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## A CONSTITUTIONAL CAVEAT ON THE VICARIOUS LIABILITY OF PARENTS

### I. Introduction

On April 4, 1971, Wayne Edgerton and John Bonesteel, both eleven years of age, went on a shooting spree near their homes in Lapeer, Michigan, with air rifles given them by their parents. The damage which resulted amounted to \$1,200 worth of broken windows and other sundry, vulnerable targets. On April 5, William Edgerton, father of Wayne, and John's divorced mother were arrested, and charged with failing to properly "supervise and control" the youths. At trial, Judge John P. Spires found that they had not met "community standards of supervision and control" and found them guilty of misdemeanors, assessing fines of \$50.<sup>1</sup>

The Lapeer ordinance is similar to others enacted in Detroit and surrounding communities including Pontiac, Troy, West Bloomfield and Madison Heights.<sup>2</sup> These appear to be the first criminal statutes holding parents vicariously liable for the acts of their children. There are two other types of statutes, however, which have similar effects and are likewise aimed at increasing the care taken by parents in exercising their duty to control their children. The most important, from the standpoint of the volume of actions, are parental civil liability statutes. The liability imposed by these laws is quite limited, however, and the extent of the restrictions belies any intent on the part of the legislatures to provide for compensation to an injured party.<sup>3</sup> In all but three states, recovery is limited to amounts varying from \$300 to \$5,000<sup>4</sup> and in twenty-nine states the recovery is allowable only for property damage.<sup>5</sup> In each of the forty-six states which have passed such a liability statute, negligence upon the part

1 *A Father On Trial for What His Son Did*, LIFE, Feb. 18, 1972, at 61.

2 N.Y. Times, Oct. 18, 1970, at 68, col. 3.

3 Gen. Ins. Co. of Amer. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645, 650 (1963). *But see* Kelly v. Williams, 346 S.W.2d 434, 438 (Tex. Civ. App. 1961).

4 GA. CODE ANN. § 105-113 (1966); NEB. REV. STAT. § 43-801 (1968); PA. STAT. ANN. tit. 11, § 2001 (Supp. 1970).

5 The following states limit recovery to property damage. ALA. CODE tit. 7, § 113(1) (Supp. 1969); ALASKA STAT. § 34.50.020 (1971); ARK. STAT. ANN. § 50-109 (1947); COLO. STAT. ANN. § 4-2-7 (1963); DEL. CODE ANN. tit. 10, § 3923 (Supp. 1970); FLA. STAT. ANN. § 741.24 (1971 Cum Supp.); IND. ANN. STAT. § 2-520 (Supp. 1970); IDAHO CODE ANN. § 6-210 (Supp. 1971); KAN. STAT. ANN. § 38-120 (Supp. 1971); KY. REV. STAT. § 38.120 (Supp. 1971); MO. ANN. STAT. § 537.045 (Supp. 1971); MONT. REV. CODES ANN. § 61-112 (Supp. 1971); NEB. REV. STAT. § 43-801 (1968); NEV. REV. STAT. § 41.470 (1953); N.J. REV. STAT. § 2A:53A-15 (Supp. 1971); N.M. STAT. ANN. § 13-8-53 (1969); N.Y. GEN. OBLIGATIONS LAW § 3-112 (McKinney Supp. 1971); N.C. GEN. STAT. § 1-538 (1969); N.D. CENT. CODE § 32-03-39 (1960); OKLA. STAT. ANN. tit. 23, § 10 (Supp. 1971); ORE. REV. STAT. § 30.770 (Supp. 1971); S.C. CODE ANN. § 10-2595 (Supp. 1972); S.D. COMP. LAWS ANN. 25-5-15 (1967); TENN. CODE ANN. § 37-1001 to 37-1003 (Supp. 1971); TEX. REV. CIV. STAT. art. 5923-1 (Supp. 1972); VA. CODE ANN. § 8-454.1:1 (Supp. 1971); WASH. REV. CODE ANN. § 4.24.190 (Supp. 1971); W. VA. CODE ANN. § 55-7A-1, 7A-2 (1966); WYO. STAT. ANN. § 14.5.1 (1957).

The following states allow recovery for personal injury as well as for property damage: ARIZ. REV. STAT. ANN. § 12-661 (1956); CALIF. CIV. 1714.1 (West Supp. 1971); CONN. GEN. STAT. ANN. § 52-572 (Supp. 1971); GA. CODE ANN. § 105-113 (1966); HAWAII REV. LAWS § 577-1 (1968); IOWA CODE ANN. § 613.16 (Supp. 1971); ILL. ANN. STAT. ch. 70, § 51 et seq. (Smith-Hurd Supp. 1971); LA. CIV. CODE ANN. arts. 237, 2318 (Supp. 1971); ME. REV. STAT. ANN. tit. 19, § 217 (1964); MD. ANN. CODE art. 26, § 71A (1964); MINN. STAT.

of the child is not grounds for an action against his parents.<sup>6</sup> Only one state statute allows the parents to assert as a defense their reasonable efforts to prevent the deviant behavior.<sup>7</sup>

