

Does fault matter?

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Article begins on next page

DOES FAULT MATTER?

Vera Bergelson*

Introduction

This paper addresses an old theoretical question that has acquired new practical urgency. The question is: is it morally permissible to punish people who, through no fault of their own, produced harm or threat of harm to others? The urgency comes from the increased use of such punishment as a means of regulating industries. Governmental agencies have declared their intention to put corporate executives in prison for their company's criminal wrongdoings even when those executives had no knowledge of or participation in the wrongdoing.¹ Recent prosecutions show a "trend toward harsher sentences, penalties, and collateral consequences."²

Consider *US. v. DeCoster*,³ a case that has gained significant publicity and stands a good chance of being heard by the United States Supreme Court. It started in August 2010 when tens of thousands of people across the United States fell ill after eating eggs infected by salmonella bacteria. The eggs were traced back to an Iowa-based company, Quality Egg, LLC ("Quality Egg"). Quality Egg was prosecuted and pled guilty to felony and misdemeanor violations leading to the outbreak of salmonella contamination.

The company's owner Austin De Coster and its chief financial officer Peter DeCoster (together, the "DeCosters") were also prosecuted and pled guilty to a misdemeanor violation of the Food, Drug, and Cosmetic Act ("FDCA")⁴ as responsible corporate officers ("RCOs") under the *Park* doctrine. Pursuant to that doctrine, a person is guilty of violating the law if he had, "by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct" the illegal activity.⁵ The FDCA violation with which the DeCosters were charged was a strict liability offense, so, had the case gone on trial, the government would not have to prove the DeCosters' culpability. In fact, the government stipulated that neither the DeCosters nor anyone associated with the Quality Egg had knowledge that the eggs were contaminated.⁶

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¹ Letter from FDA Comm'r Margaret Hamburg to Sen. Charles E. Grassley, Member, H. Comm. On Energy and Commerce, March 4, 2010, available at www.grassley.senate.gov/about/upload/FDA-3-4-10-Hamburg-letter-to-Grassley-re-GAO-report-on-OCI.pdf; Brief for the United States, Sup. Ct., *United States v. Park*, No. 74-215; FDA Regulatory Procedures Manual, § 6-5-3, "Special Procedures and Considerations for *Park* Doctrine Prosecutions" (revised Jan. 26, 2011), available at: www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176738.htm#SUB6-5-3.

² Joseph F. Savage, Jr., Maren Klawiter, *The Revival Of The Responsible Corporate Officer Doctrine?*, *The Health Lawyer*, Volume 26, Number 1, October 2013

³ *US. v. DeCoster*

⁴ 21 U.S.C. §§ 331(a) (introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded)..

⁵ *United States v. Park*, 421 U.S. 658, 673-74 (1975).

⁶ Jack DeCoster Plea Agreement at 7(c); Peter DeCoster Plea Agreement at 7(c.) quoted in *Amici Curiae* brief to the 8th circuit.

Each defendant was sentenced to a three months' jail term among other penalties. The jail sentences have been appealed and upheld by the court. The appeals lost, the DeCosters have filed a petition for a writ of certiorari with the United States Supreme Court.⁷

The DeCosters' case raises some important issues of constitutional law, which I will not discuss here. It also highlights the quintessential dilemma of Anglo-American criminal jurisprudence: what defines a criminal wrong—social harm or the perpetrator's culpability? The two narratives—of harm and culpability—are largely independent. Most crimes include both the culpable perpetrator and a harmful outcome. Yet, the two elements do not have to coincide, and when one is missing, the question arises: may the magnitude of one compensate for the lack or low level of the other? Specifically, when the harm or threat of harm is particularly serious, may criminal law reduce or eliminate the requirement of culpability?

The law has been both ambiguous and hypocritical on this point. On the one hand, it has been emphatically declared that an innocent may never be punished;⁸ at some point, even the United States Supreme Court believed that: "All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one."⁹ On the other hand, shock or no shock, American criminal law includes today scores of strict liability offenses.¹⁰ A large portion of those are regulatory "public welfare offenses" that came into being in the second part of the nineteenth century in response to the increased urbanization and industrialization of life and the perceived need to protect the general public from unknown systemic failures and risks.¹¹ Today, the number of regulatory offenses is measured by thousands.¹²

It has been argued by many that public welfare offenses, and more generally, punishment based on strict liability, violate such fundamental principles of criminal law as culpability, legality, and proportionality, and may not be justified either morally or politically in a liberal state. Those defending public welfare offenses usually justify them by the need to make the laws protecting

⁷ <http://www.foodsafetynews.com/2016/10/supreme-court-might-want-to-hear-decoaster-egg-sentence-case/#.WFDxAX0jzKA>

⁸ Blackstone, *"Commentaries on the laws of England"*. ("the law holds it better that ten guilty persons escape, than that one innocent party suffer"). *Sherras v De Rutzen* [1895] 1 QB 918, 922, Wright J ("There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence").

⁹ *Felton v. United States*, 96 U.S. 699, 703 (1877).

¹⁰ See Stuart Green, *Six Senses of Strict Liability in: Smester, Appraising Strict Liability*.

¹¹ *Morissette v. United States*, 342 U.S. 246, 254 (1952).

The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

¹² JOHN S. BAKER, JR., *THE FEDERALIST SOC'Y FOR L. & PUB. POL., MEASURING EXPLOSIVE GROWTH OF FED. CRIME LEGISLATION* (2004).

public health and safety effective and by the relatively low price paid by the defendants. Needless to say, I belong to the first group but, in this paper, I will try to argue both sides with the hope of asserting my belief that strict liability in criminal law is morally unjustifiable. To do that, I will try to confront the following three arguments:

- Penalties for public welfare offenses are punishment only by name, thus traditional justifications for punishment are not needed;
- Even if those penalties are punishment, punishing those who produce or threaten significant harm to others is not necessarily unjust; and
- Even if such punishment is not entirely just, it is consistent with other widely accepted criminal law doctrines.

