

Section 2.05. When Culpability Requirements Are Inapplicable to Violations and to Offenses Defined by Other Statutes; Effect of Absolute Liability in Reducing Grade of Offense to Violation.*

(1) The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to:

(a) offenses that constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense; or

(b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.

(2) Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides:

(a) when absolute liability is imposed with respect to any material element of an offense defined by a statute other than the Code and a conviction is based upon such liability, the offense constitutes a violation; and

(b) although absolute liability is imposed by law with respect to one or more of the material elements of an offense defined by a statute other than the Code, the culpable commission of the offense may be charged and proved, in which event negligence with respect to such elements constitutes sufficient culpability and the classification of the offense and the sentence that may be imposed therefor upon conviction are determined by Section 1.04 and Article 6 of the Code.

Explanatory Note

Subsection (1) provides that the culpability requirements of Sections 2.01 and 2.02 are not applicable to violations, unless the definition of the offense specifically provides otherwise or the court determines that its application is consistent with effective enforcement of the law defining the offense. Violations are not, however, crimes under Section 1.04(5) and cannot result in a sentence of probation or imprisonment under Section 6.02(4). The theory of the Code is that noncriminal offenses, subject to no

**History.* This section was presented to the Institute in Tentative Draft No. 4 and considered at the May 1955 meeting. See ALI Proceedings 172-73 (1955). It was presented again, with minor changes, to the Institute in the Proposed Official Draft and approved at the May 1962 meeting. See ALI Proceedings 226-27 (1962). For original detailed commentary, see T.D. 4 at 140 (1955).

severer sanction than a fine, may be employed for regulatory purposes upon the basis of strict liability because the condemnatory aspect of a criminal conviction or of a correctional sentence is explicitly precluded.

Subsection (1) also speaks to offenses defined by statutes other than those in the criminal code, and provides that strict liability may be applied only if a legislative purpose to that effect plainly appears. In that event, however, Subsection (2)(a) makes the grade of the offense a violation irrespective of the penal provisions contained in the statute itself, unless the statute is passed after adoption of the Code and makes contrary provision. The penalties authorized for violations by Sections 6.02 and 6.03 are thus superimposed upon statutes outside the Code. This result is qualified by Subsection (2)(b) which provides that the culpable commission of any such offense may nevertheless be charged and proved, in which case negligence constitutes sufficient culpability, the offense is criminal, and the restrictions as to sentence are removed.

Comment[†]

1. *General.* This section makes a frontal attack on absolute or strict¹ liability in the penal law, whenever the offense carries the possibility of criminal conviction, for which a sentence of probation or imprisonment may be imposed. The method used is not to abrogate strict liability completely, but to provide that when conviction rests upon that basis the grade of the offense is reduced to a violation, which is not a "crime"² and under Sections 1.04(5) and 6.02(4) may result in no sentence other than a fine, or a fine and forfeiture or other authorized civil penalty.

This position is affirmed not only with respect to offenses defined by the penal code; it is superimposed on the entire corpus of the law so far as penal sanctions are involved. Since most

[†] With a few exceptions, research ended Jan. 1, 1979. For the key to abbreviated citations used for enacted and proposed penal codes throughout footnotes, see p. xliii *supra*.

¹ The term "absolute" liability has been objected to as not properly descriptive of the fact that all defenses are not meant to be foreclosed when an offense is so classified. See Perkins, *Alignment of Sanction with Culpable Conduct*, 49 Iowa L.Rev. 325, 331, 337-88 (1964). However, the terms are frequently treated as fungible in common usage. See, e.g., *People v. Stuart*, 47 Cal.2d 167, 302 P.2d 5 (1956) (Traynor, J.). See also G. Williams, *Criminal Law: The General Part* 215 (2d ed. 1961): "The word 'strict' is . . . preferable to 'absolute,' though either term may be used if its meaning is understood." The substance of the matter, of course, is covered by the explicit reference in the introductory phrase of Subsection (1) to the defenses that are excluded when liability is strict.

² See Section 1.04.

strict liability offenses involve special regulatory legislation, normally found in titles of a code other than the criminal title, this superimposition is essential if the principle of no criminality, probation or imprisonment for strict liability offenses is to be made effective.

The Institute did not doubt that the principle is one that should be given force. The liabilities involved are indefensible, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of probation or imprisonment may be imposed. It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. Crime does and should mean condemnation³ and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed.⁴

³ See P. Brett, *An Inquiry into Criminal Guilt* 36 (1963); Hart, *The Aims of the Criminal Law*, 23 *Law & Contemp.Prob.* 401, 404-05 (1958).

