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)).

part, to benefit the corporation."[21]

Although theoretically more demanding than the standard for respondeat superior liability in the civil context, the standard for strict vicarious corporate criminal liability is generally not meaningfully different in practice. Civil respondeat superior liability for a corporation requires that the employee's act was done within the scope of his employment. Strict vicarious criminal liability for a corporation requires, in addition, that the employee intended at least in part to benefit the corporation. This additional requirement will rarely make a difference. Except in cases where an employee stole from the corporation, an employee's misconduct will usually result in a financial benefit to the corporation, which will satisfy the intent requirement. For instance, a sales representative's off-label promotion of a prescription drug will increase his or her employer's sales of that drug. Similarly, when a truck driver for a waste hauling company unlawfully disposes of hazardous waste, he or she saves the employer the costs of disposing of the waste properly.

Moreover, even if the corporation did not receive any financial benefit from an employee's crime, it will still be subject to strict vicarious criminal liability if the employee *intended*, in part, to benefit the corporation. For example, the Fourth Circuit has taken the position that "it is not necessary for an agent's actions to have actually benefited the corporate entity."[22] The Fourth Circuit reasoned that "whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation."[23] In the Fourth Circuit's view, the "intent to benefit" requirement adequately protects the corporation because it "insulate[s] the corporation from criminal liability for actions of its agents which [were] *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation."[24]

A number of courts have claimed support for subjecting corporations to strict vicarious criminal liability from the Supreme Court's decision in *New York Central & Hudson River Railroad Co. v. United States*.[25] For example, the Sixth Circuit has cited *New York Central* for the proposition that "so long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act

21. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.200(B) (2008) [hereinafter USAM], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

22. *Automated Med. Labs.*, 770 F.2d at 407.

23. *Id.*

24. *Id.*

25. 212 U.S. 481 (1909); *see* ANDREW WEISSMANN ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, REFORMING CORPORATE CRIMINAL LIABILITY TO PROMOTE RESPONSIBLE CORPORATE BEHAVIOR 4–5 (2008) (stating that lower courts have mistakenly interpreted *New York Central* to require them to apply respondeat superior in the criminal context).

also, and must be deemed to have 'authorized' the criminal act."[26] The Fourth Circuit has similarly construed *New York Central* as recognizing vicarious corporate criminal liability.[27] The Third Circuit has described *New York Central* as broadly "holding [a] corporation liable for its agents' crimes."[28] Citing *New York Central*, the D.C. Circuit has made the sweeping statement that "[c]orporations may be held liable for specific intent offenses based on the 'knowledge and intent' of their employees."[29] Similarly, the Seventh Circuit has cited *New York Central* to support the notion that "if a crime at least ostensibly in the corporation's financial interest is committed or condoned at the managerial or board of directors level of the corporation, the corporation itself is criminally liable."[30]

Contrary to these courts of appeals' interpretations, however, *New York Central* did not broadly endorse strict vicarious corporate criminal liability. *New York Central* applied a statute that expressly *mandated* vicarious criminal liability, and held only that Congress has the constitutional authority to make a corporation vicariously liable—*not* that statutes *must* be interpreted to allow such liability.[31] The case involved a railroad company that was convicted for violating the Elkins Act, which "ma[de] it an offense to give or receive a rebate whereby goods are transported in interstate commerce at less than the published rate."[32] The basis for the conviction was that a general manager and an assistant general manager of the company entered into an agreement with sugar distributors and one of their customers that violated the Act.[33] Under the agreement, after the railroad company shipped sugar for the published rate, it paid a rebate to the sugar distributors and their customer.[34] The Elkins Act specifically required vicarious liability, stating:

> (1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed.

26. Cont'l Baking Co. v. United States, 281 F.2d 137, 149 (6th Cir. 1960).
27. Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945).
28. Genty v. Resolution Trust Corp., 937 F.2d 899, 909 (3d Cir. 1991).
29. United States v. Philip Morris USA Inc., 566 F.3d 1095, 1118 (D.C. Cir. 2009) (quoting *N.Y. Cent.*, 212 U.S. at 495).
30. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1018 (7th Cir. 2011).
31. *N.Y. Cent.*, 212 U.S. at 496.
32. *Id.* at 498.
33. *Id.* at 489.
34. *Id.*

> In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case, be also deemed to be the act, omission or failure of such carrier, as well as of that person.[35]

The railroad company argued that "these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses."[36] The Court disagreed, ruling that there was "no question" that Congress, when it acted "to secure equal rights to all engaged in interstate trade," had the power to hold corporations responsible for their agents' acts.[37] *New York Central* did not hold that such liability is permitted, let alone required, when a statute is silent with respect to the possibility of corporate liability.[38]

