unimpaired pursuit of lawful conduct. To prevent lawful conduct under the guise of preserving peace and order is altogether anomalous. It is to be hoped that the rule of this case will be followed and extended.

CRIMINAL LAW

CONSTITUTIONALITY OF CRIMINAL STATUTES CONTAINING NO REQUIREMENT OF *MENS REA*

A state embezzlement statute which dispenses with *mens rea*[1] as a constituent of the crime is repugnant to the due process clause of the Fourteenth Amendment to the Federal Constitution, according to a recent decision of the Supreme Court of New Mexico. *State v. Prince*, 189 P.2d 993 (N. M. 1948).

Defendant was charged in an information based upon a New Mexico statute which reads: "Any person being in the possession of the property of another, who shall convert such property to his own use, or dispose of such property in any way not authorized by the owner thereof, or by law, shall be guilty of embezzlement. . . ."[2] This statute expressly repealed a prior embezzlement statute which had included *mens rea* as a requisite of the crime.[3]

The trial court sustained a motion to quash the information as unconstitutional and void, notwithstanding the fact that the information did allege *mens rea*.[4] Upon review by writ of error, the New Mexico Supreme Court agreed with the trial court that the statute upon which the information was based was invalid. It was held that the statute constituted a denial of due process in that to make an "innocent" act a crime is "inconsistent with law," and that the statute

1. As used throughout this note, the term *mens rea* is defined as meaning the intentional or reckless doing of an act forbidden by the criminal law, with knowledge of, or reckless disregard for, the facts which make the act forbidden. Screws v. United States, 325 U. S. 91, 96 (1945); Ellis v. United States, 206 U. S. 246, 257 (1907); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 138-168, esp. 148-49 (1947).
2. N. M. STAT. ANN. § 41-4519 (1941).
3. N. M. STAT. ANN. § 1543 (1915).
4. Courts frequently read the requirement of *mens rea* into statutes which have omitted it. Cases cited notes 34, 35, and 36 *infra*. When a statute is so construed, it is uniformly held that if the indictment or information alleges *mens rea*, the charge is sufficient. Baender v. Barnett, 255 U. S. 224 (1921).

was "vague and indefinite."[5] However, the court further held that the repealing clause of the invalid statute fell with the rest, hence the prior embezzlement statute remained in effect, and the case was reversed and remanded for trial under the provisions of the old statute.

It is difficult to refrain from sympathizing with the court in its zeal to hold invalid a statute under which it is possible to become criminally liable for an unintentional conversion. Any adequate analysis of the ethical and policy considerations involved in imposition of strict criminal liability is beyond the scope of this note. It is asserted as a general proposition, however, that statutory imposition of strict criminal liability is usually, if not always, unwise, often harsh, and becomes less defensible in proportion to the severity of the penalty attached and to the degree of moral turpitude involved in the intentional performance of the proscribed conduct.[6] At least one recognized authority in the field of criminal law finds *no* rational basis for such liability.[7] Others find strict criminal liability defensible only in the area of the so-called public welfare and petty regulatory offenses where the penalty does not exceed a fine.[8]

It is not, however, within the province of courts to invalidate a statutory enactment merely because the statute is an unwise one. No citation of authority is needed to support the proposition that a state statute is valid unless it conflicts with the state or federal constitution or with a valid act of Congress.

In the instant case the court rests its decision entirely

5. Sadler, J., dissented on the ground that the requirement of *mens rea* should be read into the statute, and as thus interpreted the statute should be sustained. Instant case at 997.

6. For two recent cases which illustrate the possible injustices which may attend the enforcement of statutes eliminating *mens rea*, see United States v. Dotterweich, 320 U. S. 277 (1943) and In re Marley, 29 Cal.2d 525, 175 P.2d 832 (1946). Another striking illustration is furnished by the case of Rex v. Larsonneur, 24 Cr. App. R. 74 (1933), in which the defendant was convicted of violation of the English immigration laws, even though she came into England by being bodily transported there against her will by Irish officers who turned her over to the English police.

7. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 279-322, esp. 298-308 (1947).