⁴ There is some authority to support a constitutional limitation precluding the use of imprisonment for strict liability offenses. See, e.g., *Satterfield v. State*, 174 Ark. 733, 296 S.W. 63 (1927); *Commonwealth v. O'Harrish*, 262 S.W.2d 385 (Ky. Ct. App. 1953); *State v. Hefflin*, 338 Mo. 236, 89 S.W.2d 938 (1935); *State v. Prince*, 62 N.M. 15, 189 P.2d 993 (1948); *People v. Estreich*, 272 App.Div. 698, 75 N.Y.S.2d 267 (1947); *aff'd*, 297 N.Y. 910, 79 N.E.2d 742 (1948); *State v. Williams*, 94 Ohio App. 249, 115 N.E.2d 36 (1952); *Kilbourne v. State*, 84 Ohio St. 477, 95 N.E. 824 (1911); *State v. Lisbon Sales Book Co.*, 21 Ohio Op.2d 455, 182 N.E.2d 641 (C.P. 1961); *City of Seattle v. Ross*, 54 Wash.2d 655, 344 P.2d 216 (1959). *Lambert v. California*, 355 U.S. 225 (1957), indicates a narrow constitutional limitation on the use of strict liability, which arguably deserves expansion. See also *Powell v. Texas*, 392 U.S. 514 (1968). See generally W. LaFave & A. Scott, *Criminal Law* 144-46, 221-22 (1972); Hart, *supra* note 3, at 423-24; Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 *Houston L.Rev.* 1039 (1973); Packer, *Mens Rea and the Supreme Court*, 1962 *Sup.Ct.Rev.* 107; Note, 24 *Ind.L.J.* 89 (1948).

For examples of the voluminous literature on strict liability for criminal offenses, see *Codification of the Criminal Law: Strict Liability and the Enforcement of the Factories Act 1961* (G.B. Law Comm'n Working Paper No. 30) (1970); J. Edwards, *Mens Rea in Statutory Offences* (1955); J. Hall, *General Principles of Criminal Law* 325-59 (2d ed. 1960); C. Howard, *Strict Responsibility* (1963); W. LaFave & A. Scott, *supra*, at 218-23 (1972); G. Williams, *supra* note 1, at 215-65; Brady, *Strict Liability Offenses: A Justification*, 8 *Crim.L.Bull.* 217 (1972); Brett, *Strict Responsibility: Possible Solutions*, 37 *Mod.L.Rev.* 417 (1974); Fox, *Statutory Criminal Law: The Neglected Part*, 62 *J.Crim.L.C. & P.S.* 392 (1961); Hart, *supra* note 3, at 423-24; Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 *U.Chi.L.Rev.* 423 (1963); Packer, *The Model Penal Code and Beyond*, 63 *Colum.L.Rev.*

Some indication of the need for such a provision, and of the range of strict liability that has been imposed in the past, is indicated by the following citations compiled at the time this section was considered by the Institute:

Pure Food and Drug

Mistake as to purity of article: *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Greenbaum*, 138 F.2d 437 (3d Cir. 1943); *People v. Schwartz*, 28 Cal.App.2d 775, 70 P.2d 1017 (1937); *State v. Kelly*, 54 Ohio St. 166, 43 N.E. 163 (1896); *Commonwealth v. Farren*, 91 Mass. 489 (1864); *Scott v. State*, 171 Wis. 487 (1920); *Parker v. Alder*, [1899] 1 Q.B. 20; *Betts v. Armstead*, 20 Q.B.D. 771 (1888); *accord*, *United States v. 11¼ Dozen Packages*, 40 F.Supp. 208 (W.D.N.Y. 1941); *cf.* *United States v. Hart Motor Express, Inc.*, 160 F.Supp. 886 (D. Minn. 1958) (removing seal).

Mistaken belief in curative powers of advertised drug: *United States v. Kaadt*, 171 F.2d 600 (7th Cir. 1948).

Giving False Weight

People v. Mishkin, 170 Misc. 889, 11 N.Y.S.2d 77 (Sp. Sess. App. Pt. 1939) (alternative holding); *State v. Weisberg*, 74 Ohio App. 91, 95, 55 N.E.2d 870, 872 (1943).

Selling Over Ceiling Prices

Pearks' Dairies, Ltd. v. Tottenham Food Control Committee, 26 Cox Crim.Cas. 356 (K.B. 1918) (erroneous weighing led to overcharge on price).

Minimum Wage Laws

Duncan v. Ellis, 21 C.L.R. 379 (High Ct. Austl. 1916) (mistaken belief that employee was young enough to be paid novice wage).

