A CRITICAL EVALUATION OF SECTION 332
OF THE CRIMINAL PROCEDURE ACT
51 OF 1977

by

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The general principle in criminal law is that a person is liable when committing a criminal offence. This may include an offence a person has facilitated or procured. Vicarious liability, a principle borrowed from civil law, is an exception to the general rule in that it allows for a person to be held liable for the criminal acts of another.

Legal persons have no physical existence and do not have hands and brains like natural persons. A legal person acts through its directors, employees, members or representatives. The corporation, being distinct and separate from its agents, is held liable for the acts or omissions of its representatives. This liability exists even though the corporate body never acted.

International recognition of corporate criminal liability can be based on vicarious liability, identification or aggregation. All these forms of liability are derived from the human actus and mens rea. The identification theory provides for the liability of the corporate body, when someone who is identified with it, acted during the course of his employment when committing the offence. Those acts are treated as the acts of the corporate body. The identification theory is normally applied where mens rea is a requirement of the offence. The Aggregation theory provides for criminal liability of the corporation based on the conduct of a group of members of the company taken collectively. This theory is applied effectively where it is difficult to prove that a single person within the company is responsible for the commission of the offence.

In South Africa corporate criminal liability developed from vicarious liability. It is regulated by section 332(1) of the Criminal Procedure Act 51 of 1977. This liability is based on the special relationship between the director or servant and the corporate body. Corporations act through its agents. The agent can be a director, servant or a third person instructed by either of them.

In terms of section 332(1) it is possible that the corporate body can be held liable even where the agent acted beyond the scope of his employment. The latter can be argued is an extension of vicarious liability. Vicarious liability, can be argued, is too broad, because the intention of
the agent is imputed to the corporate body, without the enquiry of fault by the corporate body. This offends the general principles of substantive criminal law. Generally, liability in criminal law accrues to someone who committed the offence with the required state of mind. The constitutionality of section 332(1) Act 51 of 1977 is questioned.

The question is asked whether it is desirable to punish a legal person for the behaviour of its representatives or employees. Criminal law purports to control the behaviour of individuals to be in line with the interest and values of society. There is doubt whether the same goal can be achieved with the prosecution of corporate bodies. Prosecution of corporate bodies results in stigma to the corporation, which results in suffering a loss of reputation.

Some authors argue that civil remedies can control the activities of corporate bodies more effectively. This argument, however, fails to address the issue that criminal law concerns the harm inflicted by human beings, hence the need to regulate human conduct. Corporate criminal liability attempts to address the harm inflicted by corporate bodies. It regulates pollution, health, safety and business. This liability is firmly established around the world but requires further development and modern refinement in South Africa.
CHAPTER 1
INTRODUCTION

As a general rule only human beings can commit offences. The exception is that corporate bodies also can be liable for corporate crime, despite absence of unlawful conduct and mens rea.¹

A corporate body is a legal person, with constitutional rights just like natural persons. It is a separate person distinct from its members.²

Corporate criminal liability developed through necessity. Courts are inundated with economic and environmental crime. The majority of those offences result from corporate conduct, because a great deal of economic activity today takes place through corporations.³

This research aims to examine corporate criminal liability in South Africa and will address the question whether or not the provisions of section 332 (1) of Act 51 of 1977 are sufficient for our needs. South African corporate criminal liability is based on agency.

Chapter 2 examines the origin and development of corporate criminal liability. Vicarious liability forms part of the agency model and applies in many legal systems. It is closely associated to South African corporate liability which is based on extended vicarious liability embodied in section 332(1) of Act 51 of 1977. Chapter 2 further discusses the other two derivative models of corporate liability, namely identification and aggregation.

Chapter 3 discusses the historical development of corporate liability of in South Africa.

In Chapter 4 the provisions of section 332(1) of 51 of 1977 are analysed and discussed. Chapter 5 addresses the question whether it is desirable to punish a corporate body. Corporate criminal liability and other liability strategies including civil liability are compared. The dissertation acknowledges that where crime exists there is need for punishment.

Chapter 6 outlines the need for possible review of section 322(1) and for harmonization of laws relating to corporate criminal liability.
CHAPTER 2
THEORIES ON CORPORATE CRIMINAL LIABILITY

2.1 INTRODUCTION

Criminal law, in general, provides for the punishment of unlawful human conduct. Only natural persons can act or form an intention. Criminal liability of a corporate body, e.g. a company or a close corporation is an exception to the general rule. A corporate body is a legal person. A juristic person is an abstract legal entity which lacks physical existence. It acts through its representatives or agents.

A corporate body like a company or close corporation is an association of persons, having a juristic personality, which is separate from that of its members. A corporate body is the bearer of rights and is liable for its own liabilities. The principle of existence separate from its members was confirmed in Salomon v Salomon & Co Ltd, where the court held that Salomon, the shareholder in the company, was not personally liable for debts of the company. The court held that a company exists separately even when controlled by a single person, because it is legally incorporated and complies with the requirements in the Company Act. Where one person is entitled to all the profits he is not acting contrary to the intention of the Companies Act nor against public policy.

The courts have no general discretion to disregard the separate legal existence of a company. Various provisions in the Companies Act 61 of 1973 allow the courts to pierce

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6 Snyman Criminal Law 249, describes the juristic person as an “abstract body of persons, an institution or entity which can also be the bearer of rights and duties, without having a physical or visible body or a mind.
7 Ngcwase v Terblanche NO 1977 3 SA 796 (A) 803-4.
9 Snyman Criminal Law supra.
10 1897 AC 22. Cape Pacific Ltd v Lubner Controlling Investment Pty (Ltd) 1995 4 SA 790 (A).
11 Salomon v Salomon supra para 53.
12 Supra.
14 The ground for winding up in s 344(h) of the Companies Act 61 of 1973. See also s 50(3), s 66, s 172(5)(b), s 280(5), s 424 etc of Act 61 of 1973.
the corporate veil. Similarly section 65 of the Close Corporation Act 69 of 1984 allows the court to strip the corporation of its juristic personality as a separate entity if it abuses it. From this it follows that a corporate body on its own cannot commit an offence intentionally and unlawfully because it has no physical existence separate from its members and only acts through its functionaries.

Corporate criminal liability can simply be described to be the liability of the corporate body for the unlawful criminal acts committed by its directors or employees. The basis for such liability is vicarious liability, personal liability for contravening a statutory duty and personal liability on the basis of attributing to the corporation the actus reus and mens rea of an individual.

The common law allows for a person to be held criminally responsible for an offence if he has “authorized or procured its commission or took part in it”. A corporate body is prosecuted for the acts committed by its functionaries, and is liable for the unlawful act and culpability of the individual servant. In South Africa both the corporate body and its functionaries are prosecuted and punished.

### 2.2 THEORIES OF CORPORATE CRIMINAL LIABILITY

Three main theories of corporate blameworthiness derive from the human actus reus and mens rea, namely:

(i) agency or vicarious liability;
(ii) identification; and
(iii) aggregation.

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15 Domanski “Piercing the Corporate Veil A New Direction” (1986) SALJ 224. LAWSA First Reissue 4 Part I Companies para 41 77.
16 Haygro Catering BK v Van der Merwe 1996 4 SA 1063 (C).
19 Card, Cross & Jones Criminal Law 858.
22 Burchell & Hunt South African Criminal and Procedure Vol. 1 General Principles of Criminal Law 298: They regard this liability as vicarious.
23 Ss 332(1) and 332(5) Act 51 of 1997.
These three theories seek to equate the corporate body’s culpability with that of an individual. They are derivative forms of liability.

221 VICARIOUS LIABILITY

Vicarious liability can be described as the liability for the acts of another. The concept of vicarious liability developed in the English civil law of torts, where it held an employer liable for a delict committed by his employee, if done with the employer’s authority and in the scope of the employee’s employment.

The body corporate, who is guilty in terms of vicarious liability, has neither acted nor formulated the intention for the offence, but another person has done so on its behalf.

The English common law vicarious liability was the law of tort, and not applicable in criminal law. Two exceptions existed, namely common law cases of public nuisance and criminal libel where the employer could be held criminally liable for the acts of his employee. The employer was liable even if he was not aware of the actions of the latter.

Various statutes expressly imposed vicarious liability in criminal law. Vicarious liability imposed by statute could arise in four ways, namely:

(i) Express statutory provisions.

(ii) Implied vicarious liability.

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29 Huggins (1730) 2 Str 883, 93 ER 915. Smith & Hogan Criminal Law 171.
31 Smith & Hogan Criminal Law 172: Simester & Sullivan Criminal law 243-244.
32 E.g. s 163 of the Licensing Act 26 of 1964 provided that “a person shall not, either himself or by his agent” do certain prohibited things. Section 55(1) of the Children and Young Persons Act 12 of 1933 provided for the liability of the parent to pay the fine for the child where he failed to exercise due care and control over the child.
33 Reed & Seago Criminal Law 178: Simester & Sullivan Criminal Law 244; Card, Cross & Jones Criminal Law 852.
34 Simester & Sullivan Criminal Law 244: Reed & Seago Criminal Law supra 178.
The licensee cases provides for liability of the licensee for failure by the licensee or his employee to comply with the conditions of his licence.

The delegation principle. Liability arises from the delegation of powers.

In *Somerset v Hart* the court held that delegation means the employer is liable for the intention of the employee on imputation, where there has been delegation of duties. It is a prerequisite to liability that there must be complete delegation of such powers.

Another example of vicarious criminal liability is found in *National Rivers Authority v Alfred McAlpine Homes East Ltd*, where the company was convicted for contravention of section 85(1) of the Water Resources Act 1991 in that its employees allowed wet cement to pollute the controlled waters. The court held that aim of the section was to keep streams free from pollution for the benefit of plants and mankind. This offence was created to protect the environment by holding the company criminally liable for acts and omissions of its employees performed during the scope of their employment.

**2 2 1 1 LIMITATIONS ON VICARIOUS LIABILITY**

Vicarious liability can be limited in three ways, namely where the offence is not committed in furthering or endeavouring to further the interest of the body corporate; where the employee’s acts amount to aiding and abetting, and where there was an attempt to commit the offence.

Where limitations apply the employer cannot be vicarious liable for the agent’s action, because of imputed knowledge. For example, in *Ferguson v Weaving* a licensee was charged for abetting customers in consuming liquor in his licensed premises after hours. It appeared that all proper steps were taken except for her waiter’s omission to collect liquor

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35 1884 12 QBD 360 362 per Lord Coleridge CJ.
36 *Allen v Whitehead* 1930 1 KB 211 DC.
37 *Vane v Yinnaopoulo* 1965 AC 486.
38 1994 4 All ER 286 QB.
39 *Supra*.
41 *Coppen v Moore* No2 1898 2 QB 306.
42 *Gardner v Akeroyd* 1952 2 QB 743. See Smith & Hogan *Criminal Law* 179.
43 *Ferguson v Weaving* 1951 1 KB 814.
44 *Supra*. 

from customers. The court held she could aid and abet where she knew that customers were committing the offence. The court was not prepared to hold the licensee liable by imputing her waiter’s knowledge to her as the aider or abettor where she was not charged as principal offender.\textsuperscript{45} That would have been tantamount to creation of a new principle in criminal law.

In \textit{Adams v Camfoni}\textsuperscript{46} the licence holder was found not guilty and discharged for supplying liquor outside the permitted hours because the sale was concluded by a messenger boy who had no authority to sell.

An attempt to commit an offence is founded in common law, and there is no vicarious liability for the principal where the agent attempted to commit an offence even if the offence so attempted would create vicarious liability.\textsuperscript{47}

\subsection*{2 2 1 2 JUSTIFICATION FOR VICARIOUS LIABILITY}

Vicarious liability was used by the courts to hold corporations liable for non-compliance with regulations which direct the sale of food, drugs etc.\textsuperscript{48} There is belief that, if this liability is imposed on the employers, they in turn will stop their employees from contravening the relevant statutes.\textsuperscript{49} It is further argued that a strict vicarious liability could be a good deterrent if the corporation is strictly liable for all the crimes committed by its functionaries.\textsuperscript{50}

The proponents of vicarious liability believe that employers who spend money to detect crime committed by employees at their places of work should get lesser fines because they make efforts to prevent crime. Corporate crime should be subject to a fine equal to the social cost of crime, divided by the probability of detection, because this forces the corporation to internalize the social cost of its activity.\textsuperscript{51}

The issue is whether imposing strict vicarious liability provides the body corporate with an incentive to apply measures of deterring the crime. Some commentators argue that pure strict

\begin{itemize}
\item \textsuperscript{45} \textit{Supra.}
\item \textsuperscript{46} 1929 1 KB 95 DC.
\item \textsuperscript{47} \textit{Gardner v Akeroyed supra.}
\item \textsuperscript{48} \textit{Supra.}
\item \textsuperscript{49} \textit{Reynolds v GH Austin & Sons Ltd} 1951 2 KB 135.
\item \textsuperscript{50} Becker “Make the Punishment Fit the Corporate Crime” \textit{Bus Wk} (1989) 22 Col 2.
\item \textsuperscript{51} \textit{Supra.}
\end{itemize}
vicarious liability creates an irreconcilable conflict between two possible goals, namely competent enforcement measures and competent effective production. To be effective in reducing crime, vicarious criminal liability must be able to compel the corporate body to use internal measures to control the social cost of crimes associated with its activities.

Strict vicarious liability can only be effective when the courts are to consider the corporation’s actual enforcement strategies implemented when sentencing them. This will result in those corporate bodies that allocate more resources to detect crime, receiving fewer fines. The latter view is supported as it will encourage companies to allocate resources to detect crimes, which may not be easy to investigate. It is submitted that those companies who have proved to be applying due diligence should either be given lesser fines or be exonerated from blame.

Vicarious liability is the best tool to compel corporations to comply with statutes. Corporations, which are subject to vicarious criminal liability, do not take probability of detection for granted but allocate resources to ensure that there is balance between detection and resultant liability.

2.2.1.3 CRITICISM AGAINST VICARIOUS LIABILITY

According to Read and Seago vicarious liability can be both too broad and too narrow. It is too narrow or under-inclusive because it can only be committed through the unlawful act of a natural person. Where the body corporate is the wrongdoer, the courts are concerned with the fault of a natural person and not the corporate fault even where the latter fault is clear.

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54 Card, Cross & Jones Criminal law 857.
55 Supra. Card, Cross & Jones maintain that this statement has not been proved. They further argue that vicarious liability could be justified if it was limited to negligent employers who fail to control the contravention.
57 Reed & Seago Criminal 185.
58 Mousell Bros Ltd London and North-Western Rly Co 1917 2 KB 836.
On the other hand, it is too broad, because once the individual liability is established, the body corporate is liable whether it has fault or not.\(^60\)

The results of the broad terms of vicarious liability are that the body corporate can be liable even if the employee acted against the clear instructions and policies of the body corporate.\(^61\)

This occurs frequently where liability of the body corporate is extended to all employees.\(^62\) It is submitted that the corporate body should rather be provided with a defence based on due diligence.\(^63\) This means that where the company uses all available reasonable means to avoid crime it should be exonerated because of its diligence.

Vicarious liability treats corporate bodies differently because the fault enquiry is not required for corporate bodies, while it is required for natural persons.\(^64\) In terms of the South African Constitution legal persons have the same rights entrenched in the Bill of Rights as natural persons.\(^65\) It is argued that imposing vicarious liability on corporate bodies is unfair, because it stigmatizes a company when it is charged with a criminal offence.\(^66\) Vicarious liability also damages the reputation of the body corporate and punishes its shareholders.\(^67\)

Although in theory vicarious criminal liability often requires that the agent intended to benefit the corporation, this rule does not effectively limit the scope of vicarious liability in any significant way.\(^68\) E.g. corporations do not commit corporate crime, but their agents commit crimes in order to benefit themselves.\(^69\) The agent may commit a crime that incidentally benefits the corporation, but the benefit to the corporation is not the agent’s primary motivation, but purely incidental. The agent commits crime for his or her personal needs within the scope of his employment. A company can be criminally liable even if it was

\(^{60}\) Colvin “Corporate Personality and Criminal Liability” (1995) 6 Criminal Law Forum 1 at 8, cited by Clarkson & Keating Criminal Law 231.

\(^{61}\) Card, Cross & Jones Criminal Law 857.

\(^{62}\) Reed & Seago Criminal Law 185.

\(^{63}\) Arlen “The Potentially Perverse Effects of Corporate Criminal Law” supra 840.

\(^{64}\) Supra.

\(^{65}\) S 8 of the Constitution Act 108 1996.

\(^{66}\) Supra.

\(^{67}\) Smith & Hogan Criminal Law 186; Simester & Sullivan Criminal Law supra 251.

\(^{68}\) Arlen “The Potentially Perverse Effects of Corporate Criminal Law” supra 838.

defrauded by its controlling officer if the offence was committed within the scope of his office.70

2 2 2 IDENTIFICATION THEORY

The theory of identification is often referred to as the alter ego doctrine.71 This theory is applied in English law and some other jurisdictions.72 This theory recognizes certain senior individuals as being the company itself, and the acts of these individuals are regarded as that of the company.73

In *HL Bolton Co Ltd v PJ Graham and Sons Ltd*74 Lord Denning explained this theory as follows:

“A company may in ways be linked to a human body. It has a brain and nerve centre which controls what it does. It also has hands, which hold the tools and act in accordance with directions from the nerve centre. Some people in the company are mere servants and agents who are nothing more than hands to do work and cannot be said to represent the mind or will of the company. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company, and is treated by law as such.”

From this passage quoted it follows that those who are directing the mind and will of the corporation are the company.75 These people include directors, managers and those who have powers that were delegated to them, having full discretion to act independently of the instruction from the management.76 The application of the identification theory is very similar to vicarious liability.77 The company’s blameworthiness is deduced from the human state of mind and conduct.78 This form of liability has no application in South Africa.

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70 *Moore v Bressler Ltd* 1944 2 All ER 515 DC.
72 USA, Canada, New Zealand etc.
74 1957 1 QB at 159.
75 Smith & Hogan *Criminal Law* 184.
76 Smith & Hogan *Criminal Law* 182.
77 Simester & Sullivan *Criminal Law supra* 255.
78 *Supra.*
2221 CRITICAL EVALUATION OF IDENTIFICATION

The identification doctrine focuses at the top echelon of the body corporate and its application is to a certain degree predictable. The senior officers identify the state of mind of the company. In terms of this test liability is attributed to a person to whom the general management of the corporation has been delegated. He can be a manager to whom directors have delegated full authority to administer affairs of the corporation.

In *Meridian Global Funds Management Asia Ltd v Securities Commission* the question was whether the knowledge of one of the two senior investment managers could be attributed to the corporate body. The court held that the senior investment managers’ act and mind could be attributed to Meridian. The court held that the “directing mind and will” test was not always appropriate, and attribution of knowledge should not be confined to the standard principle of “brains and hands” of a company which was a general term not applicable in all cases. At times the acts and mind of someone lower in the institution could be attributed to the corporation. The manner of interpretation of a rule in each case indicates how it was intended to apply. The court must establish whether an act and knowledge were intended to be that of the company. The court arrives at its conclusion by using the rules of interpretation taking into account the language of the statute, its content and policy.

Where the company is multifaceted with different managerial levels it is difficult to identify the controlling officer.

There are cases where managers could not be identified with their companies or where courts refused to accept that they were fully representing their companies. In *Redfern*, the Court of Appeal held that the sales manager was not senior enough to be identified with the company. In limited companies, the principle of identification is limited to those people

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79  Simester & Sullivan *Criminal Law* 255.
80  *Bolton (Engineering) Co Ltd v Graham & Sons* 1957 1 QB 159 172.
81  *Supra.* See also criticism by Card, Cross & Jones *Criminal Law* 861-862.
82  *Supra.*
83  1995 2 A.C. 500.
84  *Supra.*
85  *Supra.*
86  *Supra.*
87  Card, Cross & Jones *Criminal Law* 862.
88  *Magna Plant Ltd v Mitchell* 1996 *Crim LR* 696; *Readhead Freight Ltd v Schulman* 1988 *Crim LR* 696.
89  1993 *Crim LR* 43.
whose names appear in memorandum and articles of the association.\textsuperscript{90} In \textit{P & O Ferries (Dover Ltd)},\textsuperscript{91} the company faced charges for culpable homicide after the ship owned by it sank with passengers. The shipmaster was not identified with the corporation.\textsuperscript{92}

The Company was found not guilty and discharged for manslaughter. The Law Commission found that the corporate body should on the ground of public policy be liable for serious accidents resulting from gross negligence due to failure of the management.\textsuperscript{93} As a result the Law Commission recommended a new offence based on corporate fault.\textsuperscript{94}

Allen\textsuperscript{95} lists four problems with the identification theory, namely:

1. In large and diverse companies, the manager has no control over the company affairs. In \textit{Tesco Store Ltd v Brent}\textsuperscript{96} the court asked how the controlling officer in the head office, i.e. London, can know the age of a person to whom a video is supplied in a store in another town. In this case \textit{mens rea} is not an element of the offence but due diligence is a defence.

2. The court decision in \textit{Meridian Global Funds Management Asia v Securities Commission} has weakened the principle of identification, since the company was convicted based on interpreting the statute, but not based on the actions of the controlling officers.\textsuperscript{97}

3. Where there is more than one controlling officer, should each officer be proved to have \textit{mens rea}? Where the answer is positive, this will be tantamount to aggregation.

\textbf{2 2 3 AGGREGATION THEORY}

This theory is also referred to as the collective knowledge doctrine,\textsuperscript{98} which is used in USA but not South Africa. This liability is based on the sum total of knowledge and acts of the

\textsuperscript{90} \textit{Tesco Supermarkets Ltd v Nattrass} supra 200.
\textsuperscript{91} 1990 93 Cr App R 72.
\textsuperscript{92} Supra.
\textsuperscript{94} S 4 of the Law Com No. 237 Involuntary Manslaughter (1996).
\textsuperscript{95} Allen \textit{Criminal Law} 231-233.
\textsuperscript{96} 1993 2 All ER 718.
\textsuperscript{97} 1995 3 All ER 918.
\textsuperscript{98} Herring \textit{Criminal Law} 5th ed (2005) 125.
various employees of the corporate body who were at fault where it is not possible to single out one employee within the corporation, who committed a wrongful act. The corporation is held liable in order to prevent corporations trying to evade liability by making fragments and division of duties of its employees in order to hide its responsibility deep within the corporate structure.

The corporation may accept the blameworthiness of those associated with it. It is not the fault of one person, which determines the liability, but the collective fault of all the employees together. The theory of aggregation is closely related to the newly proposed form of liability called corporate guilt which is based on corporate culture and policies of the corporation. In terms of the corporate guilt it is the corporate body on its own which is liable by failing to cultivate a certain culture and policies laid down for its employees. This is not a derivative form of liability.

The aggregation theory is applied where negligence is an element of the offence and not in offences that require intention. Its use in cases where intention is the element of the offence amounts to artificial manufacturing of fault.

2 2 3 1 EVALUATION OF THE AGGREGATION THEORY

This theory also has the disadvantage in that it does not lift the corporate veil. Instead of looking for one single individual whose liability can be attributed to the corporate body one focuses on several persons. The doctrine ignores the reality that the corporation has a duty to put measures in place to ensure that not only must individuals be prevented from committing offences but it must put policies in place in order to prevent the commission of crime by a group of persons.
Applying the aggregation theory can result in stigma to persons charged when they in fact committed no offence at all.\textsuperscript{109} People representing the corporate body are at times subjected to criticism in courts and linked to the guilty verdict of the body corporate, with possible adverse consequences.

The doctrine of aggregation could be accepted if the corporation possesses moral and agency duties in the same way as a natural person would have.\textsuperscript{110}

\section*{2.3 CONCLUSION}

Corporate criminal liability in South Africa is based on vicarious liability. This liability covers both the corporation and its functionaries. It is a liability which canvasses different kinds of offences. It is wide enough to include third parties. The company can have knowledge and form intention through its human functionaries. The knowledge of the people who can speak, act or think for the body corporate is attributed to it.

\textsuperscript{109} Simester and Sullivan \textit{Criminal Law} 260.
\textsuperscript{110} Simester and Sullivan \textit{Criminal Law supra}. 
CHAPTER 3
HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA

3.1 INTRODUCTION

In *R v Werner*\(^{111}\) the court held that the master is liable for the offences committed by his servant if he knew or foresaw that there was likelihood for the contravention of the statute, or had *culpa* in failing to foresee.\(^{112}\) Fault and the unlawful act by the employee acting within the scope of his employment, are requirements for liability.\(^{113}\)

3.2 ROMAN LAW

Under Roman law the whole community was sometimes held liable for the wrong actions of one of its members, even though they were innocent regarding the commission of the unlawful act.\(^{114}\) The primitive family was a corporation, represented by the *Paterfamilias* in Roman law.\(^{115}\) He held possessions of the members in trust for the family. He was able to sue or be sued.\(^{116}\) It is not clear whether Roman law up to the time of *Justinian* conceived the corporation as a juristic person as we know it today.\(^{117}\) The *Institute* by *Gaius* divided the law into law of persons, things and actions. *Gaius* only refers to *res universitas*, i.e. corporate property.\(^{118}\)

In his *Digest* he uses the word corporations and not legal persons.\(^{119}\) Romans invented the idea of a corporation, where two or more persons combined their resources in order to achieve a desired result.\(^{120}\) They developed the concept of a separate legal entity, when

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111 *R v Werner* 1917 EDL 71, 79.
112 *Burchell & Milton Principles of Criminal Law* 560.
113 *Supra* 558.
114 *Snyman Criminal Law* 247.
116 *Supra* 185-187.
118 *Supra* 277.
119 *Supra* 285.
120 *Supra*. 

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acknowledging the existence of public and private corporations.\textsuperscript{121} The corporation could sue or be sued, with no liability attaching to its members.\textsuperscript{122} In Roman law, corporate criminal liability was unknown.\textsuperscript{123}

3.3 ROMAN-DUTCH LAW

Juristic persons were known in Roman-Dutch law. Corporations could acquire property, sue or be sued.\textsuperscript{124} Academic writers doubt whether corporate criminal liability existed.\textsuperscript{125} Kahn states that in Roman law and possibly, in classical Roman-Dutch Law the corporation could not commit an \textit{actus reus} or have \textit{mens rea}.\textsuperscript{126}

3.4 COMMON LAW

Corporate criminal liability in our law is based on vicarious liability.\textsuperscript{127} The common law accepted that the corporate body, just like a natural person, is criminally responsible for a contravention of law committed by its agent or servant while acting within the scope of his agency or course of employment.\textsuperscript{128} This was not applicable where the \textit{actus reus} could not be performed by a legal person, where the legislature restricted the commission of an offence only to natural persons and where penalty provided could be chastisement or imprisonment. It is fictitious in nature and cannot be incarcerated.\textsuperscript{129}

Where knowledge is an element of the offence, the knowledge of the agent was imputed to the master or the employer even where he neither wilfully permitted the act nor authorized it.\textsuperscript{130} In \textit{Charter v Freeth & Pocock Ltd},\textsuperscript{131} there was sale to the detriment of the purchaser, who bought goods not in the nature and quality expected. The court held that the intention of the

\begin{thebibliography}{99}
\bibitem{121} Supra.
\bibitem{122} Supra 291. Digest 3; 4, 7.
\bibitem{123} De Wet & Swanepoel \textit{Strafreg} 51-53.
\bibitem{124} Lee \textit{An Introduction to Roman Dutch Law} 5\textsuperscript{th} ed (1961) 117.
\bibitem{125} De Wet & Swanepoel \textit{Strafreg} 51-55.
\bibitem{126} Kahn “Can a Corporation be Found Guilty of Murder? The Criminal Liability of a Corporation” (1990) \textit{BML} 145-146.
\bibitem{127} Jordaan “New Perspectives on the Criminal Corporate Liability of Corporate Bodies” (2003) \textit{Acta Juridica} 49. She states that vicarious liability has played a predominant role in the development of corporate criminal liability in South Africa.
\bibitem{128} Gardiner & Landsdown \textit{South African Criminal Law & Procedure} Vol 1 (1917) 34.
\bibitem{129} Gardiner & Landsdown \textit{South African Criminal Law & Procedure} 5\textsuperscript{th} ed (1946) 61.
\bibitem{130} In \textit{Bezuidenhout v Boksburg Municipality} 1916 TPD 555. The owner paid fine for cattle that strayed to the municipal commonage.
\bibitem{131} 105 LT 238.
\end{thebibliography}
legislature cannot be limited to natural persons and the corporate body was held liable on the basis of vicarious liability. Initially, vicarious liability in criminal law was based on the contravention of a statutory provision.\textsuperscript{132}

The common law recognized the corporation as an artificial person with legal personality.\textsuperscript{133} The wider meaning of the word “person” was recognised by Parliament which defined a “person” as local government, an incorporated body or registered company.\textsuperscript{134} Section 390 of the Criminal Procedure and Evidence Act\textsuperscript{135} extended the same interpretation to all corporations and certain associations.

Although our corporate criminal liability was similar to vicarious liability, there were certain exceptions where the body corporate could not be liable, namely where:\textsuperscript{136}

(i) The conduct demands that a natural person should act, e.g. rape and bigamy, and offences, which can only be committed with a human body.

(ii) The legislature or statute provided that only natural persons can commit the offence.

(iii) The penal provisions for the offence committed cannot be applied to a juristic person, i.e. imprisonment or death penalty. Where it is not possible to prosecute the corporate body for the offence, the individual who committed the offence must be charged.

In addition to the instances above where the corporate body could not be liable, certain offences could not be committed by the corporate body, e.g.\textsuperscript{137} offences committed with a wicked intention, treason, murder, assault, arson, perjury and similar offences.

Under the common law a juristic person could not be held liable for an offence requiring \textit{mens rea}, because the corporation has no mind of its own.\textsuperscript{138}

\textsuperscript{132} Gardiner & Landsdowne \textit{South African Criminal Law and Procedure} 6\textsuperscript{th} ed Vol 1 (1957) 78.
\textsuperscript{133} Supra.
\textsuperscript{134} S 3 of Act 5 of 1910.
\textsuperscript{135} Act 31 of 1917.
\textsuperscript{136} Gardiner & Landsdowne \textit{South African Criminal Law & Procedure} Vol 1 45.
\textsuperscript{137} Supra 45-46.
\textsuperscript{138} Charter v Freeth & Pocock Ltd \textit{supra}. 
Corporate criminal liability was regulated by statute since 1917. The statute law of 1917, however, failed to alter the common law position.\(^{139}\)

Section 384 of the Criminal Procedure and Evidence Act 31 of 1917 provided that in any criminal proceedings under statute or common law against the company, the secretary, manager or chairperson thereof may be charged with the offence unless it is otherwise directed or provided. He shall be liable to be punished for the offence unless it is proved that he was in no way a part thereto. That was a change from common law position.

This section has been described as a poor piece of legal draftsmanship since it dealt with procedural law\(^{140}\) and not with substantive law on the liability of the body corporate. Courts struggled to apply this legislation because it was still the civil law application of vicarious liability without changing the substantive law part of common law.\(^{141}\) This provision was the brainchild for the enactment of the next Act.\(^{142}\)

### 3 5 2 THE PERIOD FROM 1939

Section 384 of the Criminal Procedure and Evidence Act 31 of 1917 was later amended by section 117 of Act 23 of 1939. The corporate body was held liable for offences under statute, common law or byelaw committed by its directors or servants or at their instruction.\(^{143}\) This provision applied to both conduct and omissions, which were performed in the exercise of their duties, or in furthering the interests of the corporate body.\(^{144}\) Those acts or omissions were deemed to have been performed by the corporate body itself.\(^{145}\) The latter provision was a major move to extend vicarious liability.\(^{146}\) These provisions are still present in the current legislation and will be discussed in detail in the next chapter.

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\(^{140}\) Kahn “Can a Corporation be Found Guilty of Murder? The Criminal Liability of a Corporation” *supra*.

\(^{141}\) *Supra*.

\(^{142}\) S 117 Act 23 of 1939.

\(^{143}\) S 384 of the Criminal Procedure Act and Evidence Act 31 of 1917 as amended.

\(^{144}\) *Supra*.

\(^{145}\) *Tesco Supermarkets Ltd v Nattrass* 1972 AC 153 170; 1971 2 All ER 127 (HL) 131: *El Ajou v Dollar Land Holdings plc* 1994 2 All ER 685 (CA) 695.

In *R v Bennet & Co (Pty) Ltd*\(^{147}\) the court decided that a limited company was criminally liable for the negligent acts of one of its servants in terms of the provisions of section 384(1) of 1917, as amended. The company was convicted of culpable homicide. The apprentice of the company died as a result of the negligence of another servant of a company. Section 384 of the Criminal Procedure and Evidence Act, as amended, dealt with substantive issues of corporate criminal liability and was no longer limited to procedural law. It was clear from the section that where proof of any intent is necessary to constitute crime, the intent is that of the physical actor.\(^{148}\)

The purpose of section 384(1) of 1917, as amended by 1939 enactment was to remove the restrictions that previously existed in common law. The common law provided that a corporate body could not be convicted of an offence requiring *mens rea*. In *R v Durban Baking Co*\(^{149}\) the court decided that a corporate body is liable for offences requiring *mens rea* because the language used in the statute was so clear that no other interpretation could be justified.\(^{150}\) The court further held that the corporate body used its functionaries to formulate the required intent.\(^{151}\)

Both the wrongful act and the intent of a director or servant of a corporation were deemed to be that of the corporation itself.\(^{152}\) Where the director or servant acted *ultra vires*, but in furthering or endeavouring to further the interest of the corporate body, the act or omission of a director or servant was deemed to be the act of the corporation itself.\(^{153}\)

In *R v Phillips Dairy*,\(^{154}\) the court held that section 384(1) of Act 31 of 1917, as amended, is substantive law and it makes a limited company criminally liable as an employer, even in cases where private employers would not be so liable. This means the company is liable even where the employee acted *ultra vires*, as long as he or she was furthering the interests of the

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\(^{147}\) 1941 TPD 194.

\(^{148}\) Supra.

\(^{149}\) 1945 NPD 136.

\(^{150}\) Supra.

\(^{151}\) Supra.

\(^{152}\) Supra.

\(^{153}\) *R v Bennett* supra 194.

\(^{154}\) 1955 2 SA 120 (T).
company.\textsuperscript{155} This extended the liability of corporate bodies beyond the accepted limits of vicarious liability.\textsuperscript{156}

In \textit{R v Van Heerden},\textsuperscript{157} the company was convicted of fraud, despite the defence that the other accused acted as a servant of the company and not as director. In \textit{Mkize v Martens},\textsuperscript{158} the court explained the reason for the liability of the company for the acts of its employees as follows:\textsuperscript{159}

“…I am answerable for the wrongs of my servant or agent, not because he is authorised by me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.”

\subsection*{3.5.3 THE PERIOD FROM 1955}

Section 384 of Act 31 of 1917 was replaced with section 381 of the Criminal Procedure Act, 56 of 1955. The statutory provision incorporated corporate criminal liability into our legal system. It provided that a body corporate is liable for an act or omission done with intent or without by the employee in the course of his duties, furthering the interest of the corporate body. The employee’s actions are then deemed to have been performed by the body corporate.

Whether a body corporate can be liable for wrongful acts by agents of another body corporate should be investigated. Where a body corporate instructs another body corporate to do a certain piece of work, the former, if it does not exercise control over the latter’s employees at work, is not liable for the criminal actions performed by one of those employees.\textsuperscript{160}

\section*{3.6 CONCLUSION}

Historical development of corporate criminal liability in South Africa shows that corporate criminal liability is wider than the vicarious liability of natural persons.\textsuperscript{161} Corporate criminal liability is founded on attribution to the corporate body of crimes committed by its agents or

\begin{itemize}
  \item \textsuperscript{155} \textit{Supra.}
  \item \textsuperscript{156} \textit{Supra.}
  \item \textsuperscript{157} 1946 AD 168.
  \item \textsuperscript{158} 1914 A.D 382.
  \item \textsuperscript{159} Pollock \textit{Torts} 8\textsuperscript{th} ed 78.
  \item \textsuperscript{160} \textit{R v Murray & Stewart} 1950 1 SA 194 (C).
  \item \textsuperscript{161} Hunt \textit{South African Criminal Law & Procedure: General Principles of Criminal Law} 3\textsuperscript{rd} ed (1997) Vol 1 299.
\end{itemize}
officers rather than on vicarious liability. 162 This argument is supported when one considers its development and founding principles.

