CHAPTER 38

PUBLIC WELFARE OFFENSES

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I. INTRODUCTION TO PUBLIC WELFARE OFFENSES

“Public welfare offenses” form a curious category within criminal law for several reasons. First, they contradict a purported principle of criminal law by imposing strict liability, when criminal law is distinguished from civil by its requirement of fault as a prerequisite to punishment. Secondly, these strict liability crimes are endorsed with little hesitancy largely in the United States and England, although criminal codes elsewhere employ rules that are not far removed from strict liability. Finally, despite widespread judicial approval of strict criminal liability, the number of truly strict public welfare offenses is probably much smaller than courts and some commentators suggest; even without formal mens rea requirements, many such crimes rest on a plausible inference of culpability.

Even if the last claim is persuasive, public welfare offenses make a useful concept not for the clarity it adds to criminal law but for the insights it offers about jurisdictions that embrace it. For one, public welfare offenses arguably are more a creation of courts than of legislatures, and so they reveal a widespread judicial approval of criminal liability without culpability. In particular, they reveal judicial—and perhaps a broader political or cultural—receptivity to utilitarian rationales that trump
conflicting normative principles; this is especially interesting when we recognize that arguments for the need of public welfare crimes, as opposed to equivalent civil sanctions, are weak. Moreover, while I will raise questions about the meaningfulness of public welfare offenses as a distinctive category, they seem to be a good indicator of a jurisdiction’s embrace of strict criminal liability more generally: the more a jurisdiction legitimizes public welfare offenses, the more it seems to incorporate strict liability elsewhere in its criminal law.

In what follows, I develop these claims and offer explanations—some of them familiar—for long-standing Anglo-American acceptance of public welfare offenses. After defining the category in more detail, I recount widely accepted historical and practical explanations for public welfare offenses. I also provide context that corrects some details in familiar accounts of the origin of these offenses. Attention then turns to the rationales for and criticisms of public welfare offenses, including conceptual and political considerations. Public welfare offenses reveal Anglo-American criminal law’s distinctive comfort with criminal liability that is not defined closely in relation to fault, and tendencies in both jurisdictions to embrace a significant de facto conceptual distinction between offenses that are formally criminal and a subset that are widely accepted as not truly criminal.

II. Definitions: Public Welfare Offenses and Strict Liability

1. “Public welfare offenses”

The term “public welfare offenses” is more common among U.S. courts and scholars. In England, Canada, and elsewhere, “regulatory offences” is probably more common. By either label, public welfare offenses are generally defined as minor crimes that carry modest fines, although short incarceration terms may be authorized. They are understood as “regulatory” in nature—malum prohibitum rather than malum in se—and commonly address threats to “public health, public safety, public morals, or public order.” The fact that they regulate morally neutral rather than inherently wrongful conduct is thought to minimize any stigma attached to conviction. Partly for these reasons—and the lack of explicit mens rea terms in the

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2 Provincial Motor Cab Co. v. Dunning [1909] 2 K.B. 599, 602 (“particular class” of offenses that “arise only from the breach of a statutory regulation... is not to be regarded as a criminal offence in the
statutes—courts interpret these offenses to carry strict liability. As additional justification, courts assert that potential offenders know or should know of the regulated nature of their activity; and add the practical claim that proof of mens rea for these settings would be unusually difficult to prove, making enforcement difficult and costly.

Given their strict liability nature, these offenses violate criminal law’s core normative principle, actus non facit reum nisi mens sit rea—roughly, no criminal liability without proof of fault, or in Blackstone’s words, the requirement that a “vicious will” must accompany an “unlawful act.” For this reason, courts try to sharply distinguish public welfare offenses from “ordinary” or “true” criminal law, although the category is so well established that it in fact is part of Anglo-American criminal law.

2. Strict criminal liability

Before proceeding, a more precise definition of “strict liability” is in order, if only because courts and scholars have given the term (and the related label “absolute liability”) different meanings. There are important distinctions among crimes described as “strict.” Following others, I employ strict liability to mean that an offense contains at least one material element for which the state is not required to prove mens rea, or culpable state of mind. As one example, a crime of possessing an unregistered automatic weapon that requires proof that one knew the weapon’s nature (automatic) but not its unregistered status is a strict liability offense. Possessing such a weapon is not inherently wrongful, but its nature is thought to put one on notice about regulations that carry penalties if breached. For other strict liability offenses, proof of fault is required for an element that defines wrongfulness, while

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an element that increases punishment severity is strict. For example, sexual assault is wrongful. Assault on a victim under age 13 constitutes a more serious offense, but the victim’s age is usually a strict liability element in U.S. law. (“Constructive” strict liability sometimes describes crimes that require culpability for one wrongful element but not others.)

Public welfare offenses, however, go further: they lack mens rea requirements for most or all elements, even for elements that define wrongfulness. One example is liability for a seller of adulterated food without proof he knew (or was negligent regarding) its adulterated nature; another is punishment of a parent for a child’s truancy without proof the parent was reckless or negligent as to the child’s absence from school. Offenders may be punished under such statutes for conduct (or inaction) they reasonably believed to be wholly innocent. (“Pure” strict liability sometimes describes such offenses.) U.S. and English courts approve public welfare offenses of this form, although in practice it is hard to find examples of defendants who were not (at least arguably) negligent.

