ECONOMIC AND CRIMINAL PENALTIES IN A MORAL PERSPECTIVE

A moral philosopher has raised this intriguing question:

Why do we have strict liability in the economic sphere but not in the criminal law?

Put differently:

Why is a man penalized in the economic order for actions he cannot avoid, but not in the criminal law? Why do we hold a man to a strict standard of performance in the economic world whereas in dealing with a criminal defendant we make allowance for his competence (e.g., excusing the mentally disturbed) and for his intentions (e.g., excusing negligence)?

A facile answer would be that the economic order deals with rewards in terms of profits as a *quid pro quo* for services or goods. The criminal law is concerned with punishing those who knowingly and wilfully perpetrate an injury. In the economic system we merely withhold something from someone who does not offer anything, whereas in the criminal law we are imposing a hardship (in the way of the monetary penalty of a fine or in the way of imprisonment). (I am taking the criminal law as we find it: administering punishments without an accepted theory of punishment or any assurance of its efficacy.) (1).

But the easy answer will not satisfy the moral philosopher who will see both systems as two different ways we have of controlling one another's conduct. Leave the labels aside (or see our society through the eyes of the man from Mars) and the moral philosopher's question remains germane. Indeed, our legal system does not rest upon a hard and fast distinction between the law of crimes and the laws regulating economic activity. The law of contracts, which regulates economic transactions,

---

World Congress of Legal and Social Philosophy. Madrid, Spain. September, 1973.

(1) Cf. WASSERSTROM: «Strict Liability in the Criminal Law», 12 *Stanford Law Review,* 1960, pp. 730-745.

serves the same purpose as the criminal law in channelling our conduct along certain lines by refusing to enforce certain types of contract which are branded as illegal, such as slavery and gambling contrats.

I shall argue, first, that liability in the economic order is not as strict as the moral philosopher supposes, that we do take account of reasons why men should be excused from toeing the line.

I shall argue, second, that, even with these qualifications, it remains true that we may be bestowing more consideration upon the criminal defendant than upon our neighbor, that we may be penalizing our wholly innocent neighbor in circumstances where we would no penalize an aggressor.

Let us consider, as salient examples, three basic legal aspects of our economic order: social legislation, labor arbitration and social security administration. All of these will display departures from strict liability. The last of these will exhibit our ambivalences and the way in which, despite our departures, we tend to punish the economically infirm.

I. Departures From Strict Economic Liability

A. *Social legislation:* The question which has been posed arises from the theory of the laissez-faire market, which saw the profit motive as the only economic mover. In each man's pursuit of his own profit, social equilibrium is though to be achieved through the automatic deployment of the invisible hand. Imbalances are deemed to correct themselves. If, for example, there is an oversupply of labor (which means, in human terms, that a lot of men are out of work), the unemployed workers have only to starve to death and equilibrium will be restored! Supply will again equal demand. The market mechanism is not concerned with human victims. A man fails the demands of the market at his own peril. There is indeed strict liability.

Since the Great Depression, however, a depersonalized market no longer exists in this pristine form. As one of the architects of the New Deal has put it: «Automatic balances achieved at a high price in human misery are not acceptable». (2). The core remains but the goverment, through social legislation, provides redress and support for the market's victims. We now have minimum wage laws, unemployment insurance, old age and disability insurance, medicare, welfare systems, government housing subsidies, protection for union organization, anti-discrimination sta-

(2) Adolph Berle: *The American Economic Republic*, p. 80.

tutes, etc. We no longer say: «We do not care why you cannot meet the market standard.» We look into special circumstances and we take melioristic steps.

Caught between an oversupply of goods and a lack of demand caused by poverty, we do not wait for the invisible hand to rectify the imbalance; the public hand is placed on the scale in the interest of those who cannot make the grade alone. The simple market model does not suffice for an affluent society which produces more than we can absorb. The hindmost may falter but they are no longer left to the devil. Our commitment to welfare is steady, however much criticized are our present programs. A guaranteed annual minimum income had even been proposed by President Nixon.