Liquor Laws

Mistake as to minor's age: *Hershorn v. People*, 108 Colo. 43, 113 P.2d 680 (1941); *State v. Dahnke*, 244 Iowa 599, 57 N.W.2d 594, 595-96 (1963); *Packer, Mens Rea and the Supreme Court*, 1962 Sup.Ct.Rev. 107; *Perkins, supra* note 1, at 325; *Perkins, The Civil Offense*, 100 U.Pa.L.Rev. 832 (1952); *Remington, Liability Without Fault Criminal Statutes—Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin*, 1956 Wis.L.Rev. 625; *Sayre, Public Welfare Offenses*, 33 Colum.L.Rev. 55 (1933); *Thalberg, Hart on Strict Liability and Excusing Conditions*, 81 Ethics 150 (1971); *Starrs, The Regulatory Offense in Historical Perspective*, in *Essays in Criminal Science* 235 (G. Mueller ed. 1961); *Wasserstrom, Strict Liability in the Criminal Law*, 12 Stan.L.Rev. 731 (1960).

553 (1953); *Duncan v. Commonwealth*, 289 Ky. 231, 158 S.W.2d 396 (1942); *State v. Hardy*, 232 La. 920, 95 So.2d 499 (1957); *Commonwealth v. Stevens*, 153 Mass. 421, 26 N.E. 992 (1891); *People v. Werner*, 174 N.Y. 132, 66 N.E. 667 (1903); *Knabb v. McCoy*, 73 Ohio App. 204, 55 N.E.2d 345 (1943).

Mistake as to vendee's sobriety: *Hershorn v. People*, 108 Colo. 43, 113 P.2d 680 (1941); *Barnes v. State*, 19 Conn. 398 (1849); *Cundy v. LeCocq*, 13 Q.B.D. 207 (1884).

Mistake as to alcoholic nature of beverage sold: *Hill v. State*, 19 Ariz. 78, 165 P. 326 (1917); *Ware v. State*, 6 Ge.App. 578, 65 S.E. 333 (1909); *Commonwealth v. Boynton*, 84 Mass. (2 Allen) 160 (1861); *Rex v. McKenzie*, 60 D.L.R. 163 (B.C. Ct. App. 1921).

Mistake as to alcoholic content of beverage transported or possessed: *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910); *Commonwealth v. Liberty Products Co.*, 84 Pa.Super. 473 (1925) (compare with case reported immediately after it); *accord*, *Mayberry v. The King*, 98 Can.Crim.Cas. 295 (Exch. 1950) (forfeiture proceeding).

Soliciting Insurance for Unlicensed Insurer

McKnight v. State, 171 Tenn. 574, 106 S.W.2d 556 (1937) (ignorance that insurance company was unlicensed).

Borrowing Bank Funds by Bank Officer

State v. Lindberg, 125 Wash. 51, 215 P. 41 (1923) (mistaken belief that funds were lent by another bank and not officer's own bank).

Receiving Mental Patients Without Authorization

The Queen v. Bishop, 5 Q.B.D. 259 (1880) (ignorance that patient received at convalescent home was lunatic).

Possession of Counterfeit Ration Stamps

Rex v. Kostynyk, [1944] 3 W.W.R. 545 (Man. Ct. App.) (ignorance that stamps were counterfeit).

Using Another's Trademark

The King v. Newcombe, 52 N.S.R. 85 (1918) (ignorance that milk bottle bearing rival's mark was among the 100 being run through defendant's milk plant).

Purchasing Army-Issue Supplies Without Authorization

Rex v. Jobidon, 78 Can.Crim.Cas. 147 (Que. Sess. of Peace 1. 2) (*semble*) (ignorance that supplies were army-issue).

Making False Statement in Shipping Declaration

Moussell Bros. v. London & N.W. Ry., [1917] 2 K.B. 836; Chamberlain and Fenn, [1906] 26 N.Z.L.R. 152 (S.C.) (mistake as to contents of box shipped).

Fishing in Prohibited Area

Balarix v. State, 81 Ga.App. 649, 59 S.E.2d 524 (1950).

Polluting Streams

Magnolia Pipe Line Co. v. State, 95 Okla.Crim. 193, 243 P.2d 369 (1952) (conviction rev'd on other grounds) (ignorance that oil pipe was leading oil into water).

Entering Polling Booth with Voter Without Authorization Card

Commonwealth v. Fine, 166 Pa.Super. 109, 70 A.2d 677 (1950) (ignorance that voter had not filled out the authorization card).

Possessing a Machine Gun

People v. Daniels, 118 Cal.App.2d 340, 257 P.2d 1038 (1953) (ignorance that gun was fully automatic).

Shooting Game Birds Which Have Been Lured by Grain Bait

United States v. Schultze, 28 F.Supp. 234 (W.D. Ky. 1939) (ignorance that grain had been used to entice the birds to place where they were shot).

