heart.[51] Because of the difficulties of proving bad motive as an element of an offense, this interpretation was widely criticized.[52] As a result, proof of a bad motive is

[36] Smith & Hogan, Criminal Law 43 (1965).
[37] Morss v. Forbes, 24 N.J. 341, 132 A.2d 1, 10 (1957).
[38] *Id.*
[39] United States v. Magliano, 336 F.2d 817, 820 (4th Cir. 1964). But where the self-incrimination possibility is a valid defense, motive for the proscribed conduct becomes relevant to criminality. This would be true in cases like *Magliano* itself if the Supreme Court should someday accept the self-incrimination argument.
[40] Morss v. Forbes, 24 N.J. 341, 132 A.2d 1, 11 (1957).
[41] Hall 102.
[42] Hall 97.
[43] State v. Hansen, 195 Oreg. 169, 244 P.2d 990, 1001 (1952).
[44] *See, e.g.*, Ill. Rev. Stat. ch. 38, §11–20 (c) (1965).
[45] *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966).
[46] For this reason it is ironic that an old obscenity case, United States v. Harmon, 45 F. 414 (D. Kan. 1891), is still cited to support the notion that criminality does not depend upon motive. In the obscenity area, as in criminal defamation, it is often difficult to distinguish specific intent from motive. A statute could require proof of a specific intent to profit financially and make irrelevant proof of predominant motive (to be able to support one's children, to be able to buy liquor, etc.). But bad motive in present obscenity law seems closer to predominant motivation than specific intent takes us.
[47] *See, infra* p. 11.
[48] *See* Ill. Rev. Stat. ch. 38, §7–13 (1965).
[49] The interpretive, administrative, and evaluational problems involved suggest, for instance, that a codification of a defense of necessity will present more problems than can be tolerated.
[50] *See generally* Wechsler, *On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code*, 339 Annals 24, 25–26 (1962).
[51] Edwards, Mens Rea in Statutory Offences 6 (1955). *See* State v. Pudman, 65 Ariz. 197, 177 P.2d 376 (1946).
[52] Edwards, *supra* note 51, at 7.

generally unnecessary today even when *malice* is used in a statute.[53] By now it "is a commonplace that 'malice' in the law generally means intention or recklessness".[54] Infrequently it is suggested that a man cannot act maliciously unless he knows not just the nature of his conduct but also the meaning of the penal statute under which he is charged.[55] But this is not a favored interpretation since ignorance or mistake of the penal law very rarely is permitted as a defense.

The word *wilfully* may also mean intentionally or recklessly, as opposed to inadvertently,[56] especially if the crime is not one of moral turpitude.[57] Given this interpretation, the further problem, discussed later,[58] is whether the intentionality requirement extends only to defendant's actions or whether it also extends to the other circumstances and results that constitute the *actus reus* of the offense. If the former alternative is chosen, the word *wilfully* means no more than the defendant's actions must have been voluntary; in other words, it imposes no *mens rea* requirement at all.[59] On the other hand, in some contexts, especially where the crime is one of moral turpitude, courts have acknowledged that proof of a bad motive is necessary.[60] This interpretation gives rise to the administrative problems previously discussed.

Because of its currency, one further interpretation of the word *wilful* should be considered. In prosecutions under certain gaming tax stamp and registration statutes,[61] the lower federal courts have held that the defendant has not acted wilfully unless he knew of the penal statute under which he is charged and understood that it applied to the gaming tax.[62] The spectacle of prosecutors using newspaper reports of former prosecutions to prove that the defendant must have read about the gaming tax laws and prosecutions brought for their violation[63] demonstrates the wisdom of the maxim which says that ignorance of the penal law excuses no man. There is a significant difference between allowing exculpation because a defendant was ignorant of the nature of his conduct or of the likelihood of a certain result and allowing exculpation because a defendant did not understand what conduct a penal statute proscribes.[64] Where a penal statute that is not void for vagueness is properly promulgated,[65] it is rare, indeed, to see the latter

[53] *See, e.g.*, Wright v. Commonwealth, 335 S.W.2d 930 (Ky. 1960); Morss v. Forbes, 24 N.J. 341, 132 A.2d 1 (1957); *see generally* Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 915 (1939).

[54] WILLIAMS §30, at 72; *see also* Perkins, *supra* note 53, at 917; SMITH & HOGAN, CRIMINAL LAW 61–62 (1965).

[55] Morss v. Forbes, 24 N.J. 341, 132 A.2d 1, 22–23 (1957) (dissenting opinion).

[56] WILLIAMS § 22.

[57] Nabob Oil Co. v. United States, 190 F.2d 478 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951); United States v. Perplies, 165 F.2d 874 (7th Cir. 1948); Fields v. United States, 164 F.2d 97 (D.C. Cir. 1947).

[58] *See infra* p. 10.

[59] The requirement of voluntary action is usually treated as part of the *actus reus* rather than as a *mens rea* requirement. This enables us to permit the defense of "no voluntary act" to strict-liability offenses without altering our definition of strict-liability crimes, which (we are accustomed to saying) require no proof of mental attitude. WILLIAMS §9.

[60] United States v. Murdock, 290 U.S. 387 (1933); Nabob Oil Co. v. United States, 190 F.2d 478 (10th Cir.) *cert. denied*, 342 U.S. 876 (1951); *see also* EDWARDS, *supra* note 51, at 31–32. The fullest statement of the various meanings of *wilful* is found in Zimberg v. United States, 142 F.2d 132, 137 (1st Cir. 1944), citing important United States Supreme Court decisions interpreting the word.

[61] INT. REV. CODE of 1954, §§4401, 4411, 4412, & 7203.

[62] *See, e.g.*, United States v. Marquez, 332 F.2d 162 (2d Cir.), *cert. denied*, 379 U.S. 890 (1964); Edwards v. United States, 334 F.2d 360 (5th Cir. 1964) (en banc), *cert. denied*, 379 U.S. 1000 (1965); United States v. Roy, 213 F. Supp. 479 (D. Del. 1963); United States v. McGonigal, 214 F. Supp. 621 (D. Del. 1963). These cases are outgrowths of United States v. Murdock, 290 U.S. 387 (1933), where the Court held that a defendant who intentionally engaged in conduct in violation of a statute could not have acted wilfully if he reasonably, but erroneously, believed that the statute was unconstitutional. The district and circuit courts have concluded, not illogically, that if a defendant must have reason to believe that a statute is constitutional before he can wilfully violate it, he cannot wilfully violate it unless he knows of its existence and understands its meaning.

[63] *See, e.g.*, United States v. Roy, 213 F. Supp. 479 (D. Del. 1963); United States v. McGonigal, 214 F. Supp. 621 (D. Del. 1963).

[64] It could be argued that the ignorance is of a civil law and not a penal law since the gaming tax requirements are embodied in statutes separate from the statute that imposes criminal penalties for noncompliance. *See* United States v. Wilson, 214 F. Supp. 629 (D. Del. 1963). But the better view is that the laws operate together as a penal stature that makes it criminal, for instance, to wilfully engage in the business of gaming without paying the fifty-dollar stamp tax. The gaming case is different from income tax cases, where there may be ignorance of any one of hundreds of provisions used in calculating the tax owed. Necessary fictions aside, the gaming provisions are primarily penal laws; the income tax is primarily a civil law. Higher *mens rea* requirements can be tolerated in the income-tax cases since there are other means (civil penalties) of achieving the main purpose of the tax (collecting revenues).