1. PENALTIES FOR PUBLIC WELFARE OFFENSES ARE NOT PUNISHMENT.

Criminal punishment involves deliberate infliction of suffering or deprivation by the state on its subjects in response to their breaking the rules of criminal law. Since deliberate infliction of suffering or deprivation is *prima facie* bad and impermissible, it has generally been agreed that punishment requires moral as well as legal and political justification.

An appealing argument for the legitimacy of public welfare offenses is that people convicted of those are not *punished* in the traditional sense. The offenses are usually misdemeanors and sentences involve fines, restitution, and other civil-like penalties. In many respects, they are like traffic offenses which are often placed under the jurisdiction of criminal courts but are civil in nature. Therefore, traditional requirements and justifications of criminal law are not applicable to public welfare offenses.

In this spirit, A.P. Simester distinguishes between serious, “stigmatic crimes,” and non-stigmatic “quasi-criminal regulations.”¹³ The use of strict liability for stigmatic offenses is always unjustified if it leads to conviction of the blameless. “By labeling the defendant a ‘criminal,’ the conviction asserts publicly that she is a reprehensible wrongdoer.”¹⁴ This kind of condemnation is wrong with respect to a blameless person. However, not all offenses involve condemnation. Some prohibit acts that are not criminal in any real sense, but which in the public interest are prohibited under a penalty. From the formal perspective, such offenses belong to criminal law and are covered by the rules of criminal (not civil) procedure; yet, substantively, they are quasi-criminal. With respect to those offenses, Simester argues, strict liability may not be wrong because instrumental reasons (efficiency, accuracy, deterrence, etc.) overcome the moral and political costs of punishing a blameless person. The censure and stigma for quasi-criminal offenses are minimal and the deprivation is similar in kind and magnitude to the deprivation imposed by torts.

Simester is certainly right that the stigma and penalty associated with a capital felony are very different from those associated with a violation of a FDCA regulation. It would be a mistake, however, to suggest that some criminal convictions are free from stigma or entail only nominal deprivation. Quoting the Supreme Court of Canada, “The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to

¹³ A.P. Simester, Is Strict Liability Always Wrong? in: Appraising Strict Liability 21 (2005).

¹⁴ Simester at 23.

the process of the criminal law trial and, however one may downplay it, the opprobrium of conviction.”¹⁵ This is certainly true with respect to public welfare offenses. As the DeCosters’ case shows, even a misdemeanor conviction can entail considerable stigma (blame for poisoning masses of people) and deprivation (imprisonment).

Additionally, criminal record itself is a liability. Even when the imposed sentence is not particularly weighty, criminal conviction carries a host of collateral consequences, including an enhanced punishment in the event of a future offense, an impediment to employment, as well as possible loss of voting rights, public benefits, and immigration status.¹⁶

The attempt to downplay punishment for “quasi-criminal” offenses by analogizing it to torts damages is rather misguided too: torts law does not authorize punitive damages unless the defendant is subjectively at fault. It is quite amazing and abnormal that for the same act committed without fault the defendant may not be punished *civily* but may be punished *criminally*.

Perhaps only in one sense punishment of strict liability is not quite punishment: punishment is a *deserved* suffering or deprivation. If a person is wrongfully convicted and executed, can we say that he was “punished?” I think that would be morally insensitive: that person was wronged. In a similar fashion, a blameless person convicted and sentenced under a strict liability statute is not *punished* but *wronged*.

2. PUNISHMENT FOR CAUSING HARM WITHOUT FAULT IS NOT UNJUST.

a. Punishing an Innocent Is Morally Permissible.

Another line of defense for public welfare offenses may be an argument that punishing those who produce or threaten significant harm to others is not necessarily unjust. Causing harm, even innocently, is regrettable. If I accidentally stumble and fall upon a fellow subway rider crushing him and causing him pain, I should feel bad and apologize. If I do not do that and instead pretend that nothing happened, I would be acting wrongfully, and the injured subway rider would be justified in resenting me. Moreover, it would not be unjust for all other passengers on the train to look at me with disapproval. On a mini scale, their expectations and reaction are not much different from punishment. I produced a wrong (hurt my fellow passenger); therefore, I have become liable for it and I ought to provide proportionate compensation (apology) and suffer proportionate unpleasantness (guilt, dirty looks of the people on the train). I ought to suffer this unpleasantness even though I acted nonculpably and involuntarily. As B.A. Williams suggested, there is something special about the actor’s relation to the harm the actor caused, “something that cannot merely be eliminated by the consideration that it was not his fault.”¹⁷

Similarly, a person who burnt a neighbor’s barn to create a fire wall and shield a village from the spread of the fire should feel bad that he had to ruin his neighbor’s property despite the fact that

¹⁵ R. v. City of Sault Ste Marie, 85 D.L.R. 3d 161 (1978).

¹⁶ See Michael Pinard, Freedom in Decline: Reflections and Perspectives on Reentry and Collateral Consequences, 100 J. Crim.L.&Criminology 1213 (2010).

¹⁷ B.A. Williams, Moral Luck in: MORAL LUCK 28 (1981).

his actions were justified by necessity. In other words, harm has independent moral significance,¹⁸ and bringing about a harmful state of events—even by justified, nonculpable, unwilling or uncontrollable conduct—leaves a morally negative residue for which the actor is liable. This liability may be as little as an apology or as large as the actor’s life.

