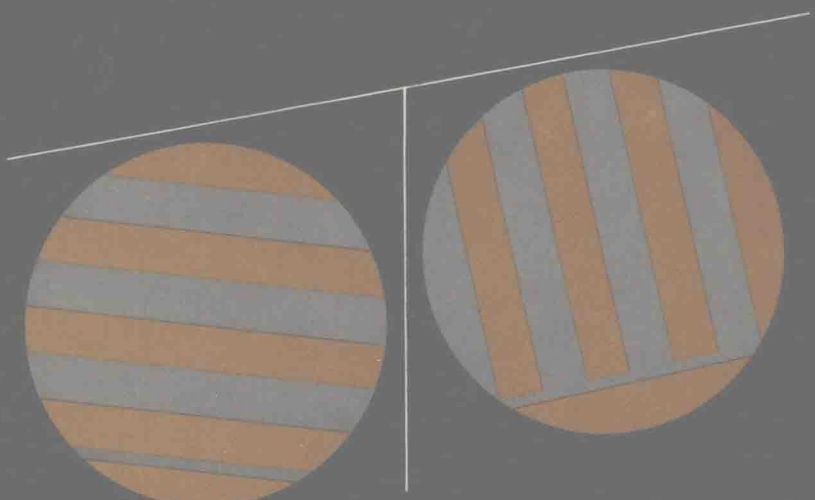
Philosophical Issues in Law

CASES AND MATERIALS

Kenneth Kipnis



PHILOSOPHICAL ISSUES IN LAW:
Cases and Materials

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For my family

Preface

From time to time the facts of a particular legal case may raise an issue which forces us to go beyond precedent, beyond statute, and even beyond the task of constitutional interpretation. The facts of such a case may take us to that area where law and philosophy intersect, where we find lawyers thinking like philosophers and philosophers reasoning like lawyers. As we read the cases which raise such issues and as we study articles by philosophers and lawyers which explore them, we can sense that what are being asked are very basic and very important questions about the way our society is to be. Further, we can come to understand that in trying to comprehend and resolve these questions, the profession of law and the discipline of philosophy have much to offer one another.

In editing this anthology, in assembling materials which display and illuminate six such issues, I have tried to convey that, in legal philosophy at least, not all philosophical problems are merely philosophers' problems. Each of the issues arises in the context of legal opinions, and each of the six sections begins with this material. Two of the cases concern substantive criminal law and a third concerns criminal procedure. Another opinion evaluates a zoning ordinance; two others, a law school admissions policy. One of the cases concerns a conscientious violation of the draft law. All of these decisions have affected the quality of our institutions. Following the opinions, each section provides materials which discuss the issue raised by the case. I have selected pieces by jurists, by legal scholars, and by philosophers, pieces that are strongly at odds with one another, that work to dispel the notion that there are merely two sides to every question. The problems here are extremely difficult and more work needs to be done on all of them. It has been my aim throughout to show the importance of that work.

In preparing this book I have tried to keep in mind the reader

who does not have a legal background. As much as possible I have avoided legal opinions and articles that are bafflingly technical to the lay reader. The introductions to each section provide a context for the main issue and a general indication of the relationships among the materials. A short glossary has been included to help the reader with difficult and unavoidable legal jargon. An appendix on legal materials will serve to initiate the novice into the mysteries of legal citation and the world of legal literature. Finally, where it seemed helpful, I have included comments on particular items in the selected supplementary readings.

As editor I have favored a no-excerpts policy, endeavoring to let each piece speak for itself. Except for the selections by Patrick Devlin, Joel Feinberg, and Richard Epstein, all of the articles are reprinted in their entirety. Among the cases, only *Dotterweich* and the two *DeFunis* opinions have been substantially shortened. To make the cases somewhat easier to read I have deleted many of the legal citations, marking the locations with a double asterisk (**). Citations for all seven cases are given and, with the help of the "Notes on Legal Materials" at the end of the book, it should not be too difficult to locate the complete opinions in any well-equipped law library.

A word of appreciation is owed to more persons and more institutions than it is possible to list here. But I would be remiss if I did not thank William Leon McBride, Jane Lynch, William McLauchlan, Richard Turkington, Arthur Finck, Maria Loffredo, Terry Pence, Bruce Hirsch, John Bruce Moore, Vivien Clair, and John R. Austin. I have been fortunate to have had the help of a production editor as gifted in his craft as Prentice-Hall's Fred Bernardi. I am indebted to the University of Chicago for generously making available resources without which this book would not have been attempted, let alone completed. Gratitude is especially due Dean Norval Morris of the Law School of the University of Chicago. His encouragement and assistance were invaluable. Finally, it is proper that credit be given to Sara Lyn Smith, whose contributions to the genesis of this work were acts of supererogation.

K.K.

