Journal of Criminal Law and Criminology

Volume 69
Issue 1 *Spring*

Article 5

Spring 1978

Toward a Rational Theory of Criminal Liability for the Corporate Executive

William McVisk

9901-4169/78/6901-0075$02.00/0
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 69, No. 1
Printed in U.S.A.

TOWARD A RATIONAL THEORY OF CRIMINAL LIABILITY FOR THE CORPORATE EXECUTIVE

In regulating corporate activity, courts and legislatures have generally treated corporations as though they were "natural persons,"[1] with a life separate from those who run their daily operations. This legal fiction has considerable limitations, however, when one seeks to control corporate behavior through the imposition of criminal penalties. As a result, many courts and legislatures have tried to make the regulation of corporate behavior more effective by creating criminal liability for both the corporation and the individual officers and executives of the corporation.[2]

Not enough attention has been paid to determining the theoretical basis of this liability, and many courts dealing with the issue have dispensed with the traditional notions underlying criminal liability. They have created a doctrine of vicarious liability, under which criminal responsibility is determined solely on the basis of the individual's relationship with the corporate offender.

In a series of decisions,[3] the Supreme Court has indicated that the criminal provisions of the Federal Food, Drug and Cosmetic Act[4] could be applied to corporate officers on the basis of their relationship with the corporate offender without regard to intent or knowledge on the part of the individual officer. In *United States v. Park*,[5] the Court followed these decisions. Elements of the decision, however, suggest a possible interpretation of the Act which would be consistent with traditional principles of criminal liability, but would still allow effective regulation of corporate activity. This comment will explore the traditional purposes behind the imposition of criminal liability and the relationship between the corporation and its management and suggest a basis upon which criminal liability can be imposed on corporate executives without doing violence to the traditional purposes behind criminal liability.

The theoretical underpinnings of criminal liability have consistently reflected two things: the role of the individual in society and the role of the criminal law in society. It is generally agreed that the principle of vengeance was the earliest source of criminal liability.[6] In its earliest form, crime was not seen as a wrong against the collective security of the state but was seen as an injury to the "private peace of a family or clan."[7] The family, organized as a unit for protection against outside aggression,[8] possessed the power to punish. Internally, wrongs were punished by the head of the family.[9] External wrongs were dealt with by a feud, which was a "private war between the clan of the offender and the offended."[10] The purpose of these feuds was to restore the "dignity of the offended clan."[11]

The clan or family of an individual was not only placed in the role of avenger for a wrong to individual members, it was also held responsible when one of its members committed a wrong. To the ancient mind, "conduct was not an individual determination, it was a result of group resolution."[12] The legal and social position of the individual was thus determined by his relationship to the clan, and the clan, rather than the individual, was the responsible entity.

Gradually, as political institutions became better developed, society developed a "consciousness for communal peace and security."[13]

[1] C. STONE, WHERE THE LAW ENDS 2 (1975).

[2] Lee, *Corporate Criminal Responsibility*, 28 COLUM. L. REV. 1, 16-28 (1928) [hereinafter cited as Lee].

[3] United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922); United States v. Johnson, 221 U.S. 488 (1911).

[4] 21 U.S.C. §§ 301-92 (1970).

[5] 421 U.S. 658 (1975).

[6] O. HOLMES, THE COMMON LAW 39-40 (1881) [hereinafter cited as HOLMES]; E. Binavince, *The Ethical Foundations of Criminal Liability*, 33 FORDHAM L. REV. 1, 2 (1964) [hereinafter cited as Binavince]; Chesney, *The Concept of Criminal Mens Rea in the Criminal Law*, 29 J. CRIM. L.C. & P.S. 627 (1939) [hereinafter cited as Chesney].

[7] Binavince, *supra* note 6, at 2-3.

[8] *Id.*

[9] *Id.* at 12.

[10] *Id.*; 2 F. POLLOCK & F. MAITLAND, HISTORY OF THE ENGLISH COMMON LAW *448 [hereinafter cited as POLLOCK & MAITLAND]; Chesney, *supra* note 6, at 12-13.

[11] Binavince, *supra* note 6, at 12-13.

[12] *Id.* at 13.

[13] *Id.* at 3.

Crimes came to be considered breaches of the peace as well as a private wrong to the family of the victim. The private law of vengeance was gradually displaced by a system which allowed the state to satisfy the desire for vengeance and to deal with the breach of the communal peace.[14]

Prior to the twelfth century, the law made no distinction between the presence or absence of a guilty mind.[15] Liability was based originally on the objective fact that an injury had been done.[16] The measure of causality was primitive, and the relevant inquiry was whether one had committed any act which had led to the injury. According to Pollock and Maitland,[17] one was considered to have slain a man "if but for some act of [his] he might perhaps be yet alive."[17] No attempt was made to distinguish between crimes committed with or without intent.[18]

The harshness of this doctrine gradually became apparent to those administering the criminal justice system, and doctrines such as self defense and accidental injury began to develop. By the thirteenth century, the king had begun to grant pardons where it was evident that the accused had acted in self defense. "But it is important to notice that justification was not as yet recognized; hence, the defendant needs a pardon."[19] As the system of justice began to take a more systematic consideration of offenses,[20] civil and criminal wrongs were contrasted. Great stress was placed on the "psychical elements of crime."[21] The concept of compensation became more prevalent in the developing law of torts. The courts began to distinguish between criminal and tort liability, arguing that "in tort, unlike in crime, the 'intent' to cause damage was immaterial."[22]

One of the most important influences in the changing concept of criminal liability was the Christian Church.[23] The Church placed great stress on the mental elements of sin.[24] Professor Binavince explained the theoretical underpinnings of this concept:

> The point of departure of the Christian religion was the existence of a creative element in the human mind. Sin evaluates the purposive functioning of this element; it is therefore a moral concept definable in reference to the activity of the relevant mental state. The sanctions following sin assume a personal moral responsibility over human conduct. These were embodied in the ecclesiastical laws and poenitentiaries of the church, and the legal minds from Henry I's reign found them ready sources of guidance in the development of criminal law.[25]

---

[14] *Id.* at 3; Chesney, *supra* note 6, at 627, 643. Shortly before the Norman Conquest, four methods had been developed for dealing with the wrongdoer. *See* POLLOCK & MAITLAND, *supra* note 10, at *447; Binavince, *supra* note 6, at 4. The harshest penalty was to declare the offender to be an outlaw, which meant that the community had declared war on the individual, and that every man had the right and duty to "hunt him down like a wild beast and slay him." POLLOCK & MAITLAND, *supra* note 10, at *447. The second way of dealing with the wrongdoer was to allow the families to exact retribution through the blood feud. In order to avoid the blood feud, a third alternative developed: payment by the offender, or his family of the tariffs of *wer*, *wite* and *bot*. *Bot* was a settlement with the injured person, determined by reference to the amount of damage done. *Wite* was a tariff made in settlement with the king. The *wer*, or *wergild*, was a statutory sum paid to the family and to the king to atone for the victim's death; the amount paid was determined by the victim's rank. *Id.* at *448-49; BLACK'S LAW DICTIONARY at 231, 1776, 1766 (Rev. 4th ed. 1968). Finally, the law could inflict corporal punishment on the offender. POLLOCK & MAITLAND, *supra* note 10, at *447; Binavince, *supra* note 6, at 4.

[15] Chesney, *supra* note 6, at 629

[16] POLLOCK & MAITLAND, *supra* note 10, at *468; Binavince, *supra* note 6, at 4; Chesney, *supra* note 6, at 627.