Failure to Have Common Carrier Permit

United States v. Gunn, 97 F.Supp. 476 (W.D. Ark. 1950) (ignorance that accomplice did not have the permit); *see* Strutt v. Clift, [1911] 1 K.B. 1.

Possession of Lottery Slips

Fiorella v. Birmingham, 35 Ala.App. 384, 48 So.2d 761 (1950), *cert. denied*, 340 U.S. 942 (1951) (ignorance that slips were lottery tickets). *See* State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951) (same).

Owning House Used for Prostitution

See *Tenement House Dept. v. McDevitt*, 215 N.Y. 160, 167, 109 N.E. 88, 89-90 (1915) (ignorance that house was being so used).

Shipping Wild Game Out of State

Wells Fargo & Co. Express v. State, 79 Ark. 349, 96 S.W. 189 (1906) (carrier ignorant of contents of box).

Failure to Pay Gaming Tax

Burks v. United States, 287 F.2d 117 (9th Cir. 1961), *cert. denied*, 369 U.S. 841 (1962).

Violation of Hunting Laws

State v. O'Heron, 250 Minn. 83, 83 N.W.2d 785 (1957).

Selling Margarine

Commonwealth v. Weiss, 139 Pa. 247, 21 A. 10 (1891) (belief substance sold was butter).

Possession of Auto with Defaced Serial Numbers

People v. Fernow, 286 Ill. 627, 122 N.E. 155 (1919) (ignorance of defacement).

Passing School Bus Stopped for Discharging Children

Menefee v. State, 29 Tex.Crim. 375, 87 S.W.2d 478 (1935) (mistaken belief that unloading had ceased).

Driving on Wrong Side of Road

State v. Calhoun, 23 Conn.Supp. 198, 179 A.2d 837 (Cir. Ct. 1962).

Driving Without Tail Light

People v. Treen, 33 Misc.2d 471, 225 N.Y.S.2d 787 (1962).

Driving Overweight Truck

Leonard v. State, 38 Ala.App. 139, 79 So.2d 803, *cert. denied*; 262 Ala. 702, 79 So.2d 808 (1955); *People v. Rodenbach*, 204 Misc. 905, 126 N.Y.S.2d 295 (Erie County Ct. 1953), *aff'd*, 307 N.Y. 614, 120 N.E.2d 826 (1954); *Commonwealth v. Olshefski*, 64 Pa. D. & C. 343 (Montour County Ct. 1948).

Carrying Altered Passport

Chajutin v. Whitehead, [1938] 1 K.B. 506 (ignorance that passport had been altered).

Shooting Domesticated Pigeons

Horton v. Gwynne, [1921] 2 K.B. 661 (mistaken belief that bird was wild pigeon).

Cutting Timber Without Authorization

See Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (mistake as to existence of authorization; state act imposing strict liability held not to violate fourteenth amendment).

Criminal Syndicalism

See State v. Hennessy, 14 Wash. 351, 195 P. 211 (1921); see State v. Smith, 57 Mont. 553, 574, 190 P. 107, 110 (1920).

Narcotic Offenses

United States v. Balint, 258 U.S. 250 (1922); People v. Sweeney, 66 Cal.App.2d 855, 153 P.2d 371 (1944); Rex v. Sung Lung, 39 Can.Crim.Cas. 187 (Que. Dist. Ct. 1923); see People v. Gory, 28 Cal.2d 450, 454, 170 P.2d 433, 436 (1946) (ignorance that substance was a narcotic); Commonwealth v. Gordetsky, 178 Pa.Super. 467, 115 A.2d 760 (1955) (ignorance of type of drug). *Contra*, People v. Winston, 46 Cal.2d 151, 293 P.2d 40 (1956); cf. Reyes v. United States, 258 F.2d 774 (9th Cir. 1958) (ignorance of registration law); United States v. Juzwiak, 258 F.2d 844 (2d Cir. 1958), *cert. denied*, 359 U.S. 939 (1959) (same).

Bluz Sky Signs

State v. Lobry, 217 Iowa 858, 250 N.W. 702 (1933), *cert. denied*, 293 U.S. 519 (1934) (mistake as to truth of registration statement); State v. Silverman, 116 N.J.L. 242, 183 A. 178 (1936) (mistake as to truth of statement in advertisement).

Obstructing Justice

United States v. Combs, 73 F.Supp. 813 (E.D. Ky. 1947) (ignorance that person resisted was an officer).

Misleading Advertising Statements

People v. Richter's Jewelers, Inc., 291 N.Y. 161, 51 N.E.2d 690 (1943) (intent to defraud not required where evasive label contained statement actually untrue).

