Winter January 24, 2011

A FAIR PUNISHMENT FOR HUMBERT HUMBERT: STRICT LIABILITY AND AFFIRMATIVE DEFENSES

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In this article, I focused on the intersection of strict liability offenses and affirmative defenses. I sought to explore and evaluate a peculiar discrepancy: all states, as well as the Model Penal Code, deny to a defendant charged with a strict liability offense the defense of mistake, yet at the same time, allow most other affirmative defenses. Is this discrepancy warranted? Consider the following scenarios in which Humbert Humbert is charged with the statutory rape of Lolita:

If Humbert Humbert tried to argue that he had acted under a mistaken belief that Lolita was above the age of consent, he most likely would not prevail. He would not prevail even if he made all possible efforts to find out Lolita's true age (e.g., checked Lolita's birth certificate and received a signed sworn affidavit from Lolita's mother) or if he fell prey to Lolita's own deception.

The outcome, however, would be different if Humbert Humbert could prove that his misperception of Lolita's age was a result of insanity. In that case, Humbert Humbert would have a valid defense. He would also have a defense if he could show that he had had sex with Lolita under duress. Say, Clare Quilty, engrossed in the production of his pornographic movie, threatened to beat up Humbert Humbert unless he and Lolita performed a sexual act in front of his camera.

Obviously, the defenses of mistake, insanity, and duress, albeit belonging to the same family of excuses, differ in many important respects. To see whether certain formative differences may account for the different treatment of these defenses,

*Professor of Law, Robert E. Knowlton Scholar, Rutgers School of Law–Newark. I am grateful to Antony Duff, Lindsay Farmer, Stuart Green, Saul Mendlovitz, Adil Haque, Alice Ristroph, and participants of the Law and Society Association 2009 Annual Meeting and the Pace Law School Faculty Colloquium for their insightful comments. I am also indebted to my research assistants Michael B. Roberts and Allyson M. Kasetta for their excellent research.

New Criminal Law Review, Vol. 14, Number 1, pps 55–77. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: 10.1525/nclr.2011.14.1.55.

I examine various excuses on the scales of cognitive-volitional, external-internal, and permanent-temporary. In the end, I conclude that, from the moral perspective, there is: (i) no difference between a permanent and temporary impairment; (ii) a marginal difference in favor of external limitation compared to internal; (iii) a meaningful difference in favor of cognitive impairment compared to volitional. Effectively, this conclusion means that a person who commits a strict liability offense pursuant to a reasonable mistake deserves punishment even less than a person who commits the same crime under duress.

I further explore the discrepancy between the treatment of the defense of mistake and other excuses in cases of strict liability from the perspectives of efficiency and other public policies. I conclude that this discrepancy is unwarranted, unfair, and arguably, unconstitutional. Accordingly, I advocate for a revision of the current law and adoption of an across-the-board rule that would make the defense of a reasonable mistake available in any criminal prosecution.

Who has a stronger claim for forgiveness: a man who had sex with a twelve-year-old girl under the mistaken but reasonable belief that she was sixteen, or a man who had sex with a twelve-year-old girl, with full awareness of her age, but under duress, to avoid a severe beating to himself?

In both scenarios, pursuant to the traditional criminal law doctrine, the perpetrator is not culpable and, therefore, should not be convicted of a crime.[1] "There can be no crime, large or small, without an evil mind," says a famous American treatise.[2] "It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist."[3]

And yet, in the majority of American states, only the second man, the one who acted under duress, would be able to take advantage of this rule.[44] In contrast, the first man would face up to twenty years in prison in

1. The maxim "Actus non facit reum, nisi mens sit rea" (a harmful act without a blameworthy mental state is not punishable) dates back to the seventeenth century. Edward Coke, The Third Part of The Institutes of the Laws of England 107 (London, Printed by M. Flesher for W. Lee & D. Pakeman 1644). It should be acknowledged though that early common law, compensatory in its essence, was focused on harm alone and largely ignored the perpetrator's culpability.

2. 1 Bishop, Criminal Law § 287 (9th ed. 1930).

3. Id.

4. It is noteworthy that, although the strict liability standard in statutory rape cases came to the United States from England, England itself has long repudiated that standard. See

Maryland, up to twenty years with a mandatory minimum of ten years in Georgia, and up to sixty years in Wisconsin.[5]

Contrary to its sweeping assertions about the overarching role of culpability, criminal law from early on recognized a number of offenses that were not predicated on a culpable mental state and merely required proof of a harmful act or omission attributable to the perpetrator. The most prominent examples of traditional strict liability offenses include felony murder, misdemeanor manslaughter, and various morals crimes, from corruption of a minor[6] to adultery[7] to bigamy.[8] The rapid industrialization and urbanization of the twentieth century supplemented this group with new panoply of regulatory strict liability and public welfare offenses.

In this article, I focus on the intersection of strict liability offenses and affirmative defenses in American criminal law. The peculiarity that I seek to explore is that both the state statutes and the Model Penal Code (MPC) deny to a defendant charged with a strict liability offense the defense of mistake; however, the same statutes do not preclude the defendant from raising other affirmative defenses.[9] To cite only a few examples,

- Kansas allows the defense of duress for strict liability traffic offenses such as driving under the influence ("DUI").[10]
- New York allows the defense of involuntary intoxication for strict liability assault and weapons charges.[11]
- Ohio allows self-defense for strict liability possession of a weapon under a disability such as a felony record.[12]

Sanford H. Kadish, Stephen J. Schulhofer, & Carol S. Steiker, Criminal Law and Its Process 246 (8th ed. 2007).

5. Md. Code Ann. § 3-304(b) (2006); Ga. Code Ann. § 16-6-3(b) (2006); Wis. Stat. § 948.02 (2006).

6. Richard A. Singer, The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability, 30 B.C. L. Rev. 337, 368 (1989).

7. Commonwealth v. Elwell, 43 Mass. (2 Met.) 190 (1840) (defendant can be convicted of adultery even if his mistaken belief that his sexual partner was unmarried was reasonable).

8. Commonwealth v. Mash, 48 Mass. (7 Met.) 472 (1844) (defendant can be convicted of bigamy despite his reasonable but mistaken belief that his wife was dead).