Significantly, the theory of strict vicarious criminal liability for corporations that has prevailed in the federal courts of appeals does not allow a corporation to defend itself by showing that the employee's conduct violated its compliance policy or a directive from a superior. For example, the Fourth Circuit has ruled that a corporation may be held criminally liable for its employee's acts "'even if . . . such acts were against corporate policy or express instructions.'"[39] According to the Fourth Circuit, that an employee's actions were "contrary to corporate policy does not absolve [the corporation] of legal responsibility."[40] Similarly, the First Circuit has held that "[e]ven a [superior's] specific directive to an agent or employee [to follow rules barring illegal acts] or *honest efforts to police such rules* do not automatically free the company for the wrongful acts of agents."[41] The First Circuit reasoned that, under principles of agency law, a principal is liable for an act that is part of a transaction that its agent was authorized to perform "'even though it is established fact that the act was forbidden by the principal.'"[42] Along the same lines, the Second Circuit has "refuse[d] to adopt the suggestion that the prosecution, in order to establish vicarious liability, should have to prove as a separate element in its case-in-chief that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees."[43] Instead, the Second Circuit has adhered to the position that "a compliance program,

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35. *Id.* at 491–92 (quoting statute).
36. *Id.* at 492.
37. *Id.* at 496.
38. *See* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009) ("*New York Central* upheld a statute that expressly punished corporations. It did not suggest that statutes silent on the subject should be read to authorize the prosecution of these entities.").
39. United States v. Automated Med. Labs., Inc., 770 F.2d 399, 406 (4th Cir. 1985) (quoting United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983)).
40. *Id.* at 407.
41. United States v. Potter, 463 F.3d 9, 26 (1st Cir. 2006) (emphasis added).
42. *Id.* (quoting HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 167 (2d ed. 1990)).
43. United States v. Ionia Mgmt. S.A., 555 F.3d 303, 310 (2d Cir. 2009).

'however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law.'"[44] Against the backdrop of decisions such as these, the U.S. Attorneys' Manual states that "the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents."[45]

B. Strict Vicarious Criminal Liability For Corporations Is Unfair, Is Bad Public Policy, And Should Be Abolished

For at least eight reasons, strict vicarious criminal liability for corporations is unfair, is bad public policy, and should be abolished.

First, it subjects a corporation to criminal liability when a single rogue employee engages in misconduct—even if the misconduct directly violates the corporation's policies and occurs despite a rigorous compliance program. As a result, "a single errant employee can cause the downfall of a multi-national corporation and the loss of thousands of jobs."[46]

Second, it treats responsible corporations the same as corporations that fail to take reasonable efforts to prevent misconduct.[47] The two are not similarly situated, however. Insofar as a corporation can be blameworthy, a corporation that has implemented a robust compliance policy is less deserving of blame than is a corporation that has failed to adopt a compliance policy. Yet strict vicarious criminal liability treats the two equally.

Third, it reduces corporations' incentives to implement vigorous and effective compliance policies, as the absence of such policies has no effect on whether a corporation is subject to strict vicarious liability for its employees' criminal acts. Indeed, strict vicarious criminal liability may actually deter corporations from having robust compliance policies. When a compliance policy yields information about criminal acts, that information can end up being used by the government to indict the corporation.[48] Corporations may decide that they are better off without compliance policies that could produce evidence that would support strict vicarious criminal liability.

Fourth, it does not serve any legitimate deterrent or retributive purpose because it punishes corporations that not only did nothing wrong, but also took reasonable steps to prevent misconduct by their employees. When a corporation whose

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44. *Id.* (quoting United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989)).

45. USAM, *supra* note 21, § 9-28.800(A).

46. Alschuler, *supra* note 38, at 1364.

47. *See* WEISSMANN ET AL., *supra* note 25, at 2 ("[T]he current standard makes no distinction between responsible corporations and those that fail to take compliance seriously.").

48. *See* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994) (explaining that a corporation's expenditures on enforcement "increase the probability that the government will detect those crimes [by the corporation's employees] that are committed, thereby increasing the corporation's expected criminal liability for those crimes").

employee committed a criminal act had in place a robust compliance policy, subjecting the corporation to strict vicarious criminal liability based on that act does not serve to deter insufficiently vigorous compliance efforts. Likewise, a corporation with a robust compliance policy in place did not do anything wrong, so no retributive purpose is served by holding it criminally liable for its employee's misconduct.

Fifth, it punishes innocent shareholders and employees, whereas the persons who are actually responsible for the crimes could be punished without the unfair consequences of holding the corporation criminally liable.[49]

Sixth, when the employee who committed the misconduct is convicted of a crime, convicting the corporation as well results in duplicative liability. This is inconsistent with the doctrine of respondeat superior that underlies vicarious corporate criminal liability. In the civil context, a tort plaintiff cannot obtain a full recovery from an agent of a corporation and also recover from the corporation itself under a respondeat superior theory; the corporation's "obligation is discharged when full satisfaction is obtained against the agent."[50] With strict vicarious criminal liability, however, the corporation and the offending employee can each be punished for the same crime.[51]

Seventh, it gives prosecutors too much power, as the threat of a prosecution based on one employee's misconduct can force a corporation to enter into a deferred prosecution agreement or a non-prosecution agreement, which itself may have substantial consequences.[52] Given "the profound impact of an indictment and the lack of a defense to vicarious liability, the mere threat of criminal sanctions based on the actions of an individual employee has been enough to compel corporations to settle non-meritorious claims."[53]

Eighth, and finally, civil liability for the corporation and prosecution of the offending employee are sufficient to remedy the harm caused by an employee's misconduct.[54] Any physical or financial injury caused by an employee's misconduct can be adequately compensated by holding the corporation liable in a civil case. There is no need to take the additional step of subjecting the corporation to strict vicarious criminal liability.

