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Legal Memorandum
Executive Summary

No. 7 June 25, 2003

THE OVER-CRIMINALIZATION OF SOCIAL AND ECONOMIC CONDUCT

PAUL ROSENZWEIG

The origin of modern criminal law can be traced to early feudal times. From its inception, the criminal law expressed both a moral and a practical judgment about the societal consequences of certain activity: to be a crime, the law required that an individual must both cause (or attempt to cause) a wrongful injury and do so with some form of malicious intent. Classically, lawyers capture this insight in two principles: in order to be a crime there must be both an *actus reus* (a bad act) and a culpable *mens rea* (a guilty mind). At its roots, the criminal law did not punish merely bad thoughts (intentions to act without any evil deed) or acts that achieved unwittingly wrongful ends but without the intent to do so. The former were for resolution by ecclesiastical authorities and the latter were for amelioration in the tort system. In America today, this classical understanding of criminal law no longer holds.

The requirement of an actual act of some form is fundamental. As an initial premise, Anglo-American criminal law does not punish thought. For a crime to have been committed there must, typically, be *some* act done in furtherance of the criminal purpose. The law has now gone far from that model of liability for an act and, in effect, begun to impose criminal liability for the acts of another based upon failures of supervision that are far different from the common law's historical understanding.

Similarly, the law historically has required that before an individual is deemed a criminal he must have acted with an intent to do wrong. Accidents and mistakes are not considered crimes. Yet contemporary criminal law punishes acts of negligence and even acts which are accidental. In the regulatory context, as Justice Potter Stewart has noted, there is, in effect, a standard of near-absolute liability.

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Expanded Reach of Criminal Law. To these fundamental changes in the nature of criminal liability one must also add significant changes in the subject matter of criminal law. At its inception, criminal law was directed at conduct that society recognized as inherently wrongful and, in some sense, immoral. These acts were wrongs in and of themselves (*malum in se*), such as murder, rape, and robbery. In recent times the reach of the criminal law has been expanded so that it now addresses conduct that is wrongful not because of its intrinsic nature but because it is a prohibited wrong (*malum prohibitum*)—that is, a wrong created by a legislative body to serve some

perceived public good. These essentially regulatory crimes have come to be known as "public welfare" offenses.

Thus, today the criminal law has strayed far from its historical roots. Many statutes punish those whose acts are wrongful only by virtue of legislative determination. The distortion of the classical criminal law has arisen for a variety of reasons (some of which may have been accompanied by benign motives). For example, the Enron scandal and similar acts of intentional corporate fraud have led to overly broad reform proposals that may trap honest but unsophisticated corporate managers. But whatever the cause, the distortion is not without its consequences. The landscape of criminal law today is vastly different from what it was 100 years ago—so much so as to be almost unrecognizable.

Lack of Judicial Constraint. Because the courts have deliberately chosen a limited, almost self-abnegating role in constraining the use of criminal sanctions, no effective judicial constraint currently limits the extent to which individual conduct that bears no direct causal relationship to a societal harm may be criminalized. Nor is there a limit on the extent to which, in the social and economic context, the legislatures may dispense with the traditional conceptions of *mens rea*. The consequences of this are two-fold: a pathological legislative approach to criminal law and an excess of prosecutorial discretion.

The legislative impetus is clear—there is a "market" of public approval for more criminal laws and no effective consideration of countervailing costs to society. And in the absence of any judicial check on this legislative trend, the result is a wholesale transfer of power from elected legislative officials to prosecutors who, in many instances, are unelected and not responsible to the public. Where once the law had strict limits on the capacity of the government to criminalize conduct, those limits have now evaporated. Society has come, instead to rely on the conscience and circumspection in prosecuting officers. Or, as the Supreme Court said in *United States v. Dotterweich*, Americans are obliged to rely only on "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries" to determine criminal conduct. In effect, the legislative branch has transferred a substantial fraction of its authority to regulate American social and economic conduct to those who have no expertise in the matter: prosecutors, trial judges, and jurors who make decisions on criminalizing conduct without any ability to consider the broader societal impacts of their decisions.

Where once, to be a criminal, an individual had to do an act (or attempt to do an act) with willful intent to violate the law or with knowledge of the wrongful nature of his conduct, today it is possible to be found criminally liable and imprisoned for a substantial term of years for the failure to do an act required by law, without any actual knowledge of the law's obligations and with no wrongful intent whatsoever. These developments are advanced in the name of the "public welfare"—an express invocation of broader social needs at the expense of individual liberty and responsibility. It is, ultimately, the triumph of a Benthamite utilitarian conception of the criminal law over the morally grounded understanding of criminal law advanced by William Blackstone. One may, and indeed one should, doubt the wisdom of such a course. Given how the criminal law has developed, a free people are constrained to ask the question: Are broader social needs well served when individual liberty and responsibility suffer?

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Edward Hanousek[1] was employed as roadmaster by the White Pass & Yukon Railroad, whose railway runs between Skagway, Alaska, and Whitehorse, Yukon Territory, Canada. As roadmaster, Hanousek was responsible under his contract for "the safe and efficient maintenance and construction of track, structures and marine facilities of the entire railroad."

One of the projects under Hanousek's supervision was a rock-quarrying project at a site alongside the railroad. The project involved blasting rock outcroppings, working the fractured rock toward railroad cars, and loading the rock onto railroad cars with a backhoe. Hanousek's company hired Hunz & Hunz, a contracting company, to provide the equipment and labor for the project.

At the site, a high-pressure petroleum pipeline ran parallel to the railroad within a few feet of the tracks. To protect the pipeline during the project, a work platform of sand and gravel was constructed on which the backhoe operated to load rocks over the pipeline and into railroad cars. The location of the work platform changed as the work progressed along the railroad tracks. In addition, when work initially began in April 1994, Hunz & Hunz covered an approximately 300-foot section of the pipeline with railroad ties, sand, and ballast material for protection. After Hanousek took over responsibility for the project in May 1994, he concluded that no further sections of the pipeline along the 1,000-foot work site would be protected, with the exception of the movable backhoe work platform.

On the evening of October 1, 1994, while Hanousek was off-duty away from the site, Shane Thoe, a Hunz & Hunz backhoe operator, used the backhoe on the work platform to load a train with rocks. After the train departed, Thoe noticed that some fallen rocks had caught the plow of the train as it departed and were located just off the tracks in the vicinity of the unprotected pipeline. Thoe moved the backhoe off the work platform and drove it down

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1. The facts of this case are taken from *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).

alongside the tracks between 50 to 100 yards from the work platform. While using the backhoe bucket to sweep the rocks from the tracks, Thoe struck the pipeline causing a rupture. The pipeline was carrying heating oil, and an estimated 1,000 to 5,000 gallons of oil were discharged over the course of many days into the adjacent Skagway River.

