RESPONSIBILITY LINKS, FAIR LABELING, AND PROPORTIONALITY IN CHINA: COMPARING CHINA’S CRIMINAL LAW THEORY AND DOCTRINE

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This paper evaluates fair labeling in the areas of criminalization and punishment in China. We consider the justice of criminal labeling from a comparative perspective by examining several core offenses and comparing how these offenses would be labeled and punished in China, the United States, and Britain. Our analysis shows that collectivist conceptualizations of responsibility, which are deeply rooted in Chinese thinking, are yielding to more individualistic conceptions of justice. Notwithstanding this phenomenon, themes of collectivism and deterrence continue to influence criminalization and punishment decisions in China, especially

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where individual acts of wrongdoing aggregate to form serious harm. Our analysis is doctrinal in that instead of conducting a large empirical study, we examine several high-profile cases and outline the general theoretical distinctions between them. Our analysis focuses on three core areas of wrongdoing: bribery offenses, manslaughter, and the criminalization of those who are remotely connected to a primary harm. We examine the way China handles corruption and corporate criminality when they result in human fatalities and ask whether their approach is reconcilable with Western notions of justice and fairness. Thereafter, we analyze and compare the use of the proportionality principle in punishment by the Chinese and Westerners. We conclude that Western definitions of harm and proportionate punishment are not universal, nor even consistently adhered to in Britain and the U.S.

I. INTRODUCTION .................................................................275
II. BACKGROUND ........................................................................279
III. CRIMINALIZING REMOTE CORPORATE ACTORS IN THE U.S. AND U.K. ........................................................................... 294
A. General Principles of Corporate Liability in the U.S. and U.K. and Tian Wenhua’s Case................................................... 295
B. General Principles of Accomplice Liability in the U.S. and U.K. and Zheng’s Case .................................................................301
IV. UNIVERSAL STANDARDS OF LABELING AND PUNISHMENT: OBJECTIVITY AND PROPORTIONALITY .................................308
VI. CONCLUSION .........................................................................332

INTRODUCTION

This paper critically examines the various legal doctrines that are used for criminalizing and punishing indirect harms caused by corruption and corporate wrongdoing in China, the U.S., and Britain. The paper focuses on two high-profile Chinese cases in which the defendants were held criminally liable for deaths that resulted from the direct wrongdoing of other “primary parties.” In these cases, the defendants were only remotely or indirectly linked with the crimes for
which they were convicted. The paper also examines how similar wrongdoings would be labeled and punished in the U.S. and Britain.

The cases we consider show that even though the Chinese system of punishment is somewhat communitarian, conduct is only labeled as seriously wrong and punished as such when there are sufficient responsibility links to connect the wrongdoer with the harm for which he or she is being held responsible. Despite the use of different criminal labels, the outcomes of these cases are reconcilable with the individualism that permeates American and British criminal justice.

The American and British systems of criminalization and punishment are justified by the deterrence and harm prevention rationales.\(^1\) The deterrence justification is checked by a number of retributive justice constraints, such as the individual culpability constraint (i.e., mens rea, which is present when the defendant intends to bring about a particular criminal consequence or brings it about with subjective or objective recklessness), the proximate causation constraint, and the constraints provided by excuse and justification defenses (e.g., insanity or self-defense). The moral justification for labeling a wrongdoer’s actions as criminal is premised on the idea that he or she deserves to be punished for culpably—that is, without excuse or justification—bringing about avoidable bad consequences for others.\(^2\) The fact that one may be deterred from engaging in similar wrongdoing is a legitimate aim or function of the institution of punishment because it is necessary to protect genuine human interests. This might explain the legitimacy of having a system of criminalization and punishment, but it does not explain when that system should be used to punish an individual wrongdoer nor the extent of the punishment. It is the retributive justice constraints that provide Western lawmakers with guidance about how to label and punish particular crimes. The retributive constraints require that the crime be labeled and punished in proportion\(^3\) to the seriousness of the

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\(^2\) Dennis J. Baker, Constitutionalizing the Harm Principle, 27 CRIM. JUST. ETHICS 3, 4-6 (2008).

\(^3\) Von Hirsch and Ashworth note that “[t]he desert rationale rests on the idea that the penal sanction should fairly reflect the degree of reprehensibleness (that is, the harmfulness and culpability) of the actor’s conduct.” Andrew Von Hirsch & Andrew Ashworth, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 4 (Oxford Univ. Press 2005).
Responsibility Links

harm and culpability involved. Lawmakers legitimate their criminalization and punishment of certain actions by pointing to the culpability and harmfulness of those actions. The potential harmfulness that flows from a person’s intentional actions makes it fair to prohibit people from performing such actions and also to state in advance that those who do so might be punished.

In 1997, China adopted an individual-rights-oriented system of criminalization and punishment, and it is increasingly developing individual and constitutional rights in a wide range of areas. Wei Lou rightly notes that The 1997 Criminal Code of the People’s Republic of China (hereinafter the 1997 Criminal Code) is basically a modern Western-style penal code. The 1997 Criminal Code incorporates a number of individual justice constraints. Article 14 of the 1997 Criminal Code recognizes the direct intention and subjectively reckless culpability constraints; Article 15 recognizes the objectively reckless culpability constraint; Article 16 recognizes the interrelated constraints provided by excuse and justification; and Article 5 incorporates fair labeling and proportionate punishment constraints. We argue that these innovations are not superficial, but rather substantive changes that are advancing criminal justice in China.

4 Baker, supra note 2, at 4-6.
5 However, the Chinese have long understood the difference between individual and collective responsibility. They also recognized the distinction between intention and recklessness and the concept of proportionality in punishment more than 2,000 years ago. The growth of collectivist responsibility (and the associated educative and deterrence penal policy) in China was fuelled for centuries because lawmaking and political decision-makers strictly adhered to Confucian philosophy. See generally Geoffrey MacCormack, The Spirit of Traditional Chinese Law (Univ. of Ga. Press 1996); Israel Drapkin, Crime and Punishment in the Ancient World 134-59 (1989). The Cultural Revolution, despite all its drawbacks, removed Confucianism from political and legal decision-making and thus not only allowed women and others to be treated as equals, but also opened the door for a more individualistic criminal justice system.
8 Article 16 states, “Although an act in fact results in harmful consequences due to unavoidable or unforeseeable causes rather than intent or negligence, it shall not be deemed a crime.” Articles 17 and 18 provide defenses for those lacking capacity due to age or mental illness. Article 20 contains a self-defense provision.
Commentators who continue to deny the rapid improvement of criminal justice in China are out of touch with what is happening on the ground. They tend to over-focus on the death penalty cases and the lack of an extensive criminal code during the Mao period or else tend to mislabel China’s communitarian justifications for punishment as a communist propaganda campaign. However, similar campaigns in Britain and the U.S. are labeled as penal populism.

Notwithstanding the major improvements found in the 1997 Criminal Code, there remains a marked difference between Western and Chinese conceptualizations of responsibility and the harmfulness of certain criminal activities. We argue that a core difference stems from the different ways in which Chinese and Western lawmakers go about establishing responsibility links. Western lawmakers tend to view direct (culpable) harm to the physical person of another human as the most serious type of harm, whereas the Chinese perspective categorizes indirect contributions to aggregate harms as equally serious. Furthermore, the Chinese perspective is less likely to regard indirectness (a remote responsibility link) as a justification for


13 For decades, British and American lawmakers allowed certain serious harms to go unpunished by labeling them as a cost of doing business. Corporate wrongdoing has traditionally been labeled as accidental rather than culpable, and wrongdoers used the fictitious corporation and its veil to avoid being held responsible for culpable recklessness. See Jeffrey Reiman, The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice (Allyn & Bacon 1995) (1979). See also Lynn K. Rhinehart, Would
grading the wrongdoer’s actions as less serious. Under American and British law, a remote responsibility link often means that a remote wrongdoer will be found less culpable than a primary wrongdoer; however, this is not always the case. For example, secondary liability can be used to impute full blame to both a secondary party and a principal when the secondary party culpably participates in the principal’s criminality.

The first section of this paper outlines the facts of our two core case examples, with reference to the relevant Chinese, British, and American law. The second section considers how those offenses would be dealt with in Britain and the U.S. We argue that even though the labels of crimes are different, the Chinese approach is fully reconcilable with Western notions of justice. We also argue that the Chinese approach reaches better results in cases of negligent and reckless killing by corporate agents. In the third section of this paper, we outline the idea of objectivity and argue that it is impossible to claim that a particular crime label or amount of punishment is disproportionately wrong or right in a universal sense. We argue in that section that too many comparative theorists assume that the human rights developed in the U.S. and Europe are universal, without questioning the normative foundations of those standards. In the final section, we look at the British and American case law concerning proportionate punishment and conclude that these nations do not adhere to the principle of proportionate punishment.

II. BACKGROUND

Let us now turn to the facts of our case examples. In the first case, the remote wrongdoer 14 (Zheng Xiaoyu, the former director of China’s State Drug Administration (SDA)), directly and intentionally facilitated the principal wrongdoers’ (several drug companies’) dangerous criminal activities that eventually caused the deaths of many people. The SFDA is China’s equivalent of the U.S. Food and Drug Administration (FDA) and was founded in 1998 with the aim of

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14 In this paper, the term “remote wrongdoer” refers to the secondary party or accessory—that is, the party who merely facilitates the criminality of another.
improving quality-assurance standards in the food-processing and drug-manufacturing sectors. Zheng was appointed as its first director and was given the unenviable task of implementing quality-assurance standards similar to those set by the U.S. FDA. Zheng tried to implement industry-wide compliance with Good Manufacturing Practice (GMP) standards, but it was impossible for companies to meet the new standards within the set timeframe, and many firms offered bribes to avoid the much greater costs of becoming GMP-compliant. The safety standards were relaxed and mass registration and certification of drugs and medicines took place. Under Zheng’s leadership, the SDA, with a staff of 120, took only three months to certify 147,900 drugs as meeting the new national safety standards. “With the right connections and money to lubricate the wheels of approval, drugs would become GMP-certified with little difficulty.”

Zheng was convicted of personally approving untested and dangerous medicines in return for bribes. On May 29, 2007, he was found guilty in the Beijing No.1 Intermediate Court of graft and bribery offenses pursuant to §§ 382, 383, 384, and 385 of the 1997 Criminal Code and for dereliction of duty pursuant to § 397. He was also stripped of his political rights, had his property confiscated, had his property confiscated,

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16 Id. at 6-10.
17 “GMP, which governs the documentation of the manufacturing process and the certification of all manufacturing and testing of equipment, is a set of industry standards designed to ensure the quality of the manufacturing process for foods and pharmaceutical products. Like the nationalization of drug standards, the adoption of GMP, which has spread worldwide in both developed and developing economies, is a highly complex, as well as a costly process, and thus demands substantial regulatory capacity.” Id. at 9.
18 Id. at 6.
19 Id. at 9-10.
20 See CRIM. CODE OF THE P.R.C., supra note 7, § 57(1) (1997) ( “A criminal who is sentenced to death or to life imprisonment shall be deprived of political rights for life. If a death penalty with a suspension of execution is reduced to fixed-term imprisonment, or life imprisonment is reduced to fixed-term imprisonment, the term of the supplementary punishment of deprivation of political rights shall be changed to not less than three years and not more than ten years.”).
21 See CRIM. CODE OF THE P.R.C., supra note 7, § 59 (1997) (which holds that “Confiscation of property is the confiscation of part or all of the property personally owned by the criminal element. Where all of the property personally owned by the criminal element
and was sentenced to death for taking over $850,000 worth of bribes.

Zheng’s corrupt practices facilitated a number of drug companies’ unsafe manufacturing practices that eventually caused many deaths. In one case, one hundred people died after ingesting cough syrup containing Chinese-made diethylene glycol that was mislabeled as glycerin. In another case, an unsafe medication, produced by the Anhui Huayuan Worldbest Biology Company and approved as safe by Zheng, caused several patient deaths and many serious injuries of a permanent and irreparable nature.

The Chinese offense of graft and bribery is solely aimed at public officials—that is, those who are entrusted “by a state organ, state-owned company, state-owned enterprise, state institution or a people’s organization to handle state affairs. . . .” The substantive offense “occurs when any state functionary takes advantage of his office to illegally possess, misappropriate, deceptively obtain, or use other means to illegally acquire public property.” However, the offense also encompasses private individuals who conspire with state officials to engage in bribery by offering the bribes. The conspirators are treated as joint criminals.

is confiscated, living expenses shall be set aside for the criminal element himself and the dependents he supports. When a sentence of confiscation of property is imposed, property that belongs to or should belong to family members of the criminal element may not be confiscated.”

24 Jyoti Thottam, The Growing Dangers of the China Trade, 170 TIME MAG. 29 (2007). The Court did not mention these deaths in its opinion in Zheng Xiaoyu (No. 1 Intermediate Criminal Trial Judgment #1599: Beijing Municipality (2007)), nor did it make any attempt to establish a responsibility link between Zheng and the deaths. Instead, Zheng was sentenced to death because of his responsibility link to the aggregate harm of corruption—which in some cases includes losses of life but generally is about undermining state institutions.
25 The company has since been closed down and its CEO committed suicide. See David Barboza, For 2 Children, Ban of a Drug Came Too Late, N.Y. TIMES, July 13, 2007, at A10.
27 See CRIM. CODE OF THE P.R.C., supra note 7, § 382(2) (1997).
28 See id. at § 382(1) (1997).
29 See id. at § 382(3) (1997). (This is compatible with the approach adopted in English and U.S. law. Long ago, Lord Mansfield expounded, “Whatever it is a crime to take, it is a crime
The bribery offenses found in English and U.S. law, on the other hand, were traditionally aimed at preventing only public officials from being corrupted and neglecting their public duties. The early English bribery offenses were narrowly tailored to prevent members of the judiciary from being corrupted. Bribe-taking by those performing a judicial function was considered to be an “offence against public justice.” In the U.S., modern bribery offenses encompass the activities of “any public officer, agent, and employee” and also cover bribery in the private sector. The Law Commission for England and Wales recently proposed several new bribery offenses, including an offense that criminalizes corporate bodies for negligently failing to prevent bribery by an employee or agent. A defense is available if the company can show that it had adequate systems in place to prevent bribery. Furthermore, the Law Commission recommends that those convicted of the general offense of bribery on a summary conviction (that is, bribery as a misdemeanor rather than a felony) should be sentenced to imprisonment not exceeding one year and those convicted of indictable or felony bribery should be sentenced to imprisonment not exceeding ten years. Similarly, most states in the U.S. set sentences between five and ten years for bribery offenses.

to give: they are reciprocal.” Rex v. Vaughan, (1769) 98 Eng. Rep. 308, 311 (K.B.). Thus, it can be a crime to offer and also to seek a bribe. These are treated as separate offenses in the U.S. See U.S. v. Jackson, 72 F.3d 1370 (9th Cir. 1995); U.S. v. Blue Tree Hotels Investment (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212 (2d Cir. 2004); People v. Frye, 248 Mich. 678 (1929).

rollin m. perkins & ronald n. boyce, criminal law 527 (the foundation press 1982) (1957) (noting that in the u.s., the common law “came to look upon bribery as the giving of any valuable consideration or benefit to the holder of a public office, or to a person performing a public duty, or the acceptance thereof by such person, with the corrupt intent that he be influenced thereby in the discharge of his legal duty.”).

id.
id.
id. at 529.
id. at 530-34.


id. at 99-100.
id. at 158.

