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Liability without Fault: Logic and Potential of a Developing Concept

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I. INTRODUCTION

The imposition of criminal liability for an unlawful act without a required showing of mental state (often termed "strict liability" or "liability without fault") has been resorted to increasingly in the last 70 years.[1] In the broad context of the historical development of criminal liability, in which emphasis has been placed on moral blameworthiness, liability without fault has been viewed alternately as an illogical development[2] or as distinguishable in theory from the "true crimes of the classic law."[3] This comment will demonstrate that, whatever may be one's emotional response to liability without fault, a rational and logical analysis of criminal liability can be made which accepts the imposition of criminal liability without a showing of fault. Given an analysis which accepts criminal liability without fault, the inquiry becomes: (1) whether a jurisdiction (*e.g.*, Wisconsin) has laid the logical foundation for such a model in statute and case law; (2) what consequences would flow from a completed model; and, (3) what forces might produce or inhibit full implementation of the model.

An analysis of the current state of liability without fault is complicated by the difficulty of determining in which instances the legislature has adopted that standard. Data gathered for Wisconsin from the 1953 statutes indicated that the language of over one-half of Wisconsin's criminal statutes did not express a requirement of fault.[4] Remington and Halstead attribute the difficulty thus created in large part to the almost complete lack of attention given the problem by draftsmen.[5] Since a clear delineation of alternatives is necessary before a cohesive legislative response can be expected,[6] this analysis hopes to provide some of the clarity which may induce legislative response.

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[1] Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 n.5 (1933).

[2] Binavince, *The Ethical Foundation of Criminal Liability*, 33 FORDHAM L. REV. 1 (1964).

[3] Sayre, *supra* note 1, at 67.

[4] Remington, *Liability without Fault Criminal Statutes—Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin*, 1956 WIS. L. REV. 625 (summarized data gathered under a research grant from the Rockefeller Foundation). There is no indication that current statutes differ greatly in their use of a fault requirement, though only a similar detailed study would accurately reflect current use.

[5] Remington & Halstead, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644, 648.

[6] *Id.* at 648 recognizes this need as concommitant with the need for greater legislative concern.

II. LIABILITY WITHOUT FAULT ANALYZED

A discussion of the appropriate role of a mental element in the imposition of criminal liability, that is, the possibility of imposing a penalty absent any showing of mental state, is effective only in the context of the historical development of the mental element in crime. Numerous discussions provide extensive historical detail,[7] but the broad outlines, on which some modicum of agreement exists, will be most useful here.

A. Historical Context

Sayre concludes that prior to the 12th century the requirement of a certain mental state, in anything like its modern sense, was nonexistent.[8] However, the absence of a mental element as a general requisite of criminality in the old records does not necessarily mean that it was disregarded entirely. The very nature of the majority of the early offenses rendered commission without criminal intent impossible.[9] Whether or not the mental element was considered in determining guilt, it was an important factor in determining the appropriate punishment.

The beginning of an ordered concept of required mental state is largely attributed to two 12th century influences: Roman law, which was receiving considerable attention in the universities; and canon law, with its emphasis on moral guilt. Under the influence of the church's teaching in England that punishment should be dependent on moral guilt, the mental element necessary for criminal liability came to the fore in prosecution. "By the second half of the seventeenth century, it was universally accepted law that an evil intent was as necessary for felony as the act itself."[10] Despite the emphasis on mental state, punishment probably was not extended beyond instances in which the mental state was manifested in some act.[11]

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[7] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 433-46 (4th ed. 1926); Binavince, *supra* note 2; Chesney, *The Concept of Mens Rea in the Criminal Law*, 29 J. CR. L. & CRIM. 627 (1939); Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922); Turner, *The Mental Element in Crimes at Common Law*, 6 CAMB. L.J. 31 (1936).

[8] Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 981 (1932).

[9] Waylaying, robbery, and rape are impossible without criminal intent. House burning might be the result of intent or negligence, but from the earliest record the felony of arson depended on proof of intent to burn.

[10] Sayre, *supra* note 8, at 993.

