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Good Faith Defenses: Reshaping Strict Liability Crimes

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GOOD FAITH DEFENSES: RESHAPING STRICT LIABILITY CRIMES

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INTRODUCTION

For years, courts and commentators have struggled with the criminal strict liability doctrine.[1] It is a doctrine that contradicts the most basic principles of modern criminal law.[2] Ordinarily, a criminal offense requires both a voluntary act (*actus reus*) and a culpable state of mind (*mens rea*).[3] Strict liability permits the conviction of a criminal defendant in the absence of mens rea.[4] In ignoring the defendant's intent,[5] the strict liability doctrine even allows for punish-

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1 *See, e.g.*, HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) [hereinafter PACKER, LIMITS]; Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463 (1967); Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966); James J. Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039 (1973); R. M. Jackson, *Absolute Prohibition in Statutory Offences*, 6 CAMBRIDGE L.J. 83 (1936-38); Phillip E. Johnson, *Strict Liability: The Prevalent View*, *in* 4 ENCYCLOPEDIA OF CRIME & JUST. 1518-21 (Sanford H. Kadish ed., 1983); Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257 (1987); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 [hereinafter Packer, *Mens Rea*]; G.L. Peiris, *Strict Liability in Commonwealth Criminal Law*, 3 LEGAL STUD. 117 (1983); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067 (1983); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960); Joseph Yahuda, *Mens Rea in Statutory Offences*, 118 NEW L.J. 330 (1968); Note, *Constitutionality of Criminal Statutes Containing No Requirement of Mens Rea*, 24 IND. L.J. 89 (1948); Claire D. Johnson, Note, *Strict Liability Crimes*, 33 NEB. L. REV. 462 (1954); William J. Sloan, Note, *The Development of Crimes Requiring No Criminal Intent*, 26 MARQ. L. REV. 92 (1942).

2 *See* Kadish, *supra* note 1, at 267; John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1373-74 (1979).

3 *See* Gerhard O.W. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1052 (1958).

4 *See* Jackson, *supra* note 1, at 83; *see also* Saltzman, *supra* note 1, at 1577 ("Strict criminal liability is often referred to as liability without mens rea."). By definition, strict liability "means no requirement of *mens rea*; i.e., no guilty knowledge or evil or wrongful purpose; it means, in some circumstances, that a criminal prosecution may take place where the defendant does not even know the facts which result in criminal liability." Robert J. Jossen, *Strict Liability in Criminal Cases—The Present Day Implications of* Dotterweich *and* Park, *in* MENS REA: STATE OF MIND DEFENSES IN CRIMINAL AND CIVIL FRAUD CASES 33, 35 (Stanley S. Arkin & John R. Wing eds., 1985).

5 *See* Note, *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1262 (1979) ("The Supreme Court has declared that no inquiry into the intent of the actor is required to establish liability under these statutes, only a finding that the defendant's conduct or neglect constitutes a proximate cause of the alleged violation.").

ment of individuals who, because of deception, unwittingly commit prohibited acts.[6] Not surprisingly, many scholars are critical of the doctrine.[7] Commenting on the imposition of liability without regard to the defendant's state of mind, Professor Kadish stated, "If a principle is at work here, it is the principle of 'tough luck.' "[8]

Yet, arguments against criminal strict liability have not convinced everyone.[9] In particular, prosecutors and legislators welcome the use of strict liability crimes.[10] Convictions are more easily obtained if the prosecution need not prove a culpable mental state. Intent, often the most difficult issue to prove,[11] must be shown indi-

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6 *See* Jackson, *supra* note 1, at 88 ("Where absolute liability has been created, and there are no statutory defences or the defendant does not come within them, evidence that the defendant acted in good faith and took reasonable care is useless as a defence although it may properly be given in mitigation of the penalty."); *see, e.g.*, United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987), *aff'd sub nom.*, United States v. United States Dist. Court, 858 F.2d 534 (9th Cir. 1988) (defendants misled as to legal age of female seeking to be employed as actress in pornographic film); Noble v. State, 223 N.E.2d 755 (Ind. 1967) (defendant, employed in state automobile license office, was convicted of making false attestation as notary when she falsely notarized document while following long-standing office procedures under supervisor's direction); State v. Gould, 40 Iowa 372 (1875) (defendant convicted of obstructing a highway after building a fence based on a survey made by a county surveyor); Commonwealth v. Olskefski, 64 Pa. D. & C. 343 (Montour County Ct. 1948) (truck driver convicted of driving an overloaded truck on the highway even though he had innocently and justifiably relied upon an erroneous weight certificate issued by a state licensed weight master); *see also* City of West Allis v. Megna, 133 N.W.2d 252 (Wis. 1965) (tavern operator convicted for permitting a minor to loiter in his tavern. Tavern operator relied on false identification card presented on previous occasion and minor's mature appearance. Court stated that even if false identification was present on date of offense, tavern operator would be strictly liable).

7 *See* Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 742-48 (1981) (arguing that the imposition of strict criminal liability in economic regulation cases contradicts the "morality of means," which concerns the propriety of methods in achieving social ends); Cuomo, *supra* note 1, at 516-22 (criticizing criminal strict liability as irrational and inadequate for retributive, deterrent, rehabilitative, and incapacitative purposes); Hippard, *supra* note 1, at 1040 (urging the unconstitutionality of strict criminal liability); Packer, *Mens Rea, supra* note 1, at 109 (asserting the irrationality of strict criminal liability); Perkins, *supra* note 1, at 106 (arguing that imprisonment in absence of fault violates 8th and 14th Amendments); Saltzman, *supra* note 1, at 1574 (urging rejection of criminal strict liability as unconstitutional); *cf.* Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973) (arguing that civil strict liability without contributory negligence defense is inefficient). In fact, the dominant view appears to be that in the Anglo-American culture, the use of strict liability crimes is arbitrary and unreasonable. Mark Kelman, *Strict Liability: An Unorthodox View*, *in* 4 ENCYCLOPEDIA OF CRIME & JUST. 1512-18 (Sanford H. Kadish ed., 1983).

8 Kadish, *supra* note 1, at 267.

9 *See* James B. Brady, *Strict Liability Offenses: A Justification*, 8 CRIM. L. BULL. 217 (1972); Ingeborg Paulus, *Strict Liability: Its Place in Public Welfare Offences*, 20 CRIM. L.Q. 445 (1977-78); Steven S. Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517 (1975).

10 Indeed, an increasing trend to use strict liability crimes exists. *See* Perkins, *supra* note I, at 1068-70 (1983); *see also infra* note 76.

11 Commonwealth v. Smith, 44 N.E. 503, 504 (Mass. 1896).

rectly from a defendant's statements and conduct.[12] Application of criminal strict liability relieves the state of this burden. The strict liability doctrine affords both an efficient and nearly guaranteed way to convict defendants.

Caught in the middle of this dispute are the trial courts. While judges wish to uphold legislative intent and enforce the laws as enacted, they must also confront, face-to-face, individual strict liability defendants for whom punishment simply is not warranted.[13] Trial judges may find it hard to imprison, even for a short period, a person who has not committed a crime intentionally.[14]

Presently, the strict liability doctrine operates as an irrebuttable presumption.[15] Once an individual is shown to have committed an impermissible act, the law presumes some level of culpable intent justifying punishment.[16] This basic presumption, however, is not always valid. Sometimes a defendant will face several years in jail despite having taken extraordinary efforts to comply with the law.[17] In these situations, the irrebuttable presumption will unjustly convict an individual who is not criminally culpable. Because the defendant took all reasonable preventive steps and was still unaware of the un-

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12 SEVENTH CIRCUIT JUDICIAL CONFERENCE COMM. ON JURY INSTRUCTIONS, MANUAL ON JURY INSTRUCTIONS IN FED. CRIM. CASES § 4.04, *reprinted in* 33 F.R.D. 523, 550 (Walter J. La Buy, Chairman 1963).

13 Judge Marvin E. Frankel's article, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4-10 (1972), describes the personal nature of the sentencing process in punishing a defendant, especially when the sentencing judge is granted broad discretion.

14 See *infra* part II.C for a discussion of certain acts punishable as strict liability crimes that do not warrant sanctions under traditional principles of retribution and deterrence.

15 *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 9.3.2, at 716 (1978); Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on* Dotterweich *and* Park, 28 UCLA L. REV. 463, 466 (1981); Mueller, *supra* note 3, at 1092.

16 Packer, *Mens Rea, supra* note 1, at 140. Furthermore, the Supreme Court has fostered a misperception that culpability is irrelevant because of the absence of severe punishment. In Morissette v. United States, 342 U.S. 246 (1952), the Court identified strict liability crimes as public welfare offenses where the "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Id.* at 256. Where minimal sanctions are imposed, *Morissette* permits courts to construe statutes as dispensing with the requirement of guilty intent.

17 *See supra* note 6. Many strict liability statutes set forth severe punishment which, if a good faith defense is not recoguized, may be imposed. *See, e.g.*, United States v. Balint, 258 U.S. 250 (1922) (strict liability narcotics charge; five year maximum sentence); United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987), *aff'd sub nom*, United States v. United States Dist. Court, 858 F.2d 534 (9th Cir. 1988) (strict liability poruography charge; 10 year maximum sentence); People v. Keating, No. BA 025236 (Super. Ct. Cal. 1991) (strict liability securities fraud charge; five year maximum sentence); State v. Quinn, 59 So. 913 (La. 1912) (strict liability bribery charge; five year maximum sentence); State v. Lindberg, 215 P. 41 (Wash. 1923) (strict liability bank loan charge; 10 year maximum sentence); States v. Hennessy, 195 P. 211 (Wash. 1921) (strict liability criminal syndicalism charge; five year maximum sentence).

lawful nature of his conduct, traditional purposes of punishment would not be served by prosecuting this individual.[18]

This Article proposes an alternative to the irrebuttable presumption—a good faith defense to strict liability crimes. By definition, the good faith defense would reinsert the issue of mens rea into certain criminal strict liability cases. In limited cases, defendants could attempt to prove beyond a reasonable doubt that they operated under an honest and reasonable mistake of fact because they took affirmative steps to comply with the law but were misled in their efforts.[19] The good faith defense would reintroduce mens rea, not as an element that the prosecution must prove for conviction, but as an element a defendant must disprove for acquittal.

Those favoring the strict liability doctrine may worry that the good faith defense will transform all strict liability trials into disputes over defendants' intent. However, certain important limitations on the defense would minimize this concern. First, the good faith defense would impose a heavy burden of proof—beyond a reasonable doubt. This high burden would ensure that individuals committing prohibited strict liability acts will be punished. The prosecution would remain free from its ordinary burden of proving a culpable mens rea. Second, the proposed defense would be limited to crimes involving incarceration. The defense would not be available for strict liability offenses punishable only by fines. Incarceration, with its unique effects on both the defendant's liberty and status in the community, requires moral culpability.[20]

Adoption of the good faith defense necessitates a reexamination of traditional concepts of American criminal jurisprudence. The defense requires a shift in our ordinary approach to burden of proof,[21] as well as a broader understanding of the nature of strict liability offenses.[22] Nonetheless, this Article demonstrates that the good faith defense is neither a radical nor unprincipled step. Not only do foreign countries routinely apply the good faith defense[23] but even conservative members of American courts consider it an

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18 Kelman, *supra* note 7, at 1515.

19 *See infra* part III.B.

20 *See* Packer, *Mens Rea*, *supra* note 1, at 150 ("The combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes.").

21 Ordinarily, the prosecution bears the burden of proving each element of the offense beyond a reasonable doubt. *In re* Winship, 397 U.S. 358, 364 (1970).

22 Strict liability has been defined as "criminal liability without negligence as to an element of the offense . . . ." Saltzman, *supra* note 1, at 1576. The good faith defense essentially transforms a strict liability crime into a negligence offense, in which the defendant must prove reasonable conduct under the circumstances. *See infra* part III.A.

23 *See infra* part III.A.

alternative to traditional strict liability doctrine.[24] Important strict liability prosecutions, such as the Traci Lords child pornography case[25] and the trial of Lincoln Savings and Loan Association president Charles Keating,[26] illustrate the need to develop an alternative to our current approach to strict liability crimes. The good faith defense offers a proven and viable alternative.

Part One of this Article examines *United States v. Kantor*.[27] This case affords an overview of criminal strict liability and the arguments both for and against it. More importantly, *Kantor* is a rare example of an American court relying on a good faith defense.

Part Two looks more closely at the strict liability doctrine. The discussion comprises three sections. The first section reviews from a theoretical perspective the rationales for the strict liability doctrine. The second section scrutinizes these rationales and identifies the theoretical and practical problems associated with the strict liability doctrine. The third section addresses traditional judicial alternatives employed to avoid the harsh effects of strict liability and discusses why these alternatives do not deal successfully with the recognized inequities of the strict liability doctrine.

Part Three of this Article proposes a solution. It reviews the approaches that foreign countries use to reconcile the strict liability debate. It then contrasts these approaches with the traditional American view of strict liability crimes. Part Three next identifies a basis in American constitutional law—the right to due process[28]—as a foundation for adopting a good faith defense in our country. Finally, Part Three sets forth a model good faith defense that would accommodate both those interests supporting the strict liability doctrine and those interests opposing its application.

I

IDENTIFYING THE PROBLEM: *UNITED STATES V. KANTOR*

A. The Case

While the criminal strict liability doctrine has been applied in various ways,[29] one of the most provocative cases is *United States v.*

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24 *See* United States v. United States Dist. Court [Kantor], 858 F.2d 534 (9th Cir. 1988). The opinion was written by Reagan appointee Judge Alex Kozinski, who is described as "young, white, male, staunchly conservative, and vehemently anti-Communist." Susan Rice, *Alex Kozinski*, L.A. DAILY J., Sept. 29, 1988, *reprinted in* 3 JUD. PROFILES.

25 United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987), *aff'd sub nom*, United States v. United States Dist. Court [Kantor], 858 F.2d 534 (9th Cir. 1988).

26 People v. Keating, No. BA 025236 (Super. Ct. Cal. 1991).

27 *Kantor*, 677 F. Supp. at 1421.

28 U.S. CONST. amends. V, XIV.

29 In a seminal article published in 1933, Professor Sayre listed those public welfare offenses deemed "strict liability offenses." Sayre, *supra* note 1, at 73. They included:

United States District Court for the Central District of California [Kantor].[30] The case exemplifies why the strict liability doctrine is used and why it is opposed. The case is unusual, however, because the court used a good faith defense to address the problem of incarcerating defendants who, despite their reasonable efforts, were misled into committing a criminal act.

In 1984, President Ronald Reagan began his "war" against pornography.[31] Shortly thereafter, the federal government charged defendants Kantor and McNee, admitted producers of pornographic films, with violating the federal child pornography law. This law prohibits the production of materials depicting a minor[32] engaged in sexually explicit conduct.[33] The crime carries a maximum penalty of ten years in jail.[34]

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(1) Illegal sales of intoxicating liquor;
  (a) sales of prohibited beverage;
  (b) sales to minors;
  (c) sales to habitual drunkards;
  (d) sales to Indians or other prohibited persons;
  (e) sales by methods prohibited by law;
(2) Sales of impure or adulterated food or drugs;
  (a) sales of adulterated or impure milk;
  (b) sales of adulterated butter or oleomargarine;
(3) Sales of misbranded articles;
(4) Violations of anti-narcotic acts;
(5) Criminal nuisances;
  (a) annoyances or injuries to the public health, safety, repose or comfort;
  (b) obstructions of highways;
(6) Violations of traffic regulations;
(7) Violations of motor-vehicle laws;
(8) Violations of general police regulations, passed for the safety, health or well-being of the community.

Today this list might also include: child pornography (18 U.S.C. § 2251 (Supp. II 1990)); bank fraud (18 U.S.C. § 1005 (Supp. II 1990)); and narcotics transactions involving minors (21 U.S.C. § 860 (Supp. II 1990)).

30 858 F.2d 534 (9th Cir. 1988), *aff'g* United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987).

31 When signing the Child Protection Act of 1984 into law, President Reagan stated: "[Child] pornography is ugly and dangerous. If we do not move against it and protect our children, then we, as a society, just aren't worth much." *Child Protection Act of 1984, Remarks on Signing H.R. 3635 Into Law*, 20 WEEKLY COMP. PRES. DOC. 743 (May 21, 1984).

32 "Minor" is defined as "any person under the age of eighteen years." 18 U.S.C. § 2255(1) (Supp. IV 1986 & Supp. II 1990).

33 The Child Protection Act of 1984, the law violated in *Kantor*, was codified at the time of the offense at 18 U.S.C. § 2251 (Supp. IV 1986). Despite several minor revisions and subsequent re-codifications, the law remains substantially the same as that violated in *Kantor*. The current codification is 18 U.S.C. § 2251 (Supp. II 1990).

34 18 U.S.C. § 2251(d) (1988) provides:

> (d) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both . . . .

Defendants Kantor and McNee had employed Traci Lords,[35] an underage actress, in several of their pornographic films.[36] While defendants admitted making the films, they argued they did not know, and had no reason to believe, that Lords was underage at the time of production.[37] Defendants sought to introduce evidence that Lords, her parents, and her agent made considerable efforts, including producing a false birth certificate and driver's license, to deceive defendants into believing that Lords was old enough to make the films.[38] Additionally, both Lords' physical appearance and reputation in the industry supported her agent's claim that she was an adult.[39] Based on this evidence, defendants argued it was reasonable to believe Lords was of legal age when they hired her.

In a motion to preclude any evidence tending to show defendants' mistaken belief about Lords' age, the prosecution argued that defendants' good faith belief was irrelevant given the strict liability nature of the crime.[40] Defendants moved to dismiss the charges as violating their First Amendment rights because of their good faith belief that they had complied with the law.[41]

The legislative history of the statute indicated that the crime was "a strict liability offense."[42] Both houses of Congress had originally drafted bills making it unlawful for any person "knowingly" to employ, entice, or coerce a minor to engage in sexually explicit conduct.[43] When the Justice Department protested that the "knowingly" requirement would grant defendants a mistake of fact

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35 For an earthy discussion of Traci Lords' acting career, see Pat Jordan, *Traci Lords With Her Clothes On*, GENTLEMEN'S Q., Apr. 1990, at 250.

36 United States v. Kantor, 677 F. Supp. 1421, 1422-23 (C.D. Cal. 1987), *aff'd sub nom.*, United States v. United States Dist. Court, 858 F.2d 534 (9th Cir. 1988).

37 *Kantor*, 677 F. Supp. at 1423. Defendants did not contest Lords' minority but instead argued that given her misrepresentations, they did not know, nor had reason to believe, that she was underage.

38 Defendants' evidence included: (1) photographic and testimonial evidence that Lords appeared physically mature when she made the film and acted with a demeanor and sophistication and apparent sexual experience that belied her minority; (2) evidence that Lords and those responsible for her employment produced a false California photographic identification of her age, as well as release forms and other official documents that misrepresented her age; and (3) evidence that Lords had appeared in two mass-marketed magazines that were known to investigate the age of their models. United States v. United States Dist. Court, 858 F.2d at 540.

39 *Id.*

40 Courts in other jurisdictions had previously rejected efforts to inject a mens rea requirement into the child pornography offense. *See* United States v. Kleiner, 663 F. Supp. 43 (S.D. Fla. 1987).

41 United States v. United States Dist. Court, 858 F.2d at 536.

42 *Id.* at 538.

43 *Id.*

defense,[44] the legislators removed the term.[45] The conference committee accepted the House version "with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child."[46]

Despite acknowledging the strict liability nature of the offense, both the trial and appellate courts in *Kantor* hesitated to apply strict liability to individuals deceived into committing a crime. Making pornographic films is not illegal.[47] Prosecution of the case appeared to violate both the First Amendment and due process principles. By permitting prosecution of defendants who reasonably believed their employee was an adult, the statute could potentially censor a protected form of artistic expression.[48] The First Amendment protects the right to film hard core pornographic scenes, even those with teenagers in their late teens.[49] Strict liability for using underage subjects might deter producers from making adult films in which the actors and actresses were of legal age.[50] Given this First Amendment issue, the trial court believed it had to either invalidate the statute or engraft some type of defense onto the statute to allow defendants to prove their good faith belief that their employee was over eighteen years old.[51]

Apart from the First Amendment concern, the trial court believed "allow[ing] an employer to be imprisoned and severely [sic] fined based upon a factual error, which might have been the product of trickery and deception" was fundamentally unfair.[52] According to the trial court, due process requires that if lengthy incarceration is to be based on a defendant's factual error, "the error cannot be one into which the person had been intentionally and convincingly tricked."[53]

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44 S. REP. No. 438, 95th Cong., 1st Sess. 29 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 64; H.R. REP. No. 696, 95th Cong., 1st Sess. 21-22 (1977).

45 *See* H.R. REP. No. 696, at 12.

46 H.R. CONF. REP. No. 811, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 69, 69; S. CONF. REP. No. 601, 95th Cong., 1st Sess. 5 (1977).

47 *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) ("The First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value.").

48 United States v. United States Dist. Court, 858 F.2d 534, 538 (9th Cir. 1988), *aff'g* United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987).

49 New York v. Ferber, 458 U.S. 747, 763-64 (1982).

50 As the Supreme Court noted in Smith v. California, 361 U.S. 147 (1959), legal doctrines such as strict liability, although generally constitutional, "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Id.* at 151.

51 *Kantor*, 677 F. Supp. at 1432-33.

52 *Id.* at 1435.

53 *Id.*

In addressing these concerns, the trial court sought an alternative that would balance the legislature's interest in aggressive prosecution of child pornography cases with the defendants' First Amendment and due process interests in having a factfinder adjudge their culpability. The court relied on a good faith defense. Under this judicially created defense, the court held that the defendants, not the prosecution, would bear the burden of proving lack of knowledge by the defendants.[54] The prosecution need only prove that defendants made the pornographic films, and that some aspect of producing or distributing those films affected interstate commerce.[55] No proof that defendants knew or suspected Lords' young age would be required.

After the prosecution proved its case, the defendants could prove "the defense of a good faith, reasonable mistake of fact as to Lords' actual age."[56] The defendants would be required to carry the burden of proving this mistake to the jury. By allowing this defense, the court could give effect to clear congressional intent to create a crime in which the defendants' knowledge of Lords' age would not be an element of the offense. The court would nonetheless allow the defendants to introduce evidence of their mental states as a defense to the crime.

On appeal, the government challenged this perceived disregard for legislative will. The statute did not "allow a minor's guile to create a 'reasonable mistake' excuse; pornographers must take whatever steps are necessary to establish the age of the subjects they depict—or they must employ different subjects."[57] The prosecution argued that implicit within the nature of a strict liability offense was that no evidence regarding the defendants' intent could be offered at trial.[58] The prosecution also argued that the state's interest in protecting children against pornography outweighed the defendants' First Amendment rights and that the legislature alone should balance these interests.[59] If the legislature wanted to create a strict

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54 *Id.*

55 18 U.S.C. § 2251(a) (1988).

56 *Kantor*, 677 F. Supp. at 1435.

57 United States v. United States Dist. Court, 858 F.2d 534, 544 (9th Cir. 1988) (Beezer, J., dissenting), *aff'g* United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987).