[17] POLLOCK & MAITLAND, *supra* note 10, at *468; Binavince, *supra* note 6, at 5. Pollock and Maitland illustrate the extent to which this view was held at early law:

> At your request I accompany you when you are about your own affairs; my enemies fall upon and kill me; you must pay for my death. You take me to see a wild-beast-show or that interesting spectacle a madman; beast or madman kills me; you must pay. . . . In none of these cases can you honestly swear that you did nothing that helped to bring about death or wound.

POLLOCK & MAITLAND, *supra* note 10, at *469 (footnotes omitted). In fact, in more primitive laws, the man himself did not have to commit the act, since he was responsible for injury caused by his possessions or slaves. *Id.* at *470.

[18] "'The thought of man shall not be tried, for the devil himself knoweth not the thought of man':—thus at the end of the middle ages spoke Brian C. J. in words that might well be the motto for the early history of criminal law." *Id.* at *473.

[19] Binavince, *supra* note 6, at 7.

[20] *Id.* at 14.

[21] POLLOCK & MAITLAND, *supra* note 10, at *475.

[22] Binavince, *supra* note 6, at 9.

[23] POLLOCK & MAITLAND, *supra* note 10, at *475-76; Binavince, *supra* note 6, at 14-15; Chesney, *supra* note 6, at 629.

[24] POLLOCK & MAITLAND, *supra* note 10, at *474.

[25] Binavince, *supra* note 6, at 15.

Other factors influencing the development of the concept of individual responsibility were the general weakening of family ties and the growing number of foreigners without any family.[26] Both placed a great strain on a system of justice based on family responsibility.

Over time the individual was perceived as personally responsible for his own conduct, an idea in sharp contrast to the earlier law's emphasis on group responsibility. The law of crimes acquired a moral element, punishing only those who were morally responsible for the injurious act. The mental elements of crime became of such great importance that *mens rea* came to be regarded as fundamental to the common law of crimes.

The purpose of vengeance or retribution that was the basis of the ancient system of criminal law has largely been replaced in modern criminal law by the purpose of preventing undesirable conduct. Holmes wrote:

> [T]here can be no case in which the law-maker makes certain conduct criminal without his thereby showing a wish and purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment. The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed.[27]

In an effort to maintain the collective security, society uses punishment to deter conduct it views as undesirable. Thus, the most fundamental purpose of any criminal law is to induce external conformity with its rules.[28]

However, this objective principle of punishment generally has not weakened the principle that conduct should not be criminally punished unless individual responsibility and moral blame can be ascribed—through a finding of intent or *mens rea*. Professor Sayre noted the fundamental nature of this concept, writing that "it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual."[29] Even Holmes, one of the chief exponents of the objective view of criminal liability did not deny that an element of moral blame is inherent in criminal liability. "Such a denial would shock the moral sense of any civilized community."[30]

It is the desire to prevent undesirable external conduct, together with the desire to create liability only concomitantly with moral blame that has coalesced to form the basic formula for modern criminal liability: the commission of a prohibited act accompanied by a culpable mental state.[31] The first part of this formula is reflected in the general societal rejection of vicarious criminal liability. Criminal liability is usually predicated on conduct of the individual accused.[32] Where one person has committed an injurious act, subjecting another person to

[26] POLLOCK & MAITLAND, *supra* note 10, at *160.

[27] W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES. 64-65 (7th ed. 1967) [hereinafter cited as CLARK & MARSHALL]; HOLMES, *supra* note 6, at 46.

[28] CLARK & MARSHALL, *supra* note 27, at 1-4; HOLMES, *supra* note 6, at 49.

[29] Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 717 (1930).

[30] HOLMES, *supra* note 6, at 50. Some have even argued that if personal guilt is not the basis of criminal liability, the criminal process becomes open to the political abuses often seen in tyrannical regimes. Professor Binavince, for example, expressed the fear that criminal liability not based on personal guilt, *i.e.* the growing doctrine of strict liability was "posing a serious threat to the rational foundation of criminal liability—the same threat that prevailed to reduce penalty in Hitler's Germany into a morally indifferent 'security measure,' and made millions of innocent people 'criminals.'" Binavince, *supra* note 6, at 1.

Aware of this potential, the drafters of the 1963 *Draft Penal Code* of West Germany included the statement:

> The draft is a criminal law based on guilt. This means that the penalty, an institution which contains a judgment of moral disvalue towards human conduct and has always been fundamentally so considered, may be imposed only if the actor could be blamed for his act. To punish without such reproach of blame would distort the idea of penalty and transforms it into a morally colorless measure which could be abused for political purposes.

Entwurf eines Strafgesetzbuches (SIGB) mit Begründung, 96 (E. Binavince trans. 1962); Binavince, *supra* note 6, at 1 n.1.

Although there is little chance that the doctrine of strict liability will lead by itself to the type of political abuse described above, the doctrine is so contrary to fundamental notions of criminal law that it should not be adopted or continued without the most convincing showing of necessity.

[31] CLARK & MARSHALL, *supra* note 27, at 262 n.6; G. WILLIAMS, CRIMINAL LAW 1 (2d ed. 1961).

[32] *See, e.g.*, ILL. REV. STAT. ch. 38 §4-1, which makes a "voluntary act" a "material element of every offense."

criminal liability for the act is possible only if the other person's act could be said to have caused the proscribed result.[33] Generally, therefore, criminal liability for the acts of another may be imposed only where there has been "authorization, procurement, incitation or moral encouragement, or . . . knowledge plus acquiescence."[34] In each of these situations there has been conduct by the individual which could be considered to have caused the ultimate harmful act to another.

The second part of the formula, the requirement of a culpable mental state, stems from the desire to impose criminal punishment only where individual moral blame is attributable to the actor. Under modern law, a culpable mental state does not have to include a motive; rather, a mental state is culpable if an actor has sufficient knowledge of his surrounding circumstances to forsee that his act will, or is likely to, have proscribed consequences.[35]

These requirements, and the underlying concept of individual moral responsibility, have found support in the expressions of the United States Supreme Court. In *Felton v. United States*,[36] for example, the Court overturned the conviction of defendants who had been charged with violation of a tax on liquor because the evidence failed to show that the violation was committed knowingly. Holding that the defendants had acted in complete good faith, which was "[a]ll that the law does require or can require of them,"[37] Justice Field argued that: "All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of everyone."[38] The principle that *mens rea* must accompany an act to render it criminal was again expressed in Justice Jackson's opinion in *Morissette v. United States*:[39]

> 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," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[40]

[33] Sayre, *supra* note 29, at 702.

[34] *Id.*

[35] HOLMES, *supra* note 6, at 53-54. *See, e.g.*, ILL. REV. STAT. ch. 38 §§ 4-3 to 4-7. Under Illinois law, unless the statute defining the crime specifically provides otherwise, a person must act with intent, knowledge, or recklessness in order to commit an offense. ILL. REV. STAT. ch. 38 § 4-3. A person is considered to act recklessly when "he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow." ILL. REV. STAT. ch. 38 § 4-6.

Similarly, the *Final Draft of the Proposed Federal Criminal Code*, §§ 302(1)-(2), create a presumption that an act must be done "willfully" in order for guilt to attach. "Willfully" is defined to include conduct done intentionally, knowingly, or recklessly. U.S. NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL DRAFT, §§ 302(1)(e), 302(2) (1971). The Working Papers of the Committee indicate that recklessness requires a conscious disregard of the likelihood that the actor is engaging in prohibited conduct. U.S. NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, WORKING PAPERS 127 (1970).