[65] The gaming tax statutes are as well promulgated as other federal laws. Nor do the higher promulgation standards of Lambert v. California, 355 U.S. 225 (1957), apply since gamblers are engaged in affirmative conduct. *See* Reyes v. United States, 258 F.2d 774 (9th Cir. 1958).

sort of defense succeed.[66] The irony is that this unusually heavy *mens rea* requirement has been deduced from a word (*wilfully*) that often is interpreted to require only that the defendant have acted voluntarily, that is, from a word that often imports no *mens rea* requirement at all.[67]

The Scope of Mental Attitude Requirements

Another problem is deciding which material elements of an offense are governed by statutory words like *wilfully* and *knowingly*. For example, a statute forbids the wilful killing of a house pigeon, and *wilful* is equated with *intentional*. Does the intentionality requirement mean that the actor must know he is killing a house pigeon and not a wild bird, or is it enough that the killing be intentional? *Cotterill v. Penn*[68] chose the latter alternative. On the other hand, a New York case[69] held that the offense of knowingly permitting the operation of one's vehicle by an unlicensed driver requires not only that the "permitting" be voluntary but also that the driver be known by the defendant to be unlicensed. Similarly, a California case applied the word *wilfully* to both the failure of an employer to pay unemployment insurance premiums and to the material element of "being unable" to make the payments.[70] In other words, the employer must have intentionally disabled himself from making the payments, an interpretation that avoided constitutional difficulties. Edwards perceptively observed that the rule of construction a judge employs in interpreting these types of statutes reveals the importance that he attaches to the *mens rea* requirement in criminal law.[71]

Smith and Hogan criticize the *Cotterill* decision and argue that words like *wilfully* and *knowingly* should be interpreted to govern all the material elements unless the particular statute clearly indicates otherwise,[72] which is the position the *Model Penal Code* adopts[73] and the rule of construction that Williams claims is generally employed.[74] Ideally the legislature would indicate in each statute just what mental attitude governs each of the material elements of the offense, as did one of the writer's favorite English statutes, which made it an offense to "wittingly and willingly receive, relieve, comfort and maintain any Jesuit, . . . knowing the same to be a Jesuit".[75]

Exceptions to the Mental Attitude Requirement

A strict liability offense permits conviction without proof that the defendant had any particular mental attitude toward one or more material elements of the offense. The remainder of this essay explores two areas where the criminal law dispenses with the mental attitude requirement.

Denial of the Defense of Reasonable Mistake

When proof of intentionality or recklessness is required, any *honest* mistake which leaves the defendant without knowledge or belief that a material element exists or will result from his conduct is an absolute defense.[76] When negligence is a sufficient mental attitude to support conviction, for acquittal the mistake must be both honest

[66] The federal courts are not alone in suggesting that wilfulness requires knowledge and understanding of the penal law. *See, e.g.*, State v. Gotsch, 23 Conn. Supp. 395, 184 A.2d 56, 58 (1962); Morss v. Forbes, 24 N.J. 341, 132 A.2d 1, 23 (1957) (dissenting opinion). But usually when such a requirement is imposed, we are dealing with something less than a full-fledge criminal statute, as, for instance, a securities regulation the violation of which is criminal. *See, e.g.*, 15 U.S.C. §§78ff & 80a-48 (1964).

[67] See n. 59, *supra* p. 10. In Edwards v. United States, 334 F.2d 360 (5th Cir. 1964) (en banc), *cert. denied*, 379 U.S. 1000 (1965), the court shifted the burden to the defendant to prove his ignorance of the gaming provisions. The dissent asserted that the creation of a so-called rebuttable presumption that the defendant knew of the statutes effectively eliminated the notion that *wilfulness* requires knowledge and understanding of the particular penal statute. If this be true, the majority has done a service for the criminal law and has reached a result consistent with other recent federal interpretations of *wilful*. *See, e.g.*, United States v. Carter, 311 F.2d 934, 943 (6th Cir. 1963).

[68] [1935] All E.R. 204. *Accord*, Wells v. Hardy, [1964] 1 All E.R. 953.

[69] People v. Shapiro, 4 N.Y.2d 597, 15 N.E.2d 65, 176 N.Y.S.2d 632 (1958).

[70] People v. Neal C. Oester, Inc., 154 Cal. App.2d 888, 316 P.2d 784 (1957).

[71] Edwards, *supra* note 51, at 31, 46.

[72] Smith & Hogan, Criminal Law 62 (1965).

[73] Model Penal Code §2.02 (1) (Proposed Official Draft, 1962).

[74] Williams §61.

[75] Jesuits Act of 1585, 27 Eliz. 1, c. 2, §4.

[76] For the most part, this essay is concerned with substantive rules of law and not with the important burden-of-proof issue. For example, when the words *defense* and *exculpate* are used, the writer does not mean to imply that the defendant necessarily has the burden of proof. When mistake negates a required mental element, the state, with its ultimate burden of proving the existence of the mental element, should have the ultimate burden of showing the non-existence of the mistake. But what presumptions the state will be allowed and what sort of evidence defendant will have to introduce to overcome those presumptions and to require the state to introduce evidence to satisfy its ultimate burden are questions left for another day.

and *reasonable.*[77] When a strict-liability offense is charged, no mistake, however reasonable, will exculpate.[78] Stated conversely, when an honest but unreasonable mistake exculpates, the required mental attitude is either intentionality or recklessness. When only a reasonable mistake will suffice, negligence is the required mental attitude. When mistake, however reasonable, is denied as a defense, a strict-liability offense is created. Furthermore, whenever an affirmative defense would succeed if the facts had been as defendant reasonably believed them to be, and the defense is disallowed because the facts were otherwise, the offense is one of strict liability.[79] In concrete terms, for instance, the defendant in *People v. Young*[80] would have been acquitted had he been attacking ruffians beating a youth, rather than policemen engaged in lawful activity, as he reasonably believed he was. By disallowing the defense of reasonable mistake, the New York Court of Appeals made third-degree assault into a strict-liability offense.[81] A treatment of two areas where the defense of mistake is often denied will show in detail the effects of dispensing with the mental element in crime.

The Statutory Rape Cases

In America, statutory rape[82] is almost always a strict-liability offense; convictions may be sustained even against a showing that the defendant reasonably believed that the girl was above the age specified in the statute.[83] A "legal-wrong" theory and a "moral-wrong" theory have been offered in support of strict liability in this area.

It is argued that when a defendant has intentionally engaged in the crime of fornication, he should be punished for the more serious crime of statutory rape, regardless of his belief about the girl's age, if in fact she was under the statutory age. The intent to engage in conduct that constitutes the material elements of fornication replaces the intent to engage in the *actus reus* of a more serious crime. This theory was used in the 1840 case of *Commonwealth v. Elwell*,[84] where the court told the defendant in an adultery trial that it was unconcerned about his belief that the woman was single because defendant had intentionally fornicated. In 1859 an Iowa court[85] applied the theory in an offense-against-a-minor case. Later in *Regina*

[77] Howard, *The Reasonableness of Mistake in the Criminal Law*, 4 U. QUEENSLAND L.J. 45 (1961).

[78] The treatment of the defense of mistake as an aspect of the mental attitude requirement is the approach of the *Model Penal Code* and of modern writers. *See* MODEL PENAL CODE §2.04 (1)(a) (Proposed Official Draft, 1962); *see, e.g.*, SMITH & HOGAN, CRIMINAL LAW 114 (1965). The only reason to make separate code provisions dealing with mistake is to allow exculpation even in those strict-liability situations (where ordinarily the law dispenses with the mental-attitude requirement) when we are especially moved by the character of the mistake (for example, mistake induced by a high-court decision that is later reversed). *See* MODEL PENAL CODE §2.04 (3)(b), comment at 139 (Tent. Draft No. 4, 1955). The author does not emphasize these special situations lest he detract from his theme that not the source of the mistake but rather its reasonableness should be important in the criminal law.

[79] This is because the elements of an offense—in their broadest sense—include the absence of circumstances, conduct, or results which, when accompanied by any required mental attitude, would be a sufficient defense. *See* MODEL PENAL CODE §1.13 (9) (Proposed Official Draft, 1962).

[80] 11 N.Y.2d 274, 183 N.E.2d 319 (1962).

[81] 63 COLUM. L. REV. 160, 166 (1963). This decision demonstrates that an affirmative defense sometimes requires both the inverse of an *actus reus* (facts justifying intervention) and an accompanying mental attitude (knowledge or belief that those facts exist). If defendant joined the melee for his own reasons, ignorant of facts that would justify intervention, he must be convicted even if those facts existed. See PERKINS, CRIMINAL LAW 723 (1957). Predominant motive is as irrelevant to an affirmative defense as it is to a prima facie crime. A defendant can escape punishment even were he slays an old enemy with great delight so long as he knows that facts exist which justify the defense of self or others. Golden v. State, 25 Ga. 527 (1858), demonstrates that commentators are wrong when they use the defense-against-force situation as an illustration of the importance of motive in the criminal law. *See, e.g.*, PERKINS, *supra;* Blum *Motive, Intent, and Purpose in Federal Income Taxation*, 34 U. CHI. L. REV. 485, 486–87, 492–93 (1967).

[82] "Statutory-rape offense" is the writer's shorthand for criminal prohibitions aimed at protecting females from sexual experience at an early age. The name of the actual crime may be rape, aggravated rape, second-degree rape, indecent liberties with a child, or contributing to the delinquency of a minor. It may be a misdemeanor, or it may be punishable by death. The critical age may be ten, or it may be eighteen.