8. "There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him . . . to penal servitude is a very different matter." Wills, J., in Reg. v. Tolson, 23 Q. B. D. 168, 177 (1889). See also, Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55, 72-5, 78-84 (1933).

upon a supposed conflict of the statute with the Federal Constitution. Of course, no such specific limitation of state legislative power is to be found in that instrument. If the limitation exists, it must be found within the due process clause of the Fourteenth Amendment. No philosophical discussion of the content of the due process clause will be undertaken here. However, in terms of what the present members of the Supreme Court believe to be within and without the ambit of "due process of law," some relevant and fairly definite observations may be made.

There is substantially complete agreement among the present members of the court that the phrase "due process of law" in and of itself guarantees a fair trial and the basic procedural standards necessary to implement such a trial.[9]

In addition to the guarantee of a fair trial, Justices Black and Douglas believe that the due process clause imposes upon the states *all* of the limitations imposed upon the federal government by the first eight amendments, and imposes *no further limitations* whatsoever.[10]

Justices Murphy and Rutledge agree with Justices Black and Douglas that the first eight amendments are imposed upon the states, but believe further that there may be other (undefined) "fundamental standards of procedure" which may not be interfered with by state action despite the absence of a specific provision of the Bill of Rights.[11] It should be

9. " . . . the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect at all times, people charged with or suspected of crime by those holding positions of power and authority. . . . no man's life, liberty or property may be forfeited as criminal punishment . . . until there [has] been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power." Chambers v. Florida, 309 U. S. 227, 236-37 (1940). "This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment." *Id.* at 238. "A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment." Adamson v. California, 332 U. S. 46, 53 (1947). "The hearing, moreover, must be a real one, not a sham or a pretense." Palko v. Connecticut, 302 U. S. 319, 327 (1937).

10. See the dissent of Mr. Justice Black in Adamson v. California, 332 U. S. 46, 68 et seq. (1947); Comments, 33 IOWA L. J. 668 (1948) and 46 MICH. L. REV. 372 (1948). The process whereby these two Justices rationalize their position in holding "vague and indefinite" statutes invalid is not, however, entirely clear. See note 23 *infra*.

11. See Mr. Justice Murphy dissenting for himself and Rutledge, J., in Adamson v. California, 332 U. S. 46, 124 (1947).

observed that the four Justices heretofore mentioned are those who are generally most sensitive and alert to claimed infringement of personal liberties.[12]

The other five members of the Court do not believe that all of the first eight amendments are imposed upon the states.[13] State legislatures may not interefere (outside certain narrow limits) with freedom of speech, thought, the press, and peaceful assembly,[14] but may impose double jeopardy,[15] dispense with indictment by grand jury,[16] modify or abolish trial by jury,[17] and compel the accused in a criminal case to be a witness against himself.[18] Due process of law restrains a state from interfering with those rights which are "implicit in the concept of ordered liberty"; from violating a "principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental"; from disregarding those "immutable principles of justice which inhere in the very idea of free government"; whether or not such restraints are specifically enunciated in the Bill of Rights.[19]

In addition to the views as above expressed, it appears

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12. Frank, *The United States Supreme Court: 1946-47*, 15 U. CHI. L. REV. 1, 20-22 (1947).

13. See the opinion of the Court, per Reed, J., in Adamson v. California, 332 U. S. 46 (1947), and Mr. Justice Frankfurter's concurring opinion, *id.* at 59.

14. W. Va. State Board of Education v. Barnette, 319 U. S. 624 (1943); Thornhill v. Alabama, 310 U. S. 88 (1940); Lovell v. Griffin, 303 U. S. 444 (1937); Herndon v. Lowry, 301 U. S. 242 (1936); Near v. Minnesota, 283 U. S. 697 (1931). *See* Palko v. Connecticut, 302 U. S. 319, 326-7 (1937). It is to be noted, however, that even these freedoms are not absolute, and may, to an extent, be limited by the state in the due exercise of its police power. Gitlow v. New York, 268 U. S. 652 (1925); Abrams v. United States, 250 U. S. 616 (1919); Schenck v. United States, 249 U. S. 47 (1919). See Mr. Justice Frankfurter dissenting for himself, Roberts, and Reed, JJ., in W. Va. State Board of Education v. Barnette, 319 U. S. 624, 646 (1943).

15. Palko v. Connecticut, 302 U. S. 319 (1937).

16. Hurtado v. California, 110 U. S. 516 (1884); Gaines v. Washington, 277 U. S. 81, 86 (1928).

17. Wagner Electric Co. v. Lyndon, 262 U. S. 226 (1923); New York Central R.R. Co. v. White, 243 U. S. 188 (1917); Maxwell v. Dow, 176 U. S. 581 (1900); Walker v. Sauvinet, 92 U. S. 90 (1875).