Take the case of an innocent aggressor who threatens the life of an innocent bystander. The aggressor may be innocent because his aggression is not voluntary (like my falling on a fellow subway rider) or because the actor has an affirmative defense of excuse (duress, insanity, or extreme minority),¹⁹ or, in rare instances, even justification.²⁰ If, as a result of this aggression, only one life can be spared, it is justifiable to kill the innocent aggressor but not the innocent bystander even though neither the bystander nor the aggressor is at fault in creating this dramatic choice. Furthermore, this killing is justifiable not merely from the bystander’s agent-relative perspective but from the agent-neutral perspective as well: a third party witnessing the attack would be justified in saving the life of the innocent bystander by killing the innocent aggressor but not *vice versa*.²¹

What happens in the case of the innocent aggressor is that harm trumps culpability: an innocent actor loses his equal moral standing with the rest of the world and becomes liable to suffer harm merely by virtue of threatening harm. This outcome raises a question: if an innocent person may incur liability, why may he not incur punishment? If it is just to *kill* an innocent aggressor, how is it not just to *punish* an innocent wrongdoer?

Punishment and self-defense share many common features.²² Both are permissible forms of intentional infliction of deprivation on a person. Both base that permission on a moral asymmetry between the aggressor and the defender (in the case of self-defense) and the offender and society (in the case of punishment). True, punishment also involves condemnation which self-defense may not necessarily entail but self-defense is not morally neutral either: it is justified. Justified conduct is that which “the law does not condemn, [and] even welcomes.”²³ It is “a good thing, or the right or sensible thing, or a permissible thing to do.”²⁴ Perhaps when we

¹⁸ MICHAEL MOORE, PLACING BLAME 191-247 (1997); Michael Moore, Victims and Retribution: A Reply to Professor Fletcher, 3 Buff. Crim. L. Rev. 65 (1999) (“it’s not culpability alone that counts in determining desert. . . . Rather, the amount of harm caused determines the seriousness of the wrong done, and the amount of wrong done does affect desert.”).

¹⁹ See, e.g., George Fletcher, “Proportionality and the Psychotic Aggressor,” 371.

²⁰ See Vera Bergelson, “Rights, Wrongs, and Comparative Justifications,” 101 (discussing conflicting justifications).

²¹ Vera Bergelson, Victims’ Rights and Victims’ Wrongs. But see Laurence A. Alexander, Justification and Innocent Aggressors, 33 Wayne L. Rev. 1177, 1187 (1987) (“We can sympathize with and excuse a person who uses deadly force to fend off innocent aggressors, but we cannot say that it is right for him to do so.”).

²² Among the scholars who draw parallels between punishment and self-defense are: Jeff McMahan, “Aggression and Punishment” in War: Essays in Political Philosophy, 67, 84 (2008); Victor Tadros, The Ends of Harm: The Moral Foundations of the Criminal Law (2011); Daniel M. Farrell, “The Justification of General Deterrence,” The Philosophical Review 94.3 (1985): 367-394; Warren Quinn, “The Right to Threaten and the Right to Punish”, Philosophy and Public Affairs 14.4 (1985): 327-373; John Gardner and François Tanguay-Renaud, Desert and Avoidability in Self-Defense, *Ethics* 111, 118-19 (2011).

²³ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 13 (1968).

²⁴ JOHN LANGSHAW AUSTIN, A PLEA FOR EXCUSES, IN FREEDOM AND RESPONSIBILITY 6 (Herbert Morris ed., 1961).

talk about killing an innocent aggressor, the praise and welcome are not appropriate but nevertheless that killing is justified as *a lesser evil*. It is morally preferable to save the life of the innocent bystander by killing the innocent aggressor than the other way around. Through no fault of his own, the innocent aggressor did something wrong and impermissible: threatened the life of another human being. And just like my fellow subway riders may look at me with disapproval when I accidentally stumble and fall on another passenger, so does society disapprove of the innocent aggressor's endangering the life of another person.

Finally, one might argue that it is permissible to kill even a non-aggressor in order to save numerous other lives. The Model Penal Code (the "MPC") certainly holds this view. In the commentary to the necessity provision, the drafters opine:

[R]ecognizing that the sanctity of life has a supreme place in the hierarchy of values, [nonetheless] conduct that results in taking life may promote the very value sought to be protected by the law of homicide. Suppose, for example, that the actor makes a breach in a dike, knowing that this will inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. The life of every individual must be taken in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act.²⁵

Michel Moore's more sophisticated and nuanced account is also based on numbers: according to him, it is morally permissible to harm a non-aggressor if the number of saved lives is very high. "To justify torturing one innocent person requires that there be horrendous consequences attached to not torturing that person—the destruction of an entire city, or, perhaps, of a life boat or building full of people."²⁶ Following the MPC and Moore's logic, one could argue that it is morally permissible to punish an innocent person if the consequences of not punishing him would be horrendous. In that sense, the DeCosters' punishment may be justified: because of the unsanitary conditions at their company, thousands of people fell ill. Assuming punishment has a deterrent effect, punishment of blameless RCOs is morally justified if it helps to prevent similar health disasters in the future.

These arguments present a serious challenge. However, I believe that there are important qualities uniquely pertinent to punishment, which make it morally impermissible to punish an innocent even when it is permissible to harm an innocent.

1. Punishment is a state sanction. The state in many ways is more limited than an individual in what it may do. Even if we allow that an individual may be justified in torturing a suspected terrorist in a ticking bomb scenario, such torture may not be an official course

²⁵ Model Penal Code and Commentaries, Comment to §3.02 at 14-15 (1985).