Contents

SECTION ONE

Strict Liability in the Criminal Law

At the very broadest level, the criminal law consists of two parts. One part, the law of criminal procedure, is concerned with the manner in which the various elements of the criminal justice system function in the handling of criminal cases. It is through that system that society imposes its most severe sanctions upon its members. The other part of the criminal law, the substantive criminal law, treats the definition and grading of offenses. The issue raised in this section concerns a small but important part of the substantive criminal law: the "strict liability" offenses. To understand what these offenses are and why they are important, some background is required.

Typically, the prosecutor in a criminal case must be prepared to prove more than the fact that the defendant performed an act prohibited by the substantive criminal law. The general rule in Anglo-American jurisprudence is that the act alone is not criminal unless it be accompanied by some specified mental state. Thus, if Betty shoots and kills Bruce, whether Betty has committed a crime—and, if so, which crime she has committed—will depend upon what she had in mind. It may be that Betty planned the death of Bruce in advance, evaluated the possible and probable consequences of her act, and pulled the trigger intending to kill Bruce. If, in addition to proving that Betty shot and killed Bruce, the prosecutor can prove premeditation, deliberation and intent to kill—common mental elements of first-degree murder—then it may be that a conviction for first-degree murder can be obtained. However, if Betty intended to kill Bruce, but did so with neither premeditation nor deliberation, then a conviction for second-degree murder might be in order. But what if Betty did not intend to kill anyone? Say she was test-firing her gun at the wall, aware that the bullet might penetrate and strike someone on the other side. In such a case, because she was aware that there was an unreasonable and high risk that someone would be killed

when she fired her gun, a conviction for manslaughter might be in order. Of course, if Betty, exercising all due care, unintentionally shoots and kills Bruce while trying to save him from being mauled by a mountain lion, it is likely that there is no crime at all. The legal maxim *actus non facit reum, nisi mens sit rea*—the act is not guilty unless the mind be guilty—applies in almost all of the criminal law; virtually every crime includes as one of its elements a *mens rea* (guilty mind) requirement.

There are, however, two important types of exception to this rule. In some jurisdictions Betty would be guilty of manslaughter even if she were *not* aware that there was an unreasonable and high degree of risk that someone would be killed when she fired her gun. Even if she mindlessly discharges the gun without realizing that what she is doing is dangerous, she could be convicted if the reasonable person in the same circumstances would have been aware of the risk. A person can be convicted of such an "objective liability" offense even if there was no subjective awareness that the conduct in question was unreasonable. The prosecutor need only prove that the reasonable person under those circumstances would have known of the risk, and that the defendant engaged in the conduct.

Strict liability offenses represent another exception to the traditional *mens rea* requirement. As with objective liability offenses, strict liability crimes do not contain a *mens rea* element. But it is no defense in a strict liability case—as it would be with objective liability—to show that the defendant was acting as a reasonable person would have acted under the circumstances. Bigamy, for example, has been held to be a strict liability offense in some jurisdictions. Thus, where this is so, if Betty marries Bruce while reasonably believing that Fred, her "former husband," has divorced her, she may still be convicted of bigamy if it happens that her belief is false and her earlier marriage to Fred is legally intact. It would not be a defense to show that the reasonable person would have made the same mistake that she did. Betty may have acted with all the care we expect of people and yet, through strict liability and no fault of her own, she may nonetheless find herself in jail.

There has been a substantial amount of controversy as to whether strict liability offenses are justifiable. The selections of this section are intended as an introduction to this problem. The case with which we begin, *United States* v. *Dotterweich,* illustrates some of the main features of the conflict. Dotterweich is the president of a company which shipped adulterated and misbranded drugs in violation of the Federal Food, Drug, and Cosmetic Act. Though there was neither proof nor even a claim that Dotterweich knew that the drugs were adulterated and misbranded, he has been convicted nonetheless. Justice Frankfurter writes the opinion for the court and stresses the importance and difficulty of designing legislation that would effectively protect "the innocent public who are wholly helpless" from the hazards of "illicit and noxious articles." Referring to "questions of importance in the enforcement of the Federal Food, Drug, and Cosmetic Act" and to the difficulty of subjecting

corporations to criminal penalties, the court holds that though "consciousness of wrongdoing be totally wanting" the offense is committed where "the accused shares responsibility in the business process resulting in unlawful distribution."

Frankfurter looks at the conviction of Dotterweich against the background of an insufficient "enterprise liability," that is, the criminal liability of a corporation for the acts of its agents. The four dissenters, however, are troubled by their apprehension of strict liability and "vicarious liability," that is, the criminal liability of an individual for the act of another. They are also troubled by the apparent failure of the Federal act to include language explicitly permitting convictions like that of Dotterweich. On the one hand we have an apparent desire to safeguard the "lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection," and on the other, a "tenderness of the law for the rights of individuals."