18. Adamson v. California, 332 U. S. 46 (1947); Twining v. New Jersey, 211 U. S. 78 (1908).

19. Palko v. Connecticut, 302 U. S. 319, 325 (1937); Twining v. New Jersey, 211 U. S. 78, 101-2 (1908). In Adamson v. California, 322 U. S. 46 (1947), four of these five Justices specifically approved the doctrine of the *Palko* case, while Mr. Justice Frankfurter rested his concurring opinion entirely upon the *Twining* case.

probable that a majority of the present membership of the Court believe that the due process clauses give the Court power to invalidate state and federal legislation which *in the opinion of the Court* constitutes an arbitrary or unreasonable interference with personal liberty and which has no rational relationship to protection of the public health, safety, morals, or general welfare.[20] Only Justices Black and Douglas definitely oppose the test of constitutionality as thus expressed.[21]

Applying these various attitudes to the facts of the principal case, is a state embezzlement statute which dispenses with *mens rea* a deprivation of due process of law? Even were the question an entirely open one, the result would appear to be by no means certain. In order to convince a majority of the present Court, it would be necessary to persuade at least one Justice from among Vinson, Frankfurter, Reed, Jackson, and Burton that freedom from strict criminal liability is a "principle of justice [more deeply] rooted in the traditions and conscience of our people" than are, for example, freedom from double jeopardy and trial by jury; or else that such liability constitutes an unreasonable or arbitrary interference with personal liberty which has no rational relation to protection of the public health, safety, morals or welfare. Justices Black and Douglas would have to be shown that strict criminal liability is incompatible with the basic procedural standards necessary to implement a fair trial, or

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20. Federal Power Comission v. Natural Gas Pipeline Co., 315 U. S. 586, 599 (1942); United States v. Carolene Products Co., 304 U. S. 144, 152 (1938); West Coast Hotel Co. v. Parrish, 300 U. S. 379, 398 (1937). There is, however, a judicial presumption of the existence of facts to support the rationality of the legislative judgment. United States v. Carolene Products Co., *supra* at 152, esp. footnote 4. While the "arbitrary" or "unreasonable" test is generally applied by the Court in the field of freedom of contract (cases cited *supra*), the language has been used in at least one civil rights case. Herndon v. Lowry, 301 U. S. 242, 257 (1936).

21. See Black, Douglas, and Murphy, JJ., concurring in Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 599 (1942); Mr. Justice Black's concurrence in United States v. Carolene Products Co., 304 U. S. 144, 155 (1938); Mr. Justice Black dissenting for himself and Douglas, J., in Adamson v. California, 322 U. S. 46, 68 *et seq.* (1947). Mr. Justice Murphy seems in substantial agreement with Justices Black and Douglas in their views on this point in respect to "freedom of contract," but his dissent in Adamson v. California, *supra* at 124, makes it appear doubtful whether he consistently carries over the same view into the field of other personal rights. Mr. Justice Rutledge's position is similarly in doubt in view of his joining in Mr. Justice Murphy's dissent in the *Adamson* case.

else that such liability falls within the proscription of the Sixth Amendment in that it would tend to make a farce of trial by jury by taking away an essential issue of fact from the jury.[22] It is believed that only Justices Murphy and Rutledge could be counted upon with some confidence to hold such a statute unconstitutional. While the prospect of convincing enough of the others to constitute a majority is far from hopeless, neither is it bright.[23]

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22. In State v. Strasburg, 60 Wash. 128, 110 Pac. 1027 (1910), for this reason, among others, a state statute abolishing the defense of insanity was held unconstitutional. The basic problem involved in such a statute is essentially the same as in a statute dispensing with *mens rea*. For a strongly adverse criticism of the *Strasburg* case, see Rood, *Statutory Abolition of the Defense of Insanity in Criminal Cases*, 9 MICH. L. REV. 126 (1910).