²⁶ MICHAEL MOORE, PLACING BLAME 721-22 (1997).

of action by a state authority.²⁷ On the other hand, the state may do many things that an individual may not—e.g., sentence to death and execute a convicted criminal long after he stops posing danger. In other words, the state’s and individual’s powers are entirely different in scope, origin, and moral foundation. The fact that an individual may sometimes be justified in harming an innocent tells us nothing about the permissibility of similar conduct by the state.

2. In a situation of self-defense, when, as between an aggressor and a target, only one life can be spared, killing the aggressor, even the innocent aggressor, is *necessary*. Punishing a wrongdoer is not *necessary* in any real sense; it is merely instrumental in achieving various consequentialist goals, such as general and specific deterrence, rehabilitation, incapacitation etc. Causing harm that is necessary to avoid a greater harm may be justifiable whereas causing harm that is merely instrumental is not. An innocent bystander would not be justified in killing an innocent aggressor if that killing was not necessary.
3. Self-defense is a form of self-help, justifiable, to a large degree, by the target’s inability to defer to the legal process and state institutions entrusted with the protection of individual rights. For better or for worse, the affirmative defense of self-defense relies on an emergency, hence the requirements of imminence of harm (the predominant view of American jurisdictions) or the immediate need to use force (the MPC). It is understandable—and justifiable—that a person may need to harm an innocent aggressor in a situation of emergency when the state is just not there to step in. Punishment is different. There is no immediate hurry to punish an offender. The state is right there, on the spot. With the 20/20 clear knowledge of the facts of the harmful incident, what could justify punishing the defendant who was innocent?
4. Neither the MPC’s inclusion of homicide in the defense of necessity nor Moore’s “threshold” version of necessity has been followed in any jurisdiction—at least not yet. In fact, the German Supreme Court has held unconstitutional a regulation that authorized the military to shoot down a plane used by terrorists as a weapon.²⁸ That decision has been criticized by some commentators. Without taking a side in that debate, I would like to distinguish the fact pattern discussed by the German Supreme Court, on the one hand, from the scenario presented by Moore (torturing the terrorist’s little daughter) and punishment of an innocent wrongdoer, on the other. I believe that, even if shooting down a hijacked plane is morally permissible, torturing an innocent or punishing an innocent is not.

²⁷ Public Committee Against Torture v. State of Israel, S. Ct of Israel, H.C. 5100/94 (Sept. 6, 1999). (“These prohibitions are ‘absolute.’ There are no exceptions to them and no room for balancing.”).

²⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] (2006). 115 Entscheidungen des Bundesverfassungsgerichts 118 (F.R.G.). http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html.; Bundesverfassungsgericht - Pressestelle - Press release no. 11/2006 (2006). Authorisation to shoot down aircraft in the Aviation Security Act void. <http://www.bundesverfassungsgericht.de/en/press/bvg06-011en.html>; BBC News (2006). German Court Rejects Hijack Law. <http://news.bbc.co.uk/2/hi/europe/4715878.stm>.

The doctrine of double effect (the “DDE”) helps to unpack this distinction. The doctrine holds it permissible to cause a morally grave harm as a *side effect* of pursuing a good end but not as a *means* of pursuing a good end.²⁹ All three scenarios—shooting down a plane; torturing an innocent, and punishing an innocent—involve morally grave harm; however, the outcomes under the DDE would not be the same. Shooting of the hijacked plane would most likely be allowed. Killing the innocent passengers here is not the means but a foreseeable, practically certain, side effect of an otherwise legitimate state action necessary to avoid a greater catastrophe. If the passengers could miraculously survive the shooting, the purpose of the shooting would not be destroyed.

Torturing an innocent is different. Here, the child’s suffering is not just a side effect but the means of obtaining the necessary information from her father. If the child had a rare medical condition that made her insensitive to pain, there would be no point in torturing her—the terrorist would not talk. Making the child suffer is necessary and thus morally impermissible.³⁰

Similarly, punishment *must* involve suffering or deprivation. If it does not, it fails to achieve its goal. Suffering or deprivation is not a side effect but the means (if not the goal) of punishment. Accordingly, causing the morally grave harm of punishing an innocent is as morally impermissible as causing the morally grave of torturing an innocent.

b. The Defendants Are Not Innocent.

Some courts and commentators have asserted that people convicted of public welfare offenses are not quite blameless. By engaging in business activities in a highly regulated industry these people cannot be said to totally lack the notice of potential liability.³¹ Moreover, those who occupy positions of authority in the industries that may present threat to public health effectively “assume the risk” of punishment if that threat materializes.³² This argument has been criticized by many on both moral and practical grounds,³³ so I will simply defer to those critiques and will not further discuss it here, particularly because I address parts of this argument in later sections of this paper.³⁴ Instead, I will focus on a more inventive suggestion according to which, at least

²⁹ Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/double-effect/>

³⁰ I am not arguing here that the state may never do what is morally impermissible; I am simply denying this act the status of being justified.

³¹ Darryl K. Brown, Public Welfare Offenses in: [], 862, 875. “Courts assert that even actors engaged in lawful endeavors are fairly punished when reasonable people in contemporary society would recognize the activity as likely to be a *regulated* one (e.g. food distribution, manufacturing, firearms possession), and the regulation addresses risks to others. By electing to engage regulated lawful activity, an actor has “changed his normative position.”

³² U.S. v. Park, 421 U.S. 658 (1975).

The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being or the public that supports them.

³³ See, e.g., 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 (1974); Martin Petrin, Circumscribing the Prosecutor’s Ticket to Tag the Elite - A Critique Of The Responsible Corporate Officer Doctrine, 84 Temp. L. Rev. 283 (2012).