Hanousek (not Thoe) was charged with two federal crimes: negligently discharging a pollutant into a waterway of the United States (a misdemeanor offense punishable by up to 1 year in prison) and making false statements for allegedly lying to the Coast Guardsmen investigating the incident. His superior, M. Paul Taylor, was charged with the same negligent discharge offense and with conspiracy to make false statements for his part in Hanousek's alleged cover-up. The government's theory was not that either Hanousek or Taylor had directly caused the accident, but that their negligence in failing to supervise Thoe had contributed to the accident because they had failed to exercise the care required of a reasonable supervisor in that position of authority. At trial, Taylor was acquitted of both charges and Hanousek was acquitted of the more serious felony false statement charge. Hanousek was, however, convicted of the charge of negligence for his failure to appropriately supervise the construction project and sentenced to 6 months imprisonment. His conviction was subsequently affirmed on appeal.[2]

Regulatory Crimes in America Today. The law under which Hanousek was prosecuted is far from unique. Congress has exercised precious little self-restraint in expanding the reach of federal criminal laws to new regulatory areas.

Estimates of the current size of the body of federal criminal law vary. It has been reported that the Congressional Research Service cannot even count the current number of federal crimes.[3] The American Bar Association reported in 1998 that there were in excess of 3,300 separate criminal offenses.[4] More than 40 percent of these laws have been enacted in just the past 30 years, as part of the growth of the regulatory state.[5] And these laws are scattered in over 50 titles of the United States Code, encompassing roughly 27,000 pages.[6] Worse yet, the statutory code sections often incorporate, by reference, the provisions and sanctions of administrative regulations promulgated by various regulatory agencies under congressional authorization. Estimates of how many such regulations exist are even less well settled, but the ABA thinks there are "[n]early 10,000."[7] The appetite for more federal criminal laws is driven principally by political consideration,[8] and not by any consideration of whether particular laws are intrinsically federal in nature.[9] The growth of "public welfare"

2. Some commentators have suggested that Hanousek's case is not an egregious one—that the heart of the case was the post-spill charges of concealment, which explain why the government viewed his conduct as criminal. *See* Steve Solow & Ronald Sarachan, "Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of *Hanousek* and *Hong*," 32 Env. L. Reptr. 11153, 11159 (Oct. 2002). The authors buttress their argument with a statistical analysis suggesting that negligence convictions under the Clean Water Act either accompany more serious felony convictions, *id.* at 11157, or are the product of negotiated dispositions by plea, *id.* at 11158. This contention is no doubt an accurate description, but it begs the normative question. Perhaps Hanousek's conviction was a compromise verdict—but should the compromise position have been available in the first instance?
3. Paul Rosenzweig, "Civil Sanctions and the Labor-Management Reporting and Disclosure Act," United States House of Representatives, Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations, June 27, 2002 (at *http://edworkforce.house.gov/hearings/107th/eer/lmrdatwo62702/rosenzweig.htm*).
4. American Bar Association , "*The Federalization of Criminal Law*" (Washington, DC; ABA, 1998), Appendix C; *see also* Ronald L. Gainer, "Federal Criminal Code Reform: Past and Future," 2 Buff. Crim. L. Rev. 46, 53 (1998).
5. *Federalization of Criminal Law* at 9 & 11 (Chart 2).
6. Gainer, *Federal Criminal Code*, at 53.
7. *Federalization of Criminal Law* at 10.
8. James D. Calder, *The Origin and Development of Federal Crime Control Policy,* (1983), pp. 20–24, 198–203 (describing events leading to enactment of criminal laws in the 1920s and early 1930s); Kathleen F. Brickey, "The Commerce Clause and Federalized Crime: A Tale of Two Thieves," 543 Annals Am. Acad. Pol. & Soc. Sci. 27, 30 (1996) (recounting events leading to passage of federal carjacking legislation).

offenses will, therefore, be restrained (if at all) only by a public or a court system educated as to the need for restraint.

Nor is the growth in the number of federal criminal statutes merely an academic question, without real world effects. To the contrary, between March 2001 and March 2002 (the latest year for which data are available), federal prosecutors commenced 62,957 cases, involving 83,809 individual defendants.[10] More than 3,100 of these defendants were charged with crimes categorized as violations of "federal statutes"—a category broadly (though not precisely) congruent with charges reflecting violations of a regulatory program.[11] This number exceeds the number of federal prosecutions during the same year for a host of common law offense categories, including murder, robbery, embezzlement, forgery, and sex offenses. Put another way, more federal prosecutorial resources are invested in regulatory prosecutions than in the prosecution of forgery charges.[12]

The Changing Face of Criminal Law. The origin of modern criminal law can be traced to early feudal times. From its inception, the criminal law expressed both a moral and a practical judgment about the societal consequences of certain activity: to be a crime, the law required that an individual must both cause (or attempt to cause) a wrongful injury and do so with some form of malicious intent. Classically, lawyers capture this insight in two principles: in order to be a crime there must be both an *actus reus* (a bad act) and a culpable *mens rea* (a guilty mind). At its roots, the criminal law did not punish merely bad thoughts (intentions to act without any evil deed) or acts that achieved unwittingly wrongful ends but without the intent to do so. The former were for resolution by ecclesiastical authorities and the latter were for amelioration in the tort system. As *Hanousek* demonstrates, this classical understanding of criminal law no longer holds.

To these fundamental changes in the nature of criminal liability one must also add significant changes in the subject matter of criminal law. At its inception, criminal law was directed at conduct that society recognized as inherently wrongful and, in some sense, immoral. These acts were wrongs in and of themselves (*malum in se*), such as murder, rape, and robbery. In recent times the reach of the criminal law has been expanded so that it now addresses conduct that is wrongful not because of its intrinsic nature but because it is a prohibited wrong (*malum prohibitum*) — that is, a wrong created by a legislative body to serve some perceived public good. These essentially regulatory crimes have come to be known as "public welfare" offenses.

Thus, today the criminal law has strayed far from its historical roots. Where once the criminal law was an exclusively moral undertaking, it now has expanded to the point that it is principally utilitarian in nature. In some instances the law now makes criminal the failure to act in conformance with some imposed legal duty. In others the law criminalizes conduct undertaken without any culpable intent. And many statutes punish those whose acts are wrongful only by virtue of legislative determination. The distortion of the classical criminal law has arisen for a variety of reasons (some of which may have been accompanied by benign motives). Some have argued that the growth in the use of criminal sanctions is a response to the increasing industrialization of American economic activity and the difficulty of capturing within the construct of criminal law the "wrongs" done to society arising from that activity. For example, the Enron scandal and similar acts of intentional corporate fraud have led to overly broad reform proposals that may trap honest but unsophisticated corporate managers.[13] Others argue that public choice theories provide a better explanation. But whatever the cause, the distortion

9. Franklin E. Zimiring & Gordon Hawkins, "Toward a Principled Basis for Federal Criminal Legislation," 543 Annals Am. Acad. Pol. & Soc. Sci. 15, 20–21 (1996).

10. Administrative Office of United States Courts, "Federal Judicial Caseload Statistics," Table D-2, at *http://www.uscourts.gov/caseload2002/contents.html* (accessed April 3, 2003).