The provisions of statute extended the scope of vicarious liability in common law, which had limited vicarious liability to corporations in the same way as natural persons. 163 The extension of criminal provisions to corporate bodies depended on the wording of the penal statute, whether it was such that the artificial person can serve the punishment. 164 South Africa adopted the strategy of punishing both the body corporate and the actual wrongdoer. 165

162 Supra.
164 Gardiner & Landsdowne South African Criminal Law and Procedure 78.
165 The provision directed to punish the directors and officers of the company was s 318(7) of Act 56 of 1955.
CHAPTER 4
CURRENT CORPORATE CRIMINAL LIABILITY
IN SOUTH AFRICA

4 1 INTRODUCTION

Corporate criminal liability is currently regulated by section 332 of the Criminal Procedural Act, 51 of 1977. This section has twelve subsections which deal with substantive as well as procedural law. Of importance for this discussion are the provisions of section 332(1), which are substantive law, meaning that they deal with principles of law applicable to corporate criminal liability in South Africa. Reference shall be made to a lesser extent to sections 332(5) and 332(7) which deal with procedure relating to corporate criminal liability.

4 2 SECTION 332(1) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

Section 332(1) provides that, for the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law:

(a) any act performed, with or without a particular intent, by or an instruction or with permission, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed by that corporate body, or as the case may be, to have been an omission on the part of that corporate body.

In chapter 2 it was indicated that corporate criminal liability in section 332(1) of Act 51 of 1977 is based on vicarious liability. The wording of the provisions of section 332(1) is

\(^{166}\) See the conclusion para 2 3 in Chapter 2.
similar to that of the old section 384(1) of the Criminal Procedure and Evidence Act 31 of 1917, as amended in 1939, and section 381(1) of Act 56 of 1955 its predecessor. It is broader than normal vicarious liability, because it includes not only servants but also third parties instructed by those servants whose actions are accountable to the body corporate.\textsuperscript{167}

\section*{4.2.1 General Requirements for Liability in Terms of Section 332(1)}

A body corporate is criminally liable for the unlawful acts of its agents and those persons instructed by its agents.\textsuperscript{168} This liability is based on attribution.\textsuperscript{169} A body corporate, such as a public and private company, local authority or any other incorporated body may be criminally liable in the same manner as a natural person.\textsuperscript{170}

\subsection*{4.2.1.1 The Act or Omission}

To be convicted of a crime the accused must have acted or failed to act. The prohibited conduct is called the \textit{actus reus}. An omission occurs where someone fails to act when having a duty to act. In certain crimes an omission, namely failure to act in circumstances where the law requires a person to act, is sufficient. Since the body corporate has no physical existence the act or omission attributed to it must be that of a human being.\textsuperscript{171}

The conduct or omission must have been performed by the director or servant during the course of exercising his or her duties as a director or servant of the company.\textsuperscript{172} The act or omission must further the interest of the body corporate.\textsuperscript{173} The difference between the \textit{actus reus} and the omission in terms section 332(1) is that, only the \textit{actus reus} can be performed with express or implied permission of the director or employee of the corporate body.\textsuperscript{174}

\textsuperscript{167} In s 332(1) Act 51 of 1977 reference is made to someone instructed by the director or servant. Unlike in vicarious liability where the master is liable only for the acts of his servant.
\textsuperscript{168} S 332(1). See Snyman \textit{Criminal Law} 250.
\textsuperscript{169} Supra.
\textsuperscript{170} Allen \textit{Criminal Law} 229: Card, Cross & Jones \textit{Criminal Law} 858.
\textsuperscript{171} Jordaan “New Perspectives on the Criminal Corporate Liability of Corporate Bodies” 48.
\textsuperscript{172} S 332(1) Act 51 of 1977.
\textsuperscript{173} Supra.
\textsuperscript{174} Supra.
Since section 332(1) is vicarious in nature, the director or the servant of the corporate body acts on behalf of or for the company as representative agent or delegate.\textsuperscript{175} Both the act and the mind of the agent are deemed to be that of the body corporate.\textsuperscript{176}

4 2 1 2 FAULT

Liability in criminal law in most cases requires \textit{mens rea} to commit an offence. There are few instances where there is liability without fault. Liability for wrongful conduct has to correspond with the definitional elements of the crime in order to be culpable.\textsuperscript{177} Culpability means that there must be grounds for blaming the individual personally for his unlawful conduct.\textsuperscript{178} In order to be culpable, a person must have intention, or have been negligent.\textsuperscript{179}

In terms section 332(1) the corporate body is criminally liable for an act performed by its director or servant when performed with or without intent. Since the corporate body has no mind of its own the law attributes the state of mind of certain persons to the corporate body.\textsuperscript{180} Burchell and Milton\textsuperscript{181} submit that section 332(1) removes the obstacles in regard to attaching criminal liability on juristic persons and affirms that this artificial person could be convicted of a crime requiring fault. Although the corporation is charged, the fault that is imputed to the company is that of the director or servant who committed the crime.\textsuperscript{182}

Since a juristic person is afforded the same rights as a natural person in the Bill of Rights,\textsuperscript{183} Jordaan argues that section 332(1) can be challenged for being too broad. It extends liability to the corporate body that could not be extended to a natural person.\textsuperscript{184} A corporate body can be convicted without it having been proved that it had been at fault.\textsuperscript{185}

\textsuperscript{176} Supra.
\textsuperscript{177} Snyman \textit{Criminal Law} 143.
\textsuperscript{178} Supra.
\textsuperscript{179} Such as culpable homicide.
\textsuperscript{180} \textit{Lennard`s Carrying Company Ltd v Asiatic Petroleum Co Ltd} 1915 A.C. 705.
\textsuperscript{181} Burchell & Milton \textit{Principles of Criminal Law} 386 supra.
\textsuperscript{182} Supra.
\textsuperscript{183} S 8(4) Constitution Act 108 of 1996.
\textsuperscript{184} Jordaan “New Perspectives on the Criminal Corporate Liability of Corporate Bodies” 48 53.
\textsuperscript{185} \textit{HL Bolton Co Ltd v PJ Graham and Sons Ltd} 1957 1 QB 159.
4 2 1 2 1 INTENTION

An intention to commit an offence can be defined as the knowledge and the will to perform an act which has consequences outlined in the definitional elements of crime. 186 This intention can either be dolus directus, dolus indirectus or dolus eventualis.

Section 322(1) provides that the particular intention of the director or servant is attributed to the corporate body. In Ex parte Minister of Justice: In re S v South African Broadcasting Corporation, the court held that word “particular” has no intended results and refers to any relevant intention with which the act was committed. 187

Practice has shown that it is not easy to identify and prove that a particular individual from a big company has acted and that he had the required intention. 188 In Ex parte Minister of Justice; In re S v SABC, 189 no particular individual employee was identified. In this case it was held that the scope of corporate liability in section 332(1) is wide enough to include offences based not only on intention but also on negligence and strict liability. 190

4 2 1 2 2 NEGLIGENCE

Mens rea includes both intention and negligence. Negligence occurs when the offence has occurred unintentionally or accidentally. 191 This form of fault arises because a person’s conduct did not meet the standards required by law. 192 Where the person did not act as the reasonable man would have acted he has fault in the form of culpa. 193

When referring to negligence section 332(1) refers to an act performed without a particular intent. In Ex parte Minister of Justice, In re South African Broadcasting Corporation, 194 the Court had to decide on two questions, namely:

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186 Snyman Criminal Law 180.
187 1992 4 SA 804 (A) 808-809.
188 Clarkson “Kicking Corporate Bodies and Damning Their Souls” (1996) 59 MLR 557, 563 cited by Reed & Seago Criminal Law 184.
189 1992 4 SA 807 (A).
190 Supra.
191 Snyman Criminal Law 208.
192 Supra.
193 Supra.
Whether the proper interpretation of section 332(1) refers to intention only or whether it also refers to negligence. The court held that on a proper interpretation of section 332(1) of the Criminal Procedure Act 51 of 1977 a juristic person can also be liable for crimes of negligence committed by its directors and officers.

Whether the decision in *R v Bennett and Co (Pty) Ltd* was correct when the court held that the negligence of an employee was imputed to the company, resulting in the company being convicted of culpable homicide. The Court in *In re South African Broadcasting Corporation* held that *R v Bennett* was correctly decided, because negligence based on omission can result in culpable homicide, where the body corporate had a duty to protect persons from serious bodily harm or death. Those persons could be its employees or persons using its product.

**4 2 1 2 3 STRICT LIABILITY**

*Mens rea* is a common element for liability in criminal law but there are instances where a person is liable for a criminal offence without *mens rea*. In most cases this liability arises from statutory offences where the Legislature is silent about culpability. Strict liability offences are established with a justification to ensure compliance with regulatory norms.

The words “without intent” in section 322(1) include liability of the corporate bodies for offences committed by directors or servants without fault. The prevalent statutory offences with strict liability are those legislated to regulate environmental pollution where corporate bodies are the main culprits. Although vicarious liability and strict liability have the advantage of being the easiest tools for the state to prove the commission of the offence, they have the disadvantage of being liability without fault.
Strict liability has been criticized for being unconstitutional.207 O’Regan J in S v Coetzee208 said:

“The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies; as a general rule people who are not at fault should not be deprived of their freedom by state. This rule is the corollary of another rule which the same comparative exercise illustrates; when a person has committed an unlawful act intentionally or negligently, the state may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule. Where culpability is established and conduct is legitimately deemed unlawful, then no such breach arises.”209

It may be argued that strict liability like vicarious liability without fault is necessary. This view is based on the fact that the limitation clause210 in our Constitution may allow the legislature to constitutionally create strict liability offences more particularly to regulate environmental protection from agents of corporate bodies.211

4 2 1 3 EXPRESS OR IMPLIED PERMISSION

The director or servant of the corporate body must either give express or implied permission to a third person prior to the corporate body incurring liability. The word “permission” attributes the knowledge of either the director or that of the servant to the company.212 Such knowledge includes intention or recklessness.213 The express and implied permission relates to the actus reus of the director or servant but not his omission.214

In countries where express or implied permission of the director or servant applies to an omission the corporate body is liable where the director or servant knew that the offence was being committed but failed to prevent it.215 The same can apply to the director who knows

207  Snyman Criminal Law 243.
208  1997 1 SACR 379 (CC).
209  Supra 442 par 76.
211  S v Magagula 2001 2 SACR 123 (T).
212  Supra.
213  Card, Cross & Jones Criminal Law 106-110.
214  See footnote 174 supra.
215  In English law supra 109.
that the offence is likely to be committed but ignores the eventuality. This is sometimes referred to as wilful blindness.\textsuperscript{216}

In \textit{James & Son Ltd v Smee},\textsuperscript{217} the court held that in regard to the word “permitting” the use of this word at once imports a state of mind. It was further held that a person might permit another to use a vehicle with defective brakes, when knowing that the brakes are not working. The person who permits the use of that motor vehicle can be convicted if he had the prescience knowledge that the brakes are out of order.\textsuperscript{218} He must have turned a blind eye to the obvious by impliedly permitting the use of a defective motor vehicle.\textsuperscript{219} This liability can also be attributed to the corporate body.

In \textit{Vehicle Inspectorate v Nuttal},\textsuperscript{220} the court held that the meaning of the word “permitted” depends on the context in which it was used.\textsuperscript{221} Where someone had a duty to take reasonable steps to prevent a certain occurrence and he failed to do so it would lead to the conclusion that he permitted the occurrence.\textsuperscript{222} Where someone is reckless as to whether or not something unlawful occurs he has the required \textit{mens rea} by permitting it.\textsuperscript{223} This liability applies to corporate bodies, too.

\section*{4 2 1 4 EXERCISING POWERS OR PERFORMANCE OF DUTIES}

The director or servant must perform the unlawful act or omission during the course of his employment.\textsuperscript{224} The words “exercise of powers and performance of duties” apply equally to both the director and the servant.

Barlow argues\textsuperscript{225} that power is only exercised by directors, and not by servants. He further argues that the performance of duties applies only to servants and not to directors. If Barlow’s arguments are correct, the director can instruct another person, not employed by the corporate

\begin{footnotes}
\item[216] Supra.
\item[217] 1953 QB 78, 1954 3 All ER 273, D.C.
\item[218] Supra. See Williams \textit{Textbook of Criminal Law} (1978) 934-944.
\item[219] Supra.
\item[220] 1999 WLR 629, HL.
\item[221] Supra.
\item[222] Supra.
\item[223] Supra 217.
\item[224] Feldman Pty Ltd v Mall 1945 AD 733 736.
\end{footnotes}
body, to act only when exercising his or her powers. Similarly the servant too can instruct the third person to act for the corporate body when performing his or her duties. The corporate body cannot be liable where the director instructed another person to act whilst performing his duties or where the servant instructed another person to act in exercise of his powers.

4 2 1 5 FURTHERING THE INTEREST OF THE CORPORATION

The words “furthering the interest of the corporation” also include the intent to benefit the corporate body. The act must be performed within the scope of the director’s or the servant’s employment. That the corporation is liable for an offence committed by a servant in furthering or endeavouring to further the interest of the corporate body was confirmed in *S v African Bank of South Africa Ltd.* The court held that where the agents furthered their own interests and in the process had to further the interest of the corporate body the corporate body should be liable. Liability exists when the agent, while furthering the interest of the corporate body, took advantage of the situation and furthered his own interest.

According to the decision in *R v Meer* if the corporation, which was created for a lawful purpose, decides to follow unlawful ends, it would still be liable for the acts of its director or servant who exercised powers in the performance of their duties. Where the director or servant committed an offence in order to further his or her own interest, the corporate body would not be liable.

Where the employee commits a crime in order to further the corporate body’s interest, the latter is liable even where the employee acted beyond the scope of his employment, because the employee was not acting in his own interest. In *Banur Investments (Pty) Ltd,* a record clerk who was not authorised to sell liquor concluded sales in contravention of the liquor licence. The court held that she was not acting in her own interest, but for the benefit

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227 *Supra.*
228 1990 2 SACR 585 (W) 648.
229 *R v Van Heerden and Others* 1946 AD 168, 171.
230 1958 2 SA 175 (N).
231 *R v Barney’s Super Service Station, Pty Ltd* 1956 4 SA 107 (T).
232 *S v Banur Investment (Pty) Ltd* 1969 1 SA 231 (T).
233 1969 1 SA 231 (T).
of the corporation.\textsuperscript{234} The court held that the liability of the corporate body exists because the corporate body is liable for the wrongs if its agents, not because the corporate authorised them, but because these wrongful acts were committed in the conduct of its affairs.\textsuperscript{235} The court held that the sale of liquor was for the benefit of the employer and not for the barman’s personal benefit.\textsuperscript{236}

Criticism against holding the body corporate liable even when the agent acted \textit{ultra vires}\textsuperscript{237} is that the company only permits its agents to perform \textit{intra vires} acts.\textsuperscript{238} In \textit{R v Booth Road Trading Pty Ltd},\textsuperscript{239} a new salesman had been specifically forbidden to effect sales during the first two weeks of his employment. He sold goods in excess of the maximum statutory price during those two weeks. The corporate body was liable because the servant was employed to sell goods. He was a servant doing his job to further the interest of his employer, but according to the instruction that he was not to sell for two weeks.

\textbf{4 2 1 6 TYPES OF OFFENCES COMMITTED BY THE BODY CORPORATE}

Section 332 (1) refers to “any offence” when describing offences which can be committed by the corporate body. The words “any offence” make the ambit of corporations’ criminal liability too wide. There are authorities who agree that there is no offence, both under common law and statutory law which cannot be committed by the corporate body.\textsuperscript{240} There are authorities who argue that not all offences under both common law and statutory law can be attributed to the corporate body.\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{234} Supra 234.
\item \textsuperscript{235} Supra 233 referring to \textit{Mkize v Martens} 1914 AD 382 390.
\item \textsuperscript{236} Supra 233.
\item \textsuperscript{237} \textit{R v Van Heerden} 1946 AD 168; \textit{R v Phillips Dairy Pty Ltd} 1956 4 SA 107 (T) 108.
\item \textsuperscript{238} See Matzukis, “Corporate Crimes. Who Must Pay for Them?” (1987) (16) BML 215, 216 who argues that liability of corporate bodies should be limited, because a company can not have effective control over large numbers of employees.
\item \textsuperscript{239} 1947 (1) PH H 48 N.
\end{itemize}
4 2 1 6 1 COMMON LAW OFFENCES

A corporate body cannot be convicted of rape, since the offence can only be committed by a natural person.242 Burchell argues that a corporation that creates a working environment conducive to the commission of sexual offences or does not prevent the probable risk that such offences be committed could be found guilty as an accomplice where its director or servant has committed such an offence.243

The question whether a South African corporation could be convicted of treason has not been decided by the courts.

A juristic person can be found guilty of culpable homicide based on a positive act or a failure to act.244 A corporate body can be convicted of murder where the corporate body foresaw that its action could result in the death of a person.245 Where corporate bodies are convicted of common law offences a fine is imposed as a sentence. Where the prescribed sentence is imprisonment the corporation can still be convicted as the courts are given discretion to impose a fine instead of imprisonment.246

4 2 1 6 2 STATUTORY OFFENCES

Just like in common law offences the corporate body is liable for contravening statutory offences. Not all statutory offences can be attributed to the corporate bodies when these are committed by directors or servants.247 In R v Sutherland,248 the court held that there are certain offences in the Liquor Act 30 of 1928 which cannot be committed by the corporation because the prohibition is directed to the licence holder personally, who will always be a natural person.

242 Burchell & Milton Principles of Criminal Law 566. See also S v Coetzee supra 609.
243 Burchell & Milton Principles of Criminal Law 566.
244 Ex parte Minister of Justice - In re S v SABC supra.
245 Burchell & Milton Principles of Criminal Law 567.
247 R v Kaloo 1941 A.D 17.
248 1972 3 SA 385 (N).
The words “any offence” do not include commissions and omissions, which are punishable under the Companies Act 61 of 1973, for which directors and officers will be liable.\textsuperscript{249}

In \textit{S v International Computer Broking and Leasing Pty Ltd and Another},\textsuperscript{250} the body corporate was convicted for contravening the provisions of section 2(1)(a) of the Usury Act 73 of 1968. The Company lent money and charged interest rates at 120\% \textit{per annum}.\textsuperscript{251} The permissible interest rate allowed then was 32\% \textit{per annum}.\textsuperscript{252} The court held that the company was liable for commission of the offence on the basis of failure to comply with the provisions of section 2(1)(a) of the Usury Act 73 of 1968.\textsuperscript{253} The court held that the legal advice followed by the corporate body was so absurd as to be not acceptable to the reasonable man.\textsuperscript{254}

In \textit{S v Long Distance (Natal) Pty Ltd},\textsuperscript{255} the corporate body was charged for contravening section 31 of the Road Transportation Act 74 of 1977. The corporate body transported goods not specified in the transport permit.\textsuperscript{256} The court held that \textit{culpa} was sufficient for conviction under paragraph (a) or (b) of section 31(1) of the Road Transportation Act 74 of 1977 since corporate bodies were obliged to take all reasonable care to acquaint themselves with what they are allowed to transport.\textsuperscript{257}

\section*{4 2 1 7 \textbf{ATTRIBUTION}}

The acts and the intentions of the agents are deemed to be the acts and the intentions of the body corporate. The law attributes acts and state of mind of these agents to the company because the latter has no hands and mind of its own.\textsuperscript{258} Those who represent and control the corporate body formulate the mind and perform acts for the corporate body.\textsuperscript{259}

\begin{flushleft}
\textsuperscript{249} S 424(3) Act 61 of 1973. \\
\textsuperscript{250} 1996 3 SA 582 (W). \\
\textsuperscript{251} 583. \\
\textsuperscript{252} Supra. \\
\textsuperscript{253} 590. \\
\textsuperscript{254} Supra. \\
\textsuperscript{255} 1990 2 SA 277 (AD). \\
\textsuperscript{256} 280. \\
\textsuperscript{257} \textit{Long distance} 283; \textit{S v Blom} 1977 3 SA 513 (A) at 532G. \\
\textsuperscript{258} \textit{Tesco Supermarkets v Nattrass} 1972 AC 153 170; \textit{Ajou v Dollar Land Holdings plc} 1994 2 All ER 685 (CA) 695. \\
\textsuperscript{259} \textit{R v Kritzinger} 1971 2 SA 57 (A); \textit{Harris v Unihold (Pty) Ltd} 1981 3 SA 144 (W).
\end{flushleft}
Where the agent’s act is attributed to the body corporate it does not cease to be his action as well.260 He acts for the body corporate and for himself, and the agent may be prosecuted individually under section 333(5).

4218 PERSONS WHOSE LIABILITY IS ATTRIBUTED TO THE BODY CORPORATE

Section 332(1) does not limit the liability of the corporation only to acts or offences committed by its directors or servants.261 The offences can be committed by a third party, not employed by the corporate body, provided the third person acted on the instruction of the servant or the director of the company.262

Three categories of persons’ liability can be attributed to the corporate body, namely directors, servants or third parties.

4218.1 DIRECTOR

The word “director” is defined in section 332(10) of Act 51 of 1977 as a person who in relation to that body corporate has powers of control or to govern it. The person can be a member of a body or group of persons who control or govern that body corporate.263

Where a person is regarded as a director of a company, in terms of the definition as described in section 332(10), it is immaterial whether or not he or she is a director in terms of the Companies Act 61 of 1973.264 In terms of section 332(1) a director’s liability is attributed to the body corporate. In *R v Mall,*265 the court held that there is no ground for limiting the language of section 332(10) to those who are constitutionally and legally vested with the control and government of the body corporate. Since those directors are required by statute266 they are essential to a company and their functions and duties are defined by law.267 For purposes of criminal law a director need not be someone with the title “director”; it can be

261 See footnote 167.
262 S 332(1).
263 Snyman Criminal Law 250.
265 1959 4 SA 607 (N).
266 Supra 611.
267 Supra.
anyone including the manager if he or she is involved in the governing and control of the corporate body. The court held that the plain words are “any person who controls or governs”, that is to say, in fact “controls or governs”.268

The word “director” as defined in section 332(10) of Act 51 of 1977 has a broader meaning for criminal purposes than the meaning of the same word in the Companies Act 61 of 1973.269 The latter Act imposes criminal liability only on directors of its own definition.270 Section 1(1) of Companies Act 61 of 1973 defines the director as “any person occupying the position of a director or alternate director of a company by whatever name he may be designated”. A director is a person who directs the affairs of the company and he has the authority to exercise all the powers of the company except those exercised by the company in a general meeting.271

The court further held that it is inconceivable that the legislature did not know and appreciate that corporate bodies, particularly companies, are sometimes controlled, wholly or partially, by persons who are not personally on the board of directors, but are represented there by a nominee.272 A nominee director is a person nominated to act as a director by another person, for example a shareholder of the company.273 Recognising that it is possible that a person should usurp the functions of a director, the court stated that if that should happen, there is no reason why he should not be treated as having brought himself within subsection (10) and so has taken upon himself the responsibilities placed on the director by the section.274

A matter for argument is whether shadow directors should be liable in terms section 332(10). A shadow director is a person who to a greater extent influences the decisions of the directors in a company.275 This person does not acquire powers or rights in relation to the management of the company.276 A shadow director does not appear in South African Companies Act, but the concept of a controlling hand behind the director is known in our law. Courts have held that a person who manipulates a director does not escape the fiduciary duties of a director.277

268 Supra.
270 R v Mall 610-611.
272 Supra.
273 S v Shaban 1965 4 SA 646 (W).
274 R v Mall 610 – 611.
275 Pretorius Hahlo’s South African Company Law through Cases 445.
276 Van Dorsten Rights, Powers and Duties of Directors 33.
277 S v Shaban 1965 4 SA 646 (W) 651-2 and S v De Jager & Another 1965 2 SA 616 (A) 627-8.
This extended meaning of the word “director” to include any person who governs or controls
the company was confirmed in *S v Marks.* The accused, a stockbroker, was charged with
fraud, i.e. “rigging the market”. The court held that the accused usurped the duties of being a
director and he was accepted by the boards of the three companies as someone who takes the
active role of influencing the way the boards conduct their affairs. He was in control and
therefore a director of the three companies.

Although directors are for some reasons company managers their status as directors is
different from that of a manager. The difference is that directors are required by the statute.
The manager on the other hand is an employee of the corporate body under the control of the
director. He is not legally essential to the corporate body.

In *S v Van den Berg and Others,* the court decided that section 332(10) with its extended
definition of directors is of limited application, as it does no more than to define the directors
referred to in section 332. The same definition of “director” cannot be extended beyond the
scope of section 332 and in particular cannot be extended to other statutes where the same
term is used. For purposes of corporate criminal liability the director is the one defined in
section 332(10) of Act 51 of 1977.

4 2 1 8 2 SERVANTS

A servant of the corporate body includes any officer or employee, irrespective of the person’s
rank in that corporate body. The word “servant” has not been defined. It is submitted that
a person qualifies to be a servant of the corporate body, if he/she is permanently employed or
employed regularly on a contractual basis.

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278 1965 3 SA 834 (W).
279 *Supra* 843.
280 *Supra* 844.
281 *R v Mall supra* 622-3.
282 *L Suzman (Rand) Ltd v Yamoyani (2)* 1972 1 SA 109 (W) 112-3.
283 1979 1 SA 208 (D); *S v De Jager* 1965 2 SA 616 (A) 622-3.
284 *Van den berg supra* 216-217.
285 *Supra*.
286 Burchell and Hunt *Criminal Law and Procedure* Vol 1 *supra* 297.
In *R v Mall* it was held that it is possible that a manager could be both a servant and a director,\(^{287}\) depending on the nature of the contract of employment.\(^{288}\) A servant is a person, who, in carrying out duties on behalf of the corporate body, has to obey the instructions of some superior officer of the corporate body.\(^{289}\)

**4 2 1 8 3 THIRD PERSON**

“Third person”\(^{290}\) refers to a person who is not employed by the corporate body. Section 332(1) extends the liability for actions of a third person to a corporate body *if he acted with the permission, express or implied, of the director or servant of the company.* It can be argued that the permission given by the director or servant should be acceptable only if given during the exercise of their powers and duties,\(^{291}\) in furthering or endeavouring to further the interest of the corporate body.\(^{292}\)

Third persons can also include self-employed persons or independent contractors. A self-employed person or an independent contractor has to act with the permission, express or implied, for the corporate body to be held liable. A self-employed person contracted to be a traffic manager of the company was regarded as the third person in that his conduct and *men rea* was attributed to the company.\(^{293}\)

**4 3 CRITICISM OF SECTION 332(1) OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977**

Section 332(1) provides that the corporate body will be liable for all acts of its directors, servants or third persons instructed by the director or servant, if done in furthering or in an endeavour to further the interests of that corporate body. Section 332(1), although vicarious in nature, is too broad to extend beyond the normal limits of vicarious liability.\(^{294}\) Vicarious liability results in the employer being liable for actions performed by its employee during the

\(^{287}\) *Supra* 624.

\(^{288}\) *Supra* 619.

\(^{289}\) Bailes “Watch Your Corporation” 24-25.

\(^{290}\) The word “third person” do not appear in s 332(1) but it is implied by the words at the instruction of the director or servant. Then an outsider or third person shall be so instructed.

\(^{291}\) This is the wording of s 332(1).

\(^{292}\) The argument in the footnote above still applies.

\(^{293}\) *Worthy v Gordon Plant Ltd* 1989 RTR 7n DC.

\(^{294}\) Burchell & Milton *Principles of Criminal Law* 563.
course of his employment. Liability of the company in terms of section 332 (1) occurs even when the agent acted *ultra vires.*

Every wrongful act of an employee of the corporate body, committed during the course of his employment, is accountable to the corporate body whether or not it was aware of the actions. This may be a sufficient deterrence to the corporation, but Clarkson and Keating argue that it extends the corporation’s liability too widely in that the corporation can be liable for an offence where it has expressly forbidden the offence. That the corporate body is liable for wrongful acts of every employee, and third persons instructed by them, is burdensome to the company.

Section 332(1) extends vicarious liability to absolute liability. If the requirements of section 332(1) are proved, the corporate body is guilty, with no other possible defence. According to Kahn, vicarious liability is presently manifest in section 332(1) as a legal straightjacket from which even a Houdini of the law could not escape.

The wording of section 332(1) which includes acts of third parties who were acting on instruction of a director or servant of the corporate body in the exercise of his powers or in the performance of his duties by furthering the interest of the corporate body, has given rise to interpretation problems in South African courts. As a result courts have formulated a restrictive interpretation of the section in that the corporate body must have a degree of control over the third person.

In *S v Coetzee* the court stated that nobody was prepared to defend the extension of liability to servants, as the provision does. The court held that there is no justification for including the category of “servants” in the provision and then proceeded to analyse the provisions of

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295 Matzukis “Corporate Crimes. Who Must Pay for Them?” 215 216 where he suggest that there should be limitation of criminal liability of corporate bodies because they have limited control over their activities, in particular those which employed many employees. See also *R v Philips Dairy (Pty) Ltd* 1955 4 SA 120(T).

296 Supra.

297 Clarkson & Keating *Criminal Law* 231.

298 Bailes “Watch Your Corporation” 24.


300 *R v Murray & Stewart* 1950 1 SA 194 (C).

301 Supra 199.

302 1997 1 SACR 379 (CC).
section 332(5) on the basis that the section refers only to directors. Although not referring to section 332(1), the remarks in S v Coetzee can be used as an argument in favour of the body corporate, namely that section 332(1) extends its liability too widely by including servants.

Many South African writers do not accept vicarious liability as a basis for criminal liability because it promotes liability without fault. In addition the corporate body is liable for the fault of its director or servant without enquiry of fault in regard to it or its corporate culture and policies. Some authors argue that section 332(1) may be unconstitutional because it creates no fault liability. Various South African writers have raised concerns about the wide scope of section 332(1). Corporate criminal liability should be limited only to controlling officers who direct the “mind and the will” of the corporate body. However, in the dissenting judgment in S v Coetzee Kentridge A J held that not all cases involving strict liability are unconstitutional. Common purpose which has the effect of imputing liability of one person to another has been declared constitutional.

4.4 COMPARISONS OF SECTION 332(1) AND OTHER MODELS OF DERIVATIVE LIABILITY

Section 332(1) creates only one form or model as the basis of corporate criminal liability. The agency doctrine in section 332(1) is out of touch with modern developments, because two or more models of derivative liability often exist in other countries, which include the agency doctrine, identification doctrine and the aggregation theory.

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303 Coetzee supra 388 Par 26: This was also confirmed by Madala J in that the inclusion of the words “or servants” in s 332(5) is constitutionally not defensible 427 par 110.
304 1997 1 SACR 379 (CC).
309 1997 1 SACR 379 (CC).
310 S v Coetzee supra 416 par 96.
311 S v Thebus 2003 2 SACR 319 (CC).
313 See Chapter 2.
Some scholars argue that the liability based on agency is expensive. They further argue that corporate criminal liability is best evaluated as a substitute for the direct criminal liability of the agent.

In England, New Zealand, Canada and some common law jurisdictions the agency doctrine has been supplemented by identification, whereas in the United States of America aggregation supplements agency. Section 332(1) does not accommodate the aggregation principle in that it is a liability of a director or servant, not a group of persons in the collective body structure that is imputed to the corporate body. Section 332(1) is wider in identification since it does not limit the liability to those persons who represent the corporate body by directing its mind and will. Section 332(1) is similar to the *respondeat superior* doctrine also used in USA based on the Model Penal Code.

4.5 COMMON PURPOSE

Common purpose is a general principle in criminal law where two or more people, having a common intent to commit an offence, act together in order to achieve a common goal. The action by either of them in the execution of that purpose is imputed to the other.

The argument is whether the corporate body is acting on common purpose with its director or servant to be liable in criminal law. This has to do with the perpetrator-corporation relationship, since it is the act and mind of the agent that are attributed to the corporation. The conspiracy theory allows the conspirator to be liable for the crimes committed by other conspirators in the furtherance of conspiracy, even if the conspirator was not able to commit the offence himself.

It is open to doubt whether it can be assumed that the corporation can be a partner in criminal conspiracy. If common purpose and corporate criminal liability are similar corporate

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316 *Supra*.
318 Snyman *Criminal Law* 260.
319 *Pinketon v United States* 328 US 640 1946.
320 *State v Myers* 211 P 440 Idaho 1922.
criminal liability is constitutional because common purpose has already been declared to be constitutional.  

4.6 CONCLUSION

The South African model of corporate criminal liability in section 332(1) is essentially vicarious because it is based on the special relationship between the director or servant and the corporate body. Section 332(1) is vicarious in nature, but broader than vicarious liability of a human being. A natural person as an employer is vicariously liable for the criminal acts of his employee that was performed within the scope of the employment. In contrast, under section 332(1), the corporate body is liable for all the acts of its directors or servants even if they fall outside the course and scope of their employment, when performed in an endeavour to further the interests of the corporate body.

The theoretical basis of the provisions of section 332(1) is that the juristic person on its own cannot perform the actus reus and is incapable of having the required fault. The crimes committed by the director or servants are deemed to be that of the corporate body. All elements of the offence must be proved to have been committed by the director, servant or the third person and not by the corporate body. Vicarious liability is very harsh on the corporate body when extended to all company employees. It is recommended that at least a certain level of the management of the company be targeted in order to limit the corporate body’s liability to a limited number of individuals who represent, govern or manage the corporate body.

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322 S v Thebus 2003 2 SACR 319 (CC).
323 Burchell & Milton Principles of Criminal Law supra 563.
324 Supra.
325 R v Bennett and Co Pty Ltd supra 194; S v Joseph Mtshumayeli Pty Ltd 1971 1 SA 33 (RA).
326 Jordaan “New Perspectives on the Criminal Corporate Liability of Corporate Bodies” supra 50.
327 LAWSA Article 5 Vol par 655.
328 Supra.
330 Supra.
CHAPTER 5
THE DESIRABILITY OF CORPORATE CRIMINAL LIABILITY

5.1 INTRODUCTION

Criminal law “defines certain forms of human conduct as crimes and provides for the punishment of those persons with criminal capacity who unlawfully and with a guilty mind commit crime”.331 This Chapter evaluates whether corporate criminal liability can be included in the above-mentioned definition. Criminal law prescribes unlawful conduct and purports to direct the behaviour of individuals to be in line with society’s interest and values.332 The question is whether the same purpose can be achieved with corporate bodies.

A corporate body is an institution not capable of acting on its own nor able to formulate its own intention.333 Some authors argue that the corporate body acts and thinks through its members and employees and only they deserve punishment.334 Vicarious liability is based on principles of civil law, in that the master can be held liable for the actions of his servant even if he never knew or foresaw that the offence will be committed.335

Substantive criminal law, with the exception of strict liability, does not permit the imputation of will and act of one person to another nor does it accept the theory of identification.336 Criminal law emphasizes personal liability and is reluctant to accept that the unlawful conduct of one person can be made that of another.

331 Burchell & Milton Principles of Criminal Law 1.
333 Snyman Criminal Law 249.
334 Clarkson & Keating Criminal Law 244.
335 Burchell & Milton Principles of Criminal Law 560.
5.2 LEGAL PERSONALITY

As discussed in Chapter 2, a company or corporate body has the same rights and duties in law as natural persons, despite the fact that it has no physical existence. Corporations have identifiable persona and have presence in the community. Each and every corporation has its own culture, its own way of giving skills to its employees as well as its own practices. These practices collectively give a corporation a unique character.

A corporation possesses an “ethos” which distinguishes it from the specific individuals who control or work for the corporation. Corporate ethos is defined as the theoretical and intangible character of a corporation separate from the substance of what it actually does, whether manufacturing, retailing, financing or other activity. Each corporation is distinctive and draws its uniqueness from a multifaceted combination of formal and informal factors.

The formal structure of a corporation is identifiable and observable. These formal and informal factors and structures serve to inform and advance the conduct and actions of the corporation through its employees or agents. If these arguments are accepted there is justification for allowing corporate criminal liability because directors and officials of the corporate body are furthering the interest of the corporation.

In *FNB of Boston v Bellotti*, the court acknowledged that the voice with which the corporation speaks in public represents an interest distinct from that of the individuals, or groups of individuals, who manage or work for the corporate body. A corporation can express exclusive viewpoints, attitudes and moral judgments.