Other distinctions matter as well. For some offenses, defendants may argue against the strict liability element by proving reasonable care or due diligence, or powerlessness to prevent the violation. In Canadian law, the defendant can always offer this kind of defense to a strict liability offense; a disfavored group of minor offenses that permit no defense are labeled “absolute liability.”9 In England and the United States, some strict liability statutes specifically provide for such defenses.10 This offense structure in effect shifts part of the burden of proof to the defendant.

### III. Comparative Status of Strict Regulatory Offenses

As noted, public welfare offenses seem largely to be a feature of the criminal law of England, Wales, and U.S. jurisdictions. Other common law jurisdictions, notably Canada, New Zealand, and much of Australia, have been much

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It may be that differences between countries that reject strict liability regulatory offenses and those that embrace them is less than initially appears. Procedural and evidentiary rules can ease the state’s burden of proof on mens rea with effects that approach strict liability. Evidentiary presumptions regarding mens rea, for example, function much like strict liability rules that are rebuttable by defense evidence of due diligence. Both ease the state’s task of proving prima facie liability without proving culpability, then place the burden on defendants

to either overcome the presumption or show due diligence. Additionally, offense definitions can be reformulated to ease the prosecution's task, for example by criminalizing risk creation instead of harmful results, by defining preparatory conduct as a crime, or by otherwise eliminating an element from an offense definition, thereby also removing *mens rea* for that element. All common law and European legal systems engage in some of this, and national laws vary also in how rigorously they conceptualize *mens rea* terms such recklessness or negligence; some ease the prosecution's *mens rea* burden through *mens rea* definitions.\(^{16}\) In sum, comparisons between jurisdictions that endorse and reject strict liability offenses may be less than they sometimes appear, and so require careful attention.

Nonetheless, meaningful differences surely remain regarding regulatory offenses. On one view, this may be puzzling. All advanced nations have for several decades had extensive systems of administrative regulation—with ever-growing enforcement capacity—that serve much the same regulatory function as public welfare offenses. Where strict liability is disfavored, states rely on civil or administrative laws to impose sanctions for the same harmful or risk-creating conduct targeted by public welfare offenses. In Germany, for example, non-criminal provisions (*Ordnungswidrigkeiten*) that carry administrative fines (*Geldbuße*)\(^{17}\) address the same sorts of regulatory topics as U.S. public welfare offenses. Even England and the United States, where public welfare offenses are most firmly established, have expansive administrative codes that provide parallel civil penalties. Criminal public welfare offenses and civil sanctions often cover the same activity, giving the government choices between civil or criminal enforcement strategies.

The availability of civil alternatives do much to undermine arguments, commonly accepted by courts, that *criminal* regulatory offenses are necessary to meet the regulatory demands of modern societies. The modern administrative state, then, poses the question: why do some states retain this category of strict criminal liability, when it violates their purported *actus non facit* principle and can be easily replaced by non-criminal rules and penalties? Recall that judicial explanations suggest that public welfare offenses are functionally civil offenses already—minimal stigma and minor fines, usually for morally innocuous conduct. Part of the answer seems to lie in the history of public welfare offenses, and also in the reasons that scholars and courts have gotten that history wrong.

\(^{16}\) Blomsma (n. 12) 218 ff. examines these differences in several countries and assesses their resemblance to strict liability.

IV. History of Public Welfare Offenses

1. Judicial embrace of strict regulatory offenses

Familiar accounts of public welfare offenses in Anglo-American law trace their origins to the mid-nineteenth century, and to an identifiable historical cause: the need for greater regulation that accompanied growing markets, industrialization, and urbanization in the 1800s. One scholarly account has had a singular influence: Francis Sayre’s 1933 Columbia Law Review article, “Public Welfare Offenses.” Sayre surveyed decades of criminal law decisions in English and U.S. courts and concluded that criminal offenses were unusual until the 1840s. Before that decade, strict criminal liability was confined to a few exceptional offenses, especially certain libel offenses and morals crimes like statutory rape and adultery. Beginning at mid-century, however, English and U.S. courts began to conclude that a wide range of minor “police offenses and criminal nuisances” lacked any requirement to prove the defendant’s guilty mind along with his action (or inaction despite a duty to act). In both countries, these “public welfare offenses” had “increased rapidly in number and importance” in the second half of the nineteenth century and into the twentieth.

Sayre was not alone in noticing this development. R. M. Jackson described the evolution in English criminal law in a Cambridge Law Journal article in the same era, earlier treatise writers such as Bishop and Prentice had acknowledged strict liability in various police offenses, and courts by the 1930s widely recognized a presumption against mens rea for malum prohibitum statutes that lacked explicit mental-state terms. But Sayre’s article gave a name to this class of offenses, especially in U.S. courts.

a) English courts

The 1846 decision of R. v. Woodrow is commonly cited as the turning point. In that decision, the Court of Exchequer affirmed a £200 forfeiture for possession of adulterated tobacco, even though Woodrow had convincingly shown that he had “no knowledge or cause to suspect” the tainted status of the goods. Baron Parke’s
opinion offered a rationale that courts continue to invoke today as a justification for strict criminal liability: for some offenses, the difficulty of proving \textit{mens rea} is accompanied by the special importance of preventing the harm that the statute seeks to prevent. “[T]he public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so.” The “public inconvenience” of ineffective enforcement arising from the burden of proving \textit{mens rea} justified, for the Woodrow court and subsequent ones, interpreting the statute as a strict liability offense.

