Crim Law and Philos (2018) 12:427–438
https://doi.org/10.1007/s11572-017-9433-x

ORIGINAL PAPER

Reflections on *Prince*, Public Welfare Offenses, *American Cyanamid*, and the Wisdom of the Common Law

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Published online: 28 July 2017

Abstract The fundamental requirement of Anglo-American criminal law is that crime must consist of the concurrence of a guilty mind—a *mens rea*—with a guilty act—an *actus reus*. And yet, the criminal law is shot through with discordant lumps of strict liability—crimes for which no *mens rea* is required. Ignoring the conventional normative objections to this aberration, I distinguish two different types of strict criminal liability: the type that arose at common law and the type associated with the public welfare offenses that are the product of twentieth and twenty-first century legislation. Using famous cases as exemplars, I analyze the two types of strict liability, and then examine the purposes served and incentives created by subjecting individuals to strict liability. I conclude that common law strict liability is rational in that it advances the purposes of the criminal law, while the public welfare offenses are at best pointless and at worst counterproductive. I suggest that in this respect the common law contains more wisdom than the results of the legislative process.

Keywords Strict liability · Public welfare offenses · Regina v. Prince · United States v. Dotterwich · Indiana Harbor Belt R. R. v. American Cyanamid

1 Introduction

It is an axiom of Anglo-American criminal law that a criminal offense consists in the concurrence of a guilty act—the *actus reus*—with a guilty mind—the *mens rea*. This flows directly from the fact that criminal law is penal law; its purpose is to punish. Because punishment requires blameworthy conduct, a criminal offense requires that an actor engage in prohibited conduct *with a culpable state of mind*. Criminality thus entails culpability.

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And yet, there are many instances in which our criminal law imposes punishment either in the absence of or out of proportion to the actor's culpability. Like a bowl of poorly stirred porridge, the smooth association of punishment with personal culpability is interlaced with lumps of strict liability—offenses in which an actor's liability to punishment is unrelated to his or her purpose, knowledge, recklessness, or negligence.[1]

Criminal law scholars regularly denounce these lumps as unfortunate aberrations that should be excised from our system of criminal law.[2] Although I share this opinion, I do not intend to argue for it here. Rather, I want to call attention to the fact that two distinct forms of strict liability reside within our criminal law; one that developed at common law and one that was introduced legislatively. Although neither is theoretically consistent with a liberal legal system, I contend that the form that developed at common law is at least intelligible and serves an identifiable purpose, whereas the form that was legislatively introduced is not only theoretically incoherent, but practically counterproductive.

2 Two Types of Strict Liability

2.1 Strict Liability at Common Law

Most professors of criminal law are familiar with the case of *Regina v. Prince*,[3] which is in almost every first-year casebook. In this 1875 English case, the defendant, Henry Prince, was convicted of taking an unmarried girl under the age of 16 out of the possession and against the will of her father. The object of Henry's affection was Annie Phillips, a 14-year-old girl who told Prince that she was 18 years old and apparently had a manner and appearance to inspire in him a reasonable belief that she was. Prince appealed his conviction, claiming that his honestly held but erroneous belief about Ms. Phillips' age meant that he did not have the necessary *mens rea* to be convicted of the offense.

The court upheld Prince's conviction on the ground that, because the act of taking a girl out of the possession of her father against his will "is wrong in itself,"[4] the state does not have to establish that Prince knew that Phillips was under 16 years of age, and that if one does such a wrongful act, "he does it at the risk of her turning out to be under sixteen."[5]

This is the famous (or infamous) "moral wrong principle" that holds that, when the underlying act is morally wrong, no *mens rea* is required with respect to a legally necessary attendant circumstance. In the court's Victorian era judgment, taking any young girl out of the possession of her father without his consent was morally wrong. Therefore, Prince could be convicted even if he honestly and reasonably believed that Phillips was older than

[1] Whether negligence is truly a type of culpability that can justify criminal punishment is a matter of some controversy. To the extent that negligence consists in inadvertence, the defendant has not chosen to perform the prohibited act. Yet punishment, as opposed to compensation, requires an act of will. Thus, there is reason to doubt that negligence can ground criminal punishment. (This argument is developed in Michael Moore's contribution to this symposium, *The Strictness of Strict Liability*). Although I am sympathetic to this argument, I do not advance it in the present context. For purposes of this article, I merely adopt the Model Penal Code's characterization of negligence as a culpable state of mind. Thus, as I employ the term, "strict liability" refers to cases in which one acts neither purposely, knowingly, recklessly, nor negligently.

