

How About Making It a Crime?

In the FAA's Aviation Safety Reporting System, one of the exclusions for being able to safely report is that of criminal conduct. If you have engaged in criminal conduct, you cannot be afforded the protections of the ASRS. We have to draw the line somewhere, right? Yes, we can learn from human errors. That's a far cry from letting criminals participate in the learning process with an assurance that we're not coming after them. There we cannot go. Right?

Julie Thao, Joseph Lepore, and Jan Paladino

Julie Thao was a nurse at St Mary's Medical Center in Madison, Wisconsin. On July 5, 2006, Thao was caring for a 16-year-old young woman in labor. The mother-to-be had a strep infection, leading the doctor to order penicillin to protect the baby from infection. As asserted in the criminal complaint, Thao took a second medication out of the locked storage so that she could show the patient what the actual medication, the penicillin, would look like. Through a series of errors, this second medication (Bupivacaine) was

administered to the patient instead of the desired penicillin. Within five minutes of administering the Bupivacaine, the patient was in seizure and dying. This event led the Wisconsin Department of Justice to file a criminal complaint against Thao. If found guilty of the class H felony, Thao faced punishment of a fine not to exceed \$25,000 or imprisonment not to exceed six years, or both.

Approximately two months later, while flying over Brazil, two U.S. pilots, Joseph Lepore and Jan Paladino, were involved in the worst aviation accident in Brazil's history. At 37,000 feet, their executive jet clipped the wing of a Gol Airlines 737, sending the 737 spinning out of control, killing all 154 people on board. Similar to Thao, the two pilots found themselves facing criminal charges in Brazil for "a lack of necessary diligence that is expected and required of flight crews."

Both of these events led to public debate. In Wisconsin, the hospital association issued a press release:

"The Department of Justice's (DOJ) decision to pursue unprecedented criminal charges against a nurse who did not deliberately harm a patient accomplishes nothing other than to compound the anguish of the situation... It makes no sense to add to this tragedy by alleging that this mistake, as upsetting as it was, was more than a human error. And it is cruel to allege that this mistake constituted criminal conduct. By setting a precedent that the DOJ will pursue criminal charges against health care professionals who make unintentional human errors, the

DOJ sends a chilling message to health care professionals now in the state, and to those considering practicing here.”

Likewise, in response to the criminal complaint following the aviation accident in Brazil, aviation safety experts have expressed regret. Flight Safety Foundation’s Kenneth Quinn said:

“There is a tremendous chilling effect that criminal prosecutions can have on getting people to come forward and admit mistakes. We need to focus not on putting people behind bars, but rather on finding out what went wrong and why, and then to prevent its reoccurrence.”

Prosecuting human error is a slippery slope. Few of us would argue against the role of the criminal system in taking care of those who intend to cause harm to another. The important question is whether we should be using the criminal system to exact justice for human errors that were not intended by the human beings involved. Should we criminally prosecute the father who inadvertently left his child in the car rather than dropping him off at daycare? Should we have criminally prosecuted Thao, Lepore, and Paladino?

Morrisette v. United States, 342 U.S. 246 (1952)

In December 1948, William Morrisette went deer hunting in an inactive bombing range in a sparsely populated area of Michigan. In this range, spent bomb casings had been cleared away into piles that were exposed to the weather and eventually rusted away. On this trip, Morrisette did not get a deer. To help cover his expenses, he loaded about three tons of spent casings into his truck and sold them as scrap for a total of \$84. To his surprise, I am sure, Morrisette was criminally indicted under 18 U.S. Code 641, which provides that “whoever embezzles, steals, purloins, or knowingly converts” U.S. property is punishable by fine and imprisonment.

What made this case important to U.S. legal history is that the jury was essentially instructed to ignore Morrisette’s intent and focus simply on his actions in converting U.S. property. The reason this case went all the way to the U.S. Supreme Court was essentially the same issue that was at hand in the case of the Wisconsin nurse and the U.S. pilots. Did Morrisette have criminal intent? Was evil intent required for him to be found guilty of a crime? Yes, we understand that murder and other high-intent activities deserve criminal penalty, but what about a human mistake?