[11] That "the will might be taken for the deed" appeared in English canonists' writings. STAUNFORD, PLEAS OF THE CROWN 27 (1557), asserted that in the time of Edward III the doctrine was applied to robbery and several other crimes. Sayre, *supra* note 8, at 992, concludes that no such doctrine existed in the practicing criminal system but notes that recurrent reference to the maxim indicates the strong movement after the 13th century to making intent the primary element of criminal responsibility.

Particularization of the general mental element with respect to specific felonies followed. Since each felony touched different social and public interests, and thus served a different function, the mental elements came to differ from one another.[12] In this way the concept of *mens rea*, a general mental element necessary to convict for any crime, gave way to a new theory of *mentes reae*. The range of mental states involved in the imposition of criminal liability could then run from specific intent, through general subjective awareness, to an objective standard which all must meet at their peril.[13]

Largely within the last 75 years, the range has been extended at the one extreme to include the imposition of criminal liability regardless of the actor's state of mind,[14] with application to some policy offenses and criminal nuisances in which only light penalties are imposed.[15] A broad view of the historical development of the mental element of crime supports this liability without fault concept as the logical conclusion of a shift of emphasis in the objectives of the law.[16]

The literature of various disciplines is in accord that a shift of emphasis in the 20th century has moved the focus of law from the protection of individual interests, which marked the 19th century criminal administration, to the protection of public and social interests.

> Our modern objective [of criminal justice] tends more and more in the direction, not of awarding adequate punishment for moral wrongdoing, but of protecting social and public interests. . . . As the underlying objective of criminal administration has almost unconsciously shifted, and is shift-

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12 Sayre, *supra* note 8, at 994.

13 Binavince, *supra* note 2, at 34, detailed the shift between subjective and objective liability:

> The major problem of criminal law theory is the determination of the basic ethical principal in reference to which the fundamental element of crime should be defined. The history of criminal law, like the growth of our moral consciousness, shows two relevant postulates in characterizing crime, either in reference to the external conduct and its material consequences, or the subjective elements that control or direct the conduct.

14 The extension is operationally described by HOLMES, THE COMMON LAW 50-51 (1881):

> [The standards enforced by the criminal law] are not only external, . . . but they are of general application. They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of his incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command.

15 Sayre, *supra* note 1, at 56, denotes these as "public welfare offenses." Sayre argues that the range of acts which produce liability without fault should be sharply limited to police offenses of a merely regulatory nature with light monetary fines as a penalty.

16 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961): "objective—something toward which effort is directed: an aim or end of action, . . .

> ing, the basis of the requisite *mens rea* has imperceptibly shifted, lending a change to the flavor, if not to the actual content, of the criminal state of mind which must be proved to convict.[17]

Initially, the industrial revolution may be credited with the shift. Proof of fault became difficult as technical regulation increased. The New Deal and the subsequent development of the service state focused increasing attention on the larger public interest.[18]

Selznick noted the shift to protection of public and social interests as a third "master trend" in the American legal system—"the ascendance of social interests over parochial interests"—subordinating the concept of abstract individually held rights to consideration of the general welfare.[19] Discussions of the American Philosophical Society[20] were premised on the thought that the form, content, and overall purpose of the law result from the values, obligations, and rights of the people which first relate to their common needs.

B. Assumptions

If the shift in the focus of the law from the protection of individual interests to the protection of public and social interests is taken as explaining the appearance and development of liability without fault, the assumptions which are believed to follow therefrom should be clearly articulated. After being stated, the assumptions of this explanation can be used to answer objections raised to the extension of liability without fault to the criminal law.

> (1) *A means-end relationship is the source of law's obligation.* Legal obligation has been viewed variously as having a natural existence to be "discovered," as existing to impose a sovereign's scheme of duties and morals on his people, and as a manifestation of divine will. More realistically, the legislative process in creating legal obligations reacts to the pressure of particular problems (ends). Thus, a means-ends necessity precedes law.
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> (2) *Given as an end the protection of certain public and social interests, the choice of means is the variable for con-*

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the purpose to be satisfied." Objectives of the law, by definition, guide its development. The term is a summary of the forces or ideas pressuring development in some direction. When the forces are altered there is a concommitant change in the objective.