58 *Id.* at 536.

59 Judge Beezer agreed with the government. He wrote:

> Section 2251(a), which serves a government interest of the utmost importance, does not pose a substantial threat of inhibiting protected expression. The statute as written is constitutional; the first amendment does not call for a reasonable mistake defense. As a practical matter, such a defense offers little benefit at great cost.

Id. at 547 (Beezer, J., dissenting).

liability offense, the court had no authority to fashion a mens rea defense.[60]

Somewhat surprisingly,[61] the Ninth Circuit rejected the government's argument and upheld the good faith defense.[62] Writing for the majority, Judge Alex Kozinski found a good faith defense compatible with the concept of a strict liability crime. The court viewed the good faith defense as a proper means of balancing the government's interest in using a strict liability standard against the defendants' interest in being punished only for culpable acts.[63] The court believed it had both the right and the responsibility to balance these conflicting interests[64] particularly when "specific constitutional guarantees" were threatened.[65] According to the Ninth Circuit, Congress' interest in protecting minors from exploitative use in pornographic films only relieved the prosecution from proving intent.[66] It did not preclude a defense based upon the defendants' good faith mistake as to Lords' age.

In order to prove their lack of culpability, the court required defendants to show by clear and convincing evidence that they were mistaken as to Lords' age, and that they had been misled in their

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60 According to the dissent, Congress could create a crime forcing defendants to act at their own peril because the need for strict liability outweighed the defendants' countervailing interests in producing films: "Congress intended to protect children like Traci Lords, who try to pass as adults to appear in pornography. . . . Section 2251(a) is the strongest protection for such children. It puts the burden on producers of pornography to establish that their subjects are not minors." *Id.* at 544 (Beezer, J., dissenting).

61 This result was a surprising display of judicial activism. Rather than adhering strictly to the text of the statute, the court permitted a defense not provided by Congress. *Id.* at 542.

62 *Id.*

63 The court's language reveals the tensions it faced. Although the case involved a First Amendment issue, the opinion also discloses an underlying concern for "fairness." The Court of Appeals stated that the good faith defense was "grounded in common law notions of public policy." *Id.* at 543. The district court stated more explicitly:

> When a factual error made by one who knowingly engages in a regulated activity which could have been abolished, and by mistake of fact seriously injures a strong interest of the "innocent public," it does not seem particularly *unfair* to punish the person even where the penalty is large. There is a sense of injustice, however, when a person is punished where the "innocent public" is not innocent, but is instead another individual who, by his own connivance, has produced the error, but for which, no crime would have been committed.

United States v. Kantor, 677 F. Supp. 1421, 1435 (C.D. Cal. 1987) (emphasis added), *aff'd sub nom.*, United States v. United States Dist. Court, 858 F.2d 534 (9th Cir. 1988).

64 United States v. United States Dist. Court, 858 F.2d at 542-43.

65 *Id.* Although the primary constitutional issue was the First Amendment challenge to the statute, a due process basis for the decision appeared as well. Analogizing the case to one in which due process required the court to consider an outrageous government conduct defense, the court held that it bad the power to engraft a narrow mistake of age defense in order to avoid constitutional infirmity. *Id.* at 542.

66 Defendants argued that the government must prove scienter as part of its case. The court expressly rejected this suggestion. *Id.* at 543 n.6.

efforts to ascertain the truth.[67] The good faith defense would, therefore, continue to require that those in the industry use the highest level of caution in selecting actors. The law would presume that the hiring of an underage actress was not accidental. Nonetheless, if the defendants could make an affirmative showing of their efforts to comply with the law, they would avoid conviction.[68] As might be expected, once the court recognized the good faith defense, the prosecution dropped its case against the producers in *Kantor*.[69]

B. The Debate

The *Kantor* case is a microcosm of the strict liability debate.[70] Congress may be tempted to pass strict liability statutes to provide maximum protection from certain conduct. If the prosecution need not prove the defendant's intent, its burden becomes considerably lighter.[71] Thus, strict liability presents an attractive alternative for combatting conduct such as child pornography.

On the other hand, *Kantor* shows how the strict liability doctrine, if left unchecked, can violate one of the most basic principles of criminal law: that criminal liability is warranted only when a defendant is proven culpable. It is easy to presume that pornography producers know that minors audition for their films, especially now that many youth tragically try to pass themselves off as adults to gain the "wealth" and "glamour" of a film career. However, given the primacy of culpability in criminal law, each criminal case must be

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67 *Id.* at 543 n.5.

68 *Id.* The court acknowledged that it intended to create a very narrow defense:

> Such a defense would be entirely implausible under most circumstances, particularly in cases involving children or prepubescent teenagers. Even when dealing with older teenagers, a defendant would have a tough row to hoe in convincing a jury that he had acted with appropriate prudence in ensuring that the actor or actress was an adult. Cases like this one, where the actress allegedly engaged in a deliberate and successful effort to deceive the entire industry, are likely to be exceedingly rare; even in those rare instances, juries may well be skeptical and choose to convict.

Id. at 542-43.

69 Telephone interview with Ronni McClaren, Assistant U.S. Attorney, Central District of California (Jan. 30, 1991), *cited in* Jörn Axel Holl, Note, *Judges, Congress and the Sixteen-Year-Old Porn Star: Questions on the Proper Role of the First Amendment*, 75 IOWA L. REV. 1355, 1365 n.90 (1990).

70 Three student notes have addressed the *Kantor* case. Their focus, however, has been limited to the decision's First Amendment implications. *See* Holl, *supra* note 69; Janelle E. Pretzer, Note, United States v. United States Dist. Court (Kantor): *Protecting Children From Sexual Exploitation or Protecting the Pornography Producer?*, 20 PAC. L.J. 1343 (1989); Robert R. Strang, Note, *"She Was Just Seventeen . . . And The Way She Looked Was Way Beyond [Her Years]": Child Pornography and Overbreadth*, 90 COLUM. L. REV. 1779 (1990).

71 Kelman, *supra* note 7, at 1515 (arguing that "proof of state of minds is administratively burdensome").

judged on its own merits. In some cases, the defendant is not the villain and the child is not the victim. *Kantor* was one such case.

Society has not chosen to ban all pornography; in fact, the First Amendment protects its production. Strict liability punishes individuals (such as the defendants in *Kantor*) who have engaged in constitutionally protected activity, endeavored to comply with the law, and acted as anyone else would under the circumstances. Those who attempt to comply with the law and produce constitutionally protected material should not be convicted on par with those who intentionally exploit children.

Over the course of time, the strict liability doctrine has been used to prosecute individuals who are not clearly culpable. Examples of convictions include: a widow convicted for adultery who remarried after being told her husband was dead when, unbeknownst to her, he was still alive;[72] a farmer convicted for trespass who erected a fence on another's land after being given a faulty survey report by government officials;[73] and a food retailer convicted for selling adulterated products when he had no involvement in the sale.[74] Society ordinarily would not want to punish these individuals because they acted as reasonable persons would have under similar circumstances. For such individuals, the good faith defense can reshape strict liability crimes into offenses that consider individual culpability.

As the financial and environmental hazards affecting public welfare increase, the strict liability doctrine will be invoked more frequently by legislatures and prosecutors. At the same time, the strict liability doctrine is more likely to be misapplied to offenses that should require proof of intent.[75] Recent evidence bears out this trend.[76] For example, President George Bush launched his own

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72 Regina v. Tolson, 23 Q.B.D. 168 (1889); *see also* Commonwealth v. Mash, 48 Mass. (7 Met.) 472 (1844) (bigamy conviction proper even when defendant reasonably but mistakenly believes his first wife to be dead).

73 State v. Gould, 40 Iowa 372 (1875).

74 Groff v. State, 171 Ind. 547 (1909) (defendant did not sell product and had left express instructions to his employee not to sell it).

75 In discussing public welfare offenses, Dean Sayre warned of this danger.

> The modern rapid growth of a large body of offenses punishable without proof of a guilty intent is marked with real danger. Courts are familiarized with the pathway to easy convictions by relaxing the orthodox requirement of a *mens rea*. The danger is that in the case of trne crimes where the penalty is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare offenses may now and again similarly relax the *mens rea* requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions.

Sayre, *supra* note 1, at 79.

76 In the last five years, at least seven federal statutes have been codified or recodified to impose strict liability for offenses carrying possible punishment of incarceration.

"war" against those perceived as responsible for the massive failures of financial institutions. Not surprisingly, early savings and loan fraud cases included attempts to use strict liability charges. In the recent prosecution of Charles Keating, the former president of

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See, e.g., Tobacco Adjustment Act of 1984, 7 U.S.C. § 509 (Supp. II 1990) (imprisonment up to five years for failure to comply with tobacco manufacturer's reporting requirements); Federal Trade Commission Act, 15 U.S.C. § 50 (1988) (imprisonment up to one year for failure to answer commission inquiry); Wholesale Meat Act, 21 U.S.C. § 676 (1988) (imprisonment up to one year for distribution or attempted distribution of adulterated article); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 331, 333 (1988) (imprisonment up to one year for distribution of adulterated or mislabeled food or drugs); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 938 (1988) (imprisonment up to one year for employer's failure to secure payment of workers' compensation to employee); Antitrust Amendments Act of 1990 (amending Sherman Act), 15 U.S.C. §§ 1-3 (Supp. II 1990) (imprisonment up to three years for contract, trust, or conspiracy in restraint of trade).

The prosecution and conviction rate for regulatory crimes, many of which are prosecuted under strict liability principles, is also increasing. As the charts below indicate, defendants prosecuted under federal public-order offenses increased by 33% from 1980 to 1988, the number of convictions under these statutes increased by 27%, and the percentage of defendants convicted of these crimes who were sentenced to prison increased from 31.0% to 40.6%. The average sentence length for conviction also rose from approximately two years to two years, three months.

Table 5.10: Defendants Prosecuted in U.S. District Courts

	1980		1985		1986		1987		1988	
	Number	%	Number	%	Number	%	Number	%	Number	%
Public-order offenses	12,696	38.9	16,837	49.7	16,764	46.4	16,673	49.6	16,921	47.3
Regulatory offenses	1,936	31.1	2,548	39.2	2,520	35.8	2,867	38.3	3,064	39.2
Agriculture	75	24.8	241	57.7	183	44.5	340	68.4	418	68.0
Antitrust	154	84.6	55	77.5	65	89.0	114	79.2	100	82.0
Fair labor standards	16	39.0	27	47.4	26	63.4	19	46.3	19	47.5
Food and drug	233	49.4	237	63.7	402	72.6	475	75.4	494	79.2
Motor carrier	61	53.5	85	59.9	76	57.1	75	52.1	86	45.3
Other regulatory offenses	1,397	27.4	1,903	34.9	1,768	30.3	1,844	30.6	1,947	31.2

Table 5.11: Defendants Convicted in U.S. District Courts

	1980	1985	1986	1987	1988	1989
Public-order offenses	11,893	15,132	15,193	14,500	14,593	15,120
Regulatory offenses	1,828	2,167	2,010	1,847	1,965	2,010
Agriculture	308	369	174	167	261	244
Antitrust	125	118	74	110	178	110
Fair labor standards	30	38	42	60	34	29
Food and drug	105	86	85	72	50	120
Motor carrier	73	104	82	52	66	59
Other regulatory offenses	1,187	1,452	1,553	1,386	1,376	1,448

Table 5.12: Offenders Sentenced to Prison in U.S. District Courts

1980		1985		1986		1987		1988		Preliminary 1989	
Number	%	Number	%	Number	%	Number	%	Number	%	Number	%
3,690	31.0	5,410	35.8	5,682	37.4	5,312	36.6	5,395	37.0	6,145	40.6
484	26.5	661	30.5	688	34.2	601	32.5	640	32.6	742	36.9
54	17.5	51	13.8	24	13.8	16	9.6	52	19.9	37	15.2
32	25.6	6	5.1	7	9.5	11	10.0	43	24.2	22	20.0
11	36.7	4	10.5	2	4.8	3	5.0	6	17.6	2	6.9
5	4.8	10	11.6	13	15.3	19	26.4	8	16.0	24	20.0
2	2.7	34	32.7	18	22.0	15	28.8	27	40.9	21	35.6
380	32.0	556	38.3	624	40.2	537	38.7	504	36.6	636	43.9

Lincoln Savings and Loan Association,[77] the prosecution asserted that the charge of aiding and abetting the sale of securities through misstatements of material fact[78] did not require a showing of knowledge or intent, and Keating could be found guilty regardless of his awareness of any misstatements.[79] According to the prosecution, Keating could be responsible for the criminal acts of his subordinates by virtue of his supervisory position.[80] Arguing that his knowledge of any misstatements was irrelevant, the prosecution asked the court to bar all evidence that Keating had instructed his staff not to use misrepresentations.[81] According to the prosecution, if any member of Keating's staff made the misrepresentations, his or her guilt should be imputed to Keating.[82] The prosecution proposed to hold Keating "responsible for an offense which, no matter how careful, no matter how honest, no matter how decent and law abiding he may be, [he] could not by the most diligent effort know about."[83]

Table 5.13: Average Length of Prison Sentences for Offenders Convicted in U.S. District Courts

	Average sentence length for convicted offenders sentenced to prison (in months)					
	1980	1985	1986	1987	1988	Preliminary 1989
Public-order offenses	24.5	32.7	36.9	35.5	30.7	27.0
Regulatory offenses	25.3	37.7	47.2	42.1	30.4	22.8
Agriculture	12.4	16.3	6.2	11.7	7.4	7.9
Antitrust	3.2	5.3	10.7	3.6	8.3	13.5
Fair labor standards	53.0	10.2	36.0	2.0	8.7	5.0
Food and drug	4.4	9.5	24.9	17.1	12.6	11.3
Motor carrier	66.5	10.2	6.9	10.2	23.6	11.8
Other regulatory offenses	28.3	42.4	50.9	45.8	35.6	24.8

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, pub. no. NCJ-125616, FED. CRIM. CASE PROCESSING, 1980-87, ADDENDUM FOR 1988 AND PRELIMINARY 1989, at 2, 3, 9, 15, 16, 17, *reprinted in* SOURCES OF CRIM. JUST. STATS., table 5.10-5.13 (1990).

77 People v. Keating, No. BA 025236 (Super. Ct. Cal. 1991).

78 CAL. CORP. CODE §§ 25540, 25401 (West Supp. 1992).

79 *See* People's Proposed Liability Theory Jury Instruction, Memorandum of Points and Authorities in Support Thereof (filed July 17, 1991); People's Surrebutter in Opposition to Defendants' Motions to Dismiss Pursuant to Penal Code Section 995 (filed June 7, 1991); Memorandum of Points and Authorities in Opposition to Motion to Dismiss Pursuant to Penal Code Section 995 (filed June 7, 1991), People v. Keating, No. BA 025236 (Super. Ct. Cal. 1991).

80 *Id.*

81 *Id.* In support of its position, the prosecution relied on a series of strict liability cases, including the frequently cited case of State v. Lindberg, 215 P. 41 (Wash. 1923). In *Lindberg*, the statute in question provided that "every director and officer of any bank . . . who shall borrow . . . any of its funds in an excessive amount . . . shall . . . be guilty of a felony." WASH. COMP. STAT. § 3259 (Remington 1922). The court rejected the proffered defense that defendant had borrowed the money in question only after he had been assured by another bank official that the money had come from a bank other than his own. The *Lindberg* court held that evidence of defendant's mistake was inadmissible at trial.

82 Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss Pursuant to Penal Code Section 995, at 35 (filed June 7, 1991), People v. Keating, No. BA 025236 (Super. Ct. Cal. 1991).

83 Respondent's Brief, at 18-20, *Keating*, Case No. BA 025236.

The *Keating* court correctly rejected the prosecution's argument. While the language of the statute and its legislative history suggested that the legislature wanted to impose maximum responsibility on corporate officials for the acts of their employees,[84] the concept of culpability did not appear to have been abandoned altogether. The court held that the statute did not create a strict liability crime, thereby requiring the prosecution to prove Keating's fraudulent intent.

Rather than reinterpreting the statute, the *Keating* court could have applied the good faith defense. By so doing, the court would recoguize the need for expeditious prosecution of savings and loan fraud without punishing an individual who could prove he was not knowingly responsible for a criminal act. Using the good faith defense, the legislative presumption that defendants like Keating are responsible for their subordinates' criminal acts could be rebutted by the defendant proving an absence of culpable intent.

In both *Kantor* and *Keating*, the legislature recognized a need to ease the prosecution's burden in certain cases. The strict liability doctrine is the standard mechanism for satisfying this need. Yet, these cases demonstrate that courts remain uncomfortable with the doctrine, especially when the defendant faces possible imprisonment. In these situations, courts searching for a solution can look to the good faith defense. In *Kantor*, the court adopted this approach. In *Keating*, the court simply refused to apply the strict liability doctrine and required the prosecution to prove intent. This Article will demonstrate that the *Kantor* court better accommodated both the interests of the defendant in being punished for only culpable behavior and the interests of the state in using the strict liability doctrine.[85]

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84 Keating was charged under California Corporations Code §§ 25401 and 25110. Several California courts found these statutes to be strict liability offenses. People v. Baumgart, 267 Cal. Rptr. 534 (Cal. Ct. App. 1990); People v. Johnson, 262 Cal. Rptr. 366 (Cal. Ct. App. 1989); People v. Clem, 114 Cal. Rptr. 359 (Cal. Ct. App. 1974). In *Baumgart*, the court referred to the important underlying social policies considered by the legislature in enacting the strict liability provision:

> In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute. . . . As the cases emphasize, the main objective of the securities law is to protect the public against the imposition of insubstantial, unlawful and fraudulent stock and investment schemes and to promote full disclosure of all information that is necessary to make informed and intelligent investment decisions.

Baumgart, 267 Cal. Rptr. at 541 (citations omitted).

85 A third approach is available and was used recently by the Ninth Circuit in United States v. X-Citement Video, Inc., 1992 WL 367097 (9th Cir. Dec. 16, 1992). In *X-Citement*, the court was confronted with a challenge to the constitutionality of 18 U.S.C. § 2252 (1988). Section 2252 prohibits the distribution, receipt, and shipping of child pornography. The defendant, a distributor of pornographic tapes, was charged

This Article next discusses the nature of strict liability crimes and the interests they are designed to serve. By understanding the interests furthered by the strict liability doctrine, as well as those it ignores, it is possible to construct a good faith defense that serves the interests of all involved.

II
THE NATURE OF STRICT LIABILITY CRIMES

A. Defining Strict Liability Crimes

While the precise meaning of "strict liability offenses" is unclear,[86] they are viewed most often as crimes for which liability is imposed irrespective of the defendant's knowledge or intentions, that is, crimes without a mens rea requirement.[87] Consequently, the strict liability doctrine traditionally rejects even a reasonable mistake of a fact or circumstance material to a finding of gnilt.[88] As one

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with distributing videotapes featuring Traci Lords. Lords was under the age of 18 at the time the films were made. Judge Kozinski, in his dissent, encouraged the panel to engraft a mens rea requirement of recklessness onto the statute. Instead, the majority struck down the statute as unconstitutional on its face for violating the First Amendment.

As discussed *infra* in part III.B, this alternative of declaring a statute unconstitutional is rarely used by the courts, especially in cases not involving First Amendment issues. One reason this option is rejected is that it does not take into account any of the legislative interests in employing the strict liability doctrine. 1992 WL 367097, at *10 (Kozinski, J., dissenting) ("the policies Congress sought to advance by enacting [§ 2252(a)] can be effectuated even" after we read a mental state element of recklessness into the statute) (citation omitted).

86 These offenses are often called "absolute liability" or "vicarious liability" offenses. As discussed *infra*, these terms may not always be interchangeable. While "strict liability" and "absolute liability" are often used interchangeably to describe an offense with no mens rea requirement, *see, e.g.*, C.B. Cato, *Strict Liability and the Half-Way House*, 1981 N.Z. L.J. 294, 294 n.6, "absolute liability" is more precisely used to describe those situations in commonwealth countries in which the Parliament has expressly stated that not only is there no mens rea requirement but also that there can be no defense based upon mens rea (e.g., the good faith defense) as well. *Id.* Vicarious liability refers to a respondeat superior notion that a supervising individual or corporation may be criminally liable for another's act without knowledge of the wrongful conduct of the responsible party. *See* Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988) (defining vicarious liability as "the imposition of liability upon one party for a wrong committed by another party"); *see also* Western Fuels-Utah Inc. v. Federal Mine Safety & Health Review Comm'n, 870 F.2d 711, 713 (D.C. Cir. 1989) (discussing the difference between strict liability and vicarious liability). Some crimes may, in fact, implicate both doctrines. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975), discussed *infra* note 295.

87 [T]he Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to penalty whether he has any *mens rea* or not, and whether or not he intended to commit a breach of the law.

Jackson, *supra* note 1, at 83.

88 PACKER, LIMITS, *supra* note 1, at 123 ("For our purpose strict liability can be defined as the refusal to pay attention to a claim of mistake."); FLETCHER, *supra* note 15, at

commentator has noted, "the premise of strict liability is that the defendant is held guilty no matter how careful and morally innocent he or she . . . has been."[89]

We have seen that the law may prohibit the use of minors in pornographic films.[90] Therefore, under a traditional strict liability approach, a defendant who conscientiously tries to ascertain an actress' age but is misled in his attempts would nonetheless be guilty if the actress is a minor.[91] Practically speaking, defendants face an irrebuttable presumption that they knew the actress' age.

Because of its uncompromising approach, the strict liability doctrine has been reserved historically for two categories of crimes: (1) public welfare offenses and (2) morality offenses.[92] In studying each of these categories, we can better view the rationales proffered for the doctrine.

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716 ("[w]e define strict liability to mean liability imposed . . . without considering . . . whether the defendant may exculpate himself by proving a mistake . . . .").

89 Singer, *supra* note 1, at 356.

90 Because there are other aspects of this offense, such as making the films, that may require a showing of mens rea, some may argue that child pornography is not a strict liability offense. *See* Percy H. Winfield, *The Myth of Absolute Liability*, 42 LAW Q. REV. 37, 46 (1926). This perspective, however, is too narrow. In reality, strict liability is a term used to describe a wide variety of offenses.

The strictest view of strict liability offenses is one in which the statute does not impose any culpable mental state, even one of negligence, for any of the defendant's actions. For example, if a defendant is charged with possessing an explosive device he can be convicted, even if completely unaware that he had anything in his possession. Such use of the doctrine is rare, if it indeed does exist. *See* PACKER, LIMITS, *supra* note 1 (arguing that mens rea always applies to some element of the offense).