9. Model Penal Code § 2.05, cmt. 2 at 292 (Official Draft and Revised Comments 1980) ("The recent codes and proposals that contain provisions on strict liability make clear that most general defenses are not eliminated.").

10. State v. Riedl, 15 Kan. App. 2d 326, 807 P.2d 697 (Kan. App. Div. 1991).

11. People v. Carlo, 46 A.D.2d 765 (S.C. NY 1974).

12. State v. Patton, 106 Ohio App. 3d 736, 667 N.E.2d 57 (Ohio App. Div. 1995).

- Oregon allows the insanity defense for DUI and driving under a suspended license.[13]
- The MPC provides the following illustration of its stand on the issue: "a bartender who served liquor to a minor might be denied the defense of mistake as to age or the nature of the substance he served, but afforded a defense such as entrapment or duress."[14]

The apparent discrepancy in the treatment of mistake compared to other affirmative defenses in cases of strict liability requires an explanation and, if that discrepancy cannot be explained effectively, a revision of the rule. What policies are normally served by strict liability? What policies are normally served by specific affirmative defenses? How should those policies be reconciled, and which of them should be given priority in a case of a conflict?

I. WHAT POLICIES ARE NORMALLY SERVED BY STRICT LIABILITY OFFENSES?

Until the middle of the nineteenth century, criminal law was directed primarily against the *malum in se* offenses that involved both social harm and moral culpability. In the absence of such culpability, the defendant could not be convicted. The requirement of moral culpability, however, did not completely preclude strict liability. A person could be convicted of an offense exceeding his level of fault if what he did was nevertheless illegal (the legal wrong doctrine)[15] or at least immoral (the moral wrong doctrine).[16]

The rationale behind these doctrines is largely utilitarian: to deter people from participating in certain illegal or immoral activities by the threat of an

13. State v. Olmstead, 310 Ore. 455, 800 P.2d 277 (Ore. 1990).

14. Model Penal Code § 2.05, cmt. 2 at 292 (Official Draft and Revised Comments 1980). It is important to acknowledge, however, that the MPC, with very limited exception (see, e.g., § 213.6(1) providing that a reasonable mistake about age is not a defense if the sexual partner was below ten years old), downgrades all strict liability offenses to violations; id. § 2.05. Violations do not constitute crimes and are not punishable by imprisonment; id. § 1.04(5).

15. Joshua Dressler, Understanding Criminal Law 171 (4th ed. 2006) ("D is guilty of a criminal offense X, despite a reasonable mistake of fact, if he would be guilty of a different, albeit less serious, crime Y, if the situation were as he supposed.").

16. Bell v. State, 668 P.2d 829, 833 (Alaska Ct. App. 1983) ("there should be no exculpation for mistake where, if the facts had been as the actor believed them to be, his conduct would still be . . . immoral").

additional, much steeper, punishment if those activities produced unanticipated harm. To the extent any retributivist justifications for strict liability can be construed, they usually rely on the assumption of risk argument in the sense that: (i) by engaging in antisocial behavior, the perpetrator assumes the risk that things may turn out worse than he expected; and (ii) by his willingness to undertake this risk, the perpetrator incurs additional culpability that may be fairly translated into additional sanctions.[17]

The new offenses statutorily adopted in the later part of the nineteenth and in the twentieth centuries were predominantly *malum prohibitum*. Unlike *malum in se*, these offenses were not supposed to carry significant stigma or punishment. The United States Supreme Court explained the need for the new public welfare strict liability laws in the following way:

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of 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 and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.[18]

Nevertheless, strict liability has been severely criticized by many legal scholars for going against the established principles of justice, the community's perception of right and wrong, and the very idea of responsibility that lays at the foundation of criminal law.[19] The use of strict liability with respect

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17. George Fletcher, Reflections on Felony-Murder, 12 Sw. U. L. Rev. 413, 427 (1981).

18. Morissette v. United States, 342 U.S. 246, 254 (1952).

19. For discussion of various aspects of strict liability offenses, see, e.g., Kenneth W. Simons, When Is Strict Criminal Liability Just?, 87 J. Crim. L. & Criminology 1075 (1996–97); Douglas N. Husak, Varieties of Strict Liability, 8 Can. J. L. & Jurisprudence 189 (1995); Appraising Strict Liability (A.P. Simester ed., 2005). Appraising Strict Liability includes, among other ones, the following articles: Stuart P. Green, Six Senses of Strict Liability: A Plea for Formalism; A.P. Simester, Is Strict Liability Always Wrong?; John

to the *malum in se*, or stigmatic, offenses has been described as particularly unacceptable.[20] But even regulatory welfare offenses have raised serious concerns: quoting the Supreme Court of Canada, "The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the process of the criminal law trial and, however one may downplay it, the opprobrium of conviction."[21] In a sense, concerns about *malum prohibitum* strict liability offenses are even more warranted than concerns about their *malum in se* counterparts: if the latter involve at least some degree of moral failing, the former often do not. For example, a packaging company that purchases medications from manufacturers and ships them to individual customers has no opportunity to ensure that all medications are properly labeled by the manufacturer; yet if a single box happens to be accidentally mislabeled, the president of the company may be convicted of a crime punishable by imprisonment.[22]

Like many others, I do not favor the regime of strict liability, but for the purposes of this article, I am willing to concede that strict liability may be instrumental in preventing certain socially undesirable conduct and increasing the level of care in certain socially desirable high-risk activities. I argue, however, that even if strict liability rules have a social value, still their scope and application need to be profoundly revised because, in their current form, these rules are morally and logically incoherent. The goal of this article is to expose this incoherency by analyzing the interplay of strict liability offenses and affirmative defenses and suggest avenues for a legal reform.

II. WHY DO WE HAVE DEFENSES OF JUSTIFICATION AND EXCUSE?

Justifications and excuses are affirmative defenses. Affirmative defenses do not directly challenge any element of the offense; instead, they provide non-discretionary, systemic reasons to exculpate the actor who has committed

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Gardner, Wrongs and Faults; Douglas Husak, Strict Liability, Justice, and Proportionality; Jeremy Horder, Whose Values Shold Determine When Liability Is Strict?; and R.A. Duff, Strict Liability, Legal Presumptions, and the Presumption of Innocence.