The second group is loosely termed "contribution statutes." Although the enactments passed vary from state to state as to the particular phraseology and to the particular types of conduct falling within their purview, all essentially proscribe any act or omission which causes or tends to cause delinquency in a child.<sup>8</sup> In the majority of fact patterns to which the statutes are applied, the parent has clearly breached some duty owed to the child or to the state.<sup>9</sup> In these situations the imposition of criminal or civil sanctions is justified according to the principles to be developed in this article. Examples of such behavior include the common "crimes" involving deviant sexual behavior,<sup>10</sup> criminal neglect in child care as when a child is left in a car while his parents are in a bar drinking<sup>11</sup> and unusual cases as when parents refuse to allow a daughter to diet and the child is obese and in desperate need of a vast weight loss for her psychological and social well-being.<sup>12</sup> In the small number of remaining cases, the continued coverage by these statutes is totally unjustified.<sup>13</sup> Here, the parent has done nothing which has "caused" the delinquent act or acts of the minor, instead there has been a failure or inability on the part of the parent to provide a family situation conducive to the internalization of societal behavioral norms by the infant.<sup>14</sup>

There are obvious distinctions among these statutes which may appear to inhibit discussion of them as a unit, but it is submitted that these differences are of little constitutional significance. The civil-criminal dichotomy is the most apparent.<sup>15</sup> The law has long recognized the legitimacy of the state interest in insuring that its injured citizenry receives compensation at the expense of an equally "innocent" party when required by state policy.<sup>16</sup> Workmen's compensation laws and the "family car" doctrine are two of the most common applications of this principle. Moreover, as was pointed out, the parental liability statutes are clearly not designed to compensate a victim for his injury. In addition, the criminal statutes contain provisions for prison terms which are absent

ANN. § 541.01 (1965); OHIO REV. CODE ANN. § 3109.09-10 (Supp. 1970); PA. STAT. ANN. tit. 11, § 2001 (Supp. 1970); R.I. GEN. LAWS ANN. § 9-1-3 (1969); VT. STAT. ANN. tit. 15, § 901 (Supp. 1971); WIS. STAT. ANN. § 895.035 (Supp. 1971).

<sup>6</sup> These states do not have parental civil liability statutes: Michigan, Mississippi, New Hampshire, Massachusetts, and Utah.

<sup>7</sup> TENN. CODE ANN. § 37-1003 (Supp. 1971).

<sup>8</sup> See Gladstone, *The Legal Responsibility of Parents for Juvenile Delinquency in New York State: A Developmental History*, 21 BKLYN. L. REV. 172 (1955).

<sup>9</sup> Alexander, *What's This About Punishing Parents?*, 12 FED. PROB. 23 (Mar., 1948).

<sup>10</sup> *Id.* at 25-26.

<sup>11</sup> *Id.* at 24-25.

<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.*; Geis, *Contributing to Delinquency*, 8 ST. L.U.L.J. 59, 67 (1963).

<sup>14</sup> S. RUBIN, *CRIME AND JUVENILE DELINQUENCY* 24-25 (3d ed. 1970); Alexander, *supra* note 9.

<sup>15</sup> Cf. Scott, *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MT. L. REV. 275, 278 n.11 (1956).

<sup>16</sup> T. BATY, *VICARIOUS LIABILITY* 154 (1916); W. PROSSER, *LAW OF TORTS* § 68 (4th ed. 1971); Perkins, *Alignment of Sanction With Culpability*, 49 IOWA L. REV. 325 (1963).

in the civil enactments. The general thesis of this article is that any penalty, whether it be a term in prison, a fine, or a mandatory monetary payment, is unjustifiable when it imposes liability on parents for the acts of their children. Moreover, even those appellate courts which have upheld these statutes have recognized that they are only incidentally compensatory, being primarily regulatory in nature.<sup>17</sup> A further state interest which is differentially affected by these laws is the desirability of keeping the family unit together, if possible, providing it is in the best interest of the child.<sup>18</sup> The civil statutes obviously do not pose the threat to this interest inherent in the enforcement of the contribution or control laws. This, too, is a negative argument which adds nothing which would weigh in favor of upholding one statute and not the others.

## II. Background

Before turning to the narrow question of the constitutionality of parental liability, it is helpful to survey the relevant common-law background. At common law, the parent-child relationship was never a basis for finding a parent vicariously liable in either England or the United States.<sup>19</sup> This is not to say, however, that a parent could never be held liable for harm caused by a child, for if under the established principles of agency the acts could be imputed to the principal-parent,<sup>20</sup> or it could be shown that the parents were negligent in the performance of their duty to instruct the child in the accepted modes of behavior,<sup>21</sup> or in some way created conditions leading to the harm, then the parents might be held civilly liable.<sup>22</sup>

In applying the latter theory the courts were conscious of the fact that they were moving towards making the parents insurers for personal injury or property damage caused by their children. There developed, as a result, two alternative limitations on the theory. First, the parent must have been aware of a particular vicious propensity on the part of the child<sup>23</sup> and failed to take appropriate steps to warn others of the danger<sup>24</sup> or to attempt to alleviate the specific danger in some other manner.<sup>25</sup> Second, the parents must have entrusted the child with an instrumentality which they reasonably should have known could cause injury in the child's hands.<sup>26</sup> On the criminal side, the existence of certain agency

17 *Gen. Ins. Co. of Amer. v. Faulkner*, 259 N.C. at 322, 13 S.E.2d at 650; *Mahaney v. Hunter Enterprises, Inc.*, 426 P.2d 442, 444 (Wyo. 1967).

18 *See President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME* 215-18 (1967) [hereinafter cited as *TASK FORCE REPORT*]; Alexander, *supra* note 9, at 28.

19 Ludwig, *Delinquent Parents and the Criminal Law*, 5 VAND. L. REV. 719, 721 (1951); *see Note, Parental Responsibility for Juvenile Delinquency*, 34 CHI. KENT L. REV. 222 (1956).

20 *E.g., Merick v. Suchy*, 74 KAN. 715, 87 P. 1141 (1906).