23. That the task is not hopeless, witness the fact that the entire present membership of the Court have been able to fit into their respective constitutional philosophies the doctrine that a statute is unconstitutional under the due process clause if it is so vague and indefinite that a man of ordinary intelligence cannot tell what conduct is proscribed by it. Winters v. New York, 333 U. S. 507 (1948) (Frankfurter, Jackson, and Burton, JJ., dissented, but, *semble*, only upon the ground that the particular statute involved was not objectionable); Lanzetta v. New Jersey, 306 U. S. 451 (1939); Herndon v. Lowry, 301 U. S. 242 (1935). See note on the *Winters* case, 23 IND. L. J. 272 (1948). As developed at greater length further in this note, vague statutes are somewhat similar, in terms of effect, to statutes, which omit *mens rea*. In either instance, criminal liability would be possible notwithstanding the exercise of the highest degree of care. It should be further noted that legislative enactment of vague statutes is not, in terms, forbidden by the Bill of Rights. Yet even Justices Black and Douglas adhere to the "void for vagueness" doctrine, even though they believe that the Court's power to veto legislation on due process prounds is most severely limited outside the area covered by the Bill of Rights, unless the statute violates "procedural" due process, i.e., tends to deprive of a fair trial. It is believed that Justices Black and Douglas, at least, do rationalize their adherence to the "void for vagueness" doctrine in terms of "procedural" due process. Prosecution under a vague statute smacks strongly of *ex post facto* liability, and Mr. Justice Black indicates in Chambers v. Florida, 309 U. S. 227, 236 (1940), that a trial under an *ex post facto* law would be a farce. And in the *Winters* case, 333 U. S. 507 at 510, the statute was held invalid in terms of "procedural" due process. From the foregoing it appears possible that any member of the present Court *might*, consistently with his constitutional philosophy, find a rationalization for the invalidation of strict criminal liability statutes. But speaking of strict criminal liability for the Court in United States v. Dotterweich, 320 U. S. 277, 280 (1943), Mr. Justice Black said: "Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting upon a person otherwise innocent but standing in responsible relation to a public danger." And, *id.* at 285: "Our system of criminal justice necessarily depends on conscience and circumspection in prosecuting officers . . . even when the consequences are far more drastic than they are under the provisions of the law before us."

But the question is not entirely an open one. In *United States v. Balint*,[24] Chief Justice Taft, speaking for a unanimous Court, held constitutional a federal statute which imposed strict criminal liability for violation of the Federal Anti-Narcotic Act. Conviction under the statute carried with it a maximum penalty of five years imprisonment. While the question has not since been up for full review and reexamination, the *Balint* case has recently been cited as settled law by the Supreme Court without any attempt to limit the scope of its doctrine.[25]

It is obviously too broad a statement to say that the *Balint* case definitely stands for the proposition that it is within the legislative power to eliminate *mens rea* from any and all crimes. There is, however, language in the opinion in that case asserting the legislative power in general terms, without any attempt to limit or qualify the scope of that power.[26] Nevertheless, there was no affirmative indication that the Court was thinking in terms of the traditional crimes, and there was language implying that the legislative power to eliminate *mens rea* might not be plenary.[27]

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24. 258 U. S. 250 (1922).

25. United States v. Dotterweich, 320 U.S. 277 (1943). Mr. Justice Murphy dissented in the *Dotterweich* case, for himself, Roberts, Reed, and Rutledge, JJ. But the dissent specifically admitted the legislative power and based the dissent solely upon interpretation of the statute. " . . . *in the absence of clear statutory authorization* it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge." [Italics supplied.] Mr. Justice Murphy dissenting in United States v. Dotterweich, *supra* at 286. In the forty-odd other cases, state and federal, in which the *Balint* case has been cited, none have attempted to limit the scope of its holding in respect to legislative power. One case did find *mens rea* to be a "necessary" element of the crime of embezzlement, but the court in that case was talking in terms of legislative intent, not legislative power. The requirement of *mens rea* was then "read into" the statute, and the statute, as thus construed, held valid. Mackey v. United States, 290 Fed. 18 (C. C. A. 6th 1923).

26. "It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 69, 70, (1910) in which it was held that in the prohibition or punishment of particular acts, the State may in the maintenance of public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' " United States v. Balint, 258 U. S. 250, 252 (1922). "The question before us, therefore, is one of the construction of the statute and of inference of the intent of Congress." *Id.* at 253

27. "While the general rule at common law was that *scienter* was a

Without speculating further upon the full breadth of the doctrine of the *Balint* case, it is certain that that case does stand for the proposition that the legislature has the power in some instances to dispense with *mens rea* as a constituent of a crime. Unless the *Balint* case, upon its facts, can be validly distinguished from the instant case, the New Mexico court has adopted the anomalous position that the Federal Constitution precludes a state legislature from doing that which the Supreme Court has expressly declared to be within the legislative power.