[36] 96 U.S. 699 (1877).

[37] *Id.* at 703.

[38] *Id.* In *Felton* the defendants were convicted of violating § 16 of 15 Stat. 131, Act of July 20, 1868, which imposed a tax on distilled spirits. The defendants were wine distillers who had installed a new still which turned out to be too large for the capacity of the lower wine receiver. Because of this incapacity, a great deal of wine overflowed and had to be recycled. This threw off their measuring devices, with the result that some of the wine went untaxed.

The Supreme Court overturned their conviction. It decided that the essence of the charge aginst them was that their receiver was of insufficient capacity. However, the evidence failed to show that the defendants knew of the problem until it was too late to remedy it. The Court held that their omission could not be criminal unless it was knowing and willful.

The Court also noted that while distillers could be required to be familiar with the machinery of their business, they did not have to be experienced machinists or familiar with everything required to render their machines perfect. It noted that in many aspects the defendants necessarily had to rely on others.

> All that the law does require, or can require of them, to avoid its penalties, is to use in good faith the ordinary means—by the employment of skilled artisans and competent inspectors—to secure utensils and machinery which will accomplish the end desired. .

96 U.S. at 703.

[39] 342 U.S. 246 (1952).

[40] *Id.* at 250-51. See HOLMES, *supra* note 6, at 3, who also noted the almost instinctive nature of the feeling that blame could normally only be affixed, noting that "even a dog distinguishes between being

Despite these principles, some courts and legislatures have eliminated the requirements of mental intent and individual responsibility for certain offenses which they feel require different treatment. Generally, these offenses are created by statute and have no counterpart at common law. Most often they involve regulation of business activities.[41]

The argument supporting a departure from the traditional principles of individual responsibility and *mens rea* is based on a distinction between regulatory offenses and "true crimes." A "true crime" or one which is *mala in se*, is one which "involves moral delinquency or is punishable by imprisonment or a serious penalty."[42] Almost all commentators have agreed that these "true crimes" must be based on personal moral guilt as shown by *mens rea*, and that they cannot be committed vicariously. As pointed out by Professor Sayre, none of the objectives of criminal punishment, which he identified as reformation of the offender and prevention of future criminal violations on the part of the offender and others, could be served in "true crime" cases unless the defendant had by his own conduct injured or menaced social interests or had not "measured up to the social standards imposed by the criminal law."[43]

However, where the criminal law is utilized to enforce social regulations, some commentators and many courts[44] have argued that different considerations apply. Sayre, for example, has argued that unlike true crimes, where penalties have a strongly punitive objective, the petty misdemeanors involved in regulatory offenses do not involve questions of moral guilt.[45] These regulations, he maintains, are aimed primarily at preventing direct and evident social injury. This purpose is hampered if it is necessary to prove that a master had authorized or had known about and acquiesced in the illegal actions of his servant before he could be held liable.[46] Since the penalties for such violations are normally small fines, the individual's interest in avoiding conviction without proof or personal guilt does not outweigh the societal interest in the added deterrence brought about by eliminating the need to prove intent or knowledge.[47]

Courts have not always been explicit in setting forth the distinction between regulatory crimes and other types of crimes, but as early as the turn of the century, courts had clearly accepted the doctrine of strict liability for regulatory crimes. In *Overland Cotton Mill Co. v. People*,[48] for example, the Supreme Court of Colorado found the superintendent of the Overland Cotton Mill Co. guilty of violations of the child labor law, even though it found no willful violations of the law.[49] The court argued that because of his relationship with the company, the superintendent either knew or should have known that he had hired a person under the prohibited age. As the Court noted, "[a]n agent of a corporation is presumed to have that knowledge of its affairs particularly under his control and management which, by the exercise of due diligence, he would have ascertained."[50] Since it was within the superin-

---

stumbled over and being kicked." However, both Justice Jackson in *Morrissette*, and Holmes went on to argue that this principle may not be applicable to regulatory offenses. *Morrissette*, 342 U.S. at 254–63; HOLMES, *supra* note 6, at 52. For further discussion of "regulatory offenses" or those which are considered *mala prohibita* see text accompanying notes 43–48 and 129–30 *infra*.

[41] See text accompanying notes 43–48 *infra*. The courts have generally construed crimes created by statute as including an element of *mens rea* even if it was not a specified element of the offense. Where the offense was a codification of a common law offense, it was generally assumed that the legislature intended to include the mental element which was a part of all common law offenses. As indicated in the text, however, some courts have not followed this general rule when construing regulatory offenses.

[42] Sayre, *supra* note 29, at 717.

[43] *Id.* at 717–18.

[44] *E.g.*, Sayre, *supra* note 29, at 719–22; Lee, *supra* note 2.

[45] Sayre, *supra* note 29, at 719.

[46] *Id.* at 719–20.

[47] *Id.* The Supreme Court made essentially the same argument in Morrissette v. United States, 342 U.S. 246 (1952), when it held that the crime of stealing government property could not be committed without intent, but distinguished that crime from regulatory offenses for which intent was unnecessary.

[48] 32 Colo. 263, 75 P. 924 (1904).

[49] *Id.* at 267–68, 75 P. at 926.

[50] *Id.* at 269, 75 P. at 926. Another officer of the corporation, its treasurer, was also found guilty of the offense by the trial court. The Colorado Supreme Court noted that "[h]e certainly did all as an individual, or as an official of the company, to prevent the law from being violated which could be required of him." *Id.* at 270, 75 P. at 926. However, the court did not have to answer the question of whether, despite this diligence, he could be guilty of the offense, since the treasurer had died between the time of his conviction and the appeal.

tendent's power to have prevented the employment, the court found him guilty of the violation.

The Washington Supreme Court was more explicit in setting forth the distinction between what it termed "police regulations" and other crimes in *State v. Burnam*.[51] It followed the Colorado lead and extended the doctrine of strict liability to situations where the defendant was not the person who committed the injurious act. The defendant was the secretary-treasurer and manager of the Northwestern Dairy Co., and he supervised the mixing of milk. Two bottles of milk were taken from a company milk wagon by state inspectors and were shown to have been below standard. The defendant was convicted. His conviction was upheld by the Washington Supreme Court, despite the fact that he testified that he had not been present when the milk was mixed and had left instructions to keep the milk up to prescribed standards. The court held that the statute was a police regulation enacted to protect the public health, and that its penalties were to be imposed without regard to any wrongful intention. The purpose of the statute, it argued, was to "insure such diligence as will render a violation of the law practically impossible."[52] The court purported to follow the *Overland Cotton* case, but it did not deal with the fact that in *Overland* the defendant supervisor had actually committed the illegal act by hiring the minor, while in *Burnam* the defendant's only connection with the illegal act was responsibility within the company for supervising the mixing of milk. Thus, he was convicted as much because of his position within the company as because of any action that he had taken personally.

The United State Supreme Court was first presented with a statute creating criminal liability without the requirement of *mens rea* in *Shevlin-Carpenter Co. v. Minnesota*.[53] The defendants in *Shevlin-Carpenter* had been convicted of willfully violating a state law by cutting timber on state land without a valid permit. The Minnesota statute in question imposed treble damages for a willful violation and double damages for a casual and involuntary violation. It further provided that cutting timber without a valid permit was a felony, punishable by a $1000 fine, two years imprisonment, or if the violation was willful, both.