³⁴ See *infra*, Sec. 3(b).

in some circumstances, strict liability is compatible with fault—actual fault—not constructive as in the “assumption of risk” argument above.

To make this case, Douglas Husak distinguishes between the formal and substantive conceptions of strict liability.³⁵ The former means that a defendant may be convicted without proof of *mens rea* with respect to one or more material elements. This conception is value-free; it simply relies on the language of the statute without further moral judgment.³⁶ In contrast, the substantive conception requires a normative test to determine whether a statute is or is not an instance of strict liability.³⁷ An offense is strict liability in this sense only if the defendant may be convicted despite lacking fault, where fault involves a “moral, extra-legal judgment about whether defendants deserve blame for engaging in the conduct proscribed by the statute.”³⁸ Building on the distinction between the two conceptions, Husak maintains that, unlike substantive strict liability, formal strict liability does not necessarily mean punishment without fault and thus is not always unjust.³⁹

The DeCosters’ case may serve as an illustration of Husak’s point. Notwithstanding the stipulations in the plea agreement, numerous facts indicated the defendants’ less than stellar behavior. The court believed that “the defendants had knowledge of the increased risk of [salmonella bacteria] in the processing plants, and did not minimize [salmonella bacteria] contamination in their plants, despite having knowledge of how to effectively deal with [salmonella bacteria] contamination.”⁴⁰ There was evidence that at least one of the two defendants had made misrepresentations regarding the company’s food safety and sanitation practices.⁴¹ Additionally, the defendants could be responsible for creating “a work environment where employees not only felt comfortable disregarding regulations and bribing USDA officials, but may have even felt pressure to do so.”⁴² In sum, even though the DeCosters were convicted under a strict liability statute, it could be asserted (and I take no view on the truth or falsity of this assertion) that, substantively, they were not free from fault. It was, therefore, not unjust to punish them without formal proof of culpability.

This argument has merit and is at its strongest when applied to the already determined facts of a particular case. As a guidance rule, however, Husak’s proposal seems less compelling. Were we to agree that sometimes formal strict liability is not unjust, how will this understanding help us prospectively? Should the laws be changed to provide for a “morality” defense in cases of strict liability or should we keep the existing laws but allow the jury to decide whether in each particular case the defendant was or was not morally at fault? Both options would entail serious problems with vagueness, notice, and consistency. What criteria would determine one’s moral standing and how serious should be one’s moral shortcomings to justify punishment for the conduct that is formally not culpable? Such criteria would be hard to define even retroactively; as for the prospective guidance, they are almost impossible to formalize.

³⁵ Douglas Husak, *Strict Liability, Justice, and Proportionality*, in: *Appraising Strict Liability*, 86-87.

³⁶ Husak 86-87.

³⁷ Husak 87.

³⁸ Husak, 88.

³⁹ Husak, 91.

⁴⁰ *US. v. QUALITY EGG, LLC*, Iowa Dist. Ct. opinion

⁴¹ *Id.*

⁴² *Id.*

Reliance on moral fault essentially brings back the widely disapproved of and largely abandoned “moral wrong” doctrine. Take *Regina v. Prince*, the paradigmatic application of that doctrine: the defendant was convicted of taking “an unmarried girl under 16 years of age out of the possession and against the will of her father.”⁴³ The jury found that the girl had lied to the defendant about her age and the defendant had honestly and reasonably believed her. Nevertheless, the defendant’s conviction was upheld because, generally speaking, it was morally wrong to take a young girl without her parents’ consent. The *Prince* decision is troublesome on many grounds, including that it “comes close to giving the jury a discretion to create new crimes.”⁴⁴ And yet, under Husak’s view, the *Prince* decision should stand: morally, if not legally, the defendant was not free from fault. This outcome appears unsatisfactory.

Meir Dan-Cohen has suggested a way to justify the *Prince* decision by proposing the acoustic separation doctrine according to which the law has different meanings when addressed to different audiences: one for the general public (conduct rule); another one for the courts (decision rule). The former says: don’t take young girls without their parents’ consent; the latter: don’t punish unless the girl happens to be under 16 years of age.⁴⁵ Dan-Cohen’s proposal stems from the belief that people learn their right and wrong not from penal codes but from their communities. As true as this belief may be, Dan-Cohen’s proposal can hardly be used prescriptively. Not only prosecution under the acoustic separation doctrine is likely to be both over- and under- inclusive but it is equally likely to jeopardize the principle of legality.

Who may be punished under the FDCA statute used in the DeCosters’ case? How should the law be interpreted? Apparently, the meaning addressed to the community would be: do not cut corners in operating your business—like do not take young girls without their parents’ consent. And the meaning addressed to courts would be: do not punish unless actual harm (sale of contaminated food) happens—like do not punish unless the girl is in fact a minor. So, what should happen when a RCO does not cut corners but the harm happens nevertheless? The answer is far from clear.

Husak’s theory is more definitive: if the defendant was morally at fault, punishing him would be permissible, particularly in the case of seriously harmful consequences, even though the defendant was not negligent.⁴⁶ The Quality Egg’s disaster resulted in serious, sometimes life-threatening, injuries to tens of thousands of people, so, if morally at fault, the DeCosters are good candidates for punishment. But how is their moral fault or lack thereof to be determined? Say,

⁴³ *Regina v. Prince*, L.R. 2 Cr. Cas. Res. 154 (1875) (“It seems to me impossible to say that where a person takes a girl out of her father’s possession, not knowing whether she is or is not under sixteen, that he is not guilty; and equally impossible when he believes, but erroneously, that she is old enough for him to do a wrong act with safety.”).