A court, intent upon distinguishing the two cases, would experience little difficulty in finding apt judicial language upon which to hang such a distinction. Whether the distinction would be a valid one is yet to be considered.

Conviction under the New Mexico embezzlement statute carried with it a maximum penalty of ten years imprisonment. The maximum penalty possible in the *Balint* case was five years. It seems unlikely, however, that any court would care to assert that, in terms of legislative power, the cases are distinguishable in this respect.[28]

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necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such requirements." United States v. Balint, 258 U. S. 250, 251-52 (1922). "Many instances of [elimination of *mens rea*] are to be found in regulatcry measures . . . where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of crimes as in cases of *mala in se*." *Id.* at 252.

28. For other cases upholding strict liability statutes under which substantial maximum terms of imprisonment were possible, *see* United States v. Greenbaum, 138 F.2d 437 (C. C. A. 3rd 1943) (introducing adulterated food into interstate commerce; 1 yr.); United States v. Coombs, 73 F. Supp. 813 (E. D. Ky. 1947) (resisting federal officers; 10 yrs.); In re Marley, 29 Cal.2d 525, 175 P.2d 832 (1946) (employer made liable for giving of short weight by employee; 6 mo.); People v. Wahl, 39 Cal. 771, 100 P.2d 550 (1940) (misleading advertisement; 6 mo.); State v. Dobry, 217 Iowa 858, 250 N. W. 702 (1933) (violation of state Blue Sky laws; 5 yrs.); Hunter v. State, 158 Tenn. 63, 12 S. W.2d 361 (1928) (embezzlement, mostly dicta; 20 yrs.); Pappas v. State, 135 Tenn. 499, 188 S. W. 52 (1916) (removal of mortgaged property from state; 5 yrs.); State v. Lindberg, 125 Wash. 51, 215 Pac. 41 (1923) (violation of state banking act, in that defendant borrowed money from a bank of which he was a director; 10 yrs. Note that the absence of *mens rea* here is largely illusory, for it is almost inconceivable that one could inadvertently borrow money from a bank.); Boyd v. State, 217 Wis. 149, 258 N. W. 330 (1935) (violation of state Blue Sky laws; 5 yrs.).

Courts often draw a distinction between crimes *mala in se* and those *mala prohibita.* It is often asserted that *mens rea* is a necessary element in crimes of the former type, but not of the latter.[29] It is quite possible that a court might be prevailed upon to hold that the *Balint* case stands only for the proposition that the legislature has constitutional power to eliminate *mens rea* from crimes *mala prohibita,* and that the constitutional power does not extend to crimes *mala in se.* From a critical standpoint, it is submitted that the *mala in se-mala prohibita* classification is neither a logically possible nor a valid one.[30] Assuming, however, that the conduct involved in the sale of narcotics is not "bad in itself," it seems to be a clearly absurd proposition to assert that it is within the legislative power to imprison a man for five years for unintentional performance of conduct not "bad in itself," but that it is outside the legislative power to imprison a man for unintentional performance of conduct which is "bad in itself."

It is true that the *Balint* case dealt with a so-called "public welfare" offense, and it may be contended that the Constitution dictates a different result in a case involving one of the traditional crimes. The great mass of strict criminal liability statutes are found in the field of "public welfare" offenses.[31] But in a very real sense, all criminal statutes are directed toward protection of the public welfare. In the crimes usually classified as public welfare offenses, the objects of protection

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29. *E.g.,* Landen v. United States, 299 Fed. 75, 88 (C. C. A. 6th 1924); Mackey v. United States, 290 Fed. 18 (C. C. A. 6th 1923); People v. Johnson, 288 Ill. 442, 445, 123 N. E. 543, 545 (1919); People v. D'Antonio, 134 N. Y. Supp. 557, 659-61 (1912). See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 292-93. 1947).

30. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 292-98 (1947); *cf.* Sayre, *Public Welfare Offenses,* 33 COL. L. REV. 55, 70-71 (1933).