The defendants had held a valid permit for cutting timber which had been extended, but they had continued to cut timber after the permit had finally expired. The trial court found them guilty of willful trespass, but the finding of willfullness was overturned by the Minnesota Supreme Court. The Minnesota Supreme Court found that the defendants had believed in good faith that the permit had been extended. Nevertheless, the defendants were held liable under the Act.

Before the United States Supreme Court the defendants argued that the statute violated the due process clause of the fourteenth amendment because it declared the act to be felony but eliminated altogether the question of intent. The defense, however, conceded nearly its entire argument by admitting to the Court that the rule requiring intent for criminal violations was subject to exceptions "'where so-called criminal negligence supplies a place [*sic*] of criminal intent, or where, in a few instances, the public welfare has made it necessary to declare a crime, irrespective of the actor's intent.'"[54] As the Court pointed out, such a concession of exceptions destroyed the whole rule.[55] Any time the legislature eliminated the requirement of intent, it presumably did so because it felt it was required by the public welfare. In this case the presumption was not rebutted.

The defendants contended that by making their act a crime without regard to intent, the legislature had declared punishment for innocent acts.[56] They relied on a statement by Justice Chase to the effect that the legislature could not punish a citizen for commission of an innocent act.[57] The Court rejected this argument, interpreting Justice Chase's statement to mean that no punishment could be prescribed for conduct not in violation of an existing law.[58] As the Court pointed out, the defendants' conduct had violated an existing law and was therefore not innocent under the formulation of Justice Chase.[59]

[51] 71 Wash. 199, 128 P. 218 (1912).
[52] *Id.* at 200, 128 P. at 219.
[53] 218 U.S. 57 (1910).
[54] *Id.* at 68.
[55] *Id.*
[56] *Id.* at 67–68.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 68–69.

Without mentioning *Felton v. United States*,[60] which had held that all the law could require was the use of good faith efforts to avoid violations,[61] the Court in *Shevlin-Carpenter* rejected the contention that unintended actions, or actions taken in good faith reliance on a mistake of fact, could not constitutionally be subjected to criminal penalties.[62] The Court distinguished between those acts which were *mala prohibita* and those which were *mala in se*,[63] stating that any general rule which held that all crimes had to contain an element of intent disregarded that distinction.[64] This distinction between *mala in se* and *mala prohibita* continues to be used as support for distinguishing regulatory offenses which require no intent, from crimes evolving at common law which require an element of personal guilt. However, neither the Court in *Shevlin-Carpenter* nor any later courts have attempted to explain in what way regulatory offenses—those which are *mala prohibita*—are any different than those which evolved at common law. The Court in *Shevlin-Carpenter* accepted the defendant's concession of exceptions to the general rule requiring intent without even questioning why such exceptions are valid.

The Supreme Court has decided a series of cases dealing with the Harrison Act[65] and the Federal Food, Drug and Cosmetic Act[66] which set the precedent for strict and vicarious liability of corporate officers and employees. Although the holdings in these decisions impose strict liability on the corporate officer, some language, particularly in *United States v. Park*,[67] suggests the possibility of an alternative theory of liability stressing the individual's power to prevent violations from occurring and his duty to implement measures designed to prevent violations.

United States v. Johnson[68] was the first case in which the Court indicated that a federal statute might be construed to impose liability without regard to intent. The case was brought on appeal from an order of a district court quashing an indictment charging the defendants with violating section 2 of the Food and Drug Act.[69] The indictment charged that the defendant had delivered for shipment in interstate commerce packages and bottles of r dicine containing statements that the medicine was effective in curing cancer. The defendant knew the statements were false.[70]

The question presented to the Court was whether the articles had been "misbranded" within the meaning of the statute.[71] Justice Holmes construed the term as applying only to statements which would be false or misleading as to the identity of the article or drug, rather than to statements regarding the qualities or effects of the drug.[72] The statute specified that the term "misbranded" was to apply "to all drugs, or articles of food, . . . the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular."[73] Justice Holmes argued that by including the phrase "or the ingredients or substances contained therein" after the word "article," the Congress had evidenced an intent to limit the term "article" to matters such as ingredients or substances.[74] Thus he concluded that the article was not "misbranded" within the meaning of the statute, since the label misstated its qualities rather than its identity. In an attempt to further justify this construction, Justice Holmes noted that:

> [A]lthough the indictment alleges willful fraud, the shipment is punished by the statute if the article is misbranded, and . . . the article may be misbranded without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares, but a very different and unlikely step to

[60] 96 U.S. 699 (1877). See notes 37–39 *supra* and accompanying text.

[61] *Id.*

[62] 218 U.S. at 70.

[63] *Id.* at 68.

[64] *Id.*

[65] Harrison Act, ch. 1, § 2, 38 Stat. 785 (1914) (repealed by Act of Oct. 27, 1970, 84 Stat. 1292 (1971)).

[66] 21 U.S.C. §§ 301–92 (1970) (originally enacted as Act of June 25, 1938, ch. 675, § 1, 52 Stat. 1040, repealing Food and Drug Act of June 30, 1906, ch. 3915, § 8, 34 Stat. 768).

[67] 421 U.S. 658 (1975).

[68] 221 U.S. 488 (1911).

[69] Food and Drug Act, ch. 3915 § 8, 34 Stat. 768, 770 (1906) (repealed by Act of June 25, 1938, ch. 675, § 1, 52 Stat. 1040).

[70] 221 U.S. at 495.

[71] *Id.*

[72] *Id.* at 497.

[73] Food and Drug Act, ch. 3915 § 8, 34 Stat. 768, 770 (1906) (repealed by Act of June 25, 1938, ch. 675, § 1, 52 Stat. 1040).

[74] 221 U.S. at 497.

> make them answerable for their mistaken praise.[75]

Justice Holmes' conclusion that the offense of misbranding could be committed without conscious fraud is somewhat puzzling since the defendant in the case had knowledge of his false statements, and the issue of whether knowledge was a necessary element was not before the Court. Surprisingly, however, this unsupported statement, clearly dictum in the case, was relied on by the Court in *United States v. Dotterweich*,[76] a case which now plays a central part in the Court's thinking about strict liability.[77]

In *United States v. Balint*,[78] the Supreme Court specifically construed a federal statute as imposing liability without regard to knowledge or intent. The defendants were indicted under the Harrison Act[79] for selling certain narcotic drugs "not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue."[80] The defendants demurred to the indictment, arguing that it had not charged them with knowledge that what they sold was an illegal drug. The Court acknowledged that the common law required scienter to be an element in every crime, and that this requirement was generally construed to be an element of statutory offenses, even if they did not expressly provide for scienter. The Court noted, however, that there has been a modification of this view in some situations. Many state statutes, it pointed out, imposed absolute liability in cases "where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*."[81] Revenue statutes also impose the burden of ascertaining the facts leading to tax liability on the taxpayer, subject to possible sanctions for failure to properly ascertain the correct facts. In other areas, the policy of the law may require punishment in cases of negligence, in order to stimulate a standard of care.[82] In short, the Court argued that scienter is not always required if the purpose of the statute would be obstructed by such a requirement.

In considering the aim of the Harrison Act, the Court noted that it was a taxing act, "with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs."[83] The Court then noted that the emphasis of the statute was on supervision of the drug business by the taxing officers of the government, and that it used the criminal penalty to secure recorded evidence of drug transactions in order to tax and restrain the traffic in the drugs. Thus, it concluded:

> Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him.[84]

Like *Johnson*, *Balint* has been interpreted by later courts to support the imposition of strict liability. But arguably, the Court seems merely to have held that the Harrison Act imposed a duty on all those who deal in drugs to find out what substance they are dealing with. Those who fail to determine what they are dealing with are subject to criminal penalties.