⁴⁴ Graham Hughe, *Criminal Responsibility*, 16 *Stan. L. Rev.* 470, 480 (1964). See also *Regina v. Prince* (J. Brett dissenting). (opining that , had the facts been as Prince believed them to be, “he would have done no act which has ever been a criminal offense in England”).

⁴⁵ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *Harv. L. Rev.* 625 (1984).

⁴⁶ Husak, 103 (“The case for criminal liability and punishment seems especially strong when the conduct leads to serious harms such as death—even though defendants are not negligent for the consequences they cause.”)

are they morally at fault if they tried but failed to detect a subordinate's mistake or misconduct? Consider the amicus brief in the DeCosters appeal:

There are approximately 300,000 regulations that can trigger criminal sanctions. These regulations are too often ambiguous or intricate. . . . The likelihood that an employee of a company in a highly-regulated industry unintentionally violates a law that he or she misunderstands is high.⁴⁷

According to Husak, even if the court decided that the DeCosters were not negligent (i.e., were reasonable in their personal dealings, leadership, and supervision), their punishment may be just. The concept of reasonable but immoral conduct strikes me as extremely vague and vulnerable to the fact finders' confusion, manipulation, and discrimination. The quality and scope of such conduct cannot be clearly defined and thus cannot be communicated to the public. I doubt that even the dramatic limitation on the scope of justifiable strict liability advocated by Husak is sufficient. The only proper solution is eliminating criminal strict liability altogether.

3. PUNISHMENT FOR PUBLIC WELFARE OFFENSES IS CONSISTENT WITH CRIMINAL LAW PHILOSOPHY.

(a) Punishment of the Innocent Is Part of the Criminal Justice System.

A defender of public welfare offenses could score a point by saying that, whatever we think about the fairness of punishing the blameless, these offenses are quite consistent with Anglo-American criminal law theory and practice. The very existence of punishment presumes that sometimes people who are punished are innocent. Defendants give false confessions⁴⁸ or enter guilty pleas to crimes they have not committed;⁴⁹ eyewitnesses make wrong identifications;⁵⁰ forensic evidence happens to be flawed or invalid.⁵¹ There is no clear data on how many innocent people have been wrongfully convicted. The Innocence Project, citing multiple studies, estimates that, in the United States, from two to five percent of prisoners are actually innocent.⁵² Even on the death row, four percent are likely to be innocent.⁵³ These are significant numbers, particularly considering the massive conviction and incarceration rates in the United States. Thus, an argument can be made that, since we as society knowingly authorize punishing the innocent, public welfare offenses are hardly an aberration.

To this, I would reply that there is a significant difference between reluctantly accepting a two to five percent risk that the defendant may be innocent and knowingly—with the 100 percent

⁴⁷ DeCoster Amicus Brief, at 3 (footnotes omitted)

⁴⁸ Almost 20 percent of exonerations in 2015 were for convictions based on false confessions. http://www.huffingtonpost.com/entry/exonerations-2015_us_56ac0374e4b00b033aaf3da9

⁴⁹ More than 40 percent of people exonerated in 2015 were convicted based on guilty pleas made by an innocent defendant. Id.

⁵⁰ The Innocence Project says eyewitness misidentification of a suspect plays a role in more than 70 percent of convictions that are later overturned through DNA evidence. Id.

⁵¹ According to the Innocence Project, improper forensic science is a leading cause of wrongful conviction. Id. http://www.huffingtonpost.com/entry/exonerations-2015_us_56ac0374e4b00b033aaf3da9

⁵³ Samuel R. Gross, Barbara O'Brien, Chen Hu and Edward H. Kennedy, Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death, available at <http://www.pnas.org/content/111/20/7230.full.pdf>

certainty—punishing a defendant despite any fault on his part. The former is problematic; the latter is unacceptable. The huge disparity in the *degree of accepted risks* determines the difference.

Another important difference is between *causing* and *allowing*.⁵⁴ If ten innocent people are to be shot and we can rescue nine out of ten, we are only *allowing* the shooting of the tenth. But if, in order to save the nine, we have to shoot the tenth, we are *causing* his death. The former example involves a positive duty not to allow killing of the innocent when we can prevent it; the latter—a negative duty not to kill innocent people.⁵⁵ Negative duties are much stricter than positive duties; thus, arguably, “consequential calculation could be used to justify violations of the latter but less easily be used to justify violations of the former.”⁵⁶ By conceding that two to five percent of the convicted defendants are in fact innocent, we *allow* such injustice to happen. But by convicting blameless defendants under the strict liability regime we *cause* the injustice.

The DDE produces the same result: punishing an innocent is a grave harm; it thus may be allowed only if it (i) serves a good purpose *and* (ii) is not the means but merely a side effect of bringing about that good. Arguably, a functioning criminal justice system and protection of public welfare are such goods. Thus, both wrongful convictions and convictions under strict liability statutes satisfy the first requirement of the DDE. However, wrongful convictions are only a side effect of a working criminal justice system; they are not necessary or even instrumental (in fact, quite the opposite) for its functioning; whereas conviction of the people whose fault has not been established is the very essence of strict liability. Accordingly, society’s reluctant acceptance of wrongful convictions in no way justifies criminal strict liability.

(b) Public Welfare Offenses and Other Strict Liability Doctrines.

Another argument in defense of public welfare offenses is that, even if they are not entirely just, they are at least consistent with other strict liability doctrines of American criminal law, such as moral wrong, lesser crime, felony murder, and statutory rape. Moreover, in their gravity and punishment, public welfare offenses are usually much less severe than offenses under these other doctrines. If we as society are comfortable with convicting a defendant of rape or murder without the proof of his culpability, defendants convicted of misdemeanor public welfare offenses are in a much weaker position to complain of injustice.