[83] Alaska and Hawaii are the latest jurisdictions to so hold. *See* Hawaii v. Delos Santos, 42 Hawaii 102 (1957); Anderson v. State, 384 P.2d 669 (Alaska 1963). A unanimous court in People v. Hernandez, 39 Cal. Rptr. 361, 393 P.2d 673 (1964), was the first in America to allow as a defense a reasonable but mistaken belief that the girl was above the statutory age, that is, to make negligence as to age the minimum mental attitude upon which criminality might be predicated, a decision so startling that it took even defense counsel by surprise. *See* People v. Moseley, 240 Cal. App. 2d 859, 50 Cal Rptr. 67 (1966). The burden-of-proof issue under the new rule is as yet unsettled. *See* People v. Winters, 242 Cal. App. 2d, 827, 51 Cal. Rptr. 735, 738 (1966), *and compare*, People v. Battles, 240 Cal. App. 2d 122, 49 Cal. Rptr. 367, 368 (1966). The new California rule has precedent in foreign statutes and case law. *See* Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 106–07 (1966).

[84] 43 Mass. (2 Met.) 190 (1840).

[85] State v. Ruhl, 8 Iowa 447 (1859).

v. Prince[86] the English court, in considering a hypothetical, developed the rationale in the statutory-rape situation, and its dictum has greatly influenced the American courts even though England swiftly rejected the decision.[87]

The legal-wrong theory is just one example[88] of society, outraged by a harm, punishing as a more serious offense conduct that would be punished less severely absent the substitution of intention to engage in the less grave criminal conduct for the intention to engage in the more serious criminal conduct. It is the same justification used for punishing as grand larceny the taking of property which defendant reasonably believed was worth less than the statutory minimum for grand larceny. The substitution of the intent to fornicate for the intent to commit statutory rape is analogous to the substitution of intent in the felony-murder rule, with the difference that the substituted intentionality is as to circumstances in the fornication case and as to results in the felony case.

The legal-wrong theory is unavailable in jurisdictions where fornication is not a crime and weakened where a fornication statute lies in disuse.[89] But where such a statute is enforced, the argument cannot be ignored. The substitution of the intention to engage in one criminal act for the intention to engage in another may well be tolerated by a society that so often dispenses with proof of any mental attitude at all.[90] Since it is punished more severely, statutory rape, by definition, is a greater legal harm than fornication. Harm "provides a rational basis for punishment as well as for the differentiation of punishments, *i.e.* in proportion to the gravity of the harm."[91] Although we may wish to punish the man who has intercourse with a fifteen-year-old knowing she is fifteen more severely than the man who believes she is over sixteen since the first man has intentionality as to the *actus reus* of the crime when sixteen is the critical age, we may also wish to punish the man who has intercourse with the fifteen-year-old more severely than the man who copulates with a sixteen-year-old, regardless of what either thought about age, since the first man has achieved the greater legal harm. The principle of substituted intent can no more be summarily rejected in the statutory rape area than it can in the grand-larceny hypothetical or in the application of the felony-murder rule. The critical question is when, if ever, should society increase its emphasis on harm in meting out punishment, at the cost of de-emphasizing the mental element in crime.[92] A strong argument has been made elsewhere that statutory rape is not an appropriate place to employ the principle of substituted intent.[93]

The "moral-wrong" theory allows the substitution of an intention to engage in conduct that is immoral for the intention to engage in conduct that is criminal. It is thus available even where defendant's conduct would be legal, because of the abolition of the crime of fornication, if the female had been as old as defendant reasonably believed she was. The moral-wrong rationale is as consistent with a harm-oriented theory of retribution as is the legal wrong theory. Furthermore, if deterrence is the goal of our penal system, it is possible that the legal harm sought to be prevented will occur less frequently if men are told that they must act at their peril rather than if they are told they must be careful in ascertaining the female's age. In jurisdictions were fornication is not a crime, some legal conduct may also be deterred by a strict-

[86] [1875] L.R. 2 C.C.R. 154, 13 Cox Crim. Cas. 138.

[87] Myers, *supra* note 83, at 110.

[88] *See* pp. 4–5 *supra*.

[89] Myers, *supra* note 83, at 127–28. But the argument is not entirely undermined since desuetude in the criminal law is generally of little significance.

[90] Such is the case in many bigamy prosecutions and in public welfare offense prosecutions. *See infra*, p. 15.

[91] HALL 221. But note that both Hall and Williams would accept the defense of mistake in statutory rape and would even prefer recklessness as the minimum mental attitude for conviction. HALL 374; WILLIAMS §69, at 196. This seemingly radical position is a necessary one for anyone who claims that criminality should not be predicated upon negligence.

[92] Logically, the fairest place to use the principle of substituted intention is where the intent to commit a graver crime is substituted for the intent to commit a lesser offense. *But see supra* p. 7 *and* note 24. It might also be asked why the intent to fornicate should not be substituted for the intent to commit forcible rape (making irrelevant the defendant's reasonable mistaken belief that the victim consented) as readily as it is substituted for the intent to commit statutory rape. But, at a minimum, negligence as to non-consent is required for forcible rape. *See* notes 1 & 2, *supra* p. 5.

[93] Myers, *supra* note 83. When states raise the critical age to eighteen, still punish as a felony, and still use doctrines borrowed from an era when ten years was the critical age, they ignore the fact that young men have been frequently seduced by seventeen-year-olds but rarely by nine-year-olds. The *Model Penal Code* denies the defense of reasonable mistake only when the critical age is ten or under. MODEL PENAL CODE §213.6(1) (Proposed Official Draft, 1962). The chance of defendant's proving that he reasonably believed that the female he knew as a naughty lady was under age are slim when she shows up in court with pigtails and a ragdoll. See Reid v. State, 290 P.2d 775 (Okl. Cr. 1955); Myers, *supra* note 83, at 123 n. 118.

liability standard. But there is no reason to lament, as there might be when a no-scienter obscenity statute inhibits exercise of First Amendment rights.[94] If society no longer condemns pre-marital sexual intercourse between mature persons,[95] it has not yet agreed that the state has a sacred duty to promote free love as it does free speech.

On the other hand, the moral wrong theory rests upon the assumption that society has reached a consensus as to what is morally wrong, which is untrue on the facts of *Prince*[96] and untrue in cases where any intimacy will bring criminal penalties if the girl turns out to be under eighteen.[97] At least the consensus is not so strong that the independent moral wrong upon which the theory rests has been embodied in a penal statute binding upon the entire adult population. The case law on statutory vagueness also reminds us that the consciousness of wrongdoing is not ordinarily a sufficient warning to a person that he may suffer criminal penalties.[98] Finally, although the moral-wrong theory was proposed by the very courts that suggested the legal-wrong theory, unlike the legal-wrong theory, it has few analogues in the criminal law. The substitution of one criminal intention for another is a familiar process; the substitution of immoral intent for criminal intent is rare.[99]

The Bigamy Cases

A material element of bigamy[100] is a pre-existing valid marriage of one of the parties. A defendant may have known of this marriage, or he may have been reckless or negligent as to its existence. He may also have been ignorant of its existence through no fault of his own. Negligence as to this material element is almost always a sufficient mental attitude to support conviction. Moreover, bigamy is often a strict-liability offense, that is the state need not prove that the material element of à pre-existing marriage was accompanied by any mental attitude.

A mistake of fact may explain defendant's ignorance of the existence of this material element. For example, he erroneously believed that his first wife was dead or that she had secured a divorce decree. Or he may have married a woman who, unknown to him, had a lawful husband living in some other state. For some unknown reason, reasonable mistake of fact is most likely to be accepted as a defense in the last case and least likely to be accepted when defendant claims he believed a decree existed.

The early cases denying the defense of reasonable belief of death reasoned that since the legislature expressly permitted one spouse without fear of criminal penalties to remarry after seven years' unexplained absence of the other spouse, it must have intended that remarriage before that period be at the peril of the remarrying spouse.[101] The leading English case, *Regina v. Tolson*,[102] rejected this statutory construction, and some American

[94] *See* Smith v. California, 361 U.S. 147 (1959), discussed *infra*, p. 22.

[95] The drafters of the *Model Penal Code*, for reasons known only to themselves, felt compelled to say that the "(p)ursuit of females who appear to be over 16 betokens no abnormality but only a defiance of religious and social conventions which appear to be fairly widely disregarded." MODEL PENAL CODE §207.4, comment at 253 (Tent. Draft No. 4, 1955).

