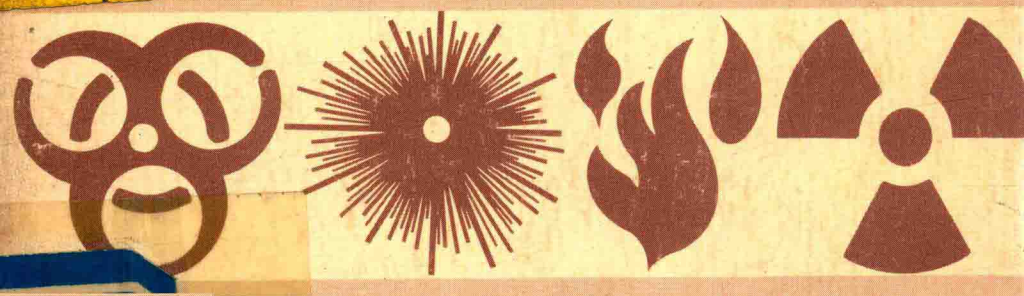




CRIMES AGAINST HEALTH AND SAFETY

RECYCLED



Nancy Frank

FRANK CRIM 12
62115 14
UVM Store
USED BOOK
L \$ 7.50

Crimes Against Health and Safety

Nancy Frank

Criminal Justice Program
University of Wisconsin-Milwaukee

A SPECIAL EDGE TEXT

☆☆☆☆☆☆☆☆☆☆☆☆☆☆☆☆

Harrow and Heston
New York

Copyright © 1985 Nancy Frank

A Harrow and Heston Special Edge Supplementary Text

All rights reserved. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the publisher.

Harrow and Heston, Publishers,
Stuyvesant Plaza,
P.O. Box 3934,
Albany, New York, 12203

Library of Congress Catalog Card Number: 85-081735

ISBN: 0-911577-05-X

Printing number

9 8 7 6 5 4 3 2 1

Cover Art: Tamsin Newman

Crimes Against Health and Safety



Acknowledgments

Permission has been received to reproduce passages from the following works:

Regulation: Process and Politics. *Congressional Quarterly*, 1982, 137-143, from Congressional Quarterly Corporation.

J. Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety*, Copyright, 1985, State University of New York.

Nancy Frank graduated from the University of Wisconsin—Madison in 1977, majoring in social work. She received her doctoral degree in Criminal Justice from The State University of New York at Albany, where her dissertation on the history of health and safety law won the University's award for outstanding dissertations. She currently teaches criminal justice at the University of Wisconsin—Milwaukee.

Contents

1. Quiet Violence	1
2. Calling a Crime a Crime	6
3. Conventional Laws for Unconventional Crimes	16
4. Regulating Health and Safety	27
5. Where There Is No Law	43
6. Rationalizations and Other Causes	50
7. Fighting Crimes Against Health and Safety	61
8. Restructuring Risk Decision-Making	75
Questions and Answers	85
Annotated Bibliography	99
Index	103

One

Quiet Violence

OVER THE LAST ten to fifteen years, a number of tragic episodes have elevated public consciousness of crimes against health and safety. The Love Canal disaster, in which an entire neighborhood had to be permanently evacuated because it had been built on an abandoned chemical dump, became only a prelude to a growing awareness of hazardous waste disposal problems. In the Pinto case the Ford Motor Company was indicted on charges of reckless homicide for selling the Pinto even though the company allegedly was aware that the car had a tendency to explode when involved in rear-end collisions. The accident at Three Mile Island, in which a nuclear reactor started to melt down before technicians were able to bring it under control, dramatically illustrated the risks that are created and managed by profit-seeking firms.

Along with these dramatic episodes has come an increasing awareness and concern about the risks that surround us in our daily lives. Hardly a day goes by without our hearing some news story about a newly identified risk. A food additive is suspected of causing cancer. A drug is suspected of causing birth defects. We are warned of the dangers of radiation emanating from our color television sets. Experts caution that automobile exhaust causes respiratory illnesses.