31. *See* United States v. Balint, 258 U. S. 250, 252 (1922), and cases there cited; HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 281-86 (1947); Sayre, *Public Welfare Offenses,* 33 COL. L. REV. 55 (1933). However, strict criminal liability, as it exists today, is by no means confined to "public welfare" offenses. Cases cited note 28 *supra.* Such liability is often imposed in sex offenses, notably statutory rape, bigamy, and adultery. People v. Dolan, 96 Cal. 315, 31 Pac. 107 (1892); Ellison v. State, 100 Fla. 737, 129 So. 887 (1930); Heath v. State, 173 Ind. 296, 90 N. E. 310 (1910); State v. Ruhl, 8 Iowa 447 (1859); Cornett v. Commonwealth, 134 Ky. 613, 121 S. W. 424 (1909); People v. Marks, 146 N. Y. App. 11, 130 N. Y. Supp. 524 (1911); State v. Ackerly, 79 Vt. 69, 64 Atl. 450 (1906); *cf.* Williams v. North Carolina, 325 U. S. 226 (1945); State v. Woods, 107 Vt. 354, 179 Atl. 1 (1935). The leading English case is Reg. v. Prince, L. R. 2 C. C. R. 154 (1875). And the felony-murder, misdemeanor-manslaughter doctrines present a closely related problem. See HALL, *op. cit. supra,* 280.

are the public health and morals. In the traditional crimes the objective is generally protection of life and property. It is a logically possible conclusion that some line can be drawn here, that the constitutional power of a legislature exercised in the protection of health and morals is greater than is the power to protect life and property.

It seems hardly credible, however, that any such elusive distinction was envisioned by the drafters of the Constitution and the Amendments. Nor does it seem likely that courts would find the arbitrary creation of such a distinction either justifiable or practicable. If the legislature can constitutionally dispense with *mens rea* in framing a statute to protect the public from the sale of narcotics, no sufficient constitutional reason appears why the same legislative power does not exist in protecting the public from the conduct entailed in the crime of embezzlement. The *Balint* case may be wrong, but it is not validly distinguishable, either logically or ethically, from the instant case.

Faced with this "state of the law," the New Mexico court solved the dilemma by failing to mention the *Balint* case, and by placing the emphasis of its opinion upon the grounds that the statute was void for vagueness, a doctrine which at present is well recoguized by the Supreme Court.[32] A fair statement of this doctrine is that when the standard of *conduct* laid down by a penal statute is so indefinite that a man of ordinary intelligence cannot determine beforehand what *conduct* is prohibited, then the statute is repugnant to the due process clause.[33]

In the instant case, however, the standard of conduct is defined by the statute with unusual clarity. If language is ever capable of having objective meaning, then the conduct prohibited by this statute must be clear to a man of even less-than-ordinary intelligence. Only by Humpty Dumpty's standards is the language of the statute open to the objection of vagueness. In short, if the statute is vague, it is so because and only because the element of intent is omitted from the definition of the crime. The opinion in the instant

32. Winters v. New York, 333 U. S. 507 (1948); Lanzetta v. New Jersey, 306 U. S. 451 (1939); Herndon v. Lowry, 301 U. S. 242 (1936); Note 23 IND. L. J. 272 (1948).

33. Winters v. New York, 333 U. S. 507, 518, 519-20 (1948); Lanzetta v. New Jersey, 306 U. S. 451, 453 (1939); Connally v. General Construction Co., 269 U. S. 385, 391 (1926).

case tacitly admits that this is the court's position, and the language of the statute and of the opinion admit of no other interpretation.

In one sense, however, the court's novel position on the vagueness point has some merit. In terms of effect, a criminal statute in which the standard of conduct is vaguely and indefinitely defined is quite similar to one which dispenses with *mens rea* as an element of a crime. In the first instance, a man of ordinary intelligence cannot ascertain what conduct is forbidden; in the latter instance a man may run afoul of the law because of unavoidable accident or because he is physically or mentally unable to comply with the standard of conduct laid down by the statute. In either case, the effect of the statute is to make possible criminal liability which cannot be avoided by exercise of the highest degree of care. Thus, speaking from a critical point of view and escaping for the moment from the tyranny of words, it might be validly asserted that a court should reach the same result in passing upon the constitutionality of either type of statute.

