SHOULD STRICT CRIMINAL LIABILITY BE REMOVED FROM ALL IMPRISONABLE OFFENCES?

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What is strict criminal liability?

- ‘An offence should be treated as a crime of strict liability if it provides for conviction without requiring fault as to at least one material element.’
- Leave out of account ‘risk-based’ offences such as causing death by dangerous driving, where result (death) is part and parcel of ‘danger’ that constitutes dangerous driving.
Reasons for Requiring Fault (1)

• ‘Rule-of-law’ arguments:
  - H.L.A. Hart – wrong to convict anyone who has not had ‘a fair opportunity’ to exercise the capacity for ‘doing what the law requires and abstaining from what it forbids.’
  - J. Raz – ‘Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people’s dignity includes respecting their autonomy, their right to control their future.’
Reasons for Requiring Fault (2)

- Censure-based arguments:
  - Henry M. Hart – what distinguishes criminal from civil ‘is the judgment of community condemnation which accompanies ... its imposition.’
  - R.A. Duff – ‘strict liability is therefore both unjust and dishonest: it portrays as proven culpable wrongdoers those who have not been proved to be that.’
Proposition One:

- “that strict liability as to a material element of an offence is wrong in principle, because the rule-of-law and censure-based arguments indicate that the prosecution should be required to prove *mens rea* (or fault) in relation to all significant elements of a crime, in order to respect the autonomy of individuals and to impose public censure only where a fair and proper foundation has been laid.”
Exceptions: two English examples

- Possession of a prohibited firearm (min. 5 years, max. 10 years)
- Rape of a child under 13 (max, life imprt).
- A) the public protection argument
- B) abnormal difficulty of proving *mens rea*
- C) deterrence
- D) ‘skating on thin ice’
- E) seriousness of the impact on the victim

A) possession of an unregistered automatic firearm is a felony;
B) D did not know the gun was capable of firing automatically;
C) So D did not know registration required;
D) Therefore it would be unfair to convict D of this felony in the absence of proof of awareness of this material element.
Three English cases

- *Deyemi and Edwards* (2008) – large torch turned out to be a stun-gun
- *G.* (2008) – boy of 15 met girl who said she too was 15, but turned out to be 12.
Proposition Two

- “that neither public protection, nor abnormal difficulty of proof, nor deterrence, nor the moralistic doctrine of ‘skating on thin ice,’ nor the seriousness of the impact of the offence on the victim are sufficient reasons for displacing the principle of mens rea in favour of strict liability, since conviction without culpability is a very serious matter for the defendant too; and that these and any other reasons adduced in favour of strict liability must be strong enough to defeat the argument that a requirement of negligence (‘reasonable grounds for believing’) should be adequate.”
Deprivation of basic right; exclusion from community; subjection to pains and deprivations of contemporary imprisonment.

Feinberg: ‘The reason why strict liability to imprisonment (punishment) is so much more repugnant to our sense of justice than is strict liability to fine (penalty) is simply that imprisonment in modern times has taken on the symbolism of reprobation.’
Fundamental Rights

Applying the reasoning

- Is there a ‘rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified’? *Lynch and Whelan* (2010)
- ‘An unjustified push can result in someone falling, hitting his head and suffering fatal injuries. The offence is manslaughter. The offender may have committed another serious offence when a young man. A life sentence in such circumstances may well be arbitrary and disproportionate and contravene Article 5. It could also be a punishment which contravenes Article 3.’ *R v. Offen (No.2)* (2001)
Proposition Three:

- that convicting a person of a serious offence without proving fault as to a material element of the offence is unfair for both censure-based and rule-of-law reasons that the State should respect; and that it is even more objectionable for the State to provide the possibility of deprivation of liberty for an offence which does not require proof of culpability as to all material elements. Deprivation of liberty in those circumstances is disproportionate, since the seriousness of the offence is constituted partly by the defendant’s culpability; no fair foundation for imprisonment has been laid if culpability is not required as to a significant element in the offence.
Conclusions

- Cavalier about culpability?
  Blasé about imprisonment?
  Need to step up to a higher level of justification in imprisonment cases
  More rigorous analysis of the elements of public protection arguments.