Statistics coldly document the harms that surround us. Almost three hundred people die each year in mining accidents (Department of Labor 1984). The Consumer Product Safety Commission (1983) estimates that 28,000 deaths annually are the result of using consumer products. Over 4000 workers die each year due to occupational accidents and illnesses (Macon 1984). One out of every four blue-collar workers will die of cancer related to their work. Asbestos alone causes almost 10,000 cancer deaths each year (Zanetos et al. 1983).

Yet these statistics cannot begin to convey the personal pain of the victims and the circumstances that led to these quiet acts of violence.

In 1975 a sixty-eight year-old woman died of pancreatic cancer. The following year, her husband died of cancer, and her forty-five year-old son developed leukemia. They had lived in Little Elk Valley near Elkton, Maryland, a quiet, rural community. The water and air in the valley was polluted with high concentrations of benzene, carbon tetrachloride, toluene, methyl ethyl ketone, and other dangerous chemicals. These chemicals were also found in blood samples of the valley's residents. At the bottom of the valley sat a small local business, the Galaxy Chemical Company which reclaimed waste solvents. Reports from plant workers and others indicated that chemicals from the plant were spilled and leaked into Little Elk Creek (Brown 1980, 204-221).

During the late 1950s, a lab technician, Beulah Jordan, who was conducting tests of a new drug, MER/29, reported to her supervisor that one of the laboratory monkeys which had been given the drug was showing loss of weight and was apparently partially blind. According to congressional testimony, her superiors:

...then decided to throw out the sick male drug monkey...from the experiment and substitute another control monkey in his place which had never been on MER/29. After this decision, Dr. van Maanen [director of biological sciences for Merrell-Richardson, the manufacturer of MER/29] called Mrs. Jordan into his office and instructed her to make this substitution in working up the weight charts...Mrs. Jordan resented being asked to...render a false report, and refused to sign her charts. Dr. King [her immediate supervisor] ordered her never to mention the substitution. She was told that this was the way the company wanted it and to forget it. She was told that this order had come from higher up and there was nothing she could do about it but obey the order and do as the "higher-ups" wanted.

MER/29 was approved by the FDA in May 1960 and marketed

by Merrell-Richardson for almost two years, when the company withdrew the drug from the market. During those two years, doctors prescribing the drug to their patients reported baldness, skin damage, changes in reproductive organs, and eye cataracts in patients using the drug. Hundreds of thousands of people used the drug before it was finally withdrawn. A subsequent investigation of company records disclosed that before the drug was approved by the FDA, the company was aware of these side effects but failed to report them to the FDA (Silverman and Lee 1974, 89-93).

In 1969 an elderly woman was killed when the accelerator on her car locked at 25 miles per hour. The rubber motor mounts holding the car's engine in place had broken, causing the engine to lunge out of place, jamming the accelerator. From 1965-1969, General Motors Corporation sold 6.7 million Chevrolets with these rubber motor mounts. As early as 1965, the Pontiac division of General Motors had found these rubber mounts to be defective and substituted a safer mounting system. Although the Pontiac engineers passed along their findings to other GM divisions, Chevrolet continued to use the rubber mounts. In 1966, reports that mounts were breaking, causing accidents, injuries, and even deaths began to emerge. General Motors refused to recall the cars until 1971, when pressure from the government, consumer groups, and the news media could no longer be ignored. The recall cost the company \$40 million dollars, at a time when it spent \$200 million a year on advertising (DeLorean and Wright 1980, 43-45).

A common reaction to stories such as these is to ask: How could this happen? How could executives at Chevrolet continue to build cars when they were aware that the cars themselves would cause accidents, and possibly injury and death? How could managers of the Galaxy Chemical Company ignore the plague of chemicals they were spewing into their own backyard? How could executives at Merrell-Richardson falsify drug test results, ignoring the evidence that the drug they were selling to people could cause illness and even blindness? With our sense of incredulity also comes a sense of outrage at the utter irresponsibility that is reflected in these incidents.

Another common reaction is to search for solutions to these problems, to find ways of preventing similar incidents from occurring in the future, and to provide some mechanism for punishing the irresponsibility that leads to such tragedies.