In the face of the *Balint case*, however, the position of the New Mexico court on the vagueness point cannot be supported. As stated above, the *Balint* case stands for the constitutional proposition that, at least in some areas of conduct, a legislature may prescribe punishment without *mens rea*. It is a manifest absurdity to assert the proposition that a legislature has the constitutional power to punish certain conduct without *mens rea*, but that an attempt to exercise the power is unconstitutional because it makes the statute "void for vagueness." Whatever else the doctrine of "void for vagueness" may mean, it does not mean that an otherwise valid criminal statute becomes invalid by elimination of the requirement of *mens rea*.

The courts have usually been vigilant to resist the statutory imposition of strict criminal liability, and this judicial resistance has generally increased in direct proportion to the severity of the punishment imposed and the degree of moral turpitude involved in the offense. Two main tools have long been used by courts in this connection. In England, where the legislative power is avowedly not directly subject to judicial limitation, the device resorted to has been that of statutory interpretation, i.e., the "reading into" the statute of the

requirement of *mens rea.* The leading English cases in point are *Reg. v. Tolson*[34] and *Reg. v. Sleep.*[35]

The courts of this country have used the same device,[36] but have also had available for experiment the additional tool of limitation of legislative power by constitutions, state and federal. A substantial body of case law has been written to the effect that the enactment of strict criminal liability, especially in the so-called *malum in se* area of conduct, is outside the scope of legislative power.[37] Such results are neither surprising nor difficult to reach under the "substantive due process" theory that the guarantee of an undetermined number of substantive "natural law" rights is incorporated into the various constitutions by virtue of the due process clauses. Since the decision in the *Balint* case, however, and with the recent decline of the doctrine of substantive due process,[38] the

34. 23 Q. B. D. 168 (1889).

35. Le. & Ca. 44, 169 Eng. Rep. 1296 (1861). Other and more recent English and Dominion cases of the line to which the Tolson and Sleep cases belong are Brend v. Wood, 62 T. L. R. 462 (1946); Rex v. Turnbull, 44 S. R. (N. S. W.) 108, 61 W. N. (N. W. S.) 70 (1943); Sherras v. de Rutzen, [1895] 1 Q. B. 918. There is, however, another line of English cases *contra,* in spirit at least, to the *Tolson* line. Rex v. Larsonneur, 24 Cr. App. R. 542 (1933); Parker v. Alder, [1899] 1 Q. B. 20; Reg. v. Bishop, 5 Q. B. D. 259 (1880); Reg. v. Prince, L. R. 2 C. C. R. 154 (1875. For a brief general discussion of these two lines of cases, see Notes, 63 L. Q. REV. 9 (1947) and 96 L. J. 399 (1946).

36. *E.g.,* Baender v. Barnett, 255 U. S. 224 (1921); Nigro v. United States, 4 F.2d 781 (C. C. A. 8th 1925); Mackey v. United States, 290 Fed. 18 (C. C. A. 6th 1923); People v. Clark, 242 N. Y. 313, 151 N. E. 631 (1926); State v. Great A&P Tea Co., 111 W. Va. 148, 161 S. E. 5 (1931). *But see* State v. Weisberg, 74 Ohio App. 91, 96-7, 55 N. E.2d 870, 872 (1943).

37. Kilbourne v. State, 84 Ohio St. 247, 95 N. E. 824 (1911); *cf.* State v. Strasburg, 60 Wash. 106, 110 Pac. 1027 (1910). Surprisingly enough, however, few direct holdings to that effect are to be found, and most of the "authority" is dictum or by implication. See State v. Laundy, 103 Ore. 443, 204 Pac. 958, 976-7 (1922); People v. Johnson, 288 Ill. 442, 445, 123 N. E. 543, 545 (1919). Raylin and Tuttle, *Due Process and Punishment,* 20 MICH. L. REV. 614 (1922), made a strong and cogent argument that strict criminal liability statutes were unconstitutional. The next month, the Supreme Court handed down its decision in the *Balint* case.