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49. Alschuler, *supra* note 38, at 1369 ("The human perpetrators of the crimes now attributed to corporations . . . can be convicted and incarcerated without punishing innocent shareholders and employees as well.").

50. Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 335 (1996).

51. *See id.*

52. *See, e.g.*, Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html (describing a deferred prosecution agreement that required a company to forfeit $1.256 billion and pay $665 million in civil penalties).

53. WEISSMANN ET AL., *supra* note 25, at 6.

54. *See* Fischel & Sykes, *supra* note 50, at 321 ("[C]orporate criminal liability is often heaped on top of substantial civil liability in circumstances where there is no reason to believe that civil liability alone would not produce appropriate deterrence.").

III. STRICT VICARIOUS CRIMINAL LIABILITY FOR CORPORATE EXECUTIVES

A. *The* Park *Doctrine*

Until 1943, the U.S. Supreme Court upheld convictions under a strict liability theory only in cases where the defendant was directly involved in the underlying events. For example, in *United States v. Balint*, the Court upheld the defendant's conviction under the Narcotic Act of 1914 because the defendant sold drugs and knew that he was doing so, though he did not know that the drugs he sold were "narcotics" under the Act.[55]

The Court took a different approach in its five-to-four decision in 1943 in *United States v. Dotterweich*,[56] the precursor to the *Park* doctrine. *Dotterweich* involved a "jobber"—a company that purchased drugs from their manufacturers, repackaged the drugs under its own label, and shipped the drugs in interstate commerce.[57] The company's president and general manager was convicted of three counts of violating the federal Food, Drug, and Cosmetic Act (the "FDCA") based on the company's shipment of misbranded and adulterated drugs in interstate commerce.[58] The Second Circuit reversed the convictions on the grounds that "only the drug dealer" was subject to the FDCA's criminal provisions and that, "where the dealer was a corporation, an individual connected therewith might be held personally [liable] only if he was operating the corporation 'as his 'alter ego.''"[59] The U.S. Supreme Court disagreed, holding that the FDCA creates criminal liability for all persons who have "a responsible share in the furtherance of the transaction" at issue.[60]

The *Dotterweich* Court did not cite any language in the FDCA that clearly required strict vicarious criminal liability for corporate executives, and no such language existed.[61] Instead, the Court relied on public policy considerations. It reasoned that the FDCA "touch[es] phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."[62] Without pointing to any support in the text of the statute, the Court asserted that "[i]n the interest of the larger good," the FDCA "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing"—and "puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[63]

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55. United States v. Balint, 258 U.S. 250, 254 (1922).
56. 320 U.S. 277 (1943).
57. *Id.* at 278.
58. *Id.*
59. United States v. Park, 421 U.S. 658, 668 (1975) (quoting United States v. Buffalo Pharmacal Co., 131 F.2d 500, 503 (2d Cir. 1942)).
60. *Dotterweich*, 320 U.S. at 284.
61. *See id.* at 287, 289 (Murphy, J., dissenting).
62. *Id.* at 280.
63. *Id.* at 281.

The *Dotterweich* Court recognized that "penaliz[ing] [a] transaction though consciousness of wrongdoing be totally wanting" creates "[h]ardship."[64] It insisted, however, that Congress did so deliberately in an effort to protect the public:

> Balancing relative hardships, Congress has 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 to throw the hazard on the innocent public who are wholly helpless.[65]

The Court did not address whether the company's president and general manager had any involvement in the shipment of the drugs at issue.[66] In addition, the Court declined to explain what it means to have "a responsible share in the furtherance of [a] transaction," stating: "It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation."[67] Instead, the Court relied on "conscience and circumspection in prosecuting officers" to fill in the contours of the standard that it announced.[68]

In its six-to-three decision in 1975 in *United States v. Park*, the Court reaffirmed and elaborated on the doctrine set forth in *Dotterweich*. *Park* involved a national retail food chain headquartered in Philadelphia.[69] The company had "approximately 36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses."[70] The company's president and CEO was convicted of five counts of violating the FDCA based on evidence that food received by the company's Baltimore warehouse after being shipped in interstate commerce was "exposed to contamination by rodents" there, making it "adulterated."[71] The trial judge instructed the jury that the company's president and CEO could be convicted if he "had a responsible relation to the situation, even though he may not have participated personally," and that the issue was "whether [he], by virtue of his position in the company, had a position of authority and responsibility in the situation out of which the[ ] charges arose."[72] The Fourth Circuit reversed the convictions on the grounds that this jury instruction "'might well have left the jury

64. *Id.* at 284.

65. *Id.* at 285.