Rather, the strict liability crime is generally one for which knowledge of the key or "material" elements of the offense is not required. *See* MODEL PENAL CODE §§ 2.02(4), 2.05, (Am. Law Inst. 1962); *see also* STANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 217 (5th ed. 1989) ("In this special sense, mens rea refers only to the mental state required by the definition of the offense to accompany the act that produces or threatens the harm."); Francis Bennion, *Statutory Exceptions: A Third Knot in the Golden Thread?*, 1988 CRIM. L. REV. 31, 34-35 (explaining how a strict liability offense may require knowledge as to one element of the offense and not as to another element); Saltzman, *supra* note 1, at 1575 (giving examples of strict liability offenses in which knowledge as to one element is irrelevant); Kenneth M. Simmons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 554 (1992) (arguing that "strict liability" is something of a misnomer because the law typically requires a distinct mental state as to some, if not all, elements of the offense). Therefore, while the defendant may need to be aware that he has some article in his possession, it would be irrelevant whether he thought it was a harmless alarm clock or a powerful bomb. *See* United States v. Freed, 401 U.S. 601 (1971). Or, for the *Kantor* case, whereas the defendants may have needed to know they were producing pornographic films (a protected activity), they did not need to know that their star was underage (the circumstance that threatens the harm). This approach to defining strict liability crimes is not only more practical, but focuses on the essence of criminal law: punishing defendants who either know, or should know, that they are not in conformity with society's norms. *See* Johnson, *supra* note 1, at 1520.

91 United States v. United States Dist. Court, 858 F.2d 534, 538 (9th Cir. 1988), *aff'g* United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987).

92 Saltzman, *supra* note 1, at 1573.

B. Justifications for Strict Liability Crimes

1. *Public Welfare Offenses*

The strict liability doctrine often applies to so-called "public welfare" offenses or regulatory crimes promulgated to address the dangers brought about by the advent of the industrial revolution.[93] Public welfare offenses include the sale of impure or adulterated foods or drugs, driving faster than the speed limit, the sale of intoxicating liquor to minors, and improper handling of dangerous chemicals or nuclear wastes.[94] Defendants violate these laws regardless of their intent or absence of negligent conduct.

There are several reasons the strict liability doctrine is used to redress invasions of the public welfare. First, the doctrine is employed for these offenses because it shifts the risks of dangerous activity to those best able to prevent a mishap.[95] For example, a pharmaceutical manufacturer is in a unique position to know and control product quality. Strict liability holds the manufacturer liable if that product becomes contaminated for any reason. The risk of

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93 Sayre, *supra* note 1, at 68-69. In Morissette v. United States, 342 U.S. 246 (1952), the Supreme Court chronicled the history and rationale of strict liability offenses:

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

Id. at 253-54.

94 Sayre, *supra* note 1, at 55; *see, e.g.*, United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971) (transportation of dangerous liquids or products); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984) (dumping of hazardous wastes); United States v. Catlett, 747 F.2d 1102 (6th Cir. 1984) (killing of protected animals under Migratory Bird Treaty Act); United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir.) (prosecution under Food, Drug and Cosmetic Act), *cert. denied*, 429 U.S. 828 (1976); People v. Dillard, 201 Cal. Rptr. 136 (Cal. App. 1984) (carrying loaded firearm).

95 Genevra Richardson, *Strict Liability for Regulatory Crime: The Empirical Research*, 1987 CRIM. L. REV. 295, 296; *see also* OLIVER W. HOLMES, THE COMMON LAW 57-59 (1881). In Dean Roscoe Pound's words, "[Strict liability] statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals." ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 52 (1921).

mishap is shifted to the manufacturer who can be assured of avoiding liability only by not engaging in the particular high risk activity.[96]

Yet, this reason alone cannot justify the doctrine. The strict liability doctrine is not the only possible method for shifting risk onto the manufacturer. A criminal negligence standard also shifts the risk to the party engaging in the activity and punishes those who act carelessly.[97] Under a negligence standard, a defendant is liable for failure to act as a reasonable person would have under the circumstances, even if he did not intend or appreciate the risks of his activities.[98] Under a negligence standard, if the defendant acts reasonably and harm results, no punishment follows. Nonetheless, the burden to learn and operate within society's standards rests with the defendant.

The strict liability doctrine operates in a fundamentally different way.[99] While both negligence and strict liability shift the burden of risk avoidance to the defendant, only under strict liability are individuals imprisoned even if they take all possible precautions to act reasonably.[100] The sole question for the trier of fact is whether the defendant committed the proscribed act.[101] The jury may not decide whether the defendant could have done anything else to prevent the unlawful act.[102]

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96 Wasserstrom, *supra* note 1, at 737.

97 Mens rea under the negligence standard is of an omissive nature. The negligent defendant, by definition, is unaware of the risks created by his activities, although he should be aware of these risks. "It is precisely the attitude of self-centered thoughtlessness and disregard for the rights of others *despite the capacity and opportunity* to realize and respect these rights which constitutes this form of mens rea." Mueller, *supra* note 3, at 1063.

98 *See* MODEL PENAL CODE § 2.02(2)(d). Although often discussed as a level of mens rea, *see* Mueller, *supra* note 3, at 1063-64, negligence is actually not a state of mind. Rather, it is a standard of conduct the defendant is expected to maintain regardless of his state of mind. PACKER, THE LIMITS, *supra* note 1, at 143.

99 *See* Kelman, *supra* note 7, at 1513.

100 "Indeed, the premise of strict liability is that the defendant is held guilty no matter how careful and morally innocent he or she, or one for whose acts he or she is responsible, has been." Singer, *supra* note 1, at 356.

101 *See* Jackson, *supra* note 1, at 88; Wasserstrom, *supra* note 1, at 733.

102 *See* Saltzman, *supra* note 1, at 1584. In discussing the difference between strict liability and negligence, Saltzman explains:

> The difference . . . is that, as long as the crime is a non-strict liability crime [i.e., negligence], the issue is decided by a tribunal which both hears the evidence and sets the standard in the defendant's case. Making the defendant's culpability an issue makes evidence respecting his culpability admissible and, since the trier of fact knows its decision determines criminal liability, the trier of fact virtually decides the following question: under the circumstances, does [the] defendant deserve criminal punishment?

Id.

Thus, there must be additional reasons for selecting the strict liability doctrine over the negligence standard. Among these reasons is the need by the legislature to assure that juries will treat like cases alike when judging conduct involving public welfare. Juries may be ill-suited to decide what is reasonable in complex high risk activities. For example, in order for juries to decide what is reasonable conduct when dealing with nuclear waste, they would have to be educated on the nuclear industry, the risks posed by it, and the safeguards that might be taken. Legislatures prefer to make this assessment themselves, rather than relying on the competence of juries. Moreover, jurors may be swayed by sympathies or prejudices of a particular case. By dictating what is *per se* unreasonable, an individual jury cannot reassess the standard of reasonableness.[103] Accordingly, a second reason for using the strict liability doctrine is that it assures uniform treatment of particular, high risk conduct.[104]

A third justification often offered for the strict liability doctrine is that it eases the burden on the prosecution to prove intent in difficult cases.[105] Strict liability is based largely on the assumption that an accident occurs because the defendant did not take care to prevent it.[106] No showing of intent or negligence is required, because the fact that a prohibited act occurred demonstrates the defendant's negligence. As with most irrebuttable presumptions, the legislature believes individual inquiries are unnecessary because the overwhelming majority of cases will show that the defendant acted at least negligently.[107] Seen in this light, strict liability is a procedural shortcut to punish those who would be culpable under traditional theories of criminal law.

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103 *Id.*.

104 Kelman, *supra* note 7, at 1517 (juries operating under vague negligence standard may encourage "inconsistent, unpredictable, and biased" verdicts). Furthermore, under a negligence regime a low standard of care in the community could be viewed as reasonable and acceptable within that community. *Id.*

105 In recognizing the need for strict liability for certain criminal acts, the California Supreme Court wrote:

> "There are many acts that are so destructive of the social order, or where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant. In these cases it is the duty of the defendant to know what the facts are . . . ."

Ex parte Marley, 175 P.2d 832, 835 (Cal. 1946) (quoting State v. Weisberg, 55 N.E.2d 870, 872 (Ohio Ct. App. 1943)).

106 The rationale underlying strict liability is a theory of presumed culpability. *See* FLETCHER, *supra* note 15, at 719.

107 Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 173-74 (1969).

Fourth, even if the presumption is incorrect in a particular case, legislatures determine that this risk is outweighed by the need for additional protection of society and expeditious prosecution of certain cases.[108] For example, driving in excess of a posted speed limit is typically a strict liability crime.[109] With nearly 398,000 annual traffic cases in one state alone,[110] processing these cases as quickly as possible is important. The most efficient way to process such cases is to presume defendants drive carelessly when exceeding speed limits. The presumption is generally accurate and, even when it is not, the need for public safety and the relatively minor punishment[111] minimizes any concern about injustice.[112]

Finally, the strict liability doctrine is attractive as a powerful public statement of legislative intolerance for certain behavior. By labeling an offense as strict liability, the legislature can claim to provide the utmost protection from certain public harms. By affording no leniency for defendants causing harm, the legislature affirms society's interest in being protected from certain conduct. In this sense, strict liability expresses emphatically that such conduct will not be tolerated regardless of the actor's intent.

2. *Morality Offenses*

Similar justifications have been offered for the application of the strict liability doctrine to "morality crimes," offenses involving

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108 The rationale of the doctrine of strict liability is that, although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction, and that the interest of the enforcement for the public health and safety requires the risk that *an occasional non-offender may be punished in order to prevent the escape of a greater number of culpable offenders.*

People v. Travers, 124 Cal. Rptr. 728, 730 (1975) (citing People v. Stuart, 302 P.2d 5, 8-9 (1956)) (emphasis added). Thus, in the interest of efficiency, the criminal law accepts some risk that the defendant charged with a strict liability crime did not act negligently. Ashford, *supra* note 107, at 182-84. At some point, however, this risk becomes too high and the presumption may be viewed as unconstitutional. Although at no set point does the risk of convicting an innocent person outweigh the interests in efficiency, some authors have suggested that the standard of precision must certainly be greater than 90% and should approach 99% in order to be consistent with notions of due process. *Id.* at 183.

109 *See, e.g.*, McCallum v. State, 567 A.2d 967 (Md. App. 1990).

110 There were 397,935 nonparking traffic violations in California during 1990. *See* JUDICIAL COUNCIL OF CALIFORNIA, STATE OF CALIFORNIA ANNUAL DATA REFERENCE 137, tbl. 1 (1991).

111 The assumption in public welfare offenses appears to be that the defendant will receive little or no time in jail and a monetary sanction. Sayre, *supra* note 1, at 78.

112 Professor Sayre explained that "the penalty in such cases is so slight that the courts can afford to disregard the individual in protecting the social interest." *Id.* at 70.

transgressions of society's sexual and social norms.[113] Examples of these crimes are statutory rape, adultery, and bigamy.[114]

Consider the classic case of *Regina v. Prince*.[115] In *Prince*, the defendant was convicted for eloping with a minor without her father's permission.[116] Although the jury accepted the defendant's claim that he did not know the girl was underage, the court denied a defense, finding "[t]he act forbidden is wrong in itself, . . . not . . . illegal, but wrong."[117]

The court in *Prince* did not require that defendant know the age of the girl with whom he eloped. Eloping with any young woman without her father's permission was considered morally wrong.[118] Because of this, the court felt it appropriate to impose punishment regardless of defendant's knowledge of the girl's age. The defendant bore the risk that his borderline conduct would violate a provision of the law.

As with the public welfare offenses, the less comfortable society is with certain types of behavior, the more likely the legislature will

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113 *See generally* Allen, *supra* note 7 (addressing "the morality of means" in assorted contexts). Once again, strict liability is justified under the theory "that the need to prevent certain kinds of occurrences is sufficiently great as to override the undesirable effect of punishing those who might in some other sense be 'innocent.'" Wasserstrom, *supra* note 1, at 739; *see* Regina v. Prince, L.R. 2 CR. CAS. RES. 154 (1875) (Eng.); *see, e.g.*, United States v. Freed, 401 U.S. 601 (1971) (strict liability used for drug offense). Furthermore, strict liability underlies the felony murder doctrine under which a defendant engaging in criminal behavior is responsible for any resulting deaths, foreseeable or not. Frank J. Remington & Orrin L. Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644, 655.

114 Remington & Helstad, *supra* note 113, at 670; *see, e.g.*, Rex v. Wheat, Rex v. Stocks, [1921] 2 K.B. 119 (holding that it was no defense to bigamy that defendant believed he had a divorce); *see also* Sayre, *supra* note 1, at 73-75 (analyzing strict liability crimes of statutory rape and bigamy); Delger Trowbridge, *Criminal Intent and Bigamy*, 7 CAL. L. REV. 1 (1918) (proposing good faith defense to strict liability offense of bigamy).

115 L.R. 2 CR. CAS. RES. 154 (1875) (Eng.).

116 The defendant was charged with violation of the Offences Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 55 (Eng.) providing:

> Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor.

117 *Prince*, L.R. 2 CR. CAS. RES. 154 (1875) (Eng.), 32 L.T.R. 700, 701 (Mar.-Aug. 1875) (Eng.).

118 Lord Bramwell's opinion stated:

> [W]hat the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a *girl*, and can be said to be in another's *possession*, and in that other's *care or charge*. No argument is necessary to prove this; it is enough to state the case. The Legislature has enacted that if anyone does this wrong act he does it at the risk of her turning out to be under sixteen.

Id.; *see also* PETER BRETT, AN INQUIRY INTO CRIMINAL GUILT 148-49 (1963) (noting that, at the time of *Prince*, community ethic morally condemned the taking of any girl without her guardian's permission).

turn to the strict liability doctrine to transfer the risks of the behavior to the defendant. These risks include the possibility of physical or moral harm, and the possibility that a culpable defendant would escape punishment by feigning ignorance or mistake.[119]

To assure that all juries assess the risks of a particular activity uniformly, the legislature designates an offense as a strict liability crime.[120] By not allowing evidence as to why the defendant transgressed, the legislature can avoid the whims of any particular jury. Rather than having an individual jury decide what conduct is reasonable, the legislature decides for all strict liability cases. In this manner, firm social and moral lines are clearly drawn.[121]

Application of the strict liability doctrine to morality offenses offers an additional justification for the doctrine. As already discussed, in strict liability offenses it is presumed that the defendant took an unjustifiable risk in his conduct and was therefore at least negligent.[122] When the defendant's conduct is already morally questionable—"borderline" conduct—concern for punishing an innocent person decreases.[123] Society does not approve of the defendant's conduct, although the limits of the law may seem to permit it. If the defendant crosses those limits, intentionally or unintentionally, society will seek to punish the defendant's behavior.[124] The strict liability doctrine thereby serves an important function of setting firm limits on conduct that society is loath to tolerate. The interests in efficient punishment and maximum deterrence of certain

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119 "Any increase in the number of conditions required to establish criminal liability increases the opportunity for deceiving the courts or juries by the pretence that some condition is not satisfied." Nemerson, *supra* note 9, at 1537 (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 77 (1968)).

120 *See supra* note 104 and accompanying text.

121 *See supra* note 112 and accompanying text.

122 *See supra* note 107 and accompanying text.

123 *See* Peter W. Low, *The Model Penal Code, The Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539, 562 (1988)

> (It is not unfair in this situation to hold the actor to an objective standard of common morality. The behavior—even if the facts were as the defendant believed them to be—is a serious breach of community standards about which the defendant should know enough to justify the imposition of serious criminal punishment. Principles of personal autonomy and responsibility are not offended.).

124 The defendants' conduct in *Kantor* was an example of such behavior. Society prohibits child pornography, and even adult pornography is considered borderline behavior that will be tolerated only if it remains within strict limits. Thus, the issue raised in morality offense cases is not whether the defendants' behavior should be lauded, but whether a defendant who crosses the limits unwittingly, as a reasonable person might have done when engaging in the same constitutionally protected behavior, should be criminally punished.

conduct is seen as outweighing the risk that a nonculpable person will be punished.[125]

Thus, for both public welfare and morality offenses, relieving the prosecution of the burden of proving a culpable mens rea is justified by the presumption that the defendant engaging in marginal and/or highly risky conduct deserves some punishment. Moreover, even if that presumption is incorrect in a given case, society receives valuable protection from such conduct.

C. Opposition to the Strict Liability Doctrine

Opponents of the strict liability doctrine argue that its justifications are inconsistent with both utilitarian and retributivist theories of punishment. Under utilitarian theory, punishment is justified if it deters unlawful behavior.[126] If punishing those who commit prohibited acts will deter others from acting similarly, punishment is justified.[127] Under the retributivist approach, an individual should be punished for choosing to violate the law.[128] Punishment reflects respect for an individual's autonomy to choose to do "wrong."[129] If

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125 The classic example of this rationale is the felony murder doctrine. *See* Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AMER. CRIM. L. REV. 73 (1990); Mueller, *supra* note 3, at 1057; Remington & Helstad, *supra* note 113, at 656; Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169 (1988). The felony murder doctrine imposes strict liability on a felon for any deaths that occur during his commission of a felony. *See* Brady, *supra* note 9, at 218. The felon is guilty of murder for that death whether or not he anticipated or intended the death. Cole, *supra*, at 74, 78 n.15. The willinguess to impose felony murder liability without a showing of intent derives in large part from a presumption that the felon has already crossed the line into unacceptable behavior and should therefore be liable for any additional harm he causes. George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 427 (1981) (stating that a felon participating in wrongdoing must run risk the that things will turn out worse than he expects). Once the assumption has been made that the defendant has a character that should be punished or deterred, there is no concern under the felony murder doctrine as to whether the defendant had the mental state for the murder. As with the strict liability doctrine, the defendant's acts classify him as culpable. Cole, *supra*, at 77 n.12, 101.

126 JEREMY BENTHAM, *Principles of Penal Law*, pt. 11, bk. 1, ch. 3, *in* THE WORKS OF JEREMY BENTHAM 396, 402 (John Bowring ed., 1843); *see also* Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Louis M. Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 319 (1984) (setting forth the principle of deterrence under a utilitarian model).

127 H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

128 *See* Nemerson, *supra* note 9, at 1560-65.

129 Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 722 (1992). Discussing in depth the utilitarian and retributivist theories of punishment is beyond the scope of this Article. *See generally* CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS AND JUSTIFICATIONS (Rudolph Gerber & Patrick McAnany eds., 1972); PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT (Gertrude Ezorsky ed., 1972); THE PHILOSOPHY OF PUNISHMENT (H.B. Actor ed., 1969); THEORIES OF PUNISHMENT (S. Grupp ed., 1971); *A Symposium on Punishment: Critique and Justification*, 33 RUTGERS L. REV. 607 (1981). For works on retribution, see David

an individual chooses to transgress the boundaries established to protect society, he "deserves" punishment.[130]

The strict liability doctrine, especially when applied to defendants misled into committing an unlawful act, is not supported by either theory of punishment. Under retributivist theory, criminal law should hold individuals responsible for only those acts for which they are blameworthy. An individual is blameworthy, not because of accidental conduct, but because of a conscious and knowing breach of the law.[131] At a minimum, the defendant must have acted below the standard of care that a reasonable person would have exercised under the same conditions. A strict liability defendant punished for an act that he has been misled into committing has not consciously decided to violate society's norms. Accordingly, under classic retributivist theory, this defendant does not "deserve" to be punished.[132]

Additionally, the strict liability doctrine conflicts with utilitarian theories of punishment. Strict liability laws are inefficient because they tend to overdeter individuals' behavior.[133] If the strict liability defendant can be punished for *any* conduct crossing a certain proscribed line, the defendant will be inclined to abstain from *all* activity that could conceivably result in illegal behavior. In some situations, certain individuals might abstain from entering a high risk industry. In situations such as in *Kantor*, individuals may be deterred from engaging in constitutionally protected activity. Thus, strict liability may deter individuals from engaging in activities that are socially necessary or desirable, constitutionally protected, or both. In this manner, strict liability overdeters conduct.[134]

Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537 (1991); Peter J. Steinberger, *Hegel on Crime and Punishment*, 77 AM. POL. SCI. REV. 858 (1983).

130 IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., 1887).

131 4 WILLIAM BLACKSTONE, Commentaries *21 and *27.

132 It is a fiction to state that an individual who commits a strict liability crime by accident or by reason of fraud has acted in a morally culpable manner. Moral culpability attaches when an individual consciously disregards a risk to society. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 259 (2d ed. 1961). The strict liability defendant is precluded from arguing that he has not consciously taken such a risk. His positive efforts and good intentions are irrelevant because he has caused the prohibited harm. Thus, an individual may act exactly as a reasonable member of the society would act under the same circumstances but nonetheless be branded as a criminal. "[T]here is no reason to believe that he is anything worse than unlucky, and no reason to single him out for disapproval." Kelman, *supra* note 7, at 1515.

133 While a strict liability defendant can be deterred if one broadens the time frame and prohibits them from engaging in any activity that could result in criminal violations, "such deterrence might come at great social cost." Simmons, *supra* note 90, at 507 n.152 (1992); *cf.* Posner, *supra* note 7, at 209 (comparing economic effects of strict liability laws to negligence laws).

134 The objection to strict liability is not that it punishes people who are literally helpless to avoid committing the act, because it is obvious that they

More fundamentally, the strict liability doctrine violates utilitarian theories of criminal punishment because an individual who has no basis for believing he is engaging in unlawful conduct will not be deterred from engaging in that behavior. If an individual has no indication that he is doing anything wrong until the harmful act is completed, then he has no reason to alter his conduct.[135]

Given the conflicts with both the retributivist and utilitarian theories of punishment, it is understandable why opponents of strict liability do not want to use the doctrine against defendants who have made an affirmative effort to comply with the law but have been misled into committing a violation. Classic Anglo-American legal philosophy is that "[i]t is better that ten guilty persons escape than one innocent suffer."[136] Strict liability theory operates from the opposite perspective. Under the strict liability doctrine, an occasional innocent may be punished to assure the safety of the majority. Thus, the prosecution of good faith defendants under strict liability laws appears to conflict with the most fundamental principles of just punishment.[137]

D. Traditional Alternatives to the Strict Liability Doctrine

While many have recoguized the possible injustice in holding defendants who have operated under a reasonable mistake of fact

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> could have avoided the possibility of liability by not going into business in the first place. The point is that selling meat or managing a factory, [for example], is a productive activity which the law means to encourage, not discourage, and we should not punish people who have taken all reasonable steps to comply with the law.

Johnson, *supra* note 1, at 1521.

135 This was also Judge Devlin's conclusion in Reynolds v. G.H. Austin & Sons Ld., [1951] 2 K.B. 135, 150 (Eng.). Inflicting a penalty on a person who could not have reasonably known the relevant circumstances is senseless.

> Such a penalty could have no effect on other persons in the future, which is one of the main purposes of the criminal law, because if they did not know what the facts were when they acted, then there could be no *mens rea* on their part. How can pressure be put on a person, who is in no way thoughtless or inefficient, to take greater care than he has already taken?

A.L. Goodhart, *Possession of Drugs and Absolute Liability*, 84 LAW Q. REV. 382, 385 (1968).

136 WILLIAM BLACKSTONE, OXFORD DICTIONARY OF QUOTATIONS 73 (2d ed. 1972).

137 As Professor Packer stated:

> [T]o punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or a retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of mens rea.

Packer, *Mens Rea*, *supra* note 1, at 109.

criminally liable, there has been little success in remedying the problem. Over time, courts have tried a variety of approaches to bring the strict liability doctrine in line with common law notions of moral culpability.[138] At best, these efforts are awkward; at worst, they widen the philosophical gap between strict liability's proponents and opponents.