Johnson and *Balint* considered the question of when an individual who had actually committed an allegedly illegal act could be held strictly liable under the language of a federal regulatory statute. In *United States v. Dotterweich*,[85] the Court faced the question of how and when strict liability might be imposed in the corporate context. Specifically at issue was

---

[75] *Id.* at 497–98.

[76] 320 U.S. at 281.

[77] The Court's assertion in *Johnson* that Congress would have been reasonable to make shippers answerable for the mistaken identity of their drugs, but not for mistakes relating to their qualities, is also untenable. A misstatement as to a drug's qualities could as easily mislead the layman as a misstatement as to its identity, and requiring dealers in drugs to be able to support any claims they make as to its qualities does not seem unduly burdensome.

[78] 258 U.S. 250 (1922).

[79] Harrison Act, ch. 1, § 2, 38 Stat. 785 (1914) (repealed by Act of Oct. 27, 1970, 84 Stat. 1292 (1971)).

[80] 258 U.S. at 251.

[81] *Id.* at 252. The Court did not explain what the purpose of punishing crimes which were *mala in se* was supposed to be, if not the achievement of some social betterment. Nor did it explain why the purposes of social betterment could be served only by the imposition of an absolute liability standard, while whatever purposes which were to be accomplished by punishing other crimes could be served despite requiring scienter.

[82] *Id.* at 252–53.

[83] *Id.* at 253.

[84] *Id.* at 254.

[85] 320 U.S. 277 (1943).

whether the criminal provisions of the Federal Food, Drug and Cosmetic Act[86] applied to officers and employees of corporations, as well as to the corporation itself.[87]

Dotterweich was the president of Buffalo Pharmacal Company. Both he and the company were charged with violating the Food and Drug Act by shipping misbranded and adulterated drugs into commerce.[88] The Buffalo Pharmacal Company had purchased the drugs from a wholesale manufacturer and had repacked them for shipment under its own label. The company then used the drugs to fill an order placed by a physician in another state. Although Dotterweich had no personal connection with the shipments, he was in general charge of the corporation's business and had given general instructions to fill orders received from physicians.[89] Although the jury acquitted the company on all of the charges, Dotterweich was convicted on all counts.[90]

Before the Second Circuit Court of Appeals, Dotterweich argued that the Federal Food, Drug and Cosmetic Act was aimed at punishing only the principal, or corporation, and not the "innocent agent who in good faith and in ignorance of the misbranding or adulteration takes part in the interstate shipment of food or drugs."[91] The Government, on the other hand, maintained that the Act reached all who had any part in the transaction. The court agreed that such a construction was supportable by a literal construction of the Act, but it argued that there were "serious objections to so construing it."[92]

The court's first objection to the government's construction stemmed from the fact that section 333(c)(2)[93] of the Act provided for exculpation for a distributor who obtained a guaranty from the manufacturer that the drug was not misbranded or adulterated. The court noted that the company was the only one likely to obtain this guaranty, but under a literal reading of the Act even a shipping clerk could be held liable for violations if no guaranty were obtained. The court maintained that the question of the liability of someone in the position of a clerk or other lower echelon employee should not be made dependent on whether the employer received a guaranty from the manufacturer. Since this would be the practical result under the literal reading of the Act proposed by the Government,[94] the court argued that congressional intent must have been to charge only the "drug dealer, whether corporate or individual,"[95] with responsibility for introducing misbranded or adulterated drugs into commerce.[96] Since the court could find no statutory basis for distinguishing between corporate agents of high and low rank, it concluded that the criminal provisions of the Act could not be applied to corporate employees, unless it were determined that the individual and the corporation were essentially alter egos.[97] Since it could not conclude that Dotterweich was the alter ego of the corporation, it reversed his conviction.

The Supreme Court rejected this approach, arguing that the Second Circuit construed the Act too narrowly, and that it read too much into the guaranty clause. The Court noted that the Act had been amended in 1938 in an effort to extend its control over food and drug commerce and to stiffen the penalties for disobedience. The Court went on to say:

> The purposes of this legislation thus touch on the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self protection. Regard for these purposes should infuse construction of this legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. . . . The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such

[86] Act of June 25, 1938, ch. 675, § 1, 52 Stat. 1040 (current version at 21 U.S.C. §§ 301–92 (1970)).

[87] 320 U.S. at 279.

[88] 21 U.S.C. § 331(a) prohibits: "The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

[89] United States v. Buffalo Pharmacal Co., 131 F.2d 500, 501 (2d Cir. 1942), *rev'd sub nom.* United States v. Dotterweich, 320 U.S. 277 (1943).

[90] The Supreme Court summarily rejected Dotterweich's argument that the jury could not find him guilty and fail to convict the corporation. The Court regarded as immaterial whether the jury's verdict was the result of carelessness, compromise or a desire to make the responsible individual suffer the penalty instead of the corporation. "Juries may indulge in precisely such vagaries." 320 U.S. at 279.

[91] 131 F.2d at 502.

[92] *Id.* at 503.

[93] 21 U.S.C. § 333(c)(2) (1970).

[94] 131 F.2d at 503.

[95] *Id.*

[96] *Id.*

[97] *Id.*

> legislation dispenses with the conventional requirement of criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to public danger.[98]

The Court cited *United States v. Balint*[99] and *United States v. Johnson*[100] for the proposition that the Act was intended to impose liability on shippers without regard to intent. However, the Court did not consider the fact that the only language in *Johnson* supporting the conclusion that scienter was not required by the Act was dictum running counter to the otherwise accepted rule of statutory construction that criminal statutes are to be construed to include a requirement of scienter. And the Court neglected to note that *Balint* had construed the Harrison Act which was not necessarily analogous to the Food, Drug and Cosmetic Act. It made no effort to consider whether the purposes of the Act required it to be construed as eliminating scienter. No section of the Act was cited which would require such a result. Instead, the Court assumed that since this was a regulatory act designed to protect the innocent public, and since the Act had not specifically included intent, that intent was not required. It did not explain how regulatory acts differed materially from criminal statutes designed to protect the public.

Having concluded that the Act should be construed to not require *mens rea*, the Court considered whether the Act should apply to corporate employees as well as to the corporation itself. The Court noted that the Act makes "any person" who violates its provisions, including a corporation, guilty of a misdemeanor. It also noted that the only way the corporation can act is through individuals acting on its behalf, "[a]nd the historic conception of a 'misdemeanor' makes all those responsible for it equally guilty."[101] Thus, the Court maintained that Dotterweich was subject to the Act, unless the Act could be read as creating an immunity for individuals when the corporation violates its provisions, even though "from the point of view of action the individuals are the corporation."[102]

After considering the history of the Act, the Court concluded that it should not be construed as exempting individuals. When it was first enacted in 1906, the Food and Drug Act contained language expressly providing that the acts of agents, officers, and employees were deemed to be the acts of the corporation. These words had been necessary in 1906 because of the strict construction then given to such statutes. The words were deleted in 1938, however, because they were thought to be superfluous under the doctrines of construction then prevailing.[103] Congress also changed other parts of the statute in 1938 with the intention of strengthening and extending the Act.[104] From this the Court concluded that Congress had intended the criminal penalties of the Act to be strong and far-reaching.