See Perrin v. United States, 444 U.S. 37 (1979); United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977); Wilson v. United States, 230 F.2d 521 (4th Cir. 1956); People v. Gaio,
Conversely, the punishment set for bribery in China is much more severe, though proportionality is considered to a certain extent. The 1997 Criminal Code calibrates punishment according to the monetary value of the bribery involved. For instance, Article 383(1) of the 1997 Criminal Code states:

Individuals who have engaged in graft with an amount of more than 100,000 yuan are to be sentenced to more than ten years of fixed-term imprisonment or life imprisonment and may, in addition, have their properties confiscated. In especially serious cases, these offenders may be sentenced to death and, in addition, have their properties confiscated.

If the bribery involves a sum of more than 50,000 yuan but less than 100,000 yuan, the offender will be sentenced to more than five years of fixed-term imprisonment and may have his or her property confiscated and face a life sentence in especially serious cases. In cases involving sums of more than 5,000 yuan but less than 50,000 yuan, the sentence can range from one to seven years’ imprisonment. It appears that the “especially serious cases” proviso refers to the value of the bribe. Thus, if the value of a bribe goes beyond a certain cut-off value, it will be graded as more serious and punished accordingly. The dereliction of duty offense is not punished with capital punishment.

97 Cal.Rptr.2d 392 (Ct. App. 2000); People v. Patillo, 54 N.E.2d 548 (Ill. 1944). In all of these cases the maximum prison sentence did not exceed five years’ imprisonment. Cf. People v. Salomon, 212 N.Y. 446 (Ct. App. 1914) (in which the maximum sentence was ten years imprisonment).

40 See id. at § 383(3) (1997). Meanwhile, § 383(4) states, “Individuals who have engaged in graft with an amount of less than 5,000 yuan, with the situation being serious, are to be sentenced to less than two years of fixed-term imprisonment or criminal detention. In lighter cases, they will be given administrative action to be decided by the unit to which they belong or the higher administrative organ.”
41 See id. at § 397 (1997) (Outlining the offense of dereliction of duty. “State personnel who abuse their power or neglect their duties, causing great losses to public property and the state’s and people’s interests, shall be sentenced to not more than three years of fixed-term imprisonment or criminal detention; and when the circumstances are exceptionally serious, not less than three years and not more than seven years of fixed-term imprisonment. Where there are separate stipulations under this law, these stipulations shall be followed.”). Here, Chinese law makes a distinction between economic crime (jingji zuixing) such as bribe-taking by officials, and faji zuixing, wrongdoing of a negligent kind where an official neglects her official duties.
Although Zheng was sentenced to death for bribery rather than for being an accomplice to mass manslaughter, his corruption seems to have been labeled from the perspective that it contributed to the total harm that results from widespread corruption (i.e., this type of corruption is seriously harmful in the aggregate as it generally undermines the state’s institutions). The aggregative harmfulness of this type of corruption arguably justifies labeling it as a fairly serious crime. When sentencing Zheng, the court referred to the aggregate harm involved and stated:

[Zheng’s actions] caused heavy losses to the interests of the country and people. Firstly, it led to a loss of control in the regulation of medicines. Secondly, it increased the risk to the users of medicines. Thirdly, it seriously undermined the public’s confidence in government institutions and had an abominable social influence.42

In the same passage of the judgment, the court also noted that the costs involved in re-checking all the drug licenses that Zheng issued were enormous.

Despite Western misconceptions, modern China generally only uses capital punishment for what it considers to be the most heinous crimes.43 Corruption and dereliction of duty have been conceptualized as heinous crimes since the time of the Han dynasty (206 BCE–8 CE).44 There is wide variance between Western and Chinese conceptualizations of what constitutes a heinous crime.45 Westerners

42 Zheng Xiaoyu (No. 1 Intermediate Criminal Trial Judgment #1599: Beijing Municipality, 4, 2007) at 8.
43 CRIM. CODE OF THE P.R.C., supra note 7, § 48 (1997) (“The death penalty is only to be applied to criminal elements who commit the most heinous crimes.”).
44 Vankeerberghen notes that, in the time of the Han Dynasty, “[h]einous crimes, i.e., crimes thought to undermine the state’s institutions, could include ‘plotting rebellion’ (moufan), ‘uttering imprecations against the emperor’ (zhuzu shang) or ‘embezzlement of government funds.’” Griet Vankeerberghen, Family and Law in Former Han China (206 BCE – 8 CE): Arguments Pro and Contra Punishing the Relatives of a Criminal, 12(1) CULTURAL DYNAMICS 111, 113 (2000). See also Brian E. McKnight, Punishments in Traditional China: From Family, to Group, to the State, in PERSPECTIVES ON PUNISHMENT 9 (Richard Mowery Andrews ed., 1997).
45 In many areas, however, there is parity. For example, § 232 of The 1997 Criminal Code of the People’s Republic of China sets a sentence of 10 years’ imprisonment up to capital punishment for murder, depending on the circumstances; § 233 sets a sentence of up to seven years’ imprisonment for negligent manslaughter; and § 234 sets a sentence of up to three years for serious assault. There are many other offenses that have similar sentences to those
might not consider Zheng’s bribe-taking as a heinous crime worthy of capital punishment, but if his wrongdoing is conceptualized in terms of complicity in mass manslaughter, then the dynamics change. Westerners may consider the latter to be a crime of the most heinous kind because of the direct responsibility link between the wrongdoer and the grave direct harm involved. Conversely, Westerners generally do not view indirect harmfulness of corruption as heinous because it is borne collectively and thus does not impact greatly the interests of any identifiable victim.

Capital punishment is no longer used in Britain, but it is used in the U.S. when a killing has occurred. Nonetheless, complicity in mass manslaughter would attract severe jail terms in both jurisdictions. In the U.S. and Britain, facilitating mass manslaughter would be regarded as more serious than individual bribe-taking. On the contrary, in Zheng’s case, the court focused on his direct responsibility for bribe-taking and its aggregative harmfulness, rather than on the responsibility link between Zheng’s culpable choice and the individualized (directly victimizing) harmfulness of his choice—that is, the injuries and fatalities. For instance, the court noted that his bribery “seriously harmed the probity of the position of a government official, seriously destroyed the normal working order of

found in Britain and the U.S. A core difference is that China still uses capital punishment for serious rape cases, whereas the U.S. recently restricted the use of capital punishment in such cases. In Kennedy v. Louisiana, 129 S. Ct. 1 (2008), the Supreme Court of the United States held that the Eighth Amendment’s Cruel and Unusual Punishment Clause did not permit a state to punish the crime of rape of a child with the death penalty.

It is worth noting that the U.S. has also permitted capital punishment for numerous non-homicide offenses, many of which remain in force. See Louisiana v. Kennedy, 957 So.2d 757, 787-790 (2007). (As mentioned in n.45, this case has been overruled by the Supreme Court. Therefore, the list mentioned within the case for non-homicidal capital punishments would not be current since non-homicidal rape cannot be a capital offense.)

This claim is premised on cases where the ultimate harm can be fairly imputed to the wrongdoers—in many of these indirect harm cases, Western lawmakers have failed to develop doctrines for imputing blame to corporate wrongdoers and remote wrongdoers thereby allowing serious wrongdoing to go unpunished. See Baker, supra note 2. Wells lists a number of cases where corporate wrongdoers have managed to evade justice. See Celia Wells, Corporations and Criminal Responsibility 43-62 (Oxford Univ. Press 2001); see also Reiman, supra note 13.

regulation of medicine in China, endangered peoples’ lives, health, and safety, and had a bad social influence.”\textsuperscript{49} Thus, the loss of lives was seen as only one part of the aggregate harm.

Other high-profile bribery cases also demonstrate that a directly culpable causation of death (or other directly victimizing action) is not a prerequisite for capital punishment. In Cheng Kejie’s case,\textsuperscript{50} the bribe-taking did not result in any direct physical or economic harm to others. Cheng was sentenced to death even though his corruption did not pose a risk of injury or death to humans. In that case, Cheng, a high-ranking government official, corruptly misused his position to seek bribes of more than 50,000,000 yuan. Cheng agreed to award lucrative construction contracts to a number of companies in return for bribes. The state lost nothing in economic terms as the state would not have received the bribes if Cheng had not. However, corruption is regarded as a heinous crime in China\textsuperscript{51} because individual acts of corruption cause aggregate harm by undermining state institutions. Corruption more generally has the potential to deter foreign investment,\textsuperscript{52} endanger millions of lives (especially in cases involving food and drug safety standards),\textsuperscript{53} and reduce export revenues.\textsuperscript{54}

The rationale for punishing contributions to aggregative harm is communitarian. It aims to protect the social institutions, relationships, and mutual cooperation that underpin any community. Lacey notes that:

\textsuperscript{49} Zheng Xiaoyu (No. 1 Intermediate Criminal Trial Judgment #1599: Beijing Municipality, 29, 2007).

\textsuperscript{50} Appeal of Cheng Kejie, (Sup. People’s Ct., Criminal Division Final Judgment #434: Beijing Municipality, 2000).


\textsuperscript{53} See Linda Calvin et al., Food Safety Improvements Underway in China, 4 Amber Waves 16, 16 (Nov. 2006).

If a certain number of community members purposefully, heedlessly, or negligently express themselves through hostility, opposition or indifference to the community’s central values in the form of criminal behavior, whether or not they can help the relevant aspects of their disposition, the community must either assert itself or allow itself to be undermined.  

Harm does not have to be serious in an individualized sense (i.e., involving direct harm to identifiable victims) to warrant labeling it as a serious criminal offense. Beyond the most obvious crimes that set back our individual interests, there are many others that set back our collective interests. Gross points out that “[s]ocial life, particularly in the complex form of civilized societies, creates many dependencies among members of a community.” The welfare of members of a community is dependent on each member of that community exercising a certain amount of restraint and precaution when pursuing his or her legitimate aims. It also depends on the members of the community cooperating to achieve certain common objectives. Collective interests normally fall into one of two categories of interests: community or governmental. Community interests include those interests that are vital to individual welfare, such as preserving health systems, national security, and the environment. Preventing harm to governmental interests, on the other hand, includes preventing tax evasion, maintaining the court system, preventing customs violations, and preventing the corruption of government officials. We all have an individual stake in both community and governmental interests. Feinberg notes:

The maintenance or advancement of a specific government interest may be highly dilute in any given citizen’s personal hierarchy. I am not seriously harmed by a single act of contempt of court or tax evasion, though if such acts become general, various government operations that are as essential to my welfare as public health and economic prosperity would no longer be possible.

57 Id.
58 Id. at 120-21.
59 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 63-64
Single acts of corruption or tax evasion not only invade a community interest in a cumulative sense, but also have harmful implications for individuals. As Feinberg explains, “bribing of a public official harms me only indirectly or remotely, but it threatens direct harm insofar as it endangers the operation of government systems in whose efficient normal functioning we all have a stake.”

Corruption can be conceptualized as a serious crime because of its aggregative harmfulness. If many government officials were to engage in bribery it would have a greater impact on the collective interests of China than, say, 100 extra homicides per year. However, an individual should be held responsible in proportion to his contribution to the aggregate harm. Although the aggregate harm of corruption would be rather high on the harm scale, only a negligible share of that harm can be imputed to any given individual who takes bribes. There is no doubt that bribery and tax evasion would lead, in the aggregate, to grave harm. These actions set back our collective and individual interests. They set back our collective interests because tax evasion would result in lower revenues for public amenities such as hospitals and schools, while bribery might result in lower food and drug standards. Moreover, it is not difficult to impute blame for harmful contributions to the total harm when the wrongdoer deliberately engages in serious corruption.

Threats to communitarian interests have long been regarded as one of the most serious sources of danger in China. The interrelated idea of communitarian or collective responsibility is deeply rooted in Chinese penal theory. The idea of community, group, or collective responsibility looks at consequences without considering the responsibility link between those being held responsible and the criminality that has resulted. However, collective liability was reserved for the most severe criminality, which almost always involved crimes that undermined the state. During the Qing period (1644–1911), collective responsibility was reserved for the ten great evils, but by the late eighteenth century corruption was included as a great evil. Waley-Cohen notes,


60 Id. at 64.
61 Baker, supra note 2, at 18-19.
62 See Joanna Waley-Cohen, Collective Responsibility in Qing Criminal Law, in THE LIMITS OF THE RULE OF LAW IN CHINA 112, 113, 118 (Karen G. Turner et al. eds., 2000) (“This was corruption when it was carried out on so vast a scale as to threaten the national economy...”)
Although criminal collective responsibility was formally abolished as part of the Qing law reforms of 1905, the influence of traditional notions of criminal collective responsibility have lingered on into the modern era in complex ways, for the idea that responsibility adhered to the family or community was too deeply ingrained to disappear without a trace. One result of this bequest was that the cultural habit of thinking more in terms of family and community responsibility than in terms of individuals gave the Marxist idea of classes a certain familiarity to Chinese of all social strata.63

The communitarian harm-doing and the corresponding communitarian responsibility rationale might explain why the authorities took a hard line with Zheng.64 It might also explain why in corruption cases Chinese lawmakers focus more on responsibility for the aggregate harm (undermining public institutions) than on the particular responsibility links between the wrongdoer and any identifiable victims.65 However, the Chinese abandoned collective responsibility more than 100 years ago. The Mao government rejected Confucianism, and the market economy has, in the last three decades, moved China toward a more individualistic society.