[2] Representative examples of such denunciations can be found in several of the other articles in this volume.

[3] L.R. 2 Cr. Cas. Res. 154 (1875).

[4] *Id.* at 174.

[5] *Id.* at 175.

16. Under the moral wrong principle, one can be subject to criminal punishment even though he or she exercised all due care to avoid violating the law.[6]

In cases like this, there is a sense in which the defendant can be said to have acted with a guilty mind because he or she knowingly engaged moral wrongdoing. But crime requires a culpable state of mind with regard to the *violation of criminal law*. One must either purposely, knowingly, recklessly, or negligently produce the *actus reus* of a criminal offense. Because the moral wrong principle permits the conviction of those who were not even negligent about whether their actions violated the law, it imposes strict criminal liability on those who engage in morally questionable behavior.

The *Prince* court supported its decision with what it considered other examples of the moral wrong principle. Thus, it stated,

> The same principle applies in other cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. Why? because the act was wrong in itself. So, also, in the case of burglary, could a person charged claim an acquittal on the ground that he believed it was past six when he entered, or in housebreaking, that he did not know the place broken into was a house?[7]

However, cases such as these can be distinguished from the situation in *Prince* because the underlying act was not only morally wrong, but was itself a violation of criminal law. One who assaults a police officer without knowing that his target is a police officer nonetheless is committing the crime of assault. A burglar ignorant of the time is still housebreaking and a housebreaker ignorant of the nature of the building is still guilty of illegal entry.

The rule governing cases such as these is conventionally described as the "lesser crime principle." It is similar to the moral wrong principle in holding that no *mens rea* is required with respect to a legally necessary attendant circumstance, but narrower in application because the underlying act must be a criminal offense, rather than a moral wrong.[8] Nevertheless, like the moral wrong principle, it imposes a level of punishment that is not tied to the culpability of the actor. Although the actor must demonstrate some level of culpability—the level required by the underlying offense—the lesser crime principle permits his or her punishment for a more serious offense that he or she has neither purposely, knowingly, recklessly, nor negligently committed. Hence, like the moral wrong principle, it imposes a form of strict liability on those who engage in any type of criminal conduct.

In the years since 1875, the "*Prince* rule," whether understood as the moral wrong principle or the lesser crime principle, has been subject to a great deal of criticism. The

[6] Another oft-cited illustration of the moral wrong principle is the case of White v. State, 185 N.E. 64 (1933) in which the court upheld the conviction of a defendant for violation of a statute making it an offense for a husband to abandon his pregnant wife even though he did not know that she was pregnant on the ground that "a husband abandoning his wife is guilty of wrongdoing. It is a violation of his civic duty. … If he abandons her, he does so at his peril, and, if she be in fact at the time pregnant, though he may not have known it, he cannot plead that ignorance as a defense." *Id.* at 65.

[7] *Prince*, L.R. 2 Cr. Cas. Res. at 176.