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337 Chapter 2 par 1.
339 *Supra*.
340 *Supra*.
342 *Supra*.
343 Bucy “Corporate Ethos: A Standard of Imposing Corporate Criminal Liability” 1123.
344 *Supra* 1127.
347 *Supra*.
When one accepts this position the argument that corporations do not deserve retribution because they consist of nothing more than the individuals of whom they are composed, and therefore lack autonomous identifiable persona may be untrue. Corporate criminal liability is an indispensable part of the law. According to Snyman corporate bodies govern our lives to a certain degree in that business affecting many nations worldwide is run by corporations. An argument in support of corporate criminal liability is that the corporate body is more identifiable than the members constituting it.

5.3 ARGUMENTS FOR AND AGAINST CORPORATE CRIMINAL LIABILITY

This is a hot debate world-wide with voluminous literature debating the desirability of imposing criminal liability on corporations. Mueller compared the development of the theory of corporate criminal liability in countries with an Anglo-American legal system influence to the growth of weeds because “nobody bred it, nobody cultivated it, nobody planted it, and it just grew”.

5.3.1 CRITICISM OF CORPORATE CRIMINAL LIABILITY

Critics of corporate criminal liability often ask whether corporate bodies should be punished for human ambitions. According to Hale criminal liability and human consciousness co-exist. A human being has two great faculties: understanding and liberty of will and as a result can be subjected to law. Consequently a human being can be guilty and be punished for the violation of that law, which in respect of these two great faculties, namely that he has a

References:

348 Friedman “In Defence of Corporate Criminal Liability” 847.
349 Snyman Criminal Law 249.
353 Supra.
355 Supra.
capacity for duty to obey.\textsuperscript{356} This explains the reason why it may be dangerous to impute criminal liability to corporations, which by their nature lack consciousness.

Many nations world-wide do not criminalize corporate actions, because there is no basis in empirical research to justify a departure from the general rule of \textit{mens rea}, a standard that can sensibly be applied only to human beings and not to corporations.\textsuperscript{357} This view appears to be in line with the corporate culture which is proposed to be the form of liability where the corporate policy shall be made equivalent to the corporate body’s intention.\textsuperscript{358}

Another view is that both the courts and Parliaments never considered the cumulative merits or demerits of imposing criminal liability on corporate bodies.\textsuperscript{359} They failed to consider the principle or its practical implications.\textsuperscript{360} Some critics do not see the need of imposing fines at the expense of serious harm and great profits made by the corporations.\textsuperscript{361}

It is important to consider whether we should make a distinction between corporate bodies and human beings. Some authors regard the existence of a corporate body as a mere legal fiction, being an entity that can never function without the presence of a human being.\textsuperscript{362} The corporate body does not have morals and feelings, hence the question: why punish the corporations at all?\textsuperscript{363}

\textbf{5 3 2 ARGUMENTS IN FAVOUR OF CORPORATE CRIMINAL LIABILITY}

Those who support corporate criminal liability argue that this liability promotes safe corporate measures by companies to protect human beings.\textsuperscript{364} Possible criminal liability serves to control those corporate bodies that would seek profit at the expense of people’s lives and risks

\textsuperscript{356} Supra.
\textsuperscript{357} Mueller “Mens Rea and the Corporation” supra.
\textsuperscript{358} Fisse “Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties” (1990) 13 UNSWLJ 1 15-16.
\textsuperscript{359} Card, Cross & Jones Criminal Law 869.
\textsuperscript{360} Supra.
\textsuperscript{361} Supra.
to their lives.\textsuperscript{365} Criminal liability sends the message that people matter more than profits and reaffirms the value of those who were sacrificed to corporate greediness.\textsuperscript{366}

Without criminal liability corporations would escape moral condemnation for wrongdoing.\textsuperscript{367} Corporate criminal liability will reduce the harm inflicted by corporate bodies.\textsuperscript{368}

Corporate criminal liability is necessary in order to achieve the intention of the legislature in statutes, which regulate pollution, health, safety and business.\textsuperscript{369} The value of human health and safety, for example, would be regarded as less important when denied by corporations as opposed to the beliefs of individuals.\textsuperscript{370} Corporate exemption from criminal liability would undermine the condemnatory effect of criminal liability on individuals in respect to similar conduct and ultimately diminish the moral authority of the criminal law as a guide to rational and accepted behaviour.\textsuperscript{371}

\section*{5.4 Civil Liability v Criminal Liability}

The main debate is whether solutions should be sought from criminal law or civil law or both. One school of thought suggests that corporate criminal liability concerns criminal behaviour which demands the application of criminal law even if it is applied to a legal person.\textsuperscript{372} The other school of thought is of the view that civil sanctions are the best tool to deal with the conduct of corporations which are not natural persons.\textsuperscript{373} Criminal and civil corporate liability have two things in common, namely the imposition of liability on the corporation and the aim of deterrence.\textsuperscript{374}

\begin{footnotesize}
\begin{enumerate}
\item[365] Reed & Seago \textit{Criminal Law} 184.
\item[367] Friedman “In Defence of Corporate Criminal Liability” 855.
\item[368] Wells \textit{Corporations and Criminal Responsibility} 15.
\item[370] United States v Wilson 133 F.3d 251 4th Cir.1997.
\item[371] Friedman “In Defence of Corporate Criminal Liability” 858.
\item[372] Friedman “In Defence of Corporate Criminal Liability” 833. He defends corporate criminal liability.
\item[374] Supra 1492.
\end{enumerate}
\end{footnotesize}
5.4.1 CIVIL LIABILITY

Some critics of corporate criminal liability maintain that corporate criminal liability serves no purpose because there are civil enforcement strategies that can be used.\footnote{Khaana “Corporate Criminal Liability: What Purpose Does it Serve?” supra 1534.}

The criminal route stigmatises the company being prosecuted,\footnote{Block “Optimal Penalties Criminal Law and the Control of Corporate Behaviour” (1991) 71 B.U.L. Rev 395 414-15. This writer maintains that reputation loss occurs from both criminal and civil liability.} and has the effect that customers and employees of the company might refuse to deal with the company in the future.\footnote{Charney “Non legal Sanctions in Commercial Relationships” 104 Harvard Law Review 373 393-397.} The stigma results in damage to the reputation of the corporation,\footnote{Fischell & Sykes “Corporate Crimes” (1996) 25 J Legal Stud 319 324 332.} and could result in over deterrence.\footnote{Supra.}

Khaana argues that\footnote{Khaana “Corporate Criminal Liability: What Purposes Does It Serve?” supra 1477.} there is no reason why corporate criminal liability should be regarded as the best way to influence corporate behaviour because corporations cannot be imprisoned. Fischell and Sykes\footnote{Fischell & Sykes “Corporate Crimes” supra 319 320.} support this view and argue that civil remedies are more appropriate. Khaana argues that one must compare the net benefit of imposing alternative liability strategies such as the civil liability forum.\footnote{Khaana “Corporate Criminal Liability: What Purpose it Serve?” supra 1492.} The public enforcement goal can be efficiently accomplished through civil liability regimes.\footnote{Khaana “Corporate Criminal Liability: What Purpose it Serve?” supra 1521.} Civil proceedings may allow for information-gathering powers similar to criminal proceedings, and would lessen the effect of the corporate criminal liability.\footnote{Hughes “Administrative Subpoenas and the Grand Jury; Converging Streams of Criminal and Civil Process” (1994) 47 VAND. L. REV 573 574-5.}

Corporate criminal liability discourages the corporation from creating effective incentives in order to engage in social optimal behaviour.\footnote{Fischell & Sykes “Corporate Crimes” supra 342-343.} Corporations do not spend enough money to ensure that the internal corporate monitoring prevents misconduct.\footnote{Fischell & Sykes “Corporate Crimes” supra 323-4.} Economic analyses indicate that civil liability in the corporate context may be a more efficient deterrent than criminal liability.\footnote{Khaana “Corporate Criminal Liability: What Purpose it Serve?” supra 1530.}
The imposition of criminal sanction on a corporation, an artificial entity which can possess no state of mind, is questionable in the absence of some theory which ascribes fault to the corporation itself, rather than to its officers, directors and employees.\textsuperscript{388} To prosecute the directors and servants of the corporate body is not fair and effective, because the convictions of the corporation’s officers and employees will not change the policy of the corporation and the way it functions.\textsuperscript{389}

Criminal corporate liability is not as efficient as civil liability, because the sanctions used to control unlawful corporate conduct, such as fines, probation, debarment, loss of licence and related penalties exist in corporate civil liability.\textsuperscript{390} Imposing a fine is cheaper to administer than any other sanction because there are administrative fines which can be imposed without taking the corporate body to court.\textsuperscript{391} Debarment would prevent the corporations conducting business with government from contracting with government departments for a period specified by the court in the debarment order.\textsuperscript{392} Corporate probation occurs when the corporate body is compelled by a court to change those policies and procedures that were amenable to the commission of the offence.\textsuperscript{393}

\textbf{5.4.2 CRIMINAL LIABILITY}

Corporate crime is a contravention of regulations intended to control corporations’ conduct and is a commission of an offence such as any other offence applicable to individuals.\textsuperscript{394} The offences committed in breach of those regulations are intended to protect the public and employees on issues of health, safety at the work place, and in general.\textsuperscript{395} Corporations can also be convicted of public welfare offences.\textsuperscript{396}

The majority view appears to be that the doctrine is ill considered, but this may be due to the fact that critics are more likely to voice their opinions than those who are satisfied with the

\textsuperscript{388} Radin “The Endless Problem of Corporate Personality” (1932) 32 Columbia Law Review 643 657.
\textsuperscript{389} Stessens “Corporate Criminal Liability: A Comparative Perspective” 493-520.
\textsuperscript{390} Khanna “Corporate Criminal Liability: What Purpose Does it Serve?” supra 1533.
\textsuperscript{391} Gruner \textit{Corporate Crime and Sentencing} (1994) 13.2.3. 757.
\textsuperscript{392} Clarkson & Keating \textit{Criminal Law} 248.
\textsuperscript{393} Wells \textit{Corporations and Criminal Responsibility} 3-5.
\textsuperscript{394} Supra.
\textsuperscript{395} Wells \textit{Corporations and Criminal Responsibility} 5-6.
Another argument is that the corporation should be criminally liable because it has corporate influence on employees, who are likely to engage in actions that they otherwise would not have engaged in, but for the employment.

There is an incipient consensus developing throughout the world that normalisation of corporate crime is a requirement for satisfactory control of organizational law violation. The state as the custodian of the rights of its citizens has a legitimate interest in prosecuting those who breach regulations and commit crime.

Corporate criminal activity needs to be regulated because a corporation can kill, maim and poison. Just like the case with individuals there is occasional deviance by corporations. Corporations can create hazardous situations, which are risky to humankind. Civil remedies alone cannot control such conduct.

Any conduct which is a threat to public safety invites the application of public law, which includes criminal law. The purpose of criminal law is to lay down acceptable behavioural standards in our societies, communities and nations. Criminal law is one of the methods used to ensure social control, but it is different in that it carries punishment.

There are also transnational corporate crimes, which are the result of the organized conduct of corporate bodies that do business in two or more nations. The prevention of organized crime is a priority of most nations. By charging individuals who work for a business involved with a crime and related activities conducted on behalf of business interests, society is directly recognizing that the business is not always an anonymous body devoid of

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398 Friedman “In Defence of Corporate Criminal Liability” 852.
400 Wells Corporations and Responsibility 6.
401 Supra.
402 Supra.
403 Supra.
404 Clarkson & Keating Criminal Law 228.
406 Supra.
407 Clarkson & Keating Criminal Law 2.
408 Stessens “Corporate Criminal Liability: A Comparative Perspective” 494.
409 Supra. This necessitates the harmonisation of principles of corporate criminal liability by various nations.
individual actors. Coercive powers of the state should be used where there is harm directed at the public.

Corporate bodies cannot be imprisoned, and they are sentenced to pay fines. Paying fines is an integral characteristic of criminal law. In *New York Central & Hudson River Railroad Company v United States* the court held that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting. Corporations are major role-players in the corporate world and to exonerate corporations from criminal liability, based on the view that corporations lack capacity to commit crimes, would eliminate the reason for controlling corporate conduct.

It is submitted that corporate criminal liability has better procedural protection measures than corporate civil liability because it has stronger enforcement mechanisms, more severe and, arguably, unique sanctions (such as stigma) and is a better deterrent.

### 5 4 3 THE EFFECT OF IMPOSING BOTH CRIMINAL AND CIVIL LIABILITY

It is common for certain actions to have both civil and criminal consequences. Criminal and civil remedies supplement each other. Using both remedies has been followed for centuries all over the world.

Asset forfeiture, commonly used in some countries, including South Africa, in order to fight the profiting in crime, is applied in criminal courts, although having civil law procedure and consequences. The state confiscates money, goods and property bought with money which was unlawfully obtained. This system applies to individuals and corporations. Asset forfeiture is a supplementary measure against the corporation which is essential because it deprives the

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410 Wells *Corporations and Responsibility* 14, 17.
411 Supra.
412 212 U.S. 481 1909.
413 Wells *Corporation and Responsibility* 8-12.
corporate body the fruits of crime.\textsuperscript{415} It addresses both criminal and civil law objectives in that it is justified by the principle of restoration.\textsuperscript{416}

Simpson researched whether criminal penalties against corporations and/or their culpable employees are effective strategies\textsuperscript{417} and concluded that, at best, results of the rare studies are open to doubt.\textsuperscript{418} She found only a few oddments in her research to support either viewpoint and came to the conclusion that such studies are not conclusive.

It is wise to implement any advantageous programme such as a compliance programme whether under civil or criminal law. A compliance programme is any programme that seeks to ensure that the corporate body complies with the law.\textsuperscript{419} For corporations, just like individuals, it is possible to use both criminal and civil corporate criminal liability.

5.5 THEORIES OF PUNISHMENT AND CORPORATE CRIMINAL LIABILITY

Coffee explains that the study of corporate criminal liability has been confused by authors who are interested in justifying the use of retributive principles on corporate bodies.\textsuperscript{420} This approach complicates how the legal fiction of corporate personality can function with legal fiction of \textit{mens rea}, and fails to explain how deterrence is applicable when the offence has been committed by the corporation.\textsuperscript{421}

Fines imposed on the companies are paid to the detriment of the shareholders who own the corporate body.\textsuperscript{422} This is unnecessary punishment because they have no control over the functionaries and the management of the company except the right to vote them out, a right that is applied late when damage has been done.\textsuperscript{423} Occasionally this affects the innocent consumers of the product because the price may be increased.\textsuperscript{424}

\begin{itemize}
  \item \textsuperscript{415} Lederman \textit{The Journal of Criminal Law and Criminology} (1985) 332.
  \item \textsuperscript{416} Supra.
  \item \textsuperscript{418} Supra.
  \item \textsuperscript{419} Huff, Note “The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach” (1996) 96 \textit{Columbia Law Review} 1252-1253.
  \item \textsuperscript{421} Supra.
  \item \textsuperscript{422} Lederman \textit{The Journal of Criminal Law and Criminology} (1985) 315 & 319.
  \item \textsuperscript{423} Supra.
  \item \textsuperscript{424} Smith & Hogan \textit{Criminal Law} 186.
\end{itemize}
Clarkson and Keating argue that individuals within the company are not the only ones who deserve to be punished, but in order to be deterred from committing crime the company should also be punished.425 The corporate structure places corporate pressures on the employees, and those pressures continue to exist even after the employee has been sacrificed by the corporate body.426

Lederman submits that corporate criminal liability is a challenge to the ideological and normative basis of criminal law which is that of expression and operation.427 This view is correct because it was the sudden need to control crime which led to the imposition of corporate criminal liability without established substantive law to suit the unique nature of corporate bodies, and to determine their liability.

5 5 1 DETERRENCE

The deterrence theory proposes that punishment must deter not only the offender but also future offenders.428

Critics of corporate criminal liability assume that deterrence of unlawful conduct is the exclusive aim of both civil and criminal corporate liability.429 Deterrence cannot be seen as the sole purpose of punishment and should be taken into account with other theories of punishment, such as rehabilitation and prevention to be the central justification for criminal liability.430

Deterrence alone is concerned with promoting “certain socially desirable consequences” or “good” ends.431 The potential imposition of punishment for wrong doing serves to encourage lawful behaviour by creating incentives to engage in reasonable conduct.432

425 Clarkson & Keating Criminal Law 245-6.
426 Supra.
428 Snyman Criminal Law 19-21.
429 Friedman “In Defence of Corporate Criminal Liability” 833-858, 840.
431 Supra.
432 Friedman “In Defence of Corporate Criminal Liability” supra 841. See also Fischell & Sykes “Corporate Crimes” supra 322. They argue that civil remedies are most effective.
Optimal deterrence of misconduct in the corporate context requires that the law offer incentives up to the point at which marginal cost would exceed the marginal gain in the form of reduced social harm from unlawful doings.\textsuperscript{433}

According to Friedman\textsuperscript{434} to eradicate the principle of corporate liability on the basis that it is not a deterrent is a mistake because it overlooks retribution as a normative basis for criminal liability.\textsuperscript{435} Even in the corporate world there should be moral condemnation. There is a general feeling, based on public policy, that corporations just like individuals, deserve to be punished or morally condemned for actions they do unlawfully.\textsuperscript{436} It is necessary to send a strong message to those controlling the company that unlawful acts are prohibited and to warn the public about such unlawful conduct.\textsuperscript{437}

The critics maintain that criminal proceedings against the individual offender are more deterrent than criminal proceedings based on derivative liability because in the latter scenario the corporate body pays.\textsuperscript{438}

\textbf{5 5 2 RETRIBUTION}

The theory of retribution is based on the need to avenge, being the expression of the society’s anger and hate for the wrongdoing.\textsuperscript{439} It restores the legal balance which was disturbed by the commission of crime; it also assures the law-abiding citizens that crime does not pay.\textsuperscript{440}

Corporations are not inherently immune from expressive retributive concerns, because they possess discrete identities within the community to which expressive conduct can be ascribed.\textsuperscript{441} The corporation can suffer moral condemnation for its wrongdoing through criminal conviction and punishment, thereby vindicating the proper valuation of persons and

\textsuperscript{433} Fischell & Sykes “Corporate Crimes” \textit{supra} 324.
\textsuperscript{434} Friedman “In Defence of Corporate Criminal Liability” 834.
\textsuperscript{435} \textit{Supra}.
\textsuperscript{436} \textit{Supra}.
\textsuperscript{437} Smith & Hogan \textit{Criminal Law} 186.
\textsuperscript{438} Lederman \textit{The Journal of Criminal Law and Criminology} Vol 76 318.
\textsuperscript{439} Snyman \textit{Criminal Law} 14.
\textsuperscript{440} \textit{Supra} 14-18.
\textsuperscript{441} Fischell & Sykes “Corporate Crimes” 319 321. These writers call this argument “naïve”. 
goods whose true worth was disparaged by the corporation’s conduct just as it is in the case of an individual wrongdoer.\textsuperscript{442}

When the corporation is convicted it is the effectuation of expressive retribution, just as in cases of individual accused.\textsuperscript{443} Notwithstanding the retributive character of some aspects of civil liability, only criminal liability is understood against the background of social norms, conveying the moral blame that expresses hate and anger which is a prerequisite for retribution.\textsuperscript{444}

Civil and criminal liability have distinct social meanings, and carry a judgment of liability differently in the civil context than in the criminal context.\textsuperscript{445} Findings of civil and criminal liability are not the same for purposes of moral blame.\textsuperscript{446}

Therefore retribution has less effect on the corporation as being a mental image than it has on its managers and agents who are physical beings.\textsuperscript{447} Retribution has no meaningful purpose in corporate criminal liability in so far as it relates to the moral fitness of the citizens.\textsuperscript{448} It is necessary to condemn the unlawful conduct whether it has been done in the name of the corporation or not. Civil sanction alone may not be enough. Civil remedies involve procedures which are not costly and are socially desirable.\textsuperscript{449}

The critics argue that retribution is not an important justification for imposing liability on corporations, because the objective of vindicating from the point of view of the victim and society cannot be achieved by punishing corporate bodies.\textsuperscript{450} The corporate body’s lack of physical being makes it insensitive to punishment as mode of social control.\textsuperscript{451} The shareholders’ profit in criminal activity (weighed against the objective of this theory) is more,
especially when the fine is less than profits made. Such unlawful profits gained infringe upon social balance in the society which suffers from unfair distribution of assets and resources. This can be remedied only by asset forfeiture which is to be discussed below.

5 5 3 REHABILITATION AND PREVENTION

Disobedient corporations can be punished, for instance, by ordering the corporate bodies to allocate financial or personnel resources in order to perform certain duties for the benefit of public welfare, such as community service. This punishment not only serves to rehabilitate the corporate body but also prevents the future commission of similar illegal conduct. The community service rendered by the corporate body may not give rise to stigma but rather to a worthy name for the service it renders to the community.

Asset forfeiture which applies to natural persons also applies to corporate bodies. Asset forfeiture rehabilitates the corporate body and reinforces the lesson that crime does not pay. The question is whether it is the delinquent corporation or its delinquent employees who may be rehabilitated, because employees may be unwilling to be rehabilitated.

The most radical punishments for corporations include incarceration through “quarantine”, where the corporation may be forbidden to conduct certain activities or to conduct business in specified areas. The punishment which is equivalent to death penalty occurs where the corporation is ordered by court to dissolve.

5 6 CONCLUSION

Arlen argues that empirical research should be conducted to determine the number of offences committed by corporate bodies and then it should be correlated with the various
consequences.⁴⁶¹ This could provide a better understanding of what should be amended or moderated in the law of corporate criminal liability.⁴⁶²

Corporate criminal liability is an established principle of law in many legal systems. The solution is to modernize the law by putting together those forms of sanctions, both under civil law and criminal law, having a logistic advantages such as alternative sentencing.⁴⁶³ Wisdom gained from having both criminal and civil remedies regarding individuals should apply to corporations. Both criminal and civil corporate criminal liability shall continue to be effective measures to regulate corporate conduct which is harmful to the public.

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⁴⁶² Supra.
⁴⁶³ Clarkson & Keating Criminal Law 247.
CHAPTER 6
CONCLUSION

The issue to be decided is whether to jettison corporate criminal. It can be argued that it exists for a purpose. 464 Throughout the world there is consensus that corporate criminal liability is a requirement for satisfactory control of organised crime. 465

The corporate body has distinct existence which is separate from its members. It is a legal person with rights in the Constitution similar to those of natural persons. Its liability is based on attribution in that the conduct and fault of the employees are considered to be those of the corporate body. 466

The corporate guilt proposed in English law is more related to the principle of aggregation. 467 It advocates for the liability of the corporate body where there was management failure, which resulted in death of persons in instances where poor health and safety policies and practice played a part. 468

In the South African context it is submitted that our problem should not be directed to the existence of the Section 332(1), but that we should rather concentrate on ways of how to adapt it to our changing conditions. We must develop strategies for limiting its harshness. For example, to hold the company liable for criminal actions of a servant is unfair, because the corporation can be liable for actions of the lowest employee or a messenger. The lowest servant in most cases is not aware of the substance of the policies of the corporate body. Although it may be argued that if the servants do not know the contents of the policies of the company it is the fault of the company, as good corporate governance requires the company to educate all servants and employees on corporate cultures and the content of policies of the entity. The best plan is to eliminate the wider and narrower limits and put corporate criminal liability within acceptable limits. 469

466 Reed & Seago Criminal Law 195.
Du Plessis submits that it would be fair and just if the corporate criminal liability in section 332(1) is limited to directors and those officers who are controlling the company, i.e. those directing the mind and will of the corporation.

This view is acceptable because it makes corporate criminal liability direct liability, which is a step closer to the liability of natural persons. This new liability can result in corporate killing, being a new species of an offence committed only by corporate bodies. In Britain the Law Commission recommended an offence which can be committed by a corporate body if the management failure caused the death of a person. Corporate punishment and corporate criminal liability have both philosophical and economic challenges.

Adopting various other forms of punishment, such as corporate probation orders, can solve problems relating to the punishment of the corporate body by fine. This punishment entails ordering the corporate body to engage in certain projects which are subject to certain supervision. This ensures a sentence that is rehabilitative. The corporate body on its own will use internal measures to discipline its employees, which will ensure that the misconduct is not committed again. Only recalcitrant corporations should receive severe deterrent punishment. There are also many available options of giving penalties to the corporate bodies which are creative: such as restraining orders, and orders to stop the corporate body from trading. Those orders can be reserved for the more serious transgressions by the corporate body.

It is also suggested that corporate bodies be ordered to do community service. Community service takes away the stigma from the corporate body. Instead, the corporate body is involved in a constructive project, which gives fame and reputation to the corporate body which serves the community.

470 Simester & Sullivan Criminal Law 261.
471 In Australia the Criminal Code Act 1995 Part 2.5 introduced the corporate culture as the Federal Law.
473 Ashworth Principles of Criminal Law 121.
474 Fisse & Braithwaite Corporations Crime and Accountability 42-83.
475 Clough & Mulhern The Prosecution of Corporations 195-212.
476 Fisse & Braithwaite Corporations Crime and Accountability 42-3 82-3.
The statute law on asset forfeiture, which applies to individuals, may as well be applied to corporate bodies.\textsuperscript{478} Corporate criminal liability has developed as a result of need and convenience.\textsuperscript{479} Although this may be an imperfect law, corporate criminal liability appears to be accepted by some communities worldwide.\textsuperscript{480}

Some people argue that corporate criminal liability is desirable and just. An important consideration is how it should be formulated, based on substantive criminal law.\textsuperscript{481} Wells argues that this may depend on the purpose of the punishment.\textsuperscript{482}

Corporate liability is necessary whether it is based on individual or collective liability. The more appropriate view is that corporate criminal liability should be based on the management of the corporate body, considering its policies.\textsuperscript{483} It is submitted that it is not enough to base the liability of the corporation on its controlling officers. It does happen that the corporate body can have more than one person directing the will and mind of the corporation.\textsuperscript{484} In \textit{Dredge & Dock Co v R},\textsuperscript{485} the Canadian Supreme Court expanded the identification theory on the understanding that corporations have more than one direction mind”.

The best solution in refining the corporate criminal liability is to mix the individual and the corporate blameworthiness.\textsuperscript{486} Another view is that it is best to move from derivative forms of liability to the organizational models of corporate liability.\textsuperscript{487} This liability places more emphasis on the corporations’ policies, practices and corporate culture.

The principle, on which corporate criminal liability should be based, urgently needs review in South Africa.\textsuperscript{488} We cannot rely on one basis for liability, i.e. the agency when various models serve different purposes. The organizational principle of collective responsibility may also be necessary for South African needs.\textsuperscript{489} It can legitimatize the liability of the corporate

\textsuperscript{478} Burchell \textit{Principles of Criminal Law} 569.
\textsuperscript{479} Card, Cross & Jones \textit{Criminal Law} 869.
\textsuperscript{480} \textit{Supra}.
\textsuperscript{481} Wells \textit{Corporations and Criminal Responsibility} 146.
\textsuperscript{482} \textit{Supra}.
\textsuperscript{483} Burchell \textit{Principles of Criminal Law} 563.
\textsuperscript{484} \textit{Supra}.
\textsuperscript{485} 1985 1 SCR 662.
\textsuperscript{486} Burchell 564 citing Clough and Mulhern \textit{The Prosecution of Corporations} 139.
\textsuperscript{487} Ashworth \textit{Principles of Criminal Law} 120-121.
\textsuperscript{488} Burchell \textit{Principles of Criminal Law} 565.
\textsuperscript{489} \textit{Supra}.
body in that it will deal with corporate faults. It can serve as an important ground to determine collective blameworthiness or mens rea that can be attributed to the corporate body. The organizational theory should address the control of managers “since the main issue in management is about control”.

The most effective way of dealing with corporate crime is to directly punish the corporations. Punishing individuals is not enough and is inefficient. Punishment in the form of a fine in our country is restrictive. There are many sentence options available to punish individuals. Where payment of a fine does not serve the desired purpose civil remedies must be applied.

Corporate criminal liability occurs when the agent’s mental element is imputed to the corporation. This is a common practice employed in many countries with tort law systems based on mens rea. The principle of ultra vires applied in Continental countries does not object to corporate criminal liability.

It is easier to enforce criminal sanctions through international co-operation than it would be to enforce the civil liability and administrative sanctions. Adopting compliance programmes is another added measure used in other legal systems. Use of these programmes does not absolve the corporation from liability but at times it may serve as a mitigating factor. The shift in people’s attitudes to safety and health hazards resulted in the focus being directed to natural person rather than corporate accountability. There is international co-operation in combating crime throughout the world. International harmonization of the law of corporate liability could improve the situation.

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491 Wells Corporations and Criminal Responsibility 150.
492 Stessens “Corporate Criminal Liability: A Comparative Perspective” 518.
493 Stessens “Corporate Criminal Liability :A Comparative Perspective” 519.
494 Supra.
496 United States v Beusch 596 F 2d 871 C9th Cir 1979.
498 Such as International Statutes to combat Corruption and Money Laundering.
499 Stessens“Corporate Criminal Liability: A Comparative Perspective” 494.
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INTERNET SOURCES

Corporate Crime

Daniel R. Fischel; Alan O. Sykes


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IN DEFENSE OF CORPORATE CRIMINAL LIABILITY

LAWRENCE FRIEDMAN

Corporations move like poltergeists through our material world: We register their presence by the tangible evidence of their actions, whether it be the construction of a manufacturing facility, the termination of employees, or the sponsorship of a sporting event. And yet corporations are regarded as more than mere ghosts. Like the actions of a corporeal person, the conduct of a corporation has consequences, and so we believe the law should set similar limits on the behavior of each. Indeed, it has become commonplace for federal and state governments to seek to impose criminal liability upon corporations for their actions in such areas as tax, securities, antitrust, insurance and environmental law.

Notwithstanding the ubiquity of federal and state corporate criminal liability regimes, there has been surprisingly little studied consideration by American jurists and legal commentators of the raison d'être for corporate criminal liability. Critics of corporate criminal liability have recently sought to correct this oversight. In his article, Corporate Criminal Liability: What Purpose Does It Serve?, Professor V.S.

* J.D., Boston College Law School; LL.M., Harvard Law School. This essay benefited immeasurably from discussions with, and the thoughtful comments and suggestions of, Kathleen Burdette, Neals-Erik William Delker, Bradley Faris, Mark Michelson, Laura Palmer, Carlos Perez-Albuerne, Motoko Rich and Carol Steiker. The views and mistakes remain my own.

1. Though corporate criminal liability has existed in some form since at least the 1800s, the number of criminal prosecutions against corporations has in recent years increased dramatically. See Sean Bajkowski & Kimberly R. Thompson, Note, Corporate Criminal Liability, 34 AM. CRIM. L. REV. 445, 445 (1997); Note, Growing the Carrot: Encouraging Effective Corporate Compliance, 109 HARV. L. REV. 1783, 1783 (1996).


Khanna concludes, on efficiency grounds, that corporate criminal liability in fact serves no purpose whatever: "After all," Khanna writes, "corporations cannot be imprisoned," and "it is not clear that corporate criminal liability is the best way to influence corporate behavior."4 And in their essay, Corporate Crime, Professors Daniel R. Fischel and Alan O. Sykes likewise conclude that, because corporations cannot be imprisoned, criminal liability ultimately "is inferior as a practical matter to an appropriate corrective on the civil side."5

In response, I suggest that these critics of corporate criminal liability may be incorrect—that corporate criminal liability is not without purpose. The problem lies in a foundational premise of the critics’ arguments: By centering the case for eradicating corporate criminal liability exclusively upon its asserted inefficiency as a deterrent to unlawful acts, Khanna, Fischel, and Sykes overlook retribution as a normative basis for criminal liability and accordingly fail fully to appreciate that, even in the corporate context, moral condemnation remains a valid aim of the criminal law. Indeed, the attributes of modern corporate existence support the argument that corporations, like individuals, can and should be morally condemned for actions that transgress the law.

This Essay proceeds thus: In Part I, after briefly visiting the history of corporate criminal liability, I review the arguments made by the critics who regard corporate civil liability as superior to criminal liability in terms of social desirability. In Part II, I suggest that, in associating social desirability exclusively with efficient deterrence, Khanna, Fischel, and Sykes slight the retributive rationale for criminal liability. To provide a framework for analysis, I sketch Kantian and expressive retributive theories of criminal liability. This leads to a discussion in Part III of the applicability of these retributive theories in the corporate context. I argue that corporations are susceptible to expressive retributive concerns because they have independent identities in the community, based upon attributes—identifiable personae and a capacity to express moral judgments—that substantively distinguish them from their owners, managers and employees. In Part IV, I address

4. Id. at 1478.
5. Fischel & Sykes, supra note 2, at 322.
the question whether the goals of expressive retribution in the
corporate context can be duplicated by civil liability regimes.
Concluding that civil liability cannot capture the retributive
concerns of criminal liability, I argue in Part V that
corporations should continue to be subject to the same dictates
that the community imposes upon individuals insofar as
criminal conduct is concerned.

I.

At the time of the framing of the United States Constitution,
private corporations lurked at the periphery of the American
commercial landscape, and corporations did not share in the
rights and liberties the Constitution promised natural citizens.
It was not long, though, before lawyers representing
corporations began to challenge accepted understandings of
the corporate form's supposed limitations. In an 1809 case,
addressed the question whether a corporation could invoke the
diversity jurisdiction of the federal courts. The Chief Justice
answered in the negative, stating that a corporation "is
certainly not a citizen," for a corporation is an "invisible,
intangible, and artificial being, . . . [a] mere legal entity."

By mid-century, the Supreme Court had reconsidered this
view. In the 1853 case *Marshall v. Baltimore & Ohio Railroad
Company*, the Court held that, while a corporation is an
artificial being, it may invoke diversity jurisdiction in the
federal courts under the legal fiction that its stockholders are
presumed to be citizens of the state of incorporation. And so,
notwithstanding their "invisibility" and "intangibility,"
corporations gained entry into the federal judicial system as
participants equal in standing to individuals.

Some fifty years later, the Supreme Court ushered in the
modern age of corporate criminal liability in *New York Central &
Hudson River Railroad Company v. United States*. In that case,
the government alleged that New York Central had violated the Elkins Act,\(^\text{11}\) section 1 of which provided, among other things, 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 . . . . 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 that of the person . . . .\(^\text{12}\)

Appealing its conviction for Elkins Act violations to the Supreme Court, New York Central urged the Court to hold the Act's authorization of corporate criminal liability unconstitutional on the ground that Congress had "no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged."\(^\text{13}\) Harking to the corporation's "invisibility" and "intangibility," the railroad maintained that "owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case."\(^\text{14}\)

Drawing from the civil law of tort, the Supreme Court rejected New York Central's argument. On the facts, the Court found no impediment to holding "that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting."\(^\text{15}\) The

\(^{12}\) Id. § 1
\(^{13}\) New York Central, 212 U.S. at 492.
\(^{14}\) Id.
\(^{15}\) Id. at 494.
public policy interests to which the Court alluded, moreover, were straightforward: Reasoning that corporations conduct a vast amount of business in interstate commerce, the Court concluded that to immunize corporations from criminal liability based upon the “exploded” doctrine that corporations lack the capacity to commit crimes would eliminate perhaps the sole means of controlling corporate conduct.  

In *Corporate Criminal Liability: What Purpose Does It Serve?*, Khanna speculates that the public nature of the harms allegedly caused by corporations in no small part inspired the Court’s policy-based decision in *New York Central*. While civil enforcement was possible in the early 1900s, mature civil enforcement mechanisms did not exist. Khanna accordingly concludes that “corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability.” Though government developed effective civil enforcement mechanisms over time, courts and commentators have to this day essentially accepted the existence of corporate criminal liability without question; as Fischel and Sykes observe in *Corporate Crime*, “the common-law rule that corporations cannot commit crimes is now nothing more than a historical curiosity.”

Given that the chasm between government’s civil and criminal enforcement powers has now narrowed considerably,

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16. See id. at 494-96. The Court noted that “interstate commerce is almost entirely in their hands.” Id. at 495.

17. Khanna, supra note 3, at 1486; see also Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1117-18 (1991) (noting that at the time of *New York Central*, “administrative regulation and supervision was in its infancy”) [hereinafter *Corporate Ethos*].