[96] The crime charged was taking an unmarried girl under sixteen out of her father's possession without his consent.

[97] Even Illinois makes the misdemeanor of contributing to the sexual delinquency of a minor a strict-liability offense as to age, although the critical age is eighteen and the conduct proscribed is, in effect, any sexual intimacy. ILL. REV. STAT. ch. 38, §11-5 (1965). This is part of a compromise that makes a reasonable mistake as to age a defense to a felony for which the critical age is sixteen. ILL. REV. STAT. ch. 38, §11-4 (1965).

[98] *But c.f.* United States v. National Dairy Products Corp., 372 U.S. 29 (1963).

[99] But there can be little objection to using either theory to allow for the substitution as to a necessary element of the offense that is jurisdictional and unrelated to the harm. For example, the intent to engage in immoral conduct should suffice even though the defendant reasonably belived he had not crossed a state line with the woman. *The Model Penal Code* achieves the same result more directly by excluding jurisdictional factors from its definition of "material element" and by requiring proof of mental attitude only as to elements of the offense that are "material." MODEL PENAL CODE §§1.13 (10), 2.02 (1) (Proposed Official Draft, 1962). It may be difficult to determine what is merely jurisdictional and what is truly related to the degree of harm. The issue of whether a defendant accused of assaulting a federal officer must know that his victim is a federal officer is still unsettled. *See, e.g.*, United States v. Bell, 219 F. Supp. 260 (E.D. N.Y. 1963), *and compare* United States v. Wallace, 368 F.2d 537 (4th Cir. 1966), *cert. denied*, 386 U.S. 976 (1967). Perhaps the *federal* element is jurisdictional and the *officer* element related to the gravity of the offense. In the latter case, there remains the problem of whether the intent to assault an ordinary citizen can replace the intent to assault an officer engaged in his official duties.

[100] The word *bigamy* is used to include bigamous marriage, bigamous cohabitation, and marrying a bigamist.

[101] *See, e.g.*, Commonwealth v. Mash, 48 Mass. (7 Met.) 472 (1844); State v. Ackerly, 79 Vt. 69, 64 A. 450 (1906).

[102] [1889] 23 Q.B.D. 168, 16 Cox Crim. Cas. 629, [1886-1890] All E.R. 26.

courts have followed *Tolson* by making negligence the minimum mental attitude for conviction.[103]

An 1899 American case[104] used decisions holding that mistaken belief of death was no defense as precedents for rejecting as a defense the mistaken belief of the existence of a divorce decree. A poorly educated defendant, who appeared to be the victim of fraudulent representations to the effect that a decree had been secured for him, was sentenced to three years in prison after the defense of reasonable belief was rejected as a matter of law. In 1908 Illinois sent a defendant to jail for five years over his protestations that he could prove that he reasonably believed that his first wife had divorced him.[105] In 1921 an English court ruled that such a defense was inadmissible and said that *Tolson* applied only in the mistake-of-death cases.[106] In 1926 a Utah court acknowledged that there was "no evidence whatever of bad faith" in defendant's belief that a decree existed—and then affirmed his polygamy conviction.[107] As late as 1962 a Maryland court, with little attempt at analysis, rejected the defense of reasonable belief in the existence of a divorce decree.[108] But some states do permit such a defense.[109]

On the other hand, few states punish criminally the man who married ignorant as to the existence of his wife's lawful husband residing elsewhere.[110] One suggested reason is that legislatures do not intend to send to jail the victims of fraud.[111] But belief in the death of a first spouse or in the existence of a divorce decree may also be induced by fraudulent misrepresentations.

Strict liability in these cases is indefensible, whatever be the nature of the underlying mistake of fact. Defendants would not have been engaged in any legal or moral wrong had the facts been as they reasonably believed them to be; hence the principle of substituted intent is unavailable. Penalties for blameless defendants may be heavy, but they are unlikely to deter people who reasonably believe that they are free to marry, so that it makes little sense to say that the stability of the family depends upon a strict-liability standard.[112] Even if such a standard would prevent more bigamous marriages than would a negligence standard, any *in terrorem* effect would also deter people whose marriages would not be bigamous from marrying because they lacked absolute certainty that the first spouse was dead or that a decree existed. This would be a significant deprivation of an important human right. Nor is there proof that juries would be deceived frequently by false claims of reasonable mistake of fact.

Whether a prior valid marriage was in force at the time of the allegedly bigamous marriage is a material fact that may also depend upon the resolution of a question of civil law, for example, the validity of an existing divorce decree, which may, in turn, depend upon the law of domicile (the basic jurisdictional requirement). Because of the hoary maxims,[113] "Ignorance of the law excuses no man," and "Everyone is presumed to know the law," the defense of reasonable but mistaken belief in the validity of a decree is almost always rejected—that is, bigamy is a strict liability offense when defendant's mistake lies in the application of the law of divorce to the facts of his case.

The typical trial sees the defendant arguing that the decree is valid and, therefore, that the second marriage is proper; or, in the alternative, that he reasonably believed that the decree was valid. The jury determines that, contrary to the finding of the

[103] *See, e.g.*, Dotson v. State, 62 Ala. 141 (1878); Welch v. State, 46 Tex. Cr. R. 528, 81 S.W. 50 (1904).

[104] Russell v. State, 66 Ark, 185, 489 S.W. 821 (1899).

[105] People v. Spoor, 235 Ill. 230, 85 N.E. 207 (1908). The rule has been reversed in Illinois by statute. Reasonable mistake is now a defense. ILL. REV. STAT. ch. 38, §11-12 (1965).

[106] Rex v. Wheat, [1921] 2 K.B. 119, 15 Cr. App. R. 134.

[107] State v. Hendrickson, 67 Utah 15, 245 P. 375 (1926).

[108] Braun v. State, 230 Md. 82, 185 A.2d 905 (1962). "The Court of Appeals, called upon to face an old problem, produced the old answer. It affords an excellent example of what Dean Pound called mechanical jurisprudence." Hogan, *Mens Rea in Bigamy in Maryland: An Obituary?*, 23 MD. L. REV. 224, 232 (1963).

[109] *See, e.g.*, People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1956); Adams v. State, 110 Tex. Cr. R. 20, 7 S.W.2d 528 (1928); Baker v. State, 86 Neb. 775, 126 N.W. 300 (1910).

[110] As of twelve years ago, every state statute, except one, that made marrying a bigamist an offense made knowledge a required mental attitude. MODEL PENAL CODE §207.2, comment at 225 n.60 (Tent. Draft No. 4, 1955). The reader is not told whether any state courts read the word "knowingly" out of the statute by saying that defendant must know that he is getting married, not that he is marrying a bigamist.

[111] *See, e.g.*, State v. Audette, 81 Vt. 400, 70 A. 833 (1908).

[112] *See, e.g.*, State v. Ackerly, 79 Vt. 69, 64 A. 450, 451 (1906).

[113] In a famous essay written sixty years ago, Keedy noted that the role of maxims in the law was dwindling. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75 (1908). Apparently the decline came too late to have much effect on the area of the law now under consideration.

judge issuing the decree, the defendant was not domiciled in the state that granted the divorce. The criminal court judge instructs the jury that reasonable belief in the decree's validity is no defense. The defendant is convicted and sentenced.[114] For example, a soldier stationed in Florida told the Florida divorce court the true facts about his status in Florida and obtained an ex parte decree from it. Two years later he remarried. In a criminal prosecution,[115] Pennsylvania alleged that the second marriage was bigamous. The Pennsylvania courts agreed that Florida had erred in its determination that the soldier had obtained a Florida domicile. That decision made, it was held proper to deem the soldier a criminal. Everyone is presumed to know the law of domicile, even though the Florida court, in the view of the Pennsylvania courts, had some trouble mastering it.

Similar problems arise when foreign decrees are relied upon. The criminal court must first decide whether the decree is to be given comity; and, if not, it will rule that reasonable belief that the decree would be given comity is no defense.[116] Or a defendant may marry in the good faith belief that his first marriage was a nullity for nonage and then have a jail term in which to ponder the distinction between *void* and *voidable*, his reasonable mistake of law having served as no defense. In one case the defendant made a solid argument that he reasonably believed that the purportedly bigamous marriage was itself voidable because of duress used against him; but he was, as a matter of law, deprived of the defense.[117]

After a valid decree has been issued, a person may have trouble in determining when he has the right to remarry, not so much in those cases where a decree does not become final for a period of time,[118] but more so when the decree orders him, as the party at fault, not to remarry during the life of his former spouse. The effect of such an order, like the determination of a state's right to grant a divorce to a soldier stationed within its borders,[119] involves complex questions in the conflicts of laws.[120] Nevertheless, defendant's remarriage in reliance on a judicial determination of those issues may bring criminal penalties at some future date in any state where he takes up residence.