It is important to note that Zheng’s personal (culpable) choice to contribute to the harm caused to communal interests by public corruption provided an equally important justification for his conviction and punishment. In the U.S. and Britain, this type of serious bribe-taking would attract a fairly severe sentence for similar

and to undermine popular respect for authority and, by extension, the security of the state itself.”). The ten great evils were “rebellion (moufan), treason (moudani), disloyalty (moupàn), parricide (enì), massacre or murder by magical means (budao), great lack of respect (dabujìng), lack of filial piety (buxiao), acute family discord (bumu), incest (buyì), and insurrection (neiluan).” Id. at 117.

63 Id. at 127.

64 Zheng is only the fourth senior official to be executed since the Cultural Revolution and it appears that these high-profile cases are used to set an example to others. Zheng to Appeal Death Sentence, CHINA ECON. REV., May 31, 2007, available at http://www.chinaeconomicreview.com/industry-focus/latest-news/article/2007-05-31/Zheng_to_appeal_death_sentence.html; Joseph Kahn, China Quick to Execute Drug Official, N.Y. TIMES, July 11, 2007, at C1.

reasons, but it certainly would not attract a life sentence or capital punishment. Western lawmakers would not impose a life sentence in such cases, as the extent of the wrongdoer’s contribution to the overall aggregate harm would work as a proportionality constraint. Western lawmakers would try to draw a responsibility link between the wrongdoer and the share of the aggregative harm for which the wrongdoer might reasonably be held responsible. The death penalty would only be justified, if at all, where a sufficient share of the aggregate harm could be individualized and imputed to the particular wrongdoer.

Regardless of whether we consider the penalty for corruption in China, the U.S., or Britain, corruption should be penalized in proportion to the bribe-taker’s individual financial gain, as it is not possible to individualize an imputable share of the total harm to an individual contributor. The courts should treat like cases alike; thus, the punishment for public corruption should not greatly exceed the punishment for private acts of corruption and fraud, even though its

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68 The authors do not support the use of capital punishment, because its use cannot be reconciled with the idea of respect for humanity. See generally, RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 236 (1993). However, we acknowledge that is it is widely used in the U.S., Japan, and China, and that it is permissible in international law. Thus, we consider proportionality in light of this reality and accept that proportionality might be satisfied according to international law if capital punishment is limited to a number of very serious offenses. See, e.g., International Covenant on Civil and Political Rights, art. 6.2, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.”).

69 Baker, supra note 2, at 18-19. Von Hirsch notes that punishing individual wrongdoing cannot be explained in terms of obtaining an unfair advantage, but suggests that some offenses “might plausibly be explained in terms of unjustified advantage. Tax evasion is an example: it seems to involve taking more than one’s share.” ANDREW VON HIRSCH, CENSURE AND SANCTIONS 8 (1993). However, von Hirsch notes that the unfair advantage test does not offer much guidance on how much to punish a tax evader. Id. Here, we suggest that any jail time should be proportionate to the wrongdoer’s individual gain, rather than her contribution to the loss caused by aggregate harm of many people evading tax because her contribution to the aggregate harm would be too trivial to measure.
Responsibility Links

public character adds dimension to its seriousness. Furthermore, if the public official took a bribe of twenty dollars, then she should not be jailed, as a person would not normally be sent to jail for stealing twenty dollars from a private individual. Determining the right measure of punishment is ultimately a matter of degree. To justify prima facie punishment, lawmakers would have to demonstrate, though not with mathematical precision, that the wrongdoer’s action is a sufficient contribution to the total harm. Beyond that, the lawmaker would have to ensure the maximum punishment is proportional to the wrongdoer’s wrongful gain and with the remote and trivial impact that a single corrupt gain would have on public institutions. The severity of the punishment should be proportional to the financial benefit obtained by the wrongdoer, as even a bribe of ten million dollars would not set back collective interests in any measurable way (i.e., it might cost China’s more than 600 million taxpayers less than a fen each). On the contrary, in the Zheng case, the individualized harm (the direct harm caused to the identifiable victims who ingested the substandard medicines) would justify labeling his wrongdoing as very serious and as deserving of the most severe punishment. When Zheng’s wrongdoing is conceptualized as accomplice to mass manslaughter (i.e., as having a responsibility link with the mass manslaughter as opposed to merely a link with the aggregate harm of corruption), a life sentence seems appropriate. We discuss this further in the next section of this paper, with reference to American and British law.

Let us now consider the second case. In this case, the remote wrongdoer (Tian Wenhua, the CEO of the Sanlu Group, a large dairy corporation) negligently made use of the independent criminal wrongdoing of others, resulting in many deaths and serious injuries. It was discovered that large quantities of liquid milk taken from a number of dairies were tainted with melamine. Melamine is an industrial chemical commonly used in plastics, but was added to

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71 The communitarian justification for punishment has utilitarian aims, which include preserving a community’s central values, which would include respect for the dignity and autonomy of each member of the given community. Respecting the dignity and autonomy of the individual members of a community means that the lawmaker should ensure that the punishment fits the crime.
watered-down milk to give the impression that the diluted milk contained sufficient levels of protein, thereby allowing the independent suppliers to sell Sanlu a mix of water and milk. \textsuperscript{73} The melamine was added at three dairies that supplied the Sanlu Group with raw milk. The Sanlu Group was implicated in the wrongdoing of those who added the melamine to the milk because it continued to sell milk after it was notified that there was a high risk that some of its supplies were tainted. \textsuperscript{74} The actions of the corporation/unit \textsuperscript{75} and its CEO caused a public confidence crisis \textsuperscript{76} and thus contributed to the potential aggregative harm of damaging China’s reputation as an exporter and manufacturing base. \textsuperscript{77} In addition, it resulted in grave individualized harm on a grand scale as the tainted milk caused thousands of babies to suffer kidney stones and other complications. Nearly 300,000 Chinese infants were left seriously injured and six died because of their ingestion of the tainted milk.

Several media reports \textsuperscript{78} note that the Sanlu Group received its first complaints about baby milk in December 2007 but failed to act. The Sanlu Group is one of China’s largest dairy producers and operates in a joint venture with Fonterra, a New Zealand-based dairy conglomerate. \textsuperscript{79} Fonterra was warned about the melamine contamination on August 2, 2008 and issued an immediate trade recall, but it said that local administrators refused to implement the recall. \textsuperscript{80} Fonterra informed the Government of New Zealand on September 5, 2008, and within days, New Zealand’s Prime Minister, Helen Clark,
Responsibility Links

alerted the Beijing officials. Four Sanlu executives were found guilty of offenses pursuant to Articles 144 and 150 of the 1997 Criminal Code for producing and selling fake and substandard products. Article 144 holds:

Whoever produces . . . foods that are mixed with poisonous or harmful non-food materials or knowingly sells such things is to be sentenced to not more than five years of fixed-term imprisonment or criminal detention and may in addition or exclusively be sentenced to a fine of not less than 50 percent and not more than 200 percent of the sale amount; when causing serious food poisoning accidents or other serious food-originated diseases and giving rise to serious harm to human health, the sentence is to be not less than five years and not more than ten years of fixed-term imprisonment and may in addition be sentenced to a fine of not less than 50 percent and not more than 200 percent of the sale amount; when causing death or particular harm to human health, is to be punished in accordance with Article 141 of the law.

Meanwhile, Article 150 of the 1997 Criminal Code holds: “Units violating provisions between Articles 140 and 148 of this Section shall be punished with a fine, with personnel directly in charge and other directly responsible personnel being punished according to provisions under the respective articles.” Thus, Article 150 makes it clear that the corporation is to be dealt with separately and is to be subjected only to a fine. However, the corporation’s personnel are to be punished in accordance with the punishments set out in Articles 140-148. Notably, Article 141 allows the death penalty to be imposed when the wrongdoer’s actions cause death or particular harm to human health. Article 150 makes it clear that Articles 140-148 impose individual liability on corporate personnel who are directly in charge or are directly responsible for the criminal harm. The direct responsibility requirement is uncontroversial, as it only catches those who deliberately or negligently bring about the harm. The “directly in

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81 Id.

The “charge” element seems to impose strict or vicarious liability on those who might be in charge of other negligent wrongdoers within a corporation. However, Article 144 of the 1997 Criminal Code includes a knowledge element, which suggests that Article 150 also incorporates a negligence standard.83

Tian Wenhua and her deputy general managers, Wang Yuliang, Hang Zhiqi, and Wu Jusheng, were grossly negligent because they knew of consumer complaints in May 2008 but did not alert the authorities until August 2008. Tian Wenhua was given a life sentence and was ordered to pay a fine of 20 million yuan. The other Sanlu executives received sentences of five to fifteen years. The Sanlu Group was fined 50 million yuan. Intentionally adding poison to foods intended for consumption by vulnerable infants is totally inexcusable, and it is little wonder that those directly involved were subjected to hefty penalties. Zhang Yujun, one of the men who produced and sold melamine-laced milk powder to the Sanlu Group, was sentenced to death by the Shijiazhuang Intermediate People’s Court for endangering public security contrary to Articles 114 and 115 of the 1997 Criminal Code. Meanwhile, Geng Jinping was sentenced to death for adding 434 kilograms of melamine to milk supplies, which he sold to the Sanlu Group.

Gao Junjie was more remotely connected to the primary harm-doing, as he merely manufactured and supplied the melamine. But he was given a suspended death sentence (a suspended death penalty in China is the equivalent to a life sentence with good behavior) for manufacturing seventy tons of melamine-laced protein powder which he sold to Zhang Yujun and Geng Jinping. They then made the independent choice to add the melamine to infant milk and to sell that milk powder to the Sanlu Group. It appears that the court discounted Gao Junjie’s sentence because he did not add the melamine to the milk but merely supplied those who did. Thus, as a mere accessory, he was given a lighter sentence.84

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83 This is compatible with the U.S. law. See Kushner, supra note 82, at 695-96.
84 Full accessories are not normally given lighter sentences in the U.S. and Britain.
III. CRIMINALIZING REMOTE CORPORATE ACTORS IN THE U.S. AND U.K.

In Britain, it is an offense to cause another to be poisoned, but when fatalities are involved, the offense would be one of manslaughter or murder, depending on the facts. In the following sections, we discuss in detail how these cases would be dealt with in the U.S. and Britain. We start by considering Tian Wenhua’s case, and ask whether it might be appropriate to label her wrongdoing as reckless manslaughter or negligent homicide, given her direct responsibility link with the negligent selling of the poisoned milk. We then consider complicity liability for manslaughter and ask whether it is appropriate merely to label Zheng’s wrongdoing as bribery, given his direct responsibility link with the drug manufacturers’ criminality.

A. General Principles of Corporate Liability in the U.S. and U.K. and Tian Wenhua’s Case

Is it really possible to criminalize a corporation as opposed to its agents? Criminalization in its purest sense is based on an agent’s culpable choice to bring about bad consequences for others. Legitimate criminalization requires the lawmaker to produce a normative justification to support the decision to criminalize. The lawmaker would have to demonstrate that the unwanted consequences are in fact bad, were culpably brought about, and are sufficiently serious to warrant a criminal law response as opposed to some other form of regulation. In the case of corporate wrongdoing, penal censure for culpable wrongdoing is not possible, as a corporation cannot deliberate. Therefore, corporations are penalized in a regulatory sense. Regulatory criminalization is criminalization that involves criminal punishment other than imprisonment and does not censure an individual but censures a collective of individuals indirectly for their collective wrongdoing. The fictitious entity is labeled a criminal, which allows its executives, personnel, and shareholders to avoid direct stigmatization and punishment. This form of criminalization does not censure or blame an individual. Rather, it censures or blames a collective group of individuals in a very indirect way, as it is the fictitious legal entity that bears a direct stigma, censure, and punishment. In practice, the term “regulatory” is often used in the

85 Offenses Against the Person Act, 1861, 24 & 25 Vict., c. 100, §§ 23-24 (U.K.) (carrying jail terms of ten and five years, respectively).
criminalization domain to describe offenses that do involve individualized conviction and jail time. But we use the term as a convenient label for distinguishing criminalization that results in a personal conviction, personal stigma, and personal punishment for individual wrongdoing from that which merely labels a company as a criminal. Corporate liability shelters the governing minds of a corporation from direct censure, stigmatization, and imprisonment.

The term “regulatory” is used in this paper to refer to punitive responses to unwanted behavior that does not (and cannot) result in a personal conviction or in an individual being jailed (i.e., it is not possible to jail a company or government). However, the term “regulatory criminalization” would also catch those petty offenses where an individual is blamed personally for a given wrong, but does not receive a conviction or risk jail time for his or her wrongdoing. The difference between using a regulatory response to punish a corporation is that the blame and censure is not individualized. Thus, regulatory criminalization is best explained as involving less censure in that it is indirect when borne collectively, and it is borne trivially, though individually, when the crimes are mere mala prohibitum offenses, such as parking infractions. In many cases, corporate criminalization is used as a backup penalty, but in reality, it works as little more than a cost of doing business. Thus, it is a toothless tiger. This is often the case with corporate wrongdoing where the directors are too far removed from the actual harm to be blamed for it in an individualized way. While reforms in Britain have made it easier to get a corporate manslaughter conviction, such a conviction is no substitute for labeling the human agents responsible as criminals.

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86 Littering offenses are regulatory even though they involve individualized blame for personal wrongdoing, because in most jurisdictions such offenses would not result in a personal conviction or a jail term. In this context, the offenses are merely a form of quasi-criminalization because the harm-doing involved is not sufficient to warrant the full censuring force of the criminal law. Nonetheless, such conduct does result in aggregative harm and is deserving of a punitive regulatory response by way of fines. See GLANVILLE L. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 936 (1983).


88 The Corporate Manslaughter and Corporate Homicide Act 2007 (U.K.) created a new offense that allows for the prosecution of companies and other organizations where a gross failing throughout the organization regarding the management of health and safety results in fatalities. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19 (U.K.). But cf.
The criminalization of a fictitious legal entity does not have the same censuring and retributive impact as criminalizing a human agent for his or her wrongful choices, though it might have an indirect impact. A penal fine and a corporate conviction might affect the directors and shareholders indirectly as the company bears the costs of the fine and the cost of its stock being devalued by any bad publicity following a corporate conviction, but these losses are borne essentially collectively and indirectly. Furthermore, the penal fine would not even be borne collectively when a government department is involved, since the taxpayers would bear the burden of any fine.