[17] Sayre, *supra* note 8, at 1017.

[18] *See* S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 987 (1965) (as to the New Deal). On the welfare or service state see Address by Roscoe Pound, Economic and Business Foundation and the Service and Professional Clubs at New Castle, Pa., June 13, 1949, in GREAT POLITICAL THINKERS 832 (W. Eberstein ed., 3rd ed. 1966).

[19] Selznick, Sociology of Law, Paper prepared for the International Encyclopedia of the Social Sciences, Berkeley, Cal., April 1965, at 50, 57.

[20] Davitt, *The Basic Values of Law*, 58 TRANS. OF THE AM. PHIL. SOC. 22 (1968).

sideration.[21]

(3) *The potential range of means appropriate to furthering the end of public and social interests may be the opposite of that when primary emphasis is on individual interests.* Elimination of any showing of mental state may most effectively meet public and social needs. A required showing of specific intent promotes individual interests.

(4) *An unfettered sclection from a range of means is essential to produce laws responsive to changing conceptions of common need.* The effectiveness of any model of criminal liability which accepts liability without fault as an alternative is its ability to move within a range of means as the ends require, rather than being theoretically tied to requirements of mental state. Likewise, there should be no commitment to impose liability without fault in every instance, for that would be as restrictive as requiring proof of mental state in every instance.

C. *Objections Considered*

The assumptions which follow from a historical analysis of liability without fault as a logical development of the increasing emphasis in the law on protection of public and social interests provide the basis upon which objections to liability without fault can be considered and the sources of its support summarized.

1. LOGIC

The extension to liability without fault, especially if viewed as an imposition on the criminal law, is often discounted as illogical. Hall found the earlier extension to criminal negligence equally objectionable—"the inclusion of negligence [for criminal liability] bars the discovery of a scientific theory of penal law, *i.e.*, a system of propositions interrelating variables that have a realistic foundation in fact and values."[22] Sayre's underlying premise is that liability without fault does not play a legitimate part in completing the range of criminal liability. He rejects the idea that the extension to liability without fault developed from within the criminal system in response to appropriate concerns of criminal theory, and views it instead as an imposition on the operating machinery of the criminal system.[23] Likewise, Binavince concluded, after consider-

[21] The regulations which are law should be concerned only with the values which relate proximately to the common needs. The values which pertain first and foremost to their individual needs and refer only remotely to common needs should not become part of the content of the law.

Id. at 23.

[22] Hall, *Negligent Behavior should be Excluded from Penal Liability,* 63 COLUM. L. REV. 632, 643 (1963). The same objection, if valid, would apply to liability without any showing of fault.

[23] This view is illustrated by his Comment, *supra* note 1, at 68: [G]rowing complexities of twentieth century life have demanded

ing the German experience during the Third Reich, that "[i]n England and the United States, the considerable extension of the doctrine of strict liability is posing a serious threat to the rational foundation of criminal liability. . . ."[24]

This criticism assumes that the objectives of the criminal law are static. It is here assumed that the objectives have not been static, and that in fact it is a change in objective which has brought about a growing use of liability without fault. Objections to the logic of imposing liability without fault to be valid, should be directed first to the fundamental shift in objective, rather than solely to the resulting choice of means to attain the objective.

2. CULPABILITY

Culpability has been considered essential for ethical soundness in a system generally requiring a showing of mental state.[25] It is generally evidenced, to the degree required by the particular statute, by proof of mental state.

The argument that culpability is essential to a criminal law system does not defeat a model capable of imposing liability without a showing of mental state. Rather than dispensing with the concept of culpability, the more recent trend toward emphasis on public and social interests lays a broader basis for its definition. What becomes wrongful is not only the intentional infliction of harm, or negligent failure to avoid harm, but also a failure to meet an active and affirmative duty to protect public interests.

The showing of mental state has a utilitarian aspect which the imposition of liability without fault can also be made to serve. It has been argued that deterrence (*i.e.*, preventing individuals from committing criminal acts) is effective only when the individual contemplates the act and has a period of time in which he can decide that the act should not be committed.