On the other side of the Atlantic, scholars often identified the 1849 decision in \textit{Barnes v. State} as U.S. counterpart to \textit{Woodrow}—the decision that signaled courts’ new willingness to interpret certain minor statutory offenses as having no \textit{mens rea} requirement. In \textit{Barnes}, the Connecticut Supreme Court affirmed a petty conviction for selling liquor to a “common drunkard” without proof that the defendant knew his customer’s status as a drunkard.\footnote{\textit{Barnes v. State}, 19 Conn. 398 (1849).} Over the subsequent several decades, English and U.S. courts issued numerous decisions concluding that various statutory offenses included no \textit{mens rea} requirement. Often, they inferred legislative intent by reference to public interests in preventing the specific harm that the offense targeted, or the fact that the conduct posed a risk of harm to large numbers of people.

A few English decisions illustrate the point. The 1866 decision in \textit{R. v. Stephens} upheld an indictment based on the common law public nuisance doctrine rather than a statute and provided an early example of a court endorsing \textit{vicarious} strict liability on a business owner for the conduct of agents. A quarry owner had been charged after his workers—unknowingly to him “and against his general orders”—obstructed a river with waste from the quarry.\footnote{\textit{R. v. Stephens} (1866) L.R. 1 Q.B. 207. For an earlier example, see \textit{R. v. Medley} (1834) 6 C. & P. 292, 172 ER 1246 (affirming criminal liability for public nuisance of owners of gas works after agents despoiled a river with refuse from the business).} Vicarious liability for firms, owners, and supervisors was to become a routine form of public welfare offense liability in the next century. Jackson identified the 1873 decision in \textit{Fitzpatrick v. Kelly} as the first to impose absolute liability for sale of adulterated food.\footnote{\textit{(1873) L.R. 8 Q.B. 337.}} By 1899, Lord Russell concluded that adulterated-food offenses are “one of the class of cases in which the Legislature has, in effect, determined that \textit{mens rea} is not necessary to constitute the offence.”\footnote{\textit{Parker v. Adler} [1899] 1 Q.B. 20.} \textit{Provincial Motor Cab Co. v. Dunning} approved a conviction for operating cars without tail lights—as required by a regulation pursuant to the Motor Car Act 1903—without proof that

\begin{itemize}
\item \textit{Barnes v. State}, 19 Conn. 398 (1849).
\item \textit{R. v. Stephens} (1866) L.R. 1 Q.B. 207. For an earlier example, see \textit{R. v. Medley} (1834) 6 C. & P. 292, 172 ER 1246 (affirming criminal liability for public nuisance of owners of gas works after agents despoiled a river with refuse from the business).
\item \textit{[1910] 2 K.B. 471.}
\end{itemize}
the owner-defendants knew of the tail light failures.28 The court explained that proof of intent “does not apply to that particular class” of offenses that “arise only from the breach of a statutory regulation,” because the regulation “was for the protection of the public” and a breach “is not to be regarded as a criminal offence in the full sense of the word.”

b) U.S. courts

U.S. state courts followed the same path in the decades after Barnes. A number of decisions concluded that no mens rea proof was required for petty offenses that addressed such matters as sale of liquor, contaminated foods, and—in the South, where slavery prevailed until the 1860s—slavery regulations such as a prohibition on common carriers transporting slaves without the owner’s written permission. In 1846 the Tennessee Supreme Court insisted, in a common-carrier prosecution, on the “sacred principle” that “the intention to commit the crime is of the essence of the crime.”29 But a decade later a Maryland court held a similar statute to require no mens rea proof, and thereafter courts frequently abandoned the “sacred principle” for many mala prohibita statutes. They approved criminal liability under various statutes “irrespective of any knowledge” on the defendant’s part regarding the critical conduct or circumstance elements that made the conduct criminal—the intoxicating or contaminated nature of their products, or the presence of a slave on their vessels.30

By the early twentieth century, the category of strict regulatory offenses was firmly established in U.S. courts, even if the definition of the category was imprecise. A representative state court decision described “a well-recognized distinction between statutes denouncing as crimes acts mala in se and statutes denouncing as crimes acts mala prohibita. In the former, generally speaking, intent is a necessary element, while in the latter it is not so.” The second group lacks mens rea requirements because they “are in the nature of police regulations, are for the protection of the public, or are intended to promote the general welfare.”31 The U.S. Supreme Court in U.S. v. Balint said the same:

in the prohibition or punishment of particular acts, the state may in the maintenance of a public policy provide “that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.” Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of

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29 Duncan v. State, 7 Hum. 148 (Tenn. 1846) (mens rea required for offense of transporting a slave).
31 State v. Lindberg, 125 Wash. 51, 59 (1923); also People v. D'Antonio, 134 N.Y.S. 657 (1912).
The statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se. 32

By the mid-twentieth century, the legitimacy of strict criminal liability was so widely accepted that it sometimes slipped beyond the confines of minor regulatory crimes. The Supreme Court's 1952 decision in *U.S. v. Morissette* provided an enduring description of the doctrine that courts will presume *mens rea* is required for traditional crimes but assume strict liability is intended for statutes with modern regulatory purposes. The case is telling, however, for a less noted point: the willingness of the trial and lower appellate courts to infer strict liability for a critical element of a traditional theft offense—an element essential to determining whether a defendant acted wrongfully.

