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Strict Liability Crimes

Before the middle of the 19th century it was generally stated that a criminal conviction could not be had without proof of *mens rea*.[1] By and large, the modern concept of criminal law still accepts this basic principle. However, a well recognized exception to the general rule has developed in connection with so called "public welfare offenses" or "public torts." In such offenses, the usual requirement of proof of criminal intent has been dispensed with and strict liability has been imposed.

It should be stated at the outset that the present discussion of strict liability crimes is not concerned with doctrines such as statutory rape or the felony-murder and misdemeanor-manslaughter rules. In a sense strict liability is attached to crimes falling within the purview of these doctrines, but in each event, the act to which strict liabilty is attached is morally wrong in and of itself. The present discussion is limited to acts which may entail no wrongful intent or moral guilt, but nevertheless are considered criminal offenses.

The development of strict liability crimes in England and the United States started at approximately the same time. However, the movements in the two countries seem to be independent of one another.[2]

[1] 1 Bishop, Criminal Law § 287 (9th ed. 1930).
[2] Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55, 62 (1933).

In 1846,[3] an English tobacco dealer was convicted and fined for having adulterated tobacco in his possession although he had no knowledge of the impurity of the product. In 1849,[4] a Connecticut court reversed the conviction of a tavern owner for the sale of liquor to a common drunkard. However, the court explicitly stated that proof that the defendant knew the purchaser to be a common drunkard would not be necessary to sustain the conviction.

Some of the early decisions were very harsh in their application of strict liability to bigamy cases. In 1844,[5] a Massachusetts court held that a reasonable mistake regarding the death of a spouse did not constitute a valid defense in a bigamy prosecution. An English decision to the same effect was reversed in 1889,[6] the court holding that although the statute under which the action was brought was silent in regard to proof of *mens rea,* such proof was necessary for conviction. It is doubted that modern courts would take such an extreme position as that taken by the Massachusetts court, even if authorized to do so by the general wording of a statute.

The doctrine of strict liability in criminal actions was generally accepted by the turn of the century, and courts felt free to apply it.[7] Strict liability was first evolved in cases involving violations of statutes pertaining to food and drugs and intoxicating liquor. It was gradually extended, and soon police offenses entailing small penalties became recognized as a type of criminal offense requiring no proof of *mens rea.*[8]

Nebraska, although not a leader in the new movement, followed the pattern laid down by the courts in other jurisdictions. In 1905,[9] the Supreme Court of this state affirmed a conviction for selling milk containing a poisonous substance, holding that ignorance on the part of the defendant that the substance was poisonous did not constitute a valid defense.

One of the most frequently cited Nebraska cases in this field is *Seele v. State.*[10] It involved the sale of intoxicating liquor to a minor. In affirming the conviction by the lower court, the court stated:

[3] Regina v. Woodrow, 15 M. & M. 404 (Exch. 1846).
[4] Barnes v. State, 19 Conn. 397 (1849).
[5] Commonwealth v. Mash, 7 Metc. 472 (Mass. 1844).
[6] The Queen v. Tolson, 23 Q.B.D. 168 (1889).
[7] State v. Sasse, 6 S.D. 212, 60 N.W. 853 (1894); State v. Bruder; 35 Mo. App. 475 (1889); People v. Roby, 52 Mich. 577, 18 N.W. 365 (1884); Redmond v. State, 36 Ark. 58, 38 Am. Rep. 24 (1880); State v. Coenan, 48 Iowa 567 (1878); Farmer v. People, 77 Ill. 322 (1875); State v. Cain, 9 W. Va. 559 (1874); McCutcheon v. People, 69 Ill. 601, 1 Am. Crim. Rep. 470 (1873); State v. Hartfiel, 24 Wis. 60 (1869); Commonwealth v. Emmons, 98 Mass. 6 (1867).
[8] Sayre, op cit. supra note 2, at 67.
[9] Lansing v. State, 73 Neb. 124, 102 N.W. 254 (1905).
[10] 85 Neb. 109, 122 N.W. 686 1909).

> The statute violated by defendant is a police regulation. It is a part of the legislation enacted for the purpose of keeping the traffic in intoxicating liquors under surveillance and of averting the evils growing out of sales to minors. The intent with which such sales are made is no part of the offense defined by law. The statute declares: 'Every person licensed as herein provided, who shall give or sell any malt, spirituous and vinous liquors, or any intoxicating drinks to any minor, apprentice, or servant, under twenty-one years of age, shall forfeit and pay for each offense the sum of twenty-five dollars.' ... Sales made to a minor in ignorance of his age and without any intention to disobey the law are not excepted from the operation of the statute. A licensee is not authorized to sell intoxicating liquors indiscriminately. The responsibility of complying with the terms of his license and with the provisions of the law under which he becomes a saloon-keeper is on him. Under the statute quoted, he must ascertain at his peril whether the purchaser is a minor.