11. *Id.*

12. *Id.* All categories pale, however, in comparison to the principal area of federal effort—the prosecution of drug offenses, which resulted in more than 32,000 individuals being charged in 2002. *Id.*

is not without its consequences. The landscape of criminal law today is vastly different from what it was 100 years ago—so much so as to be almost unrecognizable.

The result in *Hanousek* thus captures three troubling trends in criminal law. It involves crimes within a regulated industry that would not, under any historical understanding, be perceived as inherently morally wrong; it involves the criminalization of simple negligence (that is, of acts commonly thought to be more appropriately addressed through the civil tort system); and it involves conviction of a manager for what is, in essence, his failure to manage the conduct of a subordinate. These changes are especially significant given the gravity of the nature of criminal liability. Not only does the imposition of such liability give rise to public condemnation and fines, but it can, of course, also result in an individual's loss of personal liberty. Historically, this most severe of societal sanctions has been reserved for conduct most deserving of condemnation—a limitation that has, in the past 100 years, been significantly eroded.

This paper is an effort to outline the scope and nature of this historical change. Only by understanding the source of these trends can these doctrinal developments be fairly judged.

THE *ACTUS REUS* AND MANAGERIAL LIABILITY[14]

The Historical Meaning of Actus Reus. The concept of individual responsibility lies at the heart of the criminal law. "It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal."[15] Traditionally, the law punishes individuals because they are responsible for certain criminal acts they have personally committed or they are liable for the criminal acts of others with whom they have consciously associated themselves when those others engaged in criminal conduct. Thus, the requirement of an *actus reus* links two concepts: the necessity for an act and the necessity for a relationship between the criminal act and the individual who is held criminally culpable for the act's performance.

The requirement of an actual *act* of some form is fundamental. As an initial premise, Anglo-American criminal law does not punish thought. For a crime to have been committed there must, typically, be *some* act done in furtherance of the criminal purpose. As Blackstone said in discussing whether it would be a crime to imagine the death of the King: "[A]s this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open or *overt* act."[16]

This is not to say that the criminal law requires that an act be completed before a crime is committed; the King does not have to die for treason to occur. An attempt to commit a felony or a misdemeanor is itself a crime.[17] But ultimately, the common law has required that some act bearing a causal link to the crime or the attempted crime occur.

More significantly, the law generally requires an association between the criminal *actus reus* and the individual or individuals who have committed the acts. Those who do not act are not guilty of a crime. Put another way, mere acquiescence in the criminal conduct of another is not enough to impose criminal liability on an individual for the acts of a third party.[18] The simplest case, of course, is when the defendant personally engages

13. See Paul Rosenzweig, "Sentencing of Corporate Fraud and White Collar Crimes," United States Sentencing Commission (March 25, 2003) (available at *http://www.ussc.gov/hearings/3_25_03/rosensweig_test.pdf*) (accessed April 15, 2003).

14. A modified version of this discussion of the *actus reus* doctrine will appear in Rosenzweig, "Punishing Responsible Corporate Officers," Federal Sentencing Reporter (forthcoming). That article discusses the need for the Federal Sentencing Guidelines to be revised to incorporate an understanding of managerial liability for failures to supervise.

15. *United States v. Dotterweich*, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting).

16. 4 Blackstone, Commentaries on the Laws of England, 78-79 (1769) (emphasis in original); *see also e.g. State v. Rider*, 90 Mo. 54, 1 S.W. 825 (1886) ("The mere intent to commit a crime is not a crime. An attempt to perpetrate it is necessary to constitute guilt in law.").

17. *E.g. Rex. v. Scofield*, Cald 397 (1784); *Rex v. Higgins*, 2 East 5 (1801). For a more contemporary statement of this truism *see Gray v. State*, 43 Md. App. 238, 403 A.2d 853 (1979).

in a voluntary act of some sort that is causally linked to a crime. In that situation the requirement of a connection between the act and the actor is easily satisfied.[19]

Liability for the Acts of Another. The law has also long recognized the potential for criminal liability for the acts of others. Most typically this arises because an individual has in some way directly aided and abetted the commission of the crime.[20] Thus, if one drives the getaway car for the bank robbery, one is equally guilty of the theft even though the confederate committed the actual robbery. So, too, one may cause a crime to occur through the acts of an innocent agent who is unaware of the criminality of the conduct.[21] And, one may be guilty of joining in a conspiracy to commit a crime, so long as one of the participants in the conspiracy does an act in furtherance of the conspiracy.[22]

But these broad rules of liability for the acts of another traditionally have had limits. Those limits are illustrated well by an early English case, *Rex v. Huggins*.[23] The warden of a prison and his deputy were charged with the murder of a prisoner for keeping him in an "unwholesome place." On appeal the deputy's conviction was affirmed, for it was the deputy who had taken up the victim, Arne, and imprisoned him. But the justices of the King's Bench were unanimously of the opinion the warden could not be held criminally liable for his deputy's actions. As Lord Chief Justice Raymond wrote:

> So that if an act be done by an under-officer, unless it is done by the command or direction, or with the consent of the principal, the principal is not criminally punishable for it. In this case the fact was done by Barnes [the deputy]; and it no where appears in the special verdict that [the warden, Huggins] ever commanded, or directed, or consented to this duress of imprisonment, which was the cause of Arne's death. 1. No command or direction is found. And 2. It is not found that Huggins knew of it.[24]

Liability for "Negative Acts." The final piece of the historical puzzle lies in the concept of criminal liability for "negative acts," that is, criminal liability for the failure to act. Such liability has historically been rare, for the general rule is that "[s]tarting with a human act, we must next find a causal relation between the act and the harmful result; for in our law—and it is believed in any civilized law—liability cannot be imputed to a man unless it is in some degree a result of his act."[25]

Nonetheless, the common law has recognized that in certain limited circumstances one may be held criminally liable without having done an affirmative act, precisely because the failure may be said to be a cause of the resulting harm. Historically, the hallmark of such liability is the existence of some legal duty on the part of the defendant to act. That duty has, typically, arisen through the common law, based upon some special legal relationship between the criminal defendant and the

18. *E.g. Gebardi v. United States*, 287 U.S. 112 (1932) (acquiescence of woman traveling interstate insufficient to sustain Mann Act conviction); *State v. Kimbrell*, 294 S.C. 51, 362 S.E.2d 630 (1987) (mere presence at criminal act insufficient to sustain conviction).

19. *See* American Law Institute, Model Penal Code § 2.01 (1985). Thus involuntary acts (e.g. reflex, convulsion, movement while asleep or under hypnosis) are not considered an adequate basis for criminal liability. *Id.* § 2.01(2).

20. *E.g.* 18 U.S.C. § 2(a).

21. *E.g.* 18 U.S.C. § 2(b); *Parnell v.* State, 323 Ark. 34, 912 S.W.2d 422 (1996).

22. *E.g. State v. Hanks*, 39 Conn. App. 333, 665 A.2d 102 (1995). The necessity of at least one act in furtherance of the conspiracy serves to differentiate the criminal conspiracy from mere thought. *E.g. People v. Swain*, 12 Cal.4th 593, 909 P.2d 994 (1996). Once an individual joins a conspiracy, he is criminally liable for all the reasonably foreseeable consequences of acts done in furtherance of the conspiracy. *E.g. Pinkerton v. United States*, 328 U.S. 640 (1946).