The Court next reviewed the holding of the appellate court that a corporate officer could not be charged under the Act unless he was the "alter ego" of the corporation.[105] The Court could not believe that Congress intended such a result.[106] It rejected the court of appeals' argument that the Act was concerned with placing the risks of the business on those in a proprietary relationship with the drug (*i.e.*, the drug dealer), arguing that the Act was concerned with the distribution of drugs, not with the nature of proprietary relationships. It noted that where a corporation was involved the distribution of the drugs must be accomplished through the efforts of many individuals standing in varying relationships with the corporation itself. Some of those individuals would be in a position to obtain a guaranty immunizing the whole shipment, while others would not have that opportunity. The Court found

[98] 320 U.S. at 280–81 (citations omitted).

[99] 258 U.S. 250. See notes 79–88 *supra* and accompanying text.

[100] 221 U.S. 488. See notes 71–78 *supra* and accompanying text.

[101] 320 U.S. at 281. The Court cited § 332 of the Penal Code which is now embodied in 18 U.S.C. § 2(a) (1969): "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

[102] 320 U.S. at 281.

[103] At the time the Food and Drug Act was originally passed, the courts were in disagreement as to whether a corporation could be held criminally liable for the acts of its agents. By the time of the 1938 amendments, it had been generally concluded that a corporation could be liable for the acts of its agents.

[104] 320 U.S. at 282.

[105] *Id.*

[106] *Id.* at 283.

no reason to assume, however, that all those who could not obtain such a guaranty would be exempt from the requirements of the Act despite their responsibility for the shipment.[107]

According to the Court, section 301 of the Act imposes liability on the corporation, and those "who aid and abet its commission are equally guilty."[108] However, cutting back on the full implication of these words, the Court explained that "the offense is committed . . . by all those who . . . have . . . a responsible share in the furtherance of the transaction." The precise definition of which employees stand in such a responsible relation to the corporation was left to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries."[109]

The Court realized that in some cases hardship might result from its interpretation, especially in light of the fact that no scienter was required to violate the Act. However, it argued that Congress had balanced the relative hardship, and had "preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than . . . [on those] who are wholly helpless."[110]

Although the limitation of liability to only those with a responsible share in the transaction narrows the range of potentially liable persons, it is important to note that in *Dotterweich* the Court went far beyond the language and holdings of *Johnson* and *Balint*. It is one thing to impose a duty on those who actually sell an item to make every effort to determine whether it is misbranded or adulterated, but it is a far greater burden to require that everyone in a "responsible relation" with a transaction must insure that the article is not misbranded or adulterated. The only relation which Dotterweich bore to the adulteration or misbranding of the drugs in question was that he was the president of the corporation that had distributed them. His only act in furtherance of the transaction was to issue general instructions to fill orders placed by physicians. Essentially, the Court imposed on Dotterweich a duty to insure that none of the of drugs distributed through his company had been adulterated or misbranded. He was required to have knowledge not only of all of the circumstances surrounding his own actions, but also those of all of his employees. Finally, there was no indication that Dotterweich could have raised the defense that he had used all reasonable efforts to prevent violations.

In his dissenting opinion, Justice Murphy argued that the statute did not give the required unequivocal warning to corporate officers that they were in the class of persons subject to vicarious liability. Recitation of statutory policy by the Court was not an adequate substitute for the "requirement that the legislature specify with reasonable certainty those individuals it desires to place under the interdict of the Act."[111]

Justice Murphy's criticism is well taken. Neither the statute itself nor the Court's interpretation specifies with reasonable certainty those who might be held liable if one of the corporation's shipments of food and drugs turns out to be adulterated or misbranded. Normally, a criminal statute which fails to give adequate warning of what conduct is required and by whom or which fails to prevent arbitrary application by judges and juries is held to be unconstitutionally vague.[112] Yet in *Dotterweich*, the Court inexplicably and deliberately left the statute vague. Further, the Court did not attempt to account for the workings of the corporate structure to determine who within that structure could rationally be held liable and under what circumstances.

The question of who in the corporation bears a responsible relation to any particular transaction was clarified in *United States v. Park*,[113] the Supreme Court's latest attempt to resolve these issues. Elements of the *Park* decision suggest how the Food, Drug and Cosmetic Act might be interpreted consistently with traditional no-

[107] *Id.* at 283–84.
[108] *Id.*
[109] *Id.* at 284–85.
[110] *Id.* at 285.
[111] *Id.* at 286–87 (Murphy, J., dissenting).
[112] The principle that a statute must be sufficiently precise to give warning of its requirements and to prevent arbitrary judicial application was enunciated by the Supreme Court in Lanzetta v. New Jersey, 306 U.S. 451 (1939), and has been reaffirmed on several occasions. *See, e.g.*, Giaccio v. Pennsylvania, 382 U.S. 399 (1966), where the Court held that a Pennsylvania statute allowing the jury discretion to assess costs to a defendant who, though acquitted, was regarded as morally reprehensible, was unconstitutionally vague.
[113] 421 U.S. 658 (1975).

tions of individual responsibility without removing the rigorous standards of care imposed on the corporate management. The decision also illustrates, however, some of the problems inherent in the doctrine announced in *Dotterweich*.

Park, the president of Acme Markets, Inc.,[114] was convicted of causing the adulteration of food which had traveled in interstate commerce in violation of section 331(k) of the Federal Food, Drug and Cosmetic Act.[115] Park was tried on the theory that he was a corporate officer in a responsible relation to the transaction and therefore liable under the *Dotterweich* rule. The Government charged that Park and the company had received food following an interstate shipment, and while holding it for sale, had allowed it to be stored in a rat infested warehouse owned by the company. At trial it was shown that Park had previously been advised of the poor conditions at his Baltimore and Philadelphia warehouses by the FDA. When the conditions at the Baltimore warehouse had not been eliminated by the time of a second inspection by the FDA, Acme and Park were charged with violations of the Act.[116]

Park testified during the trial that as president of the company he was in a sense in charge of all of its employees, but that under the organizational structure, different phases of the company's operation were assigned to different individuals, who in turn had staff and departments under their supervision.[117] Park testified that upon receipt of the FDA's notification he had conferred with the vice president for legal affairs, who had informed him that the Baltimore division vice president was taking corrective action. He stated that he did not feel that there was anything more he could do about the situation.[118]

The trial court instructed the jury that the sole question presented was whether the defendant held a position of authority and responsibility in the business of Acme Markets, and that he could be convicted despite the lack of consciousness of wrongdoing and the lack of any participation in the situation, if he occupied a position of responsibility.[119] Park's conviction was reversed by the court of appeals on the grounds that this jury instruction had not correctly stated the law as reflected in *Dotterweich*. The court construed the instruction as saying that Park could be convicted merely upon a showing that he was the president of the company. The court argued that the instruction ignored the distinction between an "awareness of wrongdoing" and "wrongful action."[120] The court interpreted *Dotterweich* to dispense with the need to show the element of awareness, but not as dispensing with the requirement that there be some showing that the defendant had committed "wrongful action." The court argued: "As a general proposition, some act of commission or omission is an essential element of every crime. For an accused individual to be convicted it must be proved that he was in some way personally responsible for the act constituting the crime."[121] According to the court, it was not enough to show merely the defendant's relation to the corporation; his relation to the criminal acts must also be shown. The court feared that the trial court's instruction might have given the jury the erroneous impression that Park could be found guilty without a showing of wrongful action.[122]

The court's attempt to distinguish the concepts of "awareness of wrongdoing" from "wrongful action" illustrates how the *Dotterweich* doctrine frustrates the concept of individual responsibility. The appellate court in *Park* was searching for a way to insure that more be required for the imposition of criminal liability than merely being the president of a corporation which was charged with a violation of the Federal Food, Drug and Cosmetic Act. Yet its distinction was clearly based on a misreading of *Dotterweich*. *Dotterweich* started from the assumption that the Federal Food, Drug and Cosmetic Act required no awareness of wrongdoing, and held that those in a responsible relation to the transaction were liable for the

[114] Acme Markets is a national food chain with 36,000 employees, 874 retail outlets, 12 general warehouses and four special warehouses. *Id.* at 660.