38. Federal Power Comm. v. Natural Gas Pipeline Co., 315 U. S. 575 (1942); Olsen v. Nebraska, 313 U. S. 236 (1941); United States v. Carolene Products Co., 304 U. S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937). See Mr. Justice Black dissenting in Adamson v. California, 332 U. S. 46, 68 (1947), and concurring in Federal Power Comm. v. Natural Gas, etc., *supra* at 599 and in United States v. Carolene Products Co., *supra* at 155. See Mr. Justice Frankfurter concurring in Adamson v. California, *supra* at 59, and dissenting in W. Va. State Board of Education v. Barnette, 319 U. S. 624, 646 (1943).

legislative power to exclude *mens rea* as a requisite of a crime has been questioned with less frequency by the courts on constitutional grounds.[39]

The instant case is not, perhaps, so remarkable for the result it reached as it is for the fact that the decision was based solely on the federal Constitution in the face of United States Supreme Court decisions which, if not squarely *contra*, at least indicated an opposite result.[40] So long as the *Balint* case stands, it seems highly doubtful that a state court can, with propriety, hold that the Federal Constitution invalidates a statute imposing strict criminal liability, unless there is a more valid ground of distinction than appears in the instant case.

It is not unlikely, however, that a state court may be prevailed upon to hold that the due process clause (or some other provision) of its state constitution places a greater limitation upon legislative power than does either the Fifth of Fourteenth Amendment. Such a device has been resorted to upon several occasions.[41] In the instant case no reference

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39. The instant case is the only one found in which such a statute has been invalidated solely upon the ground that it violated the federal Constitution. In *Ex parte* Bales, 42 Okla. Cr. 28, 274 Pac. 485 (1929), the statute (murder) was held "unconstitutional," but the court did not specify under which constitution. In the *Bales* case, as in the instant one, the statute was also held void for vagueness. The statute involved in that case was, perhaps, more vulnerable to that objection than was the one in the instant case. In People v. Estreich, 75 N. Y. S.2d 267 (App. Div. 2d. Dep't 1947), a receiving stolen property statute which omitted *mens rea* was held to violate both the state and federal constitutions. It should be noted, however, that the opinion in the Estreich case, while not entirely clear, was based at least partly upon the ground that the statute constituted "an illegal and arbitrary interference with a lawful business." *Id.* at 270. It is also interesting to note that the *Balint* case was decided in 1922 when the doctrine of substantive due process was near the peak of its prestige. It is, perhaps, a sad commentary upon the history of "due process of law" that during the period when a majority of the Supreme Court found so much constitutional protection accorded by that phrase to "freedom of contract," *e.g.*, Adkins v. Children's Hospital, 261 U. S. 525 (1923), no such protection was found for freedom from imprisonment for nonculpable conduct.

40. United States v. Dotterweich, 320 U. S. 277 (1943); United States v. Balint, 258 U. S. 250 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57 (1910).

41. *Compare* Boomer v. Olsen, 143 Neb. 579, 10 N. W.2d 507 (1943), and State Board of Barber Examiners v. Cloud, 220 Ind. 552, 44 N. E.2d 972 (1942), *with* Olsen v. Nebraska, 313 U. S. 236 (1941), and Nebbia v. New York, 291 U .S. 502 (1934). *Compare* Illinois Cent. R. Co. v. Illinois Commerce Comm., 387 Ill. 256, 56 N. E.2d 432 (1944), *with* Federal Power Comm. v. Hope Natural Gas Co., 315 U.S. 575 (1942). *Compare* Cincinnati v. Correll, 141

was made to the state constitution, although the New Mexico constitution does contain a due process clause.[42]

While overthrow of the *Balint* case during the tenure of the present membership of the Supreme Court does not seem extremely hopeful, such a possibility cannot be overlooked.[43] Meanwhile the courts can and should combat omissions of *mens rea* from criminal statutes by reading the requirement of *mens rea* into such statutes in the absence of a clear showing that to do so would be contrary to legislative purpose.[44]

Ohio 535, 49 N. E.2d 412 (1943), *with* West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).

42. N. M. Const. Art. II, § 18.

43. See note 23 *supra.*

44. Such was the position advocated by the dissenting justice in the instant case: "It convicts the legislature of sheer stupidity to hold that in enacting [the statute] it intended to authorize punishment of the innocent and well intentioned along with the venal and criminally disposed. The element of fraudulent intent necessarily is to be read into the statute and as so construed, it is perfectly valid." Sadler, J., dissenting in the instant case at 997. The majority felt themselves precluded from so holding for the reason that "When in any enactment there appears an express modification . . . of certain provisions in the former enactment, such express modification . . . will be held to disclose the full intent of the framers of the latter enactment. . . . " Instant case at 995. But in a similar case, the United States Supreme Court has found no such difficulty to exist. Baender v. Barnett, 255 U. S. 224 (1921).