"Unknowingly" Possessing Explosives Under Suspicious Circumstances

See *Rex v. Dacey*, [1939] 2 All E.R. 641, 644 (Crim. App.) (knowledge only relevant to whether the possession is for lawful object).

Converting Public Property by Public Official

See *State v. Hailey*, 358 Mo. 300, 165 S.W.2d 422 (1942) (conversion alone enough; intent not required).

Official Misfeasance (Failure to Perform Duties or Performance Ultra Vires)

Lindquist v. State, 213 Ark. 903, 213 S.W.2d 895 (1948) (mistaken belief in power to issue license); *People v. Brooks*, 1 Denio 457 (N.Y. 1845) (mistaken belief of no duty to act).

Carrying Concealed Weapons

State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907) (reversed on other grounds); *Johnson v. State*, 73 Tex.Crim. 133, 164 S.W. 833 (1914) (mistaken belief in deputization as petty enforcement official).

Voting Illegally

State v. Pruser, 127 N.J.L. 97, 21 A.2d 641 (1941) (mistaken belief that voter residence had been established); *Hamilton v. People*, 57 Barb. 625 (N.Y. 1870) (mistaken belief that felony conviction did not, because he was a minor when convicted, disfranchise defendant).

Using Proceeds of Securities Sales for Purposes Outside Those Stated in Prospectus

Boyd v. State, 217 Wis. 149, 258 N.W. 330 (1935) (*semble*) (belief that purpose was within scope of prospectus).

"Public Officers" Misappropriating or Mishandling Funds

United States v. Friend, 95 F.Supp. 580 (S.D. W. Va. 1951); *McClure v. State*, 37 Ark. 426 (1881); *People v. Dillon*, 199 Cal. 1, 248 P. 230 (1926); *Levar v. State*, 103 Ga. 42, 29 S.E. 467 (1897); *State ex rel. Rowe v. District Court*, 44 Mont. 318, 119 P. 1103 (1911) (reliance on Atty. Gen. opinion); *State v. Halsted*, 39 N.J.L. 402 (1877); *accord*, *Steen v. Craig*, 31 Utah 20, 86 P. 437 (1906); see *Ross v. Oregon*, 227 U.S. 150 (1913) (mistaken

belief in authority to deposit funds in general bank account instead of segregated fund; bank failed).

Selling Liquor Wholesale to Unauthorized Vendee

Bienert v. State, 85 Ga.App. 451, 69 S.E.2d 300, cert. denied, 344 U.S. 802 (1952) (mistaken belief that holder of federal tax permit was "licensed" retailer, within meaning of state law).

Failing to Give Notice to Respondent in Administrative Proceeding

Gardner v. People, 62 N.Y. 299 (1875) (belief that notice need not have been given under the circumstances).

Publishing Without Permission Accounts Relating to Conduct of War

Ross v. Sickerdick, 22 C.L.R. 197 (High Ct. Austl. 1916) (belief that reported events did not relate to war).

Transmission of Racing Results

State v. Chesapeake & Potomac Tel. Co., 121 W.Va. 420, 4 S.E.2d 257 (1939).

Some recent revisions follow the Code in ruling out imprisonment for strict liability offenses,⁵ and some others place less stringent limitations on the permissible penalties for such offenses.⁶ Nevertheless, strict liability offenses carrying the possibility of imprisonment still exist in most jurisdictions.⁷

⁵ See Haw. § 702-213; Mont. § 94-2-104; N.H. § 626½; Ore. § 161.105.

⁶ A few revisions confine strict liability offenses to low gradings (e.g., misdemeanor) but do not rule out imprisonment altogether. See Kan. § 21-3204; Pa. tit. 18, §§ 305, 1106 ("Summary Offense" punishable by imprisonment for not more than 90 days). See also Okla. (1975 p) § 1-204.

The Kentucky provision (Ky. § 501.050) confines strict liability for offenses defined within the penal code to misdemeanors or violations, but places no such restriction on offenses defined by statutes outside the code. The West Virginia proposal (W. Va. (p) § 61-2-5) is similar, but confines strict liability offenses within the penal code to violations. The Illinois provision (Ill. ch. 38, § 4-9) allows strict liability only if the penalty authorized is a fine no greater than \$500 or a clear legislative purpose to impose strict liability appears. See also Mo. § 562.026.

⁷ Recent cases upholding strict liability include the following:

Pure Food and Drug

United States v. Cassaro, 443 F.2d 153 (1st Cir. 1971).

Incorrect Shipping Papers for Dangerous Materials

United States v. International Minerals, 402 U.S. 558 (1971).

Fishing in Prohibited Area

United States v. Ayo-Gonzalez, 536 F.2d 652 (5th Cir. 1976), cert. denied, 429 U.S. 1072 (1977).