[115] 21 U.S.C. § 331(k) (1970).

[116] 421 U.S. at 660–62. Acme pled guilty to all counts. Park pled not guilty but was convicted and fined $50 for each of five counts. *Id.* at 660, 666. Park indicated to the court of appeals that his chief reason for appealing the conviction was the fact that a second conviction would be a felony, punishable by imprisonment up to three years. 499 F.2d 839, 840 n.2 (4th Cir. 1974), *rev'd*, 421 U.S. 658 (1975).

[117] 421 U.S. at 663.

[118] *Id.* at 663–64.

[119] *Id.* at 665 n.9.

[120] 499 F.2d at 841.

[121] *Id.*

[122] *Id.* at 841–42.

violations of the Act although not personally involved in the offending transaction. Thus, the express holding of *Dotterweich* negates any requirement of individual wrongful action on the part of the defendant.

The Supreme Court rejected the court of appeals' interpretation of *Dotterweich*. It did not agree that the district court was obliged to instruct the jury that the Government had to prove wrongful action on the part of the defendant. Recognizing that the concept of having a "responsible share" in a transaction, or bearing a "responsible relation" to the violation "imports some measure of blameworthiness," the Court held:

> [T]he Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fullfil the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link.[123]

Thus, the Court equated the concept of responsibility with that of power. One is in a position of "responsibility" within the meaning of *Dotterweich* if one occupies a position with the power to either prevent or correct violations of the Federal Food, Drug and Cosmetic Act.

Throughout its opinion, the Court emphasized the concept of prevention in defining the concept of responsibility. It argued that *Dotterweich* and subsequent cases revealed that by imposing liability on the corporate agent as well as on the corporation itself, the Act "imposes not only a positive duty to seek out and remedy violations when they occur, but also, *and primarily, a duty to implement measures that will insure that violations do not occur*."[124] It further argued that although the Act imposed the "highest standard of foresight and vigilance . . . the Act, in its criminal aspect, does not require what is objectively impossible."[125] Accordingly, it reasoned that the Act would allow the defense that the defandant was powerless to prevent or correct the violation.[126] Therefore, one of the elements to be proved by the prosecution is the defendant's power to prevent or correct the prohibited condition.[127]

By focusing on the power and the duty to implement preventive and corrective measures, the Court seems to suggest that the corporate officer should not be held vicariously liable for the violation itself. He should only be held liable for failing to perform his duty of prevention. The holding of the case, however, stopped short of this conclusion. The jury instruction which the Court ultimately upheld included the statement that "[t]he main issue for your determination is . . . whether the Defendant held a position of authority and responsibility *in the business of Acme Markets*."[128] This instruction did not direct the jury to inquire whether the defendant had instituted any preventive or corrective measures; rather, it told them that Park's guilt or innocence was to be determined by his position within the company. Nor was the jury directed to make a realistic appraisal of what the officer could be expected to know about the actions of those in his employ. As a result, an absolute duty was imposed on "responsible" corporate officers to prevent or correct violations, regardless of any requirement of knowledge, and regardless of any steps they may have taken attempting to assure compliance with the Act.

The Court's rationale in both *Park* and *Dotterweich* for imposing vicarious liability upon the corporate officer is that such measures are necessary to protect the public. It is argued that if corporate officers are not also subject to criminal penalties, corporations which might profit from illicit business operations will have no incentive to comply with the law. Imposition of fines is felt to be inadequate deterrence since the corporation can treat the fines much like a license fee for conducting illicit operations. If it is more costly to prevent the violation than to pay the fine, the corporation will simply pay the fine. It is argued that by placing the corporate officer where he could also be liable for the corporation's conduct, new incentives will be created for complying with the law. While this justification suffices to explain why criminal penalties must be imposed on corporate officers as well as on the corporation itself, it does not explain why traditional principles of criminal liability, which require, as a mini-

[123] 421 U.S. at 673–74.
[124] *Id.* at 672 (emphasis added).
[125] *Id.* at 673.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 665 n.9 (emphasis added).

mum, knowledge and acquiescence or reckless disregard must be ignored.

The difficulty the Court is having is caused by its failure to consider carefully the context in which a crime is committed. Instead it has focused solely on the type of crime involved. As noted earlier, the distinction between regulatory offenses and traditional crimes has been a recurrent theme in the cases and commentaries which have supported strict liability. They have argued that regulatory offenses were designed to protect the public from injury which it was ill equipped to guard against without such regulations. Thus, the public interest in deterrence is especially high. Supporters of strict liability argue that this interest in deterrence outweighs the individual defendant's interest in avoiding conviction except with proof of individual moral responsibility since regulatory offenses do not involve the questions of moral guilt associated with aggressive crimes, and since the penalties for these offenses are very small.

Close examination of the distinction between true crimes and regulatory offenses, however, reveals that it cannot support strict liability, especially in the corporate context found in *Dotterweich* and *Park*. The distinction fails to recognize that society's interest in preventing traditional crimes, such as murder or robbery, is just as great as its interest in preventing violations of regulatory offenses. The innocent public is in no better position to protect itself from "street crime" than it is to protect itself from regulatory offenses. Further, it is not explained how the goal of preventing violations is significantly furthered by a doctrine which makes no attempt to determine the individual responsible for the offense, but instead makes an individual liable for the acts of the corporation. Finally, although the liability imposed is often no more than a small fine, many regulatory offenses, including those under the Federal Food, Drug and Cosmetic Act, involve potential imprisonment.

Thus, by concentrating simply on the types of crimes involved, the courts have developed an unnecessary doctrine which not only undermines the concept of individual responsibility but is ill suited to accomplish the objectives of the regulatory legislation. By imposing vague and seemingly arbitrary standards of conduct, enforced by criminal sanctions, the Court's doctrine may well discourage responsible people from taking jobs in highly regulated industries. The long run result may be less careful operation of these businesses. Because the Court's system of liability does not specifically provide a defense for individual officers who have taken reasonable steps to prevent violations from occurring, it fails to provide adequate incentive to take these steps. Further, because the standards imposed seem arbitrary and impossible to fulfill, judges are likely to refuse to use the sanction of imprisonment and will probably impose very light fines, thus reducing the effectiveness of the regulation still further. Most importantly, the Court has failed to provide any clear direction which would guide corporate officials in their attempts to comply with the law.

The distinction which needs to be made is not between the types of crimes involved; rather, the courts and legislatures must attempt to deal with the peculiar problems created by the corporate context in which these crimes are committed. Many crimes are committed directly by individuals outside the context of normal lawful activities, and individual responsibility in such cases is generally easy to determine. However, when offenses are committed in the context of normal corporate activities, individual responsibility is difficult to assign. Violations by corporations are likely to occur without the knowledge or direct participation of "responsible" corporate officials. These officials will often be ignorant of the day-to-day operations of their business, in which these violations are likely to occur. Regulations which impose criminal liability on these activities should take this differing context into account by insuring that those held criminally responsible for violations are likely to be aware of the violations or conditions which would lead to a violation and are in a position to prevent or correct the situation. The *Park* decision, by equating "responsible" officers with those who had the power to prevent or correct violations, articulated half of this goal. However, its doctrine will not insure that those held responsible are those who would have knowledge of conditions which would lead to a violation. By seeking to incorporate both the requirements of *power* to prevent violations and *knowledge* of conditions which would lead to violations, a more workable theory of criminal liability can

be established to deal with offenses which take place in the corporate setting. Such a test would not need to dispense with established notions of criminal responsibility and would more effectively assure adherence to the regulations.

