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

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

This is the famous (or infamous) "moral wrong principle" that holds that when the
underlying act is morally wrong, no mens rea is required with respect to a legally necessary
attendant circumstance. Thus, when one wrongfully commits an assault, he or she is not required
to know that the victim is a police officer to be guilty of assaulting a police officer, and when one
wrongfully breaks into a house, he or she is not required to know that it was before 6:00 am to be
guilty of burglary.

This principle, which has been subsequently rejected by the English courts and the
authors of the Model Penal Code, continues to be the law in many American jurisdictions. And it
continues to be criticized by civil libertarian commentators who argue that it inappropriately
imports an element of strict liability into the criminal law. These commentators argue that
because there is no objective, commonly accepted standard of morality, the "Prince rule" is not
only unworkable, but violates the principle of legality, and further, that it constitutes an effort to
legally enforce morality that is inconsistent with the fundamental principles of a liberal society.

Now, I must confess that I am one of these civil libertarian commentators. When I am
functioning in my normative mode, I too argue for the elimination of the Prince rule and the
adoption of the Model Penal Code approach. But when I step back from my role as advocate and
engage in detached philosophical reflection, I am impressed by the subtle sophistication of the
common law process that produced the Prince rule, and find it conceptually superior to the
output of the last century of criminal legislation. To see what I mean, please consider the nature
of public welfare offenses.

"Public welfare offense" is a legal term of art that refers to a crime that requires no mens rea. A public welfare offense is a statutorily-created strict liability criminal offense. Public welfare offenses are typically regulatory offenses in which the importance of protecting the public from harm is seen as justifying the application of the criminal sanction on individuals who

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1L.R. 2 Cr. Cas. Res. 154 (1875).
were acting innocently. The Supreme Court has characterized public welfare offenses as "a now familiar type of legislation whereby penalties serve as effective means of regulation. . . . [which in the interest of the larger good . . . puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger]."

In recent years, the courts have limited the range of offenses that they are willing to interpret as public welfare offenses to those in which "a defendant knows that he is dealing with a dangerous device of a character that places him 'in responsible relation to a public danger,' [such that] he should be alerted to the probability of strict regulation." Yet Congress and state legislatures are free to create, and frequently do create, new strict liability crimes by explicitly designating them as such in the legislation that produces them.

Ordinary criminal offenses require that one act intentionally, recklessly, or with criminal negligence to be convicted. Public welfare offenses dispense with the need to demonstrate even ordinary negligence. Apparently, the thinking behind such legislation is that doing so will more effectively protect the public from the relevant danger. Is this correct?

Although criminal law is my intellectual true love, fate decreed that I should be a Torts professor. In that capacity, I teach first year students about negligence and strict liability every year. One of the leading cases on strict liability is Indiana Harbor Belt R.R. Co. v. American Cyanamid Co. In that case, American Cyanamid, a chemical manufacturer, shipped 20,000 gallons of liquid acrylonitrile, a flammable and highly toxic chemical, to market by train. While the train was stopped at a switching line in Chicago, the lid on an outlet valve of the tank car containing the acrylonitrile broke, spilling a large amount of the chemical into the local environment. The switching line bore nearly a million dollars in environmental clean-up costs, and subsequently sued American Cyanamid to recover those costs alleging that American Cyanamid was strictly liable for any damage that resulted from shipping the chemical. American Cyanamid argued that strict liability did not apply to the activity of shipping the chemical, and that it could be held liable for the damage only if Indiana Harbor Belt could establish that it had been negligent.

In order to resolve the question, the court had to consider the purposes served by the torts of negligence and strict liability respectively. In doing so, it pointed out that the purpose of negligence is to give people an incentive to conduct their activities with care. Therefore, negligence is the proper legal regime for cases in which people are engaging in productive, socially beneficial activities that pose the type of risks to others that can be reduced by being

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2The seminal case establishing this proposition was United States v. Balint, 258 U.S. 250, 254 (1922) in which the Court stated that "[c]ongress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."


5912 F.2d 1174 (7th Cir. 1990).
careful. In contrast, the purpose of strict liability is to discourage people from engaging in certain types of activities. Therefore, strict liability is the proper legal regime for cases in which people are engaging in either socially detrimental activities or beneficial activities that pose risks to others that cannot be effectively reduced by being careful. As the court explains,

The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk or harm of an accident will be less . . . , or by reducing the scale of the activity in order to minimize the number of accidents caused by it . . . . By making the actor strictly liable—by denying him in other words an excuse based on his inability to avoid accidents by being more careful—we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.6

To help determine which activities should be subject to strict liability, the court adverts to the Restatement (Second) of Torts §520, which provides six factors upon which to base such a judgment. They are:

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

The more of these factors that are satisfied, the more appropriate is strict liability, and vice versa.

With this explanation of the role of strict liability in mind, let's return to our consideration of public welfare offenses. The activities that they subject to strict liability are typically industrial production and commercial transactions, such as manufacturing, labeling, and shipping drugs and chemicals, operating waste disposal facilities, power plants, oil pipelines, etc. The feature that almost all the activities that are subject to strict criminal liability as public welfare offenses have in common is that they are productive, socially beneficial activities. These would seem to be exemplars of the activities that we want people to engage in while exercising care, but certainly do not want to discourage.

6Id. at 1177.
Applying the Restatement factors, we see that although these activities pose a risk of some harm if carried on carelessly, the activities themselves pose neither a high degree of risk of harm nor the likelihood that any harm they produce will be great. Indeed, the risk that they pose may be entirely eliminated by the exercise of due care. In our contemporary commercial society such activities are common and entirely appropriate to the locations at which they are carried on. Finally, their value to the community vastly outweighs their dangerous attributes. These activities possess none of the indicia that suggest that they should be subject to strict liability.

In fact, subjecting such activities to strict liability may actually increase, rather than reduce, the danger that they pose to the public. This is because while it will encourage careful people to avoid the activity, those who are sufficiently confident of their ability to avoid causing harm [to continue to engage in the activity] may be just the ones who are most likely to be especially careless. . . . Indeed, if the penalties are serious, those who are careful and make provision for risks may be the most likely to take the sensible precaution of not engaging in this activity at all. . . . [Thus,] the dynamic effect, under plausible assumptions about human behavior, could be to increase the total harm caused by increasing the proportion of those engaged in the activity who are relatively careless.7

Now, let's compare the output of consciously generated criminal legislation with that of the spontaneously evolved common law of crime. Generally speaking, there was no strict liability crimes at common law. To be convicted of a crime always required at least grossly negligent behavior (criminal negligence). However, as the Prince case demonstrates, elements of strict liability crept into the common law of crime when the defendant engaged in morally blameworthy action. The common law "moral wrong principle" held that, when an actor was doing something that was morally wrong, he or she was strictly liable with regard to the attendant circumstances of the crime.

The effect of strict liability is to discourage the underlying activity. Immoral activity would seem to be precisely the type of activity it would be appropriate to discourage. By permitting strict liability when one engages in immoral action but not elsewhere, the common law appears to apply strict liability where it serves its proper purpose and only where it serves it proper purpose. And that looks pretty good when compared to the promiscuous use of the strict liability made by the 20th and 21st century legislators who gave us public welfare offenses.

As much as I oppose the Prince rule on civil libertarian grounds, if my choice were between the common law of crime with the Prince rule or the criminal law created by our contemporary legislators, I would take the common law every time. And if asked why, I'd be tempted to respond with the famous quote from Louis Brandeis's dissent in Olmstead v. United States that "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal,

well-meaning but without understanding.\textsuperscript{8}