The current volumes of the Nebraska statutes contain many crimes to which the legislature has attached strict liability. They include the violation of laws pertaining to intoxicating liquors,[11] food and drugs,[12] roads and traffic,[13] narcotic drugs,[14] and games and gambling.[15]

Whether or not strict liability crimes can be squared with modern concepts of justice and responsibility is a controversial question. Professor Jerrome Hall can find nothing in their support.[16] However, it would seem that there is a logical basis for such legislation. Whether proof of *mens rea* is required or not, it would hardly be argued that the offenses characterized as strict liability crimes are not of serious social concern. Acts such as the sale of adulterated foods, traffic violations, sale of liquor to minors, and the like, may directly impair the health and safety of the community. Some efficacious means must be employed to hold infractions to a minimum. For practical reasons, the elimination of proof of criminal intent may be the best method by which to safeguard the public interest.

An analogy may be made to the imposition of strict liability in civil cases. Under generally accepted tort principles, liability may be imposed for unintentional and non-negligent conduct where an ultra-

[11] Neb. Rev. Stat. §§ 53-155, 53-157, 53-164, 53-174, 53-175, 53-176, 53-180, 53-180.05, 53-181, 53-182, 53-184, 53-192, 53-193, 53-194, 53-195, 53-196, 53-1,100 (Reissue 1952).

[12] Neb. Rev. Stat. §§ 81-214, 81-215, 81-217.02, 81-217.03, 81-217.10, 81-223, 81-225, 81-228, 81-233, 81-235, 81-240, 81-257, 81-258, 81-259, 81-264, 81-265, 81-267, 81-281, 81-283, 81-285, 81-286, 81-289, 81-291, 81-2,155, 81-2,157 (Reissue 1950).

[13] Neb. Rev. Stat. §§ 39-728, 39-732, 39-733, 39-734, 39-735, 39-769, 39-771, 39-772, 39-773, 39-774, 39-775, 39-777, 39-778, 39-780, 39-782, 39-799, 39-7,100, 39-7,101, 39-7,105, 39-7,113, 39-7,114, 39-7,118, 39-7,120, 39-7,123, 39-7,126 (Reissue 1952).

[14] Neb. Rev. Stat. §§ 28-452, 28-461, 28-463, 28-470, 28-472.01 (Reissue 1948).

[15] Neb. Rev. Stat. §§ 28-942, 28-943, 28-950 (Reissue 1948).

[16] Hall, General Principles of Crimnial Law 279-322 (1947).

hazardous activity is involved.[17] To be included within this classification of delictual responsibility, the activity must be dangerous and one which involves a risk that things may go amiss despite prior precautions. There need be no fault insofar as the actor's immediate conduct is involved; it is enough that he has created an abnormal one-sided risk and hence caused a threat to the security of his neighbors. In effect, he is allowed to conduct such an activity, but upon the condition that within the limits of the risk created he will indemnify anyone injured by the hazard.[18] The philosophical justification for such liability without fault is that the actor should be responsible when he introduces a new and one-sided threat to the security of his neighbor, and such contingent liability should insure most careful precautions and preventive measures.

At least some public welfare offenses involve situations where it is in the public interest that persons subject to regulation have a special incentive to insure compliance with the law. Ordinary precaution may be inadequate. If proof of criminal intent is dispensed with, the liquor dealer may take effective means to ascertain the age of a customer, the motorist may more carefully check his car and watch his driving, and the processor of foods may take added precautions to guard against deleterious substances.

In addition to this prophylactic basis for public welfare offenses, it has been argued that the difficulty of proving criminal intent is a reason for dispensing with the need therefore in certain types of cases.[19] It is true that it might be exceedingly difficult if not impossible to prove that a person deliberately sold liquor to a minor, or violated traffic laws, but the real point is that the legislature, in certain instances, wished to proscribe not only deliberate conduct but negligent and even unintentional and non-negligent conduct as well. Moreover, at least as to some public welfare offenses, any other approach might entail difficulties in the administration and enforcement of the law. For example, if traffic violators were permitted to litigate the issue of *mens rea,* already overburdened courts might be unable to function effectively.