1. *Reinterpreting Statutes*

The first approach courts have taken to modify the effects of the strict liability doctrine is to "reinterpret" strict liability statutes to require mens rea.[139] The Supreme Court's decision in *Morissette v. United States*[140] illustrates this approach. On its face, the statute in *Morissette* did not require intent. Defendant Morissette was charged with converting government property in violation of federal law.[141] Morissette, a junk dealer, discovered spent bomb casings that had been lying about for years and sold them to a city junk market. When charged with unlawful conversion, Morissette claimed an honest belief that the Air Force had abandoned the casings. The trial court, while recognizing that this claim of right would be a full defense to an ordinary theft charge, took the view that it was not a defense to a violation of the federal statute. The statute contained no language requiring an intent to steal, which is the traditional mens rea of theft.

The Supreme Court disagreed. It held that because the conversion appeared related to the common-law crime of theft, the common-law requirement of intent should be implied in the statute. The Court ruled that absent clear legislative history or statutory language to the contrary, statutes akin to common-law crimes should be interpreted as requiring a culpable mental state.

In reaching its conclusion, the Court acknowledged that it had previously held that intent is not required for a limited group of "public welfare" offenses.[142] However, it narrowly viewed this category of offenses to include only those offenses for which the punishment was relatively small and conviction did not pose a grave threat to the offender's reputation.[143] The Court declined to draw a line

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138 *See* Abrams, *supra* note 15, at 463-75.

139 This was the approach adopted in the *Keating* case. *See supra* part I.B.

140 342 U.S. 246 (1951).

141 18 U.S.C. § 641 (1988) (same language as 1948 enactment) provides in pertinent part: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . [a] thing of value of the United States or of any department or agency thereof . . . [s]hall be fined not more than $10,000 or imprisoned more than ten years, or both . . . ."

142 *Morissette*, 342 U.S. at 255-56.

143 *Id.* at 256.

between those crimes requiring a mental state and those lacking such a requirement.[144] It warned, however, that courts generally should be reluctant to interpret a statute as a strict liability crime.[145] In the Court's opinion, such statutes are not the best method to regulate behavior because they are based primarily on an interest in "efficiency of controls."[146]

Given the *Morissette* holding, tone, and general discussion of the nature of criminal laws,[147] many courts not surprisingly view the decision as a license to interpret statutes with harsh penalties as implicitly requiring a culpable mens rea. Courts are particularly apt to take this approach when the defendant in a strict liability case proffers a mistake of fact defense.[148]

Yet, reinterpreting statutes does not address the most difficult cases where a defendant is charged with a crime that the courts have acknowledged to be a strict liability offense. Even if the defendant asserts a reasonable and honest mistake of fact, the trial court cannot legitimately infer a mens rea requirement. For example, in *Kantor* the offense was clearly intended to be a strict liability crime,

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144 *Id.* at 260.

145 *Id.* at 263.

146 *Id.* at 254-56.

147 Reflecting the judicial system's general discomfort with strict liability offenses, Justice Jackson wrote in *Morissette*:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . . As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.

Id. at 250, 252.

148 *See, e.g.*, Liparota v. United States, 471 U.S. 419 (1985) (interpreting statute prohibiting unauthorized use of food stamps as requiring defendant to know his usage was unauthorized); States v. Williams, 872 F.2d 773 (6th Cir. 1989) (interpreting federal statute prohibiting transfer of unregistered fully automatic weapon as requiring knowledge of the weapon's fully automatic nature); United States v. Sherbondy, 865 F.2d 996 (9th Cir. 1988) (interpreting federal statute providing for enhanced punisbment for possession of a firearm by person convicted of three violent felonies as requiring "knowing" possession); Reynolds v. State, 655 P.2d 1313 (Alaska Ct. App. 1982) (interpreting statute prohibiting fishing in closed waters as requiring proof of defendant's negligence); People v. Stuart, 302 P.2d 5 (Cal. 1956) (interpreting statute prohibiting preparation, compounding, and selling of an adulterated and misbranded drug as requiring mens rea); Noble v. State, 223 N.E.2d 755 (Ind. 1967) (interpreting statute prohibiting notary public from falsely attesting affidavit as requiring criminal intent); McCallum v. State, 567 A.2d 967 (Md. Ct. Spec. App. 1990) (interpreting statute prohibiting driving a motor vehicle with a suspended license as requiring mens rea); People v. Irving, 203 N.Y.S.2d 531 (N.Y. Sup. Ct. 1960) (interpreting statute prohibiting automobile owner to allow unlicensed driver to operate vehicle as requiring proof of owner's knowledge that the operator was unlicensed).

given the statute's language and its legislative history. The legislature removed the word "knowingly" from the statute when the Justice Department protested that such a requirement would permit a mistake of fact defense. The conference committee accepted the House version of the bill excluding any mention of mens rea "with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child."[149] To require a mens rea, the court would have to rewrite the statute, which the Ninth Circuit refused to do.[150] Instead, the court applied the good faith defense.

Reinterpreting statutes may be the most popular approach employed by courts, but it is not the most intellectually honest.[151] When legislative intent is clear,[152] another approach is needed to reconcile strict liability crimes with the common-law notion of criminal culpability.

2. *Attacking Actus Reus and Causation*

An alternative method courts have employed to avoid imposing criminal liability judgment on nonculpable individuals is to attack

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149 H.R. REP. No. 811, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 69, 69; S. REP. No. 601, 95th Cong., 1st Sess. 5 (1977).

150 United States v. United States Dist. Court, 858 F.2d 534, 542 (9th Cir. 1988). The court wrote: "[A]lthough we may 'strain to construe legislation so as to save it against constitutional attack,' we 'must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it.'" *Id.* at 542 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986)).

151 For example, in the recent case of United States v. Speach, 968 F.2d 795 (9th Cir. 1992), the defendant was charged with unlawful storage of hazardous waste in violation of 42 U.S.C. § 6928(d)(2)(A) (1988) and unlawful transportation of hazardous waste in violation of 42 U.S.C. § 6928(d)(1) (1988). Defendant asserted that the trial court erred in prohibiting evidence as to his mistaken belief that the hazardous material facilities had been licensed. The Ninth Circuit held that the trial court's interpretation of the statutes as strict liability crimes was erroneous and that the jury must find that defendant knowingly and willfully used an unlicensed facility. In dissent, Judge Rymer noted that although the majority's approach was tempting on fairness grounds, prior Ninth Circuit decisions had already addressed the scienter requirement of a parallel clause of the offense and found it did not require this proof of knowledge.

Likewise, in United States v. Engler, 806 F.2d 425 (3d Cir. 1986), both the government and concurrence urged the court to avoid the constitutional issue of whether a felony prohibiting the sale of protected species (16 U.S.C. § 707(b)(2)) violates due process by inferring a scienter requirement from the statutory scheme and congressional purpose. *Id.* at 431. The majority refused to do so holding that "supply[ing] an element of specific intent here would be impermissible 'judicial legislation.'" *Id.* (quoting United States v. Engler, 627 F. Supp. 196, 199 (M.D. Pa. 1985)).

152 The trend, in fact, is toward express declarations by legislatures that an offense is a strict liability crime. Singer, *supra* note 1, at 387. *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-205(1)(b)(I) (West Supp. 1992) ("If a person . . . drives a motor vehicle while under the influence of alcohol or one or more drugs, . . . and this conduct is the proximate cause of a serious bodily injury to another, he commits vehicular assault. *This is a strict liability crime.*") (emphasis added).

the actus reus component of the crime.[153] While a strict liability crime does not require a culpable mental state, it does require a voluntary criminal act.[154] Additionally, the defendant's act must constitute a "proximate cause of the alleged violation."[155]

The existence of an actus reus requirement allows a defendant charged with a strict liability offense to invoke the defense that he acted involuntarily. If a defendant acts involuntarily, for instance, by reflex or in an automatic state, he cannot commit a strict liability crime regardless of his mental state.[156] An example of this defense is when a defendant charged with speeding claims he was acting involuntarily during an epileptic fit and that he did not know he was prone to such seizures.[157]

The involuntary act defense, however, also does not address the concerns raised in the most troublesome strict liability cases. In these cases, defendants consciously perform acts but do so because of deception. For instance, the producers in *Kantor* could hardly claim unconsciousness or involuntary action. While these individuals lack an actus reus defense, they are nonetheless not fully culpable for their conduct.[158]

Another related defense is that the defendant did not "proximately" cause the harmful act. For example, in *Kilbride v. Lake*,[159] the defendant was charged with failing to display a certificate of fitness on his automobile. The parties agreed that the defendant had placed such a certificate on his vehicle, but that the wind or individual had removed it. Rather than impose strict liability for failure to display the certificate, the court found that the defendant had not

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153 *See* PAUL ROBINSON, CRIMINAL LAW DEFENSES 265 n.26 (1984); Brady, *supra* note 9; Kadish, *supra* note 1, at 259.

154 This may be an affirmative act, an act of omission, or an act of possession in some circumstances. MODEL PENAL CODE § 2.01 (Am. Law Inst. 1962).

155 Note, *Developments in the Law*, *supra* note 5, at 1262.

156 MODEL PENAL CODE § 2.01. Jeffrie G. Murphy, *Involuntary Acts and Criminal Liability*, 81 ETHICS 332, 340-42 (1971). For more on how the actus reus component encompasses part of the element of a crime, see Ingrid Patient, *Some Remarks about the Element of Voluntariness in Offences of Absolute Liability*, 1968 CRIM. L. REV. 23, 32.

The British courts have employed this defense as a way of avoiding the strict liability doctrine for serious criminal offenses, including the unlawful possession of narcotics. *See* Regina v. Warner, [1968] 2 W.L.R. 1303, 1345 (Eng.) (no "possession" (i.e., actus reus) if another person slipped narcotics into defendant's bag without his knowledge).

157 *But see* People v. Decina, 138 N.E.2d 799, 803-04 (N.Y. 1956) (holding that one who was previously aware of epileptic condition is negligently culpable for later accident).

158 Kadish, *supra* note 1, at 268.

159 1962 N.Z.L.R. 590 (N.Z. P.C.); *see also* Hill v. Baxter, [1958] 1 Q.B. 277 (Crim. App. 1957) (Eng.) (defendant claimed he blacked out prior to accident and therefore did not cause it).

caused the illegal condition and therefore could not have violated the statute.[160]

Like the actus reus defense, the causation defense has limited use for strict liability crimes. If a defendant is directly involved in the prohibited action, the defense is unavailable. It certainly would be of no avail to the defendants in the *Kantor* case who hired Lords and produced the films.[161] Another approach is required for such cases.

3. *Relying on Prosecutorial Discretion*

Instead of turning to judicially recognized defenses, the criminal justice system might rely on prosecutors to use their discretion to refrain from charging strict liability defendants who proffer an honest and reasonable mistake defense.[162] The *Kantor* court had a cogent response to this suggestion: "[I]f law enforcement officials could always be trusted to do the right thing, there need never have been a Bill of Rights."[163]

Much of strict liability law, including the *Kantor* case, has evolved from unrestrained prosecutorial discretion.[164] There are many pressures on prosecutors to bring strict liability cases to court.

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160 *See generally* R.S. Clark, *Accident—Or What Became of* Kilbride v. Lake, 1984 ESSAYS ON CRIM. LAW 47 (proposing that limited causation defense in *Kilbride* be extended to general "accident defense" to strict liability crimes).

161 An offshoot of the causation defense is the current application of the "responsible share" doctrine raised in vicarious liability cases. In such cases, if a supervisory defendant is going to be held accountable for the acts of those in his charge, he may argue that he was powerless to control their behavior. Thus far, the defense has been limited to the corporate situations, in which the defendant has direct involvement with the offense's actus reus. *But see infra* note 297 and accompanying text.

162 Consider the Supreme Court's response in United States v. Dotterweich, 320 U.S. 277, 285 (1943), to the argument that strict liability could be used to apprehend those who had no knowledge or reason to know of illegal activity: "Our system of criminal justice necessarily depends on 'conscience and circumspection in prosecuting officers . . . .' " *Id.* at 285 (citation omitted).

163 United States v. Kantor, 677 F. Supp. 1421, 1435 n.64 (C.D. Cal. 1987), *aff'd sub nom.*, United States v. United States Dist. Court, 858 F.2d 534 (9th Cir. 1988). Similarly, when the argument was made by the majority in United States v. Dotterweich, 320 U.S. 277, 285 (1943), that "the good sense of prosecutors" could be relied upon to assure fair application of strict liability statutes, Justice Murphy replied in his dissent, "that situation is precisely what our constitutional system sought to avoid." *Id.* at 292 (Murphy, J., dissenting).

164 Cases indicating the failure to exercise responsible prosecutorial discretion include: State v. White, 464 N.W.2d 585 (Minn. Ct. App. 1990) (charging defendant with illegally employing a 17 year old female as nude dancer in adult bookstore even though she produced a false identification card, successfully repeated the information on the card to the defendant, and the signature on the I.D. card matcbed the female's siguature on her W-4 form); Noble v. State, 223 N.E.2d 755 (Ind. 1967) (charging defendant, a notary public, with making a false attestation; alleged illegal practices prevailed at the license office for many years due to administrative necessity); People v. Hernandez, 393 P.2d 673 (Cal. 1964) (government charging defendant with statutory rape; prosecutrix

First, these cases usually involve offenses labeled public welfare or morality crimes and therefore draw intense public scrutiny. Politically, it may be quite difficult for a prosecutor—often an elected official—to ignore the enforcement of these offenses.[165] Second, because the funding and prestige of prosecution offices is often based upon the number of cases handled and the prosecution's win-loss record,[166] the pursuit of strict liability crimes can often assure the prosecutor of an impressive conviction box score.

Kantor and *Keating* are prime examples of why prosecutorial discretion cannot be relied upon to temper the use of the strict liability doctrine. In both cases, extreme political pressure encouraged the prosecutors to charge the defendants under a strict liability theory, despite the fact that the defendants faced ten years in jail. The prosecution also zealously resisted efforts by defendants to present evidence of their good faith factual mistake. These cases, and many others,[167] show that political realities make reliance on prosecutorial restraint an unrealistic solution.

4. *Minimal Punishment*

Finally, several commentators have supported the imposition of minimal sentences on strict liability offenders to soften the impact of the doctrine.[168] While many courts, operating from the directive in

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was 17 3/4 years old, had been defendant's companion for several months, and had voluntarily consented to sexual relations with him).

165 Empirical evidence supports the claim that agencies feel bound to provide a symbolic display of authority and thus prosecute the "big case" even in the absence of blameworthiness. *See* KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT 202 n.11 (1984). *See also* United States v. Charnay, 537 F.2d 341 (9th Cir. 1976), *cert. denied*, Davis v. United States, 429 U.S. 1000 (1976).

> [A strict liability statute] imposes a heavy responsibility upon the prosecutor. Many are his potential targets and few are the standards by which the exercise of his discretion can be measured . . . . *Whatever his decision, it is likely to be one in keeping with the political realities within which he functions.* This is a part of the price that this type of statute compels us to pay.

Id. at 357 (Sneed, J., concurring) (emphasis added) (citation omitted).

166 JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT 26, § 1.29 (1985) (detailed prosecution records, including prosecution office's "batting average," are kept for "budgetary concerns and self-aggrandizement"). *See, e.g., id.* at Appendix § 1.33 (Data Summary Table from the Report of the U.S. Attorney for the District of Columbia).

167 *See supra* note 164 and *infra* note 261.

168 *See, e.g.*, Brady, *supra* note 9 (arguing that degree of punishment for strict liability crimes should be proportional to the culpability); Nemerson, *supra* note 9 (proposing strict liability system when punishment varies by culpability; if strict liability defendant has little or no culpability, little or no punishment should be imposed); *cf.* Albert Lévitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578, 579 (1923) ("[T]he intent of the so-called criminal is not an element of the crime he commits; but . . . is a definite element which needs to be considered when the criminal is to be punished . . . .").

Morissette,[169] will generally use the strict liability theory only when the defendant faces minimal punishment, relying on this alternative is unwise. First, not all judges will interpret leniently a strict liability statute or exercise sentencing discretion to impose minimal sentences on strict liability defendants. Judges face political pressure and may prefer the strict liability doctrine for the same reasons it is preferred by prosecutors.

Second, the federal government and many states currently limit the discretion of the sentencing judge.[170] Thus, even if a judge may wish to reduce the sentence of the strict liability defendant who made good faith efforts to prevent the crime, the court may be unable to do so under applicable sentencing guidelines.[171] Sentencing guidelines limit courts to a range of incarceration periods from which to sentence a defendant.[172] While a court may depart from these guidelines in extraordinary cases, the defendant has no legal right to such departure. Given the sentencing guidelines, it is highly likely that defendants such as those in *Kantor*[173] will serve several years in prison if convicted of their strict liability crimes.

Moreover, apart from the lengthy sentences that many strict liability defendants face under state and federal sentencing guidelines,[174] the stigma attached to the application of any form of criminal sanction argues against the imposition of even minimal in-

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169 Morissette v. United States, 342 U.S. 246, 256 (1952) (holding that, as to legislation that does not require proof of criminal intent, "penalties commonly are relatively small, and conviction poses no grave damage to an offender's reputation").

170 *See infra* note 174.

171 The Federal Sentencing Guidelines adopted in 1987 were enacted in large part to "minimize the discretionary powers of the sentencing court." FEDERAL SENTENCING GUIDELINES MANUAL 1, *Introduction and General Application Principles, The Statutory Mission* 1 (1992) [hereinafter SENTENCING GUIDELINES].

172 The range for the statute in the *Kantor* case, for example, is zero to fifteen years in jail, depending on defendant's prior criminal record. 18 U.S.C. § 2251(d) (1988). However, given the facts of that case, the actual guideline range was 57 to 137 months, depending on defendants prior criminal record. SENTENCING GUIDELINES, *supra* note 171, at 132, *Sexual Exploitation of a Minor*, § 2G2.1 (1992).

173 The criminal conduct in the *Kantor* case took place prior to the effective date of the Federal Sentencing Guidelines. Thus, the *Kantor* trial judge would have been able to exercise discretion at sentencing. In contrast, the Federal Sentencing Guidelines limit the sentencing discretion of trial judges for identical criminal offenses following the November 1, 1987 effective date.

174 "At the end of 1988 twenty states had adopted determinative or presumptive sentencing." Jane W. Williams, *Sentencing Guidelines—A Selective Bibliography of State Materials*, 10 LEGAL REFERENCE SERVICES Q., nos. 1/2, 7 (1990). Since that time at least three additional states have adopted sentencing guidelines: Pennsylvania, Louisiana, and Tennessee. In Kansas, guidelines are pending before the legislature. Finally, at least four other states have established commissions to develop sentencing guidelines: North Carolina, Ohio, South Carolina, and Texas. Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 681 (1992).

carceration.[175] The strict liability defendant gains little solace in the knowledge that he is only a short-term criminal. He is still punished even though the rationales underlying criminal punishment are not served. Like the other current alternatives to the strict liability doctrine, minimizing punishment does not address the core problem: that an honest but reasonably mistaken individual may be branded a criminal.[176]

III
THE GOOD FAITH DEFENSE

A. The Good Faith Defense: The Foreign Experience

In searching for a better alternative, we should look beyond the parameters of our own criminal justice system. Other countries have reconciled more effectively the strict liability doctrine with general principles of moral culpability. These countries employ a "good faith" or "halfway house" defense to the strict liability doctrine. The experience of these countries may prove beneficial in deciding whether the good faith defense should be adopted in our jurisdiction.

1. *The British Experience—The "Halfway House" Defense*

The good faith defense to strict liability crimes emerged abroad in an era of mistrust: mistrust by the courts of a criminal justice system that valued expediency over theories of personal culpability; mistrnst in an explosion of criminal legislation that criminalized wrongs traditionally handled in the civil courts.[177]

In the earliest period of criminal law, the mental state of the wrongdoer mattered little, if at all.[178] As a general rule, courts could find a defendant guilty without a showing of culpable mental state. Hence, the need to develop a good faith defense did not exist because a defendant's mental state was generally irrelevant.

This model of strict liability offenses governed in England throughout the feudal period. However, the influence of canon law

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175 *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (criminal punishment amounts to a "formal and solemn [societal] pronouncement of . . . moral condemnation").

176 *Cf.* Robinson v. California, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *see also* Hippard, *supra* note 1, at 1045 (asserting that justifying strict liability crimes as merely regulatory measures and not actual crimes is ludicrous).

177 *See generally* Singer, *supra* note 1, at 340-60 (tracing the historical development of strict liability crimes).

178 J.W.C. Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31, 34 (1936-38); Anne F. Noyes, Note, *Early Causes and Development of the Doctrine of Mens Rea*, 33 KY. L.J. 306 (1945).

in the thirteenth and fourteenth centuries led to the development of the concept of moral culpability as an essential element of crime.[179] For the next three hundred years, the common law required mens rea as an element of a criminal offense.

The resurgence of strict liability offenses began in the nineteenth century.[180] This tentative recovery brought with it, however, the seeds of the good faith defense. In *Regina v. Tolson*,[181] the defendant was charged with bigamy. Traditionally, courts treated bigamy statutes as classic strict liability offenses.[182] In *Tolson*, the defendant claimed that sources had informed her that her husband, who had deserted her five years earlier, had drowned in a shipwreck. According to the statute, the defendant was guilty regardless of whether she knew her husband was still alive.

Writing for the court, Justice Wills avoided the strict liability issue by reinterpreting the statute as requiring a mens rea in that case.[183] He did not focus on the language of the statute, which was to the contrary, or on the legislative intent. Rather, he returned to the general principles of culpability for criminal law: " 'It is a principle of natural justice and of our law that' . . . [t]he intent and act must both concur to constitute the crime."[184] While willing to recoguize strict liability crimes, the court found that bigamy, under the

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179 Remington & Helstad, *supra* note 113, at 648.

180 *See generally* Singer, *supra* note 1 (reviewing the modern history of strict liability law). In English law, at least three categories of crimes were acknowledged as strict liability offenses: (a) regulatory offenses penalizing quasi-criminal acts (e.g., adulteration of tobacco and food, and violation of game laws); (b) acts which amount to public nuisances in aggravating circumstances; and (c) acts which amount to summarily enforced civil torts, but were more expeditiously enforced in criminal courts. Peiris, *supra* note 1, at 119. English courts have also employed strict liability principles in the sentencing of many other crimes, including offenses such as conspiracy. *See infra* note 189. Regina v. Woodrow, 15 M. & W. 403, 153 Eng. Rep. 907 (Ex. 1846), represents the first modern strict liability case. In that case, the defendant was charged with possessing tobacco adulterated with sugar, molasses and other saccharine matter, in violation of the Tobacco Act, 1842, 5 & 6 Vict., ch. 93, § 3 (Eng.). The Court of Exchequer held that knowledge of adulteration was unnecessary and denied defendant's defense based on ignorance of tobacco adulteration.

181 23 Q.B. 168 (1889) (Eng.).

182 Note, *Strict Liability Crimes*, 33 NEB. L. REV. 462, 463 (1956) (citing Commonwealth v. Mash, 48 Mass. (7 Met.) 472 (1844); The Queen v. Tolson, 23 Q.B. 168 (1889) (Eng.)).