We are engaged in moralizing the market in the interest of individual human development. Contemporary economists can speak of the «economy of the American people» as fulfilling the conviction that, «justice demands an equal chance for personal fulfillment». (3). Our economic society no longer insists on rigorous economic liability for every individual.

B. *Labor arbitration.* Union-management contracts are commonplace today and characteristically they contain a clause providing for arbitration of disputes. The contract is a kind of constitution for the plant. It contains rules tantamount to laws. The arbitration clause is a judicial system which settles disputes which rise under the rules. The economic ruler, the employer, is no longer free to impose his autocratic will without regard to extenuating circumstances. He must justify penalties on workers to an impartial third party —the arbitrator— who is empowered to hear all the evidence on both sides. A worker, threatened with discharge for not producing enough, may argue, for example, that he could not help it because it was the supervisor's mistake, or the equipment was faulty, or that other workers were uncooperative, or that he had suffered a temporary emotional upset. The arbitrator, taking the man's whole record into account, may decide that holding him to strict liability and discharging him would not be justified, but that a censure or a week's suspension would be more just. In his rationale the arbitrator often uses the language of criminal justice. He might say that the penalty is too severe. He may observe that in the «common law of arbitration» discharge is the industrial equivalent of capital punishment, and that the worker's failure does not warrant so drastic a remedy. Indeed, arbitrators

(3) COLM AND GEIGER: *The Economy of the American People*, p. 81.

are loth to sustain a dischage when any reasonable defense is offered. The worker is not a victim of absolute liability. He is a beneficiary of due process.

We have here an industrial analogue to the political system of the criminal law. Rules are conjointly agreed on and publicized. Their violation calls for a penalty, imposed only after a fair hearing with the right to cross-examine, call witnesses, be represented by counsel, etc. There is even a final appeal to the courts for ultimate enforcement of the arbitrator's award.

C. *Social Security Administration.* In the social security system we give a hand to those who are too old or sick to do a normal spate of work. If we were proceeding on a basis of strict liability, old people would be left to wither away unless they had been provident enough to save enough for their old age.

Besides old-age insurance, the Social Security Act provides for disability insurance in case a man is disabled before he reaches retirement age. The way this disability program is administered illustrates our ambivalence toward welfare-type benefits. The legislation is humanitarian, but the Administration often imposes such severe requirements on the disability claimant as to frustrate the very expectations set up by the law.

In the Federal disability program there is formal due-process with a system of appeals to a quasi-judicial hearing officer. But the courts have often noted how the scales are tipped against the claimant. The Social Security Act defines «disability» as being «unable to engage in any substantial gainful employment.» It is a well-settled principle in construing statutes that humanitarian statutes are to be construed liberally. Yet the Social Security Administration construes this provision strictly, denying benefits to a claimant who could do any kind of work at all. A man could be denied benefits, for example, if all he can do is sit in a wheel chair and make paper flowers, regardless of what he had done the rest of his life or the possibilities of his getting a local job in his reduced capacity.

In case after case, this never-never-land policy (as one Court dubbed it) has been followed. One would never suspect that this statute had been designed (as another Court pointed out) to ameliorate the hardships of life.

This disability program, while it takes account of people's infirmities and misfortunes, holds claimants to a relatively strict level of productive performance in the very process of seeing if they should be relieved of

that necessity. Thus, through our analysis of this program, we have come to see, simultaneously, an example of a departure from strict liability in the benefits to be bestowed and an illustration of reversion to strict liability in the administration of the benefits. It is an apt example of our ambivalence. We start with a strict liability in a laissez-faire market; we qualify it through the statute in marked respects; but in administration we hover between its virtues and its deficiencies; and our attenuations of its harshnesses are vacillating and foot-dragging.

II. Economic Punishment of the Innocent

When an unemployed man has to starve or a man who relies on governmental benefits is frustrated in his statutory expectations, we are confronted with the fact that a man who has done nothing wrong is made to suffer. Would it be meaningful to say that he is suffering a «penalty» without adequate inquiry into his deserts?