Convicting a company is different in other ways from convicting an individual. An individual can feel shame and the consequences of imprisonment. A company may suffer bad publicity when convicted, but the penalties are usually limited to fines and revocations of licenses. Furthermore, the cases of corporate convictions do not focus on individuals getting their just deserts in retributive terms. It is important not to confuse collective corporate criminalization with white-collar wrongdoing—that is, offenders who act outside the scope of their employment, such as public officials who take bribes. In the case of a bribe-taking, the individual gets her just deserts for her personal criminal choice to commit fraud. Likewise, in some cases the company directors will be sufficiently connected to a remote harm to be held personally accountable, even though the company might also be punished independently (by way of a fine) for the same harm. The only common element in full criminalization and regulatory criminalization is that in both cases the lawmaker is aiming to prevent certain unwanted and usually harmful consequences.89

In a number of high-profile U.S. and U.K. cases, the directors of companies have evaded justice. For this reason, we think the Chinese approach might offer some clues about how to deal with corporate wrongdoers in the U.S. and Britain. Tian Wenhua was criminalized and punished not only as a responsible corporate officer, but also for her reckless/negligent decision to knowingly sell poisoned milk.90 Unlike the lawmakers in Britain and the U.S., the Chinese also have


89 Criminalizable bad consequences will not always involve harm. See FEINBERG, supra note 59, at 63-64.

90 See CRIM. CODE OF THE P.R.C., supra note 7, §§ 144 & 150 (1997).
the political will to impose liability where there is a clear responsibility link. In Britain and the U.S., Tian Wenhua might have been charged with reckless manslaughter or grossly negligent manslaughter/negligent homicide, but it is doubtful that the prosecution would have secured a conviction. Her crime would be labeled according to her level of culpability. If the evidence demonstrated that she was subjectively reckless, then reckless manslaughter would have been a possibility. But if she was merely objectively reckless, then the option would have been negligent homicide. She would have been subjectively reckless if she had known that she was running the real risk of causing fatalities. It appears that she was not aware of the severity of the danger involved in selling milk with high melamine levels. Nevertheless, the evidence presented at her trial made it clear that she knew melamine was a poison which was not meant to be added to milk, was so advised by the directors of Fonterra (the New Zealand firm that owned forty-three percent of Sanlu), and failed to recall the tainted milk. It is arguable that once Tian Wenhua became aware of the customer complaints and of the contaminated milk supplies, her failure to issue an immediate product recall was grossly reckless.

In the U.S. and Britain, a similar level of deliberate risk-taking (subjective recklessness) has not been sufficient to bring the directors within the purview of the criminal law. For example, the directors and/or senior managers involved in the Ford Pinto scandal and the Pfizer pacemaker scandal were not prosecuted, even though they

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92 See KADISH ET AL., supra note 82, at 415.
93 See JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME 19 (2003) (“The Ford Motor Company decided that settling the occasional lawsuit arising from injuries sustained when the petrol tanks of its ill-designed Pinto exploded would be less costly than altering the design prior to production or later issuing a general recall to reposition the petrol tanks (which Ford was eventually forced to do anyway).”). See also Richard T. De George, Ethical Responsibilities of Engineers in Large Organizations: The Pinto Case, 1 BUS. & PROF. ETHICS J. 1 (1981), reprinted in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 151, 156 (Larry May & Stacey Hoffman eds., 1991) (arguing that “[y]et, if we are to morally fault anyone for the decision not to add the part, we would censure not the Ford engineers but the Ford executives, because it was not an engineering but an executive decision.”). Per contra, we submit that the Ford engineers and Ford executives are equally culpable and thus equally censurable.
94 Pfizer produced defective heart valves and their testing demonstrated that some of the valves would fracture and cause the recipients’ hearts to explode. However, it refused to recall or disclose the fault and this resulted in many deaths, but the directors and senior management
acted with extreme subjective recklessness—they choose to run the risk of causing many fatalities. Rather, a number of British cases use the identification principle. Thus, it was not possible to establish a sufficient culpability link between the senior management and the harmful act. However, when a train driver went through a red signal because he was packing his bag or when a bosun failed to close a bow door on a ferry because he was asleep, it was possible to establish a sufficient responsibility link between the ultimate harm and the actions of these lower-level employees whose grossly negligent errors caused fatalities. Nonetheless, the prosecution treated their gross negligence as mere accidents, since it was unable to link the directors and senior managers of the companies to the remote harm. In these cases, the facts demonstrated that the lower-level employees had been forced to work long shifts and that insufficient maintenance rendered the electronic warning light and alarms ineffective. Even though it would be the duty of senior management to ensure that their employees followed proper safety and maintenance practices, their negligence went unpunished because English law makes it very difficult to link senior managers to the harm caused by their negligent agents.

When it comes to public welfare offenses, American courts have been willing to impute blame to those who were subjectively reckless. In *United States v. MacDonald & Watson Waste Oil Co.*, the court held that “when an individual defendant is also a corporate

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95 The identification principle allows a corporation to escape liability if the wrongdoing was committed by a person who could not be described as a person of sufficiently high rank to be involved in the management of the corporation. It allows the directors and the corporation to disassociate themselves with thewrongs of their lower level employees. R. v. Tesco Supermarkets Ltd. v. Nattrass, [1972] A.C. 153; R. v. P & O Ferries (Dover) Ltd., [1991] 93 Cr. App. R. 72; R. v. Great Western Trains Co. Ltd. (unreported) Central Criminal Court, 30 June 1999, per Scott-Baker J.


98 *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 50-51 (1st Cir. 1991).
“officer,” the prosecution could prove that the individual had knowledge of the criminality for which she is held responsible if she had actual knowledge of the criminality in question or if she was a responsible officer of the corporation committing the act. \(^{99}\) In order to prove the latter, it must be demonstrated that the defendant was in fact an officer of the corporation, rather than a mere employee, and had “direct responsibility for the activities that are alleged to be illegal.” \(^{100}\) The court held that merely being an officer or even the president of a corporation would not be sufficient to impute knowledge of acts of criminality committed by others under the officer’s supervision or direction. It must be proved that the officer had a responsibility to supervise the activities in question and that she knew or “believed that the illegal activity of the type alleged occurred.” \(^{101}\)

Article 150 of China’s 1997 Criminal Code should be read in a similar way, as Article 144 incorporates a knowledge requirement. Article 144 allows blame to be imputed to those who sell foods that have been mixed with poisonous or “harmful non-food materials” when that person has knowledge that the foods contain poison. Since Tian Wenhua had actual knowledge of the contamination in Sanlu’s milk products (she had been advised of consumer complaints and had a report about the melamine in the milk) and made a deliberate choice to allow sales to continue, she would come within the purview of the responsible corporate officer doctrine as applied in the U.S. statutory welfare offenses. However, in the U.S., statutory welfare-type offenses normally carry jail terms of only around five years. It is submitted that when extreme subjective recklessness is present, the Chinese approach achieves a fairer result. \(^{102}\) If directors are in the business of producing food, pacemakers, or Pinto motorcars and have

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\(^{99}\) Id.

\(^{100}\) Id.

\(^{101}\) Id.

\(^{102}\) In serious cases the victim’s right to justice is only served when the offender is given her just deserts. As J. R. Lucas notes:

> It makes a great difference to the victim whether the community takes his wrong seriously, or passes it off as of no consequence. If he sees the man who cared nothing for him go scot-free, he is given to understand that society cares nothing for him either. But if the wrongdoer is made to see the error of his ways, the man to whom the wrong was done sees his rights vindicated, and is assured that society cares for him, even if one of its members does not, and will uphold his rights in face of assault and injury.

full knowledge that their products are dangerous and are almost
certainly going to result in some fatalities or serious injuries, then they
should be held personally liable for these fatalities and not merely for
a welfare offense. The offense found in Article 144 of China’s 1997
Criminal Code should, however, carry a culpability requirement
similar to the standard used for reckless manslaughter in the U.S. and
Britain because the penalties involved are very severe. If that level of
culpability is involved, then it appears that Article 144 correctly labels
the deliberate selling of poisonous food as a very serious offense.
Depending on the degree of culpability and the particular facts, selling
such food would be a form of reckless or negligent manslaughter
when it results in death.

B. General Principles of Accomplice Liability in the U.S. and U.K.
and Zheng’s Case

As we noted above, the core constraint against unjust punishment
and criminalization is the proportionate punishment constraint.
It is satisfied by demonstrating that any labeling and punishment is
proportional to the offender’s culpability and the harmfulness of her
wrongdoing. Just-deserts criminalization involves showing that the
defendant intentionally (or recklessly) and directly aimed or attempted
to bring about a harm or some other sufficiently serious bad
consequence for others. Desert-constrained criminalization and
punishment is reconcilable with fairness and justice because it
allows a person to be punished only when she has made a choice to
wrong others. That includes choosing to run a risk (subjective
recklessness) and running a risk that a reasonable person would not
run (objective recklessness). When the legislature’s general aim is
consequential harm prevention, recklessness warrants individualized
and proportionate criminalization. The problem with bribe-taking is
that it does not directly

\[103\text{ See generally von Hirsch, supra note 69; Michael Moore, Placing Blame: A}
\text{ General Theory of the Criminal Law 83-188 (1997).}
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\[104\text{ See Dennis J. Baker, The Harm Principle vs. Kantian Criteria for Ensuring Fair,}
\text{ Principled and Just Criminalization, 33 Aust. J. Leg. Phil. 66 (2008); Dennis J. Baker,}
\text{ Leg. Phil. 120 (2009).}
\]
a bribe-taker such as Zheng liable for mass manslaughter when he deliberately facilitates the dangerous unlawful acts of others, which cause many deaths and injuries. In the U.S. and Britain, justice would require a responsibility link to be established between the bribe-taker and the independent wrongdoing of the drug companies. A sufficient responsibility link is required to justify holding Zheng and the like liable for the reckless manslaughter committed by the drug companies. It is not only necessary to be able to link the accomplice with the harm-doing, but also to ensure that any punishment is proportional to his contribution.

Let us consider the law of complicity in the U.S. and Britain to see if Zheng would be labeled and punished as severely in those jurisdictions. If he were labeled as an accomplice to the directors of the drug companies who committed many acts of reckless manslaughter rather than as a mere bribe-taker, then his actions would be considered very serious offenses in both the U.S. and Britain. To label Zheng as an accomplice, the American and British systems make it necessary to establish a normative or responsibility link between the principal’s and the secondary party’s independent actions. The responsibility link is established by demonstrating that the secondary party made a culpable choice to underwrite or associate herself with the primary harmer’s wrongdoing. As Dressler notes, accomplice liability is derivative in nature. An accomplice is not guilty of an independent offense of “aiding and abetting.” Instead, he derives his liability from the primary party with whom he has associated

105 See Kadish et al., supra note 82, at 415.

106 Accomplice liability is dealt with in a number of Articles in the 1997 Chinese Code including § 26 which holds: “A principal offender is one who organizes and leads a criminal group in conducting criminal activities or plays a principal role in a joint crime. A crime syndicate is a more or less permanent crime organization composed of three or more persons for the purpose of jointly committing crimes. The head who organizes or leads a crime syndicate shall bear criminal responsibility for all the crimes committed by the syndicate. A principal offender other than the one stipulated in the third paragraph shall bear criminal responsibility for all the crimes he participated in, organized, or directed.” Whereas, §27 holds: “An accomplice is one who plays a secondary or supplementary role in a joint crime. An accomplice shall, in comparison with a principal offender, be given a lesser punishment or a mitigated punishment or be exempted from punishment. Additionally, § 28 provides that “[o]ne who is coerced to participate in a crime shall, according to the circumstances of his crime, be given a mitigated punishment or be exempted from punishment.”

107 Causation involves showing that the facilitation did in fact facilitate the primary party’s wrongdoing.
A responsibility link in the accessory situation hinges on the secondary party’s culpability. If the secondary party’s contribution to the principal’s harm-doing is unintentional (mere negligence), then there will be no justification for imputing blame to her. Conversely, if $x$ gives $y$ a gun intending that $y$ use it to murder another, then $x$ clearly underwrites $y$’s act of murder. It is fair to impute blame to $x$ for $y$’s act of murder, as she has participated by intentionally supplying the murder weapon with the intention that it be used to commit murder. She associates herself normatively by intentionally assisting the principal to achieve the direct primary harm and therefore can be held responsible for that primary harm, the murder. Dressler notes that most courts hold,

[A] person is not an accomplice in the commission of an offense unless he “share[s] the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking”. In the words of Judge Learned Hand, the complicity doctrine requires that the secondary party “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. . . .”

However, should a person not also be held liable when she merely knows (rather than intends) that her intentional assistance could aid the principal to engage in criminality? Arguably, it would be fair to impute equal blame to a secondary party when she intentionally assists a principal and is extremely reckless as to the side effects of her intentional assistance. The English courts use the doctrine of oblique intention to impute intention to those who have acted with extreme subjective recklessness in causing the death of another. In Britain, a jury may find that the result was intended even when it was not the wrongdoer’s purpose to cause it, so long as the result was a virtually certain consequence of the wrong committed and the wrongdoer knew that it was a virtually certain consequence. Oblique intention is a form of extreme subjective recklessness. In the U.S., a slightly less

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109 See Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940).
110 Dressler, Understanding Criminal Law, supra note 108, at 514.
111 R. v. Woolin, (1999) A.C. 82. We use the term extreme subjective recklessness because we are of the view that purpose or aim (intention) cannot be derived from extreme subjective
demanding standard of extreme subjective recklessness is used to impute intention in homicide cases. Full intention is imputed when a person unintentionally kills another in circumstances where it is evident that she “[c]onsciously disregarded a substantial and unjustifiable risk to human life.”

This type of imputation of intention for extreme recklessness is normally applied in murder cases. Kadish argues that the U.S. standard could also be used to impute full blame to secondary parties in other circumstances, such as when a secondary party consciously disregards “‘a substantial and unjustifiable risk’ that the other person would commit the crime, the risk being ‘of such a nature and degree that, considering the nature and purpose of his conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that law-abiding persons would observe . . .’”

In many cases, mere knowledge (subjective recklessness as opposed to extreme subjective recklessness) has been sufficient for satisfying the intention requirement. We refer to subjective recklessness as involving those situations where the secondary party foresaw that there was a real possibility that an offense would be committed by the person whom she had intentionally assisted. If x, a gun seller, is in the process of selling a gun to customer y and overhears y on his cell phone telling his friend that he is in the process of purchasing a gun so that he can kill his wife and her lover, but x sells the gun anyway, x would do so with knowledge of y’s intentions—recklessness—you either have one or the other. Thus, the term oblique intention is a misnomer. See John Finnis, Intention and Side-Effects, in LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 32, 32-64 (R.G. Frey and C.W. Morris eds., 1991).