20. See, e.g., Simester, Is Strict Liability Always Wrong?, supra note 19, 21–50.

21. R. v. City of Sault Ste Marie, 85 D.L.R. 3d 161 (1978).

22. U.S. v. Dotterweich, 320 U.S. 277 (1943). Under the MPC, this defendant would be guilty only of violation and, therefore, not at risk of imprisonment.

a prima facie criminal act.[23] By relying on one group of reasons, namely, justifications, "we accept responsibility but deny that [the act] was bad;" by invoking an excuse, "we admit that [the act] was bad but don't accept full, or even any, responsibility."[24]

A classic example of justified actors is mountain climbers who, without the owner's consent, took refuge in his cabin and appropriated his provisions to wait out an impending snow storm.[25] The mountain climbers would not be justified, however, if their break-in was motivated not by the fear for their lives but by the desire to throw a party. They would not be justified even if, by breaking in, they unknowingly escaped the deadly snow storm and saved lives. Justification requires both a positive balance of harms and evils, and the actor's benevolent intent directed at achieving that positive balance.[26] It is neither fair nor efficient to punish an individual who, acting in good faith, chose a course of action that resulted in a morally preferable outcome.[27]

Excuses have a different focus, yet the values they seek to protect are quite similar: it is neither fair nor efficient to punish an actor who could

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23. Am. Jur. 2d Criminal Law § 182 (2010); State v. McIver, 902 P.2d 982 (Kan. 1995); State v. Modory, 555 N.W.2d 399 (Wis. Ct. App. 1996); People v. Reed, 932 P.2d 842 (Colo. Ct. App. 1996).

24. Id.

25. See Model Penal Code § 3.02 cmt. 2 at 9 (Official Draft and Revised Comments 1980).

26. See id. at 11 (stating that, to qualify for the defense of necessity, "the actor must actually believe that his conduct is necessary to avoid an evil"). See also, George P. Fletcher, The Right Deed for the Wrong Reason: A Reply to Mr. Robinson, 23 UCLA L. Rev. 293, 318–21 (1975) (arguing that, when consent serves as a defense, the actor must be aware of it); Anthony M. Dillof, Unraveling Unknowing Justification, 77 Notre Dame L. Rev. 1547, 1595–1600 (2002) (arguing in favor of subjective theory of justification). But see Paul Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, 23 UCLA L. Rev. 266, 288–91 (1975) (arguing that claims of justification should prevail regardless of the actor's state of mind); Larry Alexander, Lesser Evils: A Closer Look at the Paradigmatic Justification, 24 Law & Phil. 611, 626–36 (2005) (arguing that self-defense but not other defenses requires defendant's knowledge of justifying circumstances).

27. The meaning of "good faith" may differ, however, depending on whether a justification defense is—using Hohfeldian classification—a right ("public duty") or a privilege (all other defenses). Assertion of a "public duty" does not require the proof of subjective benevolent motivation, although it certainly requires the defendant's awareness of the justifying circumstances. See Vera Bergelson, Rights, Wrongs, and Comparative Justifications, 28 Cardozo L. Rev. 2481 (2007).

not avoid violating the law.[28] The actor's disability may be external (duress) or internal (insanity or infancy); cognitive (mistake of fact) or volitional (duress); permanent (insanity) or temporary (intoxication).

Just like justifications, excuses incorporate a "clean hands" limitation. The defendant must *deserve* a defense. Usually, excuses are available only when the condition that has limited the actor's ability to follow the law is not of his own doing.[29] For example, in most jurisdictions, the defense of duress is not available to an actor who recklessly placed himself in a situation in which it is probable that he would be subjected to duress.[30]

To be sure, sometimes the defendant may avoid criminal liability even when his limited capacity is a result of his own negligent or reckless actions—but only if that incapacity *negates* the state of mind required by the offense charged. For example, voluntary intoxication or unreasonable mistake may be successfully pleaded to establish the lack of specific intent.[31] However, properly characterized, neither is an affirmative defense.

It is important to distinguish between affirmative defenses and mere negation of a required element. An argument that seeks to negate an element of an offense may succeed only if the offense incorporates that element. Accordingly, pleading a cognitive impairment to negate mens rea in a case of drunk driving would be pointless: the DUI statute has no mens rea element.

Defenses are fundamentally different: they recognize the state interest in punishing a certain kind of conduct, and they do not contest that such conduct has taken place. They provide, however, independent, additional reasons that change the moral and legal meaning of the prohibited conduct

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28. Joshua Dressler, for instance, defines excuses through the actor's lacking of either "substantial capacity" or "fair opportunity," in each case, to understand the facts relating to his conduct, to appreciate that his conduct violates society's mores, or to conform his conduct to the dictates of the law. Joshua Dressler, Battered Women and Sleeping Abusers: Some Reflections, 3 Ohio State J. of Crim. Law 457, 469 (2006).

29. Except for the defense of insanity, which will be recognized even if the defendant's mental illness is a result of his irresponsible lifestyle. Many justification defenses have a similar limitation.

30. See, e.g., Alabama, Alaska, Arizona, Arkansas. See also Model Penal Code § 2.09(2) (Official Draft and Revised Comments 1980).

31. See, e.g., Cal. Penal Code §22(b) ("Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent"). See also Model Penal Code § 2.08(1) (Official Draft and Revised Comments 1980) (self-induced intoxication "is not a defense unless it negatives an element of the offense").

in the instant case. These exculpatory reasons come *on top* of the reasons for criminalization, and depending on their strength, they may change the outcome of a case in which there is a conflict between the two sets of reasons. The balancing of inculpatory and exculpatory reasons is inherent in any criminal adjudication, including adjudication of a strict liability offense.

III. HOW DO DEFENSES OF JUSTIFICATION AND EXCUSE APPLY TO STRICT LIABILITY OFFENSES?

A. Justifications

Under the current law, certain justification defenses can be invoked in prosecution for any strict liability offense.

