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"Sauce for the Goose Is Sauce for the Gander": Treating Private Parties and Government Officials Alike Under the Criminal Law

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Abstract

In their readiness to interpret federal statutes broadly, the federal bench has created expansive rules of direct and vicarious criminal liability. In doing so, however, the courts have not stopped to ask the question, "Should the same rules apply to government officials when they engage in misconduct?" The courts' failure to ask that question may account for some of the unduly broad liability rules that now exist. Courts should refuse to adopt novel readings of criminal statutes that expand criminal liability in order to reach conduct that they find immoral or unethical and that they fear otherwise will go unpunished, whether the defendant is a government official or a private party. After all, sauce for the goose should be sauce for the gander.

While Congress is principally responsible for overcriminalization,[1] the federal courts deserve their share of the blame.[2] In their readiness to interpret federal statutes broadly, the federal bench has created expansive rules of direct and vicarious criminal liability.[3] In that process, however, the courts have not stopped to ask the question, "Should the same rules apply to government officials when they engage in misconduct?" The failure of the courts to ask that question may account for some of the expansive liability rules that now exist.

Corporations were artificial entities under the common law[4] and could not be charged with a crime, although corporate directors, officers, and employees could be.[5] Initially, those individuals could be held liable only for their own conduct. Since then, however, the

Key Points

- Always eager to interpret federal statutes broadly, the federal bench has created expansive rules of direct and vicarious criminal liability.
- In doing so, however, the courts have not stopped to ask the question, "Should the same rules apply to government officials when they engage in misconduct?"
- The court's failure to ask that question may account for some of the unduly broad liability rules that now exist.
- Courts should refuse to adopt novel readings of criminal statutes that expand criminal liability in order to reach conduct that they find immoral or unethical and fear otherwise will go unpunished, whether the defendant is a government official or a private party. After all, sauce for the goose should be sauce for the gander.

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Justice Department has persuaded courts to expand that rule in at least two significant ways.

First, the government has successfully argued that corporate officers and managers should be held liable not only for their own wrongdoing, but also for the misdeeds of personnel they supervise or others below them in the organizational chart—even if those officers and managers had no hand in the illegal conduct. In the food and drug area, for instance, a senior corporate officer can be held criminally responsible for violations of the Federal Food, Drug, and Cosmetic Act committed by line personnel working at one of the company's facilities.[6] As a result, the criminal liability of some corporations and senior corporate officials can effectively parallel their tort liability.

Second, the government has persuaded courts to adopt the "collective knowledge" doctrine, "under which a corporation's knowledge is deemed to be the sum of everything that its employees know when they act within the scope of their responsibilities, even if no one person knew all the necessary facts."[7]

A Pattern of Unequal Treatment

Curiously, the courts never stopped to ask whether the same rules should apply to the government and its officers. If a corporation can be held liable for the wrongdoing of its employees as long as they are not engaging in conduct that is a clear departure from anything that could be considered job-related, why not a government department or agency?[8] If a company president can be held liable for the misdeeds of the firm's personnel, should not the Attorney General or the FBI Director be held to the same standard?

It is no answer to argue that these government officials could not carry out the duties of their offices if they were forced to manage the day-to-day work of every Justice Department lawyer and FBI agent. Indeed, the same is true of the president of a