112 This standard is used to impute intention for second-degree murder. See Dressler, UNDERSTANDING CRIMINAL LAW, supra note 108, at 556.
115 The English courts seem to be of the view that intentional assistance with subjective-reckless as opposed to extreme-subjective-reckless foresight of the principal’s proposed criminality is sufficient for holding a secondary party liable. See R. v. Bryce, (2004) 2 Crim. App. 35, 2004 WL 1074533. (However, oblique intention is about imputing intention for murder where the risk-taking was of such a high and serious degree that “it might be fairly said that the actor ‘as good as intended to kill his victim and displayed . . . unwillingness to prefer the life of another person to his own objectives.’”). Dressler, UNDERSTANDING CRIMINAL LAW, supra note 108, at 555.
and would realize that there is a real possibility of $y$ carrying out the murders. Ought this level of subjective recklessness be sufficient for the purposes of imputing full intention to $x$ for double murder?

Arguably, when a person sells a gun without knowing the purchaser’s criminal intent, she should not be held liable for the principal’s criminality unless she acts with extreme subjective recklessness. The oblique intention\textsuperscript{116} culpability requirement would relieve the reckless gun seller of criminal liability because, even if the seller intends to sell the gun with knowledge of a purchaser’s planned double murder, it would be unreasonable to hold that the seller knew that the virtually certain side-effect of her intentional sale would be double murder. Merely overhearing someone rambling about a planned murder might put a gun seller on her guard, but it would not be sufficient information for the seller to conclude with certainty that the purchaser would go on to commit double murder after leaving the store. A jury is not likely to infer that the gun seller foresaw double murder as a virtually certain consequence of her intentional sale. Oblique intention would require that the foreseen side-effects of the wrongdoer’s intentional assistance be “so immediately and invariably connected with the action done that the suggestion that the action might not have that outcome would by ordinary standards be regarded as absurd...”\textsuperscript{117}

The Kadish-type extreme-recklessness test is preferred because it would not catch the subjectively reckless gun seller but would catch the extreme subjective recklessness involved in Zheng’s case, where the defendant consciously disregarded a substantial and unjustifiable risk that the principal would sell substandard drugs and medicines, while his assistance was a gross deviation from the standard of conduct that law-abiding persons would observe. The American “substantial and unjustifiable risk” standard refers to taking a great risk where there is little or no justification for taking that risk.\textsuperscript{118}

\textsuperscript{116} For a deeper discussion of oblique intention, see ITZHAK KUGLER, DIRECT AND OBLIQUE INTENTION IN THE CRIMINAL LAW: AN INQUIRY INTO DEGREES OF BLAMEWORTHINESS, 1-57 (Ashgate Publishing Co. 2002).

\textsuperscript{117} “Thus if a man struck a glass violently with a hammer, knowing that the blow would break it, he would be said to have broken the glass intentionally (though not, perhaps, to have intentionally broken the glass), even if he merely wanted the noise of the hammer making contact with the glass to attract attention.” H.L.A. HART, Intention and Punishment, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 113, 120 (1968). See generally Glanville Williams, Oblique Intention, 46 CAMB. L. J. 417 (1987).

\textsuperscript{118} See DRESSLER, UNDERSTANDING CRIMINAL LAW, supra note 108, at 556, and the
standard of a great risk is more flexible than that of virtual certainty. Gao Junjie’s suspended death sentence for manufacturing and selling seventy tons of melamine-laced protein powder to those who eventually made the independent criminal choice to use the melamine powder to make the fake milk demonstrates this flexibility. It appears that the Chinese court reduced Gao Junjie’s sentence to a suspended death sentence because he did not add the melamine to the milk but merely supplied the powder to others. In the U.S. or Britain, we might argue that Gao Junjie was complicit in the wrongdoing of those who added the melamine to the milk; however, the level of complicity, and thus the harshness of punishment, would depend on his culpability and on the harmfulness of his remote contribution. Gao Junjie’s culpability was not sufficient to meet the British oblique intention standard, and his substantial and unjustifiable risk-taking—his endangering action—was more remote than Zheng’s.

Arguably, the American “extreme recklessness” approach would catch those who intentionally assist in crimes of recklessness—that is, those who either have it as their purpose to encourage another to engage in particular reckless acts (e.g., a passenger demanding that the driver speed through a school zone and intending that the driver do so) or who intentionally assist the principal to engage in reckless criminal acts (e.g., a government official who takes bribes and is indifferent to the likely consequences of a drug company producing cases cited therein.

119 Here, the passenger encourages a dangerous act that could lead to further unintentional harm. It is her intention to encourage the acts (the substantial and unjustifiable risk-taking involved in dangerous driving) that would make her an accomplice to the dangerous driving and any unintentional harm that results. See Sanford Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 CAL. L. REV. 323, 347 (1985). See also State v. McVay, 132 A. 436 (R.I. 1926).

120 There is an important conceptual distinction between recklessly aiding the reckless criminality of another and intentionally aiding the reckless criminality of another. Williams provides an example of each: n would recklessly aid his son to drive recklessly if n knows that his son has a habit of driving in a reckless manner, if n realized after leaving the house for a long walk that he had forgotten to secure his car keys, so that his son would not be able to use the car in his absence, and instead of returning to secure the keys takes the chance that his son will not find the keys. Meanwhile, n would intentionally assist his son’s reckless driving if he allowed his son to use the car knowing that his son has a tendency to drive recklessly. However, for the latter to fall within the substantial and unjustifiable risk category, the father would have to know that his son almost always drives dangerously—has a record for doing so, and has been barred from driving. See Glanville L. Williams, Complicity, Purpose and the Draft Code: Part 2, CRIM. L. REV. 98, 99 (1990). Kadish reworks William’s intentional
dangerous medicines). However, assistance in crimes of negligence cannot incur accomplice liability because it would be logically impossible for a person to aid a principal to engage in a crime that the principal was not even aware she was committing. If $x$ assists $y$’s negligent actions with the intention that some primary harm be brought about by the actions of unaware $y$, then $x$ is a primary wrongdoer and $y$ is little more than an innocent agent. In the Zheng case, the primary wrongdoers were not negligent, but rather were reckless, as they deliberately sold substandard medicines and were fully aware that such medicines could pose a risk to those who would ingest them.

Similarly, the sellers of the melamine would be accomplices to those who added it to the milk if they were extremely reckless in supplying it. The suppliers assisted the dairy farmers’ criminality by selling them the melamine, but they should only be held equally responsible as accomplices if they were extremely reckless in doing so. Since the suppliers were aware that melamine is a chemical normally used for the manufacture of synthetic resins and that the purchasers intended to use it for the illicit purpose of hiding the lack of protein in infant milk supplies, it is arguable that the act of selling the melamine was extremely reckless. This is not the first scandal involving adulterated milk in China, and the supplier even went to the trouble of constructing an underground factory to produce the melamine. Thus, extreme recklessness would be sufficient for the purposes of imputing equal blame to both the principal and secondary party. However, a less stringent standard of subjective recklessness could also bring within the purview of the criminal law the subjectively reckless gun seller or the genuine melamine supplier who believed that his melamine would be used to produce plastic or to tan leather. If the melamine supplier were merely suspicious that the melamine might be misused, then this lower level of recklessness would justify only a lower level of punishment and criminalization.

It would not be fair to impute equal blame to those who act only with mere recklessness as to the likely consequences of their acts of assistance (i.e., those who recklessly assist and are indifferent as to the

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a assistance of reckless criminality example to demonstrate the criminal character of intentionally assisting reckless criminality under the substantial and unjustifiable risk standard. See Kadish, supra note 114, at 380 et seq.

primary harmer’s criminal intentions) because they do not share the 
primary harmer’s intent to bring about the ultimate harm and they 
only foresee the primary harmer’s criminality as a real possibility. 
Nonetheless, in such situations the accessory knows that there is a real 
possibility that the principal has bad intentions, and the accessory still 
recklessly assists. Therefore, such accessories ought to have some 
blame imputed to them for their reckless contribution. It is not too 
much, after all, to ask the seller to forfeit a single melamine sale in 
such exceptional circumstances.

In these cases, criminalization should reflect the secondary party’s 
lower level of culpability. Therefore, the appropriate form of 
criminalization would be to enact a separate facilitation offense that 
would allow the offender to be punished in proportion to the 
harmfulness and culpability of her participation. This approach 
would also eliminate the problem that arises when a lawful supplier of 
routine goods or services foresees that there is a real possibility that a 
particular customer is likely to use such goods and services to engage 
criminality because the facilitation offense would have to be 
proportional to the seriousness of the principal’s criminality. Thus, if \( x \) 
sells melamine, foreseeing that there is a real possibility that it would 
be used to produce tainted milk, then proportionate punishment for 
facilitating this type of serious wrongdoing would be fair. In trivial 
cases, proportionality would rule out having a facilitation offense at 
all. Thus, reckless contributions to trivial crimes, such as assisting a 
prostitute by dry cleaning a dress that she intends to use to attract 
clients, should not be criminalized, because the contribution to the 
principal’s trivial harm-doing is not sufficient to satisfy the harm 
constraint for the purposes of criminalizing secondary assistance. Here, 
direct criminalization of the principal’s trivial wrongdoing would be 
sufficient for dealing with the harm involved.

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122 Facilitation offenses should be used to deal with those forms of assistance in which the 
secondary party does not deserve to be blamed equally with the principal because she did not 
share the same intent as the principal with respect to the substantive offense. For a discussion 
of this alternative, see Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 
261 (2000).

123 For this and further examples, see PERKINS & BOYCE, *supra* note 31, at 746-47.
IV. Universal Standards of Labeling and Punishment: Objectivity and Proportionality

China is often criticized for not conforming to Western standards of proportionality and labeling. Amnesty International condemns China’s use of capital punishment for non-violent crimes such as economic and drug-related offenses. However, is it fair to say that such a sentence is disproportionate when the wrongdoer culpably assists criminal acts that result in many deaths? Is there some universal standard that tells us that it is wrong to imprison a CEO for life for indirectly causing the deaths of many infants? In this section, we briefly outline the limits of universal standards. We start by briefly outlining the idea of objectivity and asking whether it is possible that a particular punishment or criminal label is truly unjust because it fails to meet some universal or critical moral standard of justice. We argue that universal standards must be objective if they are to bind all nations. Western commentators often claim that certain punishments or forms of criminalization are truly wrong in a metaphysical moral sense, but they do not explain why. Nor do they explain why their claims are superior to those who might regard twenty years for shoplifting to be a just sentence—a real possibility under California’s three-strikes sentencing laws. A form of objectivity can be achieved by adopting an inter-subjective reflective-endorsement procedure, which is used as a filter to constrain conventional morality. Morality has been used to criminalize innocuous activities, so some type of procedure is needed to scrutinize decisions that criminalize activities that are merely wrong in a conventionally contingent sense, such as exhibitionism. Since the inter-subjective reflective-endorsement approach is limited by the capacity of humans and the conventional nature of many injustices, it can only provide a rough guide as to the rightness or wrongness of a particular punishment or crime label. As we will see below, it is only possible to develop universal criteria for determining proportionate punishment and fair labeling in a very loose sense.

Criminalization and punishment decisions have sound normative foundations when the right combination of empirical, social, and normative information is taken into consideration. However, criminalization decisions are unjust when a decision maker does not

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use sufficiently normative information to make a determination about criminalization and punishment. Human agents invent crimes to manage conventional conflicts that arise from communal living. Criminal law is a system of social control that allows a given community to manage itself. It is used to manage genuine conflicts (wrongs), but also, unfortunately, to criminalize mere violations of positive morality (e.g., prostitution) and to control less powerful groups in society. J. L. Mackie notes:

Only some kinds of harm are socially, cooperatively, resented, and cooperation in gratitude is even more restricted. Again we must seek and can find sociological reasons for these differences: only with particular kinds of harm are the conditions favorable for the growth of a convention of cooperative hostility to them, so only some kinds of harm are seen as wrong and as calling for general resentment and punishment. Though retributive principles cannot be defended, with any plausibility, as allegedly objective moral truths, retributive attitudes can be readily understood and explained as sentiments that have grown up and are sustained partly through biological processes, and partly through analogous sociological ones.

Criminal law based purely on custom, unreasoned convention, and sociological factors would have unjust results, unless it was subjected to the inter-subjective scrutiny of well-informed members of the given community. For instance, in the sixteenth century some lawmakers lacked the capacity to understand that humans could not really be witches, and therefore many women were criminalized for allegedly engaging in witchcraft. This would not happen in modern Britain.

129 Many normative wrongs are conventionally contingent, but others will be universally wrong—that is, wrong in any context or circumstance. On constructivism and universality, see ONORA O’NEILL, TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING (Cambridge Univ. Press 1996).
130 It has been noted that “[e]ven if an illness was explicable by medical theory, it might still be seen as originating in the evil will of another person... A distinction was made between a cause in the mechanistic sense—how a certain person was injured—and cause in the
because there is sufficient empirical information to allow the inter-subjective thinkers to rationally understand that humans cannot have supernatural powers. Similarly, the Chinese and British no longer use collective responsibility because it is clear to most sufficiently informed thinkers that it is unjust. Yet the British used collective responsibility for serious offenses, including capital offenses, until 1798. Through the legal mechanism of a bill of attainder, the legislature could declare a person or group of persons guilty of some serious crime without a trial. The bill of attainder was used to strip people of their property and to sentence them to death without the benefit of a trial.

Generally, we argue that the rightness or wrongness of a particular crime is not discovered as some universal truth but rather that crimes are invented by drawing on inter-subjectively constructed principles of justice (that is, principles that gain their normative aspect from inter-subjectively constrained morality rather than from their alleged truthfulness), social norms, and convention. We do not accept that it is possible to ascertain whether a particular punishment is wrong as a matter of truth but argue that inter-subjectively most modern deliberators (regardless of their cultural background) could understand

purposive sense—why this person not another was injured. When people blamed witches they did it not out of mere ignorance, but because it explained why a certain misfortune had happened to them, despite all their precautions; why for example, their butter did not ‘come.’” A.D.J. Macfarlane, Witchcraft in Tudor and Stuart Essex, in Crime in England 1550-1800 72, 83 (J.S. Cockburn ed., Princeton Univ. Press 1977).


132 Like the Chinese, the British usually reserved collective responsibility for offenses against the state, treason, etc. Id. Like the Chinese, the British usually reserved collective responsibility for offenses against the state such as treason. Id.