66. The dissenting opinion stated that there was "no proof or claim" that the company's president and general manager "actively participated in the[ ] introduction" of the drugs into interstate commerce. *Id.* at 286 (Murphy, J., dissenting). The Second Circuit's opinion indicated that his only link to the illegal shipment was that he was "in general charge of the corporation's business and had given general instructions to its employees to fill orders received from physicians." United States v. Buffalo Pharmacal Co., 131 F.2d 500, 501 (2d Cir. 1942).

67. *Dotterweich*, 320 U.S. at 284–85.

68. *Id.* at 285 (quoting Nash v. United States, 229 U.S. 373, 378 (1913)) (internal quotation marks omitted).

69. United States v. Park, 421 U.S. 658, 660 (1975).

70. *Id.*

71. *Id.*

72. *Id.* at 665 n.9 (internal quotation marks omitted).

with the erroneous impression that [the company's president and CEO] could be found guilty in the absence of 'wrongful action' on his part,'" and that due process required proof of such wrongful action.[73] According to the Fourth Circuit, *Dotterweich* did not dispense with the element of wrongful action.[74] The U.S. Supreme Court disagreed, holding that *Dotterweich*'s "responsible share" standard does not require any "wrongful action" by the defendant.[75] Instead, the Court held, the government may satisfy its burden of proving that a corporate executive had "a responsible share" in an FDCA violation by presenting "evidence sufficient to warrant a finding by the trier of the 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."[76] Thus, the president and CEO was subject to strict vicarious criminal liability for FDCA violations that he had the ability to prevent or promptly correct.[77] Under this standard, the jury instruction was appropriate because it "did not permit the jury to find guilt *solely* on the basis of [the president and CEO's] position in the corporation."[78]

Like the *Dotterweich* Court, the *Park* Court did not cite any language in the FDCA that expressly mandated strict vicarious criminal liability for corporate executives. Instead, the *Park* Court reasoned that public policy considerations made it fair to dispense with a "wrongful action" requirement. It stated that "the public has a right to expect" that persons "who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them" will satisfy "demanding" standards of "foresight and vigilance."[79] Given the stakes for the public health, the Court determined that the FDCA "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 will not occur."[80] It concluded that the FDCA "imposes the highest standard of care and permits conviction of responsible corporate officials who, in light of this standard of care, have the power to prevent or correct violations of its provision."[81] The Court added that the FDCA "does not require that which is objectively impossible," and hence "permits a claim that a defendant was 'powerless' to prevent or correct the violation to 'be raised defensively at a trial on the merits.'"[82] This defense is meaningless in practice,

73. *Id.* at 666 (quoting Park v. United States, 499 F.2d 839, 841–42 (4th Cir. 1974)).
74. *Id.*
75. *Id.* at 673.
76. *Id.* at 673–74.
77. *Id.*
78. *Id.* at 674 (emphasis added).
79. *Id.* at 672.
80. *Id.*
81. *Id.* at 676.
82. *Id.* at 673 (quoting United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964)).

however, as virtually any executive who is prosecuted under the theory that he was a responsible corporate officer will have had the power to prevent or correct the violation.[83]

B. Early Applications Of The Park *Doctrine*

Although the U.S. Supreme Court's strict liability analysis in *Park* did not focus on this fact, it is significant that the company's president and CEO was on notice of problems with the conditions in the company's warehouses. In April 1970, the Food and Drug Administration (the "FDA") sent him a letter stating that it found insanitary conditions in the company's Philadelphia warehouse.[84] After an inspection of the company's Baltimore warehouse during November and December 1971, the FDA sent him a letter expressing "much concern" that "areas used for food storage" there "were actively and extensively inhabited by live rodents."[85] The FDA inspected the Baltimore warehouse again in March 1972.[86] While the FDA found that "there had been improvement" in the conditions, "there was still evidence of rodent activity in the building and in the warehouses" and it "found some rodent-contaminated lots of food items."[87] *Park* could be viewed, therefore, as allowing strict liability by a responsible corporate officer who was not involved in the crimes at issue only if he or she was on notice of the facts underlying those crimes and failed to implement adequate corrective measures.

From the mid-1970s to the early 1980s, "almost all of the criminal cases the government brought under the FDCA were *Park* 'strict liability' cases."[88] Most of these prosecutions were "'dirty warehouse' cases" charging food companies and their officials for maintaining insanitary facilities," though some involved a drug or device.[89] Based on the reported opinions arising from these prosecutions, "the overwhelming majority (if not all) . . . involved a defendant who was aware of the conduct giving rise to the violation but failed to correct it"—as was the situation in *Park* itself.[90]

The number of prosecutions under the *Park* doctrine began to decline in the

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83. *See* Richard A. Samp & Cory L. Andrews, *Restraining* Park *Doctrine Prosecutions Against Corporate Officials Under The FDCA*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, Oct. 2012, at 19, 24 ("[I]t is highly unlikely that a CEO or COO exists who cannot be convicted under the Park Doctrine, as there is little if anything within most companies' operation that is not, at least on paper, within their supervisory authority and responsibility.").