21 *Norton v. Payne*, 154 Wash. 241, 281 P. 991 (1929); *Ryley v. Lafferty*, 45 F.2d 641 (N.D. Idaho 1930).

22 *Cf. Gudzieuski v. Stemplesky*, 263 Mass. 103, 160 N.E. 334 (1928); *Davis v. Gualas*, 37 Ga. 242, 139 S.E. 577 (1927).

23 *E.g., Nat'l Dairy Products, Corp. v. Freschi*, 393 S.W.2d 48 (Mo. App. 1965).

24 *E.g., Hoverson v. Noker*, 60 Wis. 511, 19 N.W. 382 (1884).

25 *E.g., Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955).

26 *E.g., Dinger v. Burnham*, 360 Mo. 465, 228 S.W.2d 696 (1950).

relationships and consent or knowledge of the impending illegal act are the sole bases for imputing liability. The justification for the imputation of guilt in the agency relations is based upon the considerations underlying the statutory or common-law crime.<sup>27</sup> For example, a parent-employer might be held liable when a child-employee sells liquor in contravention of a statute prohibiting such sales by minors. The parent is liable because efficient enforcement and the importance of the social policy of protecting the health and morals of the community require that the principal or owner share the burden of guilt.<sup>28</sup> The existence of the combined parent-employer relationship is relevant only where the agency relationship is unclear. Such a familial tie creates a presumption in favor of an agency relationship.<sup>29</sup>

It is self-evident that the civil liability statutes are a major deviation from the common law and it was almost inevitable that there would be challenges to their constitutionality. The precise constitutional question has been put in issue in only four cases to date. In *General Insurance Company of America v. Faulkner*,<sup>30</sup> *Kelly v. Williams*<sup>31</sup> and *Mahaney v. Hunter Enterprises Inc.*<sup>32</sup> their constitutionality was upheld. In *Faulkner*, the leading case in this series, the Supreme Court of North Carolina took a syllogistic approach to the issue: the state has an unquestioned right to legislate for the purpose of the prevention of juvenile delinquency; the statute imposes a sanction which could reasonably lead to a reduction in delinquency; therefore, the statute is constitutional under the fourteenth amendment due process clause.<sup>33</sup> Such a resolution begs the constitutional question. It is the reasonableness of the statute in light of all of the surrounding circumstances which is the root of the issue, and not merely the possibility of a positive effect upon the problem to be solved.<sup>34</sup> In *Corley v. Lewless*,<sup>35</sup> the Supreme Court of Georgia held that the parental liability statute in question violated the due process rights of the parents by imposing liability without fault.<sup>36</sup> This opinion was based upon a series of Georgia cases beginning with *Lloyd Adams, Inc. v. Liberty Mut. Ins. Co.*<sup>37</sup> holding that faultless liability is unconstitutional. A reading of *Lloyd*, however, indicates that this result was not reached after consideration of the various conflicting interests, rather its invalidity was assumed.<sup>38</sup> It is apparent that *Corley* or *Lloyd Adams, Inc.* would not carry much weight outside of the state of Georgia as none would accept the premise that faultless liability is unconstitutional on its face.

27 Cf. R. PERKINS, PERKINS ON CRIMINAL LAW 636-39 (1964); *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465 (1923).

28 R. PERKINS, *supra* note 27, at 638.

29 *Commonwealth v. Slavski*, 245 Mass. at 419, 140 N.E. at 470.

30 259 N.C. 317, 130 S.E.2d 645 (1963).

31 346 S.W.2d 434 (Tex. Civ. App. 1961).

32 426 P.2d 442 (Wyo. 1967).

33 130 S.E.2d at 650.

34 Text accompanying notes 39-46 *infra*.

35 227 Ga. 745, 182 S.E.2d 766 (1971).

36 182 S.E.2d at 770. It should be noted that the Georgia statute allowed full recovery for the plaintiff. The court may have felt that this distinguished this statute from those which were strictly exercises of the police power.

37 190 Ga. 633, 10 S.E.2d 46 (1940). *Accord*, *Frankel v. Cone*, 214 Ga. 733, 107 S.E.2d 819 (1959); *Buchman v. Heath*, 210 Ga. 410, 80 S.E.2d 393 (1954).

38 *Id.* at 641, 10 S.E.2d at 51.

### III. Police Power and Vicarious Liability

#### A. Police Power in General

*Faulkner, Kelly* and *Mahaney* each held that parental liability laws were valid exercises of the state police power. This power is generally defined as the power of the state to enact statutes in the interest of the general health, welfare and security of the community and is believed to be inherent in the concept of sovereignty.<sup>39</sup> The exercise of the power of judicial review of laws coming within this broad authority presents a complex problem of separation of powers, and the courts are therefore quite reluctant to interfere with legislative judgments.<sup>40</sup> There are numerous legal maxims intimating that unless a statute is clearly in conflict with a constitutional mandate, and unless there is no clear and legitimate interest of the state to protect, it will be upheld.<sup>41</sup> The validity of these generalizations is actually limited to the cases dealing with the regulation of economic activity out of which they developed. The United States Supreme Court has consistently distinguished between regulatory statutes in the economic sphere and those which are aimed at restricting more personal freedoms. In the case of economic regulation, the Court has stated that a "rational basis" for the legislation will suffice to meet the constitutional requisites of due process;<sup>42</sup> on the other extreme, a clear and present danger to the public safety is required to justify a restriction on the first amendment right to free speech.<sup>43</sup> It is between these two poles that the question of the vicarious liability of a parent lies. There is no articulated "litmus test" which may be applied to these statutes. However, if a law has an improper objective, or imposes restrictions which are unreasonable, then the act will clearly fall to a constitutional attack. In judging the reasonableness of a sanction, the nature of the right which is circumscribed,<sup>44</sup> the nature and severity of the circumstances giving rise to the need for regulation<sup>45</sup> and the existence of a rational basis for the particular methods chosen<sup>46</sup> are relevant factors to be taken into account.

