Journal of Business and Economics, ISSN 2155-7950, USA
June 2016, Volume 7, No. 6, pp. 967-977
DOI: 10.15341/jbe(2155-7950)/06.07.2016/009

http://www.academicstar.us

Whether the Gaol: Strict, Vicarious, Criminal Liability of Corporate Officers for Public Welfare Crimes

Robert T. Albrecht
(Department of American Studies, Keimyung University, South Korea)

Abstract: In western common law nations, *crime* is generally viewed as the combination of evil intent (*mens rea* or "guilty mind") with a forbidden act (*actus reus* or "wrongful act"). As long ago as the 18th century, Sir William Blackstone in his *Commentaries* wrote that *mens rea* or a "vicious will" was an essential element of a crime. Coupled with that legal doctrine, there is a strong cultural belief in personal or individual responsibility in many western societies, meaning that only individuals who actually commit a crime should be held liable and punished for that criminal act. Nevertheless, since the mid-19th century, primarily due to technological changes wrought by the Industrial Revolution, there has been a trend towards the creation of regulatory and special *public-welfare* statutes in United States law that eliminates the *mens rea* element for a number of crimes, thus making them *strict* liability offenses whereby only the *actus reus* is required without a need to show *mens rea* to establish guilt. In other words, even accidents can potentially be crimes under certain circumstances. Also, in some instances with these public-welfare offenses, corporate officers (managers) face *vicarious* criminal liability for the actions of their subordinates. That is, corporate officers who have personally done no wrong can be held criminally liable for the criminal acts of their employees. Thus today, corporate officers in some instances are potentially at risk of lengthy incarceration for crimes of which they had no knowledge or intent to commit. This paper will provide an overview of the evolution of this legal movement towards strict, vicarious, criminal liability of corporate officers — the Responsible Corporate Officer Doctrine. It will begin by explaining the purpose as well as the legal and social rationales for the creation of public-welfare statutes. Then a review of the safeguards in place that serve as a shield to preclude abuses of this special legal power is provided. Finally, some comments regarding possible implications of this legal development are made insofar as 21st century business operations in the United States are concerned.

Key words: responsible corporate officer doctrine; public welfare statutes; vicarious liability; criminal liability; strict liability

JEL codes: K0, K4

1. Introduction

The *Responsible Corporate Officer* doctrine as addressed in this paper involves a form of strict, vicarious, criminal liability of corporate officers for a variety of crimes committed by *others* — most commonly employees

Robert T. Albrecht, J.D., Department of American Studies, Keimyung University; research areas/interests: law, politics, government. E-mail: rtalbrecht@gw.kmu.ac.kr.

of a corporation responsible for the offense. *Strict* liability crimes are unlawful acts whose elements do not include the need to show criminal intent, known as *mens rea* (a "guilty mind" or a guilty or unlawful intent). Most typically, such crimes are those that might endanger public welfare. Food and drugs laws and many environmental laws are frequently construed as public welfare statutes by courts if they were written vaguely enough that they do not specify a requirement for *specific intent*, which in American criminal law means an intent to perform an act that is prohibited by law. This is in contrast to *actus rea* (the "guilty act") which is simply committing the act. To summarize, some crimes consist of elements that include the showing proof of both an *actus reas* and a *mens rea* whereas other crimes consist of elements requiring only the showing of an *actus reas* without a need to show proof of guilty intent (*mens rea*). These latter crimes are considered *strict liability* crimes.

This paper examines two of the legal theories that were used in the later part of the 20th century to enforce what are known as public welfare offenses. It reviews the public welfare doctrine and examines whether that theory of criminal justice imposes strict criminal liability. It also addresses whether the responsible corporate officer (RCO) doctrine, when applied to a public welfare offense imposes strict vicarious criminal liability.

Individuals who stand in a responsible relationship with unlawful corporate acts may be held criminally liable for these acts. Culpability typically arises in public welfare statutes which impose strict criminal liability or require some form of form of guilty knowledge. When a statute imposes strict liability, courts punish corporate conduct absent *scienter* or *mens rea*.[1] Statutes impose vicarious liability because the risk of injury to the public has superior importance to and is unrelated to the violator's intent (Zipperman, 1991).