2. *Violations.* Within the philosophy articulated above, Subsection (1)(a) accepts strict liability for all offenses that are graded as violations, unless a culpability requirement is included in the definition of the offense or the court determines that the application of such a requirement is consistent with effective enforcement of the law defining the offense. The assumption is, in short,

Polluting Streams

United States v. United States Steel Corp., 328 F.Supp. 354 (N.D. Ind. 1970); Ohio v. Gastown, 49 Ohio Misc. 29, 360 N.E.2d 970 (1975).

Shooting Game Birds Lured by Bait

United States v. Jarman, 491 F.2d 764 (4th Cir. 1974).

Possession of Lottery Slips

State v. Tutalo, 99 R.I. 14, 205 A.2d 137 (1964).

Operating Motor Vehicle Without Owner's Consent

Commonwealth v. Grant, 235 Pa.Super.Ct. 357, 341 A.2d 511 (1975).

Possession of Narcotics

State v. Scott, 278 So.2d 121 (La. 1973); State v. Gilman, 110 R.I. 207, 291 A.2d 425 (1972).

Obstructing Justice

United States v. Feola, 420 U.S. 671 (1975).

Misleading Advertising

United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966).

Possession of Unregistered Firearms

United States v. Freed, 401 U.S. 601 (1971); McQuoid v. Smith, 556 F.2d 595 (1st Cir. 1977); United States v. DeBartolo, 482 F.2d 312 (1st Cir. 1973).

For cases declining to impose strict liability, see United States v. United States Gypsum, 438 U.S. 422 (1978) (antitrust); United States v. Morrison, 536 F.2d 296 (9th Cir. 1976) (converting public funds); People v. Mijares, 6 Cal.3d 415, 491 P.2d 1115, 99 Cal.Rptr. 153 (1971) (narcotics possession); Sweet v. Parsley, [1970] A.C. 132 (narcotics possession); Kilbride v. Lake, [1962] N.Z.L.R. 590 (N.Z.S.C.) (auto fitness warrant).

In the area of Food, Drug and Cosmetic Act violations, the Supreme Court continues outwardly to apply *Dotterweich* standards of liability against corporate officers, while indicating through dictum the possible relevance of objective impossibility and due care as affirmative defenses. See United States v. Park, 421 U.S. 658 (1975); United States v. Wiesenfeld Warehouse, 376 U.S. 86 (1964). For interpretations of these limitations on strict liability, see United States v. Y. Hata, 535 F.2d 506 (9th Cir. 1976), cert. denied, 429 U.S. 828 (1977); United States v. Starr, 535 F.2d 512 (9th Cir. 1976).

It is unclear whether since approval of the Model Penal Code there has been a general trend away from strict liability; however, it has been noted that of a sampling of 27 major federal regulations, 23 impose criminal sanctions, of which 13 require "knowledge" or a similar level of culpability. O'Keefe, Jr., & Shapiro, *Personal Criminal Liability Under the Federal Food, Drug, and Cosmetic Act—The Dotterweich Doctrine*, 30 Food Drug Cosm.L.J. 5, 36 (1975). The authors also detect some movement towards statutory requirements of "knowledge" for criminal but not civil liability, as well as greater administrative flexibility for enforcement, in recent federal legislation. *Id.* 37.

For other academic comment on current developments in specific areas of strict liability, see O'Keefe, Jr., & Isley, *Dotterweich Revisited—Criminal Liability Under the Federal Food, Drug and Cosmetic Act*, 31 Food Drug Cosm.L.J. 69 (1976); Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 Colum.L.Rev. 1517 (1975); Brett, *Strict Responsibility: Possible Solutions*, 37 Mod.L.Rev. 417 (1974).

precisely the opposite from that prescribed by Section 2.02 with regard to crimes; when the offense is graded as a violation, culpability requirements ordinarily will be expressly stated when the legislative purpose is that they be included in the elements of the offense. If the law is silent, the court must make an affirmative determination—not made with crimes—that requiring proof of culpability is consistent with effective enforcement; otherwise liability will be construed as strict. This device should greatly reduce uncertainty about the meaning of statutes creating minor offenses.

This section also resolves a different question about the scope of strict liability, i.e., which defenses that might otherwise be available should ordinarily be denied in the case of violations? As a practical matter, strict liability statutes generally have the purpose of eliminating, with respect to one or more material elements of an offense, the requirement of culpability that otherwise would attach under Section 2.02. Thus, for example, 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. Though such cases rarely arise, general defenses of this character are left available even for strict liability offenses under the introductory language of Subsection (1) which excludes only Sections 2.01 and 2.02 from application to such offenses. Even the exclusion of the requirements of Section 2.01 is debatable; it may be argued that a voluntary act or omission should be required even in strict liability cases.⁸ The Code rejected this position in the view that the defensible purpose of strict liability, the reduction of the burden of proof in enforcement proceedings, would be no less frustrated by the obligation to litigate a defense under Section 2.01 than a defense under Section 2.02.