84. *Park*, 421 U.S. at 661.

85. *Id.* at 661–62 & n.6 (internal quotation marks omitted).

86. *Id.* at 662.

87. *Id.* (internal quotation marks omitted).

88. John R. Fleder, *The* Park *Criminal Liability Doctrine: Is It Dead or Is It Awakening?*, FOOD & DRUG LAW INSTITUTE, ENFORCEMENT CORNER 48, 49 (Sept./Oct. 2009), http://www.hpm.com/pdf/FLEDERPARK.PDF.

89. *Id.*

90. Brent J. Gurney et al., *The Crime of Doing Nothing: Strict Liability for Corporate Officers Under the FDCA*, 22 ANDREWS LITIG. REP., no. 3, Dec. 2007, at 9, 11 & nn.6 & 8.

early-to-mid 1980s.[91] Whereas convictions under the *Park* doctrine are misdemeanors, federal prosecutors focused on FDCA violations that involved an intent to defraud or mislead, which are felonies.[92] In the late 1980s and early 1990s, members of Congress similarly focused on cases in which they believed that executives had intentionally violated the FDCA.[93] Until several years ago, the *Park* doctrine had been virtually dormant for decades.[94] Further, there had been hardly any, if any, cases in which a corporate executive was charged purely on the ground that his or her position enabled him or her to prevent or promptly correct an FDCA violation. Instead, *Park* doctrine prosecutions always or almost always were "pursued only when the defendant was personally responsible for a violation or was on notice of it and failed to correct it."[95]

C. More Recent Applications of the Park *Doctrine*

Federal officials' approach to the *Park* doctrine changed in 2007 with the prosecution of The Purdue Frederick Company, Inc. ("Purdue Frederick") and three current or former high-level executives of one of its affiliates. The executives were the affiliate's president and CEO, its executive vice president and chief legal officer, and its former medical director.[96] The basis for the charges was that certain unnamed supervisors and employees of the company, "with the intent to defraud or mislead, marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications."[97] Significantly, "[t]he individual defendants [were] not charged with personal knowledge of the misbranding or with any personal intent to defraud."[98] Indeed, the U.S. Attorney who led the prosecution acknowledged the government's "inability to establish that any of the executives was personally involved in, or even knew of, any of the alleged improprieties."[99]

Pursuant to an information, Purdue Frederick pled guilty to felony misbranding of OxyContin with the intent to defraud or mislead in violation of 21 U.S.C. §§ 331(a) and 333(a)(2), and the executives pled guilty to misdemeanor offenses under the *Park* doctrine.[100] In addition, the company agreed "to pay about $600 million in civil and criminal fines, forfeitures, and private settlements and to comply for five years with a monitored corporate integrity agreement,"[101] and the

91. Fleder, *supra* note 88, at 49.
92. *Id.*
93. *Id.*
94. *Id.* at 50.
95. Gurney et al., *supra* note 90, at 11.
96. United States v. Purdue Frederick Co., 495 F. Supp. 2d 569, 570 n.2 (W.D. Va. 2007).
97. *Id.* at 571.
98. *Id.*
99. Gurney et al., *supra* note 90, at 12 & n.17.
100. *Purdue Frederick*, 495 F. Supp. 2d at 570–71.
101. Gurney et al., *supra* note 90, at 12.

executives agreed to disgorge a total of $34.5 million.[102] Making matters worse, based on their *Park* doctrine convictions, the U.S. Department of Health and Human Services subsequently excluded the three executives from participating in federal healthcare programs for 12 years pursuant to 42 U.S.C. § 1320a-7(b).[103] Pharmaceutical companies cannot employ excluded individuals if they want to participate in federal healthcare programs, as all major pharmaceutical companies do. Given the executives' ages, their exclusions effectively banned them from the pharmaceutical industry for life. In July 2012, a divided panel of the D.C. Circuit rejected the executives' arguments that their exclusions were not statutorily authorized and violated due process, though it remanded for further proceedings regarding the length of the exclusions.[104] With respect to the due process issue, the panel reasoned that "[s]urely the Government constitutionally may refuse to deal further with senior corporate officers who could have but failed to prevent a fraud against the Government on their watch."[105] In November 2012, the executives' petition for rehearing *en banc* was denied.[106]

The treatment of the three executives in the Purdue Frederick case shows that *Park* doctrine convictions now can have grave consequences. Previously, a *Park* doctrine conviction resulted only in a minor fine. For example, in *Park* itself, the defendant was "sentenced to pay a fine of $50 on each count."[107] When the Supreme Court upheld the constitutionality of strict liability offenses in *Morissette*, it relied in part on the fact that the "penalties commonly [were] relatively small, and conviction d[id] no grave damage to an offender's reputation."[108] For the three executives who pled guilty in the Purdue Frederick case, however, the penalties were severe—seemingly career-ending—and caused great damage to their reputations. Indeed, "virtually every major U.S. news outlet" reported the executives' guilty pleas, "generally as part of lead stories that talked of 'fraud,' felonies, 'lying to doctors,' and addiction, abuse and overdose deaths."[109]