23. 2 Ld. Raym. 1574, 92 Eng. Rep. 518 (1730).

24. *Id.*

25. Joseph Beale, "The Proximate Consequences of An Act," 33 Harv. L. Rev. 633, 637 (1920).

activity in question. Thus, for example, parents may be held liable for failing to provide care or support for their children.[26] Similarly, a master of a vessel might be criminally liable for his failure to maintain a safe ship when that failure is the cause of the drowning of his passengers.[27] But criminal responsibility only arises where the defendant is in fact capable of performing the act he is called upon to perform,[28] and where the legal duty to act exists.[29] It does not, for example, extend to impose criminal liability on a spouse for failing to summon medical aid for his competent adult spouse who has consciously chosen not to seek medical assistance.[30]

Contemporary Concepts of Managerial Liability. In the past 50 years, American law has drifted far from this traditional concept of criminal liability where a legal duty to act arises from the special nature of a relationship between the defendant and the victim of the crime (or the harm caused by the crime).[31] Social and legal obligations have come to be imposed by statute rather than through the common law. Early instances of this phenomenon continued to require some close relationship between the harm caused and the actor upon whom the duty was imposed. For example, the owners of cars were criminally liable for accidents caused while others were driving but only, apparently, if they were present in the car at the time of the accident.[32]

The law has now gone far from that model of liability for the failure to act and, in effect, begun to impose criminal liability for the acts of another based upon failures of supervision that are far different from the common law's doctrine of liability for negative acts. The trend was begun by the Supreme Court in 1943, in *United States v. Dotterweich*.[33] There the Court addressed a provision of the Food and Drug Act making it a crime to introduce into commerce an adulterated or misbranded drug (that is, one not suitable for consumption or mislabeled). Dotterweich was the president of a pharmaceutical company that had, indisputably, transported certain adulterated drugs in interstate commerce. But it was equally clear that there was "no evidence . . .of any personal guilt" on the part of Dotterweich; there was no proof that "he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction."[34]

Nonetheless, by a 5–4 vote, the Supreme Court determined that Dotterweich could be held liable for his "responsible share in the furtherance of the transaction which the statute outlaws."[35] The Court reasoned that since the purpose of the legislation "touches phases of the lives and health of

26. *E.g Commonwealth v. Hall*, 322 Mass. 523, 78 N.E.2d 644 (1948) (mother left child in attic); *State v. Fabritz*, 276 Md. 416, 348 A.2d 275 (1975) (failure to summon medical treatment). In most instances this common law duty has now been codified in statute.

27. *United States v. Schaick*, 134 F. 592 (2d Cir. 1904).

28. *Compare Commonwealth v. Teixera*, 396 Mass. 746, 488 N.E.2d 775 (1986) (no liability for failure to support absent financial ability to pay) *with Rex v. Russell*, [1933] Vict.L.R. 59 (Victoria 1932) (parent liable for failing to prevent drowning of children by wife).

29. *See Jones v. United States*, 308 F.2d 308 (1962) (no criminal liability without finding of a legal duty of care); *cf. Barber v. Superior Court*, 147 Cal.App.3d 1006, 195 Cal.Rptr. 484 (1983) (no criminal liability for doctor to remove life support at request of wife and children).

30. *People v. Robbins*, 83 A.D.2d 271, 443 N.Y.S.2d 1016 (1981); *see also Commonwealth v. Konz*, 450 A.2d 638 (Pa. 1982) (husband forgoes insulin, wife has no duty).

31. *See* Model Penal Code § 2.01(3) (1962) ("Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law.").

32. *See e.g. Commonwealth v. Putch*, 18 Pa. D&C 680 (Cty. Ct. 1932) (owner liable for acts of "his driver"); *Moreland v. State*, 164 Ga. 467, 139 S.E. 77 (1927) (owner liable for act of chauffer).

33. 320 U.S. 277 (1943).

34. *Id.* at 285-86 (Murphy, J. dissenting).

35. *Id.* at 284.

people which, in the circumstances of modern industrialism are largely beyond self-production"[36] Congress could reasonably have determined to "penalize[] the transaction though consciousness of wrongdoing be totally wanting" because it "preferred to place [the hardship] 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."[37] As a consequence, guilt was "imputed to [Dotterweich] solely on the basis of his authority and responsibility as president and general manager of the corporation."[38]

The prosecution of managers based upon theories of managerial liability has increased since *Dotterweich*. In one case,[39] the president of Acme Food, John Park, was charged with violation of the Food and Drug Act. Park had been told of a rodent problem in a Baltimore warehouse (Park worked in Philadelphia). He delegated responsibility for responding to the rodent problem to the Acme Baltimore division vice president. When the problem was not resolved by the vice president's actions, Park was charged and convicted of a crime because he bore a "responsible relation to the situation even though he may not have participated in it personally."[40] In short, Park was convicted "by virtue of [his] managerial position [and] relation to the actor" who actually committed the offense.[41] According to the Court, managers in Park's position have

> not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. 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 of the public that supports them.[42]

In other words, as has now become commonplace,[43] American society will enforce complex and often unclear regulatory obligations not through the law of tort and civil liability but through the stringent provisions of criminal law. Those who voluntarily choose to engage in productive economic conduct place themselves at risk of criminal sanction for their "felony failure to supervise." There is no better way to dissuade those who work to produce goods and services for society from continuing to do so than to criminalize their conduct without reference to whether or

36. *Id.* at 280. This phrase, among the most famous in the Supreme Court's corporate criminal law oeuvre, lies at the heart of the conception of a "public welfare offense"—a subject addressed *infra* pp. 15–17.

37. *Id.* at 284–85. The inference that Congress thought this necessary rests on a false assumption—that in the absence of Congressional criminalization no regime exists for deterring the introduction of adulterated products into the stream of commerce. This ignores the availability of tort liability and other civil liability regimes. Indeed, the availability of alternate methods of calibrated deterrence calls into question the entire justification for managerial liability. *See infra* pp. 16-17 (discussing the decline of legal distinctions between torts and crimes).

38. *Id.* at 286 (Murphy, J., dissenting).

39. *United States v. Park*, 421 U.S. 658 (1975).

40. *Id.* at 666, n. 10. The "responsible relation" doctrine is remarkably without limit. Even at its inception the Court said it could not define or "even indicate by way of illustration" the class of employees who stood in responsible relation to a crime. Rather, it left such definition to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries." *Dotterweich*, 320 U.S. at 285.

41. *Id.* at 670.