Necessity. There seems to be a significant consensus among states that necessity is available in prosecution of strict liability offenses. In *State v. Rasmussen*,[32] for example, the defendant was convicted of driving with a suspended license. Rasmussen argued that he should be allowed to plead the defense of necessity because he had been stranded in his car in bitter cold during a snow storm, and his illegal driving was a lesser evil than taking the risk of freezing to death. The appellate court agreed with Rasmussen and reversed his conviction, concluding that "public policy factors would support an affirmative defense to driving under suspension in life-threatening circumstances."[33] This result is consistent with other non-strict liability decisions involving the defense of necessity. As one court in a reckless driving case said, a "citizen cannot be reasonably expected to engage in self-sacrifice and bleed to death at the altar of the Vehicle Code by observing the basic speed law and other rules of the road."[34]

Self-Defense. The situation with self-defense is generally similar (if not always as clearly articulated). In *State v. Nollie*,[35] for example, the defendant claimed self-defense as justification for carrying a concealed weapon. The Supreme Court of Wisconsin rejected the defense because of the facts of

32. State v. Rasmussen, 524 N.W.2d 843 (N.D. 1994).
33. 524 N.W.2d at 845.
34. People v. Morris, 191 Cal. App. 3d Supp. 8, 11 (Cal. App. 1987).
35. State v. Nollie, 638 N.W.2d 280 (Wis. 2002).

the case (the threat was not "imminent and specific enough") and left for another day the issue of "when, if ever, the privilege of self-defense may be asserted for the crime of carrying a concealed weapon."[36] A few years later, however, the same court remembered its decision quite differently. In *State v. Fisher*, the court cited *Nollie* as a precedent confirming that a person may claim self-defense when charged with possession of concealed weapons.[37]

Self-defense has been also permitted as a defense to possession of a firearm by a convicted felon "when momentary possession of the weapon was solely for the purposes of using it in self-defense."[38] *State v. Patton* illustrates the absurdity of a different rule: Patton, an ex-felon, was attacked by a drunken acquaintance armed with an automatic handgun. In the fight that ensued, Patton disarmed the attacker and shot him to death. At his trial, Patton argued self-defense and was acquitted of the killing but not of the weapon possession because the latter was a strict liability offense. The appellate court recognized this outcome as abnormal and reversed the conviction.

Consent, on the other hand, is probably ineffective as a defense against a strict liability charge, and it is not surprising that it has hardly ever been raised: most strict liability offenses are "victimless"; therefore, by definition, there is no victim who could grant consent. As for those few, usually more serious, strict liability crimes that involve an identifiable victim, the law specifically precludes the defense of consent by either holding a certain *class of individuals* incapable of giving valid consent (e.g., minors with respect to offenses of statutory rape or serving alcohol to a minor) or invalidating consent to a certain *class of harm* (e.g., grievous bodily harm as a predicate for felony murder). Whether or not these policies are fully defensible, they apply equally to all offenses and stem from the domineering theory of consent rather than that of strict liability.[39]

Should justifications in general be available to a defendant charged with a strict liability offense? At least one state supreme court has answered this question affirmatively. In *State v. Brown*, the defendant asserted the defense

36. 638 N.W.2d at 281.

37. 714 N.W.2d 495, 498 (Wis. 2006).

38. State v. Patton, 667 N.E. 2d 57, 58 (Ohio App. 1995). See also State v. Coleman, 556 N.W.2d 701 (Wis. 1996); State v. Dundon, 226 Wis. 2d 654, 660 (Wis. 1999).

39. See, e.g., Vera Bergelson, The Right to Be Hurt: Testing the Boundaries of Consent, 75 Geo. Wash. L. Rev. 165 (2007).

of entrapment to a charge of speeding.[40] According to Brown, he was forced to exceed the speed limit in order to escape from the driver of another vehicle who harassed him by driving in front of, alongside, and behind him in a dangerous manner. The "other vehicle" turned out to be a police car, and Brown was pulled over immediately after he accelerated.[41]

The trial court rejected Brown's defense on the grounds that it was not available in a case of strict liability. The Supreme Court of Wisconsin disagreed, however: "When determining whether we should recognize any defenses to a strict liability traffic offense, we must determine whether the public interest in efficient enforcement of the traffic law is outweighed by other public interests which are protected by the defenses claimed."[42] The court then looked at the nature of specific justification defenses:

> While the original rationalization of the defenses of self-defense, coercion, necessity, and entrapment "may have been based on the notion that moral culpability was absent . . . the real basis for the defenses is that the conduct is justified because it preserves or has a tendency to preserve some greater social value at the expense of a lesser one in a situation where both cannot be preserved."
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> There are several public interests protected by the defenses claimed. The privilege of self-defense rests upon the need to allow a person to protect himself or herself or another from real or perceived harm when there is no time to resort to the law for protection. The rationale of the defenses of coercion and necessity is that for reasons of social policy it is better to allow the defendant to violate the criminal law (a lesser evil) to avoid death or great bodily harm (a greater evil). The public policy for recognizing entrapment as a defense is not to avoid some other harm to the defendant but to deter reprehensible police conduct.[43]

Applying these considerations, the court allowed Brown to raise the defense of entrapment, but as is typical in strict liability/affirmative defense cases,[44] the court limited its holding to the facts of the case: "We need not

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40. 318 N.W. 2d 370 (Wis. 1982). I do not suggest that entrapment is a defense of justification; I cite *State v. Brown* only for its general arguments.

41. Id. at 372.

42. 318 N.W. 2d at 375.

43. 318 N.W. 2d at 376 (citations omitted).

44. See, e.g., State v. Buchholz, 723 N.W. 2d 534, 539 (N.D. 2006) ("Only in very rare cases have we said that an affirmative defense may be applied when the offense is a strict liability offense.").

and we do not decide whether a defense of legal justification is available to the defendant . . . if the causative force is someone or something other than a law enforcement officer."[45]

The *Brown* court's argument (if not its exceedingly narrow holding) is certainly accurate and applicable to any offense, regardless of its mens rea element: any justification defense implies weighing the interests impaired and the interests served. In fact, this argument may be at its strongest in a typical strict liability case. Such a case is usually a minor public welfare violation; thus, the public interests protected by the statute defining the offense are almost always less important than the public interests protected by justification defenses (e.g., self-defense, public authority, necessity). However, the seriousness of the offense should not determine the availability of justification defenses. After all, these defenses may succeed only when the outcome is socially preferable.