133 Id.

134 Objectivity in this sense is derived through a deliberative process. “Agreement of rational, reasonable, and competent deliberators, resulting from an ideally operated deliberative process, may be our best mark of correctness of the judgments in question; but that agreement does not make the judgment correct. . . . In this point, objectivity as publicity fits Kant’s view that . . . if the judgment is valid for everyone who is in possession of reason, then its ground is objectively sufficient. This is sufficient for objectivity but not correctness (“truth” in [Kant’s] discussion). Objectivity, understood as intersubjective validity demonstrated by the agreement of all those possessed of reason, does not constitute correctness . . . but it provides the “touchstone” whereby we assure ourselves, from where we are, that our sense of the truth of judgments we accept is not idiosyncratic . . . .” Gerald Postema, Objectivity Fit for Law, in Brian Leiter, Objectivity in Law and Morals 99, 121 (Cambridge Univ. Press, 2001).
the wrongness or excessiveness of certain forms of behavior and the justice of outlawing them. This inter-subjective scrutiny allows us to provide some rough criteria for determining the general justice of a criminalization or punishment decision. The inter-subjective approach requires the rational deliberators within a community to draw on the best information and the most reasoned principles of justice available when making wrongness and criminalization determinations.

Reason allows inter-subjective thinkers to see that genocide is objectively bad and wrong regardless of the context or circumstances. Genocide is wrong in all contexts because it has the same bad consequence for all its victims, regardless of where they are situated, their race, culture, or nationality. The same deliberator would also understand that the wrongness of exhibitionism is conventionally contingent. To ascertain its badness and ultimately its wrongness the deliberator has to also consider the underlying norms that inform it. We distinguish wrongness that is supposedly discovered as a truth (ethical wrongness, grounded in moral realism, and discovered through personal conviction) from wrongness that is derived from inter-subjectively reflecting on evolving standards of justice.135 Inter-subjectively, the rational deliberator is a detached observer who is apprised of the relevant principles of justice (such as the harm principle, culpability principle, and equality principle), social facts, and conventions, and thus is in a position to reason as follows: “While I myself do not believe or value these things, I can see that it is appropriate that sensible people placed in the agent’s circumstances should do so, and in consequence it was altogether sensible for the agent to have proceeded as he did.”136 This is decided by many people rationally agreeing on the rightness or wrongness of a particular penalty given the circumstances. The inter-subjective approach is more constructive in penal ethics, as it allows a theorist, philosopher, politician, or citizen to draw not only on abstract concepts that have been thought about and developed by thinkers for generations (e.g., justice, autonomy, harm, fairness, equality, and humanity),137 but also


136 NICHOLAS RESCHER, OBJECTIVITY: THE OBLIGATIONS OF IMPERSONAL REASON 9 (Univ. of Notre Dame Press, 1997).

on relevant empirical information, context, convention, and social practice, in order to formulate practically useful guiding principles for constraining unjust criminalization and punishment in complex international and plural contexts.\textsuperscript{138}

Some argue that certain standards of rightness or wrongness are universal because they are truly correct standards, but how do we know that these standards are the truly correct standards for all to follow? Wrongness grounded in realism is, allegedly, non-invented inherent wrongness, that is, wrongness that is truly wrong. Objectivity here equals claiming that the proposition that $x$ is wrong is an absolute truth. Conversely, wrongness according to the inter-subjective approach is about applying the wrongness label to violations that humans can reason are wrong because of their impact on genuine human interests in organized, cooperative, coordinated, civilized societies. Wrongs emerged naturally as society became more complex and as more intricate coordination problems arose. Experience taught people that it was necessary and good to avoid harms and other bad consequences, especially those of the avoidable (culpable) kind. The criminal law was invented to achieve these aims, but it was also designed to solve many secondary (conventionally contingent) coordination problems.

If $x$ were to paint a bright yellow stripe across the Mona Lisa, her conduct would be classified as gross criminal vandalism.\textsuperscript{139} However, unless we consider the underlying social norms, it is not possible to comprehend the wrongness, badness, or harmfulness of intentionally painting a bright yellow stripe on an old painting. Some might argue that the additional stripe is art in itself and thus adds to the aesthetics of the original painting, if they did not know the history of the

\textsuperscript{138} “Obviously, what is rational for someone to do or think hinges on the particular details of how this individual is circumstanced—and the prevailing circumstances of course differ from person to person and group to group. The rulings of rationality are indeed universal, but conditionally universal, subject to a person-relativity geared to the prevailing circumstances.” RESCHER, \textit{supra} note 136, at 11. We take a slightly different approach to Rescher because we assert that some objective wrongs are conventionally contingent, while others are not. There is a difference in genocide and Western conceptualizations of privacy; universality cannot attach to the latter.

\textsuperscript{139} See Criminal Damage Act, 1971, c.48, §1 (Eng.).
painting. It certainly does not diminish anyone’s essential or primitive survival resources in the way that destroying a remote tribe’s only source of water and food would.\footnote{Economic harm is shaped significantly by conventional ideas of ownership. Unlike pain, torture, death, amputation, rape, and so forth, the harmfulness of theft, property damage, and embezzlement varies from culture to culture depending on whether the culture has a communal or individual conceptualization of property ownership, or whether it even recognizes property. In the most primitive sense, harm to essential resources such as shelter and water supplies could be described as harmful in a universal sense. See for example the conceptualization of property adopted by indigenous Australians. Peter Butt et al., Mabo, Wik and Native Title (4th ed. The Federation Press, 2001) (1993).} There is something much more universal about the latter harm because suffering severe dehydration would impact all humans more or less in the same way. The objective wrongness of conventional harms and offenses can only be ascertained by considering contextual, circumstantial, social, and empirical factors.\footnote{Rescher, supra note 136, at 10.} In this sense, it is necessary to understand conduct in light of the social norms that inform it. Baker and Hacker note:

[N]ormative behavior, viewed externally, in ignorance of the norms which inform it, may seem altogether unintelligible. A story is told of a Chinese mandarin passing through the foreign legations’ compound in Peking. Seeing two of the European staff playing an energetic game of tennis, he stopped to watch. Bemused, he turned to a player and said, “If it is, for some obscure reason, necessary to hit this little ball back and forth thus, would it not be possible to get the servants to do it?”\footnote{Gordon P. Baker & P. M. S. Hacker, Language, Sense and Nonsense: A Critical Investigation into Modern Theories of Language 257-58 (Basil Blackwell 1984).}

Over the centuries, lawmakers have drawn on abstract concepts such as justice, autonomy, and conventional norms in an attempt to provide legal solutions to evolving conventional conflicts. Criminal law is a human construct. Its evolution has often been shaped by unjust considerations because lawmakers were not sufficiently enlightened and rational at various stages in history to understand the injustice of some of their decisions.\footnote{Furthermore, Sayre notes that “primitive English law started from a basis bordering on absolute liability.” Francis Bowes Sayre, Mens Rea, 45 Harv. L. Rev. 974, 976-77 (1932).} We argue that a flexible approach that allows for a margin of error or for a degree of pluralism is desirable, even though this would allow some conduct to be
punished more severely in some nations than in others. It might also allow some conduct to be criminalized in some countries and not in others because some activities are only objectively wrong in a conventionally contingent way. Exhibitionism might not cause coordination problems in some parts of Africa, but it would in the U.S., China, and Britain.\footnote{Korsgaard notes, “The moral law tells us to act only on maxims that all rational beings could agree to act on together in a workable co-operative system.” Korsgaard, supra note 135, at 99.}

There is nothing universally wrong with a nudist using a public beach (100 years ago, wearing a modern bikini in public would have been the equivalent of being nude today, and 100 years from now nudity might be the norm on beaches—this is ignoring the health issues related to skin cancer which might send the trend the other way). Nevertheless, in the West, public nudity is regulated for the sake of solving coordination and cooperation problems concerning the ethical use of public spaces in complex plural societies.\footnote{Public nudity is criminalized in the U.S. and Britain because it flouts social norms concerning privacy and anonymity. It also interferes with the non-consenting auditor’s right to be let alone and be spared from receiving other people’s intimate information in public places. See generally, Dennis J. Baker, The Sense and Nonsense of Criminalizing Transfers of Obscene Material, 26 SING. L. REV. 126 (2008).}  The inter-subjective approach allows for a degree of flexibility, whereas abstract moral realism does not, because it cannot explain the badness of many conventionally contingent wrongs like public nudity. Nor could it explain why public exhibitionism is not a serious crime worthy of a long jail sentence. Realism could not demonstrate the inherent wrongness of public nudity because outside of human thought, socialization, context, and convention, it does not produce a bad consequence and is not absolutely wrong in a universal sense.\footnote{“Disgust and nausea, we can plausibly suppose, are self-contained psychological items, conceptualizable without any need to appeal to any projected properties of disgustingness or nauseatingness. . . . The question, now, is this: if, in connection with some range of concepts whose application engages distinctive aspects of our subjective make-up in the sort of way that seems characteristic of evaluative concepts, we reject the kind of realism that construes subjective responses as perceptions of associated features of reality and does no work toward earning truth, are we entitled to assume that the responses enjoy this kind of explanatory priority, as projectivism seems to require.” JOHN MCDOWELL, MIND, VALUE, AND REALITY 157 (Harvard Univ. Press 1998).}
Moral realists\textsuperscript{147} claim that certain actions are wrong in a mind-independent way—that is, wrong regardless of whether there are humans available (including culturally conditioned humans) to conceptualize wrongness. It is arguable that death or physical pain of a biological or physiological nature is a bad consequence in thought-independent terms, not only for humans but also for animals, trees, and all life forms on the planet. The ontological idea is that the consequence of death or physical harm to life would in fact be bad and would exist in strong mind-independent terms regardless of human conceptualizations of the badness of such consequences.\textsuperscript{149} Bad consequences might exist independently of human thought—for example, earthquakes wiping out species—but wrongness is a human construct designed to deal with human conflicts in human societies. When conflicts or clashes arise between human agents, intersubjective agents reflect to determine which party is acting unjustly (\textit{i.e.}, committing a wrong). For instance, the idea of lining up for customer service is a convention that evolved to solve the conflict that would arise if everyone tried to access service at the same time. Likewise, the culpability constraint evolved\textsuperscript{150} from the reflective endorsement process to explain the wrongness of deliberately violating the rights of others—bringing about avoidable (culpable) bad consequences. Deliberators do not have to reflect too deeply to


\textsuperscript{148} As Rescher puts it, “The issue of ‘objectivity’ in the sense of mind-independent is pivotal for realism. A fact is objective in this mode if it obtains thought-independently—if any change merely in what is thought by the world’s intelligences would leave it unaffected. With objective facts (unlike those which are merely a matter of intersubjective agreement) what thinkers think just does not enter in—what is at issue is thought-invariant or thought-indifferent.” RESCHER, \textit{supra} note 136, at 104.


\textsuperscript{150} For an overview of the evolution and reflective recognition of the idea of criminal fault, see Albert Levitt, The Origin of the Doctrine of Mens Rea, 17 ILL. L. REV. 117, 120 (1922-1923). (It was once normal for people to be prosecuted for any harm caused by their “slaves, animals, other members of their household, and even by inanimate things which belonged to [them].”). See also SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I. 470-80 (Cambridge Univ. Press 1952) (1895).
understand that those who fail to wait their turn in the service line (without excuse or justification) act unjustly.

The realist\textsuperscript{151} claim that culpable harm-doing is truly wrong in a strongly mind-independent way is vacuous, because culpability requires a human mind. Metaphysical moral realism does not provide any real guidance about how to identify the wrongness of a wide range of conventionally contingent wrongs because even though we might be able to use science to prove that pain really does exist as a matter of truth or that blinding a human really does harm her in a medical sense, we cannot use science to ascertain the truth of the claim that socially contingent wrongs, such as exhibitionism, are universally wrong as a matter of truth. The harmfulness of many acts is contingent upon convention. Some types of harms can involve short-term pain for some social purpose and thus may be tolerable for complex social reasons.\textsuperscript{152} Nonetheless, it is unclear how intentional human actions can be both intentional and mind-independent. For the intentional harm-doing to be willed and intended, it must be carried out by a creature of human intelligence with a mind that is in operation. When a human thinks, plans, deliberates, and then harms others, the willed harm could hardly be mind-independent. It can only be understood as wrong if there is a human knower to grasp its wrongness. It is wrong because a human being that has enormous intelligence and that has evolved and socialized itself for millennia\textsuperscript{153} is able to draw on its intellect, on social convention, empirical practices, and conventional understandings\textsuperscript{154} to realize the wrongness of intentionally (without

\textsuperscript{151} Thomas Nagel, The View from Nowhere 186 (Oxford Univ. Press 1986).

\textsuperscript{152} Physical harm often is inflicted in the short-term for some long-term benefit, as is the case with surgery. Gross pain might also be inflicted for some cultural purpose, as is the case with scarification. However, even with this type of primitive harm-doing (primitive harms are those that closely strike at a person’s survival resources, physical well-being, etc.), it is not clear that the criminal law always has a role to play. See Dennis J. Baker, The Moral Limits of Consent as a Defense in the Criminal Law, 12 New Crim. L. Rev. 93 (2009). Scarification is a permanent form of body scarring which involves cutting deep wounds in patterns on the body of a person in order to create long-term body art. These practices are dangerous but have deep cultural roots. See Daniel B. Hrdy, Cultural Practices Contributing to the Transmission of Human Immunodeficiency Virus in Africa, 9 Rev. of Infectious Diseases 1109, 1115 (1987).


\textsuperscript{154} Erving Goffman, Relations in Public: Microstudies of The Public Order (Basic Books 1971).
justification or excuse) harming others. This reasoning process demonstrates the normativity of the claim that culpable harm to others is wrong.

Realism explains the badness of primitive harm-doing at a base level, but not the wrongness of that harm-doing. Animals instinctually avoid harm and death. Even if humans were not around to observe a lion killing a wildebeest, the death of the wildebeest would exist and would be a bad consequence for the wildebeest. Instinctually, all species try to avoid pain and death. However, wrongness as opposed to badness of consequence cannot be hypothetically mind-independent.

Willful torture, while producing objectively bad consequences, can only be understood as wrong by creatures that have at least the same type of intelligence and reflective capacities as humans. Domestic cats have a tendency not only to kill birds and mice for food but also to torture such creatures by playing with them for many hours before eating them. In some cases, the cat will not even eat the bird or mouse but merely use it for the fun of playing with it.