Typically, "blameworthiness...[is] relevant to criminal stigma and punishment" (Singer, 1989). The knowledge requirement that established criminal liability was articulated by the Latin "*actus not facit reum nisi mens sit rea"* (an act does not make one guilty unless his mind is guilty) (Weidel, Mayo, & Zachara, 1990). That is the essence of *mens rea*. To understand the reasoning which justifies the elimination of the knowledge requirement (either *mens rea* or *scienter*) in some environmental criminal statutes, it was necessary to analyze the Supreme Court's decisions regarding the legal doctrines which either lessened or eliminated knowledge as a required element of a crime.

2. The Public Welfare Doctrine

The development of *public welfare offenses* in the United States began prior to the mid-nineteenth century (Sayre, 1933). Public welfare offenses were originally those laws created by Congress that did not explicitly contain the element of intent. "If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent." *United States v. Behrman* (1922). Also, they were typically regulatory in nature. "Many instances of this [speaking of public welfare statutes] are to be found in regulatory measures in the exercise of what is called police power where the emphasis...is...upon achievement of some social betterment rather than the punishment of...crimes..." *United States v. Balint* (1922). Although the doctrine developed in parallel with a similar doctrinal evolution in England, the two movements occurred independently. The first application of the concept in America occurred in Massachusetts in 1816 and from that state, it spread to other state jurisdictions and the federal courts (Sayre, 1933).

That the same doctrine developed simultaneously in England and the United States suggests that "the

[1] *Scienter* and *mens rea* are two different forms of "guilty intent" representing differences that are not relevant to the subject of this paper.

movement has been not merely an historical accident but the result of the changing social conditions and beliefs of the day" (Sayre, 1933). This development was characterized as the result of the convergence of two factors. First, the departure from an early nineteenth century emphasized on the protection of individual rights and interests to the protection of public and social interests. Second, an increasing reliance upon the criminal justice system to enforce not only classic common law criminal laws, but also many statutes that represent a type of twentieth century regulatory scheme that did not involve "evil intent" (Sayre, 1933).

Until the early twentieth century, punishments for violation of public welfare laws were very light and primarily consisted of fines for first time offenders. The balancing of public welfare needs against the possible harm to the individual was heavily weighted in favor of society. Use of the doctrine in certain regulatory activities was considered acceptable (Sayre, 1933).

Commentator Kepton Carmichael (1995), in addition to construing the development of public welfare doctrine within the context of changing social conditions and beliefs as articulated by Sayre six decades prior, also noted a "parallel trend in civil common law...during the same period" and "the emergence of strict liability [in civil common law] for certain abnormally dangerous activities".

Sayre (1933) states that a public welfare statute *should* be a law that *does not* impose harsh penalties on persons convicted of violating its provisions. His opinion, however, had not been embraced by the courts in either earlier or later years. In *Shevlin-Carpenter* (1910) the Court stated, "[T]he legislation was in effect an exercise of the police power...public policy may require that in the prohibition or *punishment* of particular acts it may be provided that he who shall do them shall do them at his peril, and will not be heard to plead in defense good faith or ignorance (emphasis added)." The court added, "It was recognized that such legislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh." In *United States v. Balint* (1922), the Court addressed the public welfare aspects of the Anti-Narcotic Act and explained the justification for the public welfare doctrine as a "modification of this view [requiring *scienter*] in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement." In *United States v. Dotterweich* (1943), the Court relied heavily on *Balint* for an explanation of a public welfare offense, although appearing to place greater emphasis on the public danger of the threat sought to be regulated by the public welfare law. In *Morissette v. United States* (1952), however, the Court in dicta stated that "[P]enalties *commonly* are relatively small, and conviction does not [sic] grave damage to an offender's reputation" (*Morissette v. United States*, 1952).