[8] This distinction is significant because one of the main objections brought against the moral wrong principle is that it violates the principle of legality. Because the law provides no legally authoritative definition of what constitutes a moral wrong, the moral wrong principle permits criminal punishment in the absence of a clearly defined standard of what conduct is prohibited, thus violating the basic principle that there can be no crime or punishment without law (*nullum crimin sine lege, nullum poena sine lege*). Further, the moral wrong principle also runs afoul of the liberal prohibition against the legal enforcement of morality. However, because in the present context I am interested only in describing the elements of strict liability that arose at common law, not exploring their justifiability, there is no need to pursue these matters further here.

majority of academic commentators have condemned the moral wrong principle[9] and the House of Lords explicitly rejected its continued validity in England in 2000.[10] The drafters of the Model Penal Code reject both versions of the rule.[11] Nevertheless, in most jurisdictions, the *Prince* form of strict liability still exists, and is especially important in cases involving minors, sexual behavior, and drugs.[12]

Of course, the *Prince* rule does not embody all the instances of strict liability that arose at common law. Another notorious example is the felony murder rule that holds that one whose actions produce an unintended death during the commission or attempted commission of a felony is guilty of murder.[13] Murder requires the intent to kill. The felony murder rule permits the conviction for murder of one engaged in the commission of a felony despite the absence of the purpose to cause death, knowledge that a death would result, or even the reckless disregard of a risk that death would result. Thus, the felony murder rule holds those who commit a felony that results in a death strictly liable for murder.[14]

Although the felony murder rule is conceptually distinct from the *Prince* rule, it is nevertheless closely related to it. To see how, consider that the *actus reus* required for a criminal conviction is conventionally analyzed in terms of three elements: the act, its consequences, and its attendant circumstances, and may consist in any combination of these three elements. It may consist in (1) an act alone—e.g., the possession of burglar tools; (2) an act and its consequences—e.g., homicide, which requires an act that results in the death of a human being; (3) an act taken when specified attendant circumstances are satisfied—e.g., receipt of stolen property, which requires the act of receiving and the attendant circumstance that the property be stolen; or (4) an act that produces specified consequences and is taken when specified attendant circumstances are satisfied—e.g., burglary, which requires the act of housebreaking, the consequence of entering, and the attendant circumstances that the building be a dwelling place and the act take place at night.

The *Prince* rule applies to crimes that have legally required attendant circumstances. It holds that, when one intentionally takes an action or produces consequences that constitute a moral wrong, no *mens rea* is required with regard to the attendant circumstances. The felony murder rule applies to homicide, which, as noted above, has a legally required consequence—death—but no legally required attendant circumstances. It holds that, when one intentionally engages in felonious activity and a death results, no *mens rea* is required with regard to the legally required consequence for a murder conviction—death. In a sense, the felony murder rule can be thought of as the *Prince* rule applied to the consequence element of the *actus reus*, rather than the attendant circumstance element.

The law of conspiracy furnishes another example of the type of strict liability that developed at common law. Under common law, one who joins a conspiracy may be held liable not only for the crime of conspiracy, but also for all substantive offenses committed

[9] *See, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW 727 (1978), Graham Hughes, *Criminal Responsibility* 16 STAN. L. REV. 470, 480–481 (1964).

[10] *See* B (a minor) v. Director of Public Prosecutions, [2000] 1 All E. R. 833.

[11] *See* MODEL PENAL CODE § 2.04 cmt. at 269–274 (1985).

[12] *See* KADISH, ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 271 (9th ed. 2012).

[13] WAYNE R. LAFAVE, CRIMINAL LAW 785 (5th ed. 2010).

[14] *See, e.g.*, People v. Stamp, 2 Cal. App. 3d 203, 209-10 (1969) ("Under the felony-murder rule … a killing committed in either the perpetration of or an attempt to perpetrate robbery is murder of the first degree. This is true whether the killing is wilfull, deliberate and premeditated, or merely accidental or unintentional. … The doctrine is not limited to those deaths which are foreseeable. Rather a felon is held strictly liable for all killings committed by him or his accomplices in the course of the felony").

by any of the conspirators in furtherance of the conspiracy. And this is the case regardless of whether he or she had any personal knowledge that such offenses were being committed.