183 He wrote:

> It seems to me to be a case to which it would not be improper to apply the language of Lord Kenyon, when dealing with a statute which literally interpreted led to what he considered an equally preposterous result, "I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences." (Fowler v. Padget, 7 T.R. 509, 514 (1798) (Eng.)).

Tolson, 23 Q.B. at 177.

184 *Id.* at 172 (quoting Fowler v. Padget, 7 T.R. 509, 514 (1798) (Eng.)).

particular facts of the case, did not constitute a strict liability offense.[185]

In a concurring opinion Justice Cave took a slightly different approach. He reinterpreted the very nature of strict liability crimes. He found them to be offenses that generally do not require proof of the defendant's mens rea, but still allow for a good faith defense when necessary to preserve the moral sense of the statute.[186] Under this interpretation, a strict liability statute merely creates a presumption that a defendant had unlawful intent. The defendant could rebut that presumption with proof of an honest and reasonable belief that her husband was dead before she remarried.[187] In essence, the strict liability nature of the offense merely shifted the burden to the defendant to adduce the proof of her mistake.

While many courts continued reinterpreting statutes,[188] Justice Cave's reinterpretation of the nature of strict liability crimes drew a following.[189] In *Sherras v. De Rutzen*,[190] the court interpreted a stat-

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185 Thus, while the court acknowledged that there was "no doubt that under the circumstances the prisoner [fell] within the very words of the statute," *Tolson*, 23 Q.B. at 171, the court nonetheless chose for that particular case to reinterpret the statute as requiring a "tainted mind." *Id.* at 180.

186 *Id.* at 181-84.

187 *Id.* at 183.

188 *See, e.g.*, Lim Chin Aik v. The Queen, 1963 App. Cas. 160 (P.C. 1962) (Eng.) (appeal taken from Sing.), in which the court refused to classify an offense as strict liability because the defendant was powerless to avoid the violation.

> But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim.

Id. at 174.

189 The acceptance of the good faith defense doctrine was not surprising given the extreme applications of strict liability. In England, the prosecution could prove even conspiracy charges involving public welfare offenses, without proving the defendant's culpable knowledge. *See, e.g.*, Regina v. Sorsky, 30 Crim. App. 84, 89-90 (1944) (Eng.) (seller charged with conspiracy even though iguorant that contract would be for an amount of goods in violation of agent's quota).

190 [1895] 1 Q.B. 918 (Eng.). In *Sherras*, the defendant was charged with supplying liquor to a constable on duty, in violation of the Licensing Act, 1872, 35 & 36 Vict., ch. 94, § 16 (Eng.). Law enforcement officers routinely frequented the defendant's pub, located across the street from the police station. However, the police constables customarily removed their armlets when off-duty. The defendant served one particular constable who had removed his armlet even though he was still on duty. Defendant was convicted of violating the Act. On appeal, the Queen's Bench quashed the conviction and found the defendant not guilty because he acted on a reasonable and bona fide belief that the police constable was off-duty.

ute that had been held to create a strict liability offense. Trying to reconcile a statute carrying no mens rea requirement with the general concept that criminal liability requires moral blameworthiness, Justice Day held that the absence of no mens rea requirement only shifted the burden of proof and did not render knowledge irrelevant.[191] Similar to Judge Kozinski in *Kantor* and Justice Cave in *Tolson*, the court viewed the strict liability doctrine as a valid procedural shortcut for prosecutors so long as it did not damage the basic concept of criminal culpability.[192]

British courts have adopted Justice Cave's good faith defense and refer to it as the "halfway house" approach.[193] It is so called because the approach is half way between a traditional negligence crime (which imposes the burden on the prosecution to prove that the defendant acted carelessly) and a strict liability offense (which prohibits the defendant from assuming the burden of proving he acted with care). The approach does not impose the burden on the prosecution to prove that the defendant intentionally acted below standards. Instead, it permits the defendant to assume the opposite burden of proving that he acted without a culpable intent.

In some ways, British courts are still experimenting with their version of the good faith defense. The defense is not applied in every strict liability case. Individual courts decide whether to permit the defense depending on the nature of the case.[194] If the court allows the defense, the crime is a "strict liability" offense. However, if the court denies the defense, the crime is an "absolute liability" offense.[195]

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191 *Sherras*, [1895] 1 Q.B. at 921.

192 Others continue to see the good faith or mistake of fact defense in the same light. In his article on strict liability, Professor Abrams does not view strict liability as dispensing with the culpability approach. Rather, he views the doctrine as relieving the prosecutor of proving culpability in particular cases. Abrams, *supra* note 15, at 473-74.

193 The proposed "halfway house" alternative to traditional strict liability also has been referred to in American criminal jurisprudence. Professor Packer uses the term to describe criminal liability based upon negligent behavior. Packer, *Mens Rea*, *supra* note 1, at 109-10 (citing GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 271 (1953)). Professor Packer's proposal differs from the British approach to halfway house offenses in that the British proposal places the burden of proof on the defendant to prove non-negligence.

194 English courts do not appear to rely on a set group of factors to decide whether to allow a halfway house approach in a particular case. Rather, the British courts employ an ad hoc approach. Courts may consider both the effect of the statute on those in the industry and the fairness of applying strict liability to the individual defendant. Peiris, *supra* note 1, at 120; *see also* Reynolds v. G.H. Austin & Sons LD., [1951] 2 K.B. 135, 147-48 (Eng.) (Devlin J.). Additionally, there is emphasis on the plain, literal, and grammatical meaning of statutory provisions. *Id.* at 149.

195 *See* Yahuda, *supra* note 1, at 330-31.

The House of Lords' decision in *Sweet v. Parsley*[196] is an interesting example of the British approach. In *Sweet*, the landlord of a farmhouse was charged with managing premises used for the purpose of smoking cannabis or cannabis resin, in violation of Section 5(b) of the Dangerous Drugs Act 1965.[197] The defendant, a school teacher in Oxford, owned the farmhouse, but did not occupy it and rarely visited it. When she did visit, she only entered the rooms of her tenants upon invitation. She had no knowledge that her tenants smoked cannabis in the house until the police executed a search warrant and found cannabis resin and L.S.D. in the garden and kitchen. Nonetheless, the defendant was convicted because she managed a premise where cannabis was smoked.

While sympathetic to Sweet's situation, the trial court faced a serious dilemma. Three years before the instant appeal, a court found the same offense to be a strict liability offense for which the defendant's intent was irrelevant.[198] Relying on precedent, the divisional court upheld defendant's conviction.

The House of Lords disagreed. At first, Lord Reid suggested that he would simply reinterpret the statute.[199] However, he did not follow this familiar course, but instead turned to the good faith defense as developed in British law:

> The choice would be much more difficult if there were no other way open than either mens rea in the full sense or an absolute offence; for there are many kinds of case [sic] where putting on the prosecutor the full burden of proving mens rea creates great difficulties and may lead to many unjust acquittals. But there are at least two other possibilities. Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention. . . . The other method would be in effect to substitute in appropriate classes of cases gross negligence for mens rea in the full sense as the mental element necessary to constitute the crime. . . . It may be that none of these methods is wholly satisfactory but at least the public scandal of convicting on a serious

196 [1970] 1 App. Cas. 132 (1969) (Eng.) (appeal taken from Q.B.).

197 *Id.* at 134. The Act states: "If a person . . . is concerned in the management of any premises used [for the purpose of smoking cannabis resin]; he shall be guilty of an offense against this Act." Dangerous Drugs Act, 1965, ch. 15, § 5b.

198 *See* Yeandel v. Fisher, [1966] 1 Q.B. 440 (Eng.). The Dangerous Drugs Act creates an absolute offense in the case of the manager of a premises used for smoking cannabis.

199 He wrote, "It does not in the least follow that when one is dealing with a truly criminal act it is sufficient merely to have regard to the subject matter of the enactment. One must put oneself in the position of a legislator." *Sweet*, [1970] 1 App. Cas. at 149.

> charge persons who are in no way blameworthy would he avoided.[200]

Thus, Lord Reid viewed the good faith defense as an alternative, on par with imposing a mens rea requirement, for alleviating the harsh effects of the strict liability doctrine when applied to an individual lacking personal culpability.[201]

Lord Morris of Borth-Y-Gest agreed with the decision. In language foreshadowing Judge Kozinski's reasoning in *Kantor*, Lord Morris argued that because Parliament had not expressly barred a mens rea requirement, the court could engraft a mens rea defense onto the statute.[202] Focusing on the powerlessness of the defendant to avoid conviction, Morris argued that guilt would not attach by reason of carelessness but instead because of "the unknown act of some unknown person whom it had not been found possible to control."[203] Refusing to hold a defendant responsible for acts beyond her control, the court allowed evidence of her mens rea.

Not all British judges accepted the good faith defense. In his concurring opinion in *Sweet v. Parsley*, Lord Pearce rejected the halfway house approach citing the hurdle posed by *Woolmington v. Direc-*

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200 *Id.* at 150.

201 Lord Reid had one year earlier in Regina v. Warner, [1969] 2 App. Cas. 256 (1968) (Eng.) (appeal taken from C.A.), analyzed the strict liability doctrine. In that case, Lord Reid acknowledged the theoretical basis for a good faith defense, but reinterpreted the statute on narrower grounds. *Id.* at 280. Nonetheless, in analyzing the theoretical operation of a halfway house defense, Lord Reid made several important observations. First, he noted that the defense would not be a far-reaching doctrine because it is based upon an objective test: "not whether the accused knew, but whether a reasonable man in his shoes would have known or have had reason to suspect that there was something wrong." *Id.* Second, Lord Reid emphasized that the defense would be limited because the burden would be on the defendant to prove the absence of mens rea. *Id.* Finally, Lord Reid rebutted what might be the greatest underlying concern about the defense—submitting to a jury the issue of the reasonableness of the defendant's actions:

> "The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief. The reluctance is due in great measure, if not entirely, to a mistrust of the tribunal of fact—the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing conditions of mind and describing sources of information . . . . It is not difficult to understand such tendencies, but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and human criminal code."

Id. at 274 (quoting Thomas v. The King, 59 C.L.R. 279, 309 (1937) (Austl.)).

202 Lord Morris wrote: "Even if, contrary to my view, it is not affirmatively enacted that there must be mens rea I cannot read the wording as enacting that there need not be mens rea." *Sweet*, [1970] 1 App. Cas. at 156.

203 *Id.* at 155.

tor of Public Prosecutions.[204] Although he extolled the virtues of the good faith defense, Lord Pearce's reading of *Woolmington* compelled him to reinterpret the statute as requiring proof of criminal intent.[205]

In *Woolmington*, the trial court shifted the burden to the defendant to prove his innocent state of mind at his murder trial.[206] Insisting that the prosecution carry the burden of proof, the high court noted that the "golden thread" in criminal law is that the prosecution must prove the defendant's guilt.[207] Forcing the defendant to prove his innocent state of mind would relieve the prosecution of its burden.

It is ironic that Lord Pearce cited *Woolmington* as a reason for not adopting the halfway house approach.[208] Both the holding in *Woolmington* and the halfway house approach are designed to assist defendants charged with criminal liability. They simply do so in different ways. Contrary to Lord Pearce's assumption, *Woolmington* need not be interpreted as an immovable obstacle to employing the halfway house defense. First, the "halfway house" defense imposes no extra burden on the defendant. Under the current strict liability doctrine, there is already an irrebuttable presumption of defendant's culpability. If anything, the halfway house reduces the defendant's burden by offering him an opportunity to rebut the allegations against him. Second, even if the good faith defense was

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204 1935 App. Cas. 462 (Eng.) (appeal taken from Crim. App.). Lord Pearce indicated that he thought the "sensible half-way house" approach should be used if it could be reconciled with *Woolmington*. On its face, however, Lord Pearce read *Woolmington* as establishing the rule that the burden of proof as to intent could not be shifted to the defendant. Thus, at least for the case before him, Lord Pearce rejected the half-way house defense and chose to interpret the statute as having a mens rea requirement. *Sweet*, [1970] 1 App. Cas. at 157-58.

205 *Sweet*, [1970] 1 App. Cas. at 157-58.

206 Defendant Woolmington shot and killed his estranged wife. There were no eyewitnesses to the shooting. At trial, the defendant claimed the shooting was accidental. He testified that he had rigged a gun inside his coat to show his wife he intended to commit suicide if she did not return. When defendant opened his coat, the gun went off. The trial judge instructed the jury that the prosecution must prove, beyond a reasonable doubt, that the victim had died at the defendant's hands. If the prosecution proved this point, the burden shifted to the defendant to prove the shooting was accidental. Ultimately the jury convicted the defendant of murder. On appeal, the House of Lords held that the trial judge erred in his instruction.

> [W]here intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. . . . If . . . there is a reasonable doubt . . . as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

Woolmington, 1935 App. Cas. at 481.

207 *Id.*

208 Justice Dickson noted this irony in the seminal Canadian case on the good faith defense, The Queen v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299, 1315-16 (Can.).

viewed as adding a burden on the defendant, both British and American courts explicitly recognized statutory exceptions to the general rule that the burden of proof lies with the prosecution.[209] Therefore, in courts where the judge is unwilling to reinterpret strict liability statutes, the "halfway house" or good faith defense may not only be the better alternative but the only recourse for a defendant facing a presumption of culpability.

The British experience shows that the good faith defense is a viable alternative to troublesome applications of the strict liability doctrine. However, it does not provide a complete model for American courts to follow because the British courts have yet to adopt a consistent or coherent application of the defense.[210] Rather, it appears to offer British courts an escape hatch when they feel compelled to impose strict liability on an individual for whom punishment seems inappropriate.

2. *Canadian Law*

The Canadian courts apply the good faith defense more consistently than the British courts.[211] In Canadian courts, the good faith defense is the rule, not the exception.[212] This "midway point" defense strikes a balance between "penalising offences which have

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209 In Patterson v. New York, 432 U.S. 197 (1977), the Supreme Court held that the legislature may shift the burden of proof onto the defendant to prove an affirmative defense, such as extreme emotional disturbance, because the statute did not make the defendant's mental state an element of the crime charged. *Id.* at 207-09. It is often difficult, however, to distinguish between elements defining the offense and elements constituting an affirmative defense. *See* Cooper v. North Carolina, 702 F.2d 481, 484 (4th Cir. 1983) (holding that federal courts will employ functional analysis to determine whether a state has impermissibly incorporated absence of an affirmative defense into elements of a crime). Nevertheless, once a court decides that a circumstance is not an element of the offense, the burden of proof as to that circumstance, including the defendant's mental state, may be shifted constitutionally to the defendant. *Patterson*, 432 U.S. at 210.

210 For example, even though Lord Diplock found that *Woolmington* did not bar such a defense, he avoided the defense in *Sweet*. Rather, he found that the offense in question contained a mens rea requirement. Sweet v. Parsley, 1970 App. Cas. 132, 164-65 (appeal taken from Q.B.) (Eng.). English law on strict liability crimes and good faith defenses remains unsettled. *See also* Singer, *supra* note 1, at 379 n.197 (arguing that unlike Canada and Australia, England has not taken the "halfway position" in strict liability offenses). *See generally* PETER SEAGO, CRIMINAL LAW (83 (1981) (acknowledging that England has not yet adopted the good faith defense).

211 In 1978, the Canada Supreme Court decided The Queen v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299 (Can.), in which it recognized a good faith defense and adopted the recommendation of the Canadian Law Reform Commission limiting the strict liability doctrine in Canadian criminal law. LAW REFORM COMM'N OF CANADA, STUDIES IN STRICT LIABILITY (1974). The Law Commission of Canada concluded "that in the regnlatory law strict liability be replaced by negligence and that the law as a minimum allow a defence of due diligence with a reverse onus of proof." *Id.* at 37.

212 Peiris, *supra* note 1, at 124; The Queen v. Roliff, 11 C.C.C.2d 10, 11 (Ont. C.A. 1973) (Can.); The Queen v. Ooms, 11 C.C.C.2d 69, 70 (Sask. C.A. 1973) (Can.).

in fact been committed but are difficult or impossible to prove, and the risk of punishing an innocent defendant."[213] Canadian courts even allow a defendant to enter a plea that "a man, intending to do a lawful act, does that which is unlawful acting upon an honest and reasonable belief."[214] As a consequence, the Canadian criminal justice system contains a category of offenses that are essentially quasi-criminal and punished accordingly.[215]

Canadian courts do not believe that strict liability offenses must be, by definition, crimes without a mens rea requirement. Rather, they view such offenses as creating a legal presumption of culpability that may be overcome.[216] Canadian courts employ a "preponderance of probabilities" standard with the good faith defense. In essence, the courts place the burden on the defendant to show that he operated in good faith. Furthermore, the defendant must prove this proposition by a preponderance of the evidence—a standard less demanding than the clear and convincing standard adopted by the *Kantor* court for the good faith defense.[217]

While the majority of Canadian courts accept the good faith defense, some judges have been unwilling to abandon the concept of absolute liability altogether.[218] If the offense is relatively minor and carries only a monetary penalty, some courts will find that the public interest in protecting against the harm created, combined with the costs of allowing a good faith defense, outweigh the defendant's in-

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213 Peiris, *supra* note 1, at 124.

214 The Queen v. Finn, 8 C.C.C.2d 233, 236 (Ont. C.A. 1972) (Can.).

215 Peiris, *supra* note 1, at 124-25. The defendant's plea under the halfway house solution is considered a plea to a criminal offense, but to one that warrants less punishment. The Canadian courts have, in essence, created an intermediate category of offenses. *Id.*

216 *Id.*

217 The preponderance of evidence standard requires evidence of greater weight than the evidence offered in opposition; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Braud v. Kinchen, 310 So. 2d 657, 659 (La. Ct. App. 1975). The clear and convincing proof standard, used in United States v. United States Dist. Court, 848 F.2d 534, 543 (9th Cir. 1988), *aff'g* United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987), requires proof that results in reasonable certainty of the truth of the ultimate fact in controversy. Lepre v. Caputo, 328 A.2d 650, 652 (N.J. Super. Ct. 1974). Therefore, the clear and convincing proof standard requires more evidence than the preponderance of the evidence standard, but less evidence than the proof beyond a reasonable doubt standard.

218 Nova Scotia and Manitoba have rejected the halfway house solution to strict liability crimes. However, the acceptance of the doctrine by Ontario and New Brunswick represents the established law of Canada. Peiris, *supra* note 1, at 125. Additionally, the Canada Supreme Court held that imprisonment for an absolute liability offense is a deprivation of liberty not "in accordance with the precepts of fundamental justice" guaranteed by the Canadian Charter of Rights and Freedoms. Thus, the good faith defense must be the rule, not the exception. Ref. Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 (Can.).

terest in being punished only for culpable behavior.[219] In these situations, Canadian courts may bar the use of the good faith defense.

In the past, it has been difficult to predict when a Canadian court would classify an offense as a strict liability crime instead of an absolute crime. Factors considered have included: (1) the severity of the penalty imposed for the offense; (2) the likely effect of a criminal conviction on the defendant's position and reputation in the community; (3) the impact of using the defense on the legislative objective of the statute; (4) the degree of danger posed by defendant's acts; (5) the overall regulatory pattern in the subject matter of defendant's crime;[220] (6) whether defendant's crime involved affirmative acts or omissions;[221] and (7) the amount of difficulty prosecutors face in enforcing a particular penal provision.[222]

More recently, however, the Canada Supreme Court has held that absolute liability crimes exposing defendants to mandatory imprisonment violate the fundamental rights of Canadians under the Canadian Charter of Rights and Freedoms.[223] Prior to that decision, the Canadian courts used an ad hoc system to decide when to allow a good faith defense.[224] Each individual judge would act as a "superlegislature," overriding legislative intent when he wanted to allow a good faith defense. This case-by-case system imposed tremendous requirements on the judiciary, consuming valuable and limited judicial resources. It also resulted in a system where different judges treated the same crime differently.[225] In response to these problems, the Canada Supreme Court held that absolute liability crimes mandating a period of imprisonment should generally be seen as violating fundamental justice and that a good faith defense should be permitted.[226] The Court did not set forth, however,

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219 Peiris, *supra* note 1, at 129-30. Canadian courts have accepted absolute liability (strict liability without a halfway house defense) in limited areas including: marketing and safety regulations, sale of alcoholic beverages to children, unlawful trading in securities, and some aspects of environmental laws. *Id.*

220 If there is a tradition of disallowing evidence of good faith, the defense will not be permitted.

221 Omissions are rarely categorized as absolute liability offenses.

222 Peiris, *supra* note I, at 126.

223 Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 (Can.).

224 Allan C. Hutchinson, *Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences Get a Home of Their Own*, 17 OSGOODE HALL L.J. 415 (1979).

225 *See* Jacques Fortin, Patrick J. Fitzgerald & Tanner Elton, *Strict Liability in Law*, *in* LAW REFORM COMM'N OF CANADA, STUDIES ON STRICT LIABILITY 157, 176 (1974) (comparing two Canadian cases with nearly identical facts treated differently for mens rea requirement).

226 There was an express caveat, however, to the Court's broad holding that absolute liability crimes should not result in imprisonment. The Court held that in extreme cases, like those arising out of "exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like," the absolute liability doctrine could be used

the quantum of proof required to satisfy the good faith defense nor whether, as in *Kantor*, the defendant must make affirmative efforts to discern the truth.[227]

Because the United State Supreme Court is unlikely to rule that strict liability crimes as a class are unconstitutional,[228] the Canadian model provides an instructive but not readily adaptable approach for American courts. American courts need a means to identify those cases that warrant a good faith defense and a model for how that defense would operate.

3. *Australian Law*

While derivative of English law,[229] the Australian legal system has always been more consistent in its approach to strict liability crimes and the good faith defense. In over sixty years, only three courts have denied the defense.[230] Australian law goes beyond a halfway house approach by accepting a *prima facie* rule that reasonable mistake of fact will exonerate common law and statutory offences without discrimination.[231] More than the courts of any other Commonwealth jurisdiction, Australian courts employ a good faith defense for offenses they deem "strict liability" offenses.[232] Even clear statutory text is treated in Australia as having "no other effect than throwing on the defendant the burden of exculpating himself

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even if the defendant was to be punished with incarceration. Reference Re Section 94(2) of the Motor Vehicle Act. [1985] 2 S.C.R. 486, 518 (Lamer, J.).

227 Peiris, *supra* note 1, at 131. Moreover, following its decision in *Motor Vehicle Act*, the Canada Supreme Court addressed the question of whether a criminal or regulatory offense is invalid because it places the burden on the defendant to establish his own due diligence. R. v. Wholesale Travel Group Inc., 84 D.L.R. (4th) 161 (1991). At least four justices believed that placing the burden on the defendant to prove due diligence would invalidate a statute. *Id.* Five other members of the court, however, left open the possibility that a presumption of negligence is valid for regulatory crimes. There is therefore an open question in Canada as to whether the good faith defense will remain the preferred option or the Canadian courts will require the prosecution to prove a culpable mens rea. *See* Editorial, *Regulatory Offences*, 34 CRIM. L.Q. 257 (1992) (analyzing *Wholesale Travel Group*); Patrick Healy, *Criminal Law-Strict and Absolute Liability Offences—The Role of Negligence—Presumption of Innocence and Reverse Onus-Charter of Rights and Freedoms, Sections 7, 11; Competition Act, Sections 36, 37.3: R. v. Wholesale Travel Group Inc.*, 64 CANADIAN B. REV. 761 (1990) (same); *see also* Chris Tollefson, *Ideologies Clashing: Corporations, Criminal Law, and the Regulatory Offence*, 29 OSGOODE HALL L.J. 705 (1991) (discussing ideological debate arising from treatment of Canadian strict liability crimes).

