Vicarious Criminal Liability

By Elizabeth K. Bingold & Michael H. Huneke

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The criminal law is a powerful tool with which federal prosecutors attempt to secure a robust and healthy marketplace. The efficacy and appropriateness of using criminal law to regulate corporations, however, has been subject to renewed scrutiny on theoretical and pragmatic grounds, including Professor John Hasnas's question of whether a corporation can ever meet the three conditions for criminal punishment: (1) "its sanction should be applied only where doing so advances the purpose of punishment,"[1] (2) there must exist a requirement "that criminal provisions be crafted to place objective limitations on prosecutorial discretion,"[2] and (3) recognition that criminal sanctions can "be applied only where they are necessary to address a public harm."[3] However, the legality of imposing criminal liability on corporations has been long settled in practice, and recently reaffirmed, in the courts. Therefore, any change in the status quo must be the result of effective legislative change. This article will briefly discuss the evolution of vicarious criminal liability for corporations, the current problem, and suggest a possible legislative solution.

Legal Background

Article 1, Section 8 of the Constitution empowers Congress to regulate and promote commerce, both with foreign nations and among the States.[4] Congress has authority to make uniform bankruptcy laws, to coin and regulate the value of money, provide punishment for counterfeiting, establish post offices and roads, and to promote science and protect inventors.[5] Such powers clearly promote an honest and fair marketplace, which all of us would recognize as a predicate to a robust economy.

In 1909, the Supreme Court determined that the Constitution also gives Congress the power to hold corporations criminally liable for the actions of their agents.[6] In *New York Central & Hudson River Railroad Co. v. United States*, the Court addressed rebates railroads paid to favored customers in violation of the Elkins Act, which prohibited corporations from engaging in actions that would be criminal if engaged in by a natural person.[7] The railroad claimed that the Court did not have the power to "impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution."[8] The Court, however, determined that Congress not only has the power to protect commerce, but also may use criminal penalties to regulate commerce.[9]

Following the Court's decision, federal authorities began prosecuting corporations criminally for traditionally civil or administrative matters.[10] Since then, federal courts, with a few notable exceptions, have regularly upheld the federal government's power to use the criminal law to protect the marketplace and regulate fraud. Earlier last year, in a well publicized decision concerning corporate criminal liability, the United States Court of Appeals for the Second Circuit upheld a corporation's conviction, premised on the conduct of an employee, against a challenge to the underpinnings of corporate criminal liability, even though the employee's actions were in violation of corporate compliance programs that prohibited his conduct.[11] The court held that, unlike sexual harassment cases under Title VII, evidence of effective compliance programs does not provide corporations with an affirmative defense against the charges.[12]

Problems with Using the Criminal Law to Regulate Corporate Behavior

The Constitution's limited and enumerated powers only allow the federal government to promote the means and instrumentalities of commerce, not to use their power to punish for regulatory conduct. Although the corporation itself exists only in the law and cannot

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be physically incarcerated, criminal indictments can cripple a corporation and have even resulted in the closure of once-successful businesses.[13] This puts a great deal of power in the hands of prosecutors who have the authority to decide the fate of these corporations, raising the issue of whether such prosecutions violate the Sixth Amendment right to a jury trial in criminal cases[14]:

> Such defendants are increasingly relegated to making their most significant moral and factual arguments to prosecutors, as a matter of "policy" or "prosecutorial discretion," rather than making them to judges, as a matter of law, or to juries, as a matter of factual guilt or innocence.[15]

The extensive use of criminal sanctions in the business context is especially problematic for corporations because they have increased exposure through liability for the actions of their employees. Under the doctrine of respondeat superior, corporations are vicariously liable for employees' acts within the scope of their employees' employment and, under the collective knowledge doctrine, corporations are imputed the aggregated knowledge of their employees, even if no single employee had sufficient knowledge to constitute the *mens rea* required for individual liability.[16] As the Second Circuit recently reaffirmed, it is no defense that an employee's conduct was against corporate policy or even contrary to express instruction from superiors. This has led to the observation that "[w]here 'intent' simply means 'knowing conduct,' and where a corporation is held to know everything any of its employees knows and is held responsible for the actions of every employee, it is easy to understand why corporate prosecutions proliferate."[17]

A corporation should not be liable for the actions of a rogue employee who secretly violates company policy, despite the corporation's best efforts to prevent such actions.[18] Even if it is assumed that some form of liability should attach when corporations encourage illegal action through company policy, tone, or culture, the actions of a rogue employee should not be imputed to the entire corporation, especially when criminal liability can have such dire consequences on the entire corporation and its shareholders.

Potential Legislative Solutions

As others have suggested, one solution is to adopt legislative alternatives that will provide a formal safe harbor for corporations with effective compliance programs.[19] These programs serve a very useful purpose and could be applied easily to these situations. As the courts have, at least for now, foreclosed efforts to reduce the use of criminal law to regulate corporations, legislative actions remain the most viable avenue for change.

Endnotes

1 John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability,* 46 Am. Crim. L. Rev. 1329, 1336-37 (2009). According to Hasnas, corporate criminal liability can never meet all three standards, since corporate criminal liability penalizes a collection of innocent parties (i.e., shareholders), existing legal standards place meaningless limitations on prosecutorial discretion, and corporations really do not threaten public harm since the individual bad actors are already subject to criminal punishment. *Id.* at 1341-47.

2 *Id.* at 1336-37.

3 *Id.* at 1345.

4 U.S. Const. art. I, § 8.

5 *Id.*

6 *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493-98 (1909).

7 212 U.S. 481, 489-90 (1909); *see* Elkins Act, ch. 708, 32 Stat. 847 (1903) (codified as 49 U.S.C. § 11907).

8 212 U.S. at 492.

9 *Id.* at 492-98.

10 *See* Richard Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes,* 44 Am. Crim. L. Rev. 1279, 1280 (2007).

11 *See* United States v. Ionia Mgmt. S.A., 555 F.3d 303, 309-10 (2d Cir. 2009).

12 *Id.*

13 "You can fight them and go to a trial, but you may then risk the fate of an Arthur Andersen, which suffered the 'corporate death penalty' as a result of its indictment and conviction. This ultimate penalty was irreversible, even after the Supreme Court actually reversed the conviction." Thornburgh, *supra* note 10, at 1283.

14 *See* Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 Wash. U. L.Q. 329, 352 (1993).

15 Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 Law & Contemp. Probs. 23, 59 (1997).

16 *See* George J. Terwilliger III, *Under-Breaded Shrimp and Other High-Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417, 1419 (2007); *Developments in Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1243, 1247-48 (1979) ("[S]ince the corporation is perceived as an aggregation of its agents, it is not necessary to prove that a specific person acted illegally, only that *some* agent of the corporation committed the crime. Thus, proving that a corporate defendant committed the illegal act is in practice substantially easier than an individual prosecution.").

17 *Id.*

18 *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972).

19 *See* Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 449 (2007); Harvey L. Pitt & Karl A. Groskaufmanis, *Mischief Afoot: The Need for Incentives to Control Corporate Criminal Conduct*, 71 B.U. L. Rev. 447, 452 (1991).

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