This aspect of conspiracy law is known as the "*Pinkerton* rule," after a case in which the defendant, who had entered into a conspiracy with his brother to evade taxes, was convicted both for conspiring to evade taxes and for several substantive counts of tax evasion that had been committed by his brother while the defendant was in jail.[15] Under the *Pinkerton* rule, as long as one has entered into an criminal conspiracy, one can be convicted of any substantive offense committed in furtherance of the conspiracy despite the absence of the purpose to commit that offense, the knowledge that the offense was being committed, and the reckless or negligent disregard of the risk that the offense might be committed. Thus, the *Pinkerton* rule holds those who enter into a conspiracy strictly liable for the offenses committed by their co-conspirators.

Once again, although the *Pinkerton* rule is conceptually distinct from both the *Prince* rule and the felony murder rule, it is closely related to them. The *Prince* rule holds that, when one engages in conduct that is either morally wrong or criminal in nature, no *mens rea* is required with regard to an attendant circumstance necessary for conviction of the relevant offense. The felony murder rule holds that, when one engages in felonious activity that causes a death, no *mens rea* is required with regard to the legally required consequence for a murder conviction. The *Pinkerton* rule holds that, when one engages in a criminal conspiracy, no *mens rea* is required with regard to any aspect of the *actus reus* of a crime committed in furtherance of the conspiracy.

This analysis suggests that, although there are various forms of strict liability at common law, they have a common trigger—an underlying instance of wrongful conduct by the defendant. Although the common law sometimes imposes punishment on individuals that is out of proportion to their culpability, it does so only on individuals who engage in some sort of blameworthy conduct. It appears that, at common law, some level of culpable conduct was a necessary condition for the imposition of strict liability.

2.2 Public Welfare Offenses

Most professors of criminal law are as familiar with the case of *United States v. Dotterweich*[16] as they are with *Prince*. In that case, Joseph Dotterweich was convicted of violating the Federal Food, Drug, and Cosmetics Act for shipping mislabeled drugs in interstate commerce even though there was no allegation that he knew the drug was mislabeled or was reckless or even negligent as to the matter.[17] The Supreme Court upheld Dotterweich's convictions on the ground that the statute required no *mens rea* for a violation, explaining that

> [t]he prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. 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 at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.[18]

[15] Pinkerton v. United States, 328 U.S. 640 (1946).

[16] 320 U.S. 277 (1943).

[17] For an intriguing account of the Dotterweich case, see Craig Lerner, *The Trial of Joseph Dotterweich: The Origins of the "Responsible Corporate Officer" Doctrine* in the current volume.

[18] *Dotterweich,* 302 U.S. at 280–281.

The Court recognized that "[h]ardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting,"[19] but justified its decision on the ground that this is what Congress intended, noting that

> [b]alancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.[20]

Dotterweich is the exemplar of what has become known as "public welfare offenses"[21]—statutorily created strict liability offenses. Such offenses are understood as "offenses against [the state's] authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted."[22] Because, for such offenses, "whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity, … legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element."[23]

The creation of such offenses was justified by the increasing commercialization of society. With the rise of mass production, the conduct of a single individual could affect the health, safety, or welfare of a large segment of the public. This was the case regardless of whether the individual's conduct was morally blameworthy in itself. The advent of public welfare offenses came "just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt,"[24] and was justified on the utilitarian ground that imposing criminal punishment on innocent actors was necessary to the maintain the effectiveness of a socially beneficial regulatory regime.

Public welfare offenses are true strict liability offenses. As *malum prohibitum* offenses that require no *mens rea*, they authorize criminal punishment in the absence of any blameworthy conduct. Unlike the common law offenses, they require no underlying moral wrong or lesser crime to support a conviction.

3 The Purpose of Strict Liability

Both the strict liability that evolved at common law and the legislatively created public welfare offenses have been subjected to frequent and extensive criticism on normative grounds.[25] However, it is not my purpose to rehearse such criticism here. Instead, I intend to focus on the empirical effects of strict liability.

[19] *Id.* at 284.

[20] *Id.* at 285.

[21] *See* Morrisette v. United States, 342 U.S. 246, 255 (1952). *See also*, Francis Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

[22] *Morrisette*, 342 U.S. at 256.