The FDA has signaled that the Purdue Frederick case is not an aberration, and that similar prosecutions of pharmaceutical company executives will be brought in the future. For example, in March 2010, the Commissioner of the FDA indicated that the agency's Office of Criminal Investigations would "increase" its use of the *Park* doctrine to "hold responsible corporate officials accountable" in "appropri-

102. *Purdue Frederick*, 495 F. Supp. 2d at 573.
103. Friedman v. Sebelius, 686 F.3d 813, 816 (D.C. Cir.), *reh'g en banc denied* (D.C. Cir. 2012).
104. *Id.* at 816, 818–24.
105. *Id.* at 824.
106. *Friedman*, 686 F.3d 813.
107. United States v. Park, 421 U.S. 658, 666 (1975).
108. Morissette v. United States, 342 U.S. 246, 256 (1952).
109. Gurney et al., *supra* note 90, at 13.

ate" cases.[110] Yet the FDA has declined to shed much light on the circumstances under which it is likely to deem a *Park* doctrine prosecution "appropriate." In the agency's Regulatory Procedures Manual, the section titled "Special Procedures and Considerations for Park Doctrine Prosecutions" lists seven non-exclusive factors to consider when deciding whether to recommend a *Park* doctrine prosecution.[111] These factors, which were released to the public in January 2011, are:

1. Whether the violation involves actual or potential harm to the public;
2. Whether the violation is obvious;
3. Whether the violation reflects a pattern of illegal behavior and/or failure to heed prior warnings;
4. Whether the violation is widespread;
5. Whether the violation is serious;
6. The quality of the legal and factual support for the proposed prosecution; and
7. Whether the proposed prosecution is a prudent use of agency resources.[112]

Although these factors are "intended solely for the guidance of FDA personnel,"[113] it is difficult to see how they can provide guidance even to the limited audience for which they are intended. Each of the factors could be considered for *any* decision involving prosecutorial discretion.[114] Moreover, "the absence of some factors does not mean that a referral is inappropriate where other factors are evident."[115] Because the FDA's "guidance" provides none, the agency is effectively mirroring the approach taken in *Dotterweich*, where the Supreme Court relied on "conscience and circumspection in prosecuting officers" to decide when to hold company executives strictly liable under the FDCA.[116] Prosecutors have unfettered discretion to bring *Park* doctrine cases as a result, which creates reason for substantial fear and uncertainty among corporate executives in industries regulated by the FDA.

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110. Letter from Margaret A. Hamburg, Comm'r of Food & Drugs, to the Honorable Charles E. Grassley, Ranking Member of the Senate Comm. on Fin. (Mar. 4, 2010), http://grassley.senate.gov/about/upload/FDA-3-4-10-Hamburg-letter-to-Grassley-re-GAO-report-on-OCI.pdf.

111. *Inspections, Compliance, Enforcement, and Criminal Investigations,* U.S. DEP'T OF HEALTH & HUMAN SERVS., U.S. FOOD & DRUG ADMIN. § 6-5-3 [hereinafter FDA], http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176738.htm#SUB6-5-3 (last updated Jan. 26, 2011).

112. *Id.*

113. *Id.*

114. *See* Samp & Andrews, *supra* note 83, at 23 ("Because these criteria are identical to those considered in almost every decision to seek a criminal sanction, they are not especially helpful.").

115. FDA, *supra* note 111.

116. United States v. Dotterweich, 320 U.S. 277, 285 (1943) (quoting Nash v. United States, 229 U.S. 373, 378 (1913)) (internal quotation marks omitted).

D. *The* Park *Doctrine Is Unfair, Is Bad Public Policy, And Should Be Abolished*

For nine reasons, many of which mirror the reasons why strict vicarious criminal liability for corporations should be rejected, the *Park* doctrine is unfair, is bad policy, and should be abolished. *First*, the *Park* doctrine subjects a corporate executive to criminal liability when a single rogue employee engages in misconduct—even if the misconduct occurred despite the corporate executive's best efforts. *Second*, it punishes corporate executives who had no involvement in the misconduct and did not even know that the misconduct was happening. *Third*, it applies to a corporate executive who acted entirely reasonably. No legitimate deterrent or retributive purpose is served by punishing corporate executives who did nothing wrong and took reasonable steps to prevent misconduct by their employees. *Fourth*, it subjects a corporate executive to criminal liability even if the employee who committed the misconduct concealed what he or she was doing, preventing the corporate executive from identifying the misconduct.

Fifth, it treats a corporate executive who implemented a robust compliance policy the same as a corporate officer who took no efforts to prevent misconduct. As with corporations, however, the two are not similarly situated. A corporate executive who implemented a robust compliance policy likely deserves little or no blame, whereas one who did nothing to prevent misconduct might fairly be deemed culpable under some circumstances. Yet the *Park* doctrine treats the two equally.

