

Prologue: the *President Coolidge*

The steamship "President Coolidge" arrived in the harbor of Honolulu August 26, 1937, and tied up at pier 8. At about the hour of 10 a.m. of that day, one Norman R. Arthur, a harbor patrol boatman under the United States District Engineer, was passing under the stern of the "President Coolidge" in a patrol boat, when a quantity of garbage, consisting of cabbage, orange peel, celery, tea leaves, and water, descended upon him, part thereof falling in the water . . . Immediately following his being drenched with the refuse, Arthur cleared his eyes, then looked and saw a person, apparently Chinese, walking away from the stern rail of the Coolidge, carrying a can or bucket . . . Arthur fastened his small boat to the pier, changed clothes and boarded the "President Coolidge" to make a search for the person responsible. He saw the chief mate and explained what had happened and the officer conducted an investigation, but no further information was secured.

There was testimony on behalf of the claimant that orders had been issued by the Company against throwing of refuse from the ship while in harbor; that signs were placed in conspicuous places written in English and Chinese, warning employees not to throw things overboard; that locks were placed upon the slop chutes to prevent their use while in harbor; that the officers of the ship had no knowledge of violation of the law or their orders in this respect and in this instance. . . .

Having committed his ship to the seas, an owner takes the risk of much which he cannot easily control. Any other construction would change the statute from one of prohibition to that requiring merely due care.

Affirmed.

With these words, on January 23rd, 1939, the Honorable Francis A. Garrecht, a senior ninth circuit court judge, affirmed the District Court of Hawaii's decree, which penalized the corporation that owned the steamship *President Coolidge*, for its employee's misconduct.¹ No questions were raised regarding what genuine efforts the corporation had made to prevent the violation. Nor were any additional arguments presented concerning other precautionary measures the corporation might have taken to prevent the violation. In fact, it was never argued that the corporation could have exercised more control over its employees or could have prevented their misconduct. Notwithstanding, the corporation was held strictly liable for the misconduct of its employee.

In the seven decades since the *President Coolidge* case, corporate

¹ See *Dollar S.S. Co. v. United States* 101 F.2d 638 (9th Cir. 1939).

enforcement policies around the globe have gone through a sea of change. One major factor underlying contemporary policy developments is the recent acknowledgment that in many contexts corporations are able to control their employees more efficiently than public authorities.² It is not surprising, therefore, that current law enforcement measures perceive corporations as potential partners, rather than enemies, in the battle against law-breaking.³ These contemporary perceptions, however, provide no single recipe for the structure of optimal enforcement policies. In some jurisdictions, such as with U.S. Federal law, the traditional, rigid approach, which disregards corporations' compliance efforts in determining corporate liability, has been replaced by a more conciliatory approach. Contemporary Federal laws in the U.S. recognize a given corporation's internal enforcement efforts as a relevant determinant of that corporation's liability.⁴ By contrast, enforcement policies in other jurisdictions, such as in certain areas of EU law, have evolved through an alternative route, replacing the conciliatory approach, which accepted corporate

² See, for instance, Jennifer Arlen and Reinier Kraakman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes," *NYU Law Review* 72(4) (1997), p. 700; Charles J. Walsh and Alissa Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?" *Rutgers Law Review* 47 (1995), p. 678; Vikramaditya S. Khanna and Timothy L. Dickinson, "The Corporate Monitor: The New Corporate Czar," *Michigan Law Review* 105 (2007), pp. 1728–1729; Ben W. Heineman, Jr., "Caught in the Middle," *Corporate Counsel*, April 2007, p. 89; Reinier Kraakman, "Vicarious and Corporate Liability," in *Tort Law and Economics*, Michael Faure ed., 2nd. edn (Cheltenham, U.K. & Northampton, MA, U.S.A.: Edward Elgar, 2009), p. 671; Steven Shavell, *Economic Analysis of Accident Law* (Cambridge, MA: Harvard University Press, 1987), pp. 173–174; Jennifer Arlen, "The Potentially Perverse Effects of Corporate Criminal Liability," *Journal of Legal Studies* 23(2) (1994), 833–867; Kevin B. Huff, "The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach," *Columbia Law Review* 96 (1996), p. 1281; Vikramaditya S. Khanna, "Corporate Liability Standards: When Should Corporations be Held Criminally Liable?" *American Criminal Law Review* 37 (2002), p. 1245.

³ See, for instance, Huff, "The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach," pp. 1263, 1295; Harvey L. Pitt and Karl A. Groskaufmanis, "Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct," *Georgetown Law Journal* 78 (1990), p. 1573; Walsh and Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?," pp. 620–621, 636, 678; Steven Shavell, "The Optimal Level of Corporate Liability Given the Limited Ability of Corporations to Penalize their Employees," *International Review of Law and Economics* 17(2) (1997), 203–213.

⁴ A detailed overview of policy developments in U.S. enforcement policies is provided in Chapter 5.

compliance efforts as a justification for liability mitigation, with a by-the-book approach, which harshly penalizes corporations for employee misconduct regardless of corporate efforts to secure compliance.⁵ Despite their different approaches, all such policies share a similar goal; they seek not only to deter corporations from law-breaking, but also to induce them to ensure, proactively, compliance by those acting on their behalf. Such policies seek, for instance, to encourage corporations to act to prevent employee misconduct by providing employees with clear guidelines, manuals, and ethics codes directing their behavior. Moreover, such policies also encourage corporations to monitor the activity of their employees, to detect misconduct, and to take appropriate actions against detected misconduct, including sanctioning employees and reporting violations to the relevant enforcement authorities.

These different approaches raise a number of questions. How should a regulatory enforcement system be crafted to efficiently induce corporate proactive compliance? Should corporations be held liable for their employee misconduct? How should the role played by corporations in supporting, or combating employee misconduct affect corporate exposure to liability? Should enforcement measures apply, uniformly, in all cases? What if the violation was conducted by an employee against clear corporate policies and direct instructions, as was the case on board the *President Coolidge*? And, may enforcement authorities consider corporations' violation records when imposing corporate liability? These questions lie at the heart of this book.

⁵ A comparative analysis of enforcement policies is provided in Chapter 5, Section 5.8.