> The theory of deterrence rests on the premise of rational utility, *i.e.* that prospective offenders will weigh the evil

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an increasing social regulation; and for this purpose the existing machinery of the criminal law has been *seized upon and utilized.*" (emphasis added)

[24] Binavince, *supra* note 2, at 1. The reference to Germany arises from Hitler's reduction of criminal penalty to what Binavince terms a morally indifferent "security measure," thereby making many innocent people criminals.

[25] Acimovic, *Conceptions of Culpability in Contemporary American Criminal Law*, 26 LA. L. REV. 28, 37 (1965), insists that, "The general principle of the criminal law should always be that there can be no criminal offense without culpability." Sayre, *supra* note 1, at 79-80, concurs:

> When the law begins to permit convictions for serious offenses of men who are morally innocent and free from fault, who may even be respected and useful members of the community, its restraining power becomes undermined. Once it becomes respectable to be convicted, the vitality of the criminal law has been sapped.

> of the sanction against the gain of the imagined crime. This, however, is not relevant to negligent harm-doers (or a strict liability harm-doer), since they have not in the least thought of their duty, their dangerous behavior, or any sanction. Insofar as potential offenders do think of these matters, they are at least reckless when they act dangerously.[26]

Such a view, while valid as to the nature of negligent wrongdoing, is restrictively framed because of the focus on the individual. While the individual committing an illegal act with specific intent and a clearly wrongful motive is admittedly the one most likely to be deterred by considering the consequences, the imposition of a positive and high duty of care on the public can achieve a degree of positive deterrence if individuals are made aware that they are expected, on pain of criminal liability, to meet this standard.[27] Thus, from this point of view, the imposition of liability without fault serves to create a positive duty of care in the individual, a means consistent with the end of protecting public and social interests.

3. POTENTIAL UNFAIRNESS TO THE INDIVIDUAL

A criminal system, when it utilizes liability without fault, is explicitly public oriented. Public interests are given higher priority than those of the individual defendant. The effect will be harsh if the legislature fails to impose penalties based on potential for harm[28] and if in fact a defendant is unable with care to avoid the harm for which liability is imposed. Harshness will be less of a potential weakness in the model when the means selected by the legislature are tailored to the reasonable accomplishment of the end.

Imposition of strict liability would therefore be fair in two instances: (1) where a degree of care can in fact always prevent a particular harm; and (2) where there is a margin of factual circumstances in which the harm cannot be avoided, but the potential harm in all instances is great and imposition of liability without fault alone induces care sufficient to prevent the harm in most instances. If liability without fault is imposed by broadly worded statutes it is more likely to produce harsh results than if the technique is specifically applied to narrower ends. Like any other model of liability, this one is subject to weaknesses inherent in the legislative process.

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

[27] In tort the imposition of an affirmative duty is not uncommon in the law of European nations.

[28] Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. U.L. REV. 345 (1966).

D. *Sources of Support*

Cohn's operational analysis of response to crime provides a framework in which to summarize the sources of support for a system of criminal liability which includes liability without fault as a viable alternative. He divides the evolution of criminal liability into three broad stages, each of which continues to have force, though muted by subsequent development.

> This challenge, which is presented by a crime, strikes simultaneously the keys of several levels, each of which produces a reaction of its own; the deepest level sounds of dull opposition against the deed and its consequences; the higher level of passionate indignation against guilt or injustice, because the free will of the actor is assumed; the third level calls attention to a rational search for means of dealing with the case purposefully to avoid a recurrence. These disparate modes of the reaction struggle in the consciousness to gain predominance in the final integral result. Each reaction forms its own objectives according to the assumptions which it makes.[29]

Imposition of liability without fault is capable of attaining the support of each of these "disparate modes of reaction." The initial opposition to the deed and its consequences inheres in any crime. Emphasis on the consequences is especially consistent with a model developing penalties on the basis of potential harm, divorced from questions of moral fault. The secondary indignation against guilt or injustice is not lost if injustice is viewed in the broader sense as failure to meet an affirmative duty to protect public interests. Rational disposal from the point of pragmatic utility most strongly supports a model which moves beyond prohibiting certain acts, and in effect imposes an affirmative duty of care.