228 *See infra* part III.B.1.

229 Colin Howard, *Strict Responsibility in the High Court of Australia*, 76 LAW Q. REV. 547, 549 (1960).

230 All three cases involved a private claim, of a business nature, against another individual. Brown v. Green, 84 C.L.R. 285, 294 (1951) (Austl.); Duncan v. Ellis, 21 C.L.R. 379 (1916) (Austl.); Spooner v. Alexander, 13 C.L.R. 704 (1912) (Austl.).

231 Peiris, *supra* note 1, at 131.

232 *Id.* at 132-33.

by showing that he acted under a reasonable mistake of fact."[233] Unless the legislation expressly prohibits the defense, Australian courts will allow the defense by implication.[234]

Australian courts are also clearer on the operation of the good faith defense.[235] First, the burden remains on the defendant to show by a "balance of probabilities"[236] that he or she had both an honest and reasonable mistake of fact.[237] Second, the courts have indicated the degree of care required to satisfy the reasonableness component: "[I]f the accused had means of knowledge which he ought to have used but of which he did not in fact avail himself, his omission to do so is culpable in a sense which excludes the advantage of the defence."[238] Thus, the defendant must take affirmative, reasonable steps to learn the truth in order to employ the good faith defense.

Limited critical analysis exists as to the effect of the good faith defense on strict liability prosecutions in Australia.[239] To the extent there has been criticism, it has focused on the lack of case precedent supporting the presumption of a good faith defense.[240] However, commentators generally have praised the doctrine as a means of rejecting crude estimates of probability.[241] The Australian courts refuse to label haphazardly some offenses as strict liability and others

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233 *Id.* at 132; Maher v. Musson, 52 C.L.R. 100, 105 (1934) (Austl.) (Dixon, J.).

234 Peiris, *supra* note 1, at 132. Master Butchers Ltd. v. G. Laughton & Coombs Ltd., 19 C.L.R. 349, 350 (1915) (Austl.) (Griffith C.J.), *aff'g* G. Laughton & Coombs Ltd. v. Master Butchers Ltd., 1915 S.A.L.R. 3, 12-13 (S. Austl.).

235 *See generally* Howard, *supra* note 229, at 549 (Australian courts interpret strict liability statutes as placing burden on defendant to rebut negligence by presenting affirmative proof of reasonable mistake).

236 Gherashe v. Boase, 1959 V.R. 1 (Vict.); The Queen v. Reynhoudt, 107 C.L.R. 381, 399 (1962) (Austl.) (Menzies J.); *see* Howard, *supra* note 229, at 565.

237 Not all courts and commentators agree that "reasonableness" should be a requirement; many argue that an honest mistake is sufficient. Peiris, *supra* note 1, at 134-35. The prevailing view, however, is that the mistake must be objectively reasonable in order to limit the defense.

238 *Id.* at 135; *see also* Asiatic Petroleum Co. Ltd. v. Lennard's Carrying Co., [1914] 1 K.B. 419, 432 (1913) (Eng.).

239 Proudman v. Dayman, 67 C.L.R. 536 (1941) (Austl.), generated most of this commentary. In that case, the high court of Australia analyzed the classic absolute liability offense of driving a car without a license. The High Court unanimously decided that mens rea was not an ingredient of the offense did not decide the question of whether the good faith defense applied. *Proudman* generated a series of articles on the theoretical effects of a good faith defense on strict liability crimes in Australia. *See* Brent Fisse, *Vicarious Responsibility in Regulatory Offences*, 44 AUSTL. L.J. 601 (1970); Brent Fisse, *The Elimination of Vicarious Responsibility in Regulatory Offences*, 42 AUSTL. L.J. 250 (1968); Dennis Rose, *Vicarious Liability in Statutory Offences*, 45 AUSTL. L.J. 252 (1971); Dennis Rose, *Vicarious Liability in Regulatory Offences*, 44 AUSTL. L.J. 147 (1970); A.J. Hannan, Note, *Mens Rea in Statutory Offences*, 16 AUSTL. L.J. 91 (1942).

240 *See* Hannan, *supra* note 239.

241 The few commentaries that do address the issue praise the defense as allowing the courts to establish a doctrine based on the probability of defendant culpability. W.B.

as negligence.[242] Instead, they use the good faith defense to determine the probability that the defendant deserves punishment. Notions of moral culpability override concerns for judicial efficiency.

4. *New Zealand Law*

Strict liability law in New Zealand is like that in Australian law, with one crucial difference. Although both countries recognize a good faith defense,[243] a defendant in New Zealand need assert only a reasonable basis for his mistake, after which the burden shifts to the government to prove the absence of a mistake.[244] Defendants need not make reasonable efforts to ascertain the truth nor prove their mistakes by a balance of probabilities.[245]

As a result, there is greater disagreement in New Zealand as to the validity of the good faith defense.[246] If defendants can shift the burden of proof to the prosecution simply by raising a reasonable basis for a mistake, more defendants will employ the defense, thus rendering judicial strict liability proceedings inefficient. Many courts in New Zealand therefore consider the alternative of adopting a good faith defense that requires the defendant to prove the absence of culpability.[247] Because of a lack of uniformity in how the New Zealand good faith defense operates, this Article endorses an approach more akin to the Australian model than to that of New Zealand: the defendant must prove that he took all reasonable steps to avoid the illegal results.[248]

5. *South Asian and African Codified Systems*

Finally, both commonwealth Asian and African countries recognize a good faith defense to strict liability crimes.[249] Unlike in the

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Fisse, *Probability and the Prondman v. Dayman Defence of Reasonable Mistaken Belief*, 9 MELB. U. L. REV. 477 (1974).

242 Reynolds v. State, 655 P.2d 1313 (Alaska Ct. App. 1982) (reinterpreting strict liability statute that prohibits fishing in closed waters as requiring at least a showing of negligence); State v. Kremer, 114 N.W.2d 88 (Minn. 1962) (reinterpreting strict liability statute prohibiting motorist from running red light to require showing of negligence).

243 Peiris, *supra* note 1, at 136.

244 *Id.* at 138.

245 *Id.*

246 *See* Janet November, *Unreasonable Mistakes and Mens Rea*, 1990 N.Z. L.J. 130. For an example, see generally Cato, *supra* note 86 (discussing halfway house defense). For a discussion of the *mens rea* debate and how it applies to strict liability narcotics offenses in New Zealand, see J.M. Conradson, *Mens Rea in Relation to Drug Offences*, 2 OTAGO L. REV. 131 (1969-72).

247 Pieris, *supra* note 1, at 138 ("[I]n the typical case of public welfare offence, the courts of New Zealand have required little persuasion . . . that initiative by the accused in demonstrating lack of fault should not be barred."); *see, e.g.*, Ministry of Transport v. Burnetts Motors Ltd. [1980] 1 B.Z.K.R. 51, 57-58 (N.Z. C.A.).

248 *See infra* part III.B.3.4.

249 Peiris, *supra* note 1, at 139.

United States,[250] the penal codes for these nations expressly recognize the defense.[251] For example, the Penal Code of Ghana provides that no person is punishable for any act that, by reason of ignorance or good faith mistake of fact, he believes to be lawful.[252]

In these jurisdictions the good faith defense is not novel or innovative. Rather, strict liability is defined not only to tolerate, but to embrace, a good faith defense. As a result, the doctrine faces little challenge or second-gnessing as to whether it properly balances utilitarian needs and fairness concerns.

While American legislatures could adopt this approach, such a proposal is politically unrealistic. Lawmakers who want to be "tough on crime" will not enact laws creating defenses for fear of being viewed as "soft." More likely, the courts will take the lead in ensuring that defendants charged with a strict liability crime are punished only if they deserve criminal punishment.[253]

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250 A survey of American state statutes indicates that they will adopt one of the following five approaches when interpreting the mens rea requirement of statutory crimes:

(1) Generally presume that a criminal offense requires proof of mental culpability; see, e.g., CAL. PENAL CODE § 4 (West 1988), MICH. COMP. LAWS § 28.192 (1990), N.Y. PENAL LAW § 15.5 (McKinney 1987), TEX. PENAL CODE ANN. § 6.01 (West 1974);

(2) Generally presume that a criminal offense requires proof of mental culpability, but allow an exception for criminal "violations," see e.g., ARK. CODE ANN. § 5-2-204 (Michie 1987), DEL. CODE ANN. tit. 11, § 253 (1987), ILL. REV. STAT. ch. 38, paras. 4-9 (1988), OR. REV. STAT. § 161.105 (1990);

(3) Reduce the grade and class of an offense if there is a showing of ignorance or mistake; see HAW. REV. STAT. § 702-219 (1985);

(4) Interpret each statute's mens rea by its langnage and intent, see KAN. STAT. ANN. § 21-3201 (1988), MINN. STAT. § 610.02(9) (1987), WIS. STAT. § 939.23 (1982);

(5) No statutes on construction, see, e.g., N.C. GEN. STAT., OHIO REV. CODE ANN., OKLA. STAT., VT. STAT. ANN.

Currently, no state has a statute mentioning a general reasonable mistake of fact defense to strict liability offenses. Some states, however, created such a defense for specific crimes. *See, e.g.*, OR. REV. STAT. 482.560 (1980) (good faith defense for driving with suspended license).

251 For example, the Penal Code of India states: "Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it." INDIA PEN. CODE § 79, Act XLV of 1860, *cited in* Peiris, *supra* note 1, at 139 n.262.

252 GHANA CRIM. CODE 1960, art. 29, § 29(1), *cited in* Peiris, *supra* note 1, at 139 n.271

> (A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent that if the real state of things had been such as he believed to exist.).

253 Because state judges are often elected officials, federal judges with lifetime tenure may have to take the lead in creating a good faith defense. *See, e.g.*, United States v. United States Dist. Court [Kantor], 858 F.2d 534 (9th Cir. 1988), *aff'g* United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987).

6. *Summary of Foreign Experience*

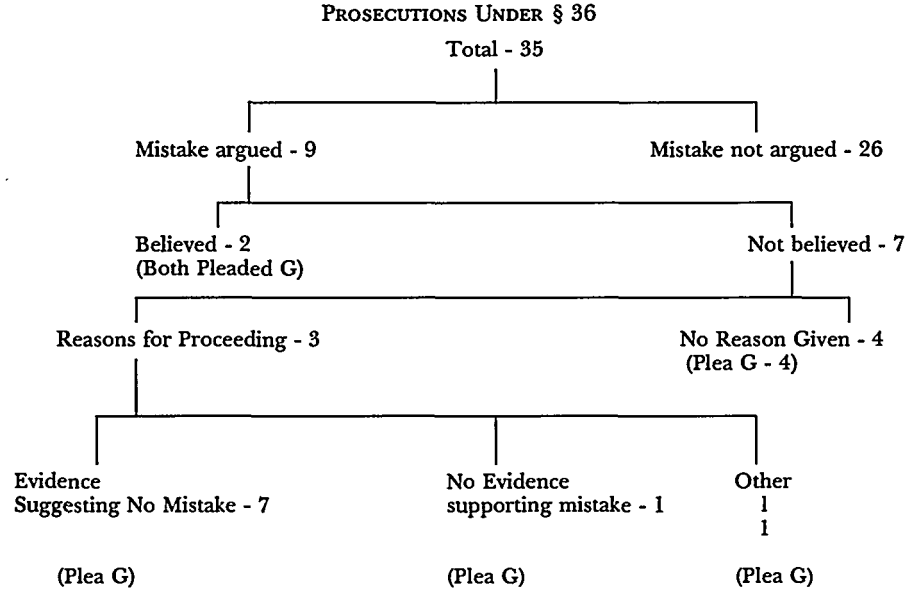
In developing a good faith defense, American courts need not write on an empty slate. They can draw upon the experience of those commonwealth countries that successfully apply the good faith defense.[254] The use of the defense has been used successfully by these nations and has not hindered their prosecutions.[255]

Several aspects of the foreign approach are worth adopting in the United States. First, courts should recognize that punishment is improper in the absence of individual culpability. Under the current American approach to strict liability law, this principle is often ignored, creating a tangible risk that nonculpable persons will be punished. Second, the experience of other countries suggests that strict liability offenses should be viewed as procedural mechanisms—re-

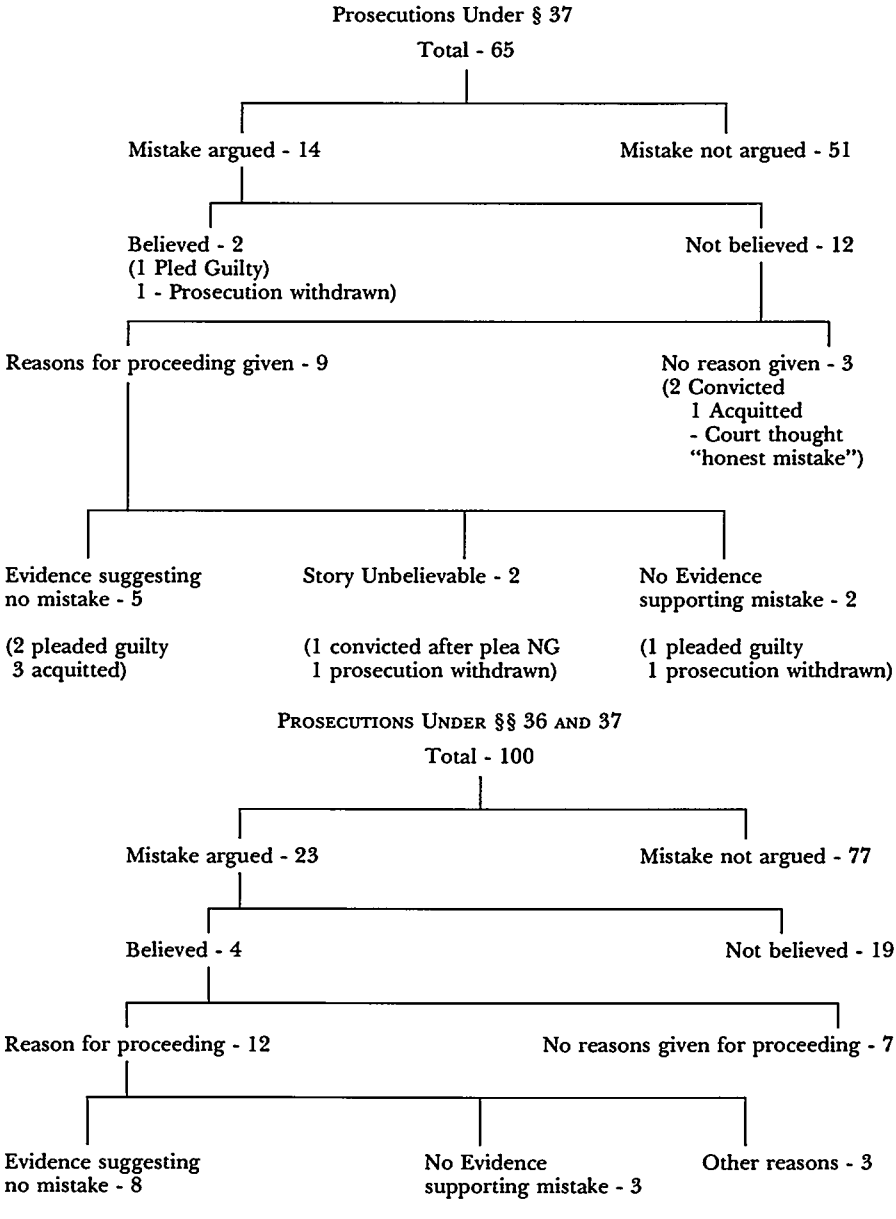
254 *See generally* COLIN HOWARD, STRICT RESPONSIBILITY (1963) (overview of strict liability in commonwealth countries; particular emphasis on Australian Criminal Codes); L. H. LEIGH, STRICT AND VICARIOUS LIABILITY: A STUDY IN ADMINISTRATIVE CRIMINAL LAW (1982) (overview of strict and vicarious liability law in commonwealth countries).

255 For example, a study conducted by the Law Reform Commission of Canada in 1974 showed that "since 1968, federal statutes in the regulatory sector have tended to include defenses of due diligence and reasonable care, without producing any great anxiety among the law-enforcers." *See* LAW REFORM COMM'N OF CANADA, STUDIES ON STRICT LIABILITY 29 (1974).

Despite the large number of strict liability cases prosecuted in Canada, the study shows that recognition of a due diligence/good faith defense does not unduly burden the trial of strict liability crimes. Consider the statistics for the crime of misleading advertising with regard to price. The Combines Investigation Act, §§ 36-37, prohibits misleading advertising with regard to price but permits a good faith defense. As diagramed below, an analysis of prosecutions under those statutes indicates that the good faith mistake is argued infrequently and does not impair prosecution.



buttable presumptions that relieve the prosecution from proving mens rea in its case-in-chief.[256] In ordinary cases, no evidence of intent would be admitted at trial because of the legislative presumption that the defendant acted negligently. However, in extraordinary cases defendants could prove good faith mistake of fact.



Even when defendants assert a good faith mistake defense, litigation was expedited by allowing the defendants to plead "*G*" (guilty with a mistake).

256 *See* Goodhart, *supra* note 135, at 385 (viewing drug strict liability crimes in England as procedural mechanisms not penal ones).

Defendants could do this by proving that they operated under a mistake of fact and took reasonable and affirmative steps to avoid criminal activity.[257]

In order to tailor the good faith defense to the American system and delineate its availability, we must understand why the defense has not been accepted by most American courts. The next section describes how the American criminal justice system differs from other legal systems, and why these differences must be considered when proposing a good faith defense model.

B. Constructing a Good Faith Defense for American Courts

1. *Traditional Strict Liability Law*

Thus far, the American criminal justice system has not adopted the commonwealth countries' approach to strict liability crimes. American courts historically have viewed strict liability crimes as offenses that do not permit an examination of an individual defendant's moral culpability. *State v. Gould*, an 1875 decision by the Iowa Supreme Court,[258] is typical of the traditional view of strict liability offenses. In *Gould*, the defendant was charged with obstructing a highway by building a fence on the north line of his farm. Before building the fence, the farmer relied on a survey obtained from the county surveyor. The surveyor, however, incorrectly measured the property. As a result, the defendant was convicted. The Iowa Supreme Court summarily rejected the defendant's proposed good faith defense: "The public cannot be deprived of, nor impeded in, the right to the use of a highway because of the mistake, however honestly made, of one who places an obstruction upon it. Such facts would very properly be considered in mitigation of punishment, but they do not show that no nuisance has been committed."[259] Strict liability crimes, by definition, permitted no inquiry into the defendant's mens rea prior to sentencing.[260]

This traditional rigid view of strict liability persists in American law for several reasons.[261] First, American scholars generally attack

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257 Moreover, in some situations (such as with absolute liability offenses) the risk of harm to the public from the defendant's conduct far exceeds any injury that an innocent could suffer by his conviction. *Id.* at 385-86. For those crimes, the good faith defense need not apply. *See infra* note 316 and accompanying text.

258 40 Iowa 372 (1875).

259 *Id.* at 374.

260 *See* Commonwealth v. Dicken, 22 A. 1043 (Pa. 1891).

261 *See, e.g.*, United States v. Freed, 401 U.S. 601 (1971) (holding that it is no defense that the defendant did not know hand grenade in his possession was not registered); United States v. Valencia-Roldan, 893 F.2d 1080 (9th Cir. 1990) (ruling that government is not required to prove that defendant knew age of minor to support conviction for use of minor in cocaine distribution), *cert. denied*, 495 U.S. 935 (1990); United States v. Pruitt, 763 F.2d 1256 (11th Cir. 1985) (holding that government is not required to

the strict liability doctrine as a whole, rather than looking for compromise doctrines, such as the good faith defense. For example, the American Law Institute ("ALI") has rejected the strict liability doctrine in its entirety.[262] Under the Model Penal Code, in order to be labeled a "crime," an offense requires proof of a culpable mental state.[263] Thus, scholarly groups have not embraced a "compromise" good faith position, but have instead rejected the *entire* strict liability doctrine.[264] In comments to the Model Penal Code, the ALI calls for a "frontal attack" to abolish the criminal strict liability doc-

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prove defendant was knowledgeable of age for conviction on distributing controlled substances to persons under 21), *cert. denied*, 474 U.S. 1084 (1986); United States v. Catlett, 747 F.2d 1102 (6th Cir. 1984) (holding that defendants, hunting migratory birds on a baited field in violation of the Migratory Bird Treaty Act, were criminally liable even though they were without knowledge that field had been baited), *cert. denied*, 471 U.S. 1074 (1985); United States v. FMC Corporation, 572 F.2d 902 (2d Cir. 1978) (ruling that it is no defense to violation of the Migratory Bird Treaty Act that defendant was not aware of the lethal-to-birds quality of water in its pond); United States v. Kleiner, 663 F. Supp. 43 (S.D. Fla. 1987) (holding that it is no defense to transportation of visual depiction of minors engaging in sexually explicit conduct that defendant was unaware females depicted were under 16); People v. Olsen, 685 P.2d 52 (Cal. 1984) (holding that defendant's good faith belief that girl was over 16 years old is no defense to charge of lewd or lascivious conduct with a child under 14); People v. Dillard, 201 Cal. Rptr. 136 (Cal. Ct. App. 1984) (holding that belief firearm was not loaded is no defense to carrying loaded firearm in public place); People v. Guinn, 196 Cal. Rptr. 696 (Cal. App. Dep't. Super. Ct. 1983) (holding that it is no defense that defendant bartender believed bar owner's caterers permit was sufficient license for sale of alcoholic beverages); State v. Stiffler, 788 P.2d 220 (Idaho 1990) (ruling that defendant's reasonable belief that girl was at least 18 years old not a defense to statutory rape); State v. Tague, 310 N.W.2d 209 (Iowa 1981) (holding that defendant's good faith reasonable mistake as to girl's age is not a defense to the charge of having sex with a child under 14); McCallum v. State, 567 A.2d 967 (Md. Ct. Spec. App. 1990) (holding that defendant's mistake in carrying the wrong automobile registration and license tags is no defense to several motor vehicle violations); State v. White, 464 N.W.2d 585 (Minn. Ct. App. 1990) (holding that defendant's mistaken belief that girl was over 18 is no defense to use of minor in sexual performances), *cert. denied*, 112 S. Ct. 77 (1991); State v. Fan, 445 N.W.2d 243 (Minn. Ct. App. 1989) (ruling that defendant's belief girl was over 18 years old is no defense to offense of employing a minor to engage in a sexual performance), *cert. denied*, 494 U.S. 1030 (1990); State v. Vogel, 315 N.W.2d 324 (S.D. 1982) (holding that defendant's mistake of law is no defense to strict liability crime of bail-jumping).