Sixth, it reduces corporate executives' incentives to implement vigorous and effective compliance policies, as the absence of such policies has no effect on whether they can be held strictly liable under the *Park* doctrine. Worse, like strict vicarious criminal liability for corporations, the *Park* doctrine may actually deter corporate executives from adopting robust compliance policies. When a compliance policy yields information about criminal acts, that information can end up being used by the government to bring a prosecution under the *Park* doctrine. Corporate executives may decide that they are better off without compliance policies that could produce evidence that would inculpate them under that doctrine.

Seventh, it gives prosecutors too much power, and that power is unchecked. There is effectively no standard for determining when the *Park* doctrine should apply. A prosecutor can invoke it in essentially any case involving a corporate employee's violation of the FDCA. Given "the breadth of the FDCA's prohibitions, the very real danger exists that an FDCA misdemeanor, coupled with the harsh threat of exclusion, will be seen by federal prosecutors as a powerful leveraging tool to obtain convictions or extract pleas in vindications of suspicions that otherwise could never be proven."[117]

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117. Samp & Andrews, *supra* note 83, at 24.

Eighth, civil liability for the corporation and prosecution of the offending employee are sufficient to remedy the harm caused by an employee's misconduct. Any physical or financial injury caused by an employee's misconduct can be adequately compensated by holding the corporation liable in a civil case. There is no need to take the additional step of subjecting corporate executives who had nothing to do with the misconduct to strict vicarious criminal liability.

Ninth, and finally, the *Park* doctrine deters talented individuals from seeking to become high-level corporate executives. Such executives are potential targets for *Park* doctrine prosecutions, and they can be effectively banned from their industry for life if they are convicted.

II. MITIGATING THE UNFAIR AND PERNICIOUS CONSEQUENCES OF STRICT VICARIOUS CRIMINAL LIABILITY FOR CORPORATIONS AND CORPORATE EXECUTIVES

As demonstrated above, the doctrines of strict vicarious criminal liability for corporations and corporate executives have unfair and pernicious consequences. These consequences can be mitigated by (i) requiring that a statute clearly mandate strict vicarious criminal liability before such liability is imposed and (ii) allowing an affirmative defense that the corporation had a reasonable compliance policy and that the responsible corporate officer made reasonable efforts to implement that policy.

A. A Clear Statement Requirement

Courts and prosecutors apply strict vicarious criminal liability to corporations even where the governing statute does not contain a clear statement that Congress intended to impose such liability.[118] This approach is not supported by *New York Central*, where the U.S. Supreme Court held that Congress has the constitutional authority to make a corporation vicariously liable for a criminal offense when it expressly mandates such liability in a statute.[119] Similarly, courts and prosecutors apply the *Park* doctrine even though the relevant provisions of the FDCA do not expressly mandate strict vicarious criminal liability—a fact ignored by the majorities of the Court in *Dotterweich* and *Park*. Those provisions do not give fair warning that corporate executives are subject to strict vicarious criminal liability.[120] Subjecting corporate executives to strict vicarious criminal liability based on such provisions is inconsistent with due process and basic principles of criminal law.[121]

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118. *See supra* notes 18–21, 25–30 and accompanying text.

119. *See supra* notes 31–38 and accompanying text.

120. *See Dotterweich*, 320 U.S. at 289 (Murphy, J., dissenting) ("[E]xpress statutory provisions are necessary to satisfy the requirement that officers as individuals be given clear and unmistakable warning as to their vicarious personal liability. This Act gives no such warning.").

121. *See id.* at 286 ("[I]n the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal

Given the harsh and undesirable effects of strict vicarious criminal liability, courts and prosecutors should not subject corporations or corporate executives to such liability unless Congress clearly stated in the governing statute that it intended to provide for such liability.[122] Such a clear statement requirement would reduce the number of cases in which corporations and corporate executives are prosecuted under a theory of strict vicarious criminal liability. In addition, a clear statement requirement would ensure that strict vicarious criminal liability is not applied under circumstances where Congress did not intend to allow it. With respect to corporations, a clear statement requirement would be consistent with the approach that the Court took in *New York Central*. With respect to corporate executives, a clear statement requirement would be consistent with the "presumption favoring *mens rea*."[123] For all of these reasons, a clear statement requirement should be adopted.

B. A Compliance Policy Defense

The Model Penal Code provides the framework for a compliance policy defense for corporations, and the same defense can be afforded to corporate executives prosecuted under the *Park* doctrine. Model Penal Code § 2.07(5) states that when a corporation is criminally prosecuted based on an employee's misconduct, "it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."[124] A "'high managerial agent' means an officer of a corporation or . . . any other agent of a corporation . . . having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation."[125] To date, the due diligence defense for corporations remains a minority rule. The

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knowledge. Before we place the stigma of a criminal conviction upon any such citizen the legislative mandate must be clear and unambiguous.").

122. With respect to strict vicarious criminal liability for corporate executives, the following excerpt from *Morissette* is relevant:

> Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clear expression, intends in any instance to do so.

Morissette v. United States, 342 U.S. 246, 254 n.14 (1952).