The Court has never specified the outer boundaries of acceptable punishment for a public welfare offense. Although some argue that the doctrine should be restricted to only offenses for which punishment is in the form of fines without lengthy imprisonment, the doctrine articulated by the Supreme Court does not bar severe punishments to include lengthy incarceration.

2.1 Evolution of Public Welfare Doctrine in the Courts

In 1922, the Supreme Court examined the issue of *mens rea* and *scienter* in two cases involving a criminal statute created by Congress that did not mention knowledge as an element of the offense. In *United States v. Balint* (1922), the question before the court was whether the statute required the defendant know that he must use certain forms to dispense narcotic drugs. The Anti-Narcotic Act (1914) did not articulate a knowledge requirement. It merely prohibited the undocumented sale of narcotics. The Court concluded: While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it...there has

been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making is so, is an absence of due process of law. But that objection is considered and overruled...(in) that in the prohibition or punishment of particular acts, the state may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power 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* (*United States v. Balint*, 1922).

The Court addressed a different *scienter* element of the Anti-Narcotics Act in the same term as the decision in *Balint*. In *United States v. Behrman* (1922), the issue was whether there was evidence to establish that the prescribed amounts represented sufficient knowledge that Behrman knew that he was acting outside of the exception to the Act which permitted him as a physician to dispense prescriptions for narcotics.

The Court concluded that "(i)f the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment *need not charge* such knowledge or intent" (emphasis added) (*United States v. Behrman*, 1922). The Court reasoned that the defendant's acts represented an actual offense within the meaning of the act. In these two decisions, the Court indicated that absent an expression by Congress that intent is *required* in a statutorily defined offense, those statutes not containing such an expression of intent would be construed to mean that Congress purposefully decided to permit the courts to establish the requirement.[2]

The court subsequently relied on *Balint* to explain the type of legislation that relieves the government of the requirement to establish proof of an awareness of criminal wrongdoing. In *United States v. Dotterweich*[3] (1943), the Court, speaking of the type of legislation that eliminated the *mens rea* element of criminal conduct stated:

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 legislation dispenses with the conventional requirement for 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 responsible relation to a public danger (*United States v. Dotterweich*, 1943).

The Court referred to public welfare statutes as a well accepted concept that should rarely, if ever cause surprise or controversy. However, the concept was less than perfectly established and two decades after the decisions in *Balint* and *Behrman*, the Court took the opportunity to refine their position.

2.2 Reconsidering *Balint* and *Behrman* in *Morissette v. United States*

The Supreme Count distinguished the nature of the *Balint* and *Behrman* offenses from those in *Morissette v. United States* (1952), calling the former category "crimes...[needing] no mental element but consist[ing] only of forbidden acts or omissions." Overviewing the effects of the Industrial Revolution on our social system, demographics, and the wide distribution of goods which also is conducive to the wide distribution of harm, the Court stated that the dangers inherent in such an impersonal system are real and that "[s]uch dangers have

[2] When the courts encounter such statutes, they are to look to the legislative history and the purpose of the statute to determine the *scienter* requirement, if any, of the law. *See* United States v. Dotterweich, 1943. ("In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted.")

[3] The most significant aspect of *Dotterweich* was an application of the "responsible corporate officer doctrine" to find Dotterweich criminally liable for a violation of the statute (*United States v. Dotterweich*, 1943). Coupled with the *Park* decision more than 40 years later, Dotterweich served as the beginning case from which to begin an examination of this doctrine.

engendered 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 (emphasis added)." After providing an overview of common law principles supporting the necessity of intent for a criminal act, the opinion also noted a "few exceptions" where intent was *not* required, to include "the whole range of crimes arising from *omission of duty* (emphasis added)." Reaffirming the appropriateness of the decisions in *Balint* and *Behrman* the Court concluded that considering the nature of the charge against Morissette, common law reasoning — requiring "knowledge" as an essential element of the crime was necessary. *Morissetti* clarified the precedent established in *Balint* and *Behrman* by distinguishing the two latter decisions as of a class of cases involving public welfare offenses. Therefore, they could not be used as authority for "eliminating intent from offenses incorporated from the common law" (*Morissette v. United States*, 1952).

