REVIEWS

MENS REA IN STATUTORY OFFENCES. By J. Ll. J. Edwards. New York: St. Martin's Press, 1955. Pp. xiv, 297. $4.25.

FORTY years ago the late Professor Ernst Freund observed: "Living under free institutions we submit to public regulation and control in ways that would appear inconceivable to the spirit of oriental despotism. . . ."[1] The fundamental changes in the relation of individual to community, announced by Professor Freund in his characteristic fashion, stem from socio-economic changes which inevitably and profoundly affected the criminal law and its administration. For the past century and a quarter the proliferation of statutory regulatory offenses has been perhaps the most important factor producing change in the character of our criminal law and the theory of criminal liability. This development has left a legacy of problems, many of which are not only unsolved but largely unexplored.

Mr. Edwards' important study, *Mens Rea in Statutory Offences*, illuminates many of the modern problems in the area. The book is one of that distinguished series appearing under the auspices of the University of Cambridge's Faculty of Law with the general title *English Studies in Criminal Science*. It should be conceded at the outset that the Edwards volume is a technical discussion of a rather esoteric branch of the law. Something over three-hundred fifty cases and over two hundred statutes are cited and discussed, the great majority of which are decisions of English courts or acts of Parliament. The author organizes these voluminous materials by discussing in order judicial interpretation of each of several characteristic and recurring terms employed in the English statutes—such epithets as malice, wilfully, knowingly, permitting, causing, fraudulently and the like. A chapter is devoted to the problem of vicarious criminal liability, and a discussion of negligence as the test of criminality is offered. But if the discussion is technical, it is neither narrow nor sterile. For Mr. Edwards carefully relates his discussion of the particular to the general. While his objectives include giving assistance to the English practitioner in the field, he is even more concerned with issues of legislative policy. Nor does his preoccupation with English materials destroy the significance of the study for American readers. Most of the problems are wholly typical of our own, and some of the legislative devices employed in the English statutes are worth our consideration and, perhaps, adoption.

1. FREUND, STANDARDS OF AMERICAN LEGISLATION 21 (1917). He added: "[I]t is well known what deep-seated repugnance and resistance of the native population to the invasion of their domestic privacy and personal habits English health officers in India have to overcome in order to enforce the sanitary measures necessary to prevent the spread of infection or contagious disease."

As one looks over the legislative materials reviewed in this volume or turns the pages of the statutory compilation of any American jurisdiction, he cannot fail to be impressed by the enormous bulk of penal regulations which have entered the law and the range of human activities sought to be affected or controlled by these prohibitions. The killing of domesticated pigeons, the fencing of saltpeter caves against wandering cattle, the regulation of automobile traffic, and the issue of daylight saving versus standard time have all, at one place or another, been made problems of the criminal law. No doubt, much of this represents the inevitable price of the new role which, perhaps through necessity, we have thrust upon government. And yet, although Mr. Edwards does not pose the question, there is surely reason to inquire whether such broad resort to *criminal* liability as the regulatory device is necessary or inevitable. The demand for regulatory legislation first reached flood stage in the last half of the nineteenth century, when administrative law was in its early period of development and sophistication. The resort to criminal penalties, in many situations, may have represented the only apparent means of accomplishing the regulatory purposes. This necessity has abated with the passage of the years and the development of alternative regulatory techniques. But as one surveys much modern legislation, he is often struck by the obvious lack of ingenuity displayed in devising sanctions. It is clear that criminal penalties are often included in such legislation almost as a matter of course. Typically, there is no adequate consideration of their necessity or utility in the particular regulatory situations. I am told that when the draftsman of one of the most intricate pieces of regulatory legislation enacted by Congress in the New Deal period was asked what considerations underlay the inclusion of rather severe criminal penalties in the law, he answered: "I don't recall; I can only say they got into the draft late one Saturday afternoon." I cannot vouch for the accuracy of the story, but it fairly reflects an attitude which pervades much legislative activity in the field.