For example, society has a significant interest in protecting children from consumption of alcohol, and the strict liability statute that prohibits serving alcohol to minors is intended to serve that interest. Yet, X should be allowed the defense of necessity for serving alcohol to sixteen-year-old Y, if Y required an emergency surgery and no other anesthesia was available. Similarly, self-defense should be a valid defense even for the most serious strict liability charge of felony murder. Say, X is caught shoplifting by Y, the shop owner; Y starts shooting at X, X attempts to disarm Y, and Y's gun accidentally goes off, killing Y. If X is charged with felony murder (causing death in the course of committing burglary and attempted larceny), X should be allowed to raise self-defense the same way he would be allowed to raise that defense in prosecution for any other homicide.[46]

B. Excuses

The real challenge of reconciling strict liability and affirmative defenses comes with excuses. Currently, criminal law does not offer a cohesive explanation of why the lines are drawn where they are. From what can be discerned from various statutes and judicial opinions, the following excuses

45. 318 N.W. 2d at 376.

46. Felony murder may not be the best example: if X's crime is serious enough, Y is justified in using deadly force, and X may not raise self-defense. If, on the other hand, X's crime is not that serious, it is unlikely it will trigger the felony murder rule because of the "inherently dangerous" limitation.

are usually available in prosecution for a strict liability offense: duress,[47] insanity,[48] infancy,[49] and involuntary intoxication.[50] At the same time, in the absolute majority of situations, mistakes of fact[51] or law[52] do not exculpate a strict liability offender. How can this discrepancy be explained?

One possible answer is that mistake is not really a defense but rather a failure of mens rea. Glanville Williams has summarized this view, stating that the rule relating to mistake

> is not a new rule; and the law could be stated equally well without reference to mistake. . . . It is impossible to assert that a crime requiring intention or recklessness can be committed although the accused laboured under a mistake negativing the requisite intention or recklessness. Such an assertion carries its own refutation.[53]

Under this view, there would be nothing surprising in the fact that a strict liability offense may benefit from "normal" defenses but not from the mistake of fact or law: there is simply no mens rea element that could be negated by a mistake.

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47. State v. Riedl, 807 P.2d 697 (Ka App. Div. 1991) (allowing a defense of duress for absolute liability traffic offenses such as DUI).

48. See State v. Lewisohn, 379 A.2d 1192 (Me. 1977) (allowing the defense of insanity for the charge of felony murder); State v. Olmstead, 800 P.2d 277 (Ore. 1990) (allowing the insanity defense for DUI and driving under a suspended license); 379 A.2d 1192 (Me. 1977) (allowing the defense of insanity for the charge of felony murder); 21 Okla. Stat. § 152; Ullery v. State, 1999 Ok. CR 36 (allowing the insanity defense); State v. Garver, 190 Ore. 291 (allowing the defense of insanity to felony murder although the statutes remain silent); S.D. Codified Laws § 22-5-10; State v. Surface, 1989 S.D. Lexis 76; Ala. Code § 13A-3-1 (allowing an affirmative defense of insanity to the prosecution for any crime); S.C. Code Ann 17-24-10 (same); Del. Code Ann. tit. 11 § 401 (same).

49. See, e.g., 21 Okla. Stat. §152 (excusing of any crime children under the age of seven, those mentally retarded, and those insane as incapable of committing crimes).

50. See People v. Carlo, 46 A.D.2d 764 (S.C. NY 1974) (allowing the defense of involuntary intoxication against the charge of illegal possession of a weapon).

51. Dressler, supra note 15 at 166 ("The mistake-of-fact rule for strict-liability crimes is straightforward: Under no circumstances does a person's mistake of fact negate his criminal responsibility for violating a strict-liability offense.").

52. Buchholz, 723 N.W.2d at 538 (opining that, "when the offense is a strict liability offense, a mistake of law defense is generally precluded because the offense does not contain a culpability requirement").

53. Model Penal Code § 2.05, cmt. 1, at 270–71 (Official Draft and Revised Comments 1980) (quoting G. Williams, Criminal Law 173 (2d ed. 1961)).

This understanding of mistake, however, seems limited. In fact, many penal codes, including the MPC, envision two roles for mistake—one described by Williams, when "the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense"[54]; and the other representing a true defense, when "the law provides that the state of mind established by such ignorance or mistake constitutes a defense."[55] In the former case, mistake negates a specific element of an offense; in the latter, it does something else—otherwise this second provision would be superfluous. I believe that, in the latter case, mistake functions as an affirmative defense that defeats the perpetrator's blame.

Take the offense of murder. Under the MPC, murder is a form of criminal homicide.[56] To be guilty of criminal homicide, a person has to cause the death of another human being purposely, knowingly, recklessly, or negligently.[57] Thus, if the death of another human being results from a nonculpable mistake, the person who caused that death is not guilty of criminal homicide: the mistake negates the required mens rea. For example, a nonculpable mistake of a surgeon that resulted in a patient's death negates the surgeon's criminal mens rea—he did not kill the patient purposely, knowingly, recklessly, or negligently. Conversely, when X kills Y in reasonable but mistaken self-defense, X's mistake does not negate the mens rea of murder: even though free from fault, X nevertheless has purposely caused the death of another human being. In that case, mistake may function only as a defense.