#### B. Rational Connection Test

The existence of a rational connection between the legislative purpose of reducing the rate of juvenile delinquency and the techniques adopted to accomplish this end was the initial point of attack by opponents of parental liability.<sup>47</sup> In passing these statutes, the legislatures have assumed that by attach-

39 Denny, *The Growth and Development of the Police Power of the State*, 20 MICH. L. REV. 173 (1921).

40 *E.g.*, *Sproles v. Binford*, 286 U.S. 374, 388 (1932).

41 *E.g.*, *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927).

42 *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

43 *See Cohen v. California*, 403 U.S. 15, 18-20 (1971).

44 *Id.* at 25.

45 *See United States v. Gordon Kiyoshi Hirabayashi*, 46 F. Supp. 657, 662 (W.D. Wash. 1942). This case deals with the war powers of Congress but it is significant in the extent to which the special circumstances brought on by the war justified extensive and arbitrary invasions of individual rights.

46 *E.g.*, *Stephenson v. Binford*, 287 U.S. 251, 272 (1932).

47 S. Rubin, *supra* note 14, at 30.

ing civil or criminal sanctions for breaches of the parental duty to control, the parents would be made more aware of their duty and would therefore exercise a greater degree of care in carrying it out.<sup>48</sup> This judgment, the opponents contend, is unjustifiable. There is an unfortunate lack of empirical data squarely on point,<sup>49</sup> but there is a great deal of more general work which supports the position of the opponents. Implicit in the legislative reasoning is the belief that the failure of the parents to control the juveniles is a cognitive process. The psychologists and sociologists who have worked in the area of the causation of delinquency, while agreeing that parental control is a major factor,<sup>50</sup> generally look upon the failure as being a result of the vast social changes occurring in industrial societies.<sup>51</sup> Their research asks the question: "What is the source of parental control?" But the legislators assume that control is inherent in the parent-child relationship. Briefly stated, the sociologists' position is that modern American society has developed new institutions, both official and unofficial, which have preempted the traditional role of the family in that society. The growth of mandatory education and welfare statism, and the decline in the importance of family business enterprises are just a few examples of the ways in which family functions have been usurped by outside institutions.<sup>52</sup> In addition, many researchers feel that today's youth views delinquent and criminal activity as being more readily accessible routes to increased status than that which is provided by the traditional methods of education and hard work.<sup>53</sup> To summarize, these disruptions of the family function have had two interrelated effects which are relevant to the issue of parental control and juvenile delinquency. First the family has declined in importance vis-à-vis the outside institutions in the eyes of a youth, and second, there is a concomitant decline in the authority of the parents *qua* parents—that is, parental control is viewed as being functionally related to the position of the family. In this analysis, the important question is not whether we should punish parents, but rather, what steps might we take to restore the family and parents to positions of relative importance?<sup>54</sup> The recommendations of the President's Commission on Law Enforcement and Administration of Justice are illustrative of this approach. The Commission recommends that:<sup>55</sup>

Efforts, both public and private, should be intensified to reduce unemployment and devise methods of providing minimum family income.

48 Comment, *Parental Liability for Wilful and Malicious Acts of Children*, 36 WASH. L. REV. 327 (1961).

49 Alexander, *supra* note 9; Whitman, *Michigan Puts It Up to the Parents*, READER'S DIGEST, Mar., 1956, at 161.

50 Rodman & Grams, *Juvenile Delinquency and the Family: A Review and Discussion*, in TASK FORCE REPORT App. L.

51 *Id.* at 188, 210; Burns & Stern, in TASK FORCE REPORT, App. S, 389-92 (1967); Toby, *Affluence and Adolescent Crime*, in TASK FORCE REPORT, App. H, 141.

52 Toby, *supra* note 51.

53 F. HARTUNG, CRIME, LAW AND SOCIETY 56-58 (1965); Rodman & Grams, *supra* note 50, at 190.

54 TASK FORCE REPORT at 46-47; Rodman & Grams, *supra* note 50, at 215.

55 TASK FORCE REPORT at 47.

Reexamine and revise welfare regulations so that they contribute to keeping the family together.

Improve housing and recreation facilities.

Insure availability of family planning assistance.

Provide help in problems of domestic management and child care.

Make counseling and therapy easily obtainable.

Develop activities that involve the whole family together.

It is unlikely that this ground alone would be sufficient to convince a court that the liability statutes are unconstitutional. The considerations which are relevant to a challenge of this nature are too closely related to the legislative prerogative and absent clear evidence the courts will not second-guess the judgment of a co-equal branch of government.

### C. *Rights of the Parent: Vicarious Liability and the Status Crime*

As was indicated above, the determination of the constitutionality of a police statute necessitates a balancing of the rights and interests of the individual citizen against those of society as represented by the state.<sup>56</sup> It is necessary, therefore, to determine exactly what the rights of the parents are which are being violated and then attempt to evaluate them in light of the state's interest in security.