High level corporate officers are essentially managers. These people spend most of their time on financial and budget matters and on long range policy planning.[129] The operational concerns of upper management are generally confined to making policies and reviewing and mediating claims and proposals arising from middle and lower levels of the corporate structure, rather than with implementing the day-to-day operation based on its policies.[130] Upper management is thus unlikely to be familiar with operations on the level that violations are likely to occur.[131]

This problem is compounded by the fact that officers at the top of the corporate hierarchy are likely to be cut off from the communications necessary to be aware of violations taking place. There is a natural tendency on the part of subordinates not to report such "bad news" on the theory that the people at the top "simply don't want to hear about it."[132] In fact, in many cases popular belief about the law actually discourages such reporting. As one commentator pointed out:

> [T]he top-level executive himself is afraid of legal trouble, and the organization banks on the unwritten hope that "what he doesn't know can't hurt him."[133]

Clearly the law should not allow corporate executives to hide behind a veil of claimed ignorance. But neither should it make demands upon the officers that are unrealistic in light of their inevitable isolation from the mechanics of daily operation of the business. What is needed is a rational system of liability which takes account of the corporate setting and uses it to the advantage of both the corporation and the law.

One commentator has suggested that when a duty is imposed upon a corporation, the corporation should be required to have an officer in charge of compliance with that legally imposed duty.[134] The requirements necessary to hold such positions would also be defined by law.[135] This individual would be legally responsible if corporate duties were not performed, thus insuring that someone within the corporation would feel complete responsibility for insuring that legally mandated tasks were performed.[136]

It would be unrealistic, however, to expect legislation which must be general by its nature, to be able to define the duties of such an officer or officers with sufficient specificity to be effective within the wide range of differing corporate structures. Further, such a proposal would cut deeply into the managerial prerogative of determining the company's organizational structure. Having an outsider forced upon them, whose loyalty is to the government rather than to the company, might cause resentment and a lack of cooperation among the corporate officers. On the other hand, these compliance officers could be looked upon as convenient scapegoats by other officers within the company who would feel that if anything goes wrong it would be the compliance officer, rather than themselves who would bear the blame.

In order to be effective in regulating corporate activity, a theory of criminal responsibility should seek to accomplish two goals. First, it should insure that everyone involved with the regulated activity is legally responsible for insuring that his activities do not contribute to violations. Second, it should make sure that some individuals can be singled out as being responsible for any violation. A system which accomplished only one of these goals would be ineffective. If everyone is considered responsible for violations, but no individual can be singled out as responsible for a given violation, individuals would feel shielded by the group. Criminal penalties would rarely be imposed on every member of the group. To do so would be unfair unless it were clear that every individual actually had a responsible share in the violation. On the other hand, a system which

[129] C. STONE, *supra* note 1, at 60 (1975).

[130] *Id.*

[131] While this situation might be undesirable, the way to deal with it is by legislation aimed directly at the problem, rather than through strained interpretations of the criminal law.

[132] C. STONE, *supra* note 1, at 61.

[133] *Id.* at 62.

[134] *Id.* at 190.

[135] *Id.* at 192.

[136] *Id.* at 190.

makes only certain individuals within the group responsible would lead to irresponsibility by the remainder of the group because they could look on the designated individuals as convenient scapegoats.

What is needed is a clear definition of the duties of all corporate personnel, outlining their role for insuring that the company complies with the law. In this way individual responsibility can be incorporated into every case where criminal liability is based upon corporate acts. For the most part, however, this definition must come from within the corporation itself. The corporate management has the expertise to insure that things get done within the corporation. The law should utilize this expertise to its advantage by requiring that the role of each person within the corporation for insuring compliance be defined by the management itself. Either legislatively or judicially a general rule should be established that when a duty is imposed upon a business organization, the president or chief executive officer is charged with the duty of instituting the necessary systems within the company to insure compliance. The president would be criminally liable only to the extent that he had failed to establish a system which could reasonably be expected to produce the required result.[137] Other officers and employees of the corporation would share liability to the extent that their function within the system established by the president was not carried out.

A requirement of knowledge and individual responsibility would be built into such a system, since it would take into account what each individual could be expected to know and do. It would impose responsibility on each individual within the group, but would insure that responsibility for violations could be assigned to specific individuals since their duties would be clearly defined. The president could not be held liable for violations of which he was not aware except to the extent that the system he established did not have reasonable means of feedback communication. The president's liability would be determined by looking to whatever system he had established to deal with the situation. Merely giving instructions to take preventive or corrective measures, without any follow-up, would not be considered reasonable measures. Perhaps the chief reason why Park was convicted, and why the Court ultimately had few qualms about holding him liable, was that he simply had not gone far enough to correct violations which had been brought to his attention. He made no efforts to insure that his instructions were carried out. This simply was not reasonable conduct. Thus, in addition to mechanisms for feedback, it would be essential that the corporate officer take action based upon the knowledge provided by the system. Similarly, each employee's liability would be determined by the extent to which he had completed his clearly defined task within the system.[138]

Many firms have already undertaken similar measures in response to increasingly tough enforcement of the antitrust laws. For example, some firms have begun to educate their sales personnel about the requirements of the antitrust laws and have issued strict directives requiring compliance. Some have held periodic meetings to discuss and evaluate the effectiveness of compliance methods.[139] This type of

[137] Reasonableness in each case would be determined according to the facts at hand. However, like any other expert, the executive's standard of care would be measured against others with his expertise. Several factors could help determine if a plan was reasonably designed to produce the required result, including the presence or absence of built in feedback mechanisms, and the efforts by top management to convince the lower levels of the sincerity of their concern.

[138] By emphasizing the duty to "implement measures that will insure that violations do not occur," 421 U.S. 658, 672, the Court in *Park* essentially suggested the proposal just outlined. But *Park* weakened any incentive for creating such systematic efforts by failing to give assurance that criminal liability would not be imposed if violations occurred despite bona fide efforts to prevent them. Further, by holding Park liable because of his position within the company, the Court repudiated such an interpretation.

[139] As an example, executives of firms making paper labels for bottles and cans who were convicted of antitrust violations in 1974 returned to court on the anniversary of their decree and reported on their activities to discourage price fixing within their industry. What was reported consisted primarily of efforts to educate sales personnel about the requirements of the law and strict instructions as to how each was to comply. Employees of the H. S. Crocker Company, for instance, were given copies of the consent decree entered in the case, and were required to sign statements that they had read it. The sales personnel of Crocker were instructed not to discuss prices with competitors. Meetings were held with the employees about the company's antitrust

systematic effort is undoubtedly necessary to insure that regulations are both understood and complied with in the corporate setting.

By clearly defining those with responsibility for insuring that corporate duties are carried out and imposing upon them the duty of deciding how the duties will be carried out, the business structure would be utilized in favor of the law, rather than at cross purposes with it. It would, most importantly, eliminate the necessity of abrogating traditional requirements of the criminal law.

WILLIAM MCVISK

---

policies. At Diamond-International Company similar efforts have been made, including periodic meetings to discuss and evaluate the effectiveness of the compliance efforts. BOYD CURRENT SUMMARY 19 (Dec. 22, 1976).