The defendant was charged with ordinary theft (or “conversion”) of government property after he took scrap metal, which he believed to be abandoned, from government land and sold it for a small profit. Even though the statute explicitly required proof that an offender “knowingly converts” government property, the trial and appellate courts both interpreted the statute to require no proof that the defendant knew the property belonged to the government, nor to permit evidence of his mistaken belief that it was abandoned as a defense. The appellate court found in this theft statute a public welfare purpose. “Manifestly,” the statute's purpose “was to afford added protection against the taking of government property,” and “punishment for an illegal act done by one in ignorance of facts making it illegal is not contrary to due process of law.” 33 This reasoning is striking and—though overturned by the Supreme Court—far from exceptional. The court extended the strict liability rationale far beyond a typical low-level police regulation. It was unconcerned with the severity of the punishment—up to ten years in prison. And it emphasized the protective purpose of the statute—something true for virtually all crimes—without regard to the principle that punishment of wrongdoing requires proof of blameworthiness.

c) **From minor offenses to serious crimes**

The inclination toward strict liability even for serious offenses displayed by the *Morissette* lower courts continues in Anglo-American criminal law. Sayre (like others) claimed public welfare offenses were characterized by modest penalties and stigma, as well as by a protective, regulatory function on morally neutral conduct. By contrast, *mens rea* is always required for crimes with a primary aim of “singling out wrongdoers for punishment.” 34 Even the earliest cases said as much. *R v. Stephens* in 1866 affirmed a strict liability conviction “In as much as the object

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34 Sayre, (1933) 33 *Columbia LR* 55 ff., 72.
of the indictment is not to punish the defendant but really to prevent the nuisance from being continued."\(^{35}\)

Initially, one can question the traditional argument that small fines for regulatory offenses uniformly carry no significant moral opprobrium. A modest fine may deter some traffic offenses, but the deterrent effect of financial loss alone seems an implausible rationale for such fines on large-scale commercial actors. Nor do offenders seem consistently to experience those fines as financial losses without attendant stigma. (The corporate CEO in *U.S. v. Park* challenged his conviction—surely at considerable expense—to the U.S. Supreme Court, although his fines for five offenses stemming from insanitary conditions of food warehouses totaled only $250.) Public welfare offenses seem to depend on signaling some social disapproval through petty criminal status in order to motivate greater care in commercial endeavors.\(^{36}\)

That point aside, the limits on strict regulatory liability were not uniformly enforced by courts even before Sayre's 1933 article. The 1922 decision in *U.S. v. Balint* held that an indictment for a federal narcotics offense need not allege that the defendant knew the substance that he distributed was a narcotic drug, even though the maximum punishment could be five years in prison.\(^{37}\) *Balint* also showed how judges interpreted the criterion of a statute's public-safety or regulatory purpose broadly to the point of disingenuousness. *Balint* found that "the emphasis of the [narcotics statute] is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government." Despite its felony classification and its authorized sentence, "it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic."\(^{38}\) Thirty years later, the lower courts in *Morissette* showed that they had learned well how to focus on a statute's regulatory aims while ignoring the magnitude of its sanctions.

Moreover, another reason that the penalty size and regulatory purpose did not serve as consistent criteria for sorting strict liability offenses from those requiring *mens rea* is that they were not the only reference points courts used to distinguish "ordinary" crimes from regulatory offenses. As we noted earlier, courts often either relied on the fuzzy *mala in se/mala prohibita* distinction or an inaccurate one between common law and statutory crimes.

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\(^{35}\) Stephens (1866) L.R. 1 Q.B. 207. See also Sherras v. De Rutzen [1895] 1 Q.B. 918, which required *mens rea* proof for a liquor offense and noted that strict liability should be confined to offenses that are "not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty."


It is worth noting that the ambiguity has run in both directions. That is, courts were hardly consistent in reading every low-level regulatory statute that lacked a mental-state term as a strict liability offense. As one example, the 1894 decision in *Somerset v. Wade* rejected a strict liability reading of an 1872 Liquor Licensing Act—precisely the sort of low-level regulatory statute that should fall within the public welfare offense doctrine. The section under which the defendant was prosecuted (for allowing drunken patrons into his licensed public house) included no *mens rea* term, yet *Wade* held that the offense required proof that the defendant knew the patron on his premises was drunk; proof merely that he sold the liquor, and that the patron was in fact drunk, was insufficient. Declining to follow Woodrow’s strict liability rationale, the court relied instead *Somerset v. Hart*, which held that a licensed pub owner must have knowledge of illegal gaming on his premises before he can be convicted for permitting it, even when his employee was aware of the illegal conduct.39

Richard Singer, revisiting the case law much later, concluded that it showed more inconsistency than Sayre recognized. Singer identified decisions in which courts misinterpreted prior cases as having affirmed strict criminal liability; and also some legislative intent to abandon *mens rea* from exceedingly thin evidence. Those errors were enough for Singer’s view that Sayre’s account was at least “overstated.”40 However, those decisions, and their rationales, cut another way as well. Courts that wrongly approved strict criminal liability by misreading precedent or legislative intent nonetheless manifested a willingness (or eagerness) to approve it, across jurisdictions, decades, and statutes, even if they did so inconsistently.