Anglo-American common law in its early development required that "fault" be established as a basis for a finding of criminal or civil liability.<sup>57</sup> It was sufficient, however, to show merely that the defendant had made some error in judgment, act, or, in certain cases, omission.<sup>58</sup> As the industrialization of England and then the United States progressed at an ever-increasing pace, the legislators and the judges found that fault liability did not provide adequate protection for the citizens of a complex industrial society.<sup>59</sup> The needs of society, it was realized, required that there be some sacrifice by the individual of his right to be liable only where he was guilty of some wrong.<sup>60</sup> There developed numerous police regulations which were designed to promote the public welfare and which did not require that there be any showing of an *act* by the defendant<sup>61</sup> or knowledge on his part which might be a basis for imputing liability under ordinary negligence or criminal principles.<sup>62</sup> Examples of these regulations include bans on

56 See text accompanying notes 39-46 *supra*.

57 4 W. BLACKSTONE, COMMENTARIES \*21; Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

58 Harris, *Liability Without Fault*, 6 TUL. L. REV. 337, 345 (1932); Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1957); Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1929).

59 Harris, *supra* note 58.

60 Perkins, *supra* note 16; Sayre, *supra* note 58.

61 *Id.*

62 *E.g.*, *Moreland v. State*, 164 Ga. 467, 139 S.E. 77 (1927); Perkins, *supra* note 16, at 355.



the sale of adulterated or misbranded food, the sale of liquor to minors, and workmen's compensation laws.

Those upon whom these new forms of liability were imposed mounted strong constitutional challenges based upon alleged deprivations of due process, to wit: the imposition of vicarious liability. In *New York Central R.R. Co. v. White*,<sup>63</sup> the United States Supreme Court passed upon the constitutionality of workmen's compensation statutes, affirming a decision of the Appellate Division of the Supreme Court of New York which upheld the validity of such statutes.<sup>64</sup> The employer in this action was attacking that portion of the statute which made him liable for the out-of-pocket expenses of an employee injured through the negligence of a co-worker while on the job.<sup>65</sup> In his opinion for the majority, Mr. Justice Pitney observed that, although the employer was being burdened with a new liability, his liability for work-related injuries was limited to lost wages and medical expenses.<sup>66</sup> Thus, the employer was receiving benefits under the statute which were offsetting the new burden. The employer is, of course, profiting from the work of the employee and it is therefore reasonable to ascribe to the costs of production the expenses of the injured employee.<sup>67</sup> On this same point the Court opined that the employer was, in a sense, benefiting from the negligence of the third party where it resulted from overconcentration on the activities of employment.<sup>68</sup> The Court then concluded that the interest of the state in insuring that injured laborers were compensated for their medical expenses outweighed the burden placed upon the employers.<sup>69</sup>

The cases involving illegal liquor sales<sup>70</sup> and adulterated food sales<sup>71</sup> suggest other factors to be taken into consideration in deciding whether the use of vicarious liability is reasonable. The liquor laws are concerned with controlling the sale of liquor to minors,<sup>72</sup> the dram shop laws with cutting down the number of accidents caused by drunken drivers,<sup>73</sup> and the food statutes with keeping adulterated food off the market.<sup>74</sup> The courts have sustained these regulations by rationalizing that the tavern keeper and the store owner are the last persons who could prevent the harms against which the laws are directed.<sup>75</sup> This imposes a standard of care upon the storekeeper with which he cannot comply. At first glance, the logic of these decisions appears forced; however, we might assume that the legislatures and courts contemplated that the assessment of fines upon the sellers would lead them to bring economic pressure upon the producers and suppliers who are in a position to actually prevent the appearance of tainted food in the market place.<sup>76</sup> It is of some importance to note that the acts involved

63 243 U.S. 188 (1917).

64 *New York Central R.R. Co. v. White*, 169 App. Div. 903, 216 N.Y. 653 (1915).

65 243 U.S. at 191.

66 *Id.* at 201.

67 *Id.* at 199, 203.

68 *Id.* at 205.

69 *Id.* at 206-08.

70 *State v. Lundgren*, 124 Minn. 162, 144 N.W. 752 (1913).

71 *E.g.*, *Groff v. State*, 171 Ind. 547, 85 N.E. 769 (1909).

72 *Id.*

73 *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959).

74 *E.g.*, *State v. Burnham*, 71 Wash. 199, 128 P. 218 (1912); *Brown v. Foot*, 66 L.T.R. (N.S.) 649 (1892).

75 *See Groff v. State* 171 Ind. at 550, 85 N.E. at 770 (1909).

76 *Sayre, supra* note 57, at 62-67.

required no *mens rea*, that is, had the employer made the sale himself, he could be held liable regardless of any lack of actual knowledge of the circumstances surrounding the sale. In concluding that the statutes are reasonable, the courts also consider that the penalties are not severe.<sup>77</sup>

The widespread use of the automobile in the United States has given rise to a number of different forms of vicarious liability, principally that imposed by the "automobile consent statutes"<sup>78</sup> and the "family purpose doctrine."<sup>79</sup> These were developed, in part, to cut down on the number of irresponsible drivers on the road,<sup>80</sup> and, in part, to require nonjudgment-proof defendants to bear the burden of the often great financial loss involved in modern automobile accidents.<sup>81</sup> The family purpose doctrine makes the owner of an automobile liable for the damage caused by a negligent driver even if the owner is not present at the time of the accident. The consent statutes are broader in their application since all that is required is the owner's consent to the negligent driver's use,<sup>82</sup> while the family purpose doctrine requires, in addition to consent or acquiescence, that the driver be a member of the owner's immediate household,<sup>83</sup> and the car be used for a "family purpose."<sup>84</sup> Although the automobile is not classified as a dangerous instrumentality giving rise to a duty of special care,<sup>85</sup> the courts have concluded that the automobile is a sufficient danger to the public safety to justify the state in regulating its use.<sup>86</sup> The early cases upholding the consent statutes are significant in that they, first, require that consent of the owner be given to the driver,<sup>87</sup> and, second, imply that the owner was at least partly at fault for loaning the car to the driver in the first place.<sup>88</sup> The latter point is well illustrated in the concluding paragraph of a 1917 case before the Supreme Court of Michigan. The court noted that:

The present statute, while safeguarding the rights of persons having occasion to use the streets, does not unreasonably infringe upon the rights of those able to own automobiles. The owner of an automobile is supposed to know, and should know, about the qualifications of the person he allows to use his car, to drive his automobile, and if he has doubts of the competence or carefulness of the driver he should refuse to give his consent to the use by him of the machine. The statute is within the police power of the state.<sup>89</sup>

The courts were thus basing their decisions, at least in part, upon a fault concept, even though the "fault" was presumed from the granting of consent.

Legal scholars have long debated over various generalizations as to the types

77 Sayre, *supra* note 58, at 717.

78 W. PROSSER, LAW OF TORTS § 73 at 486-87 (4th ed. 1971).

79 *Id.* at 483-86.

80 *Id.* at 481-83.

81 *E.g.*, Turner v. Hall's Adm'rs, 252 S.W.2d 30, 32 (Ky. 1952).

82 *E.g.*, Young v. Masci, 289 U.S. 253 (1933).

83 See Rutherford v. Smith, 284 Ky. 592, 145 S.W.2d 533 (1940).

84 *E.g.*, Rowland v. Spalti, 196 Iowa 208, 194 N.W. 90 (1923); Harmon v. Haas, 61 N.D. 772, 241 N.W. 70 (1932).

85 Elliot v. Harding, 107 Ohio St. 501, 140 N.E. 338 (1923). This is the view accepted in forty-nine states. Florida is the only state holding that an automobile is a dangerous instrumentality. *E.g.*, Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).

86 Stapleton v. Independent Brewing Co., 198 Mich. 170, 164 N.W. 520 (1917).

87 *Id.*

88 *Id.*

89 *Id.* at 521.

of regulations or crimes which are proper exercises of the principle of vicarious liability. Some have relied on the traditional *malum prohibitum-malum in se* dichotomy, contending that acts falling into the second category involve penalties which are too severe and a community sense of moral turpitude such that personal culpability is required.<sup>90</sup> Others have distinguished purely criminal acts from those which are civil in nature but cause a public harm such as a public nuisance.<sup>91</sup> These approaches are not extremely helpful in establishing which regulations are proper exercises of vicarious liability, for there is no logical connection between any of the classifications set forth and the imposition of this liability.<sup>92</sup> It is submitted that the circumstances in which faultless liability is permitted should be analyzed in terms of what harms to individual rights the courts are attempting to guard against without emasculating the state power to regulate.<sup>93</sup> Viewed in this light, the statutes which were discussed above appear, in various ways, to protect a party from being held liable solely because of his membership in a particular class.

The most explicit statement to date by the United States Supreme Court on status liability was made in *Robinson v. California*.<sup>94</sup> This case dealt with a California statute subjecting any person found to be a drug addict to criminal sanctions without a showing of either use or possession.<sup>95</sup> The Court conceded that the state might have a program of rehabilitation which could require compulsory treatment and confinement for those who are of the status of being addicted to drugs,<sup>96</sup> but the majority opinion by Mr. Justice Stewart did not define a "status crime," it simply assumed that drug addiction is a status.<sup>97</sup> The Court, however, was obviously concerned with the fact that it would be impossible for one who was addicted to drugs to avoid the threat of criminal sanction prior to his complete reformation.<sup>98</sup> As such, the Court held that the enforcement of this law was a violation of the cruel and unusual punishment clause of the eighth amendment as applied to the states by the fourteenth amendment.<sup>99</sup>

A status crime, as here used, is one which imposes sanctions upon an individual when: (1) he has not been a party to any cognitive act or omission required or proscribed by the state, and (2) there is no reasonable relationship between the plaintiff, either an individual or the state, and the accused which makes vicarious liability justifiable. The first criterion includes the absence of the traditional agency or consent principles plus any actual or constructive knowledge on the part of the defendant. In *Lambert v. California*,<sup>100</sup> the Supreme Court of the United States centered its discussion upon the element of knowledge in deciding that the due process fair notice rules had not been complied with.<sup>101</sup>

90 J. MAY, CRIMINAL LAW § 53 (4th ed. 1934); Note, *Constitutionality of Criminal Statutes Containing No Requirement of Mens Rea*, 24 IND. L.J. 89 (1948).

91 Sayre, *supra* note 57, at 67.

92 *Id.*

93 Laylin and Tuttle, *Due Process and Punishment*, 20 MICH. L. REV. 614, 628 (1928).

94 370 U.S. 660 (1961).

95 *Id.* at 662.

96 *Id.* at 665.

97 *Id.* at 666.

98 *Id.*

99 *Id.* at 667.

100 355 U.S. 225 (1957).

101 *Id.* at 229-30.