42. *Id.* at 672. This demonstrates the absence of coherent limits to the pure deterrence rationale for altering social conduct. The arguments advanced are equally supportive of a severe sentences (e.g. life imprisonment), which no society, in good conscience, would impose for these offenses.

not they have personally acted in a culpable manner.[44]

One can readily see the consequences of this development of the law. Under current doctrine, Edward Hanousek effectively was deemed liable for the conduct of Shane Thoe, without any demonstration that Hanousek had deliberately or purposefully chosen to associate himself with Thoe's acts or that Hanousek had affirmatively acted in any way to cause the criminal injury involved—the rupture of the pipeline. At the government's insistence, the court rejected Hanousek's request that the jury be instructed that he was "not responsible for and cannot be held criminally liable for any negligent acts or omissions by Shane Thoe or other Hunz & Hunz personnel." It also rejected his argument that he could not personally be deemed to have caused the accident if the actual result was not within the risk of which he was aware or should have been aware. Instead the court said that Hanousek could be deemed guilty for, in essence, his managerial failings so long as he had a "direct and substantial" connection to the discharge and the jury concluded that the discharge would not have occurred "but for" Hanousek's actions.[45]

THE REDUCTION AND ELIMINATION OF THE *MENS REA* REQUIREMENT

The Historical Meaning of Mens Rea. The second fundamental precept of criminal law is the concept of *mens rea* (*mens rea* is Latin for "guilty mind"; lawyers use it as a shorthand for the concept of intent), which must be joined with the illegal act. Historically, the law has required that before an individual is deemed a criminal he must have acted with an intent to do wrong. Accidents and mistakes are not considered crimes: "It is a fundamental principle of Anglo-Saxon jurisprudence that guilt . . . is not lightly to be imputed to a citizen who . . . has no evil intention or consciousness of wrongdoing."[46] In this area also, recent developments of the law have diverged far from that model.

Courts attempting to define the degree of intent (also sometimes called "*scienter*") that the government must prove for various criminal statutes have often written of the difficulty in determining what intent requirement the legislature adopted and in defining the terms that the legislature used. There is "variety, disparity and confusion" in the many judicial definitions of the "requisite but elusive mental element" of many criminal offenses.[47]

43. Responsible corporate officer cases are numerous. For a sampling see e.g., *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001); *United States v. Iverson*, 162 F.3d 1015 (9th Cir. 1998); *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991); *United States v. White*, 766 F.Supp. 873 (E.D. Wash. 1991). In addition to the environmental and FDA cases noted in the text, the responsible corporate office doctrine has also been applied in tax cases. See *Purcell v. United States*, 1 F.3d 932 (9th Cir. 1993). No barrier to its application in other regulatory contexts (e.g., OSHA, SEC, or Foreign Corrupt Practices Act) is apparent. For one of the earlier, and most troubling, applications of concepts of vicarious liability, one that Justice Murphy called "unworthy of the traditions of our people" and an "abandonment of our devotion to justice," *see In re Yamashita*, 327 U.S. 1, 28, 29 (1946) (Murphy, J. dissenting) (convicting Japanese General of war crimes for acts of units under his command even though he lacked the capacity to command his troops because all communications had been destroyed during the U.S. invasion of the Philippines). The prevalence of such charges today contrasts with the rarity of criminal charges against corporate officers at the turn of the century. *E.g. United States v. Wise*, 370 U.S. 405, 407 n.1 (1962) (from 1890 to 1914, fewer than two corporate officers were indicted each year for violations of the Sherman Antitrust Act). The modern use of such charges has, in some instances, been statutorily sanctioned. *See e.g.* 33 U.S.C. § 1319(c)(6) (defining a "person" to include "any responsible corporate officer").

44. *See United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of rehearing *en banc*) ("If we are fortunate, sewer plant workers . . . will continue to perform their vitally important work despite our decision. If they knew they risk three years in prison, some might decide that their pay . . . is not enough to risk prison for doing their jobs.").

45. *Hansousek*, 176 F.3d 1124. Like the "responsible relation" doctrine, the requirement of "but for" causation is one that has almost no limit. Virtually any act that bears any relationship, however small, to an event is capable of being characterized as a "but for" cause of that event.

46. *Dotterweich*, 320 U.S. at 286 (Murphy, J. dissenting).

In a clarifying effort, the Model Penal Code has recognized four different states of mind from which a legislature might chose in defining a crime's *scienter* requirement: purpose, knowledge, recklessness, and negligence.[48] To these four, one may add a fifth possibility: strict liability (or the proof of a crime without proof of any intent). By "purpose" one means the intent to purposefully do an act, knowing that it is an unlawful act. By "knowledge" one means the intent to do an act, deliberately and not by mistake or accident, but without the additional requirement that the actor know his act was unlawful. "Recklessness" means a callous and gross disregard for a risk created by an actor's conduct (what one might colloquially call "criminal negligence"). By contrast, "negligence" is intended to denote simply a failure to take the care that a reasonable person in a similar situation would.

Each of these intent requirements thus connotes a progressively less directed and intentional form of conduct. And the trend in criminal law has been to follow that progression; history tells the tale of diminished intent requirements for criminal laws.

The requirement that a crime involve culpable purposeful intent has a solid historical grounding. As Justice Robert Jackson wrote:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."[49]

Thus, the very earliest English common law recognized that one who intended to commit an act (say injuring a horse) and who mistakenly committed a different crime (killing the horse) could not be said to have intended the graver crime of intentional killing of the animal.[50]

To Act "Knowingly." But this conception of intent (or what the Model Penal Code would call "purpose")—that is, a conception necessitating proof that a defendant intended both to do the act which constituted the offense and to accomplish the particular harm prohibited—did not long survive even in the common law. The English and American courts quickly came to the view that in most legal contexts a criminal actor who intends to engage in an act is liable for whatever harm eventuates, even if it is different from that which was within his original contemplation.[51] In the words of the Model Penal Code one can act "knowingly" or with the general intent to do the acts which constitute the offense without regard to any specific intent to do a wrongful act or violate a law.[52]

In the context of regulatory offenses this concept of "knowing" intent has also taken hold. Building on the time-honored maxim that "igno-

47. *Morissette v. United States*, 342 U.S. 246, 252 (1952). Despite the difficulties courts have in defining what intent is, there is a substantial common sense component to the inquiry. After all, as Justice Oliver Wendell Holmes said: "even a dog distinguishes between being stumbled over and being kicked." *See* Holmes, The Common Law (1881).

48. American Law Institute, Model Penal Code, §2.02 (1962).

49. *Morisette*, 342 U.S. at 250-51.

50. *See Dobbs Case*, 2 East P.C. 513 (1770); *see also Thacker v. Commonwealth*, 134 Va. 767, 114 S.E. 504 (1922) (defendant shot at a light and struck and killed a victim; not guilty of murder); *State v. Peery*, 224 Minn. 346, 28 N.W.2d. 851 (1947) (requiring proof of "intent to be lewd" in indecent exposure prosecution of defendant who was accidentally viewed through ground floor window by passers-by).