18. In the United States today, the scope of corporate criminal liability is broad. A corporation may be liable for nearly any crime, “except acts manifestly requiring commission by natural persons, such as rape and murder.” Khanna, supra note 3, at 1488. To impose criminal liability on a corporation, typically three requirements must be met. First, a corporate agent must have committed an illegal act with the requisite state of mind. This state of mind can be proven by showing either that a particular agent had the necessary state of mind, or by showing that the “collective knowledge” of the employees reflects the requisite state of mind. See id. at 1489; see also United States v. Bank of New Eng., 821 F.2d 844, 856 (1st Cir. 1987) (“A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability.”). Second, the agent must have been acting within the scope of employment, which includes any act that occurs “while the offending employee was carrying out a job-related activity.” Khanna, supra note 3, at 1489 (internal citations omitted). Finally, “the agent must have intended to benefit the corporation.” Id. at 1490.

19. Fischel & Sykes, supra note 2, at 337.
the critics question whether corporate criminal liability remains "socially desirable" today. Viewing social desirability through the prism of economic analysis and operational efficiency, Khanna argues that to determine whether the imposition of corporate criminal liability is socially desirable, "one must compare the net benefits of imposing alternative liability strategies," such as a civil liability regime. Khanna maintains that the comparison is a fair one because both criminal and civil liability share two characteristics: the imposition of liability on the corporation and the goal of deterrence. Indeed, in undertaking this comparison, Khanna expressly considers deterrence to be "the aim of both corporate criminal liability and corporate civil liability." Under an economic analysis, criminal liability fares poorly as compared to civil liability. Khanna notes that the continuum of sanctions available to deter unlawful corporate conduct—cash fines, probation, debarment, loss of license and related penalties—"are or can easily be made available in corporate civil liability regimes." And he discounts the potential stigmatizing effect of a criminal conviction. Defining reputational stigma in the corporate context as "the reluctance of others, such as customers and workers, to deal with the corporation in the future," Khanna reasons, for example, that an organization will be unlikely to suffer a reputational loss for engaging in activities such as environmental pollution, because such third-party harm is unlikely to affect a firm's customers directly.

22. See Khanna, supra note 3, at 1493.
23. Id. at 1494.
24. Id. at 1499. Khanna, Fischel, and Sykes assume that nonmonetary penalties, such as imprisonment, are not applicable in the corporate context. See id., at 1478; Fischel & Sykes, supra note 2, at 320.
25. Khanna, supra note 3, at 1500.
26. In further support of his assertion that corporate criminal liability is not socially desirable, Khanna argues that criminal procedure protections are inefficient in the corporate context. He suggests, for example, that the quantum of evidence to obtain a criminal conviction—proof beyond a reasonable doubt—works optimally when the expensive criminal trial serves to avoid the social cost of wrongful imprisonment. Because Khanna believes this is not a factor in the corporate context, he advocates a lower standard of proof as a more efficient deterrent. See id. at 1516-17. Along the same lines, Khanna suggests that criminal
In regard to the public enforcement characteristics of criminal liability regimes—perhaps, in Khanna’s view, the underlying concern in the *New York Central* decision—Khanna notes the importance of such enforcement in circumstances in which private actors could not effectively police corporate behavior:

> If, for example, a firm emits toxic waste into a neighboring area, residents may not know that the waste is harming them. Even if they did, they would probably lack the resources needed to single out the offending firm from surrounding nonoffending firms. In this context, public enforcement would promote efficiency.\(^{27}\)

Khanna asserts that this public enforcement goal can be most efficiently accomplished through civil liability regimes. As an example, Khanna points to the recent emergence of a new legal tool, the civil investigative demand,\(^{28}\) which “suggests that public civil proceedings may allow for information-gathering powers similar to those available in criminal proceedings.”\(^{29}\) And so in this regard as well, corporate civil liability presents the socially desirable option for realizing the beneficial objective of corporate criminal liability—the deterrence of unlawful conduct.\(^{30}\)

Like Khanna, Fischel and Sykes challenge the notion that a criminal liability regime can create effective incentives for procedural protections, which focus upon preventing false convictions, should have little play in the corporate context, again on efficiency grounds. See id. at 1517-19; see also Fischel & Sykes, *supra* note 2, at 331-32 (stating that when “incarceration is not an issue and the goal is merely to force cost internalization, . . . the civil standard of proof and other rules of civil procedure ought function as well in cases involving corporate crime as elsewhere”).

27. Khanna, *supra* note 3, at 1521 (internal citation omitted).

28. The “civil investigative demand” (“CID”) confers the power “to compel the production of documents, to compel written answers to written interrogatories, and to compel oral testimony whenever [there is reason to believe] the person may have information relevant to a civil antitrust investigation.” Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 595 (1994) (discussing the CID powers of the Department of Justice Antitrust Division) (footnote omitted). Currently, the Department of Justice Antitrust Division, the Securities and Exchange Commission, and the Inspectors General, among other federal enforcement agencies, enjoy CID powers. See Khanna, *supra* note 3, at 1523-24.


30. Khanna reasons, for example, that a “government agency . . . can balance, on a case-by-case basis and in the context of its budgetary constraints, the costs of using more powerful and expensive enforcement tools against the likely deterrence benefits of using such tools.” *Id.* at 1530.
corporations to engage in socially optimal behavior.\textsuperscript{31} They begin with the presumption that corporations are nothing more than "webs of contractual relationships consisting of individuals who band together for their mutual economic benefit,"\textsuperscript{32} and that the task of the law is to create incentives for the individuals in corporations to monitor themselves in order to prevent the commission of unlawful acts.\textsuperscript{33} In light of this goal, they question the relative value of reputational stigma in the corporate context:

Criminal convictions may lower the value of the firm because they reveal information to its customers about a pattern of misconduct toward them or because they encourage a spate of civil actions by private plaintiffs. These same effects should follow to a considerable extent from civil actions against corporations by the government and to some degree from private actions as well.\textsuperscript{34}

Fischel and Sykes warn that a powerful stigmatizing effect, such as might accompany a criminal conviction, is not necessarily desirable: Such stigmatization, in their view, could result in overdeterrence, which, in turn, would lead to an inefficiently high level of investment in internal corporate monitoring to prevent misconduct.\textsuperscript{35}

II.

The critics of corporate criminal liability assume that deterrence of unlawful conduct is the exclusive aim of corporate liability regimes. Deterrence traditionally has been viewed as a central justification for criminal liability generally, in conjunction with rehabilitation and incapacitation.\textsuperscript{36}

\textsuperscript{31} See Fischel & Sykes, \textit{supra} note 2, at 342-43 (arguing that while the Exxon Valdez oil spill caused substantial harm, "nothing was gained by prosecuting Exxon criminally").

\textsuperscript{32} \textit{Id.} at 323.

\textsuperscript{33} See \textit{id.} at 323-24.

\textsuperscript{34} \textit{Id.} at 332. Khanna likewise insists that corporate criminal liability is neither the only means by which to communicate a message of condemnation, nor the most effective: "The government presumably could use many other tools, such as news conferences, corporate civil liability, and managerial criminal liability, to accomplish this end." Khanna, \textit{supra} note 3, at 1531.

\textsuperscript{35} See Fischel & Sykes, \textit{supra} note 2, at 324, 332. Khanna undertakes an econometric analysis of stigma, concluding that stigma is socially more expensive in the corporate context than an optimal cash fine sanction. See Khanna, \textit{supra} note 3, at 1511-12.

\textsuperscript{36} See Developments in the Law—Corporate Crime: Regulating Corporate Behavior
Deterrence offers a consequentialist rationale for criminal liability, in the sense that deterrence is concerned with promoting "certain socially desirable consequences," or "good" ends. The potential imposition of punishment for wrongdoing accordingly serves to encourage lawful behavior by creating incentives to engage in responsible conduct. Optimal deterrence of misconduct in the corporate context requires that the law offer such incentives up to "the point at which . . . marginal cost would exceed the marginal social gain in the form of reduced social harm" from unlawful activity. As Khanna, Fischel, and Sykes demonstrate, economic analysis indicates that on the whole, civil liability regimes may deter unlawful conduct in the corporate context more efficiently than criminal liability regimes.

But deterrence has never been regarded as the sole justification for criminal liability. Retribution, too, has long been seen as providing normative support for criminal liability regimes. Oliver Wendell Holmes, Jr. in 1881 acknowledged the view that "the fitness of punishment following wrong-doing" could be regarded as "axiomatic." Holmes was referring to principles whose origins may be traced to the classical, retributive framework of Immanuel Kant. Under Kant's theory, individuals in civil society have an intrinsic human dignity that is denied them when the state seeks to employ the criminal justice system to serve consequentialist ends, such as deterrence. To accord an individual's inherent dignity the

Through Criminal Sanctions, 92 HARV. L. REV. 1227, 1231 (1979) [hereinafter Developments].
37. Id.
38. Fischel & Sykes, supra note 2, at 324.
39. See Khanna, supra note 3, at 1533 (concluding that "pursuing corporate criminal liability results in society bearing the higher sanctioning costs of stigma penalties and the increased costs of deterring corporate misbehavior created by the procedural protections of criminal law"); Fischel & Sykes, supra note 2, at 322 (concluding that the economic arguments for corporate criminal liability are "ultimately unpersuasive").
40. See Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 COLUM. L. REV. 269, 350 (1996) ("The idea that a single normative theory does or should determine the shape of all criminal doctrines is exceedingly implausible.").
41. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 42, 45 (Little, Brown 1923) (1881).
42. See IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., Hackett Pub. Co. 1999) (1797) [hereinafter ELEMENTS OF JUSTICE]; see also Developments, supra note 36, at 1232 [under a Kantian retributive justification for criminal liability and punishment, "[i]mposing criminal sanctions on a guilty
appropriate respect, the state must punish individuals who violate the law because they have violated the law and only because they have violated the law—with regard, that is, for the consequences that might flow from the imposition of punishment.

To illustrate this theory of retribution, Kant explained:

Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment . . . .43

While this illustration, as H.L.A. Hart remarked, "may well be a parody of modern retributivism,"44 the pure Kantian theory nonetheless remains a benchmark in discussing retributive theories of punishment in the criminal justice context.45

Expressive theory offers an alternative and, perhaps, more palatable, retributive rationale for criminal liability. This approach reflects the sense that the commission of an act the community, through its laws, deems wrong should be met with disapprobation for the sake of the victim and the sake of the community.46 The expressive view posits:

Social norms enable rational behavior by defining how persons (or communities) who value particular goods—whether the welfare of other persons, their own honor or dignity, or the beauty of the natural environment—should

person is justified, not because of the consequences which will result, but because it is morally proper to punish that person"). The modern articulation of the general theory of retribution contains three assertions:

first, that a person may be punished if, and only if, he has voluntarily done something morally wrong; secondly, that his punishment must in some way match, or be the equivalent of, the wickedness of his offence; and thirdly, that the justification for punishing men under such conditions is that the return of suffering for moral evil voluntarily done, is itself just or morally good.


43. KANT, ELEMENTS OF JUSTICE, supra note 42, at 140.
44. HART, supra note 42, at 232.
45. See, e.g., Khanna, supra note 3, at 1494 n.92 (referring the reader to Kant's Metaphysical Elements of Justice for the basis of the retributive rationale).
behave. Actions that conform to, or defy, these norms thus express a person’s (or a community’s) attitude toward these goods.47

On this view, conduct that evinces disrespect for established valuations of persons and goods is regarded as criminal. For example,

[a]long one dimension—say, personal wealth—thief might hurt a person as much as being outperformed by a business competitor. The reason that theft but not competition is a crime . . . is that against the background of social norms theft expresses disrespect for the injured party’s worth, whereas competition (at least ordinarily) does not.48

Criminal liability in turn expresses the community’s condemnation of the wrongdoer’s conduct by emphasizing the standards for appropriate behavior—that is, the standards by which persons and goods properly should be valued.49

The expressive retributivist’s commitment is “to assert[] moral truth in the face of its denial.”50 Criminal liability asserts this truth by countering “the appearance of the wrongdoer’s superiority and thus affirm[ing] the victim’s real value.”51 The expressive rationale, like deterrence theory, is instrumental: There is, as Jean Hampton maintains, a telos to the expressive design. The expressive goal is “to establish goodness” by reinforcing the understanding among community members that persons and goods should be valued in certain ways.52 Contrary to a pure, Kantian view of retribution, then, the expressive approach can be regarded as consequentialist, a means to an end.

Notwithstanding the frequent invocation of deterrence to justify criminal justice regimes, retributive theories continue to provide viable rationales for the criminal law. With this point

47. Kahan & Nussbaum, supra note 40, at 351.
49. See Kahan & Nussbaum, supra note 40, at 351-52.
50. Jean Hampton, The Retributive Idea, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 125 (1988); see also Kahan, supra note 48, at 598 (noting that by imposing criminal liability, “society says, in effect, that the offender’s assessment of whose interests count is wrong”).
51. Hampton, supra note 50, at 130; see also Kahan & Nussbaum, supra note 40, at 352 (arguing that criminal liability reaffirms the political community’s “commitment to the values that the wrongdoer’s own act denies”).
52. Hampton, supra note 50, at 126.
in mind, the next question is whether, as Khanna, Fischel, and Sykes suppose, something peculiar to the incorporeal nature of corporations immunizes them from retributive justifications for criminal liability and punishment.

III.

The view that criminal liability in the corporate context serves only to deter unlawful conduct finds support in the work of numerous commentators.53 The argument, simply stated, is that the corporation qua corporation is an incorporeal entity that lacks the capacity to suffer moral condemnation.54 Khanna, for example, assumes this is the case, noting that corporate decisions and processes are the result of the determinations of managers and agents within the corporation.55 And Fischel and Sykes maintain that the corporation is nothing more than a collection of individuals that lacks a substantive independent identity.56 The corporation accordingly is immune from retributive concerns; we can no more condemn the organization for a criminal act than we could the glass and steel office building its managers


55. See Khanna, supra note 3, at 1494 & n.91 (regarding “deterrence, not retribution, as the aim of both corporate criminal liability and corporate civil liability”). I do not question that corporate managers and agents should also be susceptible to criminal liability as a general matter. See Lawrence Friedman & H. Hamilton Hackney III, Questions of Intent: Environmental Crimes and “Public Welfare” Offenses, 10 VILL. ENVTL. L.J. 1 (1999). Like Khanna, Fischel, and Sykes, I focus in this essay upon the issue of criminal liability and punishment of the corporation qua corporation.

56. See Fischel & Sykes, supra note 2, at 323 (describing corporations as “webs of contractual relationships consisting of individuals who band together for their mutual economic benefit”); see also Byam, supra note 53, at 584 (arguing that a corporation, “as distinct from its board of directors and managers, is not a person and has no ‘mind’”).
and agents occupy.  

So far as pure Kantian retribution is concerned, the critics of corporate criminal liability may well be correct. The Kantian justification for criminal liability is concerned with the moral fitness of citizens. This theory assumes a certain conception of the wrongdoer: that the wrongdoer is equal to other individuals in civil society, and possessed of an inherent dignity that affords him or her an intrinsic worth—a value that is "above all price and admits of no equivalent." The imposition of punishment for—and only for—wrongdoing sanctifies the individual’s intrinsic worth. Absent such punishment, the individual would be denied his or her equal dignity. Whether the individual’s inherent dignity and intrinsic worth derive from the human capacity for rational thought or some other source, to view the corporation as possessing such qualities would seem to be—as the critics of corporate criminal liability contend—an exercise in anthropomorphism. Acknowledgment of this reality necessarily undermines the argument that the corporation is susceptible to Kantian retributive concerns.

But the expressive rationale for retribution, being teleological, involves a different conception of the wrongdoer. Unlike Kantian theory, the expressive rationale is concerned primarily with the wrongdoer’s assessment of the worth of particular persons or goods as communicated through conduct, and the end of the criminal process is seen as the defeat of that incorrect valuation. Expressive theory accordingly entails a relatively "thin" conception of the wrongdoer, as an individual in a community who, through his or her conduct, can express attitudes toward particular persons or goods—attitudes either in conformity with, or in opposition to, the proper valuations of

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57. See Alschuler, supra note 55, at 313 (reasoning that attaching blame “to an artificial person” makes no more sense than attributing blame “to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime”).


59. See KANT, ELEMENTS OF JUSTICE, supra note 42, at 138 (discussing the purposes of punishment).

60. See Byam, supra note 53, at 585 (advising rejection of attempts to anthropomorphize corporations for retributive purposes).

61. See, e.g., Hampton, supra note 50, at 125 (by retributive punishment, the wrongdoer is defeated “at the hands of the victim (either directly or indirectly through an agent of the victim’s, e.g., the state”).
those persons or goods as established in the law.\textsuperscript{62}

A corporation thus can be considered as similarly situated to an individual for purposes of the expressive rationale if it has a discrete identity within a community and expressive potential—that is if, \textit{contra} Khanna, Fischel, and Sykes, a corporation objectively can be viewed as having an identity apart from its owners, managers, and employees to which expressive conduct can be ascribed. In this respect, one might be tempted to argue that, because a corporation can enter into contracts, sue and be sued,\textsuperscript{63} and own property,\textsuperscript{64} it has such an identity and, therefore, is properly subject to criminal liability.\textsuperscript{65} This argument, however, falls short as a justification for expressive retribution in the corporate context: While a corporation’s possession of such rights suggests a separate identity, that identity’s distinguishing features are relatively insubstantial. Indeed, that identity may represent nothing other than the sum of the rights the organization possesses in aid of its business\textsuperscript{66} and enjoys at the sufferance of the legislature.\textsuperscript{67}

For the purposes of expressive retribution, a corporation must possess an identity upon which the community’s judgment can be focused in a meaningful way. The modern corporation, being a complicated creature, possesses at least two attributes that testify to its independent identity within the community by substantively distinguishing it from its owners, managers and employees: an identifiable persona and a capacity to express moral judgments in the discourse of the

\begin{footnotes}
\item[62] See id. at 138 (acknowledging the applicability of the expressive rationale even absent a Kantian conception of individual human dignity).
\item[63] See, e.g., Buckman v. Gordon, 42 N.E.2d 811, 813 (Mass. 1942) (stating that a corporation “has the capacity to make contracts not in contravention of any statute, and may sue and be sued thereon”).
\item[64] See, e.g., Hubbard v. Worcester Art Museum, 80 N.E. 490, 491 (Mass. 1907) (discussing common law recognition of corporate right to hold property).
\item[65] See Fischel & Sykes, supra note 2, at 321 (calling this argument “naive”).
\item[66] See 6 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2785, at 259 (rev. ed. 1997) (noting that corporation’s implied right to own property is properly limited to acquisition of “whatever real property is needed in its business and suitable to the accomplishment of the objects for which it was incorporated”).
\item[67] See St. Louis, Iron Mountain & St. Paul Ry. v. Paul, 173 U.S. 404, 408 (1899) (observing that “[c]orporations are the creations of the State, endowed with such faculties as the State bestows and subject to such conditions as the State imposes”); see also CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) (recognizing that corporate “existence” is “a product of state law”).
\end{footnotes}
public square. I consider each attribute in turn.

A.

The modern corporation has an identifiable persona, to which we ascribe expressive conduct as a matter of course. By "identifiable persona," I refer to that sense in which the corporation has a presence in the community quite apart from that of its owners, managers and employees. Anecdotal evidence confirms that, unlike the inanimate matter of steel and glass office buildings, corporations have such a presence in the community. Consider, for example, the 1999 protests in the wake of bids to purchase the Vermont ice cream concern Ben & Jerry's. The movement's proponents sought to "save" the corporation on the belief that a takeover would "destroy the company's unique personality."68 Indeed, one protestor described Ben & Jerry's as "a living, breathing organism that is continually benefiting our planet and communities."69

Such a statement betrays the public's perception that corporations are "alive," and can act, through their agents, in specific ways. It reflects a truism that employment-seekers in the corporate world know only too well: All corporations are not alike. Each corporation has its own culture, its own way of training employees, its own preferred practices. These aspects of corporate life have a cumulative weight, and the institutionalized relationships and practices of each corporation collectively denote a unique character. And so we tend to speak of corporations "as 'real' entities in ordinary language and in moral discourse,"70 and to describe their personae as we would an individual's personality—as "staid" or "flexible," "welcoming" or "cold," even "good" or "bad."

This view of corporate persona finds support in the scholarship of Pamela H. Bucy, who argues that corporations possess an "ethos" that distinguishes them from the specific individuals who control or work for the organization.71 Focusing upon corporate culture and corporate decision-

69. Id.
71. See Bucy, Corporate Ethos, supra note 17, at 1099.
making, Bucy defines "corporate ethos" as the "abstract, and intangible, character of a corporation separate from the substance of what it actually does, whether manufacturing, retailing, finance or other activity."\textsuperscript{72} Whether the corporation's "ethos" is reflected in such superficial matters as the employee dress code, or in the substantive goals and policies of the organization, Bucy concludes that "each corporation is distinctive and draws its uniqueness from a complex combination of formal and informal factors," and that the formal and informal structure of a corporation "is identifiable, observable, and malleable."\textsuperscript{73} Significantly, these formal and informal factors and structures serve to inform and encourage the conduct and actions of the corporation through its employees and agents.\textsuperscript{74}

The development and refinement of the factors and structures that comprise a corporation's ethos are ongoing, as the corporation seeks to define itself in relation to the organizations and individuals in its particular business and political communities. Such development may be largely a matter of survival in the marketplace, reflecting a corporation's economic need to differentiate itself from its competitors in order to attract investors, employees and clients. Regardless of its genesis, the development of these structures inevitably reveals the personae by which we regularly distinguish a corporation from other corporations and from its individual owners, managers and employees, and thereby recognize the corporation as a singular presence within the community.

B.

The modern corporation also can be substantively distinguished from its owners, managers and employees by its capacity to express independent moral judgments in the discourse of the public square, and so to participate in the process of creating and defining social norms. This capacity derives from the Supreme Court's reasoning in \textit{First National Bank of Dallas v. Templet,} \textsuperscript{75} one of the first judicial efforts to meaningfully address the ethical implications of corporate conduct.

\textsuperscript{72} Id. at 1123.
\textsuperscript{73} Id. at 1127.
\textsuperscript{74} See Pamela H. Bucy, \textit{Organizational Sentencing Guidelines: The Cart Before the Horse,} 71 \textit{WASH. U. L.Q.} 329, 339 (1992) (observing that corporate conduct often is "predictable and consistent with corporate goals, policies and ethos").
Bank of Boston v. Bellotti.75 In Bellotti, the Court faced the question of whether Massachusetts could, consistent with the First and Fourteenth Amendments, “forbid[] certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals.”76 The appellant banks and businesses sought to spend corporate money to publicize their views on a proposed state constitutional amendment that would have permitted the legislature to enact a graduated income tax.

A majority of the Supreme Court viewed the issue not as whether corporations have First Amendment rights per se, but, rather, as whether the Massachusetts statutory limitation on corporate speech unconstitutionally abridged expression. The Court concluded that the speech at issue was within the First Amendment’s protective ambit, because that speech related to matters of public concern: “If the speakers here were not corporations,” the Court stated, “no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”77

In the Court’s opinion, the corporate identity of the speaker did not deprive the speech of constitutional protection: “In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”78 The Court viewed the legislative attempt to limit speech in this instance as particularly noxious, because it appeared as though the legislature had sought “to give one side of a debatable public question an advantage in expressing its views to the people.”79 The Court found neither the state’s interest in

75. 435 U.S. 765 (1978). The origins of this capacity may be traced to the Supreme Court’s nineteenth century determination that corporations may be considered as “persons” for purposes of the Fourteenth Amendment’s “liberty” protection. See Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886) (treating corporations as “persons” protected by the Fourteenth Amendment); see also BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (assuming that corporation can challenge punitive damages award on substantive due process grounds under the Fourteenth Amendment).
76. 435 U.S. at 767.
77. Id. at 777 (internal citation omitted).
78. Id. at 784-85.
79. Id. at 785.
"sustaining the active role of the individual citizen in the electoral process," nor its interest in "protecting the rights of shareholders whose views differ from those expressed by management," sufficiently compelling to justify the statutory limitations on corporate speech.\footnote{Id. at 787-95.}

In holding unconstitutional the Massachusetts restrictions on corporate speech, the \textit{Bellotti} Court adverted to the democracy-enhancing value promoted by the Free Speech Clause.\footnote{The Free Speech Clause secures many values. Principally, it recognizes the importance of expression as a means of individual self-definition, self-actualization and self-fulfillment. \textit{See} THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1966). Freedom of expression allows individuals to define themselves within a particular community, whether that community is a neighborhood, municipality, state or nation. \textit{See} Charles Fried, \textit{The New First Amendment Jurisprudence: A Threat to Liberty}, in \textit{THE BILL OF RIGHTS IN THE MODERN STATE} 225, 233 (Geoffrey R. Stone et al., eds. 1992) (discussing the importance of free expression as an extension of personal autonomy). The \textit{Bellotti} Court did not suggest that corporations share in this aspect of First Amendment freedom. \textit{But see supra} notes 68-74 and accompanying text.} Free expression is a necessary predicate to self-rule.\footnote{See Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (observing that "speech concerning public affairs is more than self-expression; it is the essence of self-government").} Democratic governance begins with individual participation in community debate over issues of public concern. Individuals participate through engagement with neighbors, friends, and colleagues in the discourse of the public square—on the editorial pages of the local newspaper, in opinion polls, and at meetings of legislative committees and local boards. Public discourse, in turn, both reflects and serves to shape social norms and, eventually, the laws of the community in which the individual resides.

Individual participation in public discourse is thus a democratic act—one, importantly, that involves the exercise of moral judgment. The societal inclinations that emerge as laws from the cacophony of the public square ideally represent, among other things, the community's definitions of right and wrong conduct—the standards by which the community establishes how persons and goods should be valued. Debate about environmental degradation, for example, attracts the attention of legislators, who then debate the issue as well. This debate leads ultimately to laws that set baselines for the proper valuation of such goods as clean air and water, with criminal
penalties for those individuals whose conduct denies the valuations the law establishes.

Under *Bellotti*, corporations are equivalent to individuals with regard to the democracy-enhancing aspects of the First Amendment’s free speech clause.\(^{83}\) The Court reasoned that in the public square, corporate speech regarding matters of public concern has worth relative to other speech in the public square—that is, relative to the speech of individuals. Critical to this reasoning is the foundational assumption that, to the extent corporations participate in public discourse, they do so in their capacities *qua* corporations, their voices distinct from those of the individual shareholders and managers who own and control them.\(^{84}\) *Bellotti* thus implicitly acknowledges that the voice with which the corporation speaks in the public square represents an interest distinct from that of the individuals, or groups of individuals, who manage or work for the corporation. The Court recognized, in other words, the capacity of the corporation to express unique viewpoints, attitudes and moral judgments.

As a measure of the dimensions of one’s identity within a community, an equal voice in the democratic arena of public affairs is no small matter. As Michael Walzer has explained, “[w]hat counts [in democracy] is argument among the citizens. Democracy puts a premium on speech, persuasion, rhetorical skill. Ideally, the citizen who makes the most persuasive argument—that is, the argument that actually persuades the largest number of citizens—gets his way.”\(^{85}\) Though the corporation *qua* corporation cannot vote, *Bellotti* validates its community identity by sanctioning corporate contributions to “what counts in democracy”: discussion and debate about a

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83. This holding naturally raises significant free speech and corporate governance issues. See Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 *Iowa L. Rev.* 995 (1998) (arguing that political action by business corporations implicates no true First Amendment values). It remains, however, that *Bellotti* is the law, and the decision accordingly must inform our understanding of corporate existence and identity.

84. See *Bellotti*, 435 U.S. at 784 (stating that speech does not lose First Amendment protection “simply because its source is a corporation,” and discussing the corporation as “spokesman” and “speaker”); id. at 807 (White, J., dissenting) (acknowledging that curtailment of corporate speech still “would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts”).

community's problems, fears and hopes, including determinations about that conduct which should be deemed laudable, and that conduct which should be condemned. Corporations, like individual members of a community, participate in the process of creating and defining social norms, and in so doing distinguish themselves from those individuals.

C.

This understanding of corporate identity differs fundamentally from the assumption underlying the analyses of Khanna, Fischel, and Sykes—that corporations cannot be susceptible to retributive concerns because they consist of nothing more than the individuals of which they are composed and, therefore, lack independent identities in the community. That assumption fails to account for the modern corporation's identifiable persona, and to reflect the fact that, as a matter of law, corporations have the capacity to express judgments and attitudes that may be entirely unrelated to the personal views of their owners, managers and employees. Possessed of these attributes, corporations can be substantively distinguished from their owners, managers, and employees, and from each other.

So understood, corporations are not inherently immune from expressive retributive concerns. Because they possess discrete identities within the community to which expressive conduct can be ascribed, corporations satisfy the thin conception of the wrongdoer required by the expressive rationale. Consequently, the corporation qua corporation can suffer moral condemnation for its wrongdoing through criminal conviction and punishment, thereby vindicating the proper valuation of persons and goods whose true worth was disparaged by the corporation's conduct—just as in the case of an individual wrongdoer. 86

Because corporations satisfy the conception of the wrongdoer contemplated by the expressive rationale, cases in which the

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86. A logical extension of this proposition would be closer attention to the standards for proving corporate intent. The work of commentators who have proposed new frameworks for understanding corporate intent provides an important start. See, e.g., Bucy, Corporate Ethos, supra note 17, at 1121-51; Ann Foerschler, Comment, Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct, 78 CALIF. L. REV. 1287, 1303-11 (1990).
government secures a criminal conviction of a corporation can be viewed as the effectuation of expressive retribution, just as in cases involving individual defendants. In *United States v. Wilson*, 87 for example, the government had charged two corporate entities—Interstate General Company and St. Charles Associates—and Interstate’s Chief Executive Officer with felony violations under the Clean Water Act. 88 The resulting criminal convictions of the individual and corporate defendants served to counter the valuation of a particular natural resource—the waters of the United States—that the defendants’ actions expressed. 89 More recently, following the 1996 ValuJet crash that claimed 110 lives, the government indicted SabreTech on charges of violating federal hazardous materials transportation and handling laws. 90 The resulting conviction of the aircraft manufacturing company signified the moral condemnation of conduct that expressed denial of the true worth of human health and safety. Regardless of its deterrent effect, the finding of criminal liability in each of these cases furthered the ends of the expressive rationale.

IV.

Having established that the corporation *qua* corporation can be subject to expressive retribution, the question remains whether a civil liability regime can more efficiently accomplish this retributive end in the corporate context than a criminal liability regime. Recall that so far as the consequentialist aim of deterrence is concerned, the critics of corporate criminal liability maintain that a civil liability regime would more efficiently prevent corporate wrongdoing than a criminal liability regime—that is, a civil regime would deliver the social

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87. 133 F.3d 251 (4th Cir. 1997).
89. See Friedman & Hackney, supra note 55, at 1-2 (discussing the Clean Water Act and environmental laws as reactions of societal concern for environmental protection).
good of deterrence at a lower cost to the community than would a criminal regime. This is so in part because criminal prosecutions are more expensive than civil enforcement actions.91

The aim of expressive retribution is the defeat of the wrongdoer’s valuation of the worth of some person or good. Unlike deterrence, this objective cannot be accomplished more efficiently via a civil liability regime; indeed, it cannot be accomplished at all through civil liability. Notwithstanding the retributive character of some aspects of civil liability (a punitive damages award, for example), only criminal liability is understood against the background of social norms, codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates.92

Civil and criminal liability have distinct social meanings; we freight a judgment of liability with a different content in the civil context than in the criminal context.93 The grammar of the civil action speaks to such matters as fault and damages, in service of an ultimate factual and legal determination as to whether and how to fix valuations, as measured in dollars, of persons and goods. The grammar of the criminal action, by contrast, speaks to such matters as knowledge and intent, to the end of determining the factual and legal relationship of the defendant’s alleged conduct to valuations of persons and goods already established. Though they may concern the same or similar persons and goods, in each context the parties proceed from different assumptions about the valuations of those persons and goods: In the civil context, valuations are a proposition to be proved; in the criminal context, they are a given to be presumed. Because they derive from different assumptions about how persons and goods should be valued, findings of civil and criminal liability mean different things in

91. See Fischel & Sykes, supra note 2, at 325 (the “social cost” of crime “must be understood to include not only the direct costs to victims but also the costs of the criminal justice system”).
92. See Hart, supra note 46, at 405 (stating that a criminal conviction represents “a formal and solemn pronouncement of the moral condemnation of the community”).
93. See Lawrence Lessig, The Regulation of Social Meaning, 62 U. CHI. L. REV. 943, 951 (1995) (defining “social meaning” as “the semiotic content attached to various actions, or inactions, or statuses, within a particular context”). I seek here simply to describe the social meanings of civil and criminal liability. See id. at 951-56 (discussing the “fact” of social meaning).
respect to those valuations.

In light of their distinct social meanings, findings of civil and criminal liability are not transmutable for purposes of moral condemnation. The expressive rationale eschews commodification; it operates from the presumption that the community has determined, and expressed through its laws, that there are circumstances in which persons and goods have a certain inherent worth that must be respected. To properly counter the wrongdoer’s incorrect assessment of those persons or goods, the retributive act must recognize that the wrongdoer denied their inherent worth, whatever that may be. In other words, the finding of liability must recognize that, in the circumstances, the victim or object’s value is beyond price. Because in the criminal context valuations are presumed to be established, it follows that a finding of criminal liability—a criminal conviction—is understood as the vehicle of moral condemnation.

Anecdotal evidence supports this impressionistic analysis of the relative meanings, and significance, of civil and criminal liability. There is a societal sense, for example, that civil liability in the wake of a failed attempt to convict an individual alleged to have committed a crime, as in the case of O.J. Simpson, does not capture the same condemnatory bite as a verdict of guilt. This sense extends to the corporate context as well. Dan Kahan has investigated the phenomenon of social meaning in the context of corporate wrongdoing and concluded:

Just as crimes by natural persons denigrate societal values, so do corporate crimes. Members of the public show that they feel this way, for example, when they complain that corporations put profits ahead of the interests of workers, consumers, or the environment. Punishing corporations, just like punishing natural persons, is also understood to be the right way for society to repudiate the false valuations that their crimes express. Criminal liability “sends the message” that people matter more than profits and reaffirms the value of those who were sacrificed to “corporate greed.”

The critics of corporate criminal liability also have remarked upon the popular desire to hold corporations criminally liable for conduct, as in the case of the Exxon Valdez oil spill.95

Note that, while the expressive rationale implicates both liability and punishment, the linchpin for retributive purposes is the finding of liability, the verdict of guilt. Therein lies the community’s expression of moral condemnation, akin to what Jean Hampton called the wrongdoer’s “experience of defeat at the hands of the victim,”96 albeit indirectly through prosecution by a legal authority. The punitive consequences of a criminal conviction, such as imprisonment, probation or a fine, while an essential aspect of retribution, necessarily take their expressive character “from the condemnation which precedes them and serves as the warrant for their infliction.”97 We accordingly appreciate that liberty-deprivation in the form of imprisonment is punitive, and liberty-deprivation in the form of conscription is not, because the former follows from a finding of criminal liability.98

Viewed through the lens of retribution, the perceived inefficiencies of a criminal liability regime for corporate conduct reflect the different expressive interests involved in the civil and criminal contexts. Consider the constitutional requirement that the government must prove liability beyond a reasonable doubt in all criminal cases.99 Under this standard, the government, on behalf of the victims of wrongdoing and the community, cannot simply impose criminal liability with abandon; rather, the burden of proof, among other factors, requires that discretion to prosecute be exercised judiciously. In this way, the burden reflects the unique significance of the proposition to be proved, as the law seeks to ensure that

95. See Fischel & Sykes, supra note 2, at 342-43; see also Alschuler, supra note 55, at 312 (observing that “in our rush to express our indignation, we may truly personify and hate the corporation”). While critics of corporate criminal liability implicitly acknowledge the different social meanings of civil and criminal liability, they maintain that, in terms of deterrence, civil liability can adequately capture the differences. See, e.g., Fischel & Sykes, supra note 2, at 332 (discussing reputational stigma associated with criminal liability).
96. Hampton, supra note 50, at 126.
97. Hart, supra note 46, at 405.
98. See Kahan, supra note 48, at 599.
99. See Khanna, supra note 3, at 1512-17 (discussing the undesirability of the criminal standard of proof as applied to corporate wrongdoing); Fischel & Sykes, supra note 2, at 331-32 (same).
liability is warranted before moral condemnation is leveled upon an alleged wrongdoer.\textsuperscript{100} The lower preponderance of the evidence standard in civil matters, by contrast, reflects the lower expressive interests at stake in such cases.