Being able to play both roles, inculpatory and exculpatory, is not unique to mistake; consent, for instance, can play dual roles too. In its inculpatory capacity, nonconsent is an element of theft, rape, or kidnapping; in its exculpatory capacity, consent may serve as a defense to assault.[58] Depending on the role—inculpatory or exculpatory— what the defendant needs to establish to be exonerated may vary. The very fact of mistake (or consent) is enough to negate an element, yet significantly more is required for a successful defense: as discussed above, the defendant must *deserve* the defense,

54. Model Penal Code § 2.04(1)(a) (Official Draft and Revised Comments 1980).

55. Id., §2.04(1)(b).

56. Model Penal Code § 210.2(1)(a) (Official Draft and Revised Comments 1980).

57. Model Penal Code § 210.1(1) (Official Draft and Revised Comments 1980).

58. See Vera Bergelson, Consent to Harm, in The Ethics of Consent: Theory and Practice 163, 171 (Alan Wertheimer & Franklin G. Miller eds., 2009).

for example, in the case of a mistake, the mistake must be inadvertent, not attributable to the defendant, and reasonable. That is, if I culpably put myself in a situation in which I am likely to make a mistake, I should not benefit from the defense. For example, if I persuaded myself that any person who asked me for five dollars was a deadly aggressor, I should not escape liability for stabbing to death a homeless man who had the bad fortune of asking me for a donation. My claim of self-defense should fail, in part, because my unreasonable mistake was of my own doing.

The defense of mistake may be restricted in one more way: when an individual is engaged in a particularly risky activity, the standard of care imposed by law may rise above the ordinary prudence, to the level of care to which a reasonable person engaged *in that kind of activity* would adhere. But, assuming he managed to satisfy that level of care, the defense should be permitted. There are fundamental reasons to shield the perpetrator from punishment when his prima facie criminal act is a result of a nonculpable mistake.

One such reason is a general consideration of criminal justice: unless the prohibited act includes a free choice of the actor, the actor should not be punished, and the free choice requires accurate information. Citing Aristotle, a man may not be held responsible for his actions unless they were voluntary, and "by the voluntary I mean . . . any of the things in a man's own power which he does with knowledge, i.e. not in ignorance."[59] We do not punish people for the most harmful results, even when they have a duty to prevent them, unless they also have the *capacity* to do so. For example, a parent who does not rescue a child from a burning building may not be charged with a culpable omission if that parent is quadriplegic. Just like a quadriplegic does not have the capacity to walk, a mistaken person does not have the capacity to choose the correct course of action.

Another consideration is the basic consistency of the theory and application of excuses: if, all other circumstances being equal, the defendant in a strict liability case may raise the defense of insanity or duress (which is true in most states and with respect to most offenses) or involuntary intoxication (which is true at least in some states and with respect to some offenses), why is the defendant not permitted to raise the defense of mistake?

Could that discrepancy be a function of a particular characteristic of the latter defense? On the scales of cognitive-volitional, external-internal, and

59. Aristotle, The Nicomachean Ethics 59 (W.D. Ross trans., 2005).

permanent-temporary, mistake is cognitive and temporary. It can be either internal (e.g., a misunderstanding of a complicated tax concept) or external (e.g., being a nonculpable victim of purposeful deception) with all shades of gray in between. For comparison, insanity is cognitive,[60] internal, and (usually) permanent; intoxication is cognitive, internal, and temporary; and duress is volitional, external, and temporary. How do these defenses interact with offenses of strict liability?

Let's take a case of consensual sexual intercourse with a minor (statutory rape). In most states, conviction may be obtained "even when the defendant's judgment as to the age of the complainant is warranted by her appearance, her sexual sophistication, her verbal misrepresentations, and the defendant's careful attempts to ascertain her true age."[61] Thus, if Humbert Humbert sincerely believed Lolita to be of legal age and, to ascertain that, he spoke to her teachers, checked her birth certificate, and received a signed, sworn affidavit from Lolita's mother, Charlotte, he would still be guilty.[62] Now, compare this outcome with situations in which Humbert Humbert invoked other excuses.

Insanity. If Humbert Humbert were legally insane, he most certainly would be found not guilty (by reason of insanity). The defense of insanity universally applies to any charge.[63] So, if, as a result of a mental disease, Humbert Humbert believed that Lolita was his deceased childhood sweetheart Annabel Leigh and that her life could be saved only by sexual intercourse, Humbert Humbert would most likely prevail in his defense. I suppose he

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60. Most state penal codes deny the volitional prong of the insanity defense. See, e.g., Michael Louis Corrado, Responsibility and Control, 34 Hofstra L. Rev. 59, 61–62 (2005).

61. Wayne R. LaFave, Criminal Law 437 (3rd ed. 2003).

62. Although there would be no impact on Humbert Humbert's verdict (unless the jury exercises its power of nullification), his sentence would most likely reflect his due diligence.

63. See Ala. Code § 13A-3-1 (allowing insanity as an "affirmative defense to prosecution for any crime" or offense); S.C. Code Ann. § 17-24-10; 11 Del. Code 401; S.D. Codified Laws §22-5-10; Utah Code Ann. §72-2-305 (allowing insanity as defense to prosecution of any crime except capital offenses); 17-A M.R.S. § 39 (a "defendant is not criminally responsible" for any crime if found to be insane); Okla. Stat. tit. 21 § 152 (children under seven, those mentally retarded, and those insane are incapable of committing crimes). For application of the insanity defense to a charge o statutory rape, see, e.g., Utah Code Ann. § 76-5-402, commentary (2008) ("Insanity was defense to statutory rape if properly proven."); State v. Hadley, 234 P. 940 (1925).

would also prevail if, as a result of his insanity, he was simply mistaken about Lolita's age and believed her to be an adult woman.

Intoxication. If Lolita had drugged Humbert Humbert in order to seduce him, he might also be able to raise a defense. Most states allow the defense of involuntary intoxication in a formulation very similar to one of the variations of the insanity defense,[64] although in reality the intoxication defense hardly ever succeeds.[65]

Duress. If Humbert Humbert had sex with Lolita under duress, he would be exculpated as well. He would be exculpated if the coercer was Lolita herself. Say, after she failed to seduce Humbert Humbert by peaceful means, she sneaked into his bedroom one night, put a gun to his head, and demanded sexual intimacy. And he would be exculpated if the coercer was a third party. Say, Clare Quilty, engrossed in the production of his pornographic movie, threatened to beat Humbert Humbert to a pulp unless he and Lolita performed a sexual act in front of his camera.