123. Staples v. United States, 511 U.S. 600, 606 (1994).

124. MODEL PENAL CODE § 2.07(5) (1985). Section 2.07(5) does not apply to "an offense for which absolute liability has been imposed." *Id.* In the terminology of the Model Penal Code, such an offense is merely a "violation," which is not a crime. *See id.* § 2.05(2)(a) ("Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides: when absolute liability is imposed with respect to any material element of an offense defined by a statute other than the Code and a conviction is based upon such liability, the offense constitutes a violation . . . ."); *Id.* § 1.04(5) ("A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.").

125. MODEL PENAL CODE § 2.07(4)(c) (1985).

federal government has not adopted it, and, according to an article published last year, "only six states have explicitly adopted the due diligence defense in section 2.07(5)" of the Model Penal Code.[126]

For six reasons, an affirmative defense that the corporation had a reasonable compliance policy and that the responsible corporate officer made reasonable efforts to implement that policy would address many of the unfair and pernicious consequences of strict vicarious criminal liability for corporations and corporate executives. *First*, such a defense would eliminate the unfairness that results when misconduct by a single rogue employee exposes a corporation or corporate executive to strict vicarious criminal liability. When an employee engages in misconduct in violation of a corporate compliance policy that the responsible corporate officer made reasonable efforts to implement, neither the corporation nor the corporate officer would be held criminally liable. *Second*, a compliance policy defense would give corporations and corporate executives an incentive to implement vigorous and effective compliance policies, as such policies could make the difference between a judgment of acquittal as a matter of law and a conviction under a theory of strict vicarious criminal liability.[127] *Third*, and related to the second point, whereas current law gives equal treatment to corporations and corporate executives that made reasonable efforts to prevent violations of the law and those that did not, a compliance policy defense would differentiate between the two, rewarding the former for their efforts. *Fourth*, a compliance policy defense would limit strict vicarious criminal liability to corporations and corporate executives that did not take reasonable steps to prevent their employees from engaging in misconduct. Such a limitation would advance legitimate deterrent and retributive purposes, as only corporations and corporate executives that are blameworthy would be subject to strict vicarious criminal liability. *Fifth*, a compliance policy defense would reduce and check prosecutors' presently unbounded power to prosecute corporations and corporate executives based on a theory of strict vicarious criminal liability. Prosecutors would know that such prosecutions would not succeed if the corporation had a reasonable compliance policy that the responsible corporate officer made reasonable efforts to implement. As a result, prosecutors would be more cautious in bringing such prosecutions, and would be more inclined to reserve them for situations where a corporation or corporate executive made insufficient compliance efforts. *Sixth*, and finally, a compliance policy defense would reduce the extent to which the fear of a *Park* doctrine prosecution deters talented individuals from seeking to become high-level

126. Peter J. Henning, *Be Careful What You Wish for: Thoughts on a Compliance Defense Under the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 883, 905–06 (2012).

127. *Cf.* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544–46 (1999) (recognizing an affirmative defense for employers that make good-faith efforts to prevent workplace discrimination because "[a]pplying the Restatement of Agency's 'scope of employment' rule in the Title VII punitive damages context . . . would reduce the incentive for employers to implement antidiscrimination programs").

corporate executives. The knowledge that reasonable efforts to implement corporate compliance policies will be a defense to such a prosecution would provide some measure of reassurance to persons who are considering taking on such positions.

Importantly, corporations and corporate executives charged under a theory of strict vicarious criminal liability should be allowed to have the validity of a compliance policy defense resolved *before trial*. The court would hold a pretrial hearing to evaluate whether the corporation had a reasonable compliance policy and whether the responsible corporate officer made reasonable efforts to implement that policy. If both of those questions were answered in the affirmative, the corporation or corporate executive would be innocent as a matter of law.[128] A compliance policy defense would thus spare responsible corporations and corporate executives from being subjected to the risks and expenses of a trial.

III. CONCLUSION

The current doctrines of strict vicarious criminal liability for corporations and corporate executives have a wide range of unfair and pernicious consequences. Both for corporations and for corporate executives, strict vicarious criminal liability is unfair, is bad public policy, and should be abolished. Insofar as courts and prosecutors continue to invoke strict vicarious criminal liability, two reforms should be adopted to mitigate its adverse effects. First, strict vicarious criminal liability should be imposed only when it is expressly authorized by the governing statute. Second, corporations and corporate executives should be able to raise an affirmative defense, before trial, that the corporation had a reasonable compliance policy in place and that the responsible corporate officer took reasonable steps to implement the policy. These changes would reduce much of the damage caused by strict vicarious criminal liability, even if the risk of such liability continues to remain an unfortunate fact of life for corporations and corporate executives.

128. *See* Larry D. Thompson, *The Blameless Corporation*, 47 AM. CRIM. L. REV. 1251, 1254 (2010) (proposing an affirmative defense for corporations based on a bona fide compliance policy, and stating: "The court . . . would be required to rule on the affirmative defense pretrial. If the corporation does indeed have a bona fide compliance program, it could possibly get a Rule 29 judgment of acquittal without submitting itself to a jury trial. The innocence of the corporation could be established as a matter of law before the trial").