The ambiguity remains in more recent case law, but so does the strong Anglo-American approval of strict criminal liability. Importantly, this is true for both minor regulatory offenses and more serious ones that carry significant punishments. Public welfare offense doctrine has not succeeded in containing strict criminal liability solely to low-level regulatory violations. It probably instead contributed to Anglo-American criminal law not requiring *mens rea* proof for significant aspects of serious offenses as a means to ease enforcement burdens and improve the harm-prevention aim of these offenses. Andrew Ashworth has described this in the context of English law,41 and it is explicit in many U.S. offenses addressing drugs, identity theft, and other topics.42

39 *Somerset v. Wade* (1894) 1 Q.B. 574; *Somerset v. Hart* (1884) 12 QBD 360. For a similar outcome, see *Sherras v. De Rutzen* [1895] 1 Q.B. 918 (liability for serving alcohol to a constable on duty requires proof that defendant knew the constable was on duty).


V. Explanations for Strict Criminal Liability

1. Tradition

Why do Anglo-American courts endorse strict criminal liability in public welfare offenses and even for elements of more serious crimes? This section outlines several explanations, without a full effort to defend them. The first is simply tradition: English and U.S. criminal law employed strict liability for certain serious crimes even before the mid-nineteenth century rise of regulatory offenses. Libel and certain morals crimes—adultery, bigamy, and statutory rape—required no proof of culpability on critical elements such as marital status or victim age. The same was true in most U.S. jurisdictions, although with less criminal libel and more use of the felony murder doctrine (abolished in England in 1957). And common law frequently required no mens rea for grading elements, the facts that distinguished lesser from greater offenses. Strict regulatory offenses did not plow entirely new ground.

2. Proportional punishment and “change of normative position”

Stepping back, the Anglo-American tradition of strict liability seems to reflect a weaker cultural or political—as well as legal—commitment to proportional liability—liability in accord with an offender’s culpability. In part, it may also reflect a different conception of proportionality. The strongest form of that idea is the principle of correspondence (or referential principle), which requires proof of culpability for every element of an offense. This principle seems to have a stronger place in most European criminal justice systems. It has had the support of most English and American scholars for several decades, and drafters of the U.S. Model Penal Code were firmly committed to it. But it has not prevailed among Anglo-American legislators and judges, and recent scholarly accounts have shed light on the intelligibility of its alternative. The alternative rests on the premise that an offender who is culpable for a single wrongful act (or offense element) undergoes “a change of normative position” relative to non-wrongdoers. Thereafter, he might be fairly punished more harshly based on circumstances or consequences he did not know, intend, or foresee because those things followed from (or accompanied) his culpable wrongdoing. Put differently, causation

43 Blomsma (n. 12) 208 ff.
of harm can aggravate punishment without reference to culpability, and mistakes as to circumstances do not mitigate liability. On this view, wrongdoers have a weaker claim to fully proportionate liability.

Something like this position lies behind strict liability for more serious offenses, many of which require *mens rea* for at least one element that represents the conduct’s wrongfulness. The argument is weaker for offenses that arguably lack *mens rea* requirements even for a single such element. But a standard judicial rationale for strict liability regulations relies on this position. Courts assert that even actors engaged in lawful endeavors are fairly punished when reasonable people in contemporary society would recognize the activity as likely to be a *regulated* one (e.g. food distribution, manufacturing, firearms possession), and the regulation addresses risks to others. By electing to engage regulated lawful activity, an actor has “changed his normative position.”

If we can plausibly attribute broad legal principles to reflect majoritarian sentiment and enjoy some popular support in democratic polities (an assumption that in some instances is contested), then the pervasive use of strict liability for public welfare offenses and for serious crimes suggests that English and U.S. popular/political sentiment embrace this weak proportionality principle for criminal punishment.

3. Preference for utilitarian rationales

Another likely explanation, also at a broad level of generality, is found in the Anglo-American receptivity to utilitarian rationales in legal reasoning. The doctrine of public welfare offenses rests largely on such rationales, rather than justifications of moral principle. Courts ubiquitously recognize the instrumental advantages that strict liability provides to enforcement officials, and they regularly concede the legislature’s prerogative to enact offenses that serve these practical ends at the expense of the principle that criminal punishment is reserved only for the blameworthy wrongdoers.