Comparing these scenarios with the one involving a reasonable mistake, I suggest that, from a moral perspective, there is: (i) no difference between a permanent and temporary impairment; (ii) a marginal difference in favor of external limitation compared to internal; and (iii) a meaningful difference in favor of cognitive impairment compared to the volitional.

Permanent v. Temporary. The first point is rather obvious. Aside from the higher evidentiary value of a permanent impairment, it does not matter for how long before or after the prima facie criminal act the perpetrator was impaired, provided that his level of impairment at the moment of the act

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64. Paul Robinson, Criminal Law Defenses, § 176(a) at 339. But see R. v. Kingston, 3 All E.R. 353 (H.L. 1994), reversing 4 All E.R. 373 (C.A. 1993) (in a case of sexual assault of a minor, rejecting the defendant's claim that involuntary intoxication overrode his ability to control his desires).

65. See Model Penal Code § 2.08 cmt. 3 at 363 (Official Draft and Revised Comments 1980) ("While there are many dicta saying that involuntary intoxication is a defense, no reported case has been found in which the defense has been successfully asserted. . . . The courts have been exceedingly restrictive in determining what pressures overcome the will of the actor."). See also Meghan Paulk Ingle, Law on the Rocks: The Intoxication Defenses Are Being Eighty-Sixed, 55 Vand. L. Rev. 607 (2002).

was sufficient for exculpation. It is, therefore, irrational to forgive Humbert Humbert's mistake regarding Lolita's age only if he were insane but not for other blameless reason. At the very least, the reasonably mistaken Humbert Humbert should be treated the same as a person under another legally recognized temporary disability (such as involuntary intoxication).

External v. Internal. We usually distinguish between the sources of exculpatory reasons even when the strength of those reasons is equal. Addressing coercion, Aristotle, for instance, maintained that only those actions committed under external "pressure which overstrains human nature and which no one could withstand"[66] are truly coerced and deserve pardon, whereas a wrongful act compelled by an internal motivation is voluntary.[67] Using similar reasoning, we may want to assign more excusatory power to a mistake resulting from someone's deliberate deception rather than personal misconception. This outcome seems intuitively right: people may legitimately expect others not to deceive them; they may not entertain equally legitimate expectations with respect to their own senses. So, Humbert Humbert should be excused if his mistake (whatever is its origin) regarding Lolita's age was reasonable, but his exculpatory claim may be even stronger if, in addition, he himself fell prey to deception.

Cognitive v. Volitional. In a case of a volitional impairment, the perpetrator understands the true state of events and can distinguish right from wrong. He may have trouble conforming his conduct to the requirements of the law, but at least he has an opportunity to do so. Conversely, in a case of a cognitive impairment, the perpetrator does not have a chance to choose correctly (he may certainly *act* correctly by accident, but an accidentally correct act does not derive from a correct moral choice).

I think most people would agree that Humbert Humbert who, in order to avoid being severely beaten by Clare Quilty, has sexual intercourse with Lolita, while knowing fully well that she is only twelve years old, acts less morally than Humbert Humbert who has sexual intercourse with Lolita in complete (if mistaken) confidence that she is sixteen. In the first case, Humbert Humbert consciously channels harm away from himself and upon someone else; he purposefully commits a self-preferential wrongful

66. Aristotle, supra note 59, at 24.
67. Id.

act. He knows that what he does is immoral and illegal, yet proceeds with it nevertheless. In the second case, Humbert Humbert is morally blameless: he has made every possible inquiry about Lolita's age and he has no reason to believe that he is doing something objectionable.

Based on this comparison, a reasonably mistaken perpetrator *deserves* excuse at least as much as an insane or involuntarily intoxicated perpetrator and even more than a perpetrator acting under duress. Thus, any disparity in the treatment of various excuses in strict liability cases can be justified only if (i) we are willing to sacrifice the principle of just desert to some legitimate utilitarian considerations, and (ii) those utilitarian considerations are in fact advanced better when excuse is granted to an insane or a reasonably coerced perpetrator but not to a reasonably mistaken perpetrator.

Addressing the second issue first: it appears that neither a reasonably coerced nor a reasonably mistaken perpetrator presents a serious rehabilitation or incapacitation problem (an insane person certainly requires treatment and confinement but not within the criminal justice system). The difference, if it exists, must thus lie in the area of deterrence. And it is certainly true that acts committed under a delusion or threat of violence are hard to deter. It could be easier to deter conduct that, although entirely lawful on its face, might involve hidden risks, which even reasonable diligence would not be able to expose. However, a policy that punishes innocently mistaken people (i) may come at a prohibitively high social cost, (ii) may be unconstitutional, and (iii) may not be even necessary for the goals at which strict liability offenses are directed.

First of all, this policy would necessitate significant limitations on citizens' liberty and autonomy: people would not be able to exercise lawful personal choices under the fear of prosecution. Moreover, this policy would deter not only socially undesirable conduct but also necessary and useful entrepreneurship. It was accurately observed that "selling meat or managing a factory 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."[68]

Second, this policy would go against the principle of legality: people would have very little notice of what conduct may lead to criminal sanctions.

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68. Phillip Johnson, Strict Liability: The Prevalent View, in Encyclopedia of Crime and Justice 1983 at 1518, 1520–21.

As a result, innocent people would be penalized, and the authority of the law would be undermined. Consider, for example, the statutory rape statute that authorizes punishment of the reasonably mistaken Humbert Humbert. That statute makes sense only if we want to discourage men from approaching youthful looking women whom they do not know very well. The purpose of the statute is not to induce men to take extra precautions (Humbert Humbert in our hypothetical did just that and nevertheless he is denied the defense). The purpose is to change the applicable conduct rule: instead of "do not have sex with women under the age of sixteen," the new conduct rule effectively says "do not have sex with women who *might be* under the age of sixteen." Obviously, any statute phrased in those terms would be struck down for vagueness, but doesn't the statute that *necessarily implies* the same (by punishing a reasonably mistaken perpetrator) suffer from similar vagueness?