The recent codes and proposals that contain provisions on strict liability make clear that most general defenses are not eliminated. Almost all waive only culpability requirements and thus permit defensive arguments that the defendant engaged in no voluntary act or omission.⁹

⁸ See *State v. Binders*, 24 Conn.Supp. 214, 189 A.2d 408 (Super. Ct. 1962); *State v. Kremer*, 114 N.W.2d 88 (Minn. 1962); *Hill v. Baxter*, [1958] 1 Q.B. 277; *Regina v. Carter*, [1969] Vict.R. 105. See also C. Howard, *Strict Responsibility* 182-200 (1963); Clark, *Automatism and Strict Liability*, 5 Vict.U. Wellington L.Rev. 12 (1968); Edwards, *Automatism and Criminal Responsibility*, 21 Mod.L.Rev. 375 (1958); Patient, *Some Remarks About the Element of Voluntariness in Offences of Absolute Liability*, 1968 Crim.L.Rev. 23.

⁹ See Ala. § 13A-2-3; Ark. § 41-202(2); C § 18-1-502; Del. tit. 11, § 251; Haw. § 702-212; Ill. ch. 38, § 4-9; Kan. § 21-3234; Ky. § 501.050; Me. tit. 17-A,

3. *Crimes Defined Outside the Code.* This section also deals with three issues regarding crimes that are defined outside the Code: when they should be construed to impose strict liability; how they should be graded when strict liability has been construed; and what the consequence of a culpable commission of the offense should be.

Subsection (1)(b) deals with the first question. It accepts strict liability when an offense is defined by a statute other than the Code "insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears." Offenses defined outside the Code thus will normally be construed according to the principles outlined in Section 2.02, absent a clear intent by the legislature to provide a contrary result. That such a purpose should not be discerned lightly by the courts seems very clear. The reason was well put by Glanville Williams, speaking of the problem with respect to British legislation:

Every criminal statute is expressed elliptically. It is not possible in drafting to state all the exceptions and qualifications that are intended. One does not, for instance, when creating a new offence, enact that persons under eight years of age cannot be convicted. Nor does one enact the defence of insanity or duress. The exemptions belong to the general part of the criminal law, which is implied into specific offences. On the Continent, where the criminal law is codified, and similarly in those parts of the Commonwealth with a criminal code, this general part is placed by itself in the code, and is not repeated for each individual crime. Now the law of *mens rea* belongs to the general part of the criminal law, and it is not reasonable to expect Parliament every time it creates a new crime to enact it or even to make reference to it.¹⁰

These considerations make it tempting to provide, as Professor Williams has suggested, that the "intention to create strict responsibility ought always to be evidenced by the words of the

§ 11; Mo. § 562.076; Mont. § 94-2-104; N.H. § 626:2(I); N.J. § 2C:2-2(c)(3); N.Y. § 15.10; Ohio § 2901.21(B); Ore. § 161.105; Pa. tit. 18, § 305; Utah § 76-2-102; U.S. (U.S. 1437) § 303(a) (Jan. 1978); Brown Comm'n Final Report § 302(2); Alas. (p) § 11.01.020 (H.B. 661, Jan. 1978); Md. (p) § 15.10; Mass. (p) ch. 263, § 17; Mich. (p) S.B. 82 § 310; Okla. (1975 p) § 1-204; S.C. (p) § 10.6; Vt. (p) §§ 1.2.1(3), 1.1.9; W. Va. (p) § 61-2-5.

Only the Pennsylvania provision agrees with the Model Code in explicitly precluding this submission.

¹⁰ G. Williams, *supra* note 1, at 259-60. See also *Morissette v. United States*, 342 U.S. 246 (1952).

statute,"¹¹ i.e., by an explicit statement and not merely by the absence of a form of words denoting a requirement of culpability. This is, however, too severe a test for practical purposes, since so much existing legislation that would not satisfy the test has been construed to impose strict liability. Legislative acquiescence in such constructions, without amendment of the statute, may reasonably be regarded as evincing legislative purpose that the liability continue. Accordingly, the weaker requirement that such a purpose "plainly appears" goes as far as it is wise to go. In practice this might well mean either a settled interpretation or an explicit statement in the statute. That is, however, left deliberately to the judgment of the courts. Some of the recently enacted and proposed revisions restricting strict liability contain a principle of interpretation for offenses outside the penal code cast in terms like that of the Model Code.¹² Utah and North Dakota apparently contain the even stronger rule that a purpose to impose strict liability must appear explicitly in the statute.¹² Others do not address the point.