Courts acknowledge that strict liability “may produce mischief in individual cases” by punishing those who acted blamelessly. They infer that legislators “weighed the possible injustice of subjecting an innocent seller to a penalty” and accede to legislative judgment that this cost is worth the benefits of greater public protection that should follow easier imposition of sanctions, or even that this

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46 Balint, 258 U.S. 250, 254 (1922). Under the federal drug sale offense at issue, justice to blameless defendants is outweighed by “the evil of exposing innocent purchasers to danger from the drug.”
tradeoff is necessary. The “difficulty of proof of knowledge” is too great for the state to bear in some cases.\textsuperscript{47} “[T]he inconvenience and injury would be much more general” than the injustice done by punishing a blameless defendant, a Maryland court reasoned in 1857, “if, in every case of this kind, the party charged could defend himself by offering evidence that he did not know . . . and that reasonable diligence had been used to prevent” any violation.\textsuperscript{48} Public welfare doctrine, in short, forsakes the actus non facit principle for practical enforcement gains. More broadly, strict liability almost by its nature prioritizes utilitarian interests over moral or political restraints on state power. Anglo-American criminal law reflects that ordering of priorities in its wide use of strict criminal liability.

4. Social duties in modern societies

Another reason for acceptance of strict liability appears in familiar explanations for its practical necessity. By the twentieth century, courts regularly cited the unavoidability of strict liability regulations in the wake of industrialization, urbanization, new technologies, and increasingly expansive commercial markets. In Morissette, Justice Jackson offered an enduring version of this understanding:

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 duties . . . 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.\textsuperscript{49}

Morissette echoed Sayre’s explanation, although Sayre made no reference to industrialization or workplace injuries and correctly recognized that these offenses arose from longer standing efforts to police threats to social order and public health—alcohol, adulterated food, misbranded or fraudulently labeled goods, traditional forms of public nuisance, and, in time, control of risks from automobile traffic and widespread narcotics. But Sayre perceptively alluded to additional, ideological shifts that accompanied social and material ones:

\textsuperscript{47} Balint, 258 U.S. 250, 254 (1922).
\textsuperscript{49} 342 U.S. 246, 253–256 (1952).
The decisions permitting convictions of light police offenses without proof of a guilty mind came just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt; the movement also synchronized with the trend of the day away from nineteenth century individualism toward a new sense of the importance of collective interests. The result was almost inevitable.

...[T]he movement has been not merely an historical accident but the result of the change social conditions and beliefs of the day. 50

Courts acknowledge only obliquely if at all this ideological shift away from traditional liberal individualism and “toward a new sense of the importance of collective interests.” Yet judicial reasoning in a number of decisions dating from the mid-nineteenth century supported Sayre’s characterization. From one perspective, this is a jarring shift for English and U.S. courts. The Anglo-American political tradition is distinctive for its commitment to individual liberty, of which the actus non facit reum principle, which constrains the state from unjustly infringing liberty, is but one manifestation. The liberal state model stood in contrast, as Anglo-American scholars of the latter nineteenth century were well aware, to the German “social state” (Sozialstaat) principle that developed in the Second Reich. The socioeconomic model of “corporatism,” marked in part by an emphasis on employer and worker associations in key economic sectors coordinated by the state (a policy of Verstaatlichung), and more generally by a commitment to social solidarity and interests rather than the laissez-faire and individualist ideals of the Anglo-American tradition. 51

What Sayre recognized and what courts repeatedly concede in their utilitarian justifications for public welfare offenses is a felt necessity to forsake some degree of private liberty and to strengthen individual social obligations to collective interests. We might view this as part of the liberal state’s path toward its own version of social state; it is a change in core legal doctrine that shifts priority to social good and social order even at some cost to private and individual interests. (Other parts of this broader story include the evolution of tort law in response to industrialization, and early social insurance schemes such as workers’ compensation laws.) 52

Judicial decisions are replete with language to this effect—language about the individual’s affirmative duty to the broader social or public interest. This was evident in early criminal nuisance decisions; R. v. Stephens described the quarry owner’s “duty to take all proper precautions to prevent the rubbish from falling into

50 Sayre, (1933) 33 Columbia LR 55 ff., 67 (emphasis added).

51 For a brief account that references the broad literature on German corporatism, liberalism, and laissez-faire in the late nineteenth century, see James Q. Whitman, “Early German Corporatism in America,” in Mattias Reimann (ed.), The Reception of Continental Ideas in the Common Law World 1820–1920 (1993), 229 ff.

the river” and harming community interests. Several decades later, the individual’s social obligation and the priority of public interests that strict liability defines was more explicit. The Supreme Court in *U.S. v. DotterweICH* described with approval “a now familiar type of legislation whereby penalties serve as effective means of regulation” without proof of “awareness of some wrongdoing” and explained: “In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”53 *Morissette* suggested the same rationale for public welfare offenses: “The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect.”

On this account, public welfare doctrine represents a sort of political irony for the two preeminent liberal states. Lacking other means—other social–economic institutions, legal principles, or political norms—to regulate increasingly complex societies for the collective benefit, English and U.S. governments evolved an unusually broad use of a rule that expands state power with minimal consideration of the individual’s distinct interest—strict criminal liability.

5. Limits on central state administrative capacity

One institution that England and the United States lacked through the nineteenth century, relatively speaking, was a strong central government with the governance capacity to accompany growing administrative needs.54 Few seemed to dispute, as Sayre put it, that “the demands of an increasingly complex social order required additional regulation of an administrative character,” and that “questions of personal guilt” were often inappropriate in this realm. Yet much, if not most, of this new regulation did not take a straightforwardly administrative form in the United States and England. It took the form of criminal regulation, eventually supplemented in many settings by parallel civil or administrative regimes. (Perhaps Germany’s greater state coordination in the Bismarckian state, to meet the challenges of urbanizing and industrializing societies, enabled it to rely less on criminal law for administrative regulation and maintain its strong commitment to the *actus non facit reum* principle.)