Would it be possible to construct a corporate civil liability regime that delivered the same retributive message as a finding of criminal liability, but more efficiently? Perhaps. Such a construction would require, at a minimum, a fundamental reconception of civil liability in the context of corporate misconduct—that is, a manufactured change in the social meaning of civil liability.\textsuperscript{101} In light of the established social meanings of civil and criminal liability, and the daily reinforcement of these meanings in schools, courts, popular culture and the media, such a reconception seems unlikely in the immediate future.

V.

Khanna concludes his article by answering his title question: The purpose served by corporate criminal liability is “almost none.”\textsuperscript{102} From a purely deterrence perspective, this may well be so. Certainly, Khanna, Fischel, and Sykes argue forcefully that criminal liability regimes may not be the most efficient means of deterring corporate misconduct, and that in dollar terms, the social utility gained by deterring corporate misconduct through civil enforcement could be significant.

But deterrence and efficiency are not the only interests in play.\textsuperscript{103} There is also the interest in expressive retribution, which provides reason enough not to dispense entirely with corporate criminal liability. Absent the possibility of criminal

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\bibitem{100} See Hart, \textit{supra} note 46, at 411 (“If what is in issue is the community’s solemn condemnation of the accused as a defaulter in his obligations to the community, then . . . the fact of default should be proved with scrupulous care.”).

\bibitem{101} See Lessig, \textit{supra} note 93, at 1008-14 (discussing techniques through which social meaning can be changed).

\bibitem{102} Khanna, \textit{supra} note 3, at 1534.

\bibitem{103} As Professor Kent Greenfield has remarked, “[e]fficiency . . . is but one basis for public policy.” Kent Greenfield, \textit{The Place of Workers in Corporate Law}, 39 B.C. L. REV. 283, 327 (1998). Another basis might be fairness. Bellotti teaches that corporations can participate in the process of norm-creation and norm-definition; in this respect, they enjoy a standing in the public square and the community akin to individuals who inevitably will be bound by the criminal law. As a matter of fairness, then, corporations should not be permitted to evade rules they indirectly helped to create: There is something intuitively unjust about allowing one to contribute to a definition of conduct she knows will not bind her.

\end{thebibliography}
liability, corporations would escape moral condemnation for wrongdoing, and the retributive import of criminal liability to the community would be lost. For under a civil liability regime for the corporation qua corporation, there would be no moral condemnation equivalent to a criminal conviction: if found civilly liable, a corporation might be deemed negligent, or perhaps reckless, but no statement, in the form of a conviction, would attest to the proper valuation of the persons or goods at issue. In the end, the financial liability imposed would come to be viewed, by both the corporation and the community, merely as a cost of doing business.

In effect, then, a corporate civil liability regime that paralleled ordinary criminal liability for individuals charged with the same wrongdoing would allow the corporation qua corporation to purchase exemption from moral condemnation. Such exemption would affect the expressive significance of criminal liability, as the vindication of the proper valuations of persons and goods would vary not with the conduct alleged—a distinction that rightly could affect the evaluative standard employed—but, rather, with the identity of the offender. The value of human health and safety, for example, would be regarded as less sacrosanct when denied by corporations as opposed to individuals.104 Thus corporate exemption from criminal liability would tend to undermine the condemnatory effect of criminal liability on individuals in respect to similar conduct—and, ultimately, to diminish the moral authority of the criminal law as a guide to rational behavior.

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104. The issue would be drawn in sharp relief in those state and federal prosecutions in which individuals and corporations otherwise would be co-defendants. See, e.g., United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (naming as co-defendants in Clean Water Act prosecution Interstate General Company and its chief executive).
Articles

Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability

Gilbert Geis* and Joseph F. C. DiMento**

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I. Introduction

Almost half a century ago, the American Law Institute (ALI) put its formal imprimatur on the doctrine of corporate criminal liability. The ALI's view that corporate entities could be held responsible under criminal law for delicts committed by their officers on the firm's behalf had its roots in medieval English law, though at first it was restricted to public nuisance violations, such as the failure of a corporate body—usually a borough or municipality—to maintain a public thoroughfare or to attend to repairs to a bridge. The liability embraced nonfeasance, but did not extend to malfeasance.¹

Resistance prior to the twentieth century to extension of the doctrine of corporate criminal liability was tied to the widely-held juridical belief that a corporation lacked the requisite mens rea essential to sustain a criminal conviction.² In a memorable phrase later employed by John Coffee as part of the title of his review of corporate criminal liability, corporations were deemed by an English Lord Chancellor to have "no soul to damn, and no body to kick."³ On the same point, Pollock and Maitland wrote: "The corporation is invisible, incorporeal, immortal; it cannot be assaulted, beaten, or imprisoned; it cannot commit treason . . . . We even find it said that the corporation is but a name. On the other hand, it is a person. It is at once a person and yet but a name."⁴ For Chief Justice John Marshall a corporation was "an artificial being, invisible, intangible, and existing only in contemplation of law."⁵

¹ The doctrine can be traced in England to as early as the seventeenth century. See WILLIAM LAMBARDE, EIRENARCHA OR THE OFFICES OF THE JUSTICES OF PEACE 477, 609 (1619). For the United States see State v. Ohio & Miss. R. R., 23 Ind. 362 (1864); and Del. Div. Canal Co. v. Commonwealth, 60 Pa. 367 (1869).
² A Maine court in the mid-nineteenth century declared: "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." State v. Great Works Milling & Mfg. Co., 20 Me. 41, 44 (1841). The doctrine was later modified to hold a corporation liable if a duty had been legislatively imposed upon it. State v. City of Portland, 74 Me. 268 (1883).
³ John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unsensational Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981). The comment is attributed to Edward, the first Baron Thurlow (1731-1806). Coffee quotes a suspect wording: "Did you ever expect a corporation to have a conscience, when it has no soul to be dammed and no body to be kicked?" Id. at 386. A source nearer to his time indicates that Thurlow said: "Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like." JOHN POYNTER, 1 LITERARY EXTRACTS FROM ENGLISH & OTHER WORKS 268 (1814). Perhaps the Lord Chancellor uttered both observations at different times. His biographer mentions neither version: ROBERT GORE-BROWN, CHANCELLOR THURLOW: THE LIFE AND TIMES OF AN XVIII CENTURY LAWYER (1953).
⁵ Dartmouth College v. Woodward, 17 U.S.(4 Wheat.) 518, 636 (1819). The punishment of
The barriers to corporate criminal liability were toppled in piecemeal fashion for a variety of reasons. Perhaps the most significant were first, that corporations were more readily identifiable than the human malefactors within them who might have been responsible for the illegality, and that second, the enormous power being accumulated by the corporate world seemed to demand that some legal doctrine be applied to restrain its free-wheeling and destructive acts. As one writer observes:

"Given the ubiquitous nature of corporations in our society, economic and social considerations have preempted the importance of anachronistic theories and conceptual consistency." Also, not insignificantly, corporations often have deep pockets from which the state, by means of criminal convictions, might extrude some recompense and impose additional financial penalties to compensate for the expenses suffered by it and its citizens because of corporate wrongdoing.

There is a voluminous literature debating the merits of imposing criminal liability on corporations.

7 The majority view of those who non-human objects nonetheless has a long history. The book-length study by Edward P. Evans tells of one such episode:

When the Russian prince Dimitri . . . was assassinated on May 15, 1591 . . . the great bell of [the] town rang the signal of insurrection . . . . [T]he bell was sentenced to perpetual banishment in Siberia . . . . After a long period of solitary confinement it was partially purged . . . . by conjuration and re-consecration and suspended in the tower of a church in the Siberian capital, but not until 1892 was it fully pardoned and restored to its original place in Uglich. 

Edward P. Evans, The Criminal Prosecution and Capital Punishment of Animals 175 (1906).

6 Glenn A. Clark, Corporate Homicide: A New Assault on Corporate Decision-Making, 54 Notre Dame L. Rev. 911, 917 (1979). As early as 1682, the English Lord Chief Justice, in a suit against the city of London, noted that if there were not a legal approach to bring corporations to heel they would be "independent commonwealths" within the kingdom since they then could do "nothing amiss." R. v. Civitatem London, 8 State Trials 1039, 1266 (T. R. Howell, ed., 1816). Pollock observes of this case that the city's counsel raised "every possible objection, technical as well as substantial, to penal proceedings against a corporation," while the King's advisers "were prepared to go very far in ascribing wrongful acts and wrongful intention to a corporate body." Pollock concluded that the case demonstrates that "there was no settled rule either way to prevent either argument from being plausible." Frederick Pollock, Has the Common Law Received the Fiction Theory of Corporations? 27 Law. Q. Rev. 219, 232 (1931).


Coffee summarizes the arguments suggesting that corporate criminal punishment should not be the
address the subject appears to be that the doctrine is ill-considered, but this may be a function primarily of the fact that critics are more likely to let their opinions be known than those who are content with what exists and seems very likely to continue to exist well into the future. A brief sampling of the rationales put forward in favor of jettisoning corporate criminal liability include the following: "The traditional theories of criminal law have been strained by the judiciary in an attempt to make them adopt to the economic realities and organizations of the marketplace. It is time for a change." Coffee declares "more deterrence is generated by penalties focusing on an individual than on a corporation," while Salmond noted "[t]hen men do not in fact become one person because they associate themselves together for one end, any more than two horses become one animal when they draw the same cart."

The debate was considered something of a non-issue by Radin who observed, "[i] have never found a situation in which as just a result could not be secured by retaining the corporate fiction as by discarding it," but for others a basic objection is that "imposing criminal sanctions on a corporation, an artificial entity which can possess no state of mind, seems questionable in the absence of some theory which ascribes fault to the corporation itself, rather than only to its officers, directors, and employees."

Law-makers and judges, unfortunately, made no attempt to carve out an innovative body of legal doctrine tailored to the nature of corporations and their acts; instead, reliance was placed on adding

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preferred route in John C. Coffee, Jr., Corporate Criminal Responsibility, 1 Encyc. of Crime & Justice 253, 257 (1983); an often-quoted view in this category is that of President Woodrow Wilson: Every act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible, and the punishment should fall upon them, not upon business organizations of which they make illegal use. Woodrow Wilson, The Lawyer and the Community, 35th annual meeting of the ABA, 35 Rpt. of the Amer. Bar Ass'n 427 (1910).


13. Recourse to this start-over tactic is advocated by Boss and George, among others: "Legislators should consider taking corporate crime completely out of the current context of common-law practices and should focus their efforts on creating laws specific to white collar crime that utilize nontraditional penalties and standards imposing accountability and 'front-end' compliance requirements." Maria S. Boss & Barbara Crutchfield George, Challenging Conventional Views of White-Collar Crime, 28 Crim. L. Bull. 32, 57-58 (1992). Loquast, for his part, notes that "because corporate criminal liability derives from the application of individual-based common law
corporations to the ledger of animate persons who could be tried under penal law for matters such as robbery and fraud as well as a host of other common law offenses, though it was pointed out that a corporation could not commit rape or bigamy.\textsuperscript{14} In addition, administrative and regulatory processes also came to include criminal punishments in the repertoire of actions that could be taken against wayward organizations.\textsuperscript{15} Most generally, a very considerable body of literature emerged that argued that many criminal actions involving corporations represented not the additive input of diverse individuals but an amalgam that could not be disentangled. Typical was the statement that a "corporation has a personality of its own distinct from the personalities which compose it, a 'group personality' different from and greater than the . . . sum of the parts."\textsuperscript{16} The writer insisted that "in the same way that a house is something more than a heap of lumber and an army something more than a mob . . . a corporate organization is something more than a number of persons."\textsuperscript{17}

It also often was claimed that because of corporate influences employees are likely to engage in actions that they otherwise would not have contemplated. If, for instance, a middle manager is told to fix prices or to face transfer or loss of his or her job, it was said to be the corporate ethos that was most responsible for the subsequent antitrust violation, not the individual culprit.

The American Law Institute Model Penal Code (MPC), promulgated in draft form in 1956, effectively overrode any lingering reservations that juridical purists might have had about the criminalization of corporate illegality. Though it equivocated, often mightily, about desirability of the doctrine, particularly in regard to its justification as something of a sport of criminal law, the ALI apparently never seriously


considered abandoning the concept and thereby disrupting what had become settled law in a considerable number of American jurisdictions.

The most significant doubter among the rather few voices raised against the ALI postulate was Gerhard O.W. Mueller, who pointed out that most nations of the world did not criminalize corporate actions and that no basis existed in empirical research to justify such a novel departure from the rule of mens rea, a standard that he believed sensibly could be applied only to human beings and not to organizational entities.

Mueller’s views of the need for empirical foundations in the realm of corporate criminal liability, though no less relevant today than when they were first published, failed to gain support. Meanwhile, the possibility of holding a corporation criminally responsible became enshrined in both the federal and all state courts in the United States. In addition, the policy is increasingly being adopted in overseas jurisdictions.

In a recent contribution to the debate about the desirability of criminalizing corporate misbehavior, Lawrence Friedman offered a variety of suppositions to support his conclusions about the need for criminal sanctions against corporate law-breaking. Friedman, however, provided no empirical evidence to back up his position. More recently, Sally S. Simpson, a sociologist who has specialized in empirical analyses of aspects of antitrust enforcement, reviewed studies that might shed light on whether criminal penalties against corporations and/or their culpable employees are effective strategies. She found only a few oddments of research that might support one or the other viewpoint, and concluded in the end that, at best, the results of the rare studies that have

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18. One writer has indicated her belief that European countries might have been reluctant to contemplate group liability because of its historical association with repressive regimes. Wells, supra note 7.


20. See infra, pp.21ff.


22. Id. at 39.


24. See infra, at 42-47.

been conducted are inconclusive.\textsuperscript{26}

II. Corporate Crime Prior to the Model Penal Code

The story of the development of the concept of corporate criminality has been particularly well told by Kathleen Brickey: "Through the feat of anthropomorphic sleight of hand, the common law subtly transformed the inanimate 'corporation' into a 'person' capable of committing criminal delicts and harboring criminal intent."\textsuperscript{27} The pragmatic, if irrational basis for this development, was set forth by an early writer:

[T]he doctrine that an individual, though he does not in any way communicate or act in conjunction with another mortal soul, may nevertheless by his wrongdoing be abetting or conspiring with that immortal entity, the corporation, is one of those peculiar judicial fancies that, were it not for the desirable results often achieved by their use, would be unqualifiedly condemned by all save those whose naive faith in the metaphysician's logic cannot be disturbed by earthly facts.\textsuperscript{28}

The principle that a corporation might be accountable for the crime of its agent emerged in the ecclesiastic courts in medieval times. These courts responded to heresy by corporate bodies, most particularly monasteries, by imposing a decree of excommunication on them. This is said to likely represent the first occasion on which, to use Coffee's wording, "the anthropomorphic fallacy that the corporation was but an individual misled courts."\textsuperscript{29} He adds: "It was not the last."\textsuperscript{30} In the thirteenth century, Pope Innocent IV, a former professor of canon law at the University of Bologna,\textsuperscript{31} forbade the practice of excommunicating corporations—\textit{universitas non delinquere}—on the theological ground that they did not possess a soul\textsuperscript{32}—they were \textit{persona ficta}\textsuperscript{33}—and on the

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29. Coffee, supra note 3, at 386, n.2. In some societies rules that hold the community responsible for individual wrongdoing prevail: "Under tribal law [in Kenya]," Huxley observes, "... the community and not the individual was held responsible for the misdemeanours of any of its members... Since every [male] member knew that he would probably have to contribute a goat or two, even a heifer in extreme cases, towards the penalty imposed on an offender, it was naturally in his interest to see that even his remotest cousin obeyed the law." ELSBETH HUXLEY, \textit{OUT IN THE MIDDAY SUN: MY KENYA} 143-145 (1985).
30. Coffee, supra note 3, at 386, n.2.
32. Abbott, supra note 18, at 18.
33. OTTO F. VON GIERKE, 1 DEN DEUTSCHE GENOSSENCHAFTS RECHT 279 (1869-1913).
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practical ground that such a decree removed their property and other assets from church control.

In England, financial responsibility for wrongdoing came to be placed on boroughs, imposing, as Carr rather quaintly puts it, "a singleness and separateness of personality on the natural plurality of our native communities." Nonetheless, the common law denied that a corporation could commit a crime. The issue in the United States was relatively insignificant until corporations began to proliferate. The first American manufacturing "corporation was not organized until 1786, and by 1801, there were still only eight manufacturing corporations in the country and only 317 corporations of all types."36

Initially, courts in the United States reasoned that although a corporation was a legal entity, it was not a "person," and thus could not form the requisite intent to commit a crime. Criminal intent first was laid upon the corporation in the 1908 New York Central Railroad case and nine years later in England in Mousell Brothers. By the twentieth century the federal system in the United States had a fully-developed law on the subject of corporate criminal liability, while state courts by and large had a somewhat more fetal but nonetheless readily recognizable body of laws and rulings dealing with the issue.40

III. On the American Law Institute

The idea for the formation of the American Law Institute was first publicly proclaimed in 1914 at a meeting of law school deans and professors. It was their ideal that legal academics, less burdened with the need to earn a living by the practice of law, could reform law and promote the influence of professors in the wider world of legal work.41

35. Anonymous Case, 88 Eng.Rep. 1538 (K. B. 1701). In the ancient case of The Abbott of St. Bennet's v. The Mayor of Norwich it was said: "[A] corporation cannot do a personal tort to another, a battery or wounding, nor can they do treason or felony, so far as the corporation is concerned." Cited in Francis Wharton, A Treatise on Criminal Law 113 (10th ed., 1896).
38. N.Y. Central & Hudson River R. R. Co. v. United States, 212 U.S. 481 (1908) (regarding illegal rebates to companies making sugar shipments).
The first world war put the quietus on blueprints, but in 1923 the ALI was officially established following a study by a group of prominent jurists that declared that the two major defects in American law were its complexity and its uncertainty. The report concluded that these conditions had produced a "general dissatisfaction with the administration of justice." The matter of inadequate scientific foundation for some legal precepts was not among the roster of dissatisfactions, though the founding declaration indicated that one of the ALI aims was to "carry on scholarly and scientific legal work." This statement would prove to be largely verbiage: the Institute would come to draft its recommendations largely on the basis of the presumed wisdom of those involved in the process. Frank, noting this ALI emphasis, offered a warning against self-interest ruling over objectivity, a matter which, we can presume, he believed was not unlikely in ALI efforts:

The product of the Institute should be objective. It should reflect the best and most independent judgment of which the members are capable. Necessarily, the members bring their experience with them, and this experience creates its own set of convictions, but it is imperative that these be objective convictions and not the product of client desire.

The failure of the ALI to do empirical work has not gone unnoticed. Schlegel points out that the Institute has eschewed empirical and field work in favor of library research to the detriment of its product. The same "serious error" is said to mark the ALI work on securities law: "They made policy change after policy change. . .without any effort to engage in scientific research into real world phenomena."

Why did the ALI, despite its bow to the need for social science research, fail to live up to that promise? It is likely true that at least to a

44. Id. The roster included lack of agreement on certain fundamental common-law principles, imprecision in the use of legal terms, conflicting and badly drawn laws, and a complexity attributed to a lack of systematic development. Id.
45. About the American Law Institute, supra note 44.
46. "Although empowered by its articles to make objective surveys of the operation of the law, the Institute has thus far devoted its efforts to . . . the 'restatement' of the law". Yntema, supra note 43, at 323.
47. Frank, supra note 43, at 628-629.
certain extent lawyers prefer ungrounded opinion to proven fact because the former offers them considerably greater latitude for partisan argument. But the issue of the standing and ideology of those involved in reviewing and developing ALI standards may also be involved. A critic of the ALI has maintained that the Institute not only shies away from replicable social science inquiries, but that it “undemocratically vest[s] immeasurable, unfettered, unchecked, and unaccountable, quasi-judicial and quasi-legislative power into the hands of the very few elitist people who control [it].”\textsuperscript{51} The matter is well summarized by one observer of the ALI:

Generally in legal reform efforts there is too much of a tendency to rely upon anecdotal accounts\textsuperscript{52}, and the membership of the institute is likely to report experiences at the extreme of the range of phenomena of interest . . . . [T]here is too much reliance on war stories in debates over legal phenomena, and the prominent lawyers who make up the membership of the institute are likely to have war stories from the biggest and most glamorous of the battles rather than from the more mundane, routine battles of the lawyers doing everyday kinds of cases. Research that looked at the adequacy of the information used in the institute’s deliberative process would be a useful input into considerations of how that process might be reformed.\textsuperscript{53}

A. The Model Penal Code on Corporate Crime

It was against this background that in 1956 the ALI promulgated Model Penal Code provisions on corporate crime. Unusually, the group

\textsuperscript{50} Note the following remarks by Joseph Beale, a professor at the Harvard Law School, who was instrumental in the foundation and the early work of the ALI:

As long as our doors were entered chiefly by immigrants of cognate blood, the common law . . . might safely be left to develop and shape itself to each changed condition. But within the last twenty years a horde of alien races from Eastern Europe and from Asia has been pouring in on us, accustomed to absolute government, accustomed to hate the law, and hostile above all to wealth and power.

According to Beale, something had to be done to check the increasing growing power of such un-American influences. Joseph Beale, \textit{The Necessity for a Study of the Legal System}, 14 ASS’N OF AMER. L. SCHL. HANDBOOK 33-34 (1913-1916).


\textsuperscript{52} Herbert M. Krizer, Lawrence C. Marhsall, & Frances Kahn Zemans, \textit{Rule 11: Moving Beyond the Cosmic Anecdote} 75 JUDICATURE 269 (1992).

that put together the Code included six "behavioral scientists," only one of whom, Thorsten Sellin, a University of Pennsylvania sociologist, was an empirical researcher. Sellin's contribution was largely confined to consideration of the death penalty. Three of the other five were psychiatrists; the remaining two high-level prison administrators. According to the Code draftsman, the provisions on corporate criminal liability offered "no revolutionary changes in existing law on the subject." Tracking the birth of the Code's provisions on corporate criminality can be slightly confusing. Time constraints undercut consideration of s. 2.07 of the Model Penal Code, Tentative Draft No. 4. at 22-24. during the 1953 A.L.I. meeting. The section was reprinted in Tentative Draft No. 5, at 67-59, and discussed at the 1956 meeting (Proceedings 170-196). The comment, however, appears with Tentative Draft No. 4, at 146-155. Nor did the proposed rules put forth much more than a bland commentary about why the drafters had elected to support the idea of corporate criminal liability: It was first observed that "the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy." The attitude of this draft," it was said, "is that on balance it is proper, and there is utility in recognizing the conception of corporate criminal responsibility for all offenses."

Professor Glanville Williams, discussing the ALI proposal, thought that it might have been the better part of wisdom to re-examine the concept of corporate criminal liability de novo rather than to accept the Topsy-like development of the idea. "I know that the Reporter has

54. GOODRICH & WOLKIN, supra note 43, at 23.
55. THORSTEN SELLIN, THE DEATH PENALTY (1959). Sellin compared adjoining states, one with and the other without capital punishment. He found no difference in the homicide rates for the adjacent jurisdictions.
56. GOODRICH & WOLKIN, supra note 43, at 23.
57. 33 A.L.I. PROC. 170, 171 (1956). He went on to indicate that "[t]his is not to say that these sections represent in any sense a restatement of the existing law. What is attempted here is to produce some order in an area that has developed in a rather disorderly way, and to state some general principles around which a rational formulation can be constructed." Id at 172.
58. MODEL PENAL CODE Section 2.07, cmt. (1)(c) (Tentative Draft No. 4. 1956). It is perhaps not unreasonable to recall a similar justification offered by the preeminent seventeenth-century jurist Sir Matthew Hale for the validity of statutes that decreed the death penalty for the practice of witchcraft:

That there were such creatures as witches he made no doubt at all; for first, the scriptures had affirmed so much. Secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their confidence of such a crime. And such hath been the judgment of this kingdom, as appears by that Act of Parliament which hath provided punishment proportionable to the quality of the offense. ANONYMOUS, A TRYAL OF WITCHES AT THE ASSIZES HELD AT BURY ST. EDMUNDS FOR THE COUNTY OF SUFFOLK; ON THE TENTH OF MARCH, 1664 102-103. [The trial date actually was 1662]; see GILBERT GEIS & IVAN BUNN, A TRIAL OF WITCHES; A SEVENTEENTH-CENTURY WITCHCRAFT PROSECUTION 101 (1997).
told us that the whole trend of decisions is in favor of extending corporate liability," Williams observed, "but he has also told us... that the cases are not well reasoned on fundamental policy, and it seems to me that the judges have not always looked where they are going." The ALI proposal offered no idea regarding what considerations had been balanced, when it observed that, "on balance," the advantage tilted toward advocacy of corporate criminal liability. The Reporter was sensitive to this logical lacuna. Virtually wringing his hands publicly, he observed: "It would be hoped that more could be pointed to in justification of placing the pecuniary burden of criminal fines on the innocent [presumably shareholders are meant] than the difficulties of proving the guilt of the culpable individual." These observations would lend themselves particularly well to research that could establish more clearly whether it is so difficult to prove the guilt of the culpable individuals sufficiently often as to make it desirable to permit and to initiate criminal prosecution of the corporation? The question could be examined from several different vantage points, including, for instance: (1) Does permissible prosecution of the corporation inhibit the prosecution of individuals? and/or (2) Does the likelihood of corporate criminal prosecution embolden individuals to engage in criminal actions? Tied to such issues are a host of other considerations which, lacking satisfactory data, often render judgments no more reliable than suspect anecdotal tales.

The particular ingredients of the Model Penal Code's conclusions on corporate crime need not detain us overlong: our interest is only passingly in what they declare; it is the empirical foundation of the reasoning that is employed to support these provisions that most concerns us. Besides, there is a particularly fine exegetic analysis by Kathleen F.

60. Id. at 179. Unease is induced in regard to the level of attention paid to the issue by the ALI reporters when we find that the Proceedings identify Professor Williams as "Granville" (Id. at 178) and Professor Mueller as "Butler" (Id. at 183).

61. Id. at 174.

62. Note the observation of a Nader study group on this point: "Part of the risk of an investment is that you may earn something you didn't expect (an unexpected oil find) or you may not earn something you do (A & P was held liable for $35 million in a price-fixing case in 1974). The risk of loss comes with the territory." RALPH NADER, MARK GREEN, & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 230 (1976).


64. But note that at least one appellate court has ruled that in order to find a corporation guilty, a responsible individual must be judged guilty of the offense: see Imperial Meat Co. v. United States, 316 F.2d 435 (10th Cir.), cert. denied, 375 U.S. 820 (1963).

65. There is "fertile ground for plea-bargaining deals between the managers or directors and the prosecution, whereby the corporate entity will admit guilt on the condition that its managers or directors will not stand trial." Eliezer Lederman, Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle, 76 J. CRIM. L. & CRIMINOLOGY 285, 317 (1985).
Brickey that deals in great depth with the Code's "dauntingly complex rule of corporate liability" that is said to be "capable of producing quixotic results." We will merely mention some of the high points in order to provide an overall sense of the direction taken by the Code as background for our call for the establishment of a satisfactory research base.

Section 2.07, the core constituent of the ALI position, sets out three situations under which corporate criminal liability is advocated. These are by no means self-defining: as Brickey points out, they have raised perhaps more questions than they answer, in part because important terms, such as "legislative purpose," "plainly appears," and "high managerial agent" are not precisely defined.

The Code specifies three major elements in its position on corporate criminal liability: First, there is the respondeat superior standard. A corporation may be held criminally liable for infractions and non-Penal Code criminal offenses committed by its agents on its behalf if the legislative purpose plainly appears to impose such liability. The precise wording is that criminal liability will be possible if:

the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on the corporation plainly appears . . . and the conduct is performed by an agent of the corporation acting within the scope of his office or employment in behalf of the corporation, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the conditions under which it is accountable, such limitations shall apply.

This rule is moderated by a due diligence clause that specifies that criminal liability will not follow if "the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission." This caveat would be eroded in time so that any corporate employee, even one specifically warned to abstain from a certain criminal act, would render the corporation criminally liable if he or she performed that act.

67. Id. at 632.
68. Id. at 611.
69. See id. at 598-604.
70. MODEL PENAL CODE, supra note 58, at § 2.07(1)(a).
71. Id. at § 2.07(4).
72. See United States v. Hilton Hotels, 467 F.2d 1000 (9th Cir. 1972), cert. denied 409 U.S. 1125 (1973). An early example is Overland Cotton Mill Co. v. People, 75 P. 934 (Colo. 1904) (an employee failed to heed specific instructions not to employ underage workers). Particularly strong arguments against watering down mens rea by holding corporations responsible for agents' acts are offered in James V. Dolan & Richard B. Rebeck, Corporate Criminal Liability for Acts in Violation
Among the justifications for holding a corporate entity liable for such offenses is the belief that an errant agent knows "that it will be difficult to identify a specific wrongdoer and that, even if he is identified, jury lenity will likely result in his acquittal." Unsaid is the idea that in such circumstances the best thing is to go after the corporation. Of course, it is empirically unknown and questionable whether any meaningful number of corporate offenders violate the law because they assume that they will be difficult to pinpoint and/or that juries will be easy on them.

The next provision in the Code deals with omissions, indicating that a corporation may be held criminally liable if "the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law."

The third and final section specifies that the corporation can incur criminal liability for offenses defined under the Penal Code and indicates the limits of this liability: "[if] the commission of the offenses was authorized, requested, commanded, performed or recklessly tolerated by the board of directors . . . or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment."

B. Mueller's Critique of the ALI Proposal

There were two major pitchfork times that Mueller thrust into the proposal by the American Law Institute on corporate crime. The first grew out of his involvement in a study of mens rea that had been underwritten by a gift to the University of Michigan. The other involved his skepticism about the ALI pronouncements because, he maintained, they lacked scientific support. Indeed, Mueller later would abandon his law school career to teach and do research at Rutgers University, in one of the leading criminology and criminal justice programs in the United States, a career switch that perhaps can be regarded as signifying his commitment to the idea that empirical investigation is an essential prior step to the enunciation of legal doctrine and one that too often is neglected or carried out by persons without adequate legal training and insight.

Several decades after Mueller attacked the ALI statement, he wrote about what had impelled him to do so:

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73. MODEL PENAL CODE supra note 58, at § 2.07 (1)(b) at 148-149.
74. Id. at § 207(1)(b).
75. MODEL PENAL CODE § 2.97(1)(c).
What gave me the idea to write on the topic? I had been a post-doc student of Herb Wechsler at Columbia, who was just starting the MPC project. We interacted frequently, both at Columbia and later at the annual drafting sessions of the ALI. I usually fed him comparative information. Francis Allen [of the University of Michigan Law School] was also working on the MPC and had been assigned the task of drafting the corporate criminal liability articles. I offered my comments, implying that this was the codification of a myth. Both Wechsler and Allen invited me to write a research paper from a comparative perspective. Since at W. Va. University we had no library resources to speak of, the Dean of the University of Michigan Law School offered me a Cook Fellowship to spend a summer at Ann Arbor on this project. The result was devastating. I had attacked the A.L.I. baby. . . Wechsler got quite cool. (But Wechsler’s increasing coolness may also have been due to my close friendship with Jerome Hall [of the Indiana University Law School], who likewise was a M.P.C. outcast early on, for precisely the same reasons: no comparison, no empirical studies, no systematic logic). The opening paragraph of Mueller’s critique of the ALI position employed a horticultural analogy:

Many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is a hybrid of vicarious liability, absolute liability, an inkling of mens rea, though a rather degenerate mens rea, a few genes from tort law and a few from the law of business associations. This weed is called corporate criminal liability (herba responsibilitas corporationis M. for those who prefer the botanical term). Nobody bred it, nobody cultivated it, nobody planted it. It just grew. To be quite sure, it has not done much harm; at least nobody has established any harmful results stemming from its mere existence, so that some may well wish to conclude upon its usefulness. Has it done any good? Again,

77. Mueller was a 1947 graduate of Schloss Ploens College in Germany, and then studied law at the University of Kiel. He received a J.D. degree (combined with work in sociology) from the University of Chicago in 1953 and an LL.M. from Columbia in 1955. He was well versed in comparative law and later spent nine years (1974-1982) traveling the world as chief of the United Nations Crime Prevention and Criminal Justice Branch.

78. Letter from Gerhard O. W. Mueller to Gilbert Geis (Feb. 8, 1993) (on file with authors). For Hall’s views on the significance of mens rea, see JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 70-211 (2nd ed. 1960). Hall’s position on corporate criminal liability can be found in JEROME HALL, LAW, SOCIAL SCIENCE AND CRIMINAL THEORY 278-283 (1982) (“Instead of indulgence in metaphor the realistic conclusion might have been - a corporation cannot commit a crime but it is defensible, perhaps useful, to subject a corporation to punitive sanctions in certain cases. This would not have confused thinking about criminal law and it would have focused attention on the pertinent question - the use of penal sanctions for damages or injuries that are not criminal”). Id. at 278-9.
nobody knows, though the framers of the law have formed many opinions, all resting on rather educated agronomic conjecture.79

Mueller lingered in herbaceous territory. When the ALI decided to cultivate the criminal law garden, he observed, it became evident that something had to be done about the rambunctious weed of corporate criminal law. One would have thought, Mueller noted, that Institute experts might have dissected a specimen to determine its constituent elements. “Instead,” he declares, “it was decided to uproot the plants and re-plant them in an orderly fashion, . . . those with blue blossoms up front, those with red blossoms way in the back, and those with white blossoms in the middle.” The result was a “neat little plot, designated section 2.07.”80

However tidy the plot, it offended Mueller’s jurisprudential sensibilities. Perhaps, he muses, the herbs [that is, corporate criminal responsibility] should have been plowed under. But he rejects this as too radical, the sort of thing “an agronomist of the radical school” or “a stupid peasant” might do.81 Then Mueller veers to his—and our—fundamental theme: “At least,” he maintains, “the wise agrarian would subject the plant to a thorough inspection first.”82 Put more prosaically, Mueller insists that the ALI code and the legislative acts and court decisions regarding corporate criminal liability should have been examined in order to answer “embarrassing questions” in regard to which “scientific data is lacking.”83 His theme is driven home with the observation that the idea of corporate criminal liability “has developed without rhyme or reason, proceeding by a hit or miss method, unsupported by economic or sociological data.”84

For Mueller, the ALI’s disregard of mens rea considerations aggravates an unexamined position. He employs evocative—if not notably to-the-point—prose to express his distress about the shunting aside of mens rea considerations: “Here the hand has moved without order from the brain. To impose liability for such a movement of the corporate hand would be analogous to subjecting an epileptic to criminal

80. Id. at 21-22.
81. Id. at 22.
82. Id.
83. Id. at 24.
liability for the harm done by a motion of his hand, not willed, but solely the reflex of an epileptic fit." 85

Were the Model Penal Code merely a Restatement, Mueller observes, he would be willing to hail much of it and would find most of it acceptable. But it is a Model Code, "the aim of which is to improve upon existing law." 86 The only point regarding corporate criminal liability in section 2.07 that pretends to be data-based, Mueller points out, appears in a sentence that declares: "In many cases . . . such penal provisions form an integral part of the regulatory policy and are based on considerable pragmatic experience indicating their usefulness." 87 Mueller presumes that his readers will appreciate the shallowness of this observation in terms of any scientific strength: it hardly rises above the level of folklore. We would note that there are many things that "form an integral part of regulatory policy" and about which "pragmatic experience", however "considerable", often is far from a reliable indicator of jurisprudential value. Capital punishment, for instance, is an integral part of the penal code in most states and pragmatic experience indicates that it is successful in killing those who are selected for execution. This does not justify the death penalty scientifically; what would be required would be evidence of its utility to attain diverse goals claimed for it, though there assuredly would be disagreement concerning what these goals ought to be.

Mueller finds the absence of hard evidence regarding the utility of the concept of corporate criminal liability, given that it is an issue that involves huge sums of money, "particularly amazing in view of the fact that the wealth of corporate interests could hardly be expended on any more fruitful and profitable economic-legal inquiry". 88 Mueller's amazement may be a bit disingenuous. Corporate spending priorities are formulated by individuals, and individual executives may prefer that their employers' entity will be targeted with criminal wrongdoing rather than themselves and their colleagues—or even in addition to themselves and their colleagues.