The answer to this may be twofold: one, the existence of bad laws does not justify the existence of other bad laws; and two, public welfare offenses are in an important way different from other strict liability doctrines.

As for the first part of the answer, all strict liability doctrines are highly controversial.⁵⁷ The moral wrong doctrine has been uniformly criticized and is barely alive as an independent basis

⁵⁴ PHILIPPA FOOT, VIRTUES AND VICES 26 (1981).

⁵⁵ Id. See also MICHAEL MOORE, PLACING BLAME at 689-690.

⁵⁶ MOORE, PLACING BLAME at 690.

⁵⁷ The MPC has advocated downgrading strict liability to the level of violation which is not a crime under the MPC. MPC, 2.05. This proposal has not gained much legislative support.

for conviction. The lesser crime doctrine is certainly widely adopted but it sees substantial competition from the legislative revisions enacted under the influence of the MPC. Pursuant to the MPC rule, the defendant's liability is measured by his culpability and not the actual consequences of his conduct.⁵⁸ A commentary to the MPC states: "The doctrine that when one intends a lesser crime he may be convicted of a graver offense committed inadvertently leads to anomalous results if it is generally applied in criminal law. . ."⁵⁹

Felony-murder has been abolished in England where it originated.⁶⁰ It has been declared unconstitutional in Canada.⁶¹ In the United States, it has been heavily criticized by judges, academics and practitioners alike, and abandoned by the MPC.⁶² The MPC drafters opined that it is "indefensible in principle to use the sanctions that the law employs to deal with murder unless there is at least a finding that the actor's conduct manifested an extreme indifference to the value of human life."⁶³ Similar arguments have been addressed to strict liability laws which punish consensual sex with a person below the age of consent. As one judge opined raising his voice against strict liability rape conviction,

Perhaps it is not enough that a person "looks" to be more than 14; perhaps there is a duty of reasonable inquiry besides. At some point, however, the belief becomes reasonable by any legitimate standard, so that one would say the defendant is acting in a way which is no different from the way our society would expect a reasonable, careful, and law-abiding citizen to act.

At that point, it seems to me, the imposition of criminal sanctions, particularly imprisonment, simply cannot be tolerated in a civilized society. . . .⁶⁴

In sum, all strict liability laws are highly morally problematic, and public welfare offenses share most of their problematic features. To quote a commentary to the MPC strict liability provision, "Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised."⁶⁵

In addition to these considerations, there are normative criteria that distinguish public welfare offenses from other strict liability doctrines. To the extent those criteria are morally significant, an argument can be made that, even if some strict liability laws be morally permissible, public welfare offenses are not among those.

1. *Passive Conduct. General Notice.* One of the most serious criticisms of strict liability deals with the lack of proper notice to the defendant and, thus, his inability to avoid

⁵⁸ MPC, 2.04(2).

⁵⁹ MPC, 2.04 commentary.

⁶⁰ Homicide Act of 1957, 5 & 6 Eliz. 2, ch. 11, §1.

⁶¹ R. v. Vaillancourt, [1987] S.C.R. 636 (holding that the felony-murder provisions of Criminal Code violate the Canadian Charter of Rights and Freedoms, in particular §7 requiring respect for "principles of fundamental justice" and §11(d) guaranteeing the presumption of innocence).

⁶² MPC, 210.2, commentary ("Principled argument in favor of the felony-murder doctrine is hard to find.").

⁶³ MPC, 210.2, commentary.

⁶⁴ People V. Olsen, 685 P.2d 52 (Cal. 1984).

⁶⁵ MPC, 2.05 commentary, 282-283.

committing the crime. However, felony-murder, statutory rape and offenses based on the lesser crime or moral wrong doctrines do not suffer from the lack of notice to the same extent as public welfare offenses because the defendants convicted of the offenses in the first group had been involved in the conduct which they knew might be violative of the community norms. In contrast, most public welfare offenses involve passive conduct. Passive conduct is morally neutral on its face and thus does not put the putative defendant on notice that he is doing something morally or legally wrong. A food manufacturer who is nonculpably unaware of a certain regulatory violation has no notice that his inaction is criminal.

2. *Specific Notice.* The offenses in the first group (felony-murder and such) often give the actor an idea as to *what* negative circumstances, unknown to him, may make his act a (more serious) crime—what to beware of and what to guard from. The location of a drug sale may turn out to be in close proximity to a school; the sexual partner may turn out to be under age; the victim of the robbery may suffer a deadly heart attack. It is not necessarily easy to take precautions against those risks but at least one has a chance to assume or reject them. A business owner or RCO realistically stands very little chance of identifying the risks of violating a specific public welfare statute or regulation and guarding against those risks.
3. *Vicarious Liability.* Vicarious strict liability of the *Park* doctrine type is particularly unjust. Under this doctrine, a RCO is supposed to guard against the risks of other people's criminal conduct. Normally, criminal law does not require people to anticipate intentional wrongdoing by others. Defendants convicted of offenses in the first group (felony-murder and such) are usually responsible only for their own wrongdoings and wrongdoings of their associates.⁶⁶ Punishment of a RCO based on vicarious liability "is a substantial departure from the ordinary rule that a principal is not answerable criminally for the acts of his agent without the principal's authorization, consent or knowledge."⁶⁷
4. *Productive Activity.* Felony-murder and other offenses in the first group address wrongdoers and threaten them with (additional) sanctions to incentivize them to abandon their initial criminal plan. Public welfare offenses address people who are involved in a productive activity which the law intends to encourage, not discourage.⁶⁸ "Unless we regard business activity as similarly inherently wrongful, holding business managers up to strict liability is unjustifiable even though they have voluntarily assumed their positions of employment."⁶⁹

(c) Public Welfare Offenses and Negligence.