In this case, now more than five decades old, the Supreme Court sketched the expansion of criminal actions into the realm of human error. In this case, Justice Robert H. Jackson traced the defining elements of a criminal. Jackson wrote that our long history of criminal law required two

elements: *actus rea* and *mens rea*, the evil hand and the evil meaning mind. Since the origins of English common law, this combination of the evil hand and the evil mind has been the centerpiece of criminal law. Ask anyone on the street to define the word criminal and they will include a requirement for some level of evil intent—the intent to cause harm. This is why many of us find the criminal indictments against Thao, Lepore, and Paladino to be unsettling. We do not believe these individuals had any evil intent to harm. Rather, they were merely trying to do their job.

Writing for the majority, Jackson addressed the requirement for intent in *Morrisette*. He wrote:

“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory, ‘But I didn't mean to...’ Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a ‘vicious will.’”

There is something inside us that sees criminal behaviors as being intrinsically tied to evil intent, something that

appears lacking in the case of Thao, Lepore, and Paladino. In that 1955 case, however, Jackson went on to describe what had fifty years later put Thao, Lepore, and Paladino in jeopardy—an accelerating tendency to hold individuals responsible for behavior that leads to harm but lacks any ingredient of intent or evil-meaning mind. That is, human error. Justice Jackson referred to these new crimes as public welfare offenses. He spoke of the industrial revolution that exposed many more workers to increasingly powerful and complex mechanisms. He spoke of the advent of automobiles where, through our behaviors, we could cause tremendous harm to one another. He spoke of the wide distribution of goods that would allow errors and harm to propagate at great distance. These industrial advances caused legislatures in the early 1900s to pass laws that no longer required evil intent as a necessary element to be considered crimes. It was the birth of criminal negligence—or to put it in terms relevant to Thao, Lepore, and Paladino, the birth of criminal human error.

The civil, criminal, and regulatory systems are increasingly obscuring the difference between intentional risky choices and inadvertent, predictable human fallibility. The net we cast to catch criminals has now caught those whose only crime is that they are human. In our zeal to exert public control, we've made human error a crime. While punishment is inarguably appropriate for criminals with *actus rea* and *mens rea*, it is counterproductive and serves no purpose for human error or at-risk behavior, which by definition preclude evil intent.

The reality is that mere human error is now criminal in a number of circumstances where public safety is an issue. If our colleague or friend has been convicted of a crime, we can no longer infer that they had evil intent—we can only say that they breached an obligation that our lawmakers chose to categorize as criminal. Jackson recognized the slippery slope we were on when we began criminalizing human error. His judgment said, essentially, that there's a time for a ding and a time for a whack when it comes to punishment. That net we cast to catch criminals may now ensnare well-meaning individuals who have made predictably human mistakes. Casting the net this broadly and bringing the full force of the criminal law against someone who didn't have criminal intent, as in *Morissette*, is what rightly bothered him. It should bother us all.

Fifty years later, we see more criminalization of human error. Congress wrote the Clean Water Act to make it a crime to release pollutants into a river—regardless of the intent. Human error alone makes you a criminal. Parents who inadvertently leave a sleeping child in the car during the summer heat are brought up on criminal charges when that error leads to the child's death. Society clamors for it, if simply to have some reason to believe that by punishing this person, it somehow, magically, cannot then happen to us. Unfortunately, from a scientific perspective, these events are statistically predictable events and will randomly hit well-meaning people. Life is like the roulette wheel. For whoever is unlucky enough to make a mistake, to land on double zero, criminal charges are only an indictment away. It is but

the most extreme version of Whack-a-Mole.

From corporate disciplinary policies to industry regulation to the criminal law itself—we have made human error a crime. It costs us in lives, it costs us in resources we could put to better use, it costs us any opportunity to learn how we might prevent or mitigate the next, inevitable human error.