Application of strict liability in the field of criminal law requires the weighing of public necessity or exigency against individual rights. Cases in which the defendant may be convicted regardless of innocent intention must form a unique type of misconduct, and legislatures should be cautious in determining which offenses are to be placed in this category. Legislative bodies should also exercise prudence in

[17] Restatement, Torts § 519 (1938).

[18] Foster and Keeton, Liability Without Fault in Oklahoma, 3 Okla. L. Rev. 1, 8 (1950).

[19] Comment, 42 Mich. L. Rev. 1103, 1106 (1944).

prescribing the punishment for the commission of such crimes. It would seem that such legislation should be subjected to two general limitations: (1) The offenses classed as strict liability crimes should be minor in nature, and the concern of a large part of the public. (2) Since no criminal intent is required for conviction, the punishment should be light.

The Nebraska legislature has not always followed the latter limitation when prescribing the penalty for the violation of strict liability crimes. For the violation of certain laws pertaining to intoxicating liquor,[20] the violator may have his liquor license revoked. The loss of such license forces the violator out of business, possibly causing the loss of a substantial amount of money when he sells out. In any event, the person so punished is cut off from his source of livelihood, and in some instances, such a penalty could work a very severe hardship.

A statute[21] enacted by the Nebraska legislature during the 65th session now makes it possible for the violator of a strict liability crime pertaining to traffic laws to lose his driver's license. The new law provides a system by which points are allotted for each violation. The conviction for any of several strict liability crimes[22] causes the convicted person to be charged with two points. The accumulation of twelve points within any two year period gives rise to the revocation of the driver's license held by the person credited with the points. It would be improbable that any person would lose his license on the basis of convictions for the violation of strict liability crimes alone, since six such convictions would be required within two years. However, conviction for the violation of other traffic laws may charge the person so convicted with up to six points thus requiring only three convictions for the violation of strict liability crimes at two points each to give a sum total of twelve points within a two year period. Loss of a driver's license would be a severe punishment for any person who is required by his employment to drive. Furthermore, such a revocation has an adverse effect on public opinion regarding our legal system. A large percentage of the public is concerned with traffic laws and their judicial treatment. It is difficult for most people to justify the loss of a driver's licenses when the act giving rise to such loss had no element of wrongful intent.

[20] Neb. Rev. Stat. §§ 53-176, 53-182 (Reissue 1952).

[21] Neb. Laws c. 39, §§ 794, 795, 796 (1953).

[22] Neb. Rev. Stat. §§ 39-728, 39-733, 39-735, 39-769, 39-771, 39-772, 39-773, 39-774, 39-775, 39-777, 39-778, 39-780, 39-782, 39-7,100, 39-7,101, 39-7,118 (Reissue 1952).

[23] Neb. Rev. Stat. §§ 39-799 (up to $500 for third conviction within one year); 53-155 (up to $5,000); 53-157 (up to $500); 53-182 (up to $1,000); 53-1,100 (up to $500 for first conviction and up to $1,000 for subsequent convictions) (Reissue 1952). Neb. Rev. Stat. § 28-470 (up to $3,000 for first conviction and up to $5,000 for subsequent convictions) (Reissue 1948).

Several of the Nebraska strict liability statutes impose heavy fines,[23] while others provide for the imprisonment of violators.[24] Subjecting men to a possible term behind bars without proof of any wrongful intent seems to tear at the "sense of justice" which people in this country speak of with pride. Punishment by confinement should be reserved for those who have intentionally committed acts in violation of the law; who know what the consequences will be if apprehended.

In certain instances strict liability crimes are a necessity to protect the public welfare, but the punishment prescribed for such crimes should be nominal. Thus, it is submitted that statutes which give courts discretionery power to impose heavy fines, penalties, or imprison violators of the statutes, without first proving *mens rea,* should be amended.

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[24] Neb. Rev. Stat. §§ 39-799 (up to ten days for first conviction, up to twenty days for second conviction within one year, and up to six months for third conviction within one year); 39-7,105 (ten days); 39-7,126 (up to three months); 53-155 (up to ten years); 53-157 (up to six months); 53-180.05 (up to 120 days); 53-182 (up to one year); 53-196 (up to thirty days for first conviction and up to sixty days for subsequent convictions); 53-1,100 (up to six months for second conviction) (Reissue 1952). Neb. Rev. Stat. §§ 81-215 (up to thre months); 81-217.10 (up to thirty days); 81-257 (up to three months); 81-267 (not less than thirty days nor more than sixty days); 81-286 (up to three months); 81-291 (not less than thirty days); 81-2,157 (up to thirty days) (Reissue 1950). Neb. Rev. Stat. § 28-470 (one year for first conviction and one to five years for subsequent conviction) (Reissue 1948).