The nineteenth-century liberal state, in the United States and even in England, lacked a sufficient regulatory structure and state capacity for administrative governance to meet the risk-management and harm-prevention agenda presented by industrial modernity. As England and the United States, like other industrializing nations,

found themselves in need of greater regulatory capacity, they adapted an established legal structure, criminal law, to meet the needs that could not be met, for some decades at least, by weak administrative institutions to address growing issues of food safety, liquor and drug distribution, auto traffic, workplace safety, and the like.\textsuperscript{55} Criminal law, after all, had long played a central role in the liberal state’s \textit{police}—the state’s exercise of its general powers “to govern men and things” in order to preserve public welfare, social order, and security.\textsuperscript{56} Through this inherent authority even decentralized common law states pervasively governed social and commercial life through regulation of sexual and familial relations, commercial markets, master–servant relations, disorderly persons, alcohol use, public roadways, threats to morals from literature, gaming, or dance halls—the full gamut of society. Recall that Sayre specified that by “public welfare offenses” he meant strict liability “police offenses and criminal nuisances.”\textsuperscript{57}

England and the United States had strong legal traditions of regulating real and perceived risks of every sort, but only limited legal and institutional capacities to do so. Public welfare offenses, then, represent an adaption of the available criminal law and state institutions to changing circumstances. That adaption took firm root. Courts so fully developed the law of strict liability regulations that the doctrine continued, on the force of its own well-established legitimacy, even after Anglo-American states developed modern administrative infrastructures that make regulatory penalties in \textit{criminal} form, per se, largely unnecessary.

\textbf{VI. Public Welfare Offenses and Culpability}

Whatever the role of these considerations in explaining the persistence of public welfare offenses, we should consider how much of a departure from the \textit{actus non facit} principle these regulatory crimes seem to represent. For at least three

\textsuperscript{55} One instance of this larger structure is referenced by Sayre, in his discussion of limitations imposed by nineteenth-century forms of action. Public actions such as nuisances generally had to be brought in criminal form (though described sometimes as quasi-criminal or quasi-civil), either by private or public prosecutors, because there was generally no option resembling a public regulatory authority with enforcement powers grounded in civil statutes. Sayre, (1933) 33 \textit{Columbia LR} 59 ff. The administrative powers of local boards of health were an early shift away from this limit. See McLaren, (1983) 3 \textit{OJLS} 355 ff.


\textsuperscript{57} Sayre, (1933) 33 \textit{Columbia LR} 55 ff. Sayre consistently used the phrases “police offenses” and “police regulations” to describe public welfare offenses.
reasons offered by courts, indifference to culpability in public welfare offenses is not as unqualified as it initially seems, and that makes the acquiescence of Anglo-American judges to formal strict liability less puzzling. Considered closely, many strict offenses rely on an intelligible idea about offenders’ culpability. If convincing, this significantly reduces the number of truly strict regulatory offenses.

1. Defenses to strict liability

Recall the distinctions noted earlier among types of strict liability; one difference is whether defendants may rebut strict liability with proof of due diligence or powerless to prevent the harm. Such defenses preserve some role for fault in liability decisions, even though the state need prove only the defendant’s conduct (or failure to act upon a duty). Many public welfare offenses have specific statutory clauses that provide for defenses of reasonable care, due diligence, lack of knowledge, or the like. The drug offense in U.S. v. Balint is one example; defendants otherwise liable under the statute may present the defense that they acted as a licensed physician or pharmacist in the course of professional practice. Some adulterated-products statutes allow defendants to avoid liability by showing that they obtained the goods from another subject to a warranty for quality—evidence of the defendant’s reasonable care.

Even when statutory text is not explicit, courts interpret some strict liability offenses to allow such defenses. A Georgia court permitted a defense of reasonable mistake of fact to the charge of allowing a minor to play billiards without parental consent. U.S. v. Park affirmed that a corporation’s chief executive can be vicariously liable under the Food and Drug Act for violations caused by employees but added that the “responsible corporate agent” theory of the statute “permits a claim that a defendant was ‘powerless’ to prevent or correct the violation to ‘be raised defensively at a trial on the merits.’” Again, some public welfare crimes (including many alcohol-related offenses) permit no such defense. Moreover, these statutes shift the burden of proof on culpability to defendants, which some protest is an

58 See Roberts (n. 10) 153 ff. (citing statutes); Jackson, (1936) 6 Cambridge LJ 88 ff. (citing the Fertiliser and Feeding Stuffs Act 1893 and the Feeding Stuffs Act 1926).
60 See Singer, (1989) 30 Boston College LR 337 ff., 348, 365, 372 (describing and citing statutes including the U.S. Food and Drugs Act § 113 (1955) and Health Act §§ 291, 298, 300 (1956 Vic.); and the U.K. Fertilisers and Feeding Stuffs Act 1926, section 7(1)).
63 See e.g. Commonwealth v. Boynton, 2 Allen 160 (Mass. 1866); Commonwealth v. Goodman, 97 Mass. 117, 119 (1867); Hill v. State, 19 Ariz. 78, 165 P. 326 (1917); State v. Valure, 95 Iowa 401 (1895); State v. Schaefer, 44 Kans. 90 (1890); Gourley v. Commonwealth, 140 Ky. 221, 227, 131 S.W. 34, 36 (1910).
inadequate substitute for requiring the state to prove fault. Nonetheless, defenses help to justify strict regulatory offenses inasmuch as they reduce the number of those punished without displaying some degree of negligence.