When a human sees a cat torture a bird or a mouse by playing with it, she tries to rescue the bird because of conventional norms about birds being good and mice being vermin. The human intervener sees the cat’s wanton use of its prey as wrong. However, no one would consider punishing the cat, as rational humans realize that a cat does not have the reflective and rational capacities of a human being and therefore realize that the cat does not bring about the bad consequences culpably. Likewise, if a tourist wanders too close to the banks of a crocodile-infested river and is killed by a crocodile for food, the crocodile in reality brings about a bad consequence. However, we no longer prosecute animals because our capacity as reflective deliberators has evolved, and we are now sufficiently enlightened to understand that animals do not have the capacity to appreciate that it is wrong to kill a human for food. Conversely, when a person intentionally aims to bring about avoidable bad consequences for others, it is her moral culpability and the badness of the consequences that provides the lawmaker with normative justifications for claiming that the conduct is worthy of criminalization. It is fair to punish

155 This was not always the case. See Edward Payson Evans, The Criminal Prosecution and Capital Punishment of Animals 183-84 (E. P. Dutton & Co. 1987) (1906).

156 The Chinese have long understood the wrongness of collective responsibility even though they continued to use it until 1905. See Vankeerberghen, supra note 44.
Responsibility Links

those who deliberately harm others because harm-doing really does produce bad consequences for those who are harmed and because the harm-doer knows that she is committing a wrong. It violates the genuine individual rights of the victims.

Realism is convincing at a base level because it is easy to ascertain the truth of factual claims, such as gold sinks when it is dropped in water, fire burns, and death and physical harm are painful, bad consequences. Because humans are extremely intelligent and well-socialized creatures, they are able to hypothesize about the existence of certain bad consequences in a mind-independent sense. All they are really doing is stating that certain bad consequences are existential. For example, one might postulate that if a group of rare apes were killed by an earthquake, or a rainforest were destroyed by a volcano, then the earthquake/volcano in reality would produce a bad consequence regardless of whether humans were around to conceptualize it. However, an earthquake or volcano is not blameworthy for its bad consequences. Blame and fault are mind-dependent, conventionally contingent moral concepts that have evolved from human rationality—human reasoning about fairness and justice and the related institutions and social practices that have evolved as people have become more civilized and socialized. Furthermore, the realist status of human culpability as an element of wrongness existing without humans or human rationality, even if correct, does little to explain the wrongness of intentionally engaging in exhibitionism in the streets of modern New York, Beijing, or London.

It might hypothetically be accepted, whether humans exist or not, that a creature with similar intelligence to humans would wrong other species and its fellow creatures by knowingly harming them without excuse or justification (i.e., deliberately bringing about avoidable bad consequences). However, it is unproductive to adopt this type of abstract moral realism when one is trying to solve ethical problems in the criminalization and punishment area. Moral principles such as the culpability principle are instantiated in the world but are human constructs. The culpability condition requires a mind of some kind—mind-dependence and rationally grounded social transactions—if it is to have purpose and appropriate normative force as a justice constraint. A cat torturing a mouse is not a rationally grounded social transaction because cats lack rationality. Soldiers are rational human agents and are able to inter-subjectively draw on principles of justice and social
norms to engage in rational social transactions. Consequently, if soldiers were to torture prisoners of war, they would be acting irrationally and thus wrongfully both in social and moral terms. The soldiers have sufficient rationality and empirical information to understand the wrongness of their actions. Here, the rational thinkers would be able to consider the relevant social information and principles of justice to identify the wrongness of torture. Principles of justice such as the harm principle, the autonomy principle, the culpability principle, and the equality principle, among others, have been developed and constructed by humans and have improved as humans have gained better insights. Claims of the wrongfulness of conduct earmarked for criminalization and punishment should accord with principles of justice and fairness that can gain normative force inter-subjectively. This process allows the lawmaker to claim objectivity but not truth.

Ethical realism cannot provide the type of guidance needed to determine the justice of punishment and criminalization in complex international contexts. Even if it is possible to determine the absolute truth of certain moral propositions about the inherent wrongness and seriousness of certain crimes, there are many crimes, such as exhibitionism, that cannot be explained as having truly bad consequences or ultimately as being absolutely wrong for all people, in all places, at all times. We have not seen a convincing account of the truth of the proposition that being naked in public is truly wrong in an inherent universal sense. It is not a mere case of whether offense and disgust are properties that are instantiated in the world but

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160 Nagel, one of the staunchest defenders of realism, has argued that exhibitionism is only wrongful in a conventional sense. See Thomas Nagel, *Concealment and Exposure*, 27(1) PHIL. & PUB. AFF. 3 (1998).
161 Husak recently attempted to ascertain the metaphysical status of offense—whether the property of offence really exists. Husak was unable to demonstrate that offence really exists and concluded that “[m]any theorists appear to believe that disgust realism is not needed to justify legal intervention; . . . in the end it is necessary to ‘examine empirical data about our disgust mechanisms.’” Douglas Husak, *Disgust: Metaphysical and Empirical Speculations, in Incivilities: Regulating Offensive Behavior* 91, 110-11 (Andrew Von Hirsch & A.P. Simester eds., Hart 2006). See also Aurel Kolnai, *The Standard Modes of Aversion: Fear,*
whether exhibitionism does in fact produce an inherently bad consequence. Socialization seems to provide the better explanation of the disgust-causing properties of public nudity. A public dialectical approach is needed to find a common, but reasoned, account of the relevant universal punishment and criminalization constraints, such as the culpability and bad consequence constraints. These constraints are objective not because they are endorsed by a majority of people but because they are endorsed through a reflective deliberative process that meets certain conditions.  

We do not try to do the impossible—namely, to invalidate the moral-realist claim that certain human actions are truly wrong. It would be impossible to invalidate such claims because they have never been validated.  

Instead, we argue that even if there is an absolute truth about the wrongness of certain actions or the amount of punishment that particular wrongs warrant, the range of possible truth conclusions would be too narrow to provide a wide range of normative standards for guiding punishment and criminalization decisions in international and plural contexts. Truth conclusions are probably limited to identifying certain consequences of a primitive kind as truly bad, such as physical pain and suffering, starvation, a lack of shelter, and dehydration. Yet it is not possible to demonstrate that many conventionally contingent bad consequences, such as the disturbance caused by exhibitionism, are truly bad consequences. Notably, some of these primitive harms are brought about directly, such as when a public official culpably harms members of the public by allowing substandard medicines to be sold, or indirectly, such as when a public official’s bribe-taking impacts people’s welfare by undermining state institutions that are designed to protect their interests. The primitive harms of starvation and blindness are in the bullseye of the inter-subjectively conceptualized bad-consequences dartboard, and as the lawmaker moves concentrically away from the bullseye, the harms become more conventionally contingent. Many would agree that intentional harm-doing is grossly wrong, but many forms of harm are conventional constructs. Therefore, it is impossible to consider how severely these conventional harms should be punished without also considering the social norms that underpin


them. If a person takes a coin and scratches the paintwork on another person’s new Rolls Royce, the car owner has been harmed in conventional terms. However, if it is a case of a minor scratch, it seems that the car owner has only been offended (rather than harmed) in a conventional sense, because she has been socialized and trained to enjoy the aesthetics of motorcars with perfect paintwork. The scratch, if shallow, would not need to be repaired, as the car would not rust; nor would the scratch affect the usability of the car. If the scratch affected the usability of the vehicle and if it is the owner’s only source of transport for attending work to earn a living then her interests have been set back in terms of a primitive harm. The reality in modern complex societies is that many genuine harms and offensive wrongs can only be understood by considering the underlying social norms, as many bad consequences have a substantial man-made element. These bad consequences come about because of the complex social arrangements on which we rely to achieve the levels of cooperation and coordination that are essential for society, community, and civilization to function and exist. Inter-subjectively, “normative claims are not the claims of a metaphysical world of values upon us: they are claims we make on ourselves and each other.”

We argue that while inter-subjective notions of justice cannot be used to ascertain the exact justice of a punishment and criminalization decision, they can be used to identify gross or excessive injustices. For example, if a person were given a capital sentence for shoplifting, then

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164 Here, inter-subjective agreement might be impossible. For instance, in R. v. Gibson, [1991] (1990) 1 All E.R. 649 Eng. Rep. 619 (Q.B.), the defendant was convicted for outraging public decency by displaying earrings made out of human fetuses in an art gallery. Interestingly, some people seem to see art in these types of displays. Likewise, many Westerners would like to have a Caravaggio hanging in their drawing room, but might not want decorated skulls from New Guinea hanging in their drawing room. Social conditioning obviously affects tastes in a fundamental way. See generally Frances Berenson, Understanding Art and Understanding Persons, in OBJECTIVITY AND CULTURAL DIVERGENCE 43 (S.C. Brown ed., Cambridge Univ. Press 1984).

165 See Korsgaard, supra note 162, at 51. (“One reason I take this option to be important is this: I think that its lack of ontological or metaphysical commitments is a clear advantage of Inter-subjectivism; we should not be Objective Realists unless, so to speak, there is no other way. This is not just because of Ockham’s razor. A conviction that there are metaphysical truths backing up our claims of value must rest on, and therefore cannot explain, our confidence in our claims of value. Metaphysical moral realism takes us the long way around to end up where we started—at our own deep conviction that our values are not groundless—without giving us what we wanted—some account of the source of that conviction.”)
the international community would be in a position to condemn the sentence. Inter-subjectively, the Chinese and Western perspectives recognize the harm and culpability constraints. Furthermore, in Britain,\textsuperscript{166} the U.S.,\textsuperscript{167} and China,\textsuperscript{168} the concept of proportionality is also recognized as a justice constraint. Thus, it is possible to determine the injustice of punishment in fairly rough terms. We may not be able to agree that ten years for mere theft is fair, but we could agree that fifteen to twenty years would be excessive. Inter-subjectively, it might be possible to explain why painting a stripe across the Mona Lisa is worse than painting a similar stripe across a kindergarten child’s amateur finger painting. It might also be possible to explain why it is unjust to use strict liability standards for attributing blame for murder.

It would not be difficult to demonstrate that it is morally right and just to jail a rapist to punish him because it is clear that the rapist’s decision to bring about such bad consequences for his fellow human is wrong. When a person intentionally aims to bring about such dire consequences for others, it is his moral culpability and the badness of the consequences that provide us with objective criteria for rationally defending the decision to use imprisonment to protect the interests of victims. Of course, any sentence should also be proportional to the offender’s culpability and the harmfulness of his wrongdoing. But why would it be wrong to sentence the rapist to death or fifty years’ imprisonment as opposed to fifteen years’ imprisonment? Societies seem to use the gravity of the bad consequences involved in rape and the level of retributive sentiments evoked by rape as a gauge for punishing it severely. However, feelings of satisfaction\textsuperscript{169} from seeing the offender brought to justice cannot be measured and thus offer no criteria for deciding the outer limit of punishment in a particular case.

Investing in a system of criminalization and punishment is similar to an airline investing in a system of maintenance for its fleet of 747s. The investment is made to prevent harm. We benefit much more from


\textsuperscript{167} U.S. CONST. amend. VIII.

\textsuperscript{168} See CRIM. CODE OF THE P.R.C., supra note 7, §§ 61-63 (1997).

\textsuperscript{169} It is arguable that compensation might have a greater long-term benefit for the victims of crime in many cases. Furthermore, a dead person does not gain any satisfaction when her murderer is punished.
avoiding criminal harms than we do by getting revenge after being victimized. Thus, it is better to see proportionate punishments as the price of maintaining a system of punishment and criminal law (harm avoidance) than merely as a means to satisfy desires for revenge. We benefit predominantly from avoiding harm, and in order to achieve that goal, crimes must be deterred in proportion to the gravity of the harm they risk.\textsuperscript{170} It is fair to ask those who have committed the gravest harms to pay more towards maintaining the system of harm prevention. They pay more by serving longer sentences, sentences that are proportionate to the harmfulness and culpability of their past wrongdoing. Thus, international lawmakers would be able to agree on the wrongfulness of a core set of primitive harms, but variations in punishment and labeling would increase as the harm becomes conventionally contingent. It is arguable that those harms that are more conventionally contingent are less serious and thus would warrant lighter punishments.


Many activities have been criminalized in Britain and the U.S. even though there is no apparent case for criminalization. For example, it is a crime to beg passively in open streets in Britain and in some U.S. states,\textsuperscript{171} to sell fruit in imperial rather than metric weights,\textsuperscript{172} to consume trans fats,\textsuperscript{173} to feed homeless people,\textsuperscript{174} to fornicate,\textsuperscript{175} to possess sex toys,\textsuperscript{176} to be a homosexual or a lesbian,\textsuperscript{177} to possess marijuana for personal use,\textsuperscript{178} or to attend a live strip show.\textsuperscript{179} The

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\textsuperscript{170} See generally H.L.A. Hart, Prolegomenon to the Principles of Punishment, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, supra note 1, at 1-27.
\textsuperscript{171} Loper v. New York City Police Dept., 802 F. Supp. 1029 (S.D.N.Y. 1992). See also Vagrancy Act, 1824, 5 Geo. 4, c. 83, § 3 (Eng.).
\textsuperscript{172} Christopher Booker, Meet the Shopkeeper who is the Latest to have been Penalized for her Imperial Measures, LONDON: THE DAILY MAIL, Oct. 15, 2008
\textsuperscript{173} Jennifer Steinhauer, California Bars Restaurant Use of Trans Fats, N.Y. TIMES, July 26, 2008.
\textsuperscript{174} Randal C. Archibold, Las Vegas Makes It Illegal to Feed Homeless in Parks, N.Y. Times, July 28, 2006.
\textsuperscript{176} Williams v. Pryor, 240 F. 3d 944, 949 (2001).
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difficult task for labeling and proportionality is to determine which conventional wrongs warrant even prima facie censure. Interestingly, the U.S. and Britain recognize the harm constraint, the culpability constraint, and the proportionality constraint. However, in practice these standards are very loose and are often ignored under political pressure. There is disproportion in labeling as well as disproportionate punishment. The criminal label is disproportionately applied when conduct is not prima facie worthy of criminalization. Criminalization in such cases is prima facie a disproportionate response to the societal problems at issue, and thus, arbitrary.\(^{180}\)

As far as disproportionate punishment is concerned, it is necessary to consider whether conduct that is prima facie criminal has been labeled and punished in proportion to its seriousness. In the U.S., the Eighth Amendment can be invoked to strike down laws that carry excessive punishments.\(^ {181}\) In *Solem v. Helm*, the respondent was convicted for uttering a “no account” check for $100. The usual maximum punishment for that crime would have been five years imprisonment and a $5,000 fine. The respondent, however, was sentenced to life imprisonment without the option of parole under South Dakota’s recidivist statute because he had a number of prior convictions. The Supreme Court held that the “Eighth Amendment’s proscription of cruel and unusual punishments prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.”\(^ {183}\)

In *Solem v. Helm*, the Court did not pluck out of thin air the right to not be punished disproportionately; rather, it referred to the pre-Constitutional history of the right,\(^ {184}\) the Framers’ original intention,\(^ {184}\) the Framers’ original intention,

\(^{180}\) *Malmo-Levine*, [2003] S.C.C. 74, at 280. (Justices LeBel and Deschamps, discussing the criminalization of marihuana possession for personal use, expounded, “[T]he harm that marihuana consumption may cause seems rather mild on the evidence we have. In contrast, the harm and the problems connected with the form of criminalization chosen by Parliament seem plain and important. . . . Jailing people for the offense of simple possession seems consistent with the perception that the law, as it stands, amounts to some sort of legislative overreach to the apprehended problems associated with marihuana consumption. . . . The fundamental liberty interest has been infringed by the adoption and implementation of a legislative response which is disproportionate to the societal problems at issue.”).