One "solution" has been the creation of health and safety laws. Few areas of law have grown as quickly as health and safety law. During the late 1960s and through the 1970s, major legislation was

passed relating to consumer health and safety, occupational health and safety, and environmental health. These laws frequently created new crimes relating to conduct affecting health and safety and a new class of criminals, primarily business corporations and executives who would be held responsible for breaches of these new laws. In other instances, traditional criminal laws were applied to punish persons who ignored health and safety concerns and who created intolerable risks of harm.

Two central issues must be examined with respect to these developments in the law:

1. **Are they effective?** That is, do these new laws and new applications of old laws provide effective solutions to health and safety problems, offering greater protection than alternative solutions?
2. **Are they fair?** Do these laws apply the criminal sanction in ways that are consistent with our traditional notions of fairness in the criminal justice system? Are only the blameworthy punished? Are these acts so morally reprehensible that they merit criminal punishment?

Some years ago, a number of criminologists turned their attention from studying crime in the streets to a study of "crime in the suites." A considerable amount of work has been done in recent years on the subject of corporate and white-collar crime. The difficulty in studying corporate and white-collar crime, however, is that these categories include widely differing behaviors, many of which are morally neutral, such as violations of economic regulations (Kadish, 1963). Distinctly different are those actions of corporations and corporate officials which cause definite harm, physical harm, to consumers, workers, and the public.

This book will examine crimes against health and safety by identifying the legal issues that arise in regard to a number of specific examples of such crimes, especially the way in which the legal system has been applied to them. It will also take a brief look at the causes of crimes against health and safety and the problems encountered in attempting to control and prosecute these crimes.

Finally, crimes against health and safety will be examined in the wider social context in which various kinds of risks are generated and widely tolerated, to address the question of how the legal system can and ought to structure health and safety risks.



REFERENCES

- Brown, M.H. 1980. *Laying Waste: The Poisoning of America by Toxic Chemicals*. New York: Pantheon Books.
- Consumer Product Safety Commission 1983. *Annual Report*. Washington, D.C.: U.S. Government Printing Office.
- DeLorean, J.Z., and J.P. Wright 1980. A Look Inside GM. In *Big Business Reader: Essays on Corporate America*, ed. M. Green and R. Massie, Jr. New York: Pilgrim Press.
- Department of Labor 1984. *Summary of Selected Injury Experience and Worktime for the Mining Industry in the United States, 1931-77*. Washington, D.C.: U.S. Government Printing Office.
- Kadish, S. 1963. Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations. *University of Chicago Law Review*, 30: 423.
- Macon, J. 1984. BLS' 1982 Survey of Work-related Deaths. *Monthly Labor Review*, 107: 43-45.
- Silverman, M. and P.R. Lee 1974. *Pills, Profits, and Politics*. Berkeley, California: University of California Press.
- Zanetos, M.A., et al. 1983. *Health Effects of Occupational Exposure to Hazardous Chemicals: A Comparative Assessment with Notes on Ionizing Radiation*. Washington, D.C.: U.S. Government Printing Office.

Two

Calling a Crime a Crime

THE DEFINITION of “crimes” against health and safety is important because it defines the moral boundaries of acceptable conduct, establishes a legal mechanism for punishing those who transgress these boundaries, and creates a system of law designed to deter these acts. Any definition of such crimes is likely to be problematic. Among the issues that arise are:

1. Whether crimes against health and safety create a just and fair system of liability in which only those who are morally blameworthy for endangering health and safety are punished.
2. Whether crimes against health and safety are defined in ways that actually protect health and safety.

This chapter will examine issues of fairness and effectiveness and will present theories for understanding how the existing laws, imperfect as they may be, have come to pass.

Defining Rights and Responsibilities

Law is a system for politically defining the rights and responsibilities of people in society. Health and safety laws establish certain rights regarding how much we may expect to be protected from

particular kinds of hazards to our health and safety. Creating a right for one class of persons necessarily establishes a responsibility for others. For example, the federal Occupational Safety and Health Act of 1970 establishes the rights of workers to a safe and healthful work environment and establishes a corresponding duty of employers to provide a place of employment that is free from recognized hazards.

Conventional criminal laws, such as those prohibiting theft or assault, are concerned with rights and responsibilities that have been recognized since ancient times and, consequently, are rarely the subject of serious disputes. In the area of health and safety, however, rapid technological developments have created a constantly changing pool of economic opportunities and potential hazards. While various legal and ethical principles are relied upon in advocating particular rights, at bottom the definition of rights and responsibilities regarding health and safety is a political process subject to competing pressures.