51. *E.g. State v. Wickstrom*, 405 N.W.2d 1 (Ct. App. Minn. 1987) (defendant hit victim causing abortion of pregnancy; guilty of criminal abortion despite lacking intent to injure fetus).

rance of the law is no excuse" courts now routinely conclude that one can be convicted of a crime for having acted knowingly (that is purposefully doing an act) without the additional requirement that the government prove that the defendant had a conscious desire to achieve a particular end or to violate a known legal duty (typically one found in the form of a statutory or regulatory prohibition). Thus, for example, violations of the Sherman Antitrust Act require only proof of deliberate business conduct without proof of intent to monopolize or intent to violate the law.[53]

To Act "Recklessly" or "Negligently." The law also recognizes yet another culpable mental state with a further diminished aspect of purposefulness: One may be deemed guilty of a crime if one has acted with "criminal negligence." One common law definition of "criminal negligence" (that is, negligence of such a substantial kind and degree as to warrant punishment) suggests the nature of the historical definition: "aggravated, culpable, gross or reckless [conduct], that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life."[54] Under this standard, for example, chiropractic doctors who have recommended fasting as a treatment for tuberculosis have been convicted of culpably negligent manslaughter.[55] Today, this type of "negligence" is more commonly called "recklessness"—that is, the awareness of a risk and disregard of the risk in circumstances that the law would consider unreasonable.

But this definition, limiting "criminal negligence" to, in effect, wanton recklessness, is no longer the rule. In many instances, the courts have allowed criminal convictions upon a showing of simple negligence—that is, a mere failure to exercise "reasonable care" that might normally give rise to civil tort liability. These cases, in contrast to those involving reckless conduct, concern situations where the actor was actually unaware of the risk involved, though perhaps he ought to have been.

Hanousek's case is one example of this trend: Hanousek had argued that criminally negligent conduct had to encompass some aspect of moral wrongdoing—in other words, a gross disregard of reasonable standards. He requested that the jury be instructed that the government had to prove that his negligence constituted "a gross deviation from the standard of care that a reasonable person would observe in the situation"[56]—a concept consistent with a traditional understanding of moral culpability. The court rejected that argument, concluding that the negligence standard for a *criminal* violation of law was identical to that for as a *civil* violation: simple negligence for the failure to use reasonable care.[57]

Strict Liability. And in the area of regulatory crimes, even proof of negligent conduct is not always necessary; the courts have, regrettably, accepted legislatures' increasing attempts to do away with the *mens rea* requirement altogether. In other words, a defendant may be found guilty of the crime even if he had no intention whatsoever that it occur and the *actus reus* arose, for example, as a result of an accident. Though the elimination of all *mens rea* requirements—so that purely innocent conduct is punished criminally—ought to be

52. *People v. Garland*, 254 Ill.App.3d 827, 627 N.E#.2d 377, 380-81 (1993) ("Specific intent exists where from the circumstances the offender must have subjectively desired the prohibited result. General intent exists when the prohibited result may reasonably be expected to follow from the offender's voluntary act even without any specific intent by the offender.").

53. *E.g. United States v. United States Gypsum Co.*, 438 U.S. 422, 445–46 (1978). Notably, in this example, a corporate executive will at least know that his company's market share is increasing, alerting him to circumstances that might warrant inquiry. In complex health, safety and environmental regulatory regimes there is often nothing extrinsic that will alert the average business person to the proscribed nature of this conduct.

54. *Walker v. Superior Court*, 47 Cal.3d 112, 115, 253 Cal.Rptr 1, 15–16, 763 P.2d 852, 866 (1988); *see also State v. Gorman*, 648 A.2d 967 (Me. 1994) (criminal negligence is gross deviation from standard of reasonable prudent person).

55. *See Gian-Cursio v. State*, 180 So.2d 396 (Fla. Ct. App. 1965).

56. *See* American Law Institute, Model Penal Code § 2.02(2)(d) (1985).

57. *Hanousek*, 176 F.3d at 1120–21.

deemed a violation the Constitution, the courts have said that is not.[58]

It is difficult, if not impossible, to identify when the first strict liability offense entered the federal statute books. One scholar has concluded that it was no earlier than 1850, and that prior to that time all common law crimes required proof of some form of *mens rea*.[59] An early example is *Regina v. Stephens*,[60] where the bed-ridden 80-year-old owner of a granite quarry had given management of the quarry to his children. Contrary to his direct orders (and those of his sons), workers at the quarry deposited rubbish in the River Tivy, thereby creating a nuisance. The owner, Stephens, was deemed strictly liable and convicted of the criminal offense. Today, although rare, there are a number of criminal offenses that impose criminal liability without fault.[61] And where the doctrine was originally limited to misdemeanor criminal liability it is now often imposed as part of felony prosecutions. For example, one court held a company strictly liable for the death of certain migratory birds, "even if the killing of the birds was accidental or unintentional."[62] Similarly, courts have held strictly liable those whose conduct contravenes the laws relating to the sale of liquor and narcotics, foods, and possession of unregistered firearms, among others.[63]

Intent and Regulatory Offenses. But this description of the *mens rea* requirements that have developed is incomplete. It does not fully make clear the extent to which actors in a highly regulated industry are subject to criminal liability for their acts. Though the law often requires that they have acted "knowingly"—a seeming protection from the imposition of strict liability—that requirement is but a parchment barrier to what is, in effect, the imposition of absolute liability. The law has been interpreted so that, in regulated industries, those who participate in the industry are presumed to know all of the intricate regulatory arcana that govern their conduct.[64] As a consequence, the only requirement imposed by requiring proof that one has acted "knowingly" is that the government must demonstrate that the defendant has purposefully done the act constituting the offense—and in the context of regulated economic conduct that showing is trivial. Moreover, proof that one in fact lacked knowledge of the regulatory requirement at issue is, uniformly, no defense to the prosecution.

Consider, for example, the crime of "knowingly filing a false monitoring report"[65] under the Clean Water Act. The law that defines what is false or misleading is part of a large regulatory scheme that also includes a regulatorily imposed obligation on each individual to insure the accuracy of any reports made. As a consequence, the only showing the government must make to the satisfaction of a jury is that the defendant has "knowingly filed" the report, irrespective of whether or not he actually knew it was false. And since nobody files a report without doing so intentionally (reports do not get signed, sealed, and mailed by accident or mistake),

58. The seminal case most frequently cited for the proposition is *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57 (1910) (State may "eliminate the question of intent" without violating the Due Process clause of the Fourteenth Amendment).

59. Hopkins, *Mens Rea and the Right to Trial by Jury,* 76 Calif. L. Rev. 391, 397 (1988).

60. 1 Q.B. 702 (1866).

61. Lafave & Scott, Criminal Law § 3.8, at 242 n.1 (2d ed. 1986).

62. *United States v. FMC Corporation*, 572 F.2d 902, 904 (2d Cir. 1978).

63. *E.g. United States v. Freed*, 401 U.S. 601 (possession of unregistered hand grenades); *Dotterweich*, 320 U.S. at 278 (sales under Food and Drug laws); *United States v. Balint*, 258 U.S. 250 (1922) (sale of narcotics).