Three judicial utterances in American law support the proposition that a reasonable but mistaken belief in the validity of a decree should be a defense to bigamy charges: *Long v. State*,[121] which held valid such a defense, emphasizing defendant's reliance upon the advice of counsel, and dissenting opinions in *Williams v. North Carolina*[122] and *State v. De Meo*.[123] The dissent in *De Meo* praised the honesty and good faith of the defendant, who, in applying for a marriage license, had volunteered all the relevant information about his Mexican decree. In *Williams* Mr. Justice Black, who could object to the state's denial of the defense only if he found constitutional infirmities, said that due process is violated by a state that sends "people to prison for lacking the clairvoyant gift of prophesying when one judge or jury will upset the finding of fact made by another." [124] The majority's response was that often people must gamble upon what a jury will decide.

Criminality should not turn upon the mindless adherence to a legal maxim. Since it is a function of proscribed harm and of mental attitude, where the proscribed harm is constant (a bigamous marriage), criminality ordinarily should depend upon the mental attitude (intentionality, recklessness, or negligence) and not upon what accounts for that attitude (bad motive, mistake of fact, or mistake of law). The remarks made about the indefensibility of making bigamy a strict-liability offense in the case of mistake of fact are, therefore, fully applicable in the case of mistake of civil law. The average citizen may be in a better position to discover whether his first spouse is dead than to evaluate the validity of a divorce decree, especially when he is not allowed to rely on a judicial opinion or the advice of counsel. Finally, the discretion to prosecute in mistake-of-law cases is much too broad. With the states having acquiesced in the

[114] *See, e.g.*, Williams v. North Carolina, 342 U.S. 226 (1945); State v. Woods, 107 Vt. 354, 179 A. 1 (1935); *cf.* State v. Zichfeld, 23 Nev. 304, 46 P. 802 (1896).

[115] Commonwealth v. Ormando, 55 Pa. D. & C. 521 (1946).

[116] *See, e.g.*, State v. De Meo, 20 N.J. 1, 118 A.2d 1 (1955).

[117] Medrano v. State, 32 Tex. Cr. R. 214, 22 S.W. 684 (1893).

[118] *See generally* Stephens v. State, 73 Okl. Cr. 349, 121 P.2d 326 (1942); State v. Grengs, 253 Wis. 248, 33 N.W.2d 248 (1948).

[119] *See* Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807 (1959).

[120] *See* Beaudoin v. Beaudoin, 270 App. Div. 631, 62 N.Y.S.2d 920 (1946).

[121] 44 Del. 262, 65 A.2d 489 (1949).

[122] 342 U.S. 226 (1945).

[123] 20 N.J. 1, 118 A.2d 1, 8 (1955).

[124] 342 U.S. 226, 278.

American system of Nevada and foreign divorces, only political pressure prevents a prosecutor from sending many leading citizens to jail merely by proving that they did not really establish domicile in obtaining their out-of-state decrees, while denying them the defense that they reasonably believed that their decrees would be honored.[125]

It is concluded that in all the bigamy cases not the source of the error but its reasonableness should determine whether the defense of mistake should be honored. Negligence should be the minimum criminal attitude upon which a bigamy conviction can be sustained. This is basically the approach of the *Model Penal Code*.[126] It is an approach that might be used profitably in all cases where the defendant was non-negligently ignorant of the existence of any element of an offense that is more than merely jurisdictional. It is an approach that would require acquittal in all such cases where the principle of substituted intent is unavailable to save the day for the prosecution.

Strict-Liability Public Welfare Offenses

Legal historians generally agree that prior to the Twelfth Century the criminal law often held a man liable for the harms he caused without proof of his mental attitude.[127] A few experts dissent,[128] however, and it may be that our knowledge of that early period is too scanty to support any generalization.[129] At any rate, proof of a blameworthy mind[130] eventually became necessary for conviction, a phenomenon attributed to the influence of the Roman Law and Canon Law.[131] The mental-attitude requirement became so embedded in the criminal law that modern historians have designated the 1846 case of *Regina v. Woodrow*[132] as the first to approve a conviction of a new type of crime, the strict-liability public welfare offense.[133] In *Woodrow* the possibility that some blameless dealer might be convicted of possessing adulterated tobacco was weighed against the "public inconvenience" of an inadequatedly regulated tobacco industry. The court decided that the difficulty of proving intentionality, recklessness, or negligence as to the material element of adulteration, together with the need for safeguarding the public, justified relieving the Crown of the burden of proving any culpable mental attitude.[134]

The use of the offense spread. For instance, in 1896 Holmes decided that a defendant could be convicted of presence in the place of gaming instruments without proof that he knew of their existence.[135] In 1899 the classic among adulterated food cases was decided.[136] Milk had been pure when it left the defendant's hands, but it was watered by another party while in transit and out of his control. Defendant was deemed guilty of an adulterated sale because title had not passed to the buyer until after the adulteration had taken place. The early Twentieth Century, with its greater concern for public health and safety, witnessed an even wider use of strict-liability public welfare offenses.[137] A survey of the old Wisconsin criminal code revealed that over one half of the criminal statutes in that state in the early Fifties were susceptible of strict-liability interpretation (although some were not of the public-welfare variety).[138] But judges, despite their talk of legislative

[125] For instance, how many citizens could have been sent to jail if the New York courts had rejected Mexican decrees and then held that reasonable belief in their validity was no excuse? Dr. Williams has argued that the determination of close questions of civil law in a criminal trial (as in Williams v. North Carolina) is an abuse of the criminal process. WILLIAMS §116, at 341.

[126] MODEL PENAL CODE §230. 1 (Proposed Official Draft, 1962). Under the code reasonable mistake always exculpates and even an honest unreasonable mistake as to the death of the first spouse suffices for acquittal.

[127] SMITH & HOGAN, CRIMINAL LAW 35 (1965); Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS L. REV. 644, 648.

[128] HALL 78; Mueller, *Tort, Crime and the Primitive*, 46 J. CRIM. L., C. & P.S. 303 (1955).

[129] Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 976 (1932).

[130] The word *blameworthy* and the word *fault* are used here without any implication that some ultimate blameworthiness was required beyond the usual criminal mental attitudes toward the material elements of the offense. Some historians may use such words to suggest true blameworthiness. But nothing turns on the distinction since public welfare offenses, in dispensing with the mental attitude requirement, a fortiori dispense with proof of a blameworthy mental attitude, which Canon Law emphasized.

[131] SMITH & HOGAN, CRIMINAL LAW 35 (1965).

[132] [1846] M. & W. 404, 153 E.R. 907.

[133] This crime is also called *malum prohibitum* offense, quasi-crime, civil offense, and crime of absolute liability.

[134] The same need for regulation is said to justify denying a defendant an opportunity to exculpate himself by assuming the burden of proving that he acted with all due care. *See infra* p. 20.

[135] Commonwealth v. Smith, 166 Mass. 370, 44 N.E. 503 (1896).

[136] Parker v. Alder, [1899] 1 Q.B. 20, 19 Cox Crim. Cas. 191.

[137] Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67 (1933).

[138] Remington, *Liability Without Fault Criminal Statutes—Their Relationship to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin*, 1956 WIS. L. REV. 625, 627.

intent, have been primarily responsible for the proliferation of convictions without proof of mental attitude in this area.[139] The Wisconsin study revealed that not one of the eleven-hundred criminal statutes contained an *explicit* rejection of the mental attitude requirement.[140]

Food, narcotic, and traffic codes generate a great portion of the strict-liability criminal litigation.[141] The mental attitude requirement is dispensed with most frequently in possession, sale, and transportation of liquor offenses.[142] Typical is the sale to a minor who has cleverly falsified his age. Sale of liquor to a sober-appearing drunk also merits criminal penalties.[143] In neither case is the defendant allowed to exculpate himself by proving that he used all due care in concluding that he was serving a sober adult. Nor can one charged with the unlawful possession of liquor win acquittal by showing that he was ignorant of the true nature of the liquid.[144] Perhaps few juries would accept a claim of reasonable mistake in these cases, but the law denies the defendant even a chance to convince them in those few cases where everyone would agree the mistake was reasonable.