III. LIABILITY WITHOUT FAULT IN WISCONSIN

It is necessary to work at two levels to determine the present use of, and potential for, liability without fault in Wisconsin: (1) current reasoning which is consistent with imposition of liability without fault; and (2) existent statements about liability without fault applicable in a criminal law context.

A. *Sources*

An analysis of the *Wisconsin Statutes* to determine the extent to which the Wisconsin Legislature may have moved away from requiring a specific mental state is beyond the scope of this comment. As indicated by the 1956 study of *Wisconsin Statutes*, the great bulk of the statutes do not, on their face, make clear what mental state must be proved.[30] When some mental state is described the lan-

[29] G. COHN, EXISTENTIALISM AND LEGAL SCIENCE 127 (1967).
[30] Remington, *supra* note 4, at 625.

guage is so varied that comparison between statutes is not possible.[31] Nor are legislative records available to clarify the intent behind the words.

Conclusions drawn from statutory changes then are generally negative in nature, derived from the initial absence or subsequent deletion of fault language.[32] More positive indications can be drawn from the opinions of the Wisconsin Supreme Court. While Remington concludes that "[c]ourts cannot deal effectively with the problem [lack of clarity as to mental state in statutes] since they are not called upon to interpret the large percentage of criminal statutes,"[33] the fact remains that the court is the ultimate arbiter of challenged legislative product. While it cannot provide an overall remedial solution, it is in the position to block a trend toward liability without fault. Thus, inability to delineate from statutes the direction in which the legislature has moved may be partially offset by the assumption that a judicial response will reflect at least the more extreme legislative or administrative movements toward liability without fault.

B. Analogous Reasoning

Modes of reasoning consistent with the rationale required to support liability without fault are most pronounced in the evidentiary presumption that one intends the natural and probable consequences of his acts and in the objective standard for criminal negligence.

1. PRESUMPTION OF INTENT FOR NATURAL AND PROBABLE CONSEQUENCES

The presumption that one intends the natural and probable consequences of his act is the method that has developed for handling the difficult problem of proof of intent.[34] It can, in effect, go further and impose a duty on the defendant not to act if he cannot prove that harmful consequences were unintended. Practically

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[31] *Id.* at 635, lists these variations: "intentionally, with intent, intended to, willfully, wilful, knowingly, maliciously, fraudulently, corruptly."

[32] *See* Comment, *Liability Without Fault in the Food and Drug Statutes,* 1956 WIS. L. REV. 641, 644-45:

> The years from 1911 to the present saw a continuing elimination by amendment and repeal of express fault requirements, until today, as we noted earlier, only two provisions containing such requirements remain. At the same time the area of regulation expanded. Chapter 97 of the 1953 Wisconsin Statutes alone comprises sixty sections.

If the subsequent change includes a general rewording it may be difficult to tell whether a change in fault requirement was intentional or inadvertent. The latter is not unlikely when you deal with a complex concept with a number of seemingly interchangeable terms available.

[33] Remington, *supra* note 4, at 625.

[34] By its very nature as a presumption it is rebuttable: Welch v. State, 145 Wis. 86, 129 N.W. 656 (1911); State v. Vinson, 269 Wis. 305, 68 N.W.2d 712 (1955); State v. Carlson, 5 Wis. 2d 595, 93 N.W.2d 354 (1958).

speaking this imposition is not small, for cases have narrowed the possibilities for rebutting the presumption.

a. As the result of *Hobbins v. State*,[35] a defendant is not exempt from criminal responsibility because he considered the act not to be wrong. If wrong is taken as turning on harm, then the belief that an act is not wrong would seem to be relevant to whether or not harm was intended. When the court refuses to consider defendant's belief in right or wrong it presumes that belief in correctness of an act cannot negate intent of harmful consequences.

b. Once found wilful, a Blue Sky Law violation in *Boyd v. State*[36] was presumed intentional. The court held that "the intent he entertained when he committed the acts, *other than an intent not to commit them*, cannot excuse his violation of the statute." (emphasis added) This language sharply increases the burden placed on a defendant once it is found that the act was wilful. While the defendant might occasionally be able to prove he intended a different consequence than that which occurred, only rarely could he prove that what he intended at the time of the act was not to do the act.