The narrowing of *Balint* and *Behrman* continued in *Lambert v. California* (1958). The Court ascertained that "(n)o element of willfulness is by terms included in the ordinance nor read into it by the California court as a condition necessary for a conviction." The decision also distinguished this registration ordinance from the types of statutes such as were dealt with in *Balint* stating, "(W)e deal here with conduct that is wholly passive — mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." (*Lambert v. California*, 1958).

In *United States v. Freed* (1971), the Court again addressed the issue of absence of *scienter*. The Court articulated where along the spectrum of previous decisions by the Court on the question of *scienter* issue that this statute — one of the regulatory exceptions — should be positioned. At one end of the spectrum are crimes that require a "vicious will." At the other extreme, are ordinances and codes as found in *Lambert* which go too far in that they not only require no intent, but also do not provide the affected party with diligent notice of a legal requirement (*United States v. Freed,* 1971).

The opinion placed regulatory measures created to serve and enhance public safely between the two extremes. Finding a public welfare interest in the National Firearms Act requirements regarding the regulation and possession of hand grenades and that the Act was in the same class of public concerns as the regulation of dangerous and addictive narcotics found in *Balint*, the Court concluded that the absence of a *scienter* requirement in the National Firearms Act which prohibited the possession of unregistered hand grenades was not a fatal defect (*United States v. Freed*, 1971).

The court articulated that activities determined to be "highly dangerous" or "intuitively risky" may be regulated by statutes lacking a requirement for *scienter.* The Court clarified its holding as follows: We need not decide whether a criminal conspiracy to do an act 'innocent in itself' and not known by the alleged conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy. An agreement to acquire hand grenades is hardly an agreement innocent in itself. Therefore what we have said of the substantive offense satisfies on these special facts the requirements for a conspiracy (*United States v. Freed*, 1971).

The decision in *Freed* affirms the existence of exceptions to the *mens rea* element for criminal statutes that have a regulatory purpose of protecting public health, safety and welfare. However, as *Lambert* illustrates, the exception does not apply to all regulatory statutes.

The Court reaffirmed *Balint* and *Freed* in *United States v. International Minerals & Chemical Corp* (1971).[4] In *International Metals*, the lower court, relying on *Boyce Motor Lines, Inc. v. United States* (1952), ruled that the information against the defendant failed to charge a knowing violation (*United States v. International Minerals & Chemical Corp*, 1971). In reversing the decision of the lower court, the Supreme Court distinguished *Boyce* from *International Minerals*, claiming the former case turned on whether the standard of guilt was overly vague (*Boyce Motor Lines, Inc. v. United States*, 1952). In the latter case however, the issue concerned a different aspect of knowledge. Specifically, whether or not knowledge of the *existence* of a regulation and its requirements is necessary in order to establish a violation of the law. The court found its reasoning in *Freed* analogous and on point: (W)here, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation (*United States v. International Minerals & Chemical Corp*, 1971).

International Minerals therefore, signaled yet again that regulated entities using dangerous materials or substances would be held strictly accountable for knowledge of any regulations that affect their activities.

The United States Supreme Court continued to address issues related to the *mens rea* requirement for public welfare statutes and further clarified the type of legislation that constitutes a public welfare law. In *Liparota v. United States* (1985), the court established that a federal statute governing food stamp fraud was not a public welfare statute as defined by the court in *Morissette* as an offense "'to 'depend on no mental element but consist only of forbidden acts or omissions.'" The court stated that regarding public welfare offenses, "Congress has rendered criminal a type of conduct that a *reasonable person* should know is subject to stringent public regulation and may seriously threaten the community's health or safety (emphasis added) (*Liparota v. United States*, 1985)."

Accordingly, the Court held that the government must prove that the defendant knew that his possession of the food stamps was illegal. The Court stated that the food stamp statutes require proof of *mens rea*, whereas public welfare statutes are an exception and thus do not require such proof (*Liparota v. United States*, 1985).