Two truck-driver cases show that the truly blameless are sometimes deemed criminal under the strict liability approach. In *Commonwealth v. Mixer*[145] a driver for a common carrier was charged with transportion of liquor without a permit. A consignor had violated his statutory duty of marking a barrel to indicate its alcoholic contents. The court acknowledged that there "was nothing about the appearance of the barrel to cause suspicion as to its contents." Defendant was deemed a criminal once the contents were proved, no mental attitude requirement being present.[146] In *Commonwealth v. Olshefski*[147] the driver possessed a certificate issued by a licensed official, who had weighed his truck out of his presence and before he had driven it anywhere. The certificate indicated his load was in compliance with legal limits. Nevertheless, a second weighing indicated that the first had been in error. Defendant was convicted and the lower court's decision affirmed.

Public welfare needs are also said to justify strict criminal liability in the regulation of securities.[148] The defendant in *People v. McCalla*[149] was charged with "knowingly" selling securities without a permit. In *Cotterill v. Penn* fashion[150] the court effectively read *knowingly* out of the statute by holding that it did not govern the word *securities*. Defendant was not allowed to raise the defense of reasonable belief (founded on the advice of counsel or otherwise) that the item in question was not a security. His was a mistake of law, and everyone is presumed to know the meaning of the Blue Sky laws. *State v. Dorby*[151] held that civil liability for innocent misrepresentations in registration statements must be supplemented by strict criminal liability if Blue Sky policies are to be implemented effectively.[152]

In *Noble v. State*[153] another prosecutor attempted to make perjury a strict-liability offense. The state of Indiana, for a fee, supplied notaries at vehicle-licensing branches to make the necessary verification that the applicant had appeared personally and had sworn that the signature on the application was his. Circumstances were such that the notaries usually did not know the applicants personally and could easily be deceived as to who actually appeared. Itself responsible for the system,

[139] Packer, *Mens Rea and the Supreme Court*, in 1962 SUPREME COURT REVIEW (Kurland ed.) 107, 147. *See also* Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1104 (1958).

[140] Remington, *supra* note 138, at 630.

[141] Sayre's enumeration of the various types of public welfare offenses remains a useful categorization and an abundant source of early cases. Sayre, *supra* note 137, at 84–88. *See also* MODEL PENAL CODE §2.05, comment at 141–45 (Tent. Draft No. 4, 1955). In their more unusual variety, strict-liability offenses include the types of crimes Dean Allen refers to when he says, "The killing of domesticated pigeons, the fencing of saltpeter caves against wandering cattle, . . . and the issue of daylight savings versus standard time have all at one place or another been made problems of the criminal law." Allen, Book Review, 66 YALE L.J. 1120, 1121 (1957).

[142] This is true even though liquor is an area that readily lends itself to administrative control through licensing.

[143] State v. Morello, 169 Ohio St. 213, 158 N.E.2d 525 (1959). The earliest dictum in the American cases approving strict liability suggested that mistake would be no defense to the offense of selling liquor to a common drunkard. Barnes v. State, 19 Conn. 397 (1849).

[144] State v. Whitman, 52 S.D. 91, 216 N.W. 858 (1927).

[145] 207 Mass. 141, 93 N.E. 249 (1910).

[146] *Contra*, State v. Williams, 94 Ohio App. 249, 115 N.E.2d 36 (1952).

[147] 64 Pa. D. & C. 343 (1948).

[148] The word *wilful* is generally used in the federal securities statutes, but the criminal prosecutions have been too few to support any generalization about its interpretation in a criminal context. *See, e.g.*, 15 U.S.C. §§77x, 77yyy, 78ff, 80a-48, & 80b-17 (1964). On the civil side, words importing intentionality are usually construed to require nothing more than actions that were voluntary.

[149] 63 Cal. App. 783, 220 P. 436 (1923).

[150] *See supra*, p. 11.

[151] 217 Iowa 858, 250 N.W. 702 (1933).

[152] *But see* State v. Smith, 151 So.2d 889 (Fla. 1963).

[153] 223 N.E. 755 (Ind. 1967).

the state earnestly contended that a notary could be convicted upon proof that she swore that an applicant (whose signature was genuine) had appeared before her when in fact she had not. The trial court disallowed the defense that the defendant used all due care in ascertaining the true identity of applicants. She was convicted and sentenced to one-to-three years in prison. The higher court reversed in an opinon more important for its result than for the line which is uses to separate mental attitude offenses from strict liability crimes.[154]

Perjury convictions, even when they arise in a securities or taxation or licensing context, are different from ordinary public welfare strict-liability convictions in that they sound of the common law and traditionally bring moral stigma. This raises the *Morissette*[155] issue: should common law roots and stigma upon conviction make us less willing to construe a statute as dispensing with a mental attitude requirement? Recently the Supreme Court of Wisconsin answered in the affirmative when it refused to make bribery a strict-liability crime.[156] On the other hand, a Connecticut court dispensed with the mental element in criminal trespass in *State v. McDermott*.[157] The statute there required proof that defendant was on another's property without right. But a reasonable, good-faith belief that federal and state labor laws gave the defendant union official such a right in the particular case was held to be no defense. Once more the hoary maxim was available to resolve the issue: every man is presumed to know the law. *State v. Lindberg*,[158] if not sounding of the common law, concerned an offense that carried the possibility of serious stigma. The heart of the crime was borrowing from a bank in which defendant held a directorship, but it was no defense that the defendant reasonably believed that the source of the remitted funds was another bank.[159]

Some writers insist that vicarious liability is fundamentally different from strict liability.[160] Since, however, both impose criminal sanctions without proof of fault, cases that permit conviction of a non-negligent employer for the acts of his employees may be considered along with other strict-liability public welfare offenses and distinguished from mental attitude crimes. The Supreme Court in *United States v. Dotterweich*[161] saw no distinction, and the English court in *Parker v. Alder*[162] very consciously cited vicarious liability cases as precedent for imposing personal strict liability.

As recently as 1964, a partner in an Iowa automobile agency was held criminally liable for "permitting" a buyer to use pasteboard plates without first applying for title and registration.[163] While the partner was absent from the country, an employee had sold the car in violation of the partner's explicit order. The court refused to read into the statutory word *permit* a barrier against vicarious liability, as dictum in a recent English case suggested is proper.[164]

Some courts do draw a line, however, between vicarious liability and other forms of strict liability without offering a justification for the distinction.[165] The Pennsylvania high court in *Common-*

[154] The court said that *malum prohibitum* offenses require proof of scienter while *malum in se* offenses do not—the very opposite of what most courts have said. The court reasoned that if defendant's knowledge that he is engaging in an immoral activity in statutory rape cases is a sufficient warning that he is acting at his peril, the converse must be true: where the activity is not immoral in itself, proof of a criminal mental attitude is required. The rationale is at odds with every case that permits public welfare convictions without proof of a mental attitude. It will be interesting to follow the future of public welfare offenses in Indiana. In using the strict liability tool inappropriately, the prosecutor forced the high court to write an opinion which, unless distinguished away, has effectively undermined strict-liability public welfare offenses in Indiana. *See also* State v. Krug, 96 Ariz. 225, 393 P.2d 916 (1964), where another court refused to make perjury a strict-liability offense.

[155] *Morissette v. United States*, 342 U.S. 246 (1952). In this case defendant claimed he had taken government property under the belief that it had been abandoned. The Supreme Court held that since the statutory offense was related to the law of theft, a criminal mental attitude requirement should be read into the statute.

[156] State v. Alfonsi, 33 Wis.2d 469, 147 N.W.2d 550 (1967).

[157] 3 Conn. Cir. 524, 220 A.2d 38 (1965).

[158] 125 Wash. 51, 215 P. 41 (1923).

[159] The defendant would probably have had difficulty in convincing a jury that had just concluded that the money had come from his bank that he reasonably believed he was borrowing from another. But all he asked was the chance, and it was denied him.

[160] Packer, *supra* note 139, at 118; Comment, 38 J. CRIM. L, C. & P.S. 132, 134–35 (1947).

[161] 320 U.S. 277 (1943).

[162] [1899] 1 Q.B. 20, 19 Cox Crim. Cas. 191.

[163] State v. Barry, 255 Iowa 1315, 125 N.E.2d 833 (1964).

[164] Yeandel v. Fisher, [1965] 3 All E.R. 158.