In "Legal Responsibility and Excuses," H. L. A. Hart discusses how different theories of criminal law have accounted for the presence of *mens rea* elements in criminal offenses. After rejecting both "moral culpability" theories and Benthamite "economy of threats" theories, Hart develops his own "mercantile" theory. This considers the criminal law as a "choosing system" in which individuals are respected as "choosing beings." From the perspective provided by this theory Hart goes on to elucidate the "moral odium of strict liability."

Richard Wasserstrom, in his article "Strict Liability in the Criminal Law," reviews some of the main criticisms of strict liability offenses and finds them wanting. Although he is apparently not convinced that strict liability offenses are desirable, and concedes that some statutes creating them may be undesirable, neither is he convinced that such offenses are the embarrassment which their critics have made them out to be. Notwithstanding the criticisms, Wasserstrom maintains that strict liability may not be inconsistent with the "commonly avowed aims of the criminal law." Moreover, it is not clear that strict liability violates the "accepted standards of criminal culpability." Finally, he warns that some of the arguments used to attack strict liability may do damage to criminal negligence offenses (what we have called objective liability offenses).

UNITED STATES V. DOTTERWEICH

UNITED STATES SUPREME COURT

Mr. Justice Frankfurter delivered the opinion of the Court.

This was a prosecution begun by two informations, consolidated for trial, charging Buffalo Pharmacal Company, Inc., and Dotterweich, its president and general manager, with violations of the Act of Congress of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. §§ 301–392, known as the Federal Food, Drug, and Cosmetic Act. The Company, a jobber in drugs, purchased them from their manufacturers and shipped them, repacked under its own label, in interstate commerce. (No question is raised in this case regarding the implications that may properly arise when, although the manufacturer gives the jobber a guaranty, the latter through his own label makes representations.) The informations were based on § 301 of that Act (21 U. S. C. § 331), paragraph (a) of which prohibits "The introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded." "Any person" violating this provision is, by paragraph (a) of § 303 (21 U. S. C. § 333), made "guilty of a misdemeanor." Three counts went to the jury—two, for shipping misbranded drugs in interstate commerce, and a third, for so shipping an adulterated drug. The jury disagreed as to the corporation and found Dotterweich guilty on all three counts. We start with the finding of the Circuit Court of Appeals that the evidence was adequate to support the verdict of adulteration and misbranding. . . .

. . . [B]aseless is the claim of Dotterweich that, having failed to find the corporation guilty, the jury could not find him guilty. Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries.**

And so we are brought to our real problem. The Circuit Court of Appeals, one judge dissenting, reversed the conviction on the ground that only the corporation was the "person" subject to prosecution unless, perchance, Buffalo Pharmacal was a counterfeit corporation serving as a screen for Dotterweich. On that issue, after rehearing, it remanded the

320 U.S. 277 (1943)
Locations of deleted citations marked with double asterisk (**). Ed.

cause for a new trial. We then brought the case here, on the Government's petition for certiorari, 318 U. S. 753, because this construction raised questions of importance in the enforcement of the Federal Food, Drug, and Cosmetic Act.

The court below drew its conclusion not from the provisions defining the offenses on which this prosecution was based (§§ 301 (a) and 303 (a)), but from the terms of § 303 (c). That section affords immunity from prosecution if certain conditions are satisfied. The condition relevant to this case is a guaranty from the seller of the innocence of his product. So far as here relevant, the provision for an immunizing guaranty is as follows:

"No person shall be subject to the penalties of subsection (a) of this section . . . (2) for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act. . . ."

The Circuit Court of Appeals found it "difficult to believe that Congress expected anyone except the principal to get such a guaranty, or to make the guilt of an agent depend upon whether his employer had gotten one." 131 F. 2d 500, 503. And so it cut down the scope of the penalizing provisions of the Act to the restrictive view, as a matter of language and policy, it took of the relieving effect of a guaranty.

The guaranty clause cannot be read in isolation. The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words.** The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint,* 258 U. S. 250. And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded [or adulterated], and that the article may be misbranded [or adulterated] without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares. . . ." *United States* v. *Johnson,* 221 U. S. 488, 497–98.