In that case, the defendant was convicted of failing to register with the County of Los Angeles as an ex-convict convicted of a felony.<sup>102</sup> The Court presumed that she did not have any actual knowledge of her duty to register nor did she have any reasonable way of becoming apprised of that duty.<sup>103</sup> The Court held that mere presence in a community was not a sufficient basis for criminal sanctions consistent with due process.<sup>104</sup>

Analysis of the type of relationship which is sufficient to impose this liability indicates that two factors may be important. First, the defendant might have actual control over the instrumentality causing the injury<sup>105</sup> or have voluntarily given up control.<sup>106</sup> Control is self-evident in certain situations, as where the defendant lends his automobile to the actual tort-feasor,<sup>107</sup> or where a dangerous instrumentality is left around for an incompetent to find.<sup>108</sup> A more subtle form of control is exercised by the storekeeper charged with the responsibility of preventing the sale of adulterated foods, for he is acting as a mere middle man between the consumer and producer. As was previously noted, however, he is in a position to minimize the danger through care in the selection of reputable suppliers.<sup>109</sup> Second, the defendant might enjoy a mutually beneficial relationship with the party injured such as that of employer-employee, or principal-agent.<sup>110</sup> These criteria are not exclusive of each other and the connection may be based in part upon each. An employer, for example, is expected to use care in initially choosing his employees to insure that they are capable of performing a job safely, or will not make sales of liquor to minors. And if he later discovers an error in judgment, he has the power to terminate the relationship.

The application of vicarious liability to parents for the acts of their children, according to this writer, puts the parent in no better position than that of a drug addict being penalized solely on the basis of his status. It has already been noted that a parent has a right to control and demand obedience from a child, but it is absurd to equate this right with the right of storekeepers to demand compliance with certain standards by their suppliers or the right of a car owner to withhold his consent to use by another driver. In each of these cases, the prospective defendant may avoid being included in the class held vicariously liable by taking certain precautions such as dismissal from employment.<sup>111</sup> In the parent-child circumstance, a like precaution is not possible without a serious breach of social policy of long standing, *i.e.*, by relinquishing custody or by

102 *Id.* at 227.

103 *Id.*

104 *Id.* at 229.

105 This may generally include a "right of control" over the instrumentality, whether or not exercised. Thus, a car owner riding as a passenger in his own automobile may be said to have control over its operation. *E.g.*, *Sutton v. Inland Const. Co.*, 144 Neb. 721, 14 N.W.2d 387 (1944). The majority view is, however, that a special reservation of control must be made by the owner, although it need not be explicitly stated. *See Kelly v. Thibodeau*, 120 Me. 402, 115 A. 162 (1921).

106 *E.g.*, *Stapleton v. Independent Brewing Co.*, 164 N.W. at 521.

107 *Id.*

108 *See* authorities cited note 22 *supra*.

109 Text accompanying notes 74-75.

110 *Napier v. Patterson*, 198 Iowa 257, 196 N.W. 73 (1923); *McComb v. Boardman*, 199 App. Div. 229, 191 N.Y.S. 874 (1921).

111 *Laylin & Tuttle*, *supra* note 93, at 629-30.

emancipation.<sup>112</sup> The courts have generally held that wherever possible the child should remain in the family unit unless the conditions are such that it is clearly detrimental to the child's welfare.<sup>113</sup> In addition, in all probability the child will have come within the cognizance of the juvenile authorities long before a parent of even the most incorrigible child would have thought of giving up custody, regardless of the existence of any form of vicarious liability statute. A more cogent reason for rejecting any notion of parental control as a basis of liability rests upon the legally recognized development of independence and personal responsibility in a child during adolescence.<sup>114</sup> A parent would certainly be remiss, and possibly criminally liable under some statutes, if a sixteen-year-old was restricted in his movements and responsibilities to the same extent as a six-year-old. Moreover, there are innumerable and unavoidable opportunities for a child to be entirely free of the control of his parents. Such an example would be the child's attendance at school. The danger created by delinquent behavior, both from the parents' point of view and from that of society, stems not only from the lack of actual control, but also from the numerous alternative influences on his behavior.<sup>115</sup>

One further argument has been made in this regard, namely, that knowledge of a vicious propensity, as evidenced by prior behavior, is sufficient to warrant holding a parent civilly liable.<sup>116</sup> The majority of courts have rejected this view as a basis for negligence.<sup>117</sup> Its utilization as an argument in favor of parental vicarious liability is equally unwarranted. Parents may, of course, be charged with the knowledge of a child's vicious propensity, and in special circumstances may be held liable for any harm which might result from that propensity. Situations in which a parent might incur such liability include: leaving a child with another without sufficient warning,<sup>118</sup> negligently failing to remove a potentially harmful instrumentality from within reach of the child,<sup>119</sup> or, possibly, not seeking medical or other advice where it is available. It is submitted that unless a circumstance similar to the ones enumerated exists, a parent should be held liable only where he has actual knowledge of an impending harm, since the purpose of preventing juvenile delinquency is not otherwise served.

The relationship of parent and child is readily distinguishable from those relationships upon which the imposition of vicarious liability has been held to be constitutional. Admittedly, a parent stands to benefit from his or her relationship with a child, but this benefit is more in the realm of intangibles, such as

112 The extent to which the courts are willing to go in maintaining this policy is aptly illustrated in the controversy surrounding the rights of natural parents versus adoptive parents. The issue is not identical but the principles are sufficiently analogous to lend support to the position in the text. Cf. H. CLARK, DOMESTIC RELATIONS § 17.5 (1968).

113 *Id.*

114 RESTATEMENT (SECOND) OF TORTS § 283A (1965); Comment, *Liability of Negligent Parents for the Torts of Their Minor Children*, 19 ALA. L. REV. 123, 131 (1966).

115 See text accompanying notes 52-54 *supra*.

116 *Mazzilli v. Selger*, 13 N.J. 296, 99 A.2d 417 (1953).

117 RESTATEMENT (SECOND) OF TORTS, § 316 (1965). This section requires in addition to knowledge of a vicious propensity, knowledge of an opportunity to exercise parental control to avoid harm to third persons or property.

