STRICT VICARIOUS CRIMINAL LIABILITY FOR CORPORATIONS AND CORPORATE EXECUTIVES: STRETCHING THE BOUNDARIES OF CRIMINALIZATION

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Under the doctrine that currently prevails in the federal courts of appeals, a corporation is subject to strict vicarious liability for a criminal act by one of its employees if the employee acted within the scope of his employment and intended, at least in part, to benefit the corporation. Similarly, under the doctrine of *United States v. Park*,[1] a corporate executive is subject to strict vicarious liability for a criminal act by one of her employees if the executive's position gave her the ability to prevent or promptly correct the act.[2] This article examines both doctrines of strict vicarious criminal liability. Part I begins by considering the history of strict liability crimes in general. Parts II and III examine the doctrines of strict vicarious criminal liability for corporations and corporate executives, respectively, concluding that both regimes are unfair, are bad public policy, and should be abolished. Part IV proposes two reforms to mitigate the adverse effects of strict vicarious criminal liability for corporations and corporate executives: a requirement that a statute clearly provide for such liability before it can be imposed, and an affirmative defense based on a corporation's compliance policy.

I. The History Of Strict Liability Crimes

Strict liability offenses are a relatively recent phenomenon, have historically involved light penalties, and are disfavored.

At common law, mens rea was a prerequisite for criminal liability. "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.'"[3] Strict liability offenses originated in the mid-to-late 1800s.[4] As the U. S. Supreme Court explained in its 1952 opinion in *Morissette v.*

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1. 421 U.S. 658 (1975).

2. *Id.* at 676.

3. Morissette v. United States, 342 U.S. 246, 251 (1952) (quoting 4 William Blackstone, Commentaries *21).

4. *Id.* at 253 & nn.11–12 (discussing "a century-old but accelerating tendency, discernible both here and in England, to call into existence new duties and crimes which disregard any ingredient of intent," and citing cases

United States, the Industrial Revolution spawned the creation of strict liability crimes. Among other things, industrialization "multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms" and resulted in "[c]ongestion of cities and crowding of quarters [that] called for health and welfare regulations undreamed of in simpler times."[5] In addition, "[w]ide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care."[6] The new "dangers" resulting from industrialization led legislators to adopt "increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare."[7] Many of these regulations created a new species of strict liability crimes, known as "public welfare offenses," that "are in the nature of neglect where the law requires care, or inaction where it imposes a duty."[8] Because such offenses present a risk of injury regardless of the violator's intent, "legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element."[9] Foreshadowing the *Park* doctrine, the *Morissette* Court added: "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."[10]

Until the past several decades, strict liability crimes were generally limited to regulatory offenses with comparatively light penalties. As the U.S. Supreme Court observed in *Morissette*, for the strict liability crimes that existed at the time, the "penalties commonly [were] relatively small, and conviction d[id] no grave damage to an offender's reputation."[11] In a more recent opinion, the Court similarly observed: "Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary."[12] The Court recognized that "the small penalties attached to such offenses logically complemented the absence of a *mens rea* requirement: In a system that generally requires 'vicious will' to establish a crime, imposing severe

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from the mid-1800s); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67 & nn.45–47 (1933) (citing cases from the late 1800s).

5. *Morissette*, 342 U.S. at 253–54.
6. *Id.* at 254.
7. *Id.*
8. *Id.* at 255.
9. *Id.* at 256.
10. *Id.*
11. *Id.*
12. Staples v. United States, 511 U.S. 600, 616 (1994).

punishments for offenses that require no *mens rea* would seem incongruous."[13]

The U.S. Supreme Court has been reluctant to endorse strict liability offenses. The Court has repeatedly described such offenses as "disfavored."[14] It has demanded "far more than the simple omission of the appropriate phrase from the statutory definition" to "justify dispensing with an intent requirement."[15] Rather than making a statute's silence on the subject dispositive, the Court has "suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime."[16] The Court has thus applied a "presumption favoring *mens rea*."[17]

II. STRICT VICARIOUS CRIMINAL LIABILITY FOR CORPORATIONS

A. The Prevailing Law in the Federal Courts

Courts generally hold that a corporation is subject to strict vicarious liability for a criminal act by one of its employees if the employee acted within the scope of his employment and intended, at least in part, to benefit the corporation. For example, the Second Circuit affirmed a corporation's conviction under a theory of strict vicarious criminal liability on the ground that its employees "acted within the scope of their employment" when they engaged in unlawful conduct "to benefit [the corporation]."[18] Similarly, the First Circuit has held that the test for whether a corporation is subject to strict vicarious criminal liability "is whether the agent [was] 'performing acts of the kind which he is authorized to perform,' and those acts [were] 'motivated—at least in part—by an intent to benefit the corporation.'"[19] Likewise, the Fourth Circuit has held that a corporation may be held criminally responsible for its employees' acts "'if they were acting within the scope of their authority, or apparent authority,'" and they "acted, at least in part, with the intent of benefiting [the corporation]."[20] Based on decisions such as these, the U.S. Attorneys' Manual strictly states that "[t]o hold a corporation liable for [its agent's] actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in

13. *Id.* at 616–17 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *21).

14. *Id.* at 606 (stating that "offenses that require no *mens rea* generally are disfavored"); United States v. U.S. Gypsum Co., 438 U.S. 422, 437–38 (1978) (stating that "the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status") (citations omitted).

15. *U.S. Gypsum Co.*, 438 U.S. at 438.

16. *Staples*, 511 U.S. at 606.

17. *Id.*

18. United States v. Ionia Mgmt. S.A., 555 F.3d 303, 309 (2d Cir. 2009).

19. United States v. Potter, 463 F.3d 9, 25 (1st Cir. 2006) (quoting United States v. Cincotta, 689 F.2d 238, 241–42 (1st Cir. 1982)).

20. United States v. Automated Med. Labs., Inc., 770 F.2d 399, 406–07 (4th Cir. 1985) (quoting United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983).