Subsection (2)(a) deals with the second question noted above, how such strict liability offenses should be graded. In accordance with the policy reflected in Subsection (1)(a), and in this section generally, such offenses should be classified as violations irrespective of what the definition of the offense itself says. Superimposition of the Code's scheme on offenses defined by statutes outside the penal code is a necessary step in achieving uniformity of principle in this regard. At the time of passage of the penal code, therefore, a desirable reform will have been imple-

¹¹ G. Williams, *supra* note 1, at 260.

¹² See Ark. § 41-202(2)(b); Del. tit. 11, § 251(c)(2); Haw. § 702-213; Ill. ch. 38, § 4-9 & commentary; Kan. § 21-3204 & commentary; Ky. § 501.050(2); Mo. § 562.026; Mont. § 94-2-104 & commentary; N.J. § 2C:2-2(c)(2); N.Y. § 15.15(2); Ore. § 161.105(1)(b); Pa. tit. 18, § 305(a)(2); U.S. (p) S. 1437 § 303(a)(2) (Jan. 1978); Md. (p) § 15.15(2) & commentary; Mass. (p) ch. 263, § 17 & commentary; Mich. (p) S.B. 82 §§ 310, 315; S.C. (p) § 10.6; Vt. (p) §§ 1.2.1(3), 1.1.9; W. Va. (p) § 61-2-5(b)(2).

¹³ The Utah provision (Utah § 76-2-102) provides:

An offense shall involve strict liability only when a statute defining the offense clearly indicates a legislative purpose to impose strict liability for the conduct by use of the phrase "strict liability" or other terms of similar import.

Note that, unlike the Model Code, the provision requires the legislature to make use of specific terms when strict liability is intended to be imposed. Note also that while the Utah section does not explicitly mention offenses found outside the code, the use of the broad term "statute" seems to indicate that the section does indeed apply to such offenses. See also N.D. § 12.1-02-02(2). Cf. Brown Comm'n Final Report § 302(2); Alas. (p) § 11.81.300(b)(1)(B) (H.B. 661, Jan. 1978); D.C. (1977 p) § 22-105(c); Mass. (p) ch. 263, § 17(b)(1).

mented, subject only to the obvious power of the legislature to introduce change by subsequent legislation.

Finally, Subsection (2)(b) provides that the culpable commission of a strict liability offense may be charged and proved, with the effect that the offense can be classified as a crime under Section 1.04 and the sentencing provisions of the Code. Negligence is permitted as a sufficient level of culpability for this purpose, in the hope that this will provide a reasonable compromise between the oft-expressed legislative desire to enact strict liability provisions as crimes and the general principles of the criminal law reflected in this section.¹⁴

A few recent revisions have similarly explicit language reducing the grade of offenses with strict liability elements outside the penal code, but allowing the culpable commission of such offenses to be charged.¹⁵

Section 2.06. Liability for Conduct of Another; Complicity.*

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

¹⁴ "There is a half-way house between *mens rea* and strict responsibility which has not yet been properly utilised, and that is responsibility for negligence." G. Williams, *supra* note 1, at 262. See also Ginossar, *Autonomy of Corrective Law: A Projection of the Doctrine of Constructive Negligence*, 9 Israel L.Rev. 24 (1974); Howard, *Strict Liability in the High Court of Australia*, 76 Law Q.Rev. 547 (1960).

¹⁵ See Haw. § 702-213; Ore. § 161-106(2) & (3); Pa. tit. 18, § 306(b)(1) & (2).

* *History.* Formerly numbered 2.04, presented to the Institute in Tentative Draft No. 1 and considered at the May 1953 meeting. See ALI Proceedings 160-91 (1953). Presented again to the Institute, renumbered 2.06, in Tentative Draft No. 4 at the May 1955 meeting. Presented finally to the Institute in the Proposed Official Draft and approved at the May 1962 meeting. See ALI Proceedings 79-80, 226-27 (1962).

Subsection (3)(a)(i) was revised pursuant to suggestion from the floor at the May 1953 meeting. Subsection (3)(b) of the previous drafts, basing complicity on "knowingly, substantially" facilitating the commission of the offense, was deleted pursuant to vote of the Institute at the May 1953 meeting. Subsections (4) and (7) were revised, Subsection (5) was added, and minor verbal changes were made prior to presentation to the Institute in the Proposed Official Draft.

For original detailed commentary, see MPC § 2.04 Comment, T.D. 1 at 18 (1953).