c. A portion of the proof required in a nonsupport case is supplied by a statutory presumption that proof of desertion is prima facie proof of wilfulness.[37] In *State v. Frieberg*,[38] this presumption was held to establish wilfulness beyond a reasonable doubt if all the other elements of the crime have been proved. Not only is the state relieved of the burden of proving wilfulness but the defendant must counter as though full proof had been entered against him on the issue of wilfulness.

d. State v. McCarter[39] effectively illustrates the presumption in action. Defendant shot his wife in a struggle with her father but claimed he had only come to frighten her. Though defendant said he remembered nothing because he had been drinking heavily, the court found this insufficient to rebut the presumption. It did not negative the existence of a state of mind essential to the crime.[40] While rephrasing the law to read that one who kills another without justification is liable to punishment might be more logical, the route of requiring a showing of intent and then imposing a presumption regarding the existence of this intent, rebuttable in theory but less often in practice, achieves much the same result.

2. THE REASONABLE MAN STANDARD FOR NEGLIGENCE

The use of the objective standard of the reasonable man is consistent in reasoning with the imposition of liability without fault.

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35 214 Wis. 496, 505, 253 N.W. 570, 574 (1934).
36 217 Wis. 149, 163, 258 N.W. 330, 335 (1935).
37 WIS. STAT. § 52.05(6) (1967).
38 35 Wis. 2d 480, 483, 151 N.W.2d 1, 2 (1967).
39 36 Wis. 2d 608, 153 N.W.2d 527 (1967).
40 WIS. STAT. § 939.42(2) (1967).

The difference is in the degree of diligence required; the ordinary reasonable man is not viewed as perfect, or as assuming an extra duty of watchfulness, but rather as being his ordinary careful self. An absolute standard imposes an affirmative duty of diligence, even on the reasonable man—a degree of diligence strict enough so that harmful consequences will not occur.

Objective liability presently appears in two relatively narrow areas. Section 940.08 of the *Wisconsin Statutes* imposes liability on whoever causes the death of another by a high degree of negligence in the operation of a vehicle or certain listed weapons. A "high degree of negligence" is defined as an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another. The objective standard is retained but a more serious risk must be created. Section 940.09 calls for a showing of causal negligence for death caused by an intoxicated individual in the operation of a vehicle or firearm.

Though there is no clear instance of imposing criminal liability for ordinary negligence, the fact that an objective standard was chosen for statutes where dangers to the public from drunk and negligent users of vehicles and weapons were involved, reveals an amiability toward the concept.

C. *Specific Application*

Liability without fault has been applied in "regulatory criminal statutes" outside the Criminal Code.[41] This application seems to recognize the utilitarian value of liability without fault. The court in *State v. Dried Milk Products Co-operative*,[42] when considering highway weight limit violations, faced squarely the effect to be given a statute not clearly requiring intent.

> Statutes of this nature, imposing criminal penalty irrespective of any intent to violate them, have for their purpose the requirement of a degree of diligence for the protection of the public which shall render a violation thereof impossible.

In *City of West Allis v. Megna*,[43] absolute liability for the presence of a minor on premises licensed for sale of liquor was upheld—"this is a price that the operator pays for the privilege of becoming li-

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41 Platz, *The Criminal Code*, 1956 WIS. L. REV. 350, 357:

> The code . . . is by no means all the criminal law of the state. Many criminal laws—in fact the numerical majority and the quantitative bulk of them—are to be found scattered through the remainder of the statutes.
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> Roughly, these extra-code laws may be regarded as "regulatory" —statutes which regulate conduct which is not always essentially bad, or at least is tolerated under controlled conditions.

42 16 Wis. 2d 357, 362, 114 N.W.2d 252, 254 (1963).

43 26 Wis. 2d 545, 548, 133 N.W.2d 252, 254 (1963).

censed." According to the court, the law[44] was designed simply to prevent minors as patrons or customers from entering taverns.