For instance, recombinant DNA technology has created potential economic opportunities for the pharmaceutical and biochemical industries. At the same time, however, the possible hazards of releasing new life forms into the environment have created a good deal of resistance to the private development and use of recombinant DNA technology. Recognition of the public's right to be protected from the unknown hazards of new life forms has led to the creation of responsibilities relating to the use of recombinant DNA technology and restricting rights to the free use of and access to new life forms. The actual definition of these rights and responsibilities is a political process in which competing groups seek to have the law recognize rights which benefit their own group. Sociologists disagree, however, about the details of this political process.

Conflict Theory of Law

Sociologists who subscribe to the *conflict theory* of law argue that the *power elite* (Domhoff 1979; Mills 1956; Reiman 1979), made up primarily of leaders within the corporate sector of American society, wield so much political power and influence that they have been able to shape the development of health and safety law to protect their rights and prerogatives to engage in business activities and to maximize profits with minimal restraints. Theorists adopting this point of view frequently emphasize the deficiencies in current health and safety law, how it fails to protect people from many kinds of hazards and minimizes the degree of control and

punishment to which members of the power elite are subjected. They point to continuing health and safety problems, such as occupational exposure to dangerous chemicals, groundwater contamination from inadequate hazardous waste disposal, and the failure of American automobile manufacturers to equip cars with airbags, as evidence of the power of the corporate elite in shaping laws to their own economic advantage.

Conflict theorists also point out that, even where laws have been passed which ostensibly establish health and safety rights and create duties for business to take precautions, they are rarely enforced. Thus, they conclude, such laws are merely part of "public relations" campaigns to assure the public that their health and safety are being protected. Business practices remain unchanged; it's "business as usual" as far as health and safety are concerned.

Pluralist Theory of Law

A somewhat different point of view is expressed by theorists who adopt a pluralist view of American politics. Rather than viewing virtually all law as representing the will and interests of a powerful and stable elite group, *pluralist theory* sees law as the product of a constant tug-of-war between competing groups. In this pluralist competition, the winner is not always the same elite group. Instead, other groups occasionally score victories, gaining new rights and concessions from their opponents in the form of stricter health and safety laws. Pluralist theorists point to the progress that has been made in health and safety protection over the past twenty years as evidence that the corporate elite, while possessing considerable political influence, has not been able to avoid new responsibilities being pressed upon it by a mobilized health and safety movement. Moreover, although many health and safety violations go uncorrected and unpunished, these theorists emphasize the increasing number of prosecutions for crimes against health and safety.

Pluralist theorists also have offered a variety of explanations, besides corporate sector power, to explain why it has been so difficult to enforce the laws protecting health and safety.

The Politics of Law

Ultimately, the difference between the conflict and pluralist theories is a matter of perspective and degree. Both view law as the product of a power struggle. They simply have different conceptions of the relative power of the parties to the conflict and the

magnitude of the victories each side has attained. While some conflict theorists overemphasize the power of the corporate sector, ignoring other important factors influencing political decisions and governmental action, some pluralist theorists have become so caught up in the details of policy implementation and the myriad difficulties that ensue that they have lost sight of the constant pressure of corporate sector power under which health and safety policy must be carried out.

These differences aside, it is abundantly clear that health and safety law, and therefore what is a crime against health and safety, is the product of a political process. Through this process, the law defines responsibilities to safeguard health and to take precautions against injury.

Because the creation of crimes against health and safety is a political process, the results obtained do not always correspond to any rational plan. All sorts of inconsistencies appear in the law. One such inconsistency relates to the type of penalty that is attached to health and safety violations. While it is convenient to continue referring to the whole class of illegal acts affecting health and safety as "crimes" it is important to recognize that the majority of the laws concerning health and safety do not impose criminal penalties. Consequently, the acts which these laws address are not truly "crimes," but only civil offenses.