2. Foreseeable risks, results, or circumstances

Another group of public welfare offenses implies some regard for culpability by foregoing mens rea proof for one aspect—a result or circumstance—when negligence (or worse) is usually apparent in the defendant’s conduct, which by its nature is committed intentionally. “Dangerous driving,” if it requires no proof of the driver’s awareness of dangerousness, is one example. No proof of a defendant’s awareness or intent is required, but the state must prove driving and its “dangerous” character, which amounts to proof of negligence.

Courts reached such conclusions in earlier eras even where the nature of some risks was no longer immediately apparent, such as selling milk adulterated with water. Judges concluded that such mixing rarely occurred unintentionally; it was a familiar fraudulent tactic of sellers. Thus proof that one sold diluted milk was taken as strong evidence of knowing adulteration. The same was true of “mislabeling” offenses, such as oleomargarine labeled as butter. Concern about misleading customers regarding certain goods was so widely recognized that only negligent (or deceptive) vendors would mislabel. A related argument helps to explain alcohol offenses, particularly during U.S. Prohibition. Many believed alcohol to be so dangerous—to individuals and social order—that distribution conduct was viewed nearly as malum in se. Beverage vendors (at least of fermentable ones such as ciders and “malt”) were expected to guard against such grave dangers. An inference of negligent causation is reflected in judicial reasoning: “where one deals with others and his mere negligence may be dangerous to them . . . the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.”

These assumptions did not hold for all such offenses. In R. v. Woodrow, the defendant-seller apparently could not reasonably have learned that his tobacco was adulterated, nor could the vendor in Parker v. Alder, where milk was adulterated by a stranger while in transit. But inferred culpability that held for most applications was sufficient to justify strict regulatory offenses in most courts.

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65 Devlin, (1957–58) 4 Society of Public Teachers of Law 206 ff.
66 State v. Rogers, 142 Me. 94, 49 A. 564, 567 (1901); Fox v. State, 94 Md. 143 (1901); Lawrence Friedman, History of American Law (1973), 400 ff.
3. Notice from the regulated nature of activity

Finally, courts adopted a third rationale for concluding that negligent conduct usually was behind breaches of strict liability offenses. Those engaged in activities that pose significant risks to others are presumed, in the modern era, to be aware that their activities are regulated by various duties of care. Woodrow made this assumption early regarding tobacco vendors. Contemporary trades such as manufacturing pharmaceuticals or transporting industrial chemicals give rise to this presumption. As long as actors know the nature of such articles, they are expected to know regulations regarding, for example, mandatory licenses or safety practices; thus failure to comply implies at least negligence. The same goes for owners and supervisors held vicariously liable for their agents’ conduct regardless of whether they were aware of it. Officers are presumed to know of their duty to ensure that agents adhere to regulations. The U.S. Supreme Court was explicit on this point in U.S. v. Park, where it inferred fault by an executive guilty under a vicarious strict liability offense. “The considerations which prompted the imposition of this duty” to guard against unsanitary conditions, which the defendant ought to know, the Court concluded, “provide the measure of culpability.” On this view, then, like the rationales arising from foreseeable risks and defenses, many public welfare offenses that are formally strict in fact reveal some level of fault in the nature of their proof.

vii. Conclusion: Limits on Criminal Culpability

In sum, the widespread persistence of public welfare offenses in English and U.S. criminal law does not mean that criminal sanctions are always imposed on wholly non-culpable actors, even where courts explicitly describe these offenses as strict criminal liability. Required proof for many of these offenses justifies a plausible inference of culpability. But this is not true for all applications of these offenses. Some can be employed to punish innocent actors in ways that mens rea proof requirements would prevent. Moreover, the theory of culpability on which many public welfare offenses rests is relatively thin, perhaps equivalent to a civil

negligence standard. Yet it is worth bearing in mind that jurisdictions which reject strict criminal liability may nonetheless devise mens rea requirements that are no more rigorous than this, and they may additionally rely on other devices, such as offense definitions, to impose criminal sanctions on offenders manifesting only marginal or debatable culpability.

The greater effect of public welfare offenses may be that they help to legitimize and sustain strict criminal liability for more serious offenses. Courts sometimes lose sight of the context and particularities that originally justified and limited the scope of a rule. So it is with public welfare offenses. Even in the 1930s, scholars lamented that English and U.S. courts had extended strict liability to serious crimes punishable by significant prison terms.73 That tendency has not abated in recent decades.74 Public welfare offenses are a primary source for legal justifications that minimize the connection between fault and the magnitude of criminal sanctions, even if their direct enforcement results in a relatively small number of unjustified punishments.

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73 See Sayre, (1933) 33 Columbia LR 55 ff., 80 (citing cases).