To summarize the case law at this point, the characteristics of a public welfare statute were as follows. It was regulatory and not derived from common law. Not all regulatory statutes satisfied the public welfare criteria. Only those regulations that controlled dangerous or risky activities could pass the public welfare doctrine test. This requirement was necessary to meet diligent notice requirements to preclude due process violations. The regulated activities had to be of a nature that a reasonable person would intuitively expect regulation and control. Although normally the statute did not contain an articulated knowledge requirement, leaving it to the courts to determine whether such a requirement was necessary, some environmental statutes that contained knowledge provisions

[4] This is one of the earliest decisions by the court addressing the concept of "strict criminal liability" for an environmental statute other than the Refuse Act. *International Minerals* and its progeny establishes a *mens rea* requirement that is somehow "relaxed compared to other offenses." United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971). (*See* Gerger, 1997). The defendant corporation in *International Minerals*, had been charged with a violation of Interstate Commerce Commission regulations with respect to the shipment of dangerous liquid acids in interstate commerce without proper labeling. The defendant shipped dangerous substances without proper labeling in violation of 18 U.S.C. § 834(f) which states "whoever 'knowingly violates any such regulation'" would be fined or imprisoned. *Id.* at 559. The regulations were created by the Interstate Commerce Commission and required shippers of hazardous material to "describe that article on the shipping paper by the shipping name..." A counterargument articulated by the dissent was that a "person could not knowingly violate a regulation unless he knows of the terms of the regulation and knows that what he is doing is contrary to the regulation." The majority, however, relying on what it conceded was a "meager legislative history" of the statute concluded that Congress did not require knowledge of both the facts (general intent) as well as knowledge of the regulation (specific intent) prior to coming subject of the requirements of that particular law (*United States v. International Minerals & Chemical Corp*, 1971).

were still considered public welfare regulations.

Although initially the doctrine applied only to misdemeanor offenses, the Court had applied the doctrine to statutes with harsh as well as light penalties.

In application the only strict liability aspect of a public welfare statute was the absence of a requirement that a person have knowledge of a regulation. General intent regarding the act itself *was* required. Perhaps the most effective way to comprehend public welfare doctrine at that time was to consider that it established a standard of criminal negligence for those regulatory laws created without an articulated knowledge element in the offense.

3. The Responsible Corporate Officer Doctrine

The Supreme Court explicitly identified the Federal Food, Drug, and Cosmetic Act of 1984 (FDCA) as a public welfare statute. Two Supreme Court decisions concerning violations of the FDCA articulated the responsible corporate officer doctrine. By virtue of this doctrine, an officer of an organization was criminally liable for activities that resulted in a violation of a statute if she had responsibility in the organization for that portion of the operation where the violation occurred (Carr, 1995). One reason for the doctrine's development was to ensure that high level corporate officers were held criminally liable for choosing to ignore violations of the law by their subordinates (Vanderver, 1994). Its use, however, was restricted to only certain situations. In *Dotterweich*, for example, both the organization and Dotterweich, its president and general manager were charged with violations of the FDCA, which charged any person found violating the act with a misdemeanor offense. Of particular importance to the Court in its deliberations was the legislative history of the Act and Congressional intent when creating and subsequently modifying it (*United States v. Dotterweich*, 1943).

The Court in *Dotterweich* developed a doctrine that when applied to a public welfare offense implicitedly created strict vicarious criminal liability for violation of certain federal statutes (United States v. Dotterweich, 1943). *Shevlin-Carpenter* established that it is not a violation of due process to find an actor criminally liable for violation of a public welfare offense, "irrespective of the actor's intent" (*Shevlin-Carpenter Co. v. Minnesota*, 1910). Hence, an individual could be held strictly liable for violation of such a statute. *Dotterweich* coupled the constitutionally sound public welfare doctrine of strict criminal liability found in *Shevlin-Carpenter* with vicarious criminal liability based upon a corporate actor's "responsible relation" to a public danger (*United States v. Dotterweich*, 1943).