[165] The holding in America's first strict-liability case was that although strict liability might be imposed upon an employee for selling liquor to a common drunkard, the employer should be acquitted if he sincerely ordered the employee not to serve common drunkards, a defense that apparently failed on remand. Barnes v. State, 19 Conn. 397 (1849), *conviction affirmed after retrial*, 20 Conn. 232 (1850).

wealth v. Koczwara[166] held that a non-negligent employer may be fined but not imprisoned for the acts of his employees. *Commonwealth v. Kempisty*[167] forbade even fines for the employer except where the crime charged was a violation of a regulatory code. Finally, *Commonwealth v. Morakis*[168] limited the use of vicarious liability in Pennsylvania to liquor-code violations. Someday a Pennsylvania court may hold that there is no sound basis for distinguishing among the various types of strict-liability public welfare offenses. It may use as precedent the vicarious liable cases, which reflect a distaste for strict liability in general, to support the proposition that no man may be convicted of a public welfare offense without proof of a criminal mental attitude. In doing so, such a court would abolish the anomaly of sending a non-negligent employee to jail while merely fining (and that only in liquor cases) his non-negligent employer.

Such speculation leads into a discussion of the policy arguments over strict-liability offenses.[169] It is contended that certain important industries could not be regulated effectively without a strict-liability standard; that, for example, the government's burden of proof in food and drug cases was impossible before *United States v. Dotterweich*[170] held that not even negligence need be proved under the federal act.[171] The usual retort is that conviction rates could be increased in any area by easing the government's burden of proof. It is further replied that the expedience argument can not justify denying a defendant the chance to exculpate himself by showing, by a preponderance of the evidence, that he acted with all due care. The proponents answer that a jury could be deceived easily into believing erroneously that a higher degree of care was impossible. But the possibility of deceiving a jury is an inadequate reason for denying the use of an otherwise proper defense in a criminal case.

It is also argued that a strict-liability standard has a more potent deterrent effect than does a negligence standard. Deterrence is not a perfectly logical phenomenon. Tell a man he will go to jail whenever he violates the letter of the law, and he may be more careful than if you had told him that he would go to jail absent a showing that he used all due care. This argument assumes that the threat of criminal penalties more adequately deters undesirable conduct than does the possibility of tort liability and civil or administrative penalties. It also assumes that it is just to punish some non-negligent defendants as a means of raising the general population's standard of care.

The advocates for strict-liability public welfare crimes say that their opponents exaggerate the significance of these offenses. They contend that criminal statutes are rarely invoked against blameless defendants who have made a real effort to conform;[172] and they note that harsh penalties are occasionally a possibility, but that mistake or faultless conduct has always been a grounds for mitigation where it has not sufficed to acquit. For instance, the penalty imposed in *Morissette* was a two-hundred dollar fine although the statute would have permitted a ten-year prison sentence. If violation of a welfare statute ever brought harsh mandatory penalties, *Noble v. State*[173] suggests that a court would find some means to take the offense out of the strict-liability category. If nothing else, it might hold that where penalties are severe, the legislative intent to dispense with a mental attitude requirement must be manifested clearly; or such a court might even reach the constitutional issue.

It is unreasonable to say that a bad law should be preserved because its sting is rarely felt, but the minimal-harm argument should not be treated lightly. It has forced the opposition to maintain that even a small criminal penalty without proof of fault may be harsh because of the stigma it brings.[174] In traffic offenses, this may not be true, but in other instances the hardships that strict-liability criminal convictions bring will vary with the circumstances.[175] The *Model Penal Code* an-

[166] 397 Pa. 575, 155 A.2d 825 (1959).
[167] 191 Pa. Super. 602, 159 A.2d 541 (1960).
[168] 208 Pa. Super. 180, 220 A.2d 900 (1966).
[169] Except for the judges who make the law, proponents of strict-liability public welfare offenses are rare. The arguments advanced for strict liability are often little more than propositions suggested, then quickly rejected, by the opponents. *But see* Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960); Rissman, *Criminal Intent Under the Federal Food, Drug, and Cosmetic Act*, 7 FOOD DRUG COSM. L.J. 498 (1952).
[170] 320 U.S. 277 (1943).
[171] Rissman, *supra* note 169, at 502.
[172] Remington, *supra* note 138, at 628.
[173] 223 N.E.2d 755 (Ind. 1967) *See supra* p. 18.
[174] Another possibility is that a strict-liability offense, with only a small penalty of its own, may function as the misdemeanor in an application of the misdemeanor-manslaughter rule, but that is a possibility that could be curtailed without eliminating the strict-liability offense itself. *See* People v. Stuart, 47 Cal.2d 167, 302 P.2d 5 (1956), *and compare* State v. Kotapish, 171 Ohio St. 349, 171 N.E.2d 505 (1960).
[175] Edwards suggests that a criminal conviction may be disastrous to a shopkeeper or a "chemist" be-

nounces that strict-liability convictions shall not bring disability or legal hardships,[176] but this goal cannot be obtained by the fiat of an obscure provision in a criminal code. Nevertheless, designating strict-liability offenses as non-criminal "violations" [177] might be helpful.

Opponents of strict liability have suggested that more than the name be changed, that administrative and civil remedies replace the criminal law[178] as a tool of regulation:

> The trial of reputable persons in a criminal court would be discontinued. Instead, sound legislation, inspection, licensing, information, investigation by boards, informal conferences, and publicity would provide likely means of influencing legitimate business.[179]

The proponents of strict liability argue, however, that non-criminal remedies have proved ineffective, at least in some industries.[180] As Hall acknowledges,[181] this is a debate that cannot be resolved until more information is gathered for each particular industry.

The opponents also speculate that the "association of criminality with complete moral innocence" may be "an obstacle to the accomplishment of the important general purposes of a system of criminal justice".[182] The suggestion is rightfully tentative because it rests upon the untested assumption that criminal justice is a single ocean, and that what happens in the tidewaters will have profound effects on the high seas. More concrete is the possibility that prosecutors, with convictions so easily attainable under a strict-liability standard, will abuse their broad discretionary powers. *Commonwealth v. Morakis*[183] shows how a totally innocent employer may be prosecuted as a scapegoat when the public is aroused by the unfortunate death of a young man. In *State v. Noble*[184] there is an indication that the decision to prosecute would not have been made absent the discovery of irregularities in the state licensing and personal property tax-collection systems in Indiana, irregularities which the prosecutor apparently did not attempt in the perjury trial to link to the defendant.[185] When a conviction is wanted, too bad if the defendant be blameless. Justice Black's tale—told in a related context[186]—of an earlier day when rulers made compliance with the law impossible so as to be able to invoke the criminal process against their enemies is not entirely inapposite.

Constitutional Limitations on the Elimination of the Mental Attitude Requirement

Constitutional attacks upon strict-liability have been confined to its use in public welfare offenses. Since no court would strike down the principle of substituted intent, the denial of the defense of mistake in the statutory-rape cases is immune from constitutional attack. However, strict liability in the bigamy cases, where heavy penalties are sometimes imposed, should receive constitutional considerations as much as strict liability in public welfare offenses. In both cases, wholly blameless persons may be deemed criminal. Unfortunately, however, the denial of the defense of mistake in the bigamy cases, even where harsh penalties have been inflicted, is so well established in America that a court might hesitate to maintain that such a denial violates traditional notions of ordered liberty.

The development of the relationship between strict liability and due process has been primitive to date.[187] The United States Supreme Court has

cause his reputation will be destroyed. Edwards, *supra* note 51, at 245 (1955). But this would be equally true if word of administrative or civil sanctions spread. The problem here is with strict liability of any sort, which is not our concern when we are weighing the criminal sort against other sorts of strict liability.

[176] Model Penal Code §§1.04 (5), 2.05 (2)(a) (Proposed Official Draft, 1962).

[177] Model Penal Code §1.04 (5) (Proposed Official Draft, 1962).

[178] One of the great tasks of the law is to "identify those particular areas that justice and expediency dictate should be the province of the criminal law" and to use other remedies where they are more fitting. Allen, *Criminal Law*, 31 U. Chi. L. Rev. 257, 261 (1964).

[179] Hall 352.

[180] Rissman, *supra* note 169, at 506.

[181] Hall 359 n. 95.

[182] Allen, *supra* note 141, at 1123.

[183] 191 Pa. Super 602, 159 A.2d 541 (1960). *See supra* p. 20.

[184] 223 N.E.2d 755 (Ind. 1967). *See supra* p. 18.

[185] As usual, the appellate report may tell only half the story. What is important is that defendants in these cases *could* be truly blameless and still be deemed criminal where the prosecutor has available the strict-liability tool.