The insouciance which has often characterized legislative consideration of criminal provisions in regulatory statutes has had a variety of unfortunate consequences. One of the most important is the deplorable quality of statutory language encountered in the area. Curiously, the most frequently committed sin against decent standards of draftsmanship cannot be explained or excused by the existence of any very serious difficulties in expression. The problem is well illustrated by the provision involved in the case of *Cotterill v. Penn.*[2] Section Twenty-three of the Larceny Act of 1861 [3] reads: "Whoever shall unlawfully and wilfully kill, wound or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction, ..." It is apparent that this section, typical of hundreds of American

2. [1936] 1 K.B. 53. The accused, whose vision was temporarily impaired by brilliant sunshine, shot and killed a house pigeon, although he intended to kill only wild birds that had been damaging his crops. These facts were held not to constitute a defense under the statute.

3. 24 & 25 VICT., c. 96.

statutes, is afflicted with an inherent ambiguity. Does the term "wilfully" import nothing more than a purpose to "kill, wound, or take" a bird which turns out to be a house dove? Or does it require a purposeful killing of a bird by the accused with knowledge, at the time of killing, that the bird is a house dove? The distinction is important because it is the difference between an absolute liability and one founded on the requirement of *mens rea*. Surely, it requires no great skill in the use of language to place the question beyond all doubt.[4] Draftsmanship of the sort involved in *Cotterill v. Penn* has plagued the courts for many years, and as Mr. Edwards' volume illustrates, has produced a body of doctrine, the parts of which are often inconsistent and irreconcilable. Each year new statutes are placed on the books which contain the same avoidable difficulties and obscurities. This may represent more than carelessness; it may sometimes involve a more or less conscious delegation of difficult policy problems to the courts. But this can only be regarded as an abdication of legislative responsibility. For if a legislature chooses to exert its authority so as to place its citizens under peril of criminal conviction and loss of property or liberty, it is surely under obligation to determine and state with clarity the conditions under which such disabilities may be imposed.

While Mr. Edwards discusses a wide range of legal questions associated with regulatory legislation, the central theme is the problem of absolute liability. Shall a provision, employing any of the variety of statutory terms used to import a state of mind, be interpreted to require only a purpose to commit the forbidden act, or must the prosecution also establish knowledge or purpose relating to all the circumstances or consequences of the conduct which are made essential elements of the offense? The author discovers, in considering the judicial interpretation of many of the statutory epithets employed in English legislation, that some cases take the latter view thereby requiring proof of a *mens rea*, and some do not. This diversity of interpretation he relates most closely to the attitude of the individual judge toward the *mens rea* requirement and the time the case was decided. He finds that the turn of the century was the period of greatest judicial tolerance of absolute liability. Perhaps unfortunately, Mr. Edwards refuses to attempt identification of the factors in the intellectual environment of those years which produced the attitude he describes.

It is fair to say that, in his analysis of the English cases, Mr. Edwards presents a reasoned and forthright defense of the *mens rea* requirement. His proper hostility toward absolute criminal liability is grounded on considerations both of moral principle and expediency. At one point he directs attention "to the serious danger of the criminal law falling into disrepute if both the legislature and the courts allow statutory offences to be administrated with scant regard for the doctrine of *mens rea*."[5] The incongruity of imposing the social condemnation of criminal conviction on those who acted in ignorance of the

4. These matters are well discussed in Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644.

5. P. xiv.

facts which rendered their conduct illegal is a moral perception at least as old as Aristotle. To be sure, penalties attached to such legislation are likely to be light, and in many cases (but by no means in all) conviction for such an offense may involve the accused in no serious loss of community esteem. But experience has shown that absolute liability, once admitted, is a principle difficult to manage; and there is the danger of its ill-considered extension to areas in which the issues are of a much graver sort. Moreover, one wonders whether the association of the notion of criminality with complete moral innocence is not, in the long run, an obstacle to the accomplishment of the important general purposes of a system of criminal justice.