In *United States v. Park* (1975)[5], the Court clarified the meaning of the "reasonable relationship" articulated in *Dotterweich* that was required to establish a corporate official's criminal liability. While clarifying the ambiguity inherent in "responsible relationship" the Court avoided direct references to "public welfare offenses". All *Dotterweich* citations were limited to references in support of the standard of liability established in that decision but the Court's analysis of the FDCA weakened the *strict* criminal liability aspects of that portion of *Dotterweich* that addressed *scienter* by phrasing the fault of the guilty corporate officer in terms of criminal negligence. In discussing the responsible corporate officer doctrine, the Court explained that:

Moreover, the principles had been recognized that a corporate agent, though whose *act, default, or omission* the corporation committed a crime, was himself guilty of that crime. The principle had been applied whether or not the crime required "consciousness of wrongdoing" and it had been applied not only to those corporate agents

[5] As a result of the *Park* decision, many legal commentators referred to the Responsible Corporate Officer doctrine as the "*Park* Doctrine". The term "responsible corporate officer doctrine" is used throughout this paper in lieu "*Park* doctrine" for clarity.

who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission (emphasis added) (*United States v. Park*, 1975).[6]

Such a description by the Court did not fit the definition of strict liability. It was however, synonymous with *negligence* as the following indicated. "(T)he 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 will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those 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 (*United States v. Park*, 1975)".

The dissenters in *Park* interpreted *Dotterweich* in terms that accurately reflected how in practice the RCO doctrine had been applied. The Dotterweich case stands for two propositions...First, "any person" within the meaning of (the FDCA)...may include any corporate officer or employee "standing in responsible relation" to a condition or transaction forbidden by the Act...Second, a person may be convicted of a criminal offense under the Act even in the absence of "the conventional requirement for criminal conduct — awareness of some wrongdoing."...

But before a person can be convicted of a criminal violation of this Act, a jury must find — and must be cleared instructed that it must find — evidence beyond a reasonable doubt that he engaged in wrongful conduct amounting at least to common-law *negligence* (*United States v. Park*, 1975).

In summary, *Dotterweich* and *Park* represented the body of law encompassing the responsible corporate officer doctrine. They appeared to establish strict vicarious criminal liability by combining the responsible corporate officer doctrine with a public welfare statute. The doctrine's effect however, was to impose an implicit standard of criminal negligence on corporate officers for their mismanagement of highly dangerous activities that posed a significant threat to the public. Although the responsible corporate doctrine permitted the courts to find a corporate official criminally liable for the unknown act of a third person and therefore created vicarious liability, it was the criminal *negligence* of the corporate official that permitted the violation to occur.

4. The Effect: A Chill in Corporate Culture?

After more than a century of development, public welfare statutes and the RCO doctrine are now solidly established in American law. However, by the latter part of the 20th century, particularly after the late 1980's, a considerable body of legal commentary existed that was critical of these developments. Perhaps for that reason or due to other factors, the expansive growth in public welfare offenses and the application of RCO doctrine to prosecutions at the federal level seemed to plateau for several decades. In fact, for nearly two decades, the federal government declined to use the RCO doctrine to pursue prosecutions of individuals. However, beginning in 2009 and continuing, federal authorities announced a return to use of the RCO doctrine for prosecutions in a variety of ways — some old and some new. For example, in 2009, Assistant Attorney General Tony West in public comments stated that the Department of Justice would move beyond seeking punishment for corporate actors (the

[6] Whereas strict liability holds an actor liable *regardless* of the degree of care exercised, the Court's explanation concerning an *act, default, or omission* comports more closely with a description of negligence, which is the inadvertent or unintentional failure to exercise that care which a *reasonable,* prudent, and *careful* person would exercise and which violates certain legal standards of due care.