262 MODEL PENAL CODE § 2.05, cmt. 1 (Tentative Draft No. 4, 1955). Some commentators have even suggested that the ALI's mode of attack on strict liability crimes was politically motivated. *See* Walter Gordon, *Strict Legal Liability, Upper Class Criminality, and The Model Penal Code*, 26 How. L.J. 781 (1983) (arguing that ALI's attack on strict liability crimes and not the felony murder doctrine shows a bias in favor of the upper class who is more susceptible to strict liability offenses).

263 MODEL PENAL CODE § 2.02 (1962).

264 Legislatures have not adopted the MPC approach. Saltzman, *supra* note 1, at 1591. This frontal attack on the strict liability doctrine did come, however, with a major reservation. If an offense does not carry the possibility of imprisonment, it may be labelled as a "violation" and strict liability doctrines employed. MODEL PENAL CODE § 2.05, cmt. 1, at 140 (Am. Law Inst.) (Tentative Draft No. 4, 1955).

trine.[265] Legislatures, however, have not heeded this cry and strict liability statutes still abound in American law.[266]

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265 MODEL PENAL CODE § 2.05, cmt. 1 (1962).

266 Child Protection Act of 1984, 18 U.S.C. § 2252 (1988 & Supp. 1991) (strict liability for depicting minors in sexually explicit conduct); Controlled Substances Act, 21 U.S.C. § 859 (Supp. II 1990) (strict liability for sale of cocaine to minor; knowledge of age of minor is irrelevant); Federal Deposit Insurance Act, 12 U.S.C. § 1828(j) (1988) (strict liability for loans and extensions of credit by a bank to its directors); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1988 & Supp. 1990) (strict liability for manufacturing, compounding, labeling, and distribution of fraudulent or harmful foods and drugs); Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1988 & Supp. 1990) (strict liability for the hunting, taking, killing, possessing, selling, transporting of any migratory bird, in whole or in part, covered by the treaty); National Firearms Act Amendments of 1968, 26 U.S.C. §§ 5841, 5861(d) (1988) (strict liability for possessing handgrenade, unregistered firearm); Northern Pacific Halibut Act of 1982, 16 U.S.C. § 773 (1988) (strict liability for selling, transporting, possessing any fish covered by Act); Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1333 (1988) (strict liability for failing to have certain warnings in a conspicuous place on every package of cigarettes sold in the United States); Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1988) (strict liability for obstructing, excavating, or filling any navigable water of the United States unless approved by Army Corps of Engineers); Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1656 (1988 & Supp. 1990) (strict liability for oil spills); 18 U.S.C. § 1382 (1988) (strict liability for entering, where prohibited, military, naval, or Coast Guard property);

ALASKA STAT. § 16.05.340 (1992) (strict liability for failing to purchase tags prior to hunting game or for failing to affix tags to game); CAL. FISH & GAME CODE § 5650 (West 1984) (strict liability for depositing substances deleterious to fish, plant life, or bird life into state waters); CAL. HEALTH & SAFETY CODE §§ 25,100-25,249 (West 1992) (strict liability for violating hazardous waste regulations), CAL. HEALTH & SAFETY CODE §§ 26,619-26,621, 26,650-26,652 (West 1984) (strict liability for compounding or selling adulterated or misbranded drugs); CAL. HEALTH & SAFETY CODE §§ 26,534 & 26,565 (West 1984) (strict liability for selling misbranded or adulterated food article); CAL. PENAL CODE § 311.5 (West 1988) (strict liability for solicitation or creation of advertising for or promotion of sale or distribution of matter represented by defendant to be obscene [whether or not actually obscene]); Illinois Environmental Protection Act, ILL. ANN. STAT. ch. 111½, paras. 1012, 1021 (1988 & Supp. 1992) (strict liability for hazardous waste clean-up); MD. TRANSP. CODE ANN. § 16-303 (Supp. 1992) (strict liability for driving motor vehicle on suspended license); MD. TRANSP. CODE ANN. § 13-703 (1992) (strict liability for unauthorized use of registration & license plate-mistake no defense); N.D. CENT. CODE § 19-03.1-23(1) (1991) (prohibits possession of controlled substance with intent to deliver; held to be strict liability offense in State v. Rippley, 319 N.W.2d 129 (N.D. 1982)—affirmative defense permitted in State v. Michlitsch, 438 N.W.2d 175 (1989)); N.M. STAT. ANN. § 30-6-1(c) (Michie 1984 & Supp. 1992) (permitting a child to be placed in situation which endangers life or health, or to be cruelly punished; defined as strict liability offense in State v. Lucero, 647 P.2d 406 (N.M. 1982) and State v. Crislip, 796 P.2d 1108 (N.M. Ct. App. 1990); S.D. CODIFIED LAWS ANN. § 23A-43-31 (1988) (prohibits bail-jumping; defined as strict liability offense in State v. Vogel, 315 N.W.2d 324 (S.D. 1982); S.D. CODIFIED LAWS ANN. § 47-31A-201 (1991) (strict liability for securities agent operating without a license);

Additionally, at least seventeen states have strict liability statutory rape statutes: COLO. REV. STAT. § 18-3-406(2) (1986); FLA. STAT. ANN. § 794.021 (West 1992); HAWAII REV. STAT. §§ 707-730, 707-731 (Supp. 1991); IDAHO CODE § 18-6101 (Supp. 1992); IOWA CODE § 709.4 (1979); LA. REV. STAT. ANN. § 14:80 (West 1992); ME. REV. STAT. ANN. tit. 17-A, § 254 (West Supp. 1991); MASS. GEN. LAWS ANN. ch. 265, § 23 (West 1990); MICH. STAT. ANN. § 28.788(4) (Callaghan 1990); MINN. STAT. ANN. § 609.342 (West 1987); MO. ANN. STAT. § 566.020 (Vernon 1979); MONT. CODE ANN. § 45-5-502

Second, reluctance to adopt the good faith defense in the United States stems from the fundamental change the doctrine would have on the balance of power between legislatures and courts. The Constitution balances the power of the three branches of government—legislative, executive and judicial—by granting the legislative branch the power to enact the laws, the executive branch the power to enforce the laws, and the courts the power to interpret the laws. By design, the separation of powers doctrine[267] limits courts to interpreting criminal laws and ensuring that application is consistent with legislative design and the Constitution.[268]

In 1910, the Supreme Court in *Shevlin-Carpenter Co. v. Minnesota*[269] stated in dicta that a legislature may enact legislation that does not allow a defense of good faith or ignorance.[270] Ten years later, in *United States v. Balint*,[271] the Court reaffirmed that, by constitutional design, courts should defer to the legislature's decision to create an offense not requiring scienter.[272] Accordingly, American courts, driven by the duty to remain loyal to legislative intent and constitutional imperative, have employed the strict liability doctrine

(1991); N.H. REV. STAT. ANN. § 632-A:3 (1986); N.M. STAT. ANN. § 30-9-11 (1992); OHIO REV. CODE ANN. § 2907.02 (Anderson 1975); OR. REV. STAT. § 163.326 (1990); 18 PA. CONS. STAT. ANN. § 3102 (1983).

267 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review as proper role of judiciary). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 2-1, 2-2 (2d ed., 1988) (discussing separation of powers doctrine).

268 *See* State v. Monahan, 104 A.2d 21, 27 (N.J. 1954) (quoting Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904) (Holmes, J.))

> [T]he determination as to what is the wise and acceptable approach from society's viewpoint clearly rests with the other [non-judicial] branches of government. Matters of statutory policy are the exclusive concern of the legislative and executive branches which are fully accountable to the electorate acting at the polls; and statutory enactments may not properly be nullified in whole or in part simply because the judicial branch thinks them unwise. It is well that we ever remind ourselves that in our democracy the executive and legislative branches of government are the "ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Id.; *see also* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 317 (1989) (courts must defer as much as possible to legislatures when evaluating constitutionality of statutes).

269 218 U.S. 57 (1910).

270 218 U.S. at 68-69. *Shevlin*, however, involved a civil fine rather than criminal punishment.

271 258 U.S. 250 (1922).

272 *Balint*, 258 U.S. at 252.

as the legislatures intended[273]—as an offense in which evidence of intent cannot be admitted.[274]

Therefore, unlike their Commonwealth counterparts, American courts are wedded to a constitutional tradition that allocates the responsibility of defining crimes to the legislature.[275] If the legislature explicitly defines a crime as one of strict liability, the court must ordinarily apply the statute as intended.[276]

2. *Constitutional Limitations*

A court's duty to remain loyal to legislative intent is not without qualification. All prosecutions in the United States must conform to the Constitution. If a constitutional provision bars prosecution under a statute, the court must either strike down or modify the statute.[277]

In the last thirty years, American courts, including the United States Supreme Court, have recognized that in limited circum-

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273 However, some courts (*Kantor* included), suggest that the legislatures never rejected the good faith defense given the absence of express prohibitions on the defense. This argument is somewhat disingenuous. Ordinarily, criminal statutes do not set forth all of the defenses available to that particular offense. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 202 (1982) (arguing that treatment of defenses in criminal law is unsystematic). Additionally, it is difficult to assume that a legislature departs from clear tradition simply by failing to affirm expressly that tradition.

274 *See supra* note 261.

275 By contrast, case law plays a dominant role in the development of criminal law in commonwealth countries. RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 3-4 (4th ed. 1991). The differences between the Commonwealth and American systems may be more a matter of degree than of principle. Similar to the American courts, the British courts also defer to a sovereign body, the Parliament, and its decree of laws. However, the British system differs from the American system in that it accommodates judicial development of both crimes and defenses:

> English judges traditionally have been less inclined to defer unquestionably to legislation, particularly social reform legislation, than United States judges. . . . The legal profession in England has bred an independent and pervasive sense of what is right. . . . Social change is thought to be introduced appropriately through the adaptation of precedent to new circumstances, not by means of legislation. . . . Although there is no dispute that legislation is the source of law wbich has authority over all other sources, the fabric of the common law is its precedent, and the vast number of volumes of 'unwritten' law is the foremost distinguishing feature of the common law tradition.

MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 233-34 (1982). Within the legislative body of Parliament is the High Court of Parliament, which interprets the laws. *See* FREDERICK G. KEMPIN, JR., HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW 17, 117 (3d ed. 1990). *See generally* CHARLES HOARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY (1979) (reviewing the history of Parliament's legislative and judicial power). England has no constitutional tradition of separation of powers that requires a court to defer to legislative command.

276 *See* Farber, *supra* note 268.

277 *See, e.g.*, Smith v. California, 361 U.S. 147, 152-53 (1959).

stances, the Constitution may require that the defendant be afforded a mens rea defense to a strict liability charge.[278] In *Kantor*, the court authorized the defense based on the First Amendment. Because application of the strict liability to the defendants in *Kantor* could chill the free exercise of their First Amendment rights, the Ninth Circuit permitted the defendants to assert a reasonable, honest mistake of fact defense.

However, a broader constitutional basis supports the adoption of some type of mens rea defense to strict liability crimes: the due process clause. Courts and commentators have consistently misinterpreted Supreme Court law as upholding strict liability prosecutions against any due process attacks.[279] Closer legal analysis reveals no *per se* rule for all strict liability cases. Indeed, in some situations due process may require the court to entertain a defense to the strict liability crime.[280]

The Court's decisions in *Shevlin-Carpenter Co. v. Minnesota*[281] and *United States v. Balint*[282] fostered much of the confusion regarding the due process clause and the good faith defense. In *Balint*, defendants were charged with unlawfully selling opium and a cocaine derivative. The technical issue before the court was whether the indictment should be quashed for failure to allege that the defendant sold the controlled drugs knowing them to be such. The statute did

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278 At least two state courts have rejected strict liability crimes as unconstitutional violations of the due process clause of the Fourteenth Amendment. *See* State v. Prince, 189 P.2d 993 (N.M. 1948); City of Seattle v. Ross, 344 P.2d 216 (Wash. 1959). Additionally, the Sixth Circuit held in United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985) that the two-year felony provision of the Migratory Bird Treaty Act, 16 U.S.C. § 707(b)(2) (1982), violated due process because it did not require proof of criminal intent.

279 *See, e.g.*, United States v. Engler, 806 F.2d 425, 433-35 (3d Cir. 1986) (court rejected due process attack even when the government conceded that a scienter requirement should be read into the statute); Stepniewski v. Ganon, 732 F.2d 567 (7th Cir. 1984) (court held strict liability home improvement trade practices violations do not violate due process); United States v. Ayo-Gonzalez, 536 F.2d 652 (5th Cir. 1976) (court held fishing violation does not violate due process), *cert. denied*, 429 U.S. 1072 (1977); Note, *Criminal Law—Lack of Knowledge and Intent Held No Defense to Criminal Prosecution*, 107 U. PA. L. REV. 855, 856 (1959) (strict liability crimes not involving omissions not subject to due process challenge); Comment, *The Intent Element in Statutory Crimes*, 2 DEPAUL L. REV. 86, 88 (1952-53) (strict liability crimes not subject to due process challenge).

280 Due process, a broad concept, is subject to a variety of approaches and definitions. A complete study of due process is beyond the scope of this Article, which focuses only on concepts of substantive due process that the Supreme Court has already discussed in strict and vicarious liability cases. In general terms, the Court's discussion has involved "the ordered liberty concept of due process." Hippard, *supra* note 1, at 1054. Under this concept, strict criminal liability is unconstitutional because it is fundamentally unfair to punish criminally an individual who was unaware his acts were wrong or was unable to control their outcome. *Id.*

281 218 U.S. 57 (1910).

282 258 U.S. 250 (1922). A complete review of *Shevlin* and *Balint* can be found in Saltzman, *supra* note 1, at 1592-95.

not make such knowledge an element of the offense. The Court held:

> While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime . . . there has been a modification of this view. . . . It is a question of legislative intent to be construed by the court. It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in *Shevlin-Carpenter Co. v. Minnesota*. . . .[283]

In 1910, the Supreme Court decided *Shevlin*. In *Shevlin*, defendants unwittingly chopped down timber after their permit to do so expired. The defendants faced a civil fine for their violation. The Court rejected defendants' proffered good faith mistake of fact defense and upheld the fine. The Court stated in dicta, which was relied upon in *Balint*,[284] that criminal prosecution against the defendants would not violate due process.[285]

More recently, however, the Supreme Court has indicated that this rule may not be absolute. Two Supreme Court cases, *United States v. Dotterweich*[286] and *United States v. Park*[287] suggest that a constitutional basis for a good faith defense exists. Although the Court upheld convictions in both cases, it developed the "responsible share" doctrine, which resurrects the possibility of a due process basis for the good faith defense.[288]

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283 *Balint*, 258 U.S. at 251-52 (citation omitted).

284 The Court's approach to the constitutionality of strict liability crimes in *Balint* was more superficial than its discussion in *Shelvin*. The Court addressed the issue after an presentation by the government. Packer, *Mens Rea*, *supra* note 1, at 113 n.29, (citing Brief on Behalf of the United States at 5-11). The Court perfunctorily relied on its earlier dicta in *Shevlin* and reversed the trial court's earlier demurrer of the indictment. *See id.* at 113-16.

285 *Shelvin*, 218 U.S. at 69.

286 320 U.S. 277 (1943).

287 421 U.S. 658 (1975).

288 Another due process theory raised to challenge strict liability crimes has been unsuccessful. In Lambert v. California, 355 U.S. 225 (1957), the Supreme Court reversed a defendant's conviction for failure to comply with a municipal criminal registration law. The defendant could not present evidence as to her lack of knowledge of the ordinance. Emphasizing the passive nature of defendant's conduct, the court held that the law violated due process because defendant did not have notice of the registration requirement. *Lambert*, however, has been restricted to regulatory crimes involving omissions and has not been expanded generally to cases involving an affirmative actus reus. *See* United States v. Engler, 806 F.2d 425, 435 (3d Cir. 1986) (refusing to expand ruling in Lambert to other strict liability crimes); Stepniewski v. Gagnon, 732 F.2d 567, 571 (7th Cir. 1984) (same). Courts have held that a crime requiring an affirmative act, unlike one of omission, is more likely to "alert the doer to the consequences of his deed." *Engler*, 806 F.2d at 435 (quoting United States v. Freed, 401 U.S. 601, 608 (1971)). Thus, regulatory crimes involving affirmative acts do not violate the due process requirement of notice. Mueller, *supra* note 3, at 1104 (*Lambert* applies only to strict liability

In *United States v. Dotterweich*,[289] Dotterweich, the president of a corporation,[290] was charged with shipping mislaheled and adulterated products.[291] Although the evidence did not establish that Dotterweich personally knew of or ordered the illegal behavior, the Court upheld his conviction because the statute dispensed with the requirement of awareness of some wrongdoing. Instead, the statute placed "the burden of acting at hazard upon a person otherwise innocent but standing in *responsible relation* to a public danger."[292] Because of the defendant's "responsible share" in the success of the transaction, his conviction was affirmed.[293] The court did not address whether the defendant would have escaped liability absent a "responsible share" in the success of the transaction.

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crimes of omission which do not provide the defendant notice of wrong-doing); *see also* Comment, *Intent After Edmund v. Florida: Not Just Another Aggravating Circumstance*, 64 B.U. L. REV. 809, 818 (1985) (referring to *Lambert* as the most extreme of cases, not generally followed by the Court).

Additionally, *Lambert* suggests that the Court did not preclude the establishment of a good faith defense. The *Lambert* Court did not hold it per se unconstitutional to convict a defendant who committed a strict liability crime by nonfeasance. Rather, it focused on "the [defendant's] failure to act under circumstances that should [not] alert the doer to the consequences of his deed." 355 U.S. at 228. In allowing the defendant to argue against his conviction, the Court addressed whether a reasonable person would have taken affirmative steps under the circumstances to comply with the law. The good faith defense has a similar focus.

289 320 U.S. 277 (1943).

290 Dotterweich was the president of Buffalo Pharmacal Company, Inc., a drug wholesaler that purchased drugs from manufacturers, repackaged them under its own label, and sbipped them on order to physicians. Dotterweich and the company were charged with two courts of interstate shipment of allegedly misbranded drugs and a third count of shipping an adulterated drug. One shipment consisted of a cascara compound that conformed to the specifications of the National Formulary, but whose labels still included reference to an ingredient that had been dropped recently from the specified formula. The other shipment consisted of digitalis tablets, whose labels did not reflect the lower potency of the product. The company did not manufacture either product, and merely repackaged them under its own label. Dotterweich was not alleged to have participated in the packaging of the drugs or to have known of their mislabeling. "Guilt [was] imputed to [Dotterweich] solely on the basis of his authority and responsibility as president and general manager of the corporation." *Id.* at 286 (Murphy, J., dissenting).

291 *Id.* at 280-81.

292 *Id.* at 281 (emphasis added).

293 Commentators have debated whether Dotterweich was convicted under a strict liability or vicarious liability theory. *Compare* Abrams, *supra* note 15, at 464-67 (referring to "strict, vicarious liability"), *with* Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337, 1348-57 (1982) (noting ambiguity but supporting strict liability standard).

See also Packer, *Mens Rea, supra* note 2, at 118 (observing that *Dotterweich* opinion did not make essential distinction between strict and vicarious liability). Given that the Court analyzed the statute in *Dotterweich* as penalizing transactions "though consciousness of wrongdoing be totally wanting," 320 U.S. at 284, it appears that the "responsible share" doctrine may be applied whenever the defendant claims not to have culpable knowledge of the charged acts, including in strict liability cases.

United States v. Park more precisely defined "responsible share" and its application to prosecutions under strict liability statutes.[294] In *Park*, the government charged defendant with shipping adulterated food. As manager of the offending corporation, the defendant (who admittedly knew of the corporation's sanitation problems) was convicted because of his responsibility, both in title and in fact, for the corporation's acts. The Court wrote:

> *Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission . . . the *Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.*[295]

The Court's approach to the responsible share doctrine in *Park* is important for two reasons. First, the Court suggests that when a defendant takes affirmative steps to prevent a legal violation but is unable to do so, he should not be held accountable for the unlawful act.[296] The individual who takes affirmative steps to comply with the law and does not know of any wrongdoing has not acted in a morally

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294 As Professor Abrams noted, "[t]he word 'responsible' itself reflects some notion of culpability. Moreover, there is a way of thinking about strict liability and the concept of a responsible share in the violative transaction that relates it to the idea of culpability." Abrams, *supra* note 15, at 465. Professor Abrams used this concept to explain the standard of criminal liability for corporate officers. This Article proposes to extend these ideas to noncorporate contexts as well.

295 *Park*, 421 U.S. at 672 (emphasis added); *cf.* Wasserstrom, *supra* note 1, at 741-45.

296 As the Court of Appeals found in reversing the *Park* conviction, due process favors "fairness and justice over ease of enforcement." United States v. Park, 499 F.2d 839, 842 (4th Cir. 1974), *rev'd*, 421 U.S. 658 (1975). Though the Supreme Court reinstated the conviction, the Court's "responsible share" or "reasonable relationship" test returns the focus of the due process argument in strict liability cases to the issue of whether the defendant can be blamed for the wrongful action. *See* FLETCHER, *supra* note 15, at 717-22.

The Court, in both *Dotterweich* and *Park*, failed to address the exact theory of due process that would invalidate strict liability laws that unfairly imposed punishment. The theory, however, is one deeply rooted in the Court's tradition:

> Due process of law restrains a state from interfering with those rights which are "implicit in the concept of ordered liberty"; from violating a "principal of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental"; from disregarding those "immutable principles of justice which inhere in the very idea of free government" . . . . [T]he due process clauses give the Court power to invalidate state and federal legislation which *in the opinion of the Court* constitutes an arbitrary or unreasonable interference with personal liberty and which has no rational relationship to protection of the public health, safety, morals or general welfare.

Note, *Constitutionality of Criminal Statutes Containing No Requirement of Mens Rea*, *supra* note 1, at 92-93 (footnotes omitted). Under this theory, legislatures may presume that prohibition of a particular act is needed to protect society from particular harm. However, if it can be shown that this presumption is irrational, the legislative enactment would lose both its moral and constitutional force. *See generally* LIVINGSTON HALL & SHELDON GLUECK, CRIMINAL LAW AND ITS ENFORCEMENT (2d ed. 1958).

culpable manner. A fundamental principle behind the good faith defense is that such an individual should not be punished.