64. *E.g. United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971) ("[W]here . . . dangerous or deleterious materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

65. *See* 33 U.S.C. § 1319(c)(4) (making it a crime to knowingly make a false statement in any certification required by the regulations promulgated by Environmental Protection Agency). Those regulations, in turn, require the compliance with permit requirements, which typically require the filing of a "discharge monitoring report." *See* 40 C.F.R. § 122.41(*l*)(4). As this brief exegesis demonstrates, even discerning that the law criminalizes the filing of a false report is, itself a problematic endeavor.

the only showing necessary is the trivial showing that the defendant has actually put a letter in the mail. As Justice Potter Stewart noted: "As a practical matter, therefore, they are under a species of absolute liability for violation of the regulations despite the 'knowingly' requirement."[66]

What is particularly disturbing about the trend toward diminished intent requirements is that it is exacerbated by a trend toward significantly harsher penalties. Historically, when the courts first considered regulatory laws containing reduced intent requirements, the laws almost uniformly provided for very light penalties such as a fine or a short jail term, not imprisonment in a penitentiary.[67] As commentators noted, modest penalties are a logical complement to crimes that do not require specific intent.[68] Indeed, some courts questioned whether any imprisonment at all could be imposed in the absence of intent and culpability.[69] This historical view has, of course, been lost. Regulatory laws with reduced *mens rea* requirements are often now felonies.[70] And even misdemeanor offenses can, through the stacking of sentences, result in substantial terms of incarceration.[71]

In short, the history of changes in the *mens rea* requirements has been substantial. The criminal law today is far different from the criminal law of 100 years ago. For regulatory crimes there is, in effect, a standard of near-absolute liability. One is entitled to wonder if contemporary legislators who have enacted regulatory statutes with increasingly onerous criminal penalties have lost sight of a fundamental truth: "If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary."[72] Or as the drafters of the Model Penal Code said:

> It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. 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.[73]

DUE PROCESS AND THE PUBLIC WELFARE OFFENSE DOCTRINE

The definition of the elements of a criminal offense—whether it requires an *actus reus* or *mens rea*—is for the most part entrusted to the legislature. This is especially true for federal offenses, which are solely creatures of statute.[74] And, as noted at the outset, Congress itself has exercised precious little self-restraint in the creation of federal criminal regulatory offenses. The final question to consider, then, is whether there are any

66. *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 569 (1971) (Stewart, J., dissenting).

67. *See Staples v. United States*, 511 U.S. 600, 616 (1994) (citing *e.g. Commonwealth v. Raymond*, 97 Mass. 567 (1867) (fine up to $200 or 6 months in jail); *Commonwealth v. Farren*, 91 Mass. 489 (1864) (fine only); *People v. Snowburger*, 113 Mich 86, 71 N.W. 497 (1897) (fine up to $500 or incarceration in county jail).

68. *See* Francis B. Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55, 70 (1933); *see also Morissette v. United States*, 342 U.S. 256, 256 (1952) ("penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation").

69. *E.g. People ex rel. Price v. Sheffield Farms-Slawson-Decker, Co.*, 225 N.Y. 25, 32–33, 121 NE 474, 477 (1918) (Cardozo, J.); *id.* at 35, 121 N.E. at 478 (Crane, J., concurring) (imprisonment for crime that requires no *mens rea* stretches law of regulatory offenses beyond its limitations).

70. *E.g. United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) (felony violation of Clean Water Act— no knowledge of regulations necessary).

71. *E.g. United States v. Ming Hong*, 242 F.3d 528 (4th Cir. 2001) (misdemeanor convictions stacked for 3 year sentence).

72. *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of rehearing *en banc*)

73. American Law Institute, Model Penal Code § 2.05 and Comments at 282–83 (1985).

external limits on this trend. Does the Constitution restrict the extent to which the legislature may do away with traditional act and intent requirements?

Due Process Limits in the Courts. One limit on the expansion of *malum prohibitum* crimes lies in the interpretative methodology used by the courts. The courts can (and sometimes even do) read statutes narrowly—to require, for example proof that a defendant knew of the law and regulations proscribing his alleged offense, when "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."[75] Similarly, where a defendant engages in apparently innocent conduct (that is, where he is unaware of underlying predicate facts that place him on notice as to the existence of criminal regulation), the courts sometimes read the Due Process clause as imposing a modest limit on criminalizing the conduct; a defendant's contention that he was completely unaware of the underlying facts that put him on notice as to the existence of regulations is exculpatory.[76] Put another way, Due Process has been construed to require that those defendants who engage in seemingly innocent conduct must be proven to have had knowledge of facts that put them on notice of the potential criminalization of their conduct.[77]

Public Welfare Offenses. But this interpretive methodology has not yet been used aggressively by the courts to cabin legislative power. Rather, the courts have generally concluded that the Due Process requirements of the Constitution do not apply in the same way and with the same effect when the crime being addressed is a regulatory offense.

The doctrine of "public welfare" offenses has its origins early in the 20th century.[78] Though usually thought of as being limited to *malum prohibitum* crimes, it has come to comprise a category of criminal laws construed by the courts as lacking, or having diminished, *mens rea* requirements.[79] Thus, under this doctrine, criminal statutes that have diminished intent requirements (that is, those which punish conduct which is not deliberate, as, for example, when the law criminalizes conduct that is no more that simple negligence) are deemed not to violate the Due Process requirements of the Constitution. But this is exactly backwards: It is this class of intent-less crimes for which due process analysis is most appropriate.

The courts reason that Congress may render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[80] In such circumstances, the law puts the burden of knowledge of the regulatory structure on those who act and presumes their knowledge of the law rather than requiring proof of that fact. "In the interest of the larger good [the law] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[81]

Consider again the Hanousek case: Consistent with earlier decisions of the Ninth Circuit,[82] the

74. *United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812). It is, perhaps, a matter of more than historical interest that the Constitution specifically identified only three federal criminal offenses: treason, piracy, and forgery. The contemporary extent of federal criminal law would look quite odd to the Founders—a topic to be addressed in a future paper.

75. *Liparota v. United States*, 471 U.S. 419 (1985).

76. *E.g. United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563–64 (1971) ("A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered"); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (defendant entitled to mistake of fact instruction).

77. *E.g. United States v. X-Citement Video*, 513 U.S. 64, 72 (1994) (Due Process requires that *scienter* standard apply to "each of the statutory elements which criminalize otherwise innocent conduct"); *cf. Ratzlaff v. United States*, 510 U.S. 135 (1994) (to prove violation of anti-structuring law, government must prove knowledge of the law, because deposit of funds in a bank is not inherently wrongful conduct putting one on notice of prohibitory criminal statutes); *Staples v. United States*, 511 U.S. 600 (1994) (mere possession of a gun insufficient to put defendant on notice as to existence of gun law prohibitions).

78. *See* Francis B. Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55 (1933).

79. Herbert Packer, "*Mens Rea* and the Supreme Court," 1962 S.Ct. Rev. 104.

80. *See Liparota v. United States*, 471 U.S. 419, 433 (1985).

81. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

government argued that the discharge of pollutants, prohibited by the Clean Water Act, was a "public welfare offense." Because Hanousek was, according to the government, working in a heavily regulated business that was a threat to community safety, he was presumed to know all of the obligations imposed upon him by the Clean Water Act and thus precluded from challenging his conviction on the ground that he did not know of his obligation not to act negligently.

When Hanousek asked the Supreme Court to review his case, the Court declined. Justices Clarence Thomas and Sandra Day O'Connor, however, thought that the expansive use of criminal sanctions in what was, essentially, a simple negligence tort, merited review. As Justice Thomas wrote, rejecting the application of the public welfare doctrine to Hanousek's activity:

> [T]o determine as a threshold matter whether a particular statute defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in "responsible relation to a public danger."[83]

The lower courts' broader view of the appropriate scope of criminal law, as Justice Thomas recognized, "expose[s] countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations."

Thus, Justice Thomas viewed the result in *Hanousek* as inconsistent with Supreme Court precedent, which had

> never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety.[84]

Put another way, given the comprehensive nature of regulation in America society today, the growth of the public welfare doctrine has, in effect, led to the abandonment of any intent requirement for virtually the entire range of commercial, social, and economic activity in the marketplace.

The Disappearance of the Tort/Crime Distinction. One corollary to the growth of the public welfare offense doctrine is the disappearance of the distinction between tort and crime in American law.[85] The use of the public welfare doctrine to address social goals enlists the criminal law as an agent of social regulation and change. Tort law has been, historically, a private mechanism for compensating for injuries. Affirmative civil enforcement by the government has been seen as a means of enforcing compliance with social norms through administrative procedures or civil litigation—the latter even having a component of punishment by virtue of the proliferation of punitive damages. These systems have been thought, in the past, to suffice in requiring economic actors to internalize the costs of their conduct and avoid imposing those same costs on unwitting external actors.

Now, however, the criminal law is being used in an avowedly instrumental capacity. Identically phrased statutes are often applicable to the same conduct—one authorizing a civil penalty and the other a criminal sanction.[86] In effect, the criminal law, through the public welfare doctrine, has

82. *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993); *but see United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996).

83. *United States v. Hanousek*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of *certiorari*) (quoting *Staples v. United States*, 511 U.S. 600, 613 n.6 (1994)).

84. *Id.*

85. John C. Coffee, Jr. "Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law," 71 B.U.L. Rev. 193 (1991).

become a tool of socialization, losing its historic character as a system for addressing wrongful conduct. Criminal sanctions for conduct affecting the public welfare have become a reflex answer. The result is a substitution of criminal law for more traditional tort and civil law: There is a "more pervasive use of the criminal sanction, a use that intrudes further into the mainstream of American life and into the everyday life of its citizens than has ever been attempted before."[87]

THE CONSEQUENCES OF JUDICIAL INACTION

In effect, then, the courts have deliberately chosen a limited, almost self-abnegating role in constraining the use of criminal sanctions. As it stands today, no effective judicial constraint currently limits the extent to which individual conduct that bears no causal relationship to a societal harm may be criminalized. Nor is there a limit on the extent to which, in the social and economic context, the legislatures may dispense with the traditional conceptions of *mens rea*. The consequences of this are two-fold: a pathological legislative approach to criminal law and an excess of prosecutorial discretion.

As Professor William Stuntz has noted, American criminal law "covers far more conduct than any jurisdiction could possibly punish."[88] This wide span of American law is the product of institutional pressures that draw legislators to laws with broader liability rules and harsher sentences.[89] The reason is the dynamic of legislative consideration: When a legislator is faced with a choice on how to draw a new criminal statute (either narrowly and potentially underinclusive or broadly and potentially overinclusive), the politics of the situation naturally cause the legislator to be overinclusive. Few, if any, groups regularly lobby legislators regarding criminal law and those that do more commonly seek harsher penalties and more criminal laws, rather than less. The political dynamic is exacerbated by the consideration (usually implicit) of the costs associated with the criminal justice system. Broad and overlapping statutes with minimum obstacles to criminalization and harsh penalties are easier to administer and reduce the costs of the legal system. They induce guilty pleas and produce high conviction rates, minimizing the costs of the cumbersome jury system and producing outcomes popular with the public.[90]

The final piece of the equation is legislative reliance on the existence of prosecutorial discretion. Broader and harsher statutes may produce bad outcomes that the public dislikes, but blame for those outcomes will lie with prosecutors who exercise their discretion poorly, not the legislators who passed the underlying statute. As a consequence, every incentive exists for criminal legislation to be as expansive as possible.

And in the absence of any judicial check on this legislative trend, the result is a wholesale transfer of power from elected legislative officials to prosecutors who, in many instances, are unelected and not responsible to the public. Where once the law had strict limits on the capacity of the government to criminalize conduct, those limits have now evaporated. Society has come, instead to rely on the "conscience and circumspection in prosecuting officers."[91] Or, as the Supreme Court said in *Dotterweich*, Americans are obliged to rely only on "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries" to determine criminal conduct.[92] In effect,

86. *See, e.g., United States v. Ward*, 448 U.S. 242, 249–51 (1980) (permitting imposition of civil penalty even though language of statute was virtually identical to longstanding criminal statute). *Ward* has been interpreted to mean that the legislature is free to choose to characterize misconduct as civil or criminal, thereby giving enforcement officials the option of choosing which sanction to impose. Examples of regulatory structures that allow the discretionary imposition of administrative, civil, and criminal sanctions for virtually identical conduct abound. *Compare e.g.*, 33 U.S.C. § 1319(g) (authorizing administrative penalties for violations of Clean Water Act); *id.* §§ 1319(b), (d) (civil penalties); *id.* § 1319(c) (criminal penalties).

87. Coffee, "Tort/Crime Distinction," at 220.

88. William J. Stuntz, "The Pathological Politics of Criminal Law," 100 Mich. L. Rev. 505, 507 (2001).

89. *Id.* at 510.

90. *Id.* at 600.

91. *Nash v. United States*, 229 U.S. 373, 378 (1913).

the legislative branch has transferred a substantial fraction of its authority to regulate American social and economic conduct to those who have no expertise in the matter: prosecutors, trial judges, and jurors who make decisions on criminalizing conduct without any ability to consider the broader societal impacts of their decisions.

CONCLUSION

And so, the criminal law has come to this odd and unusual point in its development. Where once, to be a criminal, an individual had to do an act (or attempt to do an act) with willful intent to violate the law or with knowledge of the wrongful nature of his conduct, today it is possible to be found criminally liable and imprisoned for a substantial term of years for the failure to do an act required by law, without any actual knowledge of the law's obligations and with no wrongful intent whatsoever. These developments are advanced in the name of the "public welfare"—an express invocation of broader social needs at the expense of individual liberty and responsibility. It is, ultimately, the triumph of a Benthamite utilitarian conception of the criminal law over the morally grounded understanding of criminal law advanced by Blackstone. One may, and indeed one should, doubt the wisdom of such a course. Given how the criminal law has developed, a free people are constrained to ask the question: Are broader social needs well served when individual liberty and responsibility suffer?

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92. *Dotterweich*, 320 U.S. at 285.