corporations themselves) and seek to pursue criminal cases against individuals responsible for illegal conduct (West, 2009). This shift was buttressed by the comments of Gerald Sullivan, of the U.S. Attorney's Office for the Eastern District of Pennsylvania, who stated, "(H)olding individuals accountable, either through direct proof of their knowledge of noncompliant practices or through strict liability under the responsible corporate officer doctrine, is currently a trend in government civil and criminal investigations." (Sullivan, 2009). In a March 13, 2010 letter to Senator Charles Grassley, the Commissioner of Food and Drugs commented on the intention to increase the use of the Responsible Corporate Officer doctrine to seek the prosecution of individuals — not just corporate entities (Hamburg, 2010). Then on January 26, 2011, the United States Food and Drug Administration issued updated guidelines articulating the factors that it would consider in recommending prosecutions under the Responsible Corporate Officer doctrine (FDA, 2011). This evolving threat to corporate officers was made explicitedly clear later that year when in a report by *The Philadelphia Inquirer*, Food and Drug Administration litigation chief Eric Blumberg was quoted stating, in the context of referring to corporate officers, "They need to take this seriously... In my view, one thing that will get executives' attention is a few cases in which we have convicted two-legged defendants" (Blumberg, 2011). In the same statement, Mr. Blumberg also commented that his agency was looking for ways to "change the corporate culture" of organizations.

This resurgence of the RCO doctrine in federal criminal law produced a number of immediate effects. For example, since at least 2012, corporations can now purchase "responsible corporate officer defense insurance" should any of their personnel be targeted for criminal prosecution by government attorneys (Boozang, 2012). Many corporate attorneys, particularly in the food, drug, and healthcare industries have significantly increased their oversight of the operational side of some businesses to detect problems and correct compliance problems before they involve federal officials. Some of the effects are arguably positive whereas other effects of these changes can be possibly negative. These relatively recent developments have yet been totally evaluated over the long term.

5. Conclusions: What Have We Wrought?

The development of public welfare offenses and the responsible corporate officer doctrine, like nearly all humans endeavors of any type, have produced both positive and negative effects for society in general. Viewed from the timeframe of the second decade of the 21st century, it can be argued that consumers can more reasonably expect relatively safer products in the stream of commerce. That is an obvious plus for society in general. For insurers, as discussed above, there are now new opportunities to offer innovative products to corporate customers in the form of various types of "responsible corporate officer defense insurance". However, no meaningful cost-benefit analysis has yet been done that examines whether the benefits of this approach-including the "cost" of eliminating the *mens rea* element from an increasing number of federal crimes-outweigh the perceived unfairness of holding one person liable for the sometimes unknown criminal acts of another.

In addition, it can be assumed that management techniques will be influenced by these developments. Corporate officers can be expected to become more "hands on" regarding the decisions and activities of their subordinates. Whereas in some cases such increased supervision is appropriate and effective, in other cases, the perceived "micro-managing" from the upper echelons of a business can demoralize and discourage the kind of initiative that is critically important for competing in the 21st century marketplace.

In addition, and it is too early to objectively evaluate whether this is a valid concern or not, it is conceivable

that such elementary business decisions such as whether to conduct operations within the United States or whether to locate to an offshore location could be influenced by such factors as personal risk (as a corporate officer) and attempts to elude efforts by government officials to "reshape corporate culture".

Finally, and there are some indications that this is indeed already happening, there can be expected to be an increased complexity in conducting business in certain U.S. industries insofar as exposure to the RCO doctrine and personal criminal liability is concerned. In that event, corporate lawyers can be expected to become much more involved in the day-to-day operational decision making of other corporate officers. This means more coordination, more meetings, more persons involved in decision making and oversight, and less flexibility and agility in dealing with changes in the marketplace.

Ultimately, a person's perception of the pros and cons of this issue is probably in large part going to be influenced by their position in the marketplace. Consumers can be expected to applaud any effort by the government to increase product safety - although they may fail to consider how those efforts might increase the cost of the products they consume. On the other hand, a majority of corporate officers who may consider themselves in positions whereby they could become subject to the RCO doctrine would likely see these developments as just another factor in their increasingly complicated corporate lives.

References

Anti-Narcotic Act Dec. 17, 1914 (Comp.St. §§6287g-6287q.).