Finally, if the legitimate goals of strict liability are to prevent certain particularly serious or particularly common offenses and to encourage people to employ extra caution in risky situations, these goals are poorly served by a rule that bars the defense of a reasonable mistake. As one court asked rhetorically,

> If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defense in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of the others?[69]

In other words, even assuming that considerations of efficiency justify strict liability rules, the harm at which these rules are directed would be better prevented if there were a standard of care, however high, that diligent actors could exercise to protect themselves from violating the law. It appears thus that the rule that punishes a reasonably mistaken actor not only has a prohibitively high moral cost for society, but it is also unlikely to bring about the desired higher deterrence.

As for the preference of utilitarian considerations over the just desert principle, such preference is obviously unfair to the accused. One might argue that strict liability is unfair per se, and thus the inconsistent treatment

69. R. v. City of Sault Ste Marie, 85 D.L.R. 3d 161 (1978).

of defenses does not change much. That argument has merit, but only in part. For example, despite various problems associated with the regime of strict liability, there would be no moral or logical contradiction in allowing only justification defenses for strict liability offenses. Justifications grant the perpetrator a limited license to step over a legal prohibition to avoid greater harm. The reason these defenses exist lies with our collective interest in an objectively better outcome. The individual's state of mind is a mere limitation: the perpetrator would not be granted a defense simply because he acted in good faith, but he may lose it if he did not.

To qualify for a justification, the defendant charged with a strict liability offense would have to prove good faith, even though the offense itself does not contain an element of mens rea. That incongruity by itself is not problematic, however: establishing a defense (as opposed to merely negating a charge) always requires the proof of a good purpose. For example, to negate the charge of theft, the defendant needs merely to show that she took control of the property with the owner's consent. The fact that she acquired that property in order to harm the owner, and in fact harmed him in every possible way, is irrelevant. But if the defendant tries to raise the *defense* of consent, the victim's acquiescence alone will not suffice. The defendant will also have to establish that the prima facie harm (e.g., cutting off the victim's limb) was done to avoid a greater harm (the spread of the gangrene). If, on the other hand, the same operation was done to give the invalid "more colour to begge,"[70] the defense would be denied. In sum, the rationales underlying strict liability offenses and justification defenses are not mutually exclusive, and the requirement of the defense to establish a benevolent purpose, even in the case when mens rea is otherwise neglected, is consistent with the philosophy of justification defenses in general.

The same, however, is not true for the defenses of excuse. These defenses are focused specifically on the defendant's culpability. As we saw earlier, there is no moral difference between insanity or involuntary intoxication, on one hand, and a reasonable mistake, on the other. And there are compelling reasons for affording a reasonably mistaken actor at least the same level of protection as a reasonably coerced actor. A rule that allows one perpetrator to claim duress but prohibits the other perpetrator from raising reasonable mistake is even more unfair than a rule that disallows both

70. R. v. Wright, 1 Coke on Littleton #194 (127a, 127b); 1 Matthew Hale, Historia Placitorum Coronae: The History of the Pleas of the Crown 412 (1736).

to present evidence negating an element of mens rea. The former rule not only ignores the individual perpetrator's mental state but systemically gives *preference* to a more culpable party. Such a rule undermines the justice of our criminal law by punishing a less guilty person more severely. To repeat one more time, even if there is a way to justify strict liability laws in general, still, *within* the scope of strict liability, similarly situated defendants should be treated similarly.

We, therefore, have two choices for strict liability offenses: to ban all excuses or to permit the defense of a reasonable mistake. If we follow the first route, we will have to prosecute infants and lunatics, among other blameless individuals. This is hardly acceptable. As one court put it, "To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame."[71]

The only plausible option then is to allow the defense of a reasonable mistake. Should it be available in all circumstances? Not necessarily. It absolutely has to be allowed only in those cases in which the defendant would be guilty of no offense if the facts were as he *reasonably* perceived them to be. That strikes down the doctrine of moral wrong but not legal wrong (the lesser offense doctrine). A perpetrator involved in the commission of an offense (or at least a dangerous offense) may be presumed to act unreasonably with respect to the risk of noncontemplated harm that is a natural and probable consequence of his criminal conduct.

The final rule, therefore, may be formulated the following way: a defendant charged with *any* offense (including strict liability offenses) should be allowed to raise *any* affirmative defense. The defense of a reasonable mistake should be granted, with two possible limitations: (i) one's involvement in a high-risk legal activity entails a higher standard of care, that is, what a reasonable person would do with respect to that kind of activity; and (ii) a mistake of a person involved in the commission of a (dangerous) criminal act may be presumed unreasonable. In addition, the defense may only be available to a defendant who was not subjectively at fault in putting himself in a situation in which he was likely to make the mistake.

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71. Holloway v. United States, 148 F.2d 665, 666–67 (D.C. Cir. 1945).

This rule would be in accord with the approaches already adopted by Canada, Australia,[72] and those few American states that permit the defense of acting "unwittingly" in some strict liability cases.[73] The rule would strike a manageable compromise: it would not eliminate the regime of criminal strict liability but would significantly limit its scope and application. At the same time, it would cure the main flaws of this regime by ending the inconsistent, unfair, and disproportionate treatment of those defendants who broke the law without fault.

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72. See Kadish et al., supra note 4 at 264. In fact the Canadian Supreme Court went even further and declared imprisonment for a strict liability offense unconstitutional. Strict liability public welfare offenses that do not involve imprisonment are still acceptable, but unless legislative intent to the contrary is clearly expressed, these offenses are presumed to allow the affirmative defense of due care. See City of Levis v. Tetreault, 2006 S.C.C. 12.

73. The affirmative defense of unwitting possession or conduct is currently recognized only by North Dakota and Washington. See, e.g., State v. Olson, 2003 N.D. 23, P13 (2003) ("Where willfulness is not required, a defendant may present an affirmative defense of unwitting, innocent, or mistaken conduct."); State v. Cleppe, 96 Wn.2d 373, 381 (1981) ("If the defendant can affirmatively establish his 'possession' was unwitting, then he had no possession for which the law will convict."). The defense is primarily applied to possession offenses, but it has been extended to other conduct too, for example, violation of domestic violence orders. See State v. Holte, 2001 N.D. 133, P13 (2001) (holding that the unwitting conduct "affirmative defense instruction may be given under appropriate circumstances in a prosecution for violation of a domestic violence protection").