The absolute criminal liability element in the Model Penal Code, Mueller would insist, was ill-advised since it would: (1) frustrate the enforcement of the statute, because the imposition of penalties despite

85. Mueller, supra note 21, at 41. This seems, to us, an ill-chosen analogy. What is done in the corporate world is not unwilled; it reflects decision making, either by a person or by a group of people. It is the matter of imputing the action to a mindless, anthropomorphized entity that becomes questionable: epileptics have no control over seizures, presuming that they have adhered to a prescribed medication regimen.
86. Id. at 26.
87. Id. at 27.
88. Id. at 24.
corporate efforts to avoid wrongdoing will create nonchalance rather than diligence in regard to imposed duty, with the result that (2) recurring fines become part of ordinary business operating expenses, increasing the cost of the product or service to customers. 89

We note this objection because it illustrates so clearly the almost inexorable pull on commentators dealing with corporate criminal liability to employ arguable assumptions in order to buttress the ideological position that they assume. Here Mueller, though issuing a clarion call for empirical evidence, relies upon commonsense (perhaps correct, perhaps not) inference to make his point. Does penalty despite care truly create on-the-job nonchalance? Neither Mueller nor we know the answer for certain. And the idea that fines will come to be seen as ordinary business expenses to be passed on to customers also is an empirical, not a guesswork issue; the cost of fines likely cannot be passed on to customers if the corporate culprit is in a highly competitive field where the consequences of raised prices are likely to reduce profits and, perhaps, reduce them a good deal more than they will increase revenue.

Mueller, after this excursion, notes that the view that there is a sub rosa encouragement in corporations for law violations is, in his judgment, overstated. Then he reverts to his theme: “In any event, before it can be argued that such sub rosa encouragement is so prevalent that the dragnet method of prosecution is justified, somebody will have to show that the assumption of such widespread sub rosa criminality is true. Nobody has done that yet.” 90

Mueller’s twelve-point summary of his views begins with the observation that “[t]he common law has developed the method of imposing criminal liability upon corporations without any evidence of its effectiveness in the promotion of future lawful conduct by corporations.” 91 He maintains that the Model Penal Code restates and extends principles of corporate criminal liability developed during the previous century and does so “devoid of economic-legal proof of the necessity for such liability.” 92 In the last of his points, Mueller reiterates his major policy recommendation, stating, “[i]t is urged that an economic-legal inquiry into the supposed effectiveness of corporate criminal liability be undertaken before the Model Penal Code sanctions its use, and that, in any event, the mens rea requirements of the common law be rigidly adhered to.” 93

Mueller never truly brings together his two points—the one

89. Id. at 44.
90. Id. at 45.
91. Id. at 46.
92. Id.
93. Id. at 47.
focusing on *mens rea* and the other on the empirical vacuum regarding corporate crime. If satisfactory research were to show the efficacy of corporate criminal liability, would he be willing to jettison or downplay his *mens rea* reservations? If not, presumably the research will not, for him, resolve the fundamental problem of whether to criminalize certain forms of corporate conduct.

IV. Corporate Criminal Liability after the Model Penal Code

Mueller’s plea and his reservations about the Model Penal Code doctrines on corporate crime fell upon deaf ears. In the United States, the idea of corporate criminal liability has followed a path (or perhaps it has been a detour) that diverges from the research-based law-making recommended by Mueller. The concept increasingly has been incorporated into legal codes and enunciated and supported by judicial decisions. Legislatures and courts, however, have tended to select amongst the Code provisions—or, as Brickey puts it, they have “picked and chosen at random from 2.07’s grab bag of rules.”

Brickey notes that the Code provided “an organizing principle around which many state laws have been modeled, but... it has yet to achieve the goal of bringing order and rationality to this unruly branch of the law.”

The once deeply-rooted overseas resistance to the concept of corporate criminal liability that existed when Mueller wrote has wilted significantly, as countries world-wide increasingly have exposed corporations to the whip of criminal law, making anachronistic Mueller’s observations that “a substantial portion of the world rejects corporate criminal liability after more thought and contemplation than has ever been given to the subject in this country.” Mueller later amended this position, granting that the overseas jurists had no firmer empirical basis for their opposition to corporate criminal than those who favor the doctrine: “[T]he continental lawyers who reject corporate criminal liability... do not present any empirical idea for that belief system either. They simply have hit on a solution which I believe to be, ultimately, more sustainable by empirical data yet to come.” He later added a caveat: “I am all for protecting the environment, but it should be done by civil means (polluter-pays-principle)” and he concluded on point: “But, then let’s get the evidence!”

95. Id. at 633.
96. Mueller, supra note 21, at 35.
97. Id. at 21.
98. Id.
99. Id.
A. Do Criminal Penalties Deter Corporate Illegality?

It is generally presumed that the primary aim of criminal penalties is to deter wrongdoers from engaging in further violations (specific deterrence) and/or to deter others, by example, from breaking the law (general deterrence). Does this happen when corporations are subjected to criminal proceedings and penalties? What have we learned since Mueller bemoaned the formulation by the American Law Institute of policies regarding corporate crime that lacked an empirical foundation?

A recent comprehensive review of studies on corporate deterrence concluded that the knowledge base remains woefully weak and incomplete. "Corporate crime control is a deceptively complex subject." Sally S. Simpson writes. "In spite of many suggestions for how it might be accomplished (many of which are based on ideological preferences), few strategies have been explored empirically or systematically." 100 Simpson notes further that she was "especially surprised by the woeful lack of research on corporate deterrence, especially from a criminological perspective" 101 and observes that in "the few studies that do exist the evidence [on deterrence] is far from conclusive." 102 She reiterates Cofé's claim that if assertions made about corporate criminal liability were based on reliable evidence, the case for deterrence would be strong indeed 103, but emphasizes that little is cited in support of the deterrence contention beyond anecdotal experiences and personal beliefs.

Notwithstanding Simpson's awareness of the paltry amount of evidence, she allows herself to be led to the conclusion that "state imposition of harsh punishment [on a corporation] may, in fact, be counterproductive," 104 because it could produce defiance, lack of cooperation, antagonism toward regulators, and potentially higher crime rates. She grants that a deterrent effect might not be discernible because criminal penalties are not imposed often or severely enough on corporations to insure compliance. 105 This becomes another researchable

100. SIMPSON, supra note 27 at xi. Some of the nature of this complexity is indicated in the observations of Christopher Stone:
Those who trust to the law to bind corporations have failed to take into account a whole host of reasons why the threat of legal sanctions is apt to lack the desired effect when corporate behavior is the target - for example, limited liability, the lack of congruence between the incentive of top executives and the incentive of "the corporation," the organization's proclivity to buffer itself against external, especially legal threats, and so on.
CHRISTOPHER STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORP Responsive AI: This is a legal document discussing the deterrence of corporate illegal behavior through criminal penalties. The text highlights the complexity and limited research on corporate deterrence, emphasizing the不足 of empirical evidence. Simpson's critique of the reliance on penalties for deterrence and the potential counterproductive effects are discussed. The document references previous works and acknowledges the need for further research to substantiate claims about deterrence. However, it notes that little evidence supports the deterrence of corporate crime through current practices.

101. SIMPSON, supra note 27, at xi.
102. Id. at xii.
103. Coffee, supra note 9, at 425.
104. SIMPSON, supra note 27, at 21.
105. Id. at 45.
issue: does more severe punishment reduce offending corporate behavior? All told, in the end, Simpson, writing almost half a century later, comes to echo Mueller. Today's policies might well be "bad policy," she says, because they are based on "bad science." And she concludes, much as Mueller had:

[M]uch more work on corporate compliance (and deterrence) needs to be done before any policy recommendations can be justified. It is important that crime control policies be influenced by science rather than political expediency.

B. A Current Controversy – Still Non-Empirical

Simpson's assumption that deterrence should be the measuring rod by means of which to evaluate corporate crime laws is the majority view, but not the only one. A recent law review contribution advocates a different goal, while at the same time it illustrates the failure to provide any empirical underpinning for the position being ardently argued. Lawrence Friedman takes issue with two earlier articles that favored civil penalties rather than criminal actions to punish corporate wrongdoing. He observes that one of the articles had claimed that "the doctrine of corporate criminal liability has developed ... without any theoretical justification," but he fails to appreciate that it is the absence of data that has hobbled the concept at least as much and probably a great deal more than inadequate theory: acceptable theory must be based on demonstrated and replicable fact.

Friedman begins his rebuttal by observing that "there has been surprisingly little studied consideration by American jurists and legal commentators on the raison d'etre for corporate criminal liability," a statement belied by a recently-published bibliography of some 718 different contributions on the subject, most of them appearing in the past three decades.

The main point of attack by Friedman on the writers with whom he differs rests on their estimate of the degree of deterrence that criminal actions in contrast to civil proceedings might exercise on corporations.

106. Id. at 159.
107. Id. at 161.
108. Friedman, supra note 24.
110. Fischel & Sykes, supra note 110, at 320.
111. Friedman, supra note 24, at 833.
For Friedman, the major function of the criminal law is not deterrence but "expressive retribution," by which he means that punishment should convey the moral condemnation of the citizenry, its outrage at the behavior:

The aim of expressive retribution is the defeat of the wrongdoer's valuation of the worth of some person or good. Unlike deterrence, this objective . . . cannot be accomplished at all through civil liability. Notwithstanding, the retributive character of some aspects of civil liability (a punitive damage award, for example), only criminal liability is understood against the background of social norms codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates.115

No evidence is offered that citizens notably desire or demand criminal retribution against corporations or that such criminal retribution particularly satisfies the outrage that allegedly ought to trigger the criminal proceedings. Some—perhaps a great many—survivors of persons killed in an airplane crash likely caused by manufacturing negligence, for instance, may be indifferent about criminal sanctions against the guilty corporation but intent upon receiving financial compensation from the offender.

Friedman finds Kant's categorical imperative that declares that even if an island's population is to be scattered worldwide tomorrow, it is morally necessary that they execute a condemned man today in order to honor the offender's humanity—his freedom to have chosen to do what he did—and their right to revenge.114 Friedman believes that "expressive retribution" will work because corporations have "independent identities in the community based upon attributes . . . that substantively distinguish them from their owners, managers and employees."115 He believes that it also will allow victims and the community to make known their disapprobation. How far below the Fortune 500 companies such identification descends is an open question; so too is the issue of precisely what it is, if anything, besides moral righteousness that such criminal identification will achieve. Friedman insists that the "expressive approach can be regarded as consequentialist, a means to an end."116 "Criminal liability [he insists,] sends the message that people matter more than profits and reaffirms the value of those who were sacrificed to

113. Friedman, supra note 24, at 854.
115. Friedman, supra note 24, at 834.
116. Id. at 842 (quoting Dan M. Kahan, Social Meaning and the Economic Analysis of Crime, 27 J. LEGAL STUD. 609, 618-19 (1998)).
'corporate greed.' But we have no reliable information on whether the end, amorphous as it is, in fact is achieved by criminal charges or whether the criminal law is the suitable method for achieving it. The most memorable moral condemnation of a corporation in recent times may have been the antipathy, unaccompanied by penal charges, that was directed toward the Dow Chemical Company during the Vietnam war.

In a far reach to what Friedman grants is "[a]necdotal evidence" to support his "impressionistic analysis," he adverts to the civil and criminal trials of O.J. Simpson. He reads these as demonstrating the relative inadequacy of the civil judgment to overcome in the public mind the criminal finding of not guilty. This rather odd analogy reduces a much more complex situation to at best an arguable conclusion. Polls indicate that overwhelmingly Simpson was believed to have been guilty by the time the criminal trial ended; the loss of faith in the criminal process may have been somewhat alleviated by the civil judgment. It would seem that, if nothing else, the civil action may have come closer to satisfying any public desire to "expressive retribution" in that particular case.

The issue we have with Friedman is not that he is incorrect, but that he offers virtually no support for the position for which he argues. "Thus corporate exemption from criminal liability," he maintains in his concluding sentence, "would tend to undermine the condemnatory effect of criminal liability on individuals in respect to similar conduct—and, ultimately, to diminish the moral authority of the criminal law as a guide to rational behavior." We can only ask: On what foundation of satisfactory information does Friedman base his conclusion?

C. The Law of Corporate Crime Today

There has been, as Coffee observes, an "incipient consensus" developing throughout the world that the criminalization of corporate crime is a requisite requirement for satisfactory control of organizational

117. Id. at 855.
118. See, e.g., HOWARD ZINN, DOW SHALT NOT KILL (1968).
119. Such evidence also is adduced is a recent article on "shaming" and corporations: "While I do not purport to offer any final view on these issues . . . ,my analysis will assume throughout, and at least anecdotally demonstrate, that corporations and corporate directors are enmeshed in communities in which reputation does indeed matter." Daniel A. Skel, Jr., Symposium Norms & Corporate Law: Shaming in Corporate Law, 149 U. PA. L. REV. 1811, 1812 (2001).
121. Friedman, supra note 24, at 858.
law-breaking. The pace of the developing patterns also appears to be accelerating. In 1988, the Council of Europe recommended that member states give consideration to changing their criminal codes to include corporate criminal liability and that they should attach four elements to their definition of the offense: (1) the offender's act should be related to his or her employment, even if the offense is alien to the corporation's purposes; (2) liability should attach regardless of whether a natural person who committed the act can be identified; (3) the enterprise can be exonerated if "all necessary steps" had been taken to inhibit the behavior; and (4) corporate liability should be imposed in addition to individual liability.

Mueller's advocacy of consideration of mens rea requirements before permitting prosecution of corporations has been all but totally repudiated by American courts. In Egan v. the United States, for instance, the court held that "[i]f the act was... done [by a corporate employee] it will be imputed to the corporation . . . . There is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose."

The United States Sentencing Commission provided the most notable recent additions to the debate concerning corporate criminal liability when it issued guidelines for the judicial disposition of convicted corporate criminals. The Commission has made some passing attempts at gathering data to go with its recommendations, though primarily to

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123. Wells, supra note 5 at 122 (citing Recommendation NO. R (88)(18)).

124. Egan v. United States, 137 F.2d 369, 379 (8th Cir.), cert denied, 320 U.S. 788 (1943). One writer offers the following proposed model by which to adjudicate corporate mens rea in terms of constructive fault:

Did the actions of the corporation, given the circumstances, objectively manifest intention or purpose, awareness or knowledge, indifference or recklessness? Would the average corporation of like size, structure, and complexity have known the risks of the injury? William Lauter, Corporate Bodies and Guilty Minds, 43 Emory L. J. 647, 705 (1994).

undergird what it proposed rather than to assess the subsequent influence of its new guidelines. Penalties have been made much stiffer, though they can be mitigated by cooperation with enforcement agencies and demonstration of policies and programs aimed at heading off the offense before it occurred. Such mitigation, however, is not permitted if the crime was committed by more senior employees with managerial authority.

The research potentialities associated with the operation of the new guidelines for corporate criminal liability are manifold. Arlen, for instance, suggests that the guidelines do not offer corporations enough benefits to encourage them to locate individual wrongdoers and that thereby they have the effect of possibly increasing the amount of such conduct.126 This supposition might be regarded as a hypothesis, though, unfortunately, one that has little likelihood of definitive research resolution.

Of particular note is an early report that all but a few of the companies sentenced under the guidelines had been in business ten or fewer years, and that 97 percent of the 280 firms falling under the guidelines were privately held or controlled by a small group of shareholders.127 It may be that the debate on corporate criminal liability, one that tends to visualize the culprits as Fortune 500 organizations, deals with an issue that is very far from the reality of what actually goes on.

D. Researching Corporate Criminal Liability

The intellectual focus on corporate criminal liability, as we have indicated, has overwhelmingly involved debate about juridical and philosophical issues. Coffee has made this point clearly, as well as the point that the more pressing need is for policy research:

The study of corporate criminal responsibility too long has been led astray by commentators seeking to fashion retributive justifications and anthropomorphic analogies. Such an approach not only compounds the legal fiction of corporate personality with the legal fiction of mens rea, but worse yet, it blinds us to the real issue of how to make deterrence work when the offender is an organization.128

It is far easier to fault those who have written on issues of corporate criminal liability for failing to gather and take account of empirically-based information than it is to set forth proposals for the kind

128. Coffee, supra note 5, at 448.
of work that is required. We need to emphasize initially that such work can be extraordinarily complicated, time-consuming and often very expensive. It has to be carried out with great skill or the results will confound rather than enlighten, failing to persuade policy-makers. Not that policy-makers will necessarily respond to scientifically sound results, if these results fail to coincide with their ideology or are deemed not likely to sit well with their political constituency. But democracy should rest on the belief that, given accurate information, the policy will make sensible choices.

By far, the most satisfactory method for resolving important questions regarding corporate criminal liability would be to launch a comprehensive inquiry, well-funded and staffed by persons with impeccable research credentials. The charge would be to design and carry out a research program that identifies pressing questions that can be answered with empirical evidence, and then to seek that evidence. Such a research group would be staffed by scholars and technicians representing diverse disciplines, with an overseeing board of prominent public figures who have no particular axe to grind or, at least, are willing to yield the weapon if they are persuaded that public interest so requires.

The intellectual and logistic advantages of such a comprehensive and focused approach are virtually self-evident. Besides that, a highly-regarded research enterprise would be much more likely than independent researchers to persuade criminal justice and corporate officials to allow access to data, and, in the best of all worlds, to permit the mounting of experimental designs that use random assignments to diverse interventions. For example designs that establish a protocol under which judges randomize impose on corporate offenders different, though seemingly more or less equivalent punishments. The objection to such a procedure is that it is unjust, a position that social scientists would rebut with the argument that it is far better to suffer what might prove to be minor injustices now so that in the future what is done will be done on the basis of informed knowledge rather than guesswork.\(^{129}\)

To advocate such a comprehensive research endeavor is to hope for the very best. Absent such an approach, what kinds of tactics and questions might individual scholars or investigative teams look at to begin

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\(^{129}\) Probably the most famous experimental design of recent times involved giving a reasonably representative sample of the country’s first and third graders polio shots to determine the efficacy of the newly-derived Salk vaccine. Half of the "Polio Pioneers" in this double-blind experimental design were injected with a placebo. See generally JANE S. SMITH, PATENTING THE SUN: POLIO AND THE SALK VACCINE (1990). See also UNIVERSITY OF MICHIGAN, POLIOMYELITIS VACCINE EVALUATION CENTER, AN EVALUATION OF THE EFFECTIVENESS OF THE 1954 POLIOMYELITIS VACCINE TRIALS: SUMMARY REPORT (1955). Ethical objections to the selective treatment were moot because there was only a limited amount of the vaccine available for use at the time.
to provide empirical insight into issues surrounding corporate liability? First, there needs to be a systematic and public annual accounting of law-breaking by corporate entities if we are to seek correlations between various circumstances and planned interventions, along with their consequences. Such an endeavor can be daunting: two particularly talented social scientists visited the issue at some length before virtually throwing up their hands at the complexities involved in such a task. But it can be done; the result will show flaws, but if the flaws can be kept consistent we can glean at least some idea of changes over time in the extent and form of corporate law-breaking.

Second, there is a need to carry out field work, primarily of a qualitative nature, on site (that is, inside corporations or as close as one can get to the behavioral scene) to obtain a satisfactory sense of the dynamics of decisions to violate the laws. There is an understandable tendency to avoid such demanding research efforts in favor of manipulating readily available data, such as information on corporate size and net income as these relate to offending. Such studies, as Szwajkowski notes in advocating them, are "especially attractive because the indicators cited can be readily computed or accessed without gaining access to the firm itself." But this kind of work has a tendency to substitute elegant mathematical analyses for a more thorough understanding of the dynamics of the situation that produced the violation.

Valuable research on corporate criminal liability could involve what sociologists call participant-observation. In such endeavors, an outsider participates and reports on the behavior of the group of interest—typically a juvenile gang—and seeks to gain the members' trust. There are obvious ethical questions that need to be resolved, most particularly whether to inform the group regarding how they are being used (or exploited, perhaps), and whether the observer will participate in law-breaking, especially law-breaking of a violent nature, or will report its likely occurrence to law-enforcement authorities.

Below, we offer a list of fourteen researchable issues that we have culled from various writings about corporate criminal liability.

130. ALBERT J. REISS, JR. & ALBERT BIDERMAN, DATA SOURCES ON WHITE-COLLAR LAW BREAKING 448-449 (1980).
131. Orland, in noting the need for such statistics, points out that Congress could have amended the securities law to require corporations to report all criminal indictments and convictions. Leonard Orland, Reflections on Corporate Crime: Law in Search of Theory and Scholarship, 17 AM. CRIM. L. REV. 501, 510.
These are debatable issues that could benefit from in-depth research resolution. The list could have been greatly expanded. While we seek to make it useful, we also seek to make it illustrative of the much wider realm that requires empirical attention. It should be noted that the answers to general questions might vary with significant aspects of the situation, such as the specific law involved (for example, antitrust, an environmental crime, or false advertising), the product line(s) of the corporation, its size, the historical ethos of the time, the state of the economy and similar considerations, as well as the characteristics of the persons committing the offense.

These are situations that could be examined empirically to shed more authoritative light on ingredients of corporate criminal liability and the consequences of different kinds of responses to it:

1. Perhaps the most thoroughgoing study of the processes by which a fatal (but not criminal) policy is formed in a corporate context is that presented in Diane Vaughan’s *The Challenger Launch Decision*. Vaughan was able to review a vast amount of material to support her conclusion that incremental well-meaning and perhaps even necessary compromises—none of which had untoward consequences—underlay the fatal explosion of the space craft. On the basis of her work, she observes that “research has produced little data about how decisions to violate are made” and that “absent a body of research examining these decisions, strategies for control will rest on untested assumptions.” A series of studies that retroactively seek to reconstruct the decision-making processes in major and minor instances of corporate law-breaking could prove exceptionally valuable for the formulation of public policy.

2. Leo Barille believes that Coffee’s position that juries might be impressed or intimidated by high level, powerful defendants and thus reluctant to find guilt is simply not true of many trials. There is a rich research literature on jury reactions to a variety of situations, including the status of the defendant and the particular charge. Studies

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137. “[I]n the case of health and safety statutes, the odds are high that . . . these laws will be substantially offset by judicial nullification when sentencing judges confront ‘flesh and blood’ defendants having impeccable backgrounds, community ties, and tearful families.” Coffee, supra note 11 at 462.


139. See, e.g., **Harry Kalvin, Jr. & Hans Zeisel, The American Jury** (University of Chicago Press 1987) (1966); **Valarie P. Hans & Neil Vidmar, Judging the Jury** (1986); **Saul**
tend to support the view that higher-status offenders, while they might benefit initially based on their prestige, are likely to be treated more severely than ordinary defendants when the violation is egregious.\textsuperscript{140} Little is known, however, about corporations as defendants in a jury trial. Research using real or simulated jury trials could resolve the different positions taken by Coffee and Barille and a host of issues regarding the ingredients of trials of corporations and corporate offenders and the strength or weakness in this regard of corporate criminal liability as opposed to or in concert with individual criminal liability.

3. The criminal process operates publicly and by its public operation, says Andrews, it confers disrepute on the subject. Andrews claims that outside the consumer field it is doubtful that such disrepute is very important in regard to corporations.\textsuperscript{141} This issue can be subdivided into at least two major questions: What effect does a public criminal process have on corporate matters, things such as profits, inconvenience, managerial shake-ups, stock prices, and earnings, and subsequent behavior? A second question concerns the impact on employees. Braithwaite and Fisse, in a groundbreaking field study, interviewed officials whose corporations had been involved in notorious offenses and discovered that they were very disturbed about the reactions of friends and neighbors, reactions that extended even to remarks made to their children by schoolmates.\textsuperscript{142} Very likely, different circumstances operate in different cases: the research endeavor would have to segregate and evaluate these various considerations. It would also have to attend to the consequences of actions taken at various points along the criminal justice continuum - the first publicity about the case, indictment, preliminary hearing or grand jury proceedings, the trial, the verdict, and the sentence.

4. Basic to the debate about corporate crime is the question of whether civil or criminal liability ought to be the preferred prosecutorial path. Questions abound on this issue: If only civil suits were permissible against corporate entities, would prosecutors be more dedicated to

\textsuperscript{140} See generally Brent Fisse \& John Braithwaite, The Impact of Publicity on Corporate Offenders (1983). See also Michael K. Block, Optimal Penalties, Criminal Law and the Control of Corporate Behavior, 71 B. U. L. REV. 395, 396 (1991): "Research on the 'reputational' effects of criminal indictments, including a modest study undertaken for this Article, suggests that criminal punishment of corporations does not influence corporate behavior more effectively than civil liability. Allegations of corporate wrongdoing affect the firm's reputation only if the allegations involve parties who contract with the firm."
locating a guilty individual and proceeding against that person criminally? If so, what consequences might this have in terms of deterrence, principles of justice, ideas of expressive justice, and similar matters? Since civil processes require a lower standard of proof to prevail, will there be more decisions adverse to the corporation than if the criminal route had been taken? A study employing random assignment of cases to one of the two categories would offer the likelihood of providing much better information on this key question than we now possess.

5. An interesting avenue of exploration would involve comparison of foreign jurisdictions which operate without criminal penalties for corporate wrongdoing with the situation in the United States. Alschuler offers a hypothesis to test:

My guess is that the imposition of civil sanctions through less burdensome judicial and administrative procedure in Europe results not only in greater fairness but also in more effective regulation. Our efforts to stigmatize aggregations of people, most of whom are blameless, are unjustified in principle and may be less effective in practice than civil alternatives would be. 143

A particularly good comparison might be that between Japan and the United States. The Japanese penal code has no general provision for corporate criminal responsibility, though it can be imposed as a statutory exception for acts of environmental pollution. Moreover, in Japan a corporate conviction cannot be obtained without proving criminality on the part of an individual representative of the business firm. 144 The paradox here lies in the fact that Japanese culture tends to emphasize collective responsibility for wrongdoing, while the ethos in the United States is notably individualistic. 145 Russia (and the Soviet Union before) has never adopted corporate criminal liability because the doctrine is said not to be "compatible with the tradition of our legal system." 146 It could make a useful site for comparison with the United States.

Such research assuredly is fraught with difficulties inherent in the diverse legal, social, and economic nature of the cultures and often with complications introduced by language differences, but the challenge of the work, and its likely yield, makes it a high priority research item.

143. Alschuler, supra note 85, at 311-312.
146. F. Reshetnikov, Criminal Liability of Corporations, in de Doelder & Tiedemann, supra note 123, at 343.
6. A retrospective historical and empirical review of what happened in Texas before and after 1987, when it became the last state in the United States to recognize that business entities could be held criminally responsible\footnote{147} might provide useful data on the doctrine of corporate criminal liability.

7. Pamela Bucy suggests that "[b]ecause vicarious liability is currently the universal rule of liability for the group of people most directly affected by corporate criminal liability, namely, corporate executives, the group may view the criminal justice system as unreasonable and unfair, and chose to disregard it."\footnote{148} Perhaps, but it is also possible that they will make mighty efforts to see that nothing goes wrong that will implicate them criminally, however unreasonably. It is also possible that vicarious liability is something that they know little, if anything, about and that it figures not at all into their operating procedures. Solid research could provide answers to such questions that are key to a comprehensive understanding of the implications of policies of corporate criminal liability.

8. Kenneth Dau-Schmidt has argued that the corporate wrongdoing is criminalized only because the society does not take it seriously enough.\footnote{149} Were it to be regarded as particularly blameworthy and harmful, he maintains, private litigants would attack these acts on their own and more efficiently by use of the tort system. If this is true, and it is at best arguable,\footnote{150} researchers might begin to gather information on why, if they do not, victims of corporate crime fail to take their grievance to the civil courts and if decisions are influenced by whether the entity itself can be held criminally liable.

9. "Where penalties are high individuals will fight while firms will settle," Coffee says.\footnote{151} What are the precise details of this process? How "high" must the penalties be—and does this involve both financial impositions and/or the possibility of imprisonment? Is corporate criminal liability a "higher" penalty if the penalty is a $600,000 fine than, say, a


150. See contra: "In modern societies, groups, particularly business organizations, are often sued for compensatory damages. In fact, this seems to be all that people normally want from the organizations they claim have victimized them." DONALD BLACK, THE SOCIAL STRUCTURE OF RIGHT AND WRONG 55 (1991) See also Eric H. Steele, Fraud, Dispute, and the Consumer: Responding to Consumer Complaints 123 U. PA. L. REV. 1107 (1975).

151. Coffee, Corporate Crime, supra note 9, at 463.}
civil fine of $1 million.

10. Coffee puts forward another basic proposition whose empirical resolution would contribute significantly to the debate on corporate criminal liability. "[C]orporate liability," he writes, "may make it easier to convict the individual defendants. In any multi-defendant prosecution, the interests of the defendants are at least potentially adverse, since each can generally gain concessions by implicating another. The corporation is no exception to this rule and is in a position to provide evidence against individual defendants or to discipline them, in return for leniency for itself." How often and under what circumstances does this scenario come into play? And how often does the opposite occur, that defendants became witnesses against the corporation in exchange for leniency for themselves? And how does this square with Coffee's observation that "law enforcement officials cannot afford to ignore either the individual or the firm in choosing their targets, but can realize important economies of scale by simultaneously pursuing both."152 Such a sweeping judgment, it seems to us, may do injustice to the very considerable variety of results that evolve from pursuing the corporation alone, individuals only, or both. What in fact are these things?

There also is another element to this complex interaction of considerations. It is believed that juries at times often compromise, acquitting all individual defendants and convicting the corporation in order to avoid putting the criminal label upon a white-collar defendant. But, as one comment observes: "There appears to be little empirical support bearing upon this assumption... and so the commentators have sometimes cited each other for support."153

11. Mark Cohen, on the basis of examination of some of the numerical details of sentencing practices involving corporations and their employees, has outlined briefly a line of research that could offer some substantive details about the intricate relationship between corporate defendants and employees of the organization who also are criminally charged:

Data on individual codefendants might provide many insights into


current sentencing practices. For example, in a closely held corporation, it is possible that judges view the company merely as a source of revenue to pay restitution and/or fines that otherwise might not be collected from an owner of the corporation who also is criminally liable. Alternatively, it is possible that judges do not view the individual and the corporation to be "substitutes," and instead impose distinct penalties on each. It is also possible that judges view the relationship between individuals and corporations differently from publicly held companies.\footnote{154}

Elsewhere, Cohen points out that, "somewhat surprisingly, firms [that were] found guilty after trial did not receive higher sanctions than did those that pled guilty."\footnote{155} This conclusion, he notes, run contrary to the general practice of offering "discounts" for guilty pleas.\footnote{156} He guesses that the added expenses to the corporation of going to trial plays into the calculus of the sentencing decision.\footnote{157} The determination of the accuracy and the dimensions of this situation could be part of a corporate sentencing study.

12. Research attention could profitably be directed toward the practice of indemnification of officers for their legal expenses when they are charged criminally for actions that were done as part of their employment. It is claimed that in states where such a practice is in place it undermines the possible deterrent effect of the prosecutory action.\footnote{158} It can be argued than an awareness of this financial protective shield might encourage employees to undertake actions that they otherwise would avoid if they appreciated that the full brunt of their prosecution and penalty would fall upon them rather than on the corporation. On the other hand, frivolous prosecutions of corporate officers, in which they have to pay for their defense out of their pocket, would put corporate personnel in an unfair situation. This is a subject about which we could use a good deal of solid information.

13. On an issue of specific importance to Mueller's position that mens rea cannot sensibly be imputed to a corporate body, there is anecdotal evidence that regulatory agents\footnote{159} and prosecutors\footnote{160} both tend


\footnote{156. See Milton Heumann, Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys 156 (1978).}

\footnote{157. See Cohen, supra note 154.}


\footnote{159. Hazel Croall, White-Collar Crime: Criminal Justice and Criminology 86}
to be sensitive to matters of culpable intent even when the law declares that strict liability is the operative legal rule. How exactly does such an ethos play in regard to the actual rather than the theoretical employment of the doctrine of corporate liability?

14. "[I]t would be reasonable," Leonard Orland writes, "to hypothesize that executive criminals are treated far less harshly when their corporation is a party to the crime than when their corporation is the victim of the crime." 161 This is another hypothesis that calls out for verification: is this true or not?

V. Conclusion

Orland criticizes what he believes is the ill-advised manner in which social scientists who lack training in law venture into studies of white-collar and corporate crime. 162 He grants nonetheless that "[d]espite the extraordinary expansion of the legal concept of corporate crime, both by Congress and the federal courts, the study of corporate crime remains a curiously neglected area of scholarship. The legal literature is astonishingly thin, and the non-legal literature is hopelessly misguided." 163 In terms of sheer volume, things have improved considerably since Orland made these observations more than two decades ago. But what continues to be missing is not the degree of attention devoted to the subject but the scientific nature of the information and insights regarding questions of corporate criminal liability.

The development of the doctrine of corporate criminal liability has been the result almost exclusively of expediency rather than of empirical information. This is not to say that what has resulted is necessarily wrong, only that it has not received the social scientific attention that could resolve many nagging, and very important issues. Or, put another way, what now exists in law could prove to be wrong in terms of what it seeks to achieve. 164 David Riesman, an early and eminent practitioner of social science who also held a law degree, once noted that lawyers are "very apt to be scornful of the findings of social science." 165

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161. Orland, supra note 132, at 513.
162. Id. at 503.
163. Id. But see DiMento et al., supra note 113 and accompanying text.
164. See generally Gilbert Geis & Joseph DiMento, Should we Prosecute Corporations and/or Individuals?, in CORPORATE CRIME: CONTEMPORARY DEBATES 72 (Frank Pearce & Laureen Snider eds., 1995).
Justice Brandeis quoted with approval the comment that "a lawyer who has not studied economics and sociology is very apt to become a public enemy."\textsuperscript{166} That remark strikes us as overblown, but we would offer in a similar vein the more muted observation by Justice Frankfurter: The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology, and related areas of scholarship, are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities.\textsuperscript{167}

It has been our theme that the holistic perplexity that is corporate criminal liability has suffered from the failure to recognize and, most importantly, to use empirical utensils to shed light on the legal principle of corporate criminal liability. However belated, it remains necessary to heed the warning of the British parliamentary report that emphasized the importance of evaluation of legislated policies: "It is both wasteful and irresponsible to set experiments in motion and omit to record and analyze that happens," the report observed. "It makes no sense in terms of administrative efficiency and, however little intended, it indicates a careless attitude toward human welfare."\textsuperscript{168}


\textsuperscript{168} \textit{Report of the Committee on Local Authority \& Allied Personal Services}, Cmd. 3703, at 45 (1968).
ARTICLES

CORPORATE CRIMINAL LIABILITY: WHAT PURPOSE DOES IT SERVE?

V.S. Khanna*

Although considerable debate surrounds society's increasing reliance on criminal liability to regulate corporate conduct, few have questioned in depth the fundamental basis for imposing criminal liability on corporations. In this Article, Mr. Khanna explores the underlying rationale for corporate criminal liability and finds it problematic. After summarizing the historical development of corporate criminal liability and surveying the current legal landscape, the Article explores the justifications for such liability. Mr. Khanna argues that corporate civil liability can capture the desirable features of corporate criminal liability, especially criminal liability's powerful enforcement and information-gathering dimensions. Furthermore, he contends that corporate civil liability avoids the undesirable features of corporate criminal liability. Such undesirable features include criminal procedural protections and criminal sanctions' stigma effects. Mr. Khanna concludes that a modified form of corporate civil liability could make corporate criminal liability obsolete by capturing the advantages of corporate criminal liability while avoiding or mitigating its disadvantages.