Within the Criminal Code there has been some movement by the court, though more in discussion than holding. That a requirement of *mens rea* is not constitutionally essential clearly appears. Most recently in *Roberts v. State*,[45] the court, in considering a first degree murder and burglary conviction with a defense of intoxication, adopted the conclusion of the United States Supreme Court in *Powell v. Texas*.[46]

> [T]he court went on to state it had "never articulated a general constitutional doctrine of *mens rea*." Consequently a state can create a crime which does not contain a *mens rea* as an element.

Again in relation to a code conviction, the court concluded in *State ex rel. Schulter v. Roraff*[47] that as to the increased penalty resulting from contribution to the delinquency of a minor which leads to the minor's death,[48] "forseeability or intent that the specific consequences occur are not necessary to due process or to a crime."

The tendency, however, is to construe criminal statutes so as to require a showing of intent. Thus, in *State v. Alfonsi*,[49] after noting that "the element of scienter is the rule rather than the exception in our criminal jurisprudence," the court concluded that the statute on bribery,[50] which had previously included a requirement of "corrupt acceptance" by the person taking the bribe, did not lose that "flavor of wickedness" when the term "corrupt" was omitted in the 1953 revision of the Criminal Code. It found no indication in the judiciary committee report of a desire to change the requirement of criminal intent, and concluded that for bribery a corrupt motivation is still required.

The Hallows' dissent in *Alfonsi*[51] recognized the possibility of removing the requirement of a criminal or corrupt intent. Noting the increasing use of nonfault liability, he observed that it was no "major upheaval" or "cataclysmic alteration" to create a crime without fault. As to statutory construction he was explicit:

> Whenever the code intends a crime to include a specific criminal intent, it so provides or exact language is used which comes under sec. 939.23, Stats., which defines when intent is an element. . . .[52]

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44 WEST ALLIS MUN. CODE § 9.02(20)(c), *modeled on* WIS. STAT. § 176.32 (1) (1965).
45 41 Wis. 2d 537, 545, 164 N.W.2d 525, 528 (1968).
46 392 U.S. 514 (1968).
47 39 Wis. 2d 342, 355, 159 N.W.2d 25, 32 (1967).
48 WIS. STAT. § 947.15 (1967).
49 33 Wis. 2d 469, 476, 147 N.W.2d 550, 555 (1966).
50 WIS. STAT. § 946.10 (1965).
51 33 Wis. 2d at 485, 147 N.W.2d at 559.
52 *Id.* at 486, 147 N.W.2d at 560.

This dissent provides a channel into the Criminal Code consistent with language in previous noncode cases.

Though statutes without a fault requirement clearly are possible, a limitation must be noted which is essential to avoid arbitrariness in operation. The statute must meet a standard of definiteness so as to give adequate notice. In *Day-Bergwall Company v. State*,[53] the defendant, who was accused of violating the pure food laws, claimed that "it is a basic rule that a criminal statute should be so definite and certain that a defendant can know absolutely in advance whether or not a certain act will constitute a violation of the law." The court admitted that:

> This quotation is a proper exposition of the legal principal contended for, and has been substantially approved by the courts and by the law writers . . . . They [the laws involved] should, therefore, be reasonably definite, and should not require a defendant to enter into the realm of speculation to determine whether he is or is not committing an offense.[54]

The concept of what is required in terms of notice has been gradually narrowed.

In the context of negligence in the operation of a vehicle, the court in *State ex rel. Zent v. Yanny*[55] attacked the idea that one has a right to know how much harm he could do without becoming liable.

> It is not necessary that the law be so definite that the offending operator of a vehicle may know with certainty just how negligent he may be in causing the death of another person before he becomes criminally liable under the negligent homicide statute. (cite omitted) No operator of a vehicle has a legal right to be negligent in any degree.[56]

State v. Evjue[57] stands for the proposition that there must be sufficient warning to one bent on obedience that he comes near the proscribed area. However, some diligence is required of the individual; that is, only when one is bent on obedience does the notice requirement fully arise.

In construing a disorderly conduct statute with a catch-all phrase[58] in *State v. Givens*,[59] the court made clear that a statute does not fail for vagueness because it does not itemize with particularity every possible kind of conduct which would violate it.