1. Paul J. Larkin ,Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 724–25 (2013).
2. As Professor Stephen Smith has explained, the courts have been willing participants in the expansion of criminal law, particularly federal criminal law. *See* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537 (2012).
3. Consider in that regard the morphing of the federal mail fraud statute from a law designed to redress use of the mail to defraud private parties into a mechanism for imposing federal ethical standards on private parties as well as state and local government officials. *See* Skilling v. United States, 130 S. Ct. 2896, 2926–33 (2010); *id.* at 2935–38 (Scalia, J., dissenting).
4. *See*, *e.g.*, Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").
5. *See*, *e.g.*, Anonymous Case (No. 935), 88 Eng. Rep. 1518, 1518 (K.B. 1701) ("A corporation is not indictable, but the particular members of it are."); State v. Great Works Milling & Mfg. Corp., 20 Me. 41, 44 (1841) ("It is a doctrine then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation should be indicted."). In 1909, however, the law changed dramatically when the Supreme Court ruled that a corporation be held vicariously liable under the criminal law for its employee's misconduct. *See* New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909). For an excellent discussion of the legal and policy issues raised by the prosecution of corporations, see James R. Copland, Regulation by Prosecution: The Problems with Treating Corporations as Criminals, Manhattan Institute for Policy research No. 13 (Dec. 2010), *available at* http://www.manhattan-institute.org/html/cjr_13.htm (last visited July 10, 2013).
6. *See*, *e.g.*, Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified, as amended, at 21 U.S.C. § 301 et seq. (2012)); United States v. Park, 421 U.S. 658 (1975) (company president can be held liable for presence of rodent droppings at a company warehouse); Richard A. Samp & Corey L. Andrews, *Restraining* Park *Doctrine Prosecutions Against Corporate Officials Under the FDCA*, 13 Engage 19 (Oct. 2012)
7. Larkin, *supra* note 1, at 787–88 (footnote omitted); *see*, *e.g.*, United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987); Kathleen B. Brickey, Environmental Crime 25 (2008).
8. It might be impossible as a practical matter for the Justice Department to prosecute a sitting Attorney General in the absence of public outrage, but there is no criminal law principle barring such a prosecution. If the United States as sovereign can prosecute the President, *see* United States v. Nixon, 418 U.S. 683, 692–97 (1974), it can prosecute the Attorney General. In fact, it once prosecuted a former Attorney General. *See* Lawrence Meyer, *John N. Mitchell, Principal in Watergate, Dies at 75*, Wash. Post, Nov. 10, 1988, *available at* http://www.washingtonpost.com/wp-srv/national/longterm/watergate/stories/mitchobit.htm (last visited July 10, 2013). Vicarious liability is just one route to that goal.

large corporation. Even if proximate cause principles would render the Attorney General or the FBI Director too remote from an actual violation to be held responsible,[9] what about the U.S. Attorney for the district involved or the Special Agent in Charge of the local FBI office?[10] They have but one office to manage, not the entire nation. A plant manager does not receive immunity from prosecution for the misdeeds of his employees even though he cannot monitor everything going on in his plant. Why should federal officials in a parallel position be treated differently?

The answer cannot be that there are adequate safeguards in place to ensure that no official wrongdoing can occur. Recent "miscues" put the lie to that claim.[11]

The answer also cannot be that there is something special about being a federal official that renders federal officials immune from criminal liability.[12] The Constitution grants Members of the Senate and House of Representatives a limited immunity from criminal prosecution or civil liability—only for statements made on the floor of each chamber[13]—and grants no other federal official comparable amnesty. To be sure, lower-level government employees are entitled to rely on facially reasonable directions from senior officials without fear of incurring liability, even if it turns out after the fact that what they have been ordered to do is in fact illegal.[14] But that is not a special rule for federal law enforcement officers. Any member of the public may rely on the legal opinion of federal officials that particular conduct is lawful.[15]

The point is not that the courts should be eager to hold senior federal officials vicariously liable for the criminal actions of subordinates; they should

9. *Cf.*, *e.g.*, Connick v. Thompson, 131 S. Ct. 1350 (2011) (district attorney cannot be held civilly liable under the Civil Rights Act of 1871, ch. 31, 17 Stat. 13 (codified, as amended, at 42 U.S.C. § 1983 (2012)), for a prosecutor's failure to disclose exculpatory evidence absent proof that he knew or should have known of the failure and the need for training).