[23] *Id.*

[24] Sayre, *supra* note 21, at 67.

[25] Common law strict liability has been attacked for violating the principle of legality–the moral wrong principle—and for unjustly imposing punishment that is out of proportion to the culpability of the actor—the lesser crime principle, the felony murder rule, and the *Pinkerton* rule.

Public welfare offenses have been attacked for being incoherent—punishment without fault is oxymoronic; unjust—they impose the stigma of criminal activity on those who are blameless; ineffective—those who act without awareness of wrongdoing cannot be deterred by the threat of punishment; unnecessary—civil and administrative sanctions would be just as effective at enforcing regulations; and

Indiana Harbor Belt R.R. v. American Cyanamid[26] is a case that is as familiar to tort scholars as *Prince* and *Dotterweich* are to those who study the criminal law. In that case, American Cyanamid, a chemical manufacturer, shipped 20,000 gallons of liquid acrylonitrile, a flammable and highly toxic chemical, to market by train. While the train was stopped at a switching line in Chicago, the lid on an outlet valve of the tank car containing the acrylonitrile broke, spilling a large amount of the chemical into the local environment. The switching line bore nearly a million dollars in environmental clean-up costs, and subsequently sued American Cyanamid to recover those costs alleging that American Cyanamid was strictly liable for any damage that resulted from shipping the chemical. American Cyanamid argued that strict liability did not apply to the activity of shipping the chemical, and that it could be held liable for the damage only if Indiana Harbor Belt could establish that it had been negligent.

To resolve the question, the court had to consider the purposes served by the torts of negligence and strict liability, respectively. In doing so, it pointed out that the purpose of negligence is to give people an incentive to conduct their activities with care. Therefore, negligence is the proper legal regime for cases in which people are engaging in productive, socially beneficial activities that pose the type of risks to others that can be reduced by being careful. In contrast, the purpose of strict liability is to discourage people from engaging in certain types of activities. Therefore, strict liability is the proper legal regime for cases in which people are engaging in either socially detrimental activities or beneficial activities that pose risks to others that cannot be effectively reduced by being careful. As the court explains,

> The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk or harm of an accident will be less …, or by reducing the scale of the activity in order to minimize the number of accidents caused by it. … By making the actor strictly liable–by denying him in other words an excuse based on his inability to avoid accidents by being more careful–we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.[27]

Because strict liability has the effect of discouraging the activity to which it attaches, the common law restricted its application to what the Restatement of Torts calls "abnormally dangerous activities"[28]—activities that pose such a great risk of harm relative to

Footnote 25 continued
dangerous—they give prosecutorial agents an extortionate level of discretion over whom to charge with a criminal offense.

[26] 916 F. 2d 1174 (7th Cir. 1990).

[27] *Id.* at 1177.

[28] RESTATEMENT (SECOND) OF TORTS § 519 (1977). The common law rules governing strict liability for animals parallel the distinction between ordinary and abnormally dangerous activities in that strict liability is reserved for wild animals or animals known to have unusually dangerous propensities. *See id.* at §§ 506, 507, 509, 518 (1977).

the benefits they produce that society would be better off with less of them. The Restatement provides six factors to help determine whether an activity is abnormally dangerous. They are:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.[29]

Commenting on these factors, the *American Cyanamid* court noted that these six factors "are related to each other in that each is a different facet of a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately control."[30] The court then suggested that "[t]he interrelations might be more perspicuous if the six factors were reordered"[31] to reflect their relative importance to that quest, as follows:

(c) inability to eliminate the risk by the exercise of reasonable care;
(e) inappropriateness of the activity to the place where it is carried on;
(f) extent to which its value to the community is outweighed by its dangerous attributes;
(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great; and
(d) extent to which the activity is not a matter of common usage.