And there are further considerations bearing on the issues of absolute liability which are not detailed in Mr. Edwards' analysis. As mentioned above, one of the striking aspects of regulatory legislation is the extraordinary range of conduct sought to be controlled by imposition of penalties. When such far-reaching legislation entails criminal liability despite total absence of criminal purpose, every member of the community, however respectable and law-abiding his disposition, becomes a potential offender. As a result the persons upon whom the effective administration of criminal justice depends for support are encouraged to oppose the official agencies rather than to cooperate with them. That these factors have adversely affected the relations of the public to the police, even in England, is asserted in the report of at least one Royal Commission.[6] There is a further point. The doctrine of *mens rea* is founded not only on considerations of abstract morality but of political morality as well. The rule which limits the imposition of criminal liability to conduct which is not only objectively dangerous but which is accompanied by guilty knowledge or purpose constitutes an important practical regulation of the relations between state power and individual liberty. It is a restraint that ought not to be lightly abandoned or seriously attenuated.[7]

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6. "The result is a feeling of hostility or state of friction, which is foreign to the normal relations between the police and the public, and a disposition to withhold that assistance and co-operation in the suppression of other offenses which the public has generally been ready to afford." REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE No. 3297, pp. 81-82 (1929). Similar problems are perceptively discussed by an American writer. SMITH, POLICE SYSTEMS IN THE UNITED STATES 72-74 (1949).

7. The importance of the *mens rea* requirement as a limitation on state power may be implicitly attested by the elaborate efforts made in some totalitarian regimes to prove that those convicted of essentially political crimes possessed the guilty mind. Thus after an accused was convicted of "incitement to boycott and incitement to war" in the Soviet zone of Germany for repeating a story appearing in the western press to the effect that the Soviet proposed to depopulate the strip along the border between the east and west zones to provide a buffer, the court is reported to have said: "The defendant, who describes himself as a peace-lover, *knows* all the problems of the day which dominate our hearts. He *knows* that we have only one struggle, the establishment of German unity in order to give the world peace camp yet another formidable partner against imperialist warmongers. He therefore also *knows* that nothing is ever done by the Soviet Union that stands in contradiction to these great aims. But the creation of such a zone would represent a preparation for war and would be just as dangerous a threat of war as a divided Germany is."

In view of Mr. Edwards' sturdy defense of the principle of *mens rea*, it may come as a surprise to note his advocacy of the test of negligence, or mere inadvertence, as the basis for criminal liability in at least some statutory offenses. The author makes no contribution to clear analysis, I believe, when he suggests that mere negligence, involving no knowledge, purpose or even awareness of peril, can properly be treated as fulfilling the requirements of *mens rea*.[8] But he seems clearly correct in suggesting that negligence might often be incorporated as the statutory basis for liability in many regulatory situations in which the only feasible alternative is assumed to be absolute liability. The proposal may be rendered more palatable to the dubious in many cases if the burden of proof of establishing due care is placed on the defendant as an affirmative defense. Mr. Edwards is also resigned to accepting a limited scope for the doctrine of vicarious criminal liability. He asserts, however, that the proper rationale of the English cases does not involve the principle of *respondeat superior*, but rather a theory of non-delegable duty owed by the licensee who turns over the care and control of licensed premises to a subordinate who in turn commits or permits the commission of the offense. I doubt that most of the American cases lend themselves to this explanation. The author points out that in many English statutes involving criminal liability of employers for the acts of servants, the rigors of vicarious criminal liability are mitigated by a device known as the "third-party procedure." Such a provision permits exculpation of the employer who proves his due diligence in avoiding the commission of the offense after bringing the actual offender into the proceedings and establishing his guilt.[9] The device is interesting, but the propriety of making a defendant prove the guilt of a third party in order to gain his own acquittal appears at least questionable. Here again the best solution may be simply the recognition of due diligence on the part of the employer as an affirmative defense.[10]

It is not a criticism of this book to remark that it does not tell all that one would like to know about English regulatory statutes and their administration. But it can be said without qualification that the author has made a substantial contribution to the study of an important and strangely neglected area of public policy. We shall be further in his debt if his work inspires further inquiry, both in this country and abroad.

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(Emphasis added.) INTERNATIONAL COMM. OF JURISTS, JUSTICE ENSLAVED No. 7, p. 14 (1955).

8. P. 206.

9. See, *e.g.*, Truck Amendment Act, 1887, 50 & 51 VICT. c. 46, § 12(2).

10. *Cf.* MODEL PENAL CODE § 2.07(4) (Tentative Draft No. 5, 1956): "In any prosecution of a corporation or an unincorporated association for the commission of an offense . . . it shall be a defense if the defendant proves by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. . . ."

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