Differentiating Crimes from Civil Offenses

The principle difference between crimes and non-criminal civil offenses is that the prosecution of crimes must follow the procedures of criminal adjudication. In addition, a penalty of incarceration may not be imposed for a civil offense. Because a person cannot be incarcerated for a civil offense, crimes are commonly thought of as being more serious, and as imposing more serious penalties than civil offenses. Finally, conviction for a crime is normally believed to carry with it a stigma, branding the convicted defendant as a criminal and an outcast, while a civil offense does not carry this extra load of symbolic punishment.

During the 1970s when many of the laws regarding health and safety were either strengthened or created, a number of people pushed for the adoption of criminal penalties for violations of health and safety standards. They sought criminal penalties on a number of grounds.

First, they argued that since the perpetrators of offenses against

health and safety were often well-to-do executives or corporations, the monetary fines that could be imposed as a penalty under a civil offense would not offer an adequate deterrent. Fines would be looked at as just a cost of doing business, but the possibility of going to jail could not be so easily ignored. Therefore, the use of criminal penalties, with the possibility of a jail or prison sentence, might serve as a greater deterrent to violations of health and safety law than would civil penalties.

Criminal penalties were also advocated on moral grounds. The actions of corporate executives leading to injury and illness were characterized in moral terms and compared to conventional crimes. Workplace illnesses, consumer product accidents, and harmful pollution of the air and water were described as assault. For example, Ralph Nader declared that occupational injury and disease were a "domestic form of violence." Criminal penalties were viewed as necessary for just retribution. Civil penalties could not express the moral outrage and community condemnation merited by these heinous acts.

Criminal versus Civil Offenses—Current Law

Because the creation of law is a political process, the advocates of criminal penalties were not always successful in translating their preferences into law. While most of the health and safety laws passed during the 1970s included some criminal penalties, these penalties frequently were more restricted than the advocates of criminal penalties would have preferred. Indeed, the criminal punishments prescribed in these laws are often relatively light given the seriousness of the conduct which they address.

In almost all instances, criminal penalties are authorized only in the case of a willful or knowing violation of a health or safety law. In some cases, the intentional violation must actually result in the endangerment or injury of someone in order for criminal penalties to be imposed. These are very serious offenses, yet the level of criminal penalties imposed are relatively light in comparison to conventional criminal penalties. For example, under the federal Occupational Safety and Health Act, intentionally violating a health or safety regulation and thereby causing the death of an employee, which is a crime equivalent in severity to manslaughter, may result in a maximum penalty of only six months imprisonment.

In spite of the limited range of health and safety offenses for which criminal penalties have been authorized, the number of prosecutions for crimes against health and safety increased throughout

the 1970s, usually against offenders who showed a total disregard for safety and health in the conduct of their business. Thus, the criminal penalty has been reserved for the most blameworthy offenders.

Increasing Importance of Civil Penalties

The increased use of criminal penalties has been overshadowed, however, by the tremendous increase in the use of civil penalties. Most laws pertaining to health and safety provide for a system of administrative regulation, in which an agency of the government is given the authority to make rules to safeguard health and safety. Typically, the legislation creating this authority also contains general penalty provisions, in which the penalties for different kinds of violations are spelled out. The most common form is to provide that any violation of a regulation is subject to a civil penalty.

An important characteristic of these civil penalty provisions is that they impose strict liability.

Strict liability means that the fault or intent of the violator is not relevant to the person's liability for penalty. Simply violating the law, even by accident or mistake, is still subject to penalties. For example, in water pollution law, civil penalties may be imposed upon anyone dumping illegal hazardous wastes, even though the person was not aware that what was being dumped was hazardous or illegal, and even though the dumping was inadvertent—for example, because an employee opened the wrong valve.

Strict liability is used to make enforcement easier and to raise the level of care exercised by persons engaged in potentially hazardous occupations. Proving intent is extremely difficult in many cases of health and safety violations. By eliminating the element of intent from these violations, government officials have a better chance of winning such cases. In addition, because potential violators are aware that pleading error or accident is not a sufficient legal excuse under these laws, strict liability should motivate potential violators to use extra care to avoid mistakes and accidents which might lead to violations.

Discretionary Enforcement

Because strict liability is imposed under most health and safety laws, civil penalties are potentially available in almost any instance in which a violation is discovered by government officials. As a