In this ordering, the first consideration explains why it would be pointless to encourage the actor to exercise due care. The second and third considerations explain why society would benefit from relocating or repressing the activity. The fourth and fifth considerations indicate that it is reasonable for the actor to make activity reducing changes. And the sixth makes it more likely that risk-reducing technology has not yet been developed.

Thus, the purpose of strict liability is to reduce the level of activities that present too high a risk of harm to others to justify the private benefits they generate when that risk cannot be reduced by incentivizing those engaged in the activities to be more careful.[32] And, conveniently, the common law provides us with a handy list of factors to use to identify precisely what those activities are.

4 Application to Criminal Law

The form of strict liability that evolved at common law may be normatively objectionable, but at least it serves its purpose. The purpose of strict liability is to discourage the activity to which it attaches. At common law, strict liability was triggered by some underlying act

[29] *Id.* at R §520 (1977).

[30] *American Cyanamid*, 916 F. 2d at 1177.

[31] *Id.*

[32] *See*, *e.g.*, Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 17–79 (1992).

of either moral or criminal wrongdoing—precisely the type of activities that should be discouraged.

Consider the desiderata for strict liability listed above. The activities to which common law strict liability attached are certainly not the type of activities that we want to encourage people to do more carefully; rather, we do not want them to do them at all. Because the actors are intentionally engaging in socially detrimental activities, it would be pointless to attempt to eliminate the risk they pose by stimulating more care in their execution. Further, because the actions are morally (or criminally) wrong, it is irrelevant where they are carried on. They are inappropriate to all locations. In addition, morally wrongful conduct has no value to the community to outweigh its detrimental attributes. And, although the harm it causes may or may not be great, the likelihood that the harm—the morally wrongful conduct—will result is absolute. That is the point of undertaking the activity in the first place. Finally, unless we are living in a thoroughly corrupt society, moral wrongdoing will always be exceptional rather than commonplace.

If there is something objectionable about common law strict liability, it is not its target, which is appropriate, but the means it employs in attacking it. Morally wrongful conduct, felonies, and substantive crimes committed in furtherance of conspiracies constitute the types of behavior that we want the criminal law to suppress. Our objection to strict criminal liability is that, because it either punishes the innocent or imposes punishment out of proportion to the blameworthiness of the actor, it is not a morally appropriate means of pursuing such suppression. Nevertheless, because it accomplishes its objective, it is easy to understand why strict liability evolved at common law.

Thus, it is appropriate to characterize common law strict liability as effective, but illiberal—effective because it discourages the type of behavior that criminal law is designed to suppress; illiberal because it fails to respect the autonomy of individuals by undermining "the individual's power to predict the likelihood that the sanctions of the criminal law will be applied to him."[33]

But now consider public welfare offenses. The activities subject to this form of strict liability are typically industrial production and commercial transactions, such as manufacturing, labeling and shipping drugs and chemicals, and operating waste disposal facilities, power plants, oil pipelines, etc. These are all productive, socially beneficial activities. As such, they are exemplars of the activities that we want people to engage in while exercising care, but certainly do not want to discourage.

These activities possess none of the indicia that suggest that they should be subject to strict liability. First, the dangers that they pose may be greatly reduced by the exercise of reasonable care. Errors in labeling, handling, and shipping, and other regulatory failures can all be cured by increased employee training, more frequent or more detailed inspections, or other improvements to an organization's quality control procedures. That is, by being more careful. And as Kenneth Simons points out elsewhere in this symposium, the more dangerous the activity, the more precautions are required for the care exercised to constitute reasonable care.[34] Second, there is nothing inappropriate about the places at which these activities are performed. Regulatory violations are not more or less dangerous

[33] H.L.A. Hart, *Legal Responsibility and Excuses, in* DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 99 (S. Hook, ed. 1965).