It seems at first paradoxical to speak of a monetary hardship as a penalty in the same sense as a criminal sanction. And yet a conservative Supreme Court Justice delivered the dictum: «One who does a thing in order to avoid a monetary penalty...yields to compulsion precisely the same as though he did so to avoid a term in jail.» (4). Justice Sutherland was not talking here of a fine; he was talking of a tax. The import is clear: when one must change one's behaviour to avoid a tax, one is being coerced.

It we are coerced by taxes are we not coerced also by prices? When we pay $6.60 for a theatre ticket, this sum includes the price and the tax. We cannot see the play unless we pay the price and the tax. If we go without seeing the play because we cannot afford the price-with-tax, we are yielding to compulsion. Either we pay the $ 6.60 or we do not see the play. Prices and taxes alike are an impediment to consumption. Prices and taxes alike channel our conduct, forcing us to do one thing rather than another. Of course, if we are rich enough neither the tax nor the price matters. But for most of us they determine much of what we can do and what we cannot do.

The government stands behind prices quite as much as behind taxes. If you takes something from a store without paying the price, you will suffer criminal punishment just as you will for failing to pay taxes.

Poverty leaves a person open to much coercion. Consider the passage

(4) *The Carter Coal* case, 298 U. S. 238, 289 (1936).

in Shakespeare's *Romeo and Juliet* where Romeo wants to buy poison for his suicide. To sell poison is illegal in Mantua, yet the apothecary needs the money badly. Here the seller, not the buyer, is yielding to compulsion.

«Enter APOTECARY

Apothecary:

Who call so loud?

Romeo:

Come hither, man, I see that thou art poor;
Hold, here is forty ducats: let me have
a dram of poison...

Apothecary:

Such mortal drugs I have; but Mantua's law
Is death to any he that utters them.

Romeo:

The world is not thy friend, nor the world's law:
The world affords no law to make thee rich;
Then be not poor, but break it, and take this.

Apothecary:

My poverty, but not my will, consents.

Romeo:

I pay thy poverty and not thy will (5).»

We make a conventional distinction, widely observed, between «sovereignty» as dominion over persons, and «property» as dominion over things. But property rights, like all rights, are claims against other persons. I could have no property rights without a government to enforce my claim that others leave my goods alone. The essence of my property right is that I am entitled to schut you out from using my goods or make you do something for me in return for using my goods. Property is a sovereign power for compelling services from others. Coercion without decency is tyranny. The modern measures of social welfare are a recognition of this fact.

---

(5) Act V, Scene 1.

Summary:

Strict liability, whereby persons are penalized for failures they could not help, is not all-pervasive in our economy. (Neither is it entirely absent in our criminal law but the enlightened trend is toward its diminution). Our analysis suggests tha, we need better guarantees of economic due process. Due process is as germane to economic society as to criminal law. Property owners hold their power through delegation by the governments. It is no argument against private property to say that, insofar as property functions as a form of government, property invites the same scrutiny as any other form of social power over men.

Our economic order and our criminal law system are not ends-in-themselves but institutions in the service of men. The provocative question raised by the moral philosopher focuses our attention upon similarities as well as differences in our systems of legal and economic control. Reflection upon his question shows the relationship to be more complex than his question presupposses.

We are drawn to reflect on the irony that we may be harsher to our neighbors, when we impose economic «penalties» arbitrarily, without allowing fòr extenuations, than we are to persons accused of crime who are afforded an opportunity for various justifications.

BERYL HAROLD LEVY
Hofstra University

My approach is influenced by Professor ROBERT LEE HALE (Columbia Law School) and his book, *Freedom Through Law,* Professor MORRIS R. COHEN (College of the City of New York) and his essay, *Property and Sovereignty,* reprinted in his book, *Law and the Social Order,* and Professor ADOLPS A. BERLE, Jr. (Columbia Law School) and his book (with Means), *Private Property and the Modern Corporation.* The comments of JEROME HALL and GREGORY VLASTOS have been helpful. The moral philosopher is DANIEL LYONS.