10. *Cf.*, *e.g.*, Groh v. Ramirez, 540 U.S. 551 (2004) (federal agent liable for participating in a search under a clearly invalid search warrant); Burns v. Reed, 500 U.S. 478 (1991) (prosecutor is entitled to absolute immunity for participation in probable cause hearing but not for giving advice to the police); Anderson v. Creighton, 483 U.S. 635 (1987) (law enforcement officer is entitled to qualified immunity only for conduct that reasonably could be deemed lawful).

11. *See*, *e.g.*, Peter Baker & Jonathan Weisman, *White House Says It Didn't Loop Obama in on I.R.S. Inquiry*, N.Y. Times, May 21, 2013, *available at* http://www.nytimes.com/2013/05/21/us/politics/white-house-says-obama-was-kept-out-of-loop-on-irs-inquiry.html?src=twr (last visited July 10, 2013); W.W. Houston, *Obamacare and the IRS: Spanner in the Works?* The Economist, May 16, 2013, *available at* http://www.economist.com/blogs/democracyinamerica/2013/05/obamacare-and-irs (last visited July 10, 2013); Office of The Inspector General, Department of Justice, A Review of ATF's Operation Fast and Furious and Related Matters (Sept. 2012); Henry F. Schuelke III & William Shields, *In re Special Proceedings: A Report to Hon. Emmett G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009* (D.D.C. Nov. 14, 2011); Office of Professional Responsibility, Department of Justice, Report: Investigation of Allegations of Prosecutorial Misconduct in *United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C. 2009) (EGS)* (Aug. 15, 2011).

12. Of course, in some instances, there is. Ambulances may run stop signs en route to a hospital with a patient in critical condition; DEA agents may buy drugs in an undercover operation; police officers may use force that otherwise would constitute battery in order to make an arrest; and so forth. *See*, *e.g.*, Wayne R. LaFave, Criminal Law § 10.7, at 590–600 (5th ed. 2010) (discussing defenses available to law enforcement officers). Status as a federal officer is not, however, a license to break the law. *See*, *e.g.*, United States v. Nixon, 418 U.S. 683, 692–97 (1974); *supra* note 8.

13. *See* Speech or Debate Clause, U.S. Const. art I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place.").

14. The law of entrapment is instructive in this regard. Entrapment allows a defendant to defend against a charge by claiming that he was not predisposed to commit a crime and did so only because of the government's efforts to induce him to break the law. *See*, *e.g.*, *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992). But entrapment may not be available as a defense to every crime. There may be some crimes and some conduct so wicked that a defendant cannot blame the government for persuading him to commit them. *See* Sorrells v. United States, 287 U.S. 432, 451 (1932) (ruling that a defendant generally can raise a defense of entrapment but noting that the defense may not be universally applicable: "We have no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions. No such situation is presented here. The question in each case must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object."). The same principle should apply in cases where a defendant raises the defense of reliance on official authority. A person should not be able to avoid conviction for following a patently unreasonable order from a government official, such as a command to lynch a suspect in custody awaiting trial. *See* United States v. Shipp, 214 U.S. 386, 388 (1909).

15. The Due Process Clause prohibits the government from holding a party criminally responsible for engaging in facially reasonable conduct that a government official has expressly authorized him to perform. *See*, *e.g.*, United States v. Pennsylvania Indus. Chemical Corp., 411 U.S. 655, 670–75 (1973); Cox v. Louisiana, 379 U.S. 559, 568–74 (1965); Raley v. Ohio, 360 U.S. 423, 425–26 (1959).

not. Even if the government were to bring such a prosecution, neither the Attorney General nor the FBI Director should be held criminally liable for the crimes of lawyers and agents that they had no role in committing. The point is that private parties should receive the same treatment.

Conclusion

Courts should refuse to adopt novel readings of criminal statutes that expand criminal liability in order to reach conduct that they find immoral or unethical and that they fear otherwise will go unpunished, whether the defendant is a government official or a private party. If courts looked at the issue from the perspective of government officials' own liability, they might—and should—hesitate before expanding the breadth of federal criminal laws and might—and should—force Congress to legislate with specificity and precision. After all, sauce for the goose should be sauce for the gander.

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