\(^{182}\) *Solem*, 463 U.S. 277.

\(^{183}\) Id. at 284-90.

\(^{184}\) Id. at 286 (the Court convincingly and logically demonstrated that historically the proportionality requirement applied to all forms of state punishment. It noted that “the
the text of the Constitution, a number of precedents spanning over a century, and the underlying rationale for the right. The Court held,

The principle of proportionality is deeply rooted in common-law jurisprudence. It was expressed in the Magna Carta, applied by the English courts for centuries, and repeated in the English Bill of Rights in the language that was adopted in the Eighth Amendment. When the Framers of the Eighth Amendment adopted this language, they adopted the principle of proportionality that was implicit in it.

However, the Eighth Amendment has proven to be a toothless tiger in many other cases because inter-subjectively defined standards of justice are not always considered. Instead, the right is interpreted according to the preconceptions and idiosyncrasies of the individual judges in a given case. For instance, in Harmelin v. Michigan, the Court held that the Eighth Amendment allows a state to impose a life sentence without the possibility of parole for the possession of 672 grams of cocaine. In that case, Justice Scalia failed to follow Solem v. Helm and engaged in a game of semantics to argue that there was no historical foundation for the right. In particular, Justice Scalia argued that the text of the Constitution did not expressly mention prison
sentences and that therefore they were not covered by the proportionality requirement. Justice Scalia’s reasoning cannot be reconciled with the rationale for the right or with the idea of having a constitution. Furthermore, Justice Scalia’s historical analysis is not as convincing as that expounded in Solem v. Helm. In that case, the Court noted:

It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. 189

There is clearly no foundation for the contention that the principle of proportionality does not apply to prison sentences. Neither the text of the Eighth Amendment, nor its normative basis, nor the history behind it supports such an exception. The death penalty, fines, and imprisonment were all common forms of punishment when the Eighth Amendment was drafted. What makes these common forms of punishment unusual or cruel? Fines and prison sentences are unusual and cruel when the severity of the penalty is greater than the gravity of the crime. Likewise, the death penalty is unusual when it is used for offenses that do not involve killing. “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”190

It is impossible to interpret rights by referring to a purely originalist historical analysis. Justice White explicitly recognizes this in his dissenting opinion in Harmelin v. Michigan, noting that “[t]he scope of the prohibition against cruel and unusual punishments has long understood the limitations of a purely historical analysis . . . . When it comes to the Eighth Amendment, the Court must employ a flexible and dynamic interpretation.”191 Justice White notes that the Court has recognized that a punishment may violate the Eighth Amendment if it is contrary to the “evolving standards of decency that mark the progress of a maturing society . . . . In evaluating a

punishment under this test, we have looked not to our own conceptions of decency, but to those of modern American society as a whole in determining what standards have ‘evolved.’” It is not clear how future cases will be decided, but it is worth noting that in *Kennedy v. Louisiana*\(^{192}\) the majority also adopted the “evolving standards of decency” approach.

The Supreme Court has also demonstrated some skill in drawing the line in these types of cases. In *Solem v. Helm*, the Court held that a court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including the gravity of the offense and the severity of the sentence, the sentences imposed in similar cases, and whether more serious crimes have been treated more leniently.\(^{193}\) It also held that courts are competent to judge the gravity of an offense and could do so by considering the harm caused or threatened and the culpability of the alleged offender.\(^{194}\) The Court noted that “there are generally accepted criteria for comparing the severity of different crimes . . . despite the difficulties courts face in attempting to draw distinctions between similar crimes.”\(^{195}\) The problem of knowing where to draw the moral line, although troubling, does not arise merely in the area of deciding the justice of penal punishment.\(^{196}\) The Court also referred to other objective variables such as violence, the overall magnitude of the harm involved, whether the wrong was of an inchoate nature, culpability, and status as accessory or principal.

It is clear that modern America pays little attention to fair labeling and proportionate punishment. In *Rummel v. Estelle*,\(^{197}\) the Supreme Court upheld a life sentence for fraud crimes involving a sum of $230, while in *Lockyer v. Andrade*\(^{198}\) it upheld two consecutive twenty-five-year sentences imposed under California’s Three-Strikes law for shoplifting offenses involving a theft of $150 worth of videotapes.

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193 *Solem*, 463 U.S. at 290-94.
194 *Id.* at 292.
195 *Id.* at 294.
196 *Id.* (citing a number of examples where the Court has been called on to make similar evaluative assessments).
Britain, too, only pays lip service to the idea of proportionate punishment. In *Weeks v. United Kingdom*, a seventeen-year-old man was given a life sentence for robbing a store with a starter pistol. The robbery involved a sum of thirty-five pence, which was eventually found on the shop floor. The defendant went to a pet shop with a starter pistol loaded with blank cartridges, pointed it at the owner and demanded the contents of the till. After committing the robbery, he telephoned the police station, confessed, and gave himself up. It emerged that he carried out the robbery because he wanted to pay back three pounds which he owed his mother, who had threatened him with eviction earlier that day. Nevertheless, the European Court held that the life sentence was not contrary to Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. In another line of cases, the European Commission of Human Rights has made it clear that the convention does not contain a “general right to call into question the length of a sentence imposed by a competent court.”

To determine the length of a sentence, a lawmaker would consider the harmfulness of the conduct and the degree of culpability that the offender manifested in bringing about the harm. Thus, a crude formula might be: \( \text{culpability} \times \text{bad consequence} \), that is, \( C \times BC \) (or in the case of jail sentences \( C \times \text{Harm} (H) \)) = sentence length. Culpability would have three values: (1) objective recklessness; (2) subjective recklessness; and (3) full intention (purpose). Full intention would have the higher wrongfulness value of three, with mere recklessness having the lower value of one. Harm cannot be divided into broad categories because it varies significantly in degree and character. For instance, is physical assault on a person worse than causing him or her economic harm? What if the physical harm is minor and the economic harm is great? Harm also affects different people in different ways. One might prefer a black eye to having her new uninsured Bentley

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motorcar destroyed by vandals. Furthermore, some forms of serious harm are much more conventionally contingent than others, such as painting a stripe across the Mona Lisa. Obviously, serious primitive harms (those that impact all humans equally in biological terms, in all places and at all times, such as murder, rape, amputation, starvation, and blinding) provide firmer objective criteria for gauging proportionality. Inter-subjective standards can only provide rough approximations of the limits of a given punishment, especially as the harms become more conventionally contingent.

The approximations cannot be exact, but they can be sufficiently defined for the purposes of demonstrating that the sentences in *Rammel v. Estelle*, *Lockyer v. Andrade*, *Harmelin v. Michigan*, and *Weeks v. United Kingdom* were disproportionate. Harm could be divided up into crude categories, with murder having a value of ten and littering being at the other end of the scale, with a value of one. Deciding where to slot a given harm would not be easy, but it certainly would not be impossible. We use categories rather than fixed rungs on a ladder because, like culpability, the harmfulness of a given bad consequence will be a matter of degree. It may very well fall between two rungs on the ladder. But there are many variables that need to be considered in determining how to categorize a particular harm. Economic harm could be measured to some extent by the value of the loss suffered by the victim in monetary terms. However, we would also have to factor in other variables such as physical violence and intimidation if the economic harm were brought about in violent circumstances, as is the case with armed robbery. Furthermore, physical violence against others can be measured to some degree by the extent of the physical injuries involved, though we would have to consider other variables such as the psychological consequences that flow from certain physical attacks, such as those that normally flow from rape.

A harmfulness grid or ladder would provide lawmakers with general guidance, but ultimately many decisions will be determined as a matter of degree within a particular category of harm. Using a grid

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203 As we have noted above, primitive harm-doing may also be indirectly inflicted by damaging the state institutions that aim to prevent such harms from occurring.


or ladder would mean considering all the variables and theorizing about where to slot a particular harm in each case to make sure that it is fairly labeled. Each decision would need to be supported with sound normative, inter-subjectively defined standards of justice and empirical evidence. A further variable that affects the harmfulness inquiry is the cumulative impact of certain harms. For example, a single instance of bribe-taking does not pose a serious threat to the state’s institutions, but it would pose a serious threat if all government officials took bribes.

Certain crimes might be considered serious against the rungs on the inter-subjectively conceptualized harm ladder, but there is a lot of space between the rungs, which allows for degrees of badness and harmfulness. The culpability ladder is not as controversial, as there are only three core levels of culpability. Most nations could identify the wrongness of genocide and other similarly heinous crimes, but deciding whether the death penalty is a disproportionate response for bribery where the bribe-taker has culpably caused many deaths is not so clear. In light of that, it is not clear that the Chinese acted unjustly by sentencing Zheng to death, given that he deliberately assisted others who committed reckless manslaughter. If the capital punishment were merely for accepting bribes, then it would clearly be excessive. Capital punishment would be excessive because bribery does not involve any direct harm-doing of a normative kind; rather, the harm is indirect since it is contingent on the bribe-makers also acting wrongly.

There are major differences between Britain, China, and the U.S. with respect to capital and non-capital punishment. The U.S. and China both allow capital punishment for non-homicide crimes. The above analysis shows that capital punishment for non-homicide offenses is totally disproportionate. But as we noted, Zheng’s case can be conceptualized as a homicide case because of the fatalities and because of the existence of a responsibility link between Zheng and

\footnote{208 It suggests that a person’s life is only worth the sum he has stolen. See the Appeal of Cheng Kejie (Superior People’s Court, Criminal Division Final Judgment #434: Beijing Municipality, 2000), where the defendant was sentenced to death even though his conduct did not risk or cause any primitive harm to others. Furthermore, his undermining of the state’s institutions, while deserving of a long jail sentence, would be proportionally constrained by the fact that he only made a trivial contribution to the overall harm.}

\footnote{209 See Louisiana v. Kennedy, 957 So.2d 757, 787-90 (La. 2007) for a list of non-homicide offenses in which capital punishment attaches in the U.S.; Lu & Miethe, supra note 9.
these fatalities. Similarly, if Tian Wenhua’s case is conceptualized as a homicide case, then her life sentence seems reasonable, as there is a responsibility link between her reckless choice to continue to allow contaminated supplies of milk to be purchased by her corporation, knowing that these supplies would be processed and resold directly to innocent consumers.

VI. CONCLUSION

Our analysis shows that in the U.S. and Britain courts only pay lip service to the idea of proportionate punishment and that many of the laws in these countries contravene the proportionality constraint. These nations do not follow the so-called Western standard of justice in this area. This is not surprising given that there is no clear universal standard, and there is massive disagreement within these jurisdictions as to what is an objectively fair sentence. Even in those areas where there is agreement, the room for variation in sentencing is reasonably wide. For instance, it would not be easy to determine whether the trivial harm involved in shoplifting always warrants a very short jail term. A recidivist shoplifter may very well deserve time in prison. Thus, the courts must to have some room for discretion allowing them to identify sentences that would be grossly unjust and adjust them in accordance with the proportionality principle. If a person were sentenced to ten years’ imprisonment for stealing a pair of shoes, then clearly the courts could identify the disproportionality between the harmfulness of the wrong and the sentence imposed. We have argued that measuring a harm’s seriousness involves considering the harm’s impact on primitive interests as well as the conventional implications of the harm. However, the injustice will have to be fairly gross before judicial review by the higher courts would be warranted. Therefore, some discretion in sentencing has to be left for judges to take into account the circumstances under which harms are committed.

The real problem for proportionality in both labeling and sentencing is that often it is not possible to inflict proportionate harm on the wrongdoer. For instance, if a terrorist takes 300 lives in a terrorist attack, even capital punishment can only take his single life in return. Furthermore, the harmfulness of jail time is of a completely different nature to the harmfulness of rape, so it is not clear that jail time inflicts proportionate retribution for rape. However, this does not mean that reasonable standards of proportionality are unavailable. We have argued that merely relying on realist assumptions is not sufficient
to ascertain the justice of a punishment or criminalization decision. Instead, the process is complex and multifaceted. It involves considering the relevant principles of justice and the conventional context in which those principles are being applied in order to produce a reasonable result.

Finally, we have argued that the Chinese cases are much easier to conceptualize as very serious when one identifies a responsibility link between the offenders and the homicide offenses. Article 144 of China’s 1997 Criminal Code speaks of a homicide offense when it makes specific reference to the consequence of lost lives. It also makes clear that capital punishment is limited to violations of Article 144 that result in death or particular harm. It is submitted that capital punishment is not likely to be applied unless the violation does in fact cause death and that, as a matter of labeling and proportionality, this Article should enshrine such a limitation. We argue that if the culpability standard for this offense is similar to that of a reckless manslaughter in the U.S. or Britain, then a violation of Article 144 resulting in death is appropriately punished as a homicide offense. Notably, the U.S. courts have held that “[t]he Eighth Amendment does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that results in murder is major and whose mental state is one of reckless indifference.”

Furthermore, in Tison, the Court held that:

\[\text{Enmund v. Florida}\] indicates a societal consensus that a combination of factors may justify the death penalty even without a specific “intent to kill.” Reckless disregard for human life also represents a highly culpable mental state that may support a capital sentencing judgment in combination with major participation in the felony resulting in death.

As for Zheng’s case, we are of the view that it should not have been labeled as mere bribery, because his intentional acts of assistance were sufficient to link him to the deaths caused by the reckless

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\[Id.\]


\[Tison, 481 U.S. 137, 138.\]
activities of the drug companies. Notwithstanding the aggregative seriousness of public corruption, Zheng’s individual contribution to the total harm would not be sufficient to label his wrongdoing as worthy of capital punishment or life in prison. However, intentionally assisting reckless homicide would at least provide a basis for labeling his crime as worthy of a life sentence.