Second, *Park* indicates the Court's willingness to look at the vicarious and strict liability doctrines as legislative mechanisms that simply shift the burden onto a defendant to prove that avoiding the violation was objectively impossible.[297] In *Park*, Chief Justice Burger wrote:

> The Act does not, as we observed in *Dotterweich*, make criminal liability turn on "awareness of some wrongdoing" or "conscious fraud." . . . [B]ut the Act, in its criminal aspect, does not require that which is *objectively impossible*. The theory upon which responsible corporate agents are held criminally accountable for "causing" violations of the Act permits a claim that a defendant was "*powerless*" to prevent or correct the violation to "be raised defensively at a trial on the merits." (citation omitted). If such a claim is made, the defendant has the burden of coming forward with evidence. . . . Congress has seen fit to enforce the accountability of responsible corporate agents . . . in rigorous terms, and the obligation of the courts is to give them effect as long as they do not violate the Constitution.[298]

The *Park* decision thus articulates the principle that while the legislature may constitutionally employ mechanisms that shift the burden to the defendant to show he was not culpable, due process does not permit the prosecution of an individual who can assert an objective impossibility defense.[299] At some point, legislative presump-

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297 As in *Dotterweich*, the Court in *Park* was unclear as to whether the president's liability was based upon strict liability or vicarious liability. *See supra* note 292. In one sense, the liability was vicarious because Park was being held liable for the failure of his subordinates to take proper sanitation precautions. As other have argued, however, Park was strictly liable because he personally failed to exercise the quality of care needed in his business. Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions*, *supra* note 5, at 1262 n.102. The responsible share doctrine may be applied to either type of crime, although it might be more difficult for the strict liability defendant to show lack of knowledge or inability to control prohibited acts, because he is more directly connected to the unlawful events. For example, the defendants in *Kantor* would have difficulty in showing that they did not know Lords' age and had no way of learning it. Their direct contact with her would appear to place them on notice as to her minority and give them ample opportunity to comply with the law. In *Keating*, on the other hand, without direct contact with the investors, Keating would be more likely to be mistaken about the representations his subordinates made to investors and less likely to take actions necessary to prevent the fraud.

298 *Park*, 421 U.S. at 672-73 (emphasis added).

299 When a statutory presumption loses all rational connection between the facts presumed and the facts proved, such as when it is objectively impossible for a defendant to avoid violating the law, the statute becomes arbitrary and vulnerable to a due process challenge.

> [A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

tions must allow a defendant to rebut those facts that the law has incorrectly presumed.[300]

In *Park*, the term "objective impossibility" did not require a defendant to prove literal impossibility of avoiding a violation. Rather, it meant that a defendant is entitled to a defense only if he can show that despite his position of responsibility, (1) he did not know his subordinates fell below legal standards, (2) a reasonable person in his situation would also not have known, and (3) a reasonable person would not have taken further steps to prevent the violation.[301] If applied more generally, the Court's decision in *Park* would assist defendants, such as those in *Kantor* or *Keating*, who argue that they took all reasonable steps to ascertain those facts needed to comply with the law but were misled in their efforts.[302] If there was nothing more a reasonable person could do to avoid a violation, the defendant should be allowed to rebut the presumption that he is responsible for the violation of law.

The Supreme Court's decision in *Park* also provides a preliminary model for the good faith defense. According to *Park*, a defendant who is charged with an offense imposing a form of strict liability can come forward with evidence to prove that preventing the crime was objectively impossible.[303] This evidence must show not only that the defendant was unaware of the facts constituting the crime, but also that a reasonable person in the defendant's situation would not have been aware of those facts or have taken additional steps to learn of them. Thus, *Park* places the burden on the *defendant*

Tot v. United States, 319 U.S. 463, 467-68 (1943); *see also* Clarence E. Laylin & Alonzo H. Tuttle, *Due Process and Punishment*, 20 MICH. L. REV. 614, 614-15 (1921-22) (arguing that no honest rationale exists for punishing a person incapable of complying with a law).

300 Occasionally legislative assumptions regarding a defendant's conduct are so factually incorrect that creating an irrebuttable presumption leads to an unacceptable ratio of errors. *See* Richard S. Bell, *Decision Theory and Due Process: A Critique on the Supreme Court's Lawmaking for Burdens of Proof*, 78 J. CRIM. L. & CRIMINOLOGY 557 (1987); Ashford & Risinger, *supra* note 107, at 174-86. While ordinarily the assumption that a defendant who commits a strict liability act is blameworthy will be supported by the evidence in the case, if sufficient facts disprove this, due process requires that the burden of proof be shifted to express the true ratio of factual error for such cases. Bell, *supra* at 583-84.

Moreover, this Article argues that even if no constitutional basis for the good faith defense exists, the defense is still an attractive and practical alternative for legislatures to adopt. Using the defense would allow legislatures to avoid the current situation in which the courts unpredictably redefine crimes to allow evidence of mens rea. Under the current system, a prosecutor preparing for trial may not know until the time of jury instructions that the jury will be allowed to consider defendant's good faith mistake of fact. Legislative adoption of the good faith defense would avoid this problem.

301 *Park*, 421 U.S. at 676. In *Park*, it was particularly difficult for the defendant to meet this standard because he had received prior notice of the unlawful conditions and had made only minimal efforts to remedy the violations. *Id.* at 677-78.

302 *See* FLETCHER, *supra* note 15, at 721; Saltzman, *supra* note 1, at 1621.

303 *Park*, 421 U.S. at 673-76.

to prove the defense. The prosecution need not prove culpable intent in its case-in-chief.

The good faith defense would operate in the same manner. The prosecution would not be required to prove intent, or even negligence, in a strict liability case. But, if a defendant could prove that preventing the violation was objectively impossible because a reasonable person in the defendant's situation would not have known the facts making defendant's act illegal and therefore would have no reason to prevent them, a good faith defense would be available.

3. *A Proposed American Model*

The good faith defense proposed in this article is constructed from foreign experience interpreted in light of American constitutional tradition. It is designed to accommodate the interests of both the supporters and critics of the strict liability doctrine. As such, it recognizes society's need to expedite the prosecution of certain offenses and to encourage actors to engage carefully in high risk activities. The defense is also based on the due process principle that a defendant should not be punished criminally if that defendant is not blameworthy—either because the defendant did not cause the criminal act or because the defendant did so accidently or due to deception.

The good faith defense accomplishes this by viewing strict liability as a procedural device, which relieves the prosecution of the burden of proving a culpable mens rea to obtain a conviction. By labeling a crime a strict liability offense, the legislature creates a presumption that the defendant, by committing the unlawful act, deserves punishment. Yet, unlike the traditional approach to strict liability crimes, the presumption is not irrebuttable. The defendant, under certain circumstances, can rebut the presumption by proving he acted in a manner that does not warrant punishment.

In order to rebut the presumption, the good faith defense would require a defendant charged with a strict liability crime to prove:[304] (1) he did not have subjective knowledge of those circumstances rendering his act illegal; (2) he made reasonable affirmative efforts to learu the true state of the circumstances to comply with the law; (3) he was mistaken as to the true facts; and (4) a reasonable

304 The defendant would be required to prove these elements beyond a reasonable doubt. This is the same standard of proof the prosecution must meet to rebut the traditional presumption that the criminal defendant is innocent until all elements of the crime are proven beyond a reasonable doubt. Because the good faith defense transfers onto the defendant the burden to prove the elements of his defense, the same standard of proof is adopted. *See infra* note 326 and accompanying text.

person in defendant's circumstances would also have been mistaken and acted similarly. Because of the strong presumption that a defendant who commits a strict liability act deserves punishment, the defendant must prove that he made affirmative efforts to learn the truth, but was still misled by the facts.

Operating in this manner, the good faith defense would satisfy the interests of both proponents and opponents of the strict liability doctrine. To satisfy the opponents of the doctrine, the defense would allow defendants to avoid punishment by showing the absence of a link between moral culpability and criminal liability in their cases. To satisfy the proponents of strict liability, the doctrine would still expedite prosecutions by eliminating any need for the prosecution to prove defendant's criminal intent as part of its case-in-chief. The law would continue to presume, by the mere commission of an unlawful act, that the defendant was criminally culpable for the behavior. Potential defendants would still have incentives when engaging in high risk activities to act with all reasonable care.

Importantly, the defense is constructed in such a way as to prevent every strict liability defendant from manipulating the trial into a debate on the defendant's mental state at the time of the offense. To prevent this from occurring, the good faith defense, like some other affirmative defenses,[305] would require the defendant to make a preliminary showing to the trial judge that he can meet each requirement of the defense. The defendant would have to show evidence that would convince a rational trier of fact beyond a reasonable doubt that he was unaware of the true facts surrounding his actions, made affirmative efforts to learn the true facts, but was misled as to the facts as any other reasonable person in a similar situation would be. Unless the defendant could make such a showing, he could not introduce evidence of mistake at trial, nor would mens rea be an issue for the trier of fact to consider.

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305 Packer, *Mens Rea, supra* note 1, at 144. These defenses include insanity, duress, irresistible impulse, voluntary intoxication, and entrapment. *See, e.g.*, United States v. Bailey, 444 U.S. 394 (1980) (stating that trial courts would save considerable time by requiring testimony on duress to be proffered to the court before allowing the issue to go to the jury); Leland v. Oregon, 343 U.S. 790, 799 (1952) (insanity); United States v. Pratt, 913 F.2d 982, 988 (1st Cir. 1990) (entrapment), *cert. denied*, 111 S. Ct. 681 (1991); Wood v. Marshall, 790 F.2d 548, 550 (6th Cir. 1986) (irresistible impulse), *cert. denied sub nom*, Wood v. McMackin, 479 U.S. 1036 (1987); United States *ex rel.* Goddard v. Vaughn, 614 F.2d 929, 935 (3d Cir.) (voluntary intoxication), *cert. denied*, 449 U.S. 844 (1980). The Federal Rules of Criminal Procedure also provide that if an issue, including the applicability of a defense, is capable of determination without the trial of the general issue, it is to be raised pretrial. FED. R. CRIM. P. 12. The question of whether the defendant has evidence to meet the high standards of a good faith defense can be resolved without a trial on the credibility of that evidence. Only after the defendant makes such a threshold showing should he be allowed to present good faith evidence at trial.

Given this stringent test, the ordinary strict liability defendant, such as the one charged with speeding in his vehicle, could not introduce evidence of intent at trial. Merely being ignorant or mistaken as to one's speed would not suffice. The defense is designed for those extraordinary situations in which the facts of the defendant's case run contrary to our assumptions about strict liability crimes.

Likewise, satisfying the defense would not be easy in sophisticated strict liability crimes, such as *Kantor*. In *Kantor*, the defendants would have to show not only that Lords appeared overage, but that defendants made all reasonable affirmative efforts to learn her correct age. If it is reasonable to suspect that children might lie about their ages in order to appear in these films, the producers' reliance on Lords' representations would not be enough. Independent research, such as checking certified copies of birth certificates, would be required.[306] The strict liability defendant would thus be required to engage in the conduct the doctrine is designed to promote—the exercise of extreme caution while engaging in high risk activities.

Designed as such, the good faith defense preserves those aspects of the strict liability doctrine that support its use. The presumption remains that defendants who commit strict liability crimes act culpably, but the good faith defense permits an individual to rebut this presumption when he can prove he could not prevent the violation.

4. *Fine-Tuning the Defense: Guidelines for Its Application*

Understandably, courts will want to move cautiously in implementing this proposed good faith defense. By creating a mens rea defense to an offense previously thought to preclude introduction of intent, defendants might be tempted to seek to introduce evidence of their good intentions. If that occurred, the good faith defense could swamp the court system, exactly the opposite result that the legislature intended.

In order to prevent this from occurring, it is necessary to impose limitations on the use of the defense. With these limitations, it is neither inevitable nor likely that use of the good faith defense would undermine the general use of the strict liability doctrine. As we have seen, the commonwealth countries function quite well with the good faith defense.[307] The presumption remains that a defendant charged with a strict liability crime acted culpably when com-

306 United States v. United States Dist. Court, 858 F.2d 534, 546 (9th Cir. 1988) (Beezer, J., dissenting), *aff'g* United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987).

307 *See supra* note 255.

mitting the act. Only in the extraordinary case could the defendant rebut that presumption.

Trial courts can quickly and effectively determine whether a defendant has offered sufficient evidence to support the defense. In criminal law, courts commonly require a defendant before trial to proffer what evidence he intends to present to support his defense.[308] If the defendant's proffer is insufficient to meet the legal requirements of the defense, the court may issue an order prohibiting any introduction of evidence on the issue or argument of the defense before the trier of fact.[309]

By requiring defendants to proffer evidence at pretrial and to meet a high burden of proof, American courts have limited the use of the "responsible share" doctrine. For example, in *United States v. Y. Hata & Co.*,[310] the defendants were charged with health code violations relating to the discovery of bird excrement in the their warehouses. The Ninth Circuit affirmed the trial court's pretrial ruling that the defendants could not assert the impossibility defense despite their attempts to keep the birds out of the warehouse. The court held as a matter of law that a claim of powerlessness must be accompanied by a showing that the defendant took almost all possible measures to avoid the violation.[311] Likewise, in the companion case of *United States v. Starr*,[312] the court held that a defendant corporation could be responsible even for an employee's sabotage if that violation should have been foreseen.[313] Thus, a standard that places the burden on the defendant to prove that he made all efforts to prevent a violation will avoid flooding the courts with trials over the mens rea of a strict liability defendant.

Additionally, limitations can be placed on the types of crimes for which the good faith defense is available. Because the theoretical basis for the defense is that it is unjust to criminally punish a defendant who is not culpable, the defense need only be available when criminal punishment is a possible sentence. While not all

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308 EDWARD CLEARY, MCCORMICK ON EVIDENCE THE PROCEDURE OF ADMITTING AND EXCLUDING EVIDENCE ch. 6 (3d ed. 1984).

309 The United States Supreme Court has expressly sanctioned such orders in cases in which the defendant asserts a necessity defense but fails to proffer sufficient evidence to support that defense. United States v. Bailey, 444 U.S. 394, 416 (1980). As the Court stated, "[i]f, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and the jury need not be burdened with testimony supporting other elements of the defense." *Id.*

310 535 F.2d 508 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976).

311 *Id.* at 511.

312 535 F.2d 512 (9th Cir. 1976).

313 *Id.* at 516.

commentators would agree,[314] fines and restitution are ordinarily seen as civil sanctions. Imprisonment, or probation with the later possibility of imprisonment, is the type of punishment most associated with criminal culpability.[315] Thus, when the defendant in a strict liability case does not face imprisonment, the good faith defense need not be available.[316]

Another potential limitation would place narrow parameters on what would be considered "all reasonable efforts" that the defendant must take to learn the true facts. While the question of reasonableness is ultimately a factual issue, the legislature or court could create certain legal requirements. For example, by law, a defendant would not have taken "all reasonable efforts" if:

> (1) he relied absolutely on an individual whom he knew had an interest in deceiving him;[317]
>
> or
>
> (2) he has engaged in a repeated violation of the same strict liability law using the same unreliable evidence;[318]
>
> or
>
> (3) he, in addition to making efforts to ascertain the truth, also takes steps to avoid learning the true facts.[319]

Applying these requirements to the defendants in *Kantor*, they could not claim the defense if they relied solely on Traci Lords' representations of her age. Moreover, if the defendants knew how to obtain untainted evidence of Lords' age, such as a certified birth certificate, they would be required to take such preventive measures. By setting the reasonableness standard so high, defendants in these strict

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314 Allen, *supra* note 7, at 737.

315 *See supra* note 20; *cf.* MODEL PENAL CODE § 2.05, cmt. 1 (1962) ("This section makes a frontal attack on absolute or strict liability in the penal law, *whenever the offense carries a possible criminal conviction for which a sentence of probation or imprisonment may be imposed.*") (emphasis added).

316 When efficiency is the primary interest, the legislature may enact a strict liability statute imposing only fines and restitution as sentences. If, however, the offense calls for imprisonment, the criminal justice system would have to spend more resources to assure that only criminally culpable defendants are convicted.

There are parallels in criminal procedure that would support this limitation. For example, unless a defendant faces a term of imprisonment greater than six months, he is generally not entitled to a jury trial. Duncan v. Louisiana, 391 U.S. 145 (1968). As for petty offenses, these crimes do not carry the same moral approbation as other criminal laws. To the extent that they do carry unfavorable repercussions, these consequences are outweighed by the need for speedy and inexpensive adjudications. *See* Baldwin v. New York, 399 U.S. 66 (1970).

317 Thus, as in cases like *Kantor*, the defendants could not turn a blind eye to the possibility that underage actors may be trying to secure a role in their films. United States v. United States Dist. Court, 858 F.2d 534, 542-43 (9th Cir. 1988), *aff'g* United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987).

318 *Cf.* Brown v. Foot, 66 L.T.R. 649, 652 (Q.B. 1892) (Wills, J.).

319 United States v. Jewell, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

liability cases will be forced to take all steps necessary to assure due care.

Finally, the good faith defense can be tailored to require the defendant to meet a high burden of proof—proof beyond a reasonable doubt. In *Kantor*, the court selected the "clear and convincing" evidence standard.[320] The court selected this standard because it is normally used to establish fraud in civil cases,[321] and it is the statutory standard for a defendant proving an insanity defense in federal court.[322]

This standard may not be high enough to preserve the integrity of the strict liability doctrine and to prevent a flood of superficial claims. The good faith defense is in essence a reverse presumption. Ordinarily, we presume that a defendant who commits a particular act is not guilty unless he does so with a culpable intent.[323] The presumption in strict liability cases is exactly the opposite. Requiring the defendant to prove his defense beyond a reasonable doubt is consistent with our general approach toward presumptions in criminal cases.

Additionally, pragmatic reasons exist for requiring the defendant to prove his good faith efforts to comply with the law beyond a reasonable doubt. Burdens of proof are imposed for a variety of reasons,[324] including considerations of which party has the better access to evidence on the issue.[325] The strict liability defendant possesses the best evidence of efforts he made to learn the true facts of the situation and how he was thwarted in those efforts. Also, a defendant may try to exaggerate those efforts and the extent of his mistaken impressions. Therefore, placing a high burden on the defendant is justified in order to convince the trier of fact of his good faith. The key reason for selecting this level of proof is that if strict liability is seen as a crime with a reverse presumption—one in which the defendant's culpability is presumed—then placing the same burden on the defendant ordinarily carried by the prosecution is appro-

320 United States v. United States Dist. Court, 858 F.2d at 543.

321 *Id.* at 543 n.5. The court analogized the case to civil fraud laws because the defendants were claiming that they had been defrauded by Lords and her agent.

322 *Id.* (citing 18 U.S.C. § 17(b) (Supp. IV 1986)).

323 Morissette v. United States, 342 U.S. 246 (1952); 4 WILLIAM BLACKSTONE, COMMENTARIES *21, *cited in* Sayre, *supra* note 1, at 55.

324 *See* John Quigley, *The Need to Abolish Defenses to Crime: A Modest Proposal to Solve the Problem of Burden of Persuasion*, 14 VT. L. REV. 335, 359-60 (1990). The burden of proof may be broken down into both a burden of production and a burden of persuasion. *Id.* at 361. For the good faith defense, the defendant would bear both burdens.

325 FLETCHER, *supra* note 15, at 531-32; JOHN M. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 179 (1947).

priate.[326] Given that the defendant can better present evidence on his state of mind and efforts to learn the true facts, the defendant should be able to meet this beyond a reasonable doubt standard.

Each of these devices—making the defense available only for defendants who face incarceration, strictly defining "reasonable affirmative efforts," and imposing a high burden of proof on defendants—would allow the good faith defense to be applied to American strict liability prosecutions.

CONCLUSION

Courts continue to search for alternatives to avoid the harsh consequences of the strict liability doctrine. So far, their efforts have been awkward and limited.[327] The good faith defense accommodates many of the traditional justifications for strict liability crimes, but does so in a way that reincorporates general concepts of blameworthiness into such prosecutions.

The best way to implement the good faith defense would be statutory enactment so that courts could defer to legislative intent on the issue. This will probably not occur.[328] If anything, legislatures currently are pressured to enact more strict liability crimes where the chances for conviction are high and the costs of prosecution low.

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326 "By allocating the burden of persuasion, the legal system, in effect, chooses the preferred result in close cases." Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 257 n.215 (1982). In strict liability cases, because of the high risk of injury from defendants' behavior, the legal system prefers that close cases be resolved in favor of the prosecution. *See supra* note 108 and accompanying text. The ordinary presumption that has been used to lessen the burden on the defendant to prove his defense does not apply in strict liability cases. Ordinarily, the differential between the prosecution's burden and the defendant's burden is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). This same presumption does not apply given the risk posed by strict liability crimes.

327 Some courts have used the reasoning of a good faith defense, without identifying the defense or its parameters. *See, e.g.*, State v. Williams, 115 N.E.2d 36, 42 (Ohio Ct. App. 1952) (truck driver with cargo of undersized fish was not guilty if he did not know about the cargo *and* it would have been impracticable and unreasonable to require an inspection); State v. Welch, 129 N.W. 656, 657 (Wis. 1911) (unwitting defendant charged with serving oleomargarine at lunch counter without providing notice that it was not butter; defendant's claim that objective fault was a requirement was accepted, but court affirmed conviction because defendant did not establish a lack of opportunity to learn the truth of the matter).

328 One area where legislatures have been inclined to draft strict liability statutes that provide good faith defenses is in vehicle offenses, such as driving with a suspended license. *See, e.g.*, State v. Buttrey, 651 P.2d 1075 (Or. 1982) (Upholding OR. REV. STAT. 482.560, which shifts the burden on defendant to prove lack of knowledge as to suspension).

If the legislatures decline to enact the good faith defense, courts should consider whether the Constitution demands its application.[329] The narrowly drawn standard proposed in this Article would recognize those constitutional interests and accommodate legislative interests in enacting strict liability crimes.

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329 Case law suggests that the courts are already informally turning to a good faith defense to address mistake of fact claims in strict liability cases. For example, in People v. Dillard, 201 Cal. Rptr. 136 (Cal. Ct. App. 1984), the defendant claimed that his prosecution for possessing a loaded weapon violated due process because he was not allowed to argue to the jury that he had reasons to believe the weapon was unloaded. After discussing the general law that strict liability crimes are exempt from a showing of mens rea, the court added:

> Whether a good faith and reasonable mistake of fact would be a defense. . . is not an issue presently before us. Appellant's offer of proof was deficient in that it showed only lack of knowledge, i.e., that he was unaware that the rifle was loaded. . . . *A mere belief, unsupported by a showing of due care and bona fide, reasonable effort to ascertain the facts, is insufficient to constitute a mistake of fact defense.*

Id. at 139 (emphasis added). The Oregon Supreme Court has also noted that a law which would punish the commission of an act that could not be prevented even with the utmost care would probably be invalid. State v. Laundy, 103 Ore. 443 (1922); *see also* Perez v. State; 803 P.2d 249 (N.M. 1990) (holding that defendant should be able to present mistake of age defense to statutory rape when victim makes affirmative misrepresentation which is corroborrated by another); State v. Michlitsch, 438 N.W.2d 175 (N.D. 1989) (establishing affirmative defense to strict liability charge of possession of marijuana; defendant has burden of proving that possession was unknowing); People v. Hernandez, 393 P.2d 673 (Cal. 1964) (holding that reasonable but mistaken belief in age of prosecutrix can be defense to statutory rape). Finally, a court in Pennsylvania recognized that, in a case involving both vicarious liability and strict liability, not allowing a defendant to prove that he should not be held criminally responsible for acts of which he had no knowledge and over which he had little control would violate due process. Commonwealth v. Koczwara, 155 A.2d 825 (Penn. 1959), *cert. denied*, 363 U.S. 848 (1960).