[34] *See* Kenneth W. Simons, *Can Strict Criminal Liability for Responsible Corporate Officers Be Justified by the Duty to Use Extraordinary Care?* ("Thus, even under an ordinary negligence test, more extensive precautions are required in order to avoid unusually great risks of harm. In this sense, an actor is often required to take 'extraordinary care' even under the 'ordinary care' standard").

depending on where they are committed. Third, the regulated activities provide immense material benefits to the public and are necessary to the maintenance of our advanced industrial society. As such, their value to the community greatly outweighs their dangerous attributes. Fourth, although the activities pose a risk of some harm if carried on carelessly, the activities themselves pose neither a high degree of risk of harm nor the likelihood that any harm they produce will be great. Finally, in our technologically advanced society, the activities are relatively common ones.

If the purpose of strict liability is to create an incentive to reduce or relocate an activity, then it is misapplied when imposed on socially beneficial activities that we want people to engage in while taking proper precautions. Public welfare offenses apply strict liability to precisely these types of activity. Hence, they do not serve a useful purpose.

> The objection to strict liability is not that it punishes people who are literally helpless to avoid committing the act, because it is obvious that they could have avoided any possibility of liability by not going into business in the first place. The point is that selling meat or managing a factory is a productive activity which the law means to encourage, not discourage, and we should not punish people who have taken all reasonable steps to comply with the law.[35]

Worse, there is good reason to believe that public welfare offenses are dangerously counterproductive. We want those who undertake the regulated activities to do so carefully. However, careful executives are the ones who are most likely to respond to the incentive of strict liability to refrain from the activity. In contrast, those who are

> confident of their ability to avoid causing harm may be just the ones who are most likely to be especially careless. … Indeed, if the penalties are serious, those who are careful and make provision for risks may be the most likely to take the sensible precaution of not engaging in this activity at all. … [Thus,] the dynamic effect, under plausible assumptions about human behavior, could be to increase the total harm caused by increasing the proportion of those engaged in the activity who are relatively careless.[36]

Evidence of this effect has been provided by Craig Lerner and Moin Yahya, who demonstrate that strict liability criminal offenses tend to drive out the business executives most committed to legal compliance.[37] They distinguish between two types of executives that they call "ideal entrepreneurs" and "swashbucklers." Ideal entrepreneurs are risk neutral with regard to business risk—they are willing to take financial risks in pursuit of profit opportunities, but risk averse with regard to legal risk—they adhere to a hard and fast rule against violating the law in pursuit of profit. Swashbucklers are business executives who are risk neutral with regard to both business risk and legal risk—they are willing to incur financial risks and the risk associated with legal violations in the effort to increase profits. Ideal entrepreneurs regard avoiding illegality as a matter of principle. Swashbucklers view the risk of legal sanctions as just another cost of doing business.

[35] Phillip Johnson, *Strict Liability: The Prevalent View, in* ENCYCLOPEDIA OF CRIME AND JUSTICE 1518, 1520–1521 (Sanford H. Kadish, ed., 1983).

[36] Stephen J. Schulhofer, *Harm and Punishment: a Critique of Emphasis on the Results of Conduct in the Criminal Law,* 122 U. PA. L. REV. 1497, 1587 (1974).

[37] *See* Craig S. Lerner & Moin A. Yahya, "*Left Behind" after Sarbanes–Oxley*, 44 AM. CRIM. L. REV. 1383 (2007).

Lerner and Yahya show that strict liability public welfare offenses tend to increase the percentage of swashbuckler business executives relative to ideal entrepreneurs. In part, this is because ideal entrepreneurs are more likely to respond to strict liability's signal to refrain from the regulated activity. Without the ability to avoid criminal liability by exercising care, their aversion to incurring criminal liability causes them to seek other forms of employment that do not carry an unavoidable risk of legal liability. And, in part, that is because strict liability offenses give swashbucklers a competitive advantage over ideal entrepreneurs in the executive labor market.

This is because the ideal entrepreneur will invest resources in legal compliance even though doing so cannot protect the firm against liability, where the swashbuckler will not. Hence, swashbucklers will generally generate greater returns on investment than ideal entrepreneurs and be more attractive as candidates for executive positions.[38]

In sum, whereas common law strict liability is illiberal but effective, public welfare offenses are illiberal and counterproductive. Public welfare offenses needlessly discourage socially beneficial activities while allowing punishment of the innocent that does not effectively decrease dangerous or wrongful behavior beyond what can be achieved by offenses that require *mens rea*.