The statute makes "any person" who violates § 301 (a) guilty of a

"misdemeanor." It specifically defines "person" to include "corporation." § 201 (e). But the only way in which a corporation can act is through the individuals who act on its behalf. *New York Central & H. R. R. Co.* v. *United States,* 212 U. S. 481. And the historic conception of a "misdemeanor" makes all those responsible for it equally guilty, *United States* v. *Mills,* 7 Pet. 138, 141, a doctrine given general application in § 332 of the Penal Code (18 U. S. C. § 550). If, then, Dotterweich is not subject to the Act, it must be solely on the ground that individuals are immune when the "person" who violates § 301 (a) is a corporation, although from the point of view of action the individuals are the corporation. As a matter of legal development, it has taken time to establish criminal liability also for a corporation and not merely for its agents. See *New York Central & H. R. R. Co.* v. *United States, supra.* The history of federal food and drug legislation is a good illustration of the elaborate phrasing that was in earlier days deemed necessary to fasten criminal liability on corporations. Section 12 of the Food and Drugs Act of 1906 provided that, "the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person." By 1938, legal understanding and practice had rendered such statement of the obvious superfluous. Deletion of words—in the interest of brevity and good draftsmanship [1]—superfluous for holding a corporation criminally liable can hardly be found ground for relieving from such liability the individual agents of the corporation. To hold that the Act of 1938 freed all individuals, except when proprietors, from the culpability under which the earlier legislation had placed them is to defeat the very object of the new Act. Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow and loosen it. This purpose was unequivocally avowed by the two committees which reported the bills to the Congress. The House Committee reported that the Act "seeks to set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act of June 30, 1906." (H. Rep. No. 2139, 75th Cong., 3d Sess., p. 1.) And the Senate Committee explicitly pointed out that the new legislation "must not weaken the existing laws," but on the contrary "it must strengthen and extend that law's protection of the consumer." (S. Rep. No. 152, 75th Cong., 1st Sess., p. 1.) If the 1938 Act were construed as it was below, the penalties of the law could be imposed only in the rare case where the corporation is merely an individual's *alter ego.* Corporations carrying on an illicit trade would be subject only to what the House Committee described as a "license fee for the conduct of an illegit-

[1] "The bill has been made shorter and less verbose than previous bills. That has been done without deleting any effective provisions." S. Rep. No. 152, 75th Cong., 1st Sess., p. 2.

imate business." [2] A corporate officer, who even with "intent to defraud or mislead" (§ 303b), introduced adulterated or misbranded drugs into interstate commerce could not be held culpable for conduct which was indubitably outlawed by the 1906 Act.** This argument proves too much. It is not credible that Congress should by implication have exonerated what is probably a preponderant number of persons involved in acts of disobedience—for the number of non-corporate proprietors is relatively small. Congress, of course, could reverse the process and hold only the corporation and allow its agents to escape. In very exceptional circumstances it may have required this result.** But the history of the present Act, its purposes, its terms, and extended practical construction lead away from such a result once "we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule." **

The Act is concerned not with the proprietory relation to a misbranded or an adulterated drug but with its distribution. In the case of a corporation such distribution must be accomplished, and may be furthered, by persons standing in various relations to the incorporeal proprietor. If a guaranty immunizes shipments of course it immunizes all involved in the shipment. But simply because if there had been a guaranty it would have been received by the proprietor, whether corporate or individual, as a safeguard for the enterprise, the want of a guaranty does not cut down the scope of responsibility of all who are concerned with transactions forbidden by § 301. To be sure, that casts the risk that there is no guaranty upon all who according to settled doctrines of criminal law are responsible for the commission of a misdemeanor. To read the guaranty section, as did the court below, so as to restrict liability for penalties to the only person who normally would receive a guaranty—the proprietor—disregards the admonition that "the meaning of a sentence is to be felt rather than to be proved." ** It also reads an exception to an important provision safeguarding the public welfare with a liberality which more appropriately belongs to enforcement of the central purpose of the Act.

The Circuit Court of Appeals was evidently tempted to make such a devitalizing use of the guaranty provision through fear that an enforcement of § 301 (a) as written might operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment. But that is not the way to read legislation. Literalism and evisceration are equally to be avoided. To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distri-

[2] In describing the penalty provisions of § 303, the House Committee reported that the Bill "increases substantially the criminal penalties . . . which some manufacturers have regarded as substantially a license fee for the conduct of an illegitimate business." H. Rep. No. 2139, 75th Cong., 3d Sess., p. 4.

bution depends on the evidence produced at the trial and its submission —assuming the evidence warrants it—to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it 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.

It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on "conscience and circumspection in prosecuting officers," ** even when the consequences are far more drastic than they are under the provision of law before us. See *United States* v. *Balint, supra* (involving a maximum sentence of five years). For present purpose it suffices to say that in what the defense characterized as "a very fair charge" the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict.

Reversed.

Mr. Justice Murphy, dissenting:

Our prime concern in this case is whether the criminal sanctions of the Federal Food, Drug, and Cosmetic Act of 1938 plainly and unmistakably apply to the respondent in his capacity as a corporate officer. He is charged with violating § 301 (a) of the Act, which prohibits the introduction or delivery for introduction into interstate commerce of any adulterated or misbranded drug. There is no evidence in this case of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation.

It is a fundamental principle of Anglo-Saxon jurisprudence that