⁶⁶ Certainly, under the "natural and probable consequences" doctrine of causation, responsibility for acts of others can be much more expansive but that doctrine is another example of strict liability; not surprisingly, it possesses similar flaws. In addition, under the felony-murder rule, in some jurisdictions, defendants may be responsible for justified responsible killing committed by the victim, bystander or police. I am not addressing those here because they are not "wrongdoings."

⁶⁷ 1 LaFave & Scott, *Substantive Criminal Law* (1986) 364, Section 3.10(b).

⁶⁸ Phillip Johnson, *Strict Liability: The Prevalent View*, in *Encyclopedia of Crime and Justice* 1518, 1520-1521 (1983)

⁶⁹ *Id.*

Finally, an argument can be made that punishment of blameless wrongdoing is no more problematic than punishment of negligent wrongdoing. In both instances, the actor is not subjectively at fault and “could not have helped” committing the crime.⁷⁰ Both actors may be free from a moral defect. Quoting Larry Alexander and Kimberly Ferzan,

An injunction to notice, remember, and be fully informed about anything that bears on risks to others is an injunction no human being can comply with, so violating this injunction reflects no moral defect. Even those most concerned with the well-being of others will violate this injunction constantly.⁷¹

Arguably, negligent crimes are even more problematic than public welfare strict liability. Avoiding committing a public welfare strict liability offense is more plausible than avoiding committing a negligent offense. If a person is determined not to become a criminal, he may decide to stay away from certain activities involving public welfare, such as selling food or medications or running a meat plant. In contrast, one stands no chance of staying away from all the activities that may result in a negligent accident.

I have serious reservations about criminalizing negligence. However, punishment of negligent conduct is less disturbing than punishment of the conduct that is blameless. Negligent offenses at least contain a promise of non-punishment to those who act reasonably. What would change if public welfare offenses require the proof of negligence? The regulatory agencies or industries would likely develop standards of reasonable practices and the RCOs who want to avoid criminal liability would do their best to adhere to those.

Those practices may be quite demanding but at least they would not rely on pure luck—or rather lack thereof—like strict liability offenses. Consider certain non-binding criteria published by the FDA for authorizing *Park* doctrine prosecutions.⁷² Among those are such that clearly hint at the defendants’ fault: the seriousness of the violation; its wide spread; the obvious or repetitive character of the violation; the pattern of illegal conduct etc. Those criteria, however, are non-

⁷⁰ H.L.A. Hart, *Punishment and Responsibility* 153-154 (1968).

It may well be that, even if the “standard of care” is pitched very low so that individuals are held liable only if they fail to take very elementary precautions against harm, there will still be some unfortunate individuals who, through lack of intelligence, powers of concentration or memory, or through clumsiness, could not attain even this low standard.

⁷¹ LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY* 71 (2009)

⁷² Those criteria are:

- (1) whether the violation involves actual or potential harm to the public;
- (2) whether the violation is obvious;
- (3) whether the violation reflects a pattern of illegal behavior and/or failure to heed prior warnings;
- (4) whether the violation is widespread;
- (5) whether the violation is serious;
- (6) the quality of the legal and factual support for the proposed prosecution; and
- (7) whether the proposed prosecution is a prudent use of agency resources.

FDA, *Inspections, Compliance, Enforcement, and Criminal Investigations: Special Procedures and Considerations for Park Doctrine Prosecutions* § 6-5-3, *available at* <http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176738.htm>.

binding, and the prosecutor has full discretion to prosecute a corporate defendant without any evidence of the defendant's personal involvement in any wrongdoing. Had the law required the prosecutor to prove at least negligence, the FDA criteria would remain equally relevant, and the negligent RCOs responsible for the violations would be punished, but the serious injustice of punishing a faultless person would be avoided.

Conclusion

In this paper, I tried to confirm my belief that strict liability public welfare offenses are unjust. They are unjust because the blameless do not deserve punishment, and desert is at least a necessary condition of just punishment. The probable responses to this claim could be: (i) this is not punishment; (ii) punishing the blameless may be permissible, plus the convicted are not entirely blameless; and (iii) we do it all the time, so public welfare offenses are an integral part of the existing criminal law.

I hope that I have shown that all those responses are wrong. The first and third ones are easier to refute. Criminal conviction is punishment, however we turn it. There are stigma and other quite measurable consequences of criminal conviction that should not be imposed on a blameless person. The fact that other strict liability offenses are also unjust does not make the strict liability public welfare offenses any more justifiable. Besides, public welfare offenses are different in significant ways from other strict liability crimes; accordingly, they should be treated differently. The second response is more complicated. I agree that, morally speaking, some of the defendants convicted under public welfare statutes deserve punishment. But some do not. For the fear of punishing the blameless, we need a rule that would distinguish the blameworthy from the blameless.

I think the MPC approach should be the basis for a reform of public welfare offenses' adjudication. Pursuant to this reform, violation of a public welfare statute would allow prosecution on two theories—(i) strict liability and (ii) negligence (or higher culpability). The first theory would support conviction of no more than violation, which is not a crime. The second would support a criminal conviction. If this rule be superimposed on the existing state and federal public welfare legislation, the existing laws could remain intact and the unfairness of strict liability public welfare offenses would be largely eliminated.

Let me finish with the same case I started this paper. Whatever we think about the DeCosters, their punishment is inadequate—it is either too lenient or too harsh. If they were negligent or reckless in causing the salmonella outbreak, they deserve a more serious sentence than the one they received. But, if they were not at fault, they should not be criminally punished at all. We need a reform that would achieve that result.