5 Conclusion

Criminal law is penal law. Punishment requires a wrong. Hence, criminal punishment requires blameworthy conduct. This explains why, for the most part, there were no strict liability crimes at common law. At common law, criminal conviction always required at least grossly negligent behavior (criminal negligence).

However, as the *Prince* case demonstrates, elements of strict liability crept into the common law of crime when the defendant engaged in morally blameworthy or criminal action. The common law "moral wrong principle" held that, when an actor was doing something that was morally wrong, he or she was strictly liable with regard to the attendant circumstances of the crime. The felony murder rule held that, when an actor was committing a felony, he or she was strictly liable for murder should a death result. The *Pinkerton* rule held that, when an actor participated in a criminal conspiracy, he or she was strictly liable for the substantive crimes committed by his or her co-conspirators.

The effect of strict liability is to discourage the underlying activity. Immoral and otherwise criminal activity is precisely the type of activity it would be appropriate to discourage. By permitting strict liability when one engages in immoral or criminal action but not elsewhere, the common law applies strict liability where it serves its proper purpose and only where it serves its proper purpose.

One may object to this form of strict criminal liability on moral grounds. One may argue that proper respect for individual dignity prohibits punishing people who reasonably believed that they were acting legally or forbids punishment that is out of proportion to an actor's culpability. One may argue that, in employing the *Prince* rule, the felony murder rule, and the *Pinkerton* rule, the common law is improperly employing illiberal means to attain its end of reducing wrongful and dangerous conduct by the members of society. But one cannot argue that, in allowing this form of strict liability, the criminal law is not serving its proper end.

[38] For a more detailed explanation of the economics of the competition for executive positions, *see id.* at 1411–1415.

The situation is quite different with regard to public welfare offenses. These strict liability crimes did not evolve in response to actual cases, but were consciously created by legislators who wanted to prevent those engaged in large scale commercial activity from doing business in a way that risked harm to the public. In an effort to do so, they created a new "type of legislation whereby penalties serve as effective means of regulation,"[39] whose purpose was to maintain "the efficiency of controls deemed essential to the social order as presently constituted."[40]

The problem is that strict liability criminal offenses are particularly ineffective tools for achieving this end. The only way to minimize regulatory violations is to cause those engaged in the regulated activities to take care to remain in compliance. But this is best achieved by punishing those who fail to exercise reasonable care. Punishing those who do exercise proper care not only does nothing to further reduce violations, it risks increasing them by discouraging careful people from engaging in the activity and leaving the field open for the less careful swashbucklers.

The commercial activities subject to regulation are socially beneficial activities that undergird our prosperous commercial society. These are the type of activities that we want to encourage entrepreneurs to engage in. But we want them to do so carefully. Subjecting such individuals to strict liability sends precisely the wrong message. Rather than encouraging entrepreneurs to exercise care, it discourages careful people from engaging in the activity at all and encourages the less careful to treat the risk of legal violation as a cost of doing business.

Public welfare offenses are subject to the same normative objections as common law strict liability. But this hardly matters. For, even if they were not morally objectionable, they would still be pointless. Common law strict liability may be a morally objectionable means to the end of reducing wrongful and dangerous conduct, but public welfare offenses are not even a means to that end.

As much as I oppose common law strict liability on civil libertarian grounds, if my choice were between the common law of crime with *Prince*, felony murder, and *Pinkerton*, or the criminal law created by our contemporary legislators, I would take the common law every time. And, if asked why, I'd be tempted to respond with the famous quote from Louis Brandeis' dissent in *Olmstead v. United States* that "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[41]

[39] *Dotterweich,* 302 U.S. at 280–281.

[40] *Id.* at 256.

[41] 277 U.S. 438, 479 (1928).