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53 190 Wis. 8, 18, 207 N.W. 959, 963 (1926).
54 *Id.*
55 244 Wis. 342, 12 N.W.2d 45 (1943).
56 *Id.* at 346, 12 N.W.2d at 47.
57 253 Wis. 146, 159, 33 N.W.2d 305, 311 (1948).
58 WIS. STAT. § 947.01(1) (1963).
59 28 Wis. 2d 109, 115, 135 N.W.2d 780, 784 (1964).

Thus, it seems that one bent on obedience must still draw some conclusions as to what is prohibited.

The basis in reasoning for growth in the application of liability without fault exists in Wisconsin. The means-ends nexus has been clearly recognized and the effectiveness of casting an affirmative duty admitted. Limited objective liability is established within the Criminal Code, and more extensively in other statutes. The dissent in *Alfonsi* acknowledges the possibility of clear nonfault liability within the code, numerous cases acknowledge it outside the Code, and the limiting element of notice to potential violators is relatively narrow.

IV. CONSEQUENCES AND LIMITATIONS

The above discussion recognizes more the potential of the criminal law system than actual movement within the system, which occurs subtly and often without enunciation. As to prediction of future developments, the most that can be done is to point out the forces which would move the system in one direction or another.

That force which will increase reliance on nonfault statutes is a public perception that it is threatened in a way that requires drastic response. Such a perception may appear in the recent concern about "law and order" and the rise of the crime rate. Schur describes what he believes to be the representative view of a significant body of public opinion.

> [I]t is sometimes asserted that we are a nation of criminals, that American society is vitally menaced by an unprecedented tendency to "lawlessness", that we are experiencing a truly alarming and ever-increasing "wave" of criminal behavior, behavior that foreshadows the decline of civilized life in the United States and that demands stern action to "stem the tide".[60]

Herbert Wechsler has concluded that "the law promotes the general security by building confidence that those whose conduct does not warrant condemnation will not be convicted of a crime."[61] Under a perception of a general threat to security by a wave of lawlessness, the general security may rather be protected only by the assurance that "you will not be hurt." Liability without fault, with its imposition of an affirmative duty, might appeal to people who feel threatened as offering comprehensive protection.

The vulnerability of any system of criminal liability which relies on liability without fault is that it assumes a rational public choosing its means to meet the end of protection of the public. While the possibility of imposing liability without fault is desirable for

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[60] E. SCHUR, OUR CRIMINAL SOCIETY 12 (1969).

[61] Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1435 (1968).

responsiveness to needs, the formulation of those needs must be carefully accomplished. Likewise, determination of penalties based on potential for harm must be accurately and realistically accomplished. If the penalty is not consistent with harm the imposition on the defendant would outweigh the public interest in imposing the penalty.

The major limitation on the acceptance of liability without fault is the ethical commitment to a requirement of culpability, and the lack of desire to modify the concept of culpability to include failure to meet a high affirmative public duty. The *Model Penal Code* directly rejects imposition of liability without fault and creates a grade of offense called a violation (fine or forfeiture or other civil penalty only) which does not constitute a crime.[62] If such an approach is adopted in a jurisdiction, it may well remove the basis in reasoning for a completed model including more extensive use of liability without fault.

V. CONCLUSION

The objectives of the criminal law have largely moved from concern for the individual to concern for public and social interests. The growth of liability without fault has followed that shift and can be imposed within a rational and logical model. Liability without fault cannot be discounted as merely an imposition on the true criminal law and not an extension to be dealt with. A model which accepts liability without fault as an alternative is advantageous in its flexibility and response to needs. It is vulnerable to the abuse of those in position to perceive and promote the appropriate ends to be met. Current emphasis on moral culpability has a certain amount of inertia to it. Rearticulation of culpability occurs very slowly. A model which accepts liability without fault is highly plastic. If the basis in reasoning has been laid for such a model, as it arguably has in Wisconsin, careful consideration is due to the means most appropriate to the range of ends promoting the public interest, and to the processes by which the means shall be selected.

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[62] *Id.* at 1439.