118 *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 253 P.2d 675 (1953), *Zuckerburg v. Munger*, 227 App. Div. 1061, 100 N.Y.S. 910 (1950).

119 See *Johnson v. Glidden*, 11 S.D. 237, 76 N.W. 933 (1898); *Salisbury v. Crudale*, 41 R.I. 33, 102 A. 731 (1918).

personal satisfaction rather than profit. A parent is entitled to the services of a minor child under the common law in much the same way as an employer is entitled to the services of an employee,<sup>120</sup> and, as was noted previously, the courts have generally recognized that a parent is liable for the torts, and even the crimes, of a child when there is an agency relationship present. But it is equally recognized that the parental right to services stems from the parents' duty of support,<sup>121</sup> and that one cannot infer a general agency relation from this right.<sup>122</sup> It is noteworthy that many courts now regard the right of the parent to the earnings of the child as a legal fiction in order to sustain an action which is in reality for loss of consortium or society<sup>123</sup> similar to that maintainable by a husband or wife against a third party who interferes with their marriage relationship.<sup>124</sup> In brief, changes in society have undermined the essential sources of parental authority within the family and at the same time have brought to fore less desirable influences on child behavior. Thus, parental vicarious liability is, in effect, creating a status crime. Parents are unable through the use of any reasonable steps to extricate themselves from the status upon which their liability is based, and the standard of care is beyond the pale of compliance.

#### IV. Retribution and the Parent

To this point, the question of parental liability has been analyzed solely in terms of its deterrent or preventative effect. It is undeniable that society may demand retribution from a guilty party as a part of its criminal process.<sup>125</sup> The retributive theory is based upon the presumption that for every wrong there must be a culpable party who is made to pay for the harm through fines, imprisonment or even death.<sup>126</sup> Recent developments in law and criminology have resulted in theories of causation of delinquency which remove much of the burden of culpability from the youth<sup>127</sup> and place it on the parents together with a demand for retribution.<sup>128</sup> It is beyond the scope of this paper to consider the philosophical and moral considerations which are inherent in this issue. It is submitted, however, that the principles developed in this article weigh as equally against the imposition of liability upon a parent based upon a need for retribution as upon a need to prevent delinquency.

120 4 C. VERNIER, *AMERICAN FAMILY LAWS* § 234, at 63 (1936).

121 *Id.*

122 *Cf. Broadstreet v. Hall*, 168 Ind. 192, 80 N.E. 145 (1907); *Elms v. Flick*, 100 Ohio St. 186, 126 N.E. 66 (1907).

123 *Hayward v. Yost*, 72 Idaho 415, 242 P.2d 971 (1952); Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1346 (1961).

124 H. Clark, *supra* note 112, at § 10.1 *et seq.*

125 Alexander, *supra* note 9, at 28; Binavince, *The Ethical Foundations of Criminal Liability*, 33 FORD. L. REV. 1 (1964); Geis, *supra* note 13, at 59.

126 *Id.*

127 Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909).

128 Kenny and Kenny, *Shall We Punish the Parents?* 47 A.B.A.J. 804 (1961). In this article, previously unpublished research showed that 54% of persons questioned answered affirmatively to the question "do you think that the parent should be held responsible for the delinquency of a child?" 88% felt that parents were direct causal factors.

## V. Conclusion

The main principles developed in this article are three in number. First, the underlying assumption of the concept of parental liability, that the rate of juvenile delinquency may be significantly decreased by imposing liability upon a parent, is not accepted by the weight of sociological research,<sup>129</sup> although a significant portion of the general population have feelings to the contrary.<sup>130</sup> Second, the liability created by these laws is a status liability, *i.e.*, there is no connection between the harm caused and the person charged other than the status of the defendant.<sup>131</sup> Third, status liability is not only repugnant to the common law, but also inconsistent with recent Supreme Court decisions.

It is significant to look at the possible effects of a decision to uphold these laws. There is the obvious possibility that the rate of juvenile delinquency will be, if not reduced, at least kept from increasing. In the criminal cases, this point is crucial, for if it could be proved otherwise, the statutes would fall to an attack based upon the reasonable connection test. In the civil statutes, the existence of even nominal compensation to innocent parties would be a factor weighing in favor of affirming any decision adverse to the parents.

On the negative side, the most important effect is the step which would be taken towards a deindividualization of our judicial system. In this regard, parental liability must be distinguished from the other exercises of the regulatory power of the states. Parental liability goes one step further than either faultless liability or vicarious liability in that the defendant is a stranger to the entire transaction causing harm. That is, he is neither a party to the act causing the harm complained of, nor does he stand in any special relationship to the person injured or the actual tort-feasor. The obverse of this distinction is that the legitimate use of either faultless or vicarious liability will not be affected by a decision invalidating parental liability.

The problem of "crime in the streets" is a real and serious one and is properly an object of concern not only to the legislature, but also to the judiciary. This subject is one which is inextricably tied to significant political issues. The courts have in the past allowed the state legislatures wide discretion in choosing the techniques they wished to employ to combat delinquency. Parental liability, however, is contrary both to common law doctrines and constitutional principles. It would amount to a complete abdication of the judicial function of protecting the rights of the individual from unreasonable encroachments by the state. Moreover, the creation of a new status liability would set a far too dangerous precedent for the future expansion of the police power of the state. It is submitted that the courts should refuse to pay this price for political expediency.

*Paul V. Reagan*

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129 See authorities cited notes 50-53 *supra*.

130 See authorities cited notes 128 *supra*.

131 See authorities cited notes 94-103 *supra*.