Blumberg E. (2016). "Interview comments", last accessed 22 January 2016, available online at: http://articles.philly.com/2010-10-31/business/24952706_1_fines-rodent-drug-companies.

Boozang K. (2016). "A new insurance product: Responsible corporate officer defense insurance", last accessed 22 January 2016, available online at: http://www.healthreformwatch.com/2012/03/08/a-new-insurance-product-responsible-corporate-officer-defense-insurance.

Boyce Motor Lines, Inc. v. United States 342 U.S. 337 (1952).

Carmichael K. D. (1995). "Strict criminal liability for environmental violations: A need for judicial restraint", *Ind. L. J.*, Vol. 71, p. 729.

Carr D. (1995). *Environmental Criminal Liability: Avoiding and Defending Enforcement Actions*, Bna Books.

Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1984 & Supp. 1991).

Gerger D. (1997). "Fifth circuit rejects strict criminal liability for pollution", *JUN Hous. Law*, Vol. 34, p. 32.

Hamburg M. (2015). "Letter from Margaret Hamburg, Commissioner of Food and Drugs, to Sen. Charles E. Grassley, Ranking Member, Senate Committee on Finance (Mar. 4, 2010)", accessed 13 March 2015, available online at: http://finance.senate.gov/press/Gpress/2010/ prg030410b.pdf.

Hartman B. M. and De Monaco C. A. (1993). *The Present Use of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of Environmental Laws*, 23 Envtl. L. Rep. 10145, Mar. 1993.

Lambert v. California, 355 U.S. 225 (1958).

Liparota V. United States, 471 U.S. 419 (1985).

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

Sayre F. B. (1933). "Public welfare offenses", *Columbia Law Review*, pp. 55-88.

Shevlin-Carpenter Company v. Minnesota, 218 U.S. 57, 70 (1910).

Singer R. G. (1989). "The resurgence of Mens Rea III — The rise and fall of strict criminal liability", *Boston College Law Review*, Vol. 30, pp. 337-338.

Singer R. (1994). "Strict criminal liability: Alabama State Courts lead the way into the twenty-first century", *Ala. L. Rev.*, Vol. 47, No. 46, p. 80.

Sullivan G. (2009). "Government attorneys discuss conduct that gives rise to fraud investigations", Health Care Daily Rep. (BNA) (Nov. 12, 2009), Comments attributed to Gerald Sullivan, of the U.S. Attorney's Office for the Eastern District of Pennsylvania.

United States v. Balint, 258 U.S. 250 (1922).

United States v. Behrman, 258 U.S. 280 (1922).

United States v. Dotterweich, 320 U.S. 277 (1943).

United States v. Freed, 401 U.S. 601 (1971).

United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971).

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

United States Government, Food and Drug Administration (2016). "6-5-2-referral of criminal matters to the Office of Criminal Investigations", last accessed on 22 January 2016, available online at: http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176738.htm#SUB6-5-2.

Vanderver T. A. Jr. (1994). *Environmental Law Handbook*, Bureau of National Affairs.

Weidel R. A., Mayo J. R. and Zachara F. M. (1990). "Erosion of mens REA in environmental criminal prosecutions", *Seton Hall L. Rev.*, Vol. 21, p. 1100.

West T. (2009). "DOJ officials outline enforcement, prevention initiatives to tackle fraud", Health Care Daily Rep. (BNA), Nov. 16, 2009, Comments attributed to Tony West, head of Civil Division, DOJ.

West T. (2016). "Transcript, Assistant Attorney General Tony West Speaks", in: *The 12th Annual Pharmaceutical Regulatory and Compliance Congress*, Washington, DC, Wednesday, November 2, 2011, accessed 22 January 2016, available online at: http://www.justice.gov/opa/speech/assistant-attorney-general-tony-west-speaks-12th-annual-pharmaceutical-regulatory-and.

Zipperman S. (1991). "Park doctrine — Application of strict criminal liability to corporate individuals for violation of environmental crimes", *The UCLA J. Envtl. L. & Pol'y*, Vol. 10, p. 123.