[186] Williams v. North Carolina, 342 U.S. 226, 278 (1945) (dissenting opinion).

[187] Professor Packer has blamed the state of affairs on the Supreme Court. He paraphrased its utterances: "*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes." Packer, *supra* note 139, at 107-08. But, in fact, the Supreme Court's present position on the constitutional question is more certain than Packer's. For this reason he was unable to provide any useful guidelines for determining when strict-liability offenses are unconstitutional, guidelines which he claimed are desperately needed.

implicitly acknowledged that even harsh penalties may be imposed without proof of any mental attitude,[188] even though it prefers a principle of statutory construction that would eliminate strict liability in many of these cases.[189] It has also said (in *Smith v. California*[190]) that the mental attitude requirement may not be dispensed with when to do so would, by intimidating people from engaging in a lawful activity, impinge upon the exercise of a specially protected constitutional right, such as free speech. In sum, unless we have before us a law comparable to the no-scienter obscenity statute of *Smith*, nothing that the Supreme Court has yet said would make our strict-liability statute unconstitutional. This means that no statute (and no judicial gloss) discussed in this essay would transgress constitutional limitations thus far articulated by the Supreme Court.

Since the *Smith* doctrine is of limited applicability, constitutional law must follow another path if it is to develop in this area.[191] The abuse of police power is a rationale that should not be overlooked.[192] There comes a time when the legislative approach to a public welfare problem is so irrational, makes criminals out of so many innocent people, restricts a legitimate business so severely, that state courts have been willing to label a statute a violation of due process. For example, criminal liability for innocent purchasers of stolen goods has been declared unconstitutional at least twice.[193] Another case strongly suggests that due process may be offended when the mental-attitude requirement is eliminated in criminal securities provisions.[194] Still another held that a state legislature in eliminating scienter from an embezzlement statute abused its police powers.[195] However, this approach is too sporadic. The United States Supreme Court is no longer in the business of striking down state laws on abuse-of-police-power grounds on a statute-by-statute basis.

For this reason and others, it has been suggested that the Court should end strict liability in America with a single blow. Professor Mueller advances this proposition:

> Once it is recognized that the common law created the doctrine of mens rea as a protection against conviction of the blameless and that the common law regards mens rea as a universal requirement, technical and jurisprudential difficulties are at an end. In terms of due process this recognition simply means ... that statutes attempting to abolish a universal mens rea requirement—and these are rather rare—are unconstitutional as are judicial utterances, in the nature of judicial legislation, to that effect.[196]

On the other hand, Professor Packer noting the pervasive use of strict-liability public welfare offenses in this century, hesitates to commit himself to the proposition that strict liability always and everywhere violates traditional notions of ordered liberty.[197]

Advocates of the Mueller position are encouraged by cases like *Robinson v. California*,[198] in which a constitutional infirmity is found in the punishment of moral innocents.[199] Perhaps the statutory construction in *Easter v. District of Columbia*[200] is an added source of hope for them. But strict liability offenders, unlike blameless narcotic addicts and drunkards, engage in *voluntary* activity that transgresses the law and are capable of either performing the duty the law imposes or withdrawing from the activity that is likely to bring criminal penalties. This distinction was perceived a half century ago when the Washington Supreme Court rejected cases upholding public welfare strict liability as precedents for holding constitutional a legislative attempt to abolish the defense of insanity.[201]

Those who believe that strict liability should be declared unconstitutional were also encouraged by *Lambert v. California*.[202] Shortly after that decision Mueller wrote:

[188] United States v. Balint, 258 U.S. 250 (1922); United States v. Behrman, 258 U.S. 280 (1922).

[189] Morissette v. United States, 342 U.S. 246 (1952).

[190] 361 U.S. 147 (1959).

[191] A decade of Supreme Court silence indicates that development of the constitutional issues is not inevitable.

[192] *See* Laylin & Tuttle, *Due Process and Punishment*, 20 MICH. L. REV. 614 (1922).

[193] People v. Estreich, 272 App. Div. 698, 75 N.Y.S.2d 267 (1947), *aff'd*, 297 N.Y. 910, 79 N.E.2d 742 (1948); Kilbourne v. State, 84 Ohio St. 247, 95 N.E. 824 (1911).

[194] State v. Smith, 151 So.2d 889 (Florida 1963).

[195] State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948).

[196] Mueller, *supra* note 139, at 1103.

[197] Packer, *supra* note 139, at 142.

[198] 370 U.S. 660 (1962).

[199] *See, e.g.*, Dublin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 385–87 (1966).

[200] 361 F.2d 50 (D.C. Cir. 1966).

[201] State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910).

[202] 355 U.S. 225 (1957). This case involved a registration requirement for convicts dwelling in a city.

> The Supreme Court has clearly told us that it detests the misuse of criminal sanctions in the case of a morally blameless defendant. . . . Absolute criminal liability is beginning to end in America.[203]

But Mrs. Lambert's mistake was that she did not know of the existence of a penal law, a mistake of a fundamentally different character from the mistakes involved in public welfare offenses. So with the passage of time, *Lambert* has come to stand only for the proposition that where an affirmative duty is imposed on a citizen which he would have no reason to suppose exists, and where a violation of that duty requires no affirmative act, the lawmakers must see that the act's promulgation takes these circumstances into account. The bright hopes enkindled by *Lambert* have been dimmed.

It has also been suggested that decisions striking down irrational statutory presumptions could serve as precedents for declaring strict-liability offenses unconstitutional.[204] But this analogy has merely been asserted, with little articulation. It is doubtful whether a line of cases that is itself so confused[205] could illuminate another area of the law.

It is, therefore, suggested that the simplest approach would see the Supreme Court holding that due process is offended whenever penalties above a designated severity are imposed without proof of an actual or substituted criminal mental attitude toward the material elements of an offense. A severity-of-the-punishment test finds support in the *Model Penal Code*[206] and in the *Koczwara*[207] case, which both draw the line at imprisonment. The new Illinois Criminal Code suggests that normally a five-hundred dollar fine should be the maximum penalty for strict-liability offenses.[208] The misdemeanor-felony line is also a possibility.[209] It has been useful in resolving other due process issues, although admittedly future years may see its erosion in those other areas. Once a balancing approach is accepted, the notion that it is proper to take *some* property and restrain *some* liberty, but not more, by a certain means becomes less offensive than at first glance.[210] In the public welfare cases many short imprisonments but few long ones are recorded. Therefore, it could be maintained that imprisonment without fault for more than a year, but not for less, is inconsistent with our traditional notions of ordered liberty. The possibility of the most egregious abuses of strict-liability would be ended. The Court, at some later date, could draw a line more favorable to defendants.

Conclusion

In the areas examined, proof of intentionality, recklessness, or negligence as to each non-jurisdictional material element of a crime should be required for conviction. Use of statutory language that calls for proof of bad motivation or of knowledge of a penal statute should be avoided. Sometimes the intent to commit one crime may be substituted for the intent to commit another crime, but the substitution is inappropriate when it is used to deny the defense of reasonable mistake is statutory rape cases. The complete dispensation with the mental attitude requirement in bigamy and public welfare offenses has not been demonstrated to be sound policy. The defense of reasonable mistake should be permitted in bigamy cases, even if the mistake is one of civil law. Defendants in public welfare cases should be allowed to exculpate themselves by showing that they used due care. Finally, in bigamy and public welfare cases, the Supreme Court should deem unconstitutional heavy criminal penalties imposed without proof of a criminal mental attitude.

---

[203] Mueller, *supra* note 139, at 1130.

[204] *See, e.g.*, Comment, 38 J. Crim. L., C. & P.S. 132, 135–136 (1947).

[205] *See* Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. Chi. L. Rev. 141 (1966).

[206] Model Penal Code §§1.04 (5), 2.05 (2) (Proposed Official Draft, 1962).

[207] Commonwealth v. Koczwara 397 Pa. 575, 155 A.2d 825 (1959). *See supra* p. 19.

[208] Ill. Rev. Stat. ch. 38, §4–9 (1965).

[209] Of course any test based on the severity of the penalty would require a reconsideration of United States v. Balint, 258 U.S. 250 (1922), where heavy narcotic-offense penalties were implicity approved. The opinion reveals that the Court did not give serious consideration to the due process issue. It did not have the benefit of counsel for the defendant since the government was unopposed at the Supreme Court level in its argument that the district judge erroneously quashed the indictment.

[210] Comment, 38 J. Crim. L., C. & P.S. 132, 136 (1947).