I. INTRODUCTION

Corporate criminal liability under environmental, antitrust, securities, and other laws has grown rapidly over the last two decades both in the United States and overseas.1 Although the imposition of

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1 See, e.g., Richard S. Gruner, Corporate Crime and Sentencing § 1.9.2, at 52-55 (1994) (discussing the increase in corporate sanctions and the relatively high rate of prosecution of corporate offenses); John C. Coffee, Jr., Emerging Issues in Corporate Criminal Policy, Foreword to Gruner, supra, at xix-xxi (discussing Europe's move toward more expansive corporate criminal liability); Harvey L. Pitt & Karl A. Groskaufmanis, Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 Geo. L.J. 1559, 1563, 1570, 1573-74 (1990) (noting the growth in criminal prosecutions of and sanctions against corporations as well as the growth in corporate criminal liability).
criminal liability on corporations, as opposed to managers or employees, has generated considerable debate, commentators have not comprehensively analyzed why corporate criminal liability exists. After all, corporations cannot be imprisoned. Furthermore, it is not clear that corporate criminal liability is the best way to influence corporate behavior. This Article compares the costs and benefits of corporate criminal liability with the costs and benefits of other possible liability strategies, including various forms of corporate civil liability, managers' personal liability, third-party liability, and administrative sanctions, in an effort to determine the best strategy or mix of strategies for society.

Part II of this Article examines the historical development and avowed purpose of corporate criminal liability in the United States. Part III outlines the system of corporate criminal liability in the United States and compares it to the systems used in Western Europe, highlighting the important similarities and differences. Part IV delineates six important characteristics of corporate criminal liability and argues that only the latter four should be the focus of inquiry when attempting to justify corporate criminal liability.

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2 See Richard A. Posner, Economic Analysis of Law 421–23 (4th ed. 1992) (noting that the availability of corporate criminal liability is troubling given the existence of corporate civil liability); Barry D. Baysinger, Organization Theory and the Criminal Liability of Organizations, 71 B.U. L. Rev. 341, 341–46 (1991) (arguing that imputing liability to the corporation is not likely to prompt more lawful behavior by the employees of large diversified firms, because the organizational structure of such firms pressures employees to commit crimes in order to meet short-term financial needs); John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalised Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 447–48 (1981) (discussing briefly why corporate criminal liability may exist and providing predominantly pragmatic or institutional rather than theoretical arguments in support of it); Brent Fisse & John Braithwaite, The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability, 11 Sydney L. Rev. 468, 504–07 (1988) (proposing that courts impose criminal liability on a corporation that covers up criminal conduct); Sanford H. Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423, 430–35 (1963) (advocating a lower actus reus requirement for corporate policymakers and raising questions about the effectiveness of imposing liability on the corporate entity itself); Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1231–42 (1979) (hereinafter Developments) (arguing that the need for deterrence and, perhaps, the desire for retribution are justifications for corporate criminal liability); John T. Byam, Comment, The Economic Inefficiency of Corporate Criminal Liability, 73 J. Crim. L. & Criminology 581, 581 (1982) (arguing that corporate criminal liability is inefficient from a deterrence perspective). Some of these authors have addressed the question of why corporate criminal liability exists, but this Article provides a more comprehensive treatment of this question by conducting a comparative analysis of corporate criminal liability and corporate civil liability. This analysis focuses on the relative costs and benefits of the sanctions available under each liability regime, evaluates the need for the procedural protections inherent in the corporate criminal liability regime, considers the enforcement and message-sending characteristics of alternative regimes, and provides a brief historical and comparative backdrop to this discussion.

Parts V through VIII evaluate whether these four characteristics of corporate criminal liability justify its existence. Part V examines the sanctions available against corporations in the criminal context and argues that the stigma sanction is rarely socially desirable. Part VI examines the procedural protections inherent in corporate criminal liability: the beyond reasonable doubt standard of proof, double jeopardy, jury trials, and the grand jury indictment process. It argues that these protections are almost always undesirable in the corporate context. Part VII concludes that the enforcement devices associated with corporate criminal liability will often be socially desirable, but that most of these enforcement devices are already available in other non-criminal corporate liability regimes. Part VIII examines whether corporate criminal liability sends any unique and important messages to society about which activities are worse than others. Part IX concludes that corporate criminal liability should be replaced with a corporate liability strategy that achieves deterrence at lower cost.

II. HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY

The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable. In the early 1700s, corporate criminal liability faced at least four obstacles. The first obstacle was attributing acts to a juristic fiction, the corporation. Eighteenth-century courts and legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality; a more pragmatic approach was not developed until the twentieth century. The second obstacle was that legal thinkers did not believe cor-
porations could possess the moral blameworthiness necessary to commit crimes of intent. The third obstacle was the ultra vires doctrine, under which courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters.\footnote{See Coffee, supra note 5, at 253. One important purpose of the criminal law is punishing the blameworthy. See, e.g., Developments, supra note 2, at 1231–33. Imputing an agent’s intentions to the corporation seemed inconsistent with this purpose; if the corporation itself were blameworthy, imputation would be unnecessary. Additionally, the respondeat superior doctrine had not yet developed enough to allow for the imputation of any kind of mental state. See Leigh, supra note 4, at 5–8; Coffee, supra note 5, at 253–54. Corporate criminal liability, a form of vicarious liability, may also have been impeded because English law had traditionally not recognized vicarious criminal liability between human principals and agents. See Brickey, supra note 4, at 415–21 (discussing the early English cases).} Finally, the fourth obstacle was courts’ literal understanding of criminal procedure; for example, judges required the accused to be brought physically before the court.\footnote{See Leigh, supra note 4, at 8–9; Coffee, supra note 5, at 253.} The following discussion of the historical development of corporate criminal liability emphasizes the first two obstacles — imputing acts and criminal intentions — because they were the most difficult for courts to overcome.\footnote{See Leigh, supra note 4, at 9–12; Williams, supra note 7, § 278, at 853–54; Coffee, supra note 5, at 253.}

A. Public Nuisance

Courts in both England and the United States first imposed corporate criminal liability in cases involving nonfeasances of quasi-public corporations, such as municipalities, that resulted in public nuisances.\footnote{See Coffee, supra note 5, at 253–55. Courts remedied the latter two obstacles rather easily, as Leigh notes, because the doctrine of ultra vires began to hold less sway, especially in tort and criminal cases, and because courts developed ways around the procedural problems of corporate prosecutions. See Leigh, supra note 4, at 9–12.} Brickey describes these early decisions:

In decisions imposing liability on such public entities, the courts ordinarily observed that the public convenience in question (usually a bridge or road) had been erected before the present inhabitants had taken on the responsibilities of the town, parish, or county; that it had been maintained by former inhabitants; and that present inhabitants were bound to do the same.\footnote{See Leigh, supra note 4, at 16–18; Brickey, supra note 4, at 401–02 (citing some of the early English decisions imposing corporate criminal liability, including The King v. Inhabitants of Clifton, 101 Eng. Rep. 280, 280–81 (K.B. 1794); Rex v. Inhabitants of Great Broughton, 98 Eng. Rep. 418, 418 (K.B. 1771); and Case of Langforth Bridge, 79 Eng. Rep. 910, 910 (K.B. 1635)).}
By the early 1800s, courts began holding commercial corporations criminally liable for the sorts of public nuisances that were previously inflicted by quasi-public corporations. These cases of corporate criminal liability did not fall foul of the first two obstacles. First, "no individual agent of the corporation was responsible for the corporation's omission." Second, "there was no imputation of guilt from agent to principal" because "only the corporation was under a duty to perform the specific act in question."  

B. Crimes Not Requiring Criminal Intent

As the presence and importance of corporations grew, courts extended corporate criminal liability from public nuisances to all offenses that did not require criminal intent. Prior to the mid-1800s it was questionable whether corporations could be held criminally liable for misfeasances (positive acts) as well as nonfeasances (omissions). In 1846, Lord Denman ruled in The Queen v. Great North of England Railway Co. that corporations could be criminally liable for misfeasance, and American courts soon began making similar rulings. This development eventually encouraged courts to extend corporate criminal liability to all crimes not requiring intent: "Once the principle

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14 See Elkins, supra note 5, at 91–92. Elkins cites several early decisions that imposed commercial corporate liability for public nuisance, including Susquehanna & Bath Turnpike Road Co. v. People, 15 Wend. 267, 268 (N.Y. Sup. Ct. 1836), which supported the development of liability, and McKim v. Odom, 3 Bland 407, 421 (Md. 1828), which expressed some early doubts. See Elkins, supra note 5, at 92 & nn.68–69. Elkins also notes that the criminal liability of such private corporations "was a creature not only of judicial decision but of legislative enactment." Id. at 92 (discussing The General Turnpike Act, Mass. St. 1804, Ch. 125).

15 Coffee, supra note 5, at 253.

16 Id. at 253–54.

17 See id. at 254.

18 See Elkins, supra note 5, at 93. Elkins's example of an early decision that rejected corporate liability for misfeasance is State v. Great Works Milling & Manufacturing Co., 20 Me. 41 (1841), which held that a corporation "can neither commit a crime or misdemeanor, by any positive act or affirmative act, or incite others to do so, as a corporation." Id. at 43, quoted in Elkins, supra note 5, at 93.


20 See id. at 1298.

21 See Elkins, supra note 5, at 93–95. In two mid-nineteenth-century cases, State v. Morris & Essex Railroad Co., 23 N.J.L. 360 (1852), and Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) 339 (1854), American courts followed the English precedent and indicted corporations for affirmative acts (misfeasances) that resulted in public nuisances. Brickey notes that in Morris, the court held that "once . . . corporations are indictable for nonfeasance, 'all preliminary and formal objections' to finding criminal liability . . . must be dispensed with because they apply equally to indictments for nonfeasance and misfeasance." Brickey, supra note 4, at 408 (quoting Morris, 23 N.J.L. at 360). Further, the New Bedford Bridge court explained that, even if the rule holding corporations liable only for nonfeasance had once made sense, "experience has shown the necessity of essentially modifying it." New Bedford Bridge, 68 Mass. (2 Gray) at 345, quoted in Brickey, supra note 4, at 409. Intuitively, abandoning the distinction between "acts" and "omissions to act" seems proper; the distinction is one of form rather than substance. See Brickey, supra note 4, at 409.
that corporations could be convicted of misfeasance for creating a nuisance was established, there was no theoretical impediment to imposing liability for other acts of misfeasance. . . .”

In order to hold corporations liable for misfeasance, courts imputed agent conduct to corporations, and such imputation would have been theoretically troublesome without the doctrine of respondeat superior. However, the doctrine was established at common law by the time courts decided the first corporate misfeasance cases in the mid-1800s. The doctrine’s development coincided with the growth in the number and importance of corporations and with society’s subsequent demand for regulation of business activity.

C. Crimes of Intent

Courts were slow to extend corporate criminal liability to crimes of intent. Not until New York Central & Hudson River Railroad Co. v. United States in 1909 did the Supreme Court clearly hold a corporation liable for crimes of intent. The case reached the Supreme Court

22 Brickey, supra note 4, at 410. Courts held corporations liable for many nonpublic nuisance offenses not requiring intent. See id. (“Courts accordingly held corporations amenable to conviction of such crimes as Sabbath breaking, permitting gaming on a fair ground, charging usurious interest rates, furnishing liquor to minors, and the unauthorized practice of medicine.” (citations omitted)).

23 See Coffee, supra note 5, at 253–54.

24 See id. at 254. For a discussion of the requirements of respondeat superior, see, for example, Developments, cited above in note 2, at 1247–51.


26 See Brickey, supra note 4, at 410; Elkins, supra note 5, at 95–96. For examples of courts’ reluctance to extend corporate criminal liability to crimes of intent, see State v. Morris & Essex Railroad Co., 23 N.J.L. 360, 364 (1852), and Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) 339, 345 (1854). According to Elkins, one reason for this reluctance was simply that intent raised novel issues because it was not a required element in the first cases that extended criminal liability to corporations. See Elkins, supra note 5, at 95–96. Moreover, some nineteenth-century commentators argued that the criminal law required that the convicted defendant be morally blameworthy and have the capacity to suffer from punishment, and corporations could not fulfill either of these requirements. See, e.g., Nathaniel Lindley, On the Principles Which Govern the Criminal and Civil Responsibilities of Corporations (March 30, 1857), in 2 PAPERS READ BEFORE THE JURIDICAL SOCIETY 31, 34–35 (London, William Maxwell 1863). Furthermore, finding corporations guilty of crimes of intent rather than punishing the agents and principals who actually carried out the crimes seemed to support the controversial and unpopular concept of vicarious criminal liability. Cf. Brickey, supra note 4, at 415–21 (noting the relationship between the development of corporate criminal liability and the development of vicarious criminal liability).

27 212 U.S. 481 (1909).

28 See id. at 494–95. English courts took longer to impose liability for crimes of intent. See Elkins, supra note 5, at 89.
on appeal from New York Central’s conviction for an Elkins Act violation:30

On appeal, counsel asserted that section 1 of the Act, which specifically declared the acts of officers, agents, and employees of a common carrier to be the acts of the carrier, was unconstitutional. To fine the corporation for the acts of its employees . . . amounted to taking money from and punishing innocent stockholders without due process of law.31

The Court disagreed and held that Congress could impose liability on corporations in this manner.32

Brickey notes that a motivating factor for this result was the need for effective enforcement of provisions such as the Elkins Act: “Enforcement of statutes . . . would be effective only if the corporation, which derived the benefit from the unlawful practice, were the target of the prosecution. . . . If corporations were immunized from criminal punishment . . ., Congress would lose its only effective method of controlling corporate misconduct and correcting . . . abuses . . .”33

The Court, then, apparently considered the case unique both because a failure to hold the corporation liable would compromise law enforcement and because Congress had clearly indicated its intent to impose criminal liability on the corporation.34

Subsequent courts, however, did not limit New York Central’s holding to cases of clear congressional intent.35 During the early twentieth century courts began to hold corporations criminally liable in

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30 See Brickey, supra note 4, at 413.
31 Id.
32 See New York Cent., 212 U.S. at 499. Furthermore, Brickey explains, the Court found that “the instant offense belonged to a larger class of offenses consisting merely of purposely doing something prohibited by statute. In cases involving this class of crimes, logic and policy dictated imposition of corporate liability for wrongs committed by agents acting within the scope of their authority.” Brickey, supra note 4, at 413 (citation omitted).
33 Brickey, supra note 4, at 414. “[T]he law ‘cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands.’” Id. (quoting New York Cent., 212 U.S. at 495).
34 See id. at 413–14. In addition, the political climate surrounding the decision, which came only a few years after the passage of the antitrust laws and during a general mood of hostility toward big business, would have made the decision more acceptable. See Coffee, supra note 5, at 254.
35 See Coffee, supra note 5, at 254. Courts initially drew distinctions between corporate crimes of general intent and crimes of specific intent. See Brickey, supra note 4, at 414. The question soon became “whether there remained a sound reason for drawing a distinction between imputing general and specific intent to corporations. After all, corporations had been held vicariously liable for such intentional torts as assault and battery, libel, and malicious prosecution.” Id. (citations omitted). The courts eventually resolved this issue by focusing on the power of the legislature: “The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not . . . bear discussion.” Id. at 414 (quoting United States v. MacAndrews & Forbes Co., 149 F. 823, 835 (C.C.S.D.N.Y. 1906)) (internal quotation marks omitted).
various areas in which enforcement would be impeded without corporate liability.\footnote{See Brickey, supra note 4, at 415; Coffee, supra note 5, at 254. Examples include "contempt of court, willfully or knowingly obstructing a road, conspiracy to violate federal and state antitrust laws, . . . and even manslaughter." Brickey, supra note 4, at 415 (citations omitted).} Indeed, courts were soon willing to hold corporations criminally liable for almost all wrongs except rape, murder, bigamy, and other crimes of malicious intent.\footnote{See GRUNER, supra note 1, § 3.2.3(d), at 177-78 (noting that even now corporations have not been held liable for murder, rape, and similar offenses); Brickey, supra note 4, at 410, 413-15. The argument that corporations cannot commit these acts is unconvincing. Once society is willing to accept vicarious liability and to impute agents’ acts to the corporation, the corporation should in theory be capable of "committing" rape or murder. Cf. GRUNER, supra note 1, § 3.2.3(b), at 175-76 ("Since a corporation can engage any sort of agent to undertake any human act, there is no type of conduct that an individual can perform which a corporation, acting through its agents, cannot undertake."). A more convincing rationale for why corporations cannot be liable for crimes of intent such as rape and murder is that the normal rules regarding imputation of agent behavior to the principal would probably not allow imputation when the conduct falls outside the agent’s scope of employment. Cf. id. § 3.2.3(b), at 176 ("[C]ertain sorts of illegal conduct such as rape or kidnapping are rarely undertaken for corporate benefit or in the course of corporate business activities."). As Gruner suggests, there is “circumstantial evidence that Congress did not intend to create corporate liability for [crimes such as rape] under prohibitions applicable to persons.” Id. § 3.2.3(a), at 175.}

D. A Rationale for the Development of Corporate Criminal Liability?

Although commentators initially expressed doubts about the extension of vicarious corporate liability to crimes not requiring intent,\footnote{See, e.g., Coffee, supra note 5, at 256-57; Lindley, supra note 26, at 34-35 (arguing that corporate criminal liability for crimes of intent is inappropriate, but that criminal liability for crimes such as nuisance is acceptable).} they eventually agreed that such liability served a useful purpose.\footnote{See, e.g., LEIGH, supra note 4, at 15; Harold J. Laski, The Basis of Vicarious Liability, 26 Yale L.J. 105, 111 (1916) (disagreeing with Lord Bramwell, who opposed the idea of vicarious liability); Lindley, supra note 26, at 34-35 (favoring vicarious liability, but noting that some commentators were opposed to the idea).} These early doubts, however, paled in comparison to the decidedly negative reactions of commentators to the extension of corporate criminal liability to crimes of intent. Critics contended that corporate criminal liability for crimes of intent ran contrary to an aim of the criminal
law — punishment of the morally blameworthy\textsuperscript{40} — because it relied upon vicarious guilt rather than personal fault.\textsuperscript{41}

Thus, the majority of early commentary focused on either the extension of vicarious corporate liability to the criminal context or the extension of corporate criminal liability to crimes of intent.\textsuperscript{42} Few commentators appear to have even asked, let alone comprehensively answered, why we have corporate criminal liability at all, given that corporate civil liability also exists.\textsuperscript{43} This question is especially perplexing in light of the fact that courts borrowed most of the doctrines used in corporate criminal liability, such as respondeat superior, from corporate civil liability.\textsuperscript{44} I suggest, however, that a consideration of the types of wrongs for which corporate criminal liability developed may yield a hypothesis as to why corporate criminal liability arose in the first place.

Most of the early instances of corporate criminal liability resulted from public harms, such as nuisance, for which private enforcement

\textsuperscript{40} See Developments, supra note 2, at 1232 (discussing arguments relating to moral blameworthiness); cf. Lindley, supra note 26, at 34 ("Punishment, to be effective, must fall on beings who can feel."). Indeed, this matter continues to plague modern commentators, who debate ways to construct blame for the corporation rather than asking why we want to impose liability on corporations based on some conception of blame. See, e.g., William S. Laufer, Corporate Bodies and Guilty Minds, 43 EMORY L.J. 647 passim (1994). An example of a liability standard based on corporate fault is an assessment of liability on the basis of corporate "procedures and practices [that] unreasonably fail to prevent corporate criminal violations." Developments, supra note 2, at 1243. Another possibility is the assessment of corporate fault on the basis of what the corporation and its officers did in reaction to the wrongful act. See Brent Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 56 S. CAL. L. REV. 1141, 1197–1201 (1983) (emphasizing the "reactive strategies" of corporations as representative of corporate policy). A more recent approach to corporate blame is the corporate ethos standard. See Pamela H. Bucy, Corporate Ethics: A Standard for Imposing Corporate Criminal Liability, 75 MINN. L. REV. 1095, 1121–48 (1991). Finally, one commentator suggests a liability standard based on the general appropriateness of the corporation’s internal procedures and policies. See Peter A. French, Collective and Corporate Responsibility 41–47 (1984).

\textsuperscript{41} See, e.g., Elkins, supra note 5, at 95–96 n.84 (discussing an early commentator’s views on crimes of specific intent); Lindley, supra note 26, at 34–35 (arguing that corporate criminal liability for crimes of intent is inappropriate). But see Laski, supra note 39, at 130–34 (arguing that corporate criminal liability for crimes of intent is desirable). Commentators opposed to the extension of liability to crimes of intent did not seem concerned by the imputation of criminal liability to the corporation for the acts of agents resulting in crimes that did not require intent. See, e.g., Lindley, supra note 26, at 35.

\textsuperscript{42} One group of commentators viewed corporate criminal liability in terms of the imposition of liability on the corporation’s shareholders. See Frederic P. Lee, Corporate Criminal Liability, 28 COLUM. L. REV. 1, 4–5, 14 (1928).

\textsuperscript{43} Cf., e.g., Lindley, supra note 26, at 35 (failing to comment on why the public enforcement rationale might justify corporate criminal liability for any offenses besides public nuisance offenses). Undoubtedly, the growth in the scope and number of corporations and the need to regulate them would have provided the impetus for the growth in corporate liability. See, e.g., Charles F. Adams, Jr., A Chapter of Erie, in HIGH FINANCE IN THE SIXTIES 20, 115–16 (Frederick C. Hicks ed., 1929).

\textsuperscript{44} See Elkins, supra note 5, at 97.
was unlikely. As a result, public enforcement was necessary to ensure that the corporation and its actors properly internalized the cost of their activities to society. From the late 1600s to the early 1900s, the government conducted public enforcement primarily through criminal proceedings. Public enforcement using civil proceedings only arose after corporate criminal liability had reached its present level of applicability.

For activities causing public harm, public enforcement was essential. Holding individuals liable through public enforcement was, of course, one option for addressing public harms. However, when the culpable individual within the corporate hierarchy was judgment-proof or not easily identifiable, maintaining optimal deterrence necessitated imposing liability on the corporation. Given the absence of widespread public civil enforcement prior to the early 1900s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability. At that time, corporate criminal liability may indeed have served a useful purpose.

45 See Brickey, supra note 4, at 421–22; Elkins, supra note 5, at 96. For analyses of public and private enforcement, see, for example, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 75–86 (2d ed. 1989); William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. LEGAL STUD. 1 passim (1975); and A. Mitchell Polinsky, Private Versus Public Enforcement of Fines, 9 J. LEGAL STUD. 105 passim (1980). I assume that damages in civil cases were solely compensatory and that parties paid their own legal fees.

46 See POLINSKY, supra note 45, at 75–86; infra section VII.A.

47 See Graham Hughes, Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process, 47 VAND. L. REV. 573, 587 n.37 (1994) (noting that the first agency to have investigative powers, the Interstate Commerce Commission, did not develop these powers until the late 1800s).


49 See Hughes, supra note 47, at 587 n.37.

50 See Elkins, supra note 5, at 82–84 (discussing the identifiability problem); infra 1495–96 (discussing judgment-proof managers).

51 For more recent deterrence-based arguments in support of corporate liability, consult Alan O. Sykes, The Economics of Vicarious Liability, 93 YALE L.J. 1231, 1232, 1241–42, 1246 (1984). Note that optimal deterrence is maintained "as long as the principal and the agent together have sufficient assets to cover [expected damages]." Id. at 1246. I assume that if the combined assets of the agent and the corporation are not enough to meet expected damages but exceed the agent’s assets alone, then the level of deterrence created by dual liability would be greater than the level resulting from individual liability alone. The dual liability level of deterrence, however, would not be as high as the level of deterrence achieved when the combined assets are sufficient to cover expected damages. See id.

52 See Hughes, supra note 47, at 587 n.37.

53 Early commentators emphasized that public enforcement was the critical factor in the development of corporate criminal liability. See Laski, supra note 39, at 130–34; Lindley, supra note 26, at 34–35. Other possible reasons for corporate criminal liability, such as stigma, do not arise in the early literature.

54 An alternative to relying on corporate criminal liability would be to make corporations civilly liable only upon an individual agent’s conviction. Such an approach, however, has numer-
E. The Expansion of Corporate Criminal Liability

Four historical developments facilitated the continued growth of corporate criminal liability in the twentieth century. First, federal courts in the United States disregarded European liability standards as well as the standards laid out in the Model Penal Code, settling instead on respondeat superior as the vehicle for corporate liability. Second, Congress enacted a growing body of legislation authorizing the imposition of criminal liability on corporations. The resulting heightened awareness of corporate crime, especially in the 1960s and 1970s, often intensified the debate surrounding the issue to feverish levels.

Third, public civil enforcement became more feasible after the dawn of the twentieth century, providing the government with a tool other than corporate criminal liability that combined both public enforcement and corporate liability. Public civil enforcement could have impeded the development of corporate criminal liability, given their similarity of purpose, yet it did not. By the early 1900s, courts and commentators had already accepted corporate criminal liability, and its existence was therefore unlikely to be a matter of debate. Also, public civil enforcers did not possess as much enforcement power as the criminal enforcers did. The discrepancies between enforcement powers in public criminal and public civil cases have greatly diminished.

ous problems. For instance, identifying the culpable individual might be quite difficult. Even assuming conviction of a manager who is judgment-proof, private parties might not bring follow-up civil suits. Private parties might not realize that they can recover from the corporate principal for an agent's acts; also, court costs might be prohibitive. Even if private parties were aware of the conviction and brought suit against the corporation, these suits might burden the court system and create inefficiency (if, say, 5,000 parties sued for small amounts). Furthermore, if the amount the corporation paid to private parties and the amount the individual paid in fines exceeded the total that would be optimal for deterrence purposes, overdeterrence would result.

55 See Developments, supra note 2, at 1247-48. Under respondeat superior, any agent's acts and intentions may be imputed to the corporation if other elements of the doctrine are satisfied. See id. at 1247. The Model Penal Code alternative focused on the intent of agents high up in the corporate hierarchy. See id. at 1251, 1254. Elkins notes that some early courts required a "link" between the acts and intentions of subordinates and top management. See Elkins, supra note 5, at 103-04. However, federal appellate courts have rejected this "link" requirement. See id. at 105-06. Although the debate over imputation standards is interesting and important, it does not affect the debate over the form of liability.

56 See Elkins, supra note 5, at 97-99.

57 See, e.g., Ralph Nader, Mark Green & Joel Seligman, Taming the Giant Corporation 30-32, 249-51 (1976) (asserting the existence of severe problems with corporate governance, identifying harms to consumers and society, and suggesting harsh sanctions for violators).

58 See Hughes, supra note 47, at 587 n.37.

59 See Elkins, supra note 5, at 97-99.

60 See infra p. 1522.
since that time,\textsuperscript{61} raising the question of why corporate criminal liability is necessary today.\textsuperscript{62}

The fourth development is the recent issuance of federal sentencing guidelines for crimes committed by organizations.\textsuperscript{63} The guidelines have occasioned a scholarly debate on the severity and effectiveness of criminal sanctions on corporations and on how deterrence could be improved.\textsuperscript{64} The focus on sanctions has prompted a few commentators to observe that the sanctions in corporate civil and criminal proceedings are essentially the same and to question the need for both forms of liability.\textsuperscript{65}

\section*{III. Corporate Criminal Liability in the United States and Western Europe}

This Part examines the current systems of corporate criminal liability in the United States and Western Europe, inquiring into the acts for which a corporation can be made criminally liable and the standards used to attribute liability to a corporation for the acts of its agents. The analysis indicates that corporate criminal liability in the United States is far more extensive and less restrictive than corporate criminal liability frameworks in other countries and raises the question of why these differences have developed.

The scope of corporate criminal liability in the United States is very broad. A corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder.\textsuperscript{66} Similarly, the standards that courts use to

\textsuperscript{61} See infra section VII.B.2 (discussing the information-gathering benefits conferred by the civil investigative demand (CID)).

\textsuperscript{62} Even though the presence of public civil enforcement did not abate the growth of corporate criminal liability, it may have caused a few commentators to ask this very question. See, e.g., Michael K. Block, Optimal Penalties, Criminal Law and the Control of Corporate Behavior, 71 B.U. L. Rev. 395, 414–15, 418 (1991); Coffee, supra note 2, at 447–48 (noting procedural and institutional reasons for preserving corporate criminal liability); Byam, supra note 2, passim. Although Byam's and Block's analyses are insightful, this Article explores the question more broadly and in greater depth.

Commentators have noted a number of additional problems with corporate criminal liability: [Such problems include the] discord of corporate criminal liability with the requirements that criminals have intent . . . ; the dubious applicability of constitutional [criminal] protection to corporations; the failure of corporate criminal liability to comport with the consequentialist and retributive rationales for criminal sanctions; [and] the ineffectiveness of the criminal stigma as a deterrent to corporate activities . . . .

\textsuperscript{63} See U.S. SENTENCING GUIDELINES MANUAL \textsection 8 (1995).


\textsuperscript{65} See, e.g., Posner, supra note 2, at 423; Block, supra note 62, at 418.

\textsuperscript{66} See GRUNER, supra note 1, \textsection 3.2.3, at 177–78.
attribute liability to a corporation are easily satisfied. Corporate liability in the United States is based on the imputation of agents' conduct to a corporation, usually through the application of the doctrine of respondeat superior.67

Under this doctrine, three requirements must be met in order to impose liability on a corporation.68 First, a corporate agent must have committed an illegal act (the actus reus) with the requisite state of mind (the mens rea).69 If a particular agent, regardless of rank in the corporation, had the necessary state of mind, this mens rea can be imputed to the corporation.70 Alternatively, mens rea can be shown "on the basis of the 'collective knowledge' of the employees as a group, even though no single employee possessed sufficient information to know that the crime was being committed."71

Second, the agent must have acted within his scope of employment.72 The scope of employment includes any act that "occurred while the offending employee was carrying out a job-related activity."73 In fact, this requirement is so broad that courts may hold corporations liable even when corporations have forbidden the wrongful activities.74

67 See New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494–95 (1909); Developments, supra note 2, at 1247. Although respondeat superior is the most common basis of liability, corporations can be found criminally liable under a number of related theories. See id. at 1246–47, 1251–53. Some states have embraced alternative standards, such as the Model Penal Code, see id. at 1246–47, and these standards are usually narrower than respondeat superior, see id. at 1251–53. For a discussion of the conspiracy standard of corporate criminal liability, consult GRUNER, cited above in note 1, § 5.3.1–3, at 292–97.

68 See Developments, supra note 2, at 124.

69 See id. at 1247–48.

70 See id.

71 Id. at 1248; see also GRUNER, supra note 1, § 4.1, at 263–67 (explaining that the rule of collective liability is a way to foster greater information dissemination within the corporation in order to deter corporate wrongs).


73 Developments, supra note 2, at 1250; see also GRUNER, supra note 1, § 3.5, at 263–28 (discussing in detail the scope of employment restrictions on corporate criminal liability); Developments, supra note 2, at 1250 (discussing why a broad imputation standard is generally desirable).

74 See Developments, supra note 2, at 1249–50. If a corporation's prohibition of unlawful acts excluded such acts from an agent's scope of employment, then the corporation would be equipped to avoid selectively any possible respondeat superior liability. See id. at 1250. Allowing a corporation to make such liability determinations is unpalatable; presumably, courts (or perhaps legislatures) should decide when liability attaches and what falls within the scope of an agent's employment.

This argument should be distinguished from the argument discussed above, which deals with cases in which courts find that an activity such as murder falls outside the scope of employment. See supra note 37. The argument here considers whether a corporation can limit its own liability by simply declaring certain conduct to be outside its agents' scope of employment.
Finally, the agent must have intended to benefit the corporation.\textsuperscript{75} Under this easily met standard, the employee need not act with the exclusive purpose of benefiting the corporation,\textsuperscript{76} and the corporation need not actually receive the benefit.\textsuperscript{77}

Many European jurisdictions initially refused to recognize corporate criminal liability because the notion that a juristic fiction such as a corporation could possess guilt in the sense necessary for the application of criminal law seemed far-fetched.\textsuperscript{78} Even now, Germany does not impose criminal liability on corporations.\textsuperscript{79} Instead, its corporations are subject to administrative sanctions "for public welfare or administrative offenses."\textsuperscript{80} Recently, however, other European countries, such as France and the Netherlands, amended their codes to allow for corporate criminal liability,\textsuperscript{81} and in 1988 the Council of Europe appeared to support the use of such liability.\textsuperscript{82}

Nonetheless, even though corporate criminal liability is becoming more common in Europe,\textsuperscript{83} European standards for imputation of an

\textsuperscript{75} See id. at 1250. The intent-to-benefit requirement is efficient as long as the corporation is able to influence employee incentives. See Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J.L. ECON. & ORGANIZATION 53, 55 & n.5 (1986).

\textsuperscript{76} See Developments, supra note 2, at 1250 n.34 (citing United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), cert. denied, 401 U.S. 94 (1971)).

\textsuperscript{77} See GRUNER, supra note 1, § 3.6, at 229-47; Developments, supra note 2, at 1250.


\textsuperscript{79} See Anne Ehrhardt, Unternehmensdelinquenz und Unternehmensstrafe: Sanktionen gegen juristische Personen nach deutschem und US-amerikanischem Recht 23 (1994). I am grateful to Mattias Kumm, LL.M. candidate, Harvard Law School, for translating assistance. One German commentator believes that the "purpose of corporate criminal liability [is] reclaiming from corporations the profits that have accrued to them from crime," and that this purpose "can be attained in other ways than through punishment." Leigh, supra note 78, at 1522 (discussing Hans-Heinrich Jescheck, Lehrbuch des Strafrechts, Allgemeiner Teil 156 (1969)).

\textsuperscript{80} Leigh, supra note 78, at 1522. Leigh further suggests that German scholars believe there is a difference between administrative sanctions and criminal sanctions. See id. at 1523. "[A]dministrative offenses are thought to be morally neutral." Id. Additionally, such offenses cannot result in "imprisonment when the offender is a natural person." Id.


\textsuperscript{82} See Wells, supra note 78, at 121-22; Coffee, supra note 1, at xx.

\textsuperscript{83} See Coffee, supra note 1, at xix-xx. Although the scope of corporate criminal liability is quite broad, many countries appear to use it mostly in commercial contexts. See Leigh, supra note 78, at 1512-13. Denmark imposes corporate criminal liability by statute but does not generally impose liability for crimes of intent. Cf. id. at 1519 (discussing Peter Garde, The Penal Re-
agent's actus reus or mens rea to the corporate principal often differ from the American doctrine of respondeat superior. English law, for example, only imputes an agent's criminal intent to the corporation if the agent is the "alter ego" of the corporation, and courts usually define "alter ego" to mean an agent high up in the corporate hierarchy. In contrast, respondeat superior does not premise imputation of liability upon the rank of the corporate agent who possesses intent. Other imputation standards used in Europe lie somewhere between the British alter ego approach and the American law of respondeat superior.

This brief survey illustrates that corporate criminal liability in Europe is generally more restrictive than in the United States. The comparative analysis and historical developments raise questions about why we have corporate criminal liability in the United States today. This Article examines when corporate criminal liability is socially desirable, given that civil and other liability alternatives exist and that criminal enforcement is no longer the only form of public enforcement.

Sponsibility of Judicial Persons in Danish Law, in La Responsabilità Penale Delle Persone Giuridiche in Diritto Comunitario 321, 318-45 (1981)).

84 See Tesco Supermarkets, Ltd. v. Nattrass, 1972 App. Cas. 153, 170-72 (H.L.) (concurring with the doctrine but objecting to the term "alter ego"); Coffee, supra note 1, at xix (noting that the "alter ego" rule is still the law in England and that it applies to "officers at very senior executive levels"); Leigh, supra note 78, at 1514-15 (discussing Lennard's Carrying Co. v. Asiatic Petroleum Co., 1915 App. Cas. 705, 713 (H.L.)). This doctrine is similar to the Model Penal Code's high managerial agent standard. See Developments, supra note 2, at 1251.

85 See Developments, supra note 2, at 1247-48.

86 See Coffee, supra note 1, at xx-xxi. The Netherlands has a two-part test for corporate criminal liability: "(1) did the defendant company have the power to determine whether the employee did or did not do the act in question? and (2) did the corporation accept such acts?" Id. at xx (citing Field & Jørg, supra note 81, at 164). This sort of standard appears to be gaining support in Europe:

In 1988, the Council of Europe accepted the recommendation of a select committee ... that member states consider revising their criminal codes to recognize corporate liability to reflect the following principles:

(a) Enterprises should be able to be made liable for offenses committed in the exercise of their activities, even when the offense is alien to the purposes of the enterprise.

(b) Liability should attach irrespective of whether a natural person can be identified.

(c) The enterprise should be exonerated when its management is not implicated and has taken all necessary steps to avoid the offense.

(d) Enterprise liability should be additional to any individual managerial liability.

Id. (citing Wells, supra note 78, at 121-22). Although Germany continues to employ only administrative sanctions for offenses that other European countries punish with criminal sanctions, the imputation standards that Germany uses for administrative liability are similar to those that other European systems use to determine criminal liability. See Leigh, supra note 78, at 1522-23.

87 However, European and American rules for imposing significant penalties on corporations are somewhat similar. See Coffee, supra note 1, at xx-xxi. In Europe, the general standard is that liability attaches when top-level management is involved in corporate misconduct. See id.

In the United States, liability attaches when any agent commits a wrongful act, but courts impose significant penalties only when "substantial authority personnel" are involved. See id. at xxi (discussing U.S. Sentencing Guidelines Manual § 8A1.2 application notes 3(b)-(c), § 8C2.5 (1995)).
IV. The Framework for Analysis

To determine when, if at all, the imposition of criminal liability on a corporation is socially desirable, one must compare the net benefits of imposing corporate criminal liability with the net benefits of imposing alternative liability strategies. Such alternative liability options include imposing civil liability on a corporation, imposing civil liability on a manager, imposing criminal liability on a manager, and imposing criminal or civil liability on a third party.

A. Comparison of Liability Strategies — An Introduction

In this analysis of whether corporate criminal liability has any place in an optimal liability mix, I compare corporate criminal liability with corporate civil liability, individual criminal liability, individual civil liability, and combinations of these liability strategies. I begin by asking when imposing criminal rather than civil liability on a corporation is desirable. If corporate civil liability always has greater net benefits than corporate criminal liability does, corporate civil liability should simply replace corporate criminal liability. On the other hand, if corporate criminal liability is sometimes preferable to corporate civil liability, then corporate criminal liability must be compared to the other liability regimes as well.

In order to compare liability regimes effectively, we must develop a more refined conception of the terms "corporate criminal liability" and "corporate civil liability," both of which are simply labels used to describe certain combinations of characteristics. Corporate criminal liability and corporate civil liability share two important characteristics: both impose liability on the corporation and further the goal of deterring corporate misconduct. However, four other characteristics differentiate them. Corporate criminal liability has stronger procedural protections; more powerful enforcement devices; more severe and, arguably, unique sanctions (such as stigma); and a greater message-sending role than corporate civil liability.88

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88 These characteristics are based upon the analyses provided by various commentators and upon my own analysis. See Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L.J. 1795, 1813 (1992) (discussing analogous questions of criminal and civil liability for individuals); Developments, supra note 2, at 1276–1312, 1340–65. Although Mann includes intent on his list of characteristics of individual liability, see Mann, supra, at 1813, I do not discuss it here. Because intent or scienter already may be a requirement in the civil law, it is unlikely to be a factor in a decision to favor corporate criminal liability over corporate civil liability. For similar reasons, the two characteristics shared by corporate criminal and corporate civil liability (imposition of liability on a corporation and deterrence) are not the focus of this Article. However, these two characteristics provide a basis for a comparison of the two corporate liability options because they arise in every instance of corporate liability. In contrast, intent is not an issue in every case of corporate liability. Thus, inquiry into intent is not as relevant to the analysis in this Article as is inquiry into the other two characteristics.
This sort of comparison is undoubtedly oversimplistic. Numerous corporate liability strategies form a continuum between these two extremes. Some corporate liability strategies, such as strategies with powerful enforcement devices and weak procedural protections, have characteristics of both liability paradigms.\textsuperscript{89} If we want strong enforcement devices without strong procedural protections, we can employ one of the corporate liability strategies along the continuum, obtaining the desirable characteristics without the undesirable ones. Because these intermediate options are available, corporate criminal liability is the best strategy only when substantially all of its characteristics are socially desirable.

The label placed on each corporate liability strategy along the continuum between criminal and civil liability is unimportant. However, commentators normally refer to the liability strategies on this continuum as forms of corporate civil liability.\textsuperscript{90} To maintain consistency with prior literature, I also refer to these intermediate forms as corporate civil liability regimes.

We must ask two questions about each of the characteristics of corporate criminal liability that we examine. First, when, if ever, is the characteristic socially desirable? Second, is the characteristic also part of another corporate liability strategy? The answers to these questions reveal those situations in which substantially all of the characteristics of corporate criminal liability are socially desirable. In such situations, reliance on corporate criminal liability is socially desirable. The answers to these questions also reveal those situations in which only some of the characteristics of corporate criminal liability are socially desirable. In these situations, reliance on a corporate liability strategy that incorporates the desirable traits but not the undesirable ones is preferable.

B. The Imposition of Liability on Corporations and the Goal of Deterrence

This section examines the two characteristics shared by corporate criminal and civil liability: the imposition of liability on the corporation and the goal of deterrence. Before examining when corporate criminal liability is preferable to corporate civil liability, we must un-

\textsuperscript{89} See, e.g., Mann, \textit{supra} note 88, at 1813 (noting "a vast middleground" of hybrid liability strategies for individuals). Although Mann describes hybrid strategies for individuals, hybrid strategies of a similar nature also exist for corporations. See Hughes, \textit{supra} note 47, at 587–89 (discussing civil investigative demands, which are associated with strong enforcement powers but require only the lower civil standard of proof). Note my general assumption that the traits of corporate criminal liability can be made available in corporate civil liability as well. The civil investigative demand provides an example of strong information-gathering powers in the civil sphere. See \textit{infra} section VII.B.2.

\textsuperscript{90} See, e.g., Hughes, \textit{supra} note 47, at 587–89; Mann, \textit{supra} note 88, \textit{passim} (labeling individual hybrid strategies as civil strategies or punitive civil sanctions).
understand the aims of corporate liability in general as well as how and why corporate liability achieves those aims. I treat deterrence, not retribu-
tion, as the aim of both corporate criminal liability and corporate civil liability.91 Such a treatment accords with the position of many
commentators92 and judges.93

Corporate liability may appear incompatible with the aim of deter-
rence because a corporation is a fictional legal entity and thus cannot
itself be "deterred." In reality, the law aims to deter the unlawful acts
or omissions of a corporation’s agents. To defend corporate liability in

91 Some scholars claim that retributive theory is simply not applicable in the corporate arena
because a corporation cannot be morally blameworthy. See, e.g., Byam, supra note 2, at 583–85.
The Supreme Court has held, however, that mens rea is an element of some crimes committed by
corporations. See United States v. United States Gypsum Co., 438 U.S. 422, 434–46 (1978) (hold-
ing that the Sherman Act requires intentional misconduct before a court can find a violation). At
least one scholarly work has suggested measuring corporate blameworthiness by examining the
reasonableness of the corporation’s internal procedures and policies. See Developments, supra
note 2, at 1243. Certainly a corporation’s internal processes may be flawed, but such flaws do not
provide a convincing rationale for attaching blame to the corporation; the processes are simply
the result of decisions by people within the corporation.

Another commentator asserts that a retributive justification for corporate criminal liability is
that such liability provides society with a target for its anger and displeasure. See Albert W.
Alschuler, Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand, 71
B.U.L. Rev. 307, 312 (1991) (drawing an analogy to the ancient practice of venting anger and
displeasure by blaming murder weapons, such as swords). The notion that society has a retribu-
tive need so great that it must punish nonhuman entities and label them criminal, however, re-
quires empirical support and seems implausible. In any event, corporate criminal liability, which
involves trial, imposition of sanctions, and legal fees, is more costly than simply blaming a sword.

Many of the other rationales for criminal sanctions, such as restraint, education, and rehabili-
tation of a law-breaking corporation, are "unnecessary, impractical, or nonsensical." Byam, supra
note 2, at 586. Even if these rationales were necessary or practical, civil liability might further
them just as well as criminal sanctions do. In civil proceedings, courts can use debarment and
probation to incapacitate a corporation, see infra section V.A; require a corporation to engage in a
public relations campaign to educate itself and the public; and rehabilitate corporations by en-
couraging them to develop self-regulatory mechanisms, such as environmental audits, see Envi-

92 Many commentators accept that retribution is not an important aim of corporate criminal
liability. See, e.g., Herbert L. Pack, The Limits of the Criminal Sanction 356 (1968); Developments, supra note 2, at 1235 & n.16 (citing a number of sources that suggest that deter-
rence is the "primary rationale" for corporate criminal liability); Byam, supra note 2, at 585–86.
Cf. Kraakman, supra note 3, at 865–68 (comparing corporate and individual liability in terms of
deterrence). But see Developments, supra note 2, at 1237–38 (arguing that retribution and blame-
worthiness are also factors in the corporate context). For a general discussion of retribution, con-
sult Immanuel Kant, The Metaphysical Elements of Justice 101–07 (John Ladd trans.,
Bobbs-Merrill Co. 1965) (1797). See also Wayne R. LaFave & Austin W. Scott, Jr., Crimi-
nal Law § 1.5(a), at 23–27 (1986) (arguing that criminal liability in general has purposes other
than deterrence).

93 For instance, in United States v. Nearing, 252 F. 223 (S.D.N.Y. 1918), Judge Learned Hand
noted that corporate civil and corporate criminal liability have the same purpose and that respon-
deat superior can apply to both. See id. at 231. In general, "[f]ederal law identifies offender
reform and the specific deterrence of offenders as primary goals of criminal sentences for offend-
ers including corporations." Gruner, supra note 1, § 2.3.6, at 144 n.121.
deterrence terms, one must show that it deters corporate managers or employees better than does direct individual liability.\textsuperscript{94}

Direct liability, as its name indicates, directly influences managers' or employees' behavior by imposing penalties on these agents whenever they commit certain undesirable acts. Corporate liability works more indirectly. Imposing sanctions on a corporation for the acts of its managers or employees presumably decreases the corporation's net worth.\textsuperscript{95} Shareholders, who bear the brunt of such a decrease, have an incentive to encourage managers not to commit undesirable acts (assuming that any benefits from the acts do not outweigh the costs to the shareholders).\textsuperscript{96} Shareholders can influence the behavior of corporation managers and employees in a number of ways, such as by modifying employment contracts to provide incentives not to engage in certain types of activities.\textsuperscript{97} The influence of shareholders on managers' or employees' incentives, then, can be similar to the influence of direct liability.

The ability of shareholders to set up effective incentives is tempered by the difficulty of monitoring the activities of the corporation's managers and employees.\textsuperscript{98} If shareholders can observe employee behavior cheaply, corporate civil liability can work as effectively as direct civil liability.\textsuperscript{99} However, observing managers is often prohibitively costly, and managers' activities are often imperfectly observable.\textsuperscript{100} Given this situation, some explanation for reliance on corporate liability must exist.

Probably the best reason for relying on corporate liability over direct liability is that corporate agents are often judgment-proof.\textsuperscript{101} For example, if we rely exclusively on direct liability when agents are judgment-proof, then agents will probably "invest inefficiently little . . . in the avoidance of wrongs."\textsuperscript{102} In addition, when agents are judgment-proof, the production costs to the corporation and its agents

\textsuperscript{94} See, e.g., Lewis A. Kornhauser, An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents, 70 Cal. L. Rev. 1345 passim (1982); Kraakman, supra note 3, at 858–67; Sykes, supra note 51, at 1245–56.

\textsuperscript{95} See Byam, supra note 2, at 586–87.

\textsuperscript{96} See id. at 587.

\textsuperscript{97} See, e.g., Kraakman, supra note 3, at 863; Sykes, supra note 51, at 1236–38.

\textsuperscript{98} See Sykes, supra note 51, at 1238–39.

\textsuperscript{99} See id. at 1238–39, 1245–47.

\textsuperscript{100} See id. at 1238–39, 1255–56 (asserting that the observation of agents is often difficult).

\textsuperscript{101} See, e.g., Kornhauser, supra note 94, at 1349, 1351–52, 1362–66; Sykes, supra note 51, at 1244, 1246–52, 1254–55 (examining the implications of agent insolvency for an analysis of vicarious liability).

\textsuperscript{102} Sykes, supra note 51, at 1244. For example, let us assume that an act's expected harm is $20, the expected benefit to an actor from the act is $30, and the probability of conviction is 50%. In this case, a fine of $40 should result in an expected sanction of $20 — optimal deterrence, assuming the actor is risk neutral. If the actor's assets are only $30, then his expected sanction of $15 is less than his expected benefit of $20, and he will engage in the activity.
are less than the total costs to society, and the corporation increases the level of production beyond the socially desirable level. Corporate liability addresses these problems to the extent that the assets of the corporation improve the ability of the corporation and the agent together to pay actual awarded damages. A corporation exposed to liability internalizes the costs of harm and provides incentives for its managers to avoid harm. Because the cost of harm is internalized, the costs of production will reflect the true economic costs and the level of production will approach the optimal level.

Corporate liability may also lead to more efficient risk-sharing between principals and agents. The normal assumption in the literature is that managers bear risk — including legal risk — less efficiently than do shareholders. Managers who bear legal risk will likely demand compensation up front in the form of a risk premium. This risk premium is, by hypothesis, higher than the amount that the corporation would have to offer shareholders to bear the risk because shareholders can easily diversify their risk. Thus, reallocating the risk of loss through corporate liability rather than individual liability may result in a social gain without undermining the goal of deterrence.

Direct liability still exists because corporate liability may not always achieve the optimal result alone, but in most cases corporate liability remains the most efficient liability strategy. Given that a corporation should be made liable, Part V discusses when the optimal form of corporate liability is criminal liability.

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103 See id.
104 See id. at 1246. Other alternatives to corporate liability, such as individual criminal liability for the agent, would also overcome the problem of judgment-proof agents. Cf. Kraakman, supra note 3, at 876–88 (discussing criminal liability for managers as a supplement to corporate liability); A. Mitchell Polinsky & Steven Shavell, Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?, 13 INT’L REV. L. & ECON. 239, 239–42 (1993) (discussing when imprisoning employees may be socially desirable).
105 See Sykes, supra note 51, at 1246. If agents cannot be cheaply monitored, this efficiency-enhancing aspect of corporate liability is reduced, but not eliminated. In these cases, whether corporate liability is preferable to direct liability is debatable. For a more thorough discussion of the complications of expensive or imperfect observability, see Sykes, cited above in note 51, at 1247–50.
106 See id. at 1246.
107 See, e.g., Kraakman, supra note 3, at 864–65.
108 See id. at 866.
109 See id. at 866–67. The risk-sharing benefit may be achieved without corporate liability if managers can obtain insurance or can negotiate with the corporation for some kind of indemnification agreement (assuming barriers to negotiation are trivial). See Sykes, supra note 51, at 1245.
110 See Kraakman, supra note 3, at 867–68 (describing three circumstances — asset insufficiency, sanction insufficiency, and enforcement insufficiency — under which corporate liability alone would fail).
V. SANCTIONING CHARACTERISTICS

The arguably unique sanctioning characteristic of criminal liability is the criminal sanction's potentially stigmatizing effect.\textsuperscript{111} In setting out when the different types of sanctions available in the corporate context are desirable and when the stigma sanction factors in, I assume that, all other things being equal, the socially desirable penalty structure would use the socially cheapest sanctions first and then rely on the more expensive sanctions, if needed, to obtain optimal deterrence.\textsuperscript{112}

A. Legally Imposed Sanctions

Legislatures permit judges and administrative agencies to impose many sanctions in corporate criminal proceedings, including cash fines, probation,\textsuperscript{113} debarment,\textsuperscript{114} loss of license,\textsuperscript{115} and other related penalties.\textsuperscript{116} Nonmonetary penalties, such as imprisonment, are not applicable in the corporate context.

Normally, cash fines are optimal, although sanctions such as loss of license, debarment, and probation in addition to a cash fine may prove optimal in some circumstances. The reason for this hierarchy of sanctions is that the fine is cheaper to administer than other legally imposed sanctions.\textsuperscript{117} The costs of imposing a cash fine are the costs of determining what the optimal sanction should be (administrative costs) and effecting the transfer of the cash fine after judgment (enforcement costs).\textsuperscript{118} Other sanctions engender greater administrative

\textsuperscript{111} See Karpoff & Lott, \textit{ supra} note 64, at 758 ("Reputational cost . . . constitutes most of the cost incurred by firms accused or convicted of fraud."). \textit{But see} Posner, \textit{ supra} note 2, at 422 ("Corporate punishment carries with it little or no stigma . . . ."). A discussion of stigma as a sanction against individuals is beyond the scope of this Article.

\textsuperscript{112} Other commentators make similar assumptions. \textit{See}, e.g., A. Mitchell Polinsky & Steven Shavell, \textit{The Optimal Use of Fines and Imprisonment}, 24 J. PUB. ECON. 89, 95 (1984) (arguing that, because fines are cheaper to administer than is imprisonment, society should first exhaust the deterrence potential of fines and then supplement the fines with imprisonment). \textit{See generally} Gary S. Becker, \textit{Crime and Punishment: An Economic Approach}, 76 J. POL. ECON. 169, 193–98 (1968) (discussing socially costly penalties).


\textsuperscript{114} "Debarment is an extended exclusion preventing the affected party from serving as a government contractor for a lengthy period specified in the party's debarment order." Gruner, \textit{ supra} note 1, § 13.2.3, at 757. "Suspension is a [shorter] temporary exclusion . . . limited to 18 months unless the government initiates debarment proceedings . . . within that period." \textit{Id}.

\textsuperscript{115} \textit{See id.} § 13.2.3, at 759.

\textsuperscript{116} \textit{See id.} § 13.2.3, at 756. "A number of federal benefits programs provide for the exclusion of parties following related criminal convictions." \textit{Id}.

\textsuperscript{117} See Polinsky & Shavell, \textit{ supra} note 112, at 90, 95, 98.

and enforcement costs. The loss of license remedy, for example, removes or suspends a corporation’s license to practice a certain type of activity.\textsuperscript{119} To determine the cost of the loss of license remedy, we must determine the optimal sanction (as with cash fines)\textit{ and} determine whether barring a corporation from engaging in some activity will cost the corporation exactly that optimal amount. These determinations would require estimating the corporation’s profits for future years, hypothesizing about how much would be lost by the imposition of the penalty each year, and calculating the amount of damages in present value terms.\textsuperscript{120} Thus, the costs of imposing a loss of license sanction exceed the costs of imposing cash fines, and fines are clearly the better method for achieving optimal deterrence.

If the defendant corporation cannot pay the entire amount of the appropriate cash fine at the time of judgment, then the fine will not be enough to obtain optimal deterrence.\textsuperscript{121} In this case, other sanctions, such as a loss of license, may improve deterrence. A loss of license sanction for three years may result in a present value loss of $40, for example, but it does not place an immediate drain of $40 on the corporation’s cash assets. A court could impose such a sanction on a corporation that is judgment-proof with respect to the optimal cash fine.\textsuperscript{122} However, the fact that the loss of license sanction is useful in these situations does not justify exclusive reliance upon it. If the corporation had only $30 in net cash assets, then the optimal penalty structure would be both a cash fine of $30 and a loss of license penalty with a present value of $10 (for a total sanction of $40). This combined penalty has the same deterrent effect as a $40 loss of license penalty, but would be less costly to society.\textsuperscript{123}

\textsuperscript{119} See Gruner, supra note 1, § 13.2.2(d), at 759; cf. id. § 13.2.3(c), at 757–59 (discussing the operation of the debarment remedy). The cost of debarment would be analogous to the cost of a loss of license sanction; both approaches involve determining the optimal sanction and ascertaining whether the remedy at issue would result in that sanction.

\textsuperscript{120} Denial of license may also result in a deadweight loss to society if no other corporation can provide the required service or if other corporations provide the service less efficiently than the corporation that lost its license.

\textsuperscript{121} The fine would underdeter for the same reasons that judgment-proof managers are not optimally deterred by direct liability. See supra pp. 1405–96.

\textsuperscript{122} I assume that the corporation can afford to suffer, say, a $16 loss each year over three years but does not have $40 in liquid assets to pay a cash fine immediately. Revoking a corporation’s license also has its limits, however, because the legal system cannot impose a sanction greater than the corporation’s net present value. If the legal system wanted to impose even more severe sanctions to deter corporate misconduct, it could sanction managers, see Kraakman, supra note 3, at 869–71, or connected third parties, see id. at 888–96.

\textsuperscript{123} For example, let us assume that a loss of license penalty of $40 costs society $0.80 and a cash fine of $40 costs society $0.40. Further, assume that sanctioning costs rise linearly as sanctions increase. Combining the loss of license (a $10 penalty at a cost of $0.20) and the cash fine sanction (a $30 fine at a cost of $0.30) would result in a total penalty of $40 but a cost of only $0.50. The $0.50 sanctioning cost is less than the $0.80 cost of using just the loss of license penalty but produces the same effective result (a $40 penalty). The desirability of relying more on
When a corporation does not have sufficient net assets to pay the optimal cash fine, other penalties, such as loss of license, probation, and debarment, may supplement the fine. The preferable supplemental sanction depends on the operations and history of the corporation, the desired severity of the penalty, and the nature of the firm's misconduct. For example, debarring the corporation from access to government contracts would be most effective when the firm's primary customer or supplier is the government. When the government is not the primary supplier or customer of the corporation and we still desire a large penalty, we may use loss of license to prevent the corporation from dealing with all of its customers in the applicable market. Probation may be desirable when, for example, we want to rearrange or improve some of the corporation's internal procedures. All of these sanctions are or can easily be made available in corporate civil liability regimes.

B. Social Sanctions

Both society and the legal system impose sanctions. The most powerful sanction that society can impose on a corporation is lost reputation or stigma. Section 1 explains what is meant by "reputation" in the corporate context, isolating two types of reputational effects of corporate criminal liability — one on the corporation and the other on its top management. Section 2 examines the first of these effects and seeks to determine when imposing reputational loss on a corporation is desirable. Section 3 discusses whether corporate criminal liability can ever impose a more effective reputational penalty on a corporation than can corporate civil liability, and section 4 makes the same comparison with respect to the managers of a corporation. The analysis indicates that reputational loss in any form is rarely a socially desirable sanction in the corporate context.

cash fines is strengthened if the loss of license sanction results in deadweight losses. See supra note 120.

124 See GRUNER, supra note 1, § 12.3.2(b), at 722, § 12.4, at 745; U.S. SENTENCING GUIDELINES MANUAL § 8D1 (1995). Courts may place corporations on probation and restrict their activities. See id. § 8D1. Such restrictions appear to be the corporate criminal law equivalent of a civil law injunction. One purported difference is that courts might enforce probation requirements more quickly than injunctions. See Coffee, supra note 3, at 447 (noting that criminal cases are generally resolved sooner than civil cases). However, civil injunctions do not have to be enforced more slowly than criminal probations; for example, courts can issue interim injunctions in intellectual property cases. See, e.g., ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL § 26.1, at 402 (2d ed. 1990).

125 For example, fines are the criminal law equivalent of civil law damages. Corporations convicted of certain crimes may face debarment, see GRUNER, supra note 1, § 13.2.3(c), at 757–59, and courts and enforcement agencies may also use debarment when the corporation is found liable in civil proceedings. See White Collar Crime Comm., Collateral Consequences of Convictions of Organizations, 1991 A.B.A. SEC. CRIM. JUST. 34.
1. Reputational Loss in the Corporate Context. — The term “reputation” carries with it more than one meaning. For individuals, reputational loss connotes both the individual’s sense of shame and others’ increased reluctance to do business in the future with the individual.126 For corporations, however, reputational loss refers only to the reluctance of others, such as customers and workers, to deal with the corporation in the future.127 Of course, the managers of the corporation may feel shame about their corporation’s conviction.128 As applied to corporations, reputation refers, for example, to the supra-competitive price that a firm with a good reputation can charge customers for its products or the lower wages that a “good” employer can pay while still attracting workers.129 This Article only examines the issues surrounding a corporation’s reputation among its customers, although the reasoning is analogous for other areas of corporate reputation.

However, in certain situations reputational sanctions are not effective against corporations. Because activities that harm third parties, such as environmental pollution, do not directly affect a firm’s customers, the firm will be unlikely to suffer a reputational loss for engaging in those activities.130 Also, firms that lack reputations, such as “fly-by-night” firms, cannot really suffer a reputational loss.

2. The Socially Desirable Use of Reputational Penalties. — In order to examine the desirability of reputational penalties, I briefly set out the assumptions underlying my analysis. I also highlight the role of government in influencing reputational sanctions.

Reputational penalties arise once the share market becomes aware of possible corporate misconduct. This awareness often results from news reports — of the government filing charges or taking other legal action against the corporation, for instance — reaching the share market through sources such as the Wall Street Journal.131 Assuming the market efficiently translates this news into share price, then the price of corporate stock moves to reflect market perceptions of likely future

127 This idea is eloquently expressed in the now-famous statement of Edward, First Baron Thurlow: “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?” Coffee, supra note 2, at 386 (citing Mervyn A. King, Public Policy and the Corporation 1 (1977)). Herbert Packer also expresses the idea that corporations cannot be stigmatized. See Packer, supra note 92, at 361.
128 Cf. Charny, supra note 126, at 397 (discussing “social and psychic losses” suffered by managers who mistreat workers).
129 See id. at 396–97; Karpoff & Lott, supra note 64, at 761, 763.
130 See Karpoff & Lott, supra note 64, at 797–98.
131 See id. at 769–73.
consequences. Thus, government action can spur the share market to impose reputational penalties on corporations.

In addition, government can influence the magnitude of the reputational penalty that the market imposes. To show this, I assume, as do some commentators, that reputational sanctions and cash fines are generally, albeit not perfectly, substitutable as means of assuring high quality products or services. The implication is that the government, by adjusting the amount of the cash fine, has some influence over the magnitude of the reputational loss a corporation suffers.

An important question to ask when examining corporate reputation is when a firm would want to invest resources in building a reputation as a supplier of high quality products or services. As a general matter, firms make these investments when customers desire assurances of high quality and are willing to pay for that quality. If a firm invests in reputation and provides inferior quality, and if customers become aware of this low quality, then they may withhold their patronage from the firm. Consequently, the firm’s profitability and stock price will decline, and both the value of the corporate reputational asset and the prices the corporation can charge for its goods will diminish. The threat of the diminution in value of corporate reputation provides corporations with incentives to produce high quality and customers with assurances that high quality will be provided.

The next inquiry is whether any other sanction could provide the corporation with an incentive to produce high quality. The government could impose a cash fine on the corporation every time it produced inferior quality and, in theory, such fines would provide the

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132 I assume that the market is at least semi-strong efficient. See Ronald J. Gilson & Reinier H. Kraakman, The Mechanisms of Market Efficiency, 70 Va. L. Rev. 549, 555 (1984) (defining semi-strong market efficiency as the situation created when "categories of publicly available information of obvious interest to investors" are quickly reflected in share price, thereby denying traders "lucrative trading opportunities"). I further assume that any information in publications such as the Wall Street Journal about government legal action against corporations is information falling within the semi-strong model.

133 See Karpoff & Lott, supra note 64, at 762–64 (noting that fines and reputational penalties are not perfect substitutes). Karpoff and Lott’s argument implicitly assumes that, although different parties impose cash fines and reputational losses, both penalties can work as quality assurance devices. See id. at 762–63.

134 Cf. id. at 762–64 (outlining the limited ability of government fraud penalties to impose reputational costs).

135 See id. at 761 ("People who buy cars at flea markets are probably not making systematic mistakes — they simply value additional quality assurance less than do people who buy from new car dealers. Flea market customers are more likely to be defrauded, but they also pay lower prices for cars."). The implication is that if customers do not desire high quality assurances via reputation, firms will have little incentive to make investments in reputation. See id. at 761–62.

136 See id. at 763; see also id. at 780–89 (discussing the value of reputational losses).

137 Cf. id. at 759–60 (noting that threatened reputational losses can induce companies to include safety features in their products).
corporation with an incentive to produce high quality. 138 Given that both cash fines and reputational penalties can induce firms to produce high quality, the next question is whether these sanctions can be substituted for each other. At this point I make a strong assumption, to be relaxed later, that cash fines and reputational penalties are perfectly substitutable. Thus, if the government has set the cash fine at an amount sufficient to produce the desired quality level, customers have little need to seek further quality assurances in the form of investments in reputation. 139 The firm therefore has little incentive to make investments in reputation. 140 This analysis implies that the government can determine the magnitude of the reputational penalty by adjusting the cash fine it imposes. 141 Perfect substitutability means that if the cash fine is increased by $5, then the reputational penalty should decrease by $5. 142

Of course, the perfect substitutability assumption is unrealistic. 143 However, even under a weaker assumption that cash fines and reputational penalties are generally substitutable, the government maintains some influence over the reputational loss suffered by corporations. 144 An implication of this assumption is that if cash fines are increased by $5, then reputational penalties should decrease by less than $5, but the exact amount of the decrease is uncertain ex ante. 145 Thus, the gov-

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138 See id. at 760–72 (noting that criminal and civil fines can often induce corporations to provide high quality). But see id. at 763 (discussing why cash fines may not always assure customers of high quality).

139 See id. at 762–73. Presumably, firms will only invest in their reputations for good quality if their customers desire such an investment. Cf. id. at 761 (discussing why flea market vendors do not invest much in reputation).

140 See id. at 761.

141 Cf. id. at 763–64 (noting that larger fines result in smaller reputational losses when corporate fraud is relatively easy to prove to third parties). Despite the substitutability of fines and reputational losses, a large cash fine may actually result in a large reputational penalty. If the large cash fine is sufficient for the quality level desired, reputational penalties should be small, but if the large cash fine still does not ensure the desired level of quality, reputational penalties may persist.

142 See id. at 762–63. To develop this idea further, let us assume that customers desire high quality and that the corporation would provide high quality if it were threatened with a $20 sanction for providing inferior quality. We may then impose a cash fine of $20 or a reputational penalty of $20 to induce high quality. The question is whether we can use both sanctions together. If they are perfectly substitutable, using both together is easy. See id. at 762–63. For example, assume the government sets a fine at $5, an amount insufficient to induce the corporation to provide high quality. When customers recognize this and demand higher quality, the firm will make investments in reputation. Under these circumstances, the sanction for providing inferior quality is $15 of reputational loss and $5 of cash fines. If the sanctions are not perfectly substitutable, this calculation is unlikely to result in the optimal sanction. Cf. id. at 763–64 (explaining that if fines are less effective than reputational sanctions on the margin, fine increases will not work well enough to allow concomitant reductions in reputational sanctions).

143 See id. at 763–64 (discussing reasons why reputational penalties and cash fines are not perfect substitutes).

144 See id.

145 See id. at 763.
government can trigger reputational penalties and, by adjusting the level of cash fines, influence the magnitude of reputational penalties, but cannot set the magnitude of these penalties precisely.

With this in mind, we must ask when reputational penalties are the socially desirable sanction. There are two main approaches to this question. The first line of inquiry compares reputational penalties with other possible sanctions in order to determine which sanctions are socially cheaper. The analysis suggests that the sanctioning costs of reputational penalties are almost always higher than the costs of other sanctions. The second line of inquiry investigates whether reputational penalties might still be desirable despite their high costs. This inquiry concludes that, because reputational penalties are imposed early in the proceedings, a qualified case can be made in support of reputational penalties.

The first line of inquiry requires a comparative analysis of the sanctioning costs of various legally imposed sanctions and the sanctioning costs of reputational penalties. I initially assume that the corporation is not judgment-proof and, therefore, that we may use cash fines or reputational penalties to impose the optimal sanction on the corporation. I then perform the same analysis assuming that the corporation is judgment-proof with respect to the optimal cash fine. This analysis discusses when we should choose reputational sanctions rather than other sanctions (such as loss of license) to bridge the deterrence gap.

Let us then examine the case in which the corporation is not judgment-proof. In this case, society can choose a reputational penalty of $1 million or a cash fine of $1 million to obtain the optimal sanction. Here the choice of sanction should depend, as in the example presented in section V.A, on which sanction has the lowest sanctioning costs.

Reputational penalties have costs. First, according to Karpoff and Lott, "[r]eputational penalties are costly because they arise from the quasi rents established when consumers pay high prices for high quality assurance."146 Reputational penalties reduce these quasi rents and result in the destruction of assets; these penalties are therefore costly to society.147 Put more simply, no one receives a corporation's lost reputation, whereas someone — the government or a private party — receives the cash fine. Second, in order to impose the optimal sanction on the defendant, the government would not only have to determine the size of that optimal sanction, but also would have to determine how much, in monetary terms, the criminal stigma would cost the corporation.148 "[A] corporation's sales fluctuate in response to countless

146 Karpoff & Lott, supra note 64, at 761.
147 See Chary, supra note 126, at 393.
148 See Byam, supra note 2, at 600.
variables, and the government would have to weed through sales and income data to determine, *ex ante*, a criminal conviction’s profit effect.”¹⁴⁹ In addition, corporations can take measures to mitigate the effects of a reputational penalty by generating some of their own publicity and negating the effects of the government’s actions.¹⁵⁰ Inquiring into the impact of a reputational penalty on corporate sales and the impact of corporate mitigation efforts could prove very costly because reputational penalties may be subject to considerable uncertainty.¹⁵¹ Third, assuming precise figures are not available, reliance on reputational losses results in overdeterrence or underdeterrence.¹⁵²

Reliance on fines, on the other hand, essentially involves only the costs of determining the optimal sanction and transferring the cash from the defendant to the government.¹⁵³ Therefore, the sanctioning costs associated with reputational penalties should not be less than those associated with criminal or civil fines on corporations. In other words, we should prefer cash fines over reputational sanctions as long as the corporation is not judgment-proof.

If the corporation is judgment-proof, a reputational sanction may achieve optimal deterrence when a cash fine cannot.¹⁵⁴ The use of

¹⁴⁹ Id.


¹⁵¹ Presumably, the government may underestimate or overestimate the impact, in monetary terms, of reputational penalties. If these errors are evenly balanced, then reliance on an average estimate of reputational penalties may still produce the optimal level of deterrence. I suspect, however, that underestimation is frequently a problem in the calculation of reputational penalties, and that this problem makes achieving optimal sanctions, even on average, somewhat difficult. The possibility that reputational loss could occur even in the absence of a finding of liability — an “innuendo loss” — further exacerbates the uncertainty inherent in reliance on reputational sanctions. There is some evidence of the lack of correction of initial reputational losses in the corporate context. See Karpoff & Lott, *supra* note 64, at 777 (describing a study that found that declines in stock prices caused by allegations of fraud were not reversed when new information about the fraud was published).

¹⁵² See *supra* note 143.

¹⁵³ See Karpoff & Lott, *supra* note 64, at 761 (noting that cash fines have “administrative and enforcement costs”); Posner, *supra* note 118, at 410 (suggesting that the social cost of fines is lower than the social cost of imprisonment).

¹⁵⁴ This analysis assumes that reputational penalties and cash fines sanction different sources. A cash fine reduces the available net assets of the corporation, whereas a reputational penalty reduces the total value of the corporation (as reflected in its stock price). See Karpoff & Lott, *supra* note 64, at 772 (employing a methodology that assumes that reputational loss harms the corporation’s stock price). The different sources provide different upper limits on the sanction imposed. For instance, suppose a corporation was worth $2 million and had cash assets of $200,000. The maximum cash fine that courts can impose without threatening the solvency of the corporation is $200,000, but the maximum reputational penalty is $2 million. Thus, if the optimal sanction were $300,000, this sanction could only be created through a combination of reputational penalties and cash fines.
reputation is nonetheless problematic, because reputational sanctions are inaccurate and affect only firms with good reputations. Furthermore, reputational sanctions generally are not the most efficient means of obtaining optimal deterrence. In addition to the remedies that have already been discussed, such as loss of license and debarment, the literature suggests others, including equity fines. An equity fine might require a "convicted corporation . . . to . . . issue such number of shares to the state's crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity." An equity fine, by reducing the price of corporate stock, has an effect similar to that of a reputational sanction. In fact, the maximum penalty under both equity fines and reputational penalties is the same — approximately the total share value of the corporation. However, equity fines are likely to be socially cheaper to impose because they are more precise than reputational sanctions and courts can more easily determine their impact. Further, equity fines do not result in the destruction of assets as reputational penalties do. Thus, equity fines and other comparable legally imposed sanctions, such as debarment, are generally more efficient than reputational loss as supplements to cash fines for judgment-proof corporations.

Although reputational penalties are expensive sanctions, they may still be socially desirable in two cases, regardless of whether the corporation is judgment-proof, because of the time at which they take effect. Cash or equity fines only impact a corporation once it has been convicted or found liable, whereas reputational penalties begin to take their toll as soon as the share market becomes aware that the corporation has legal troubles. Let us then assume that the reputational loss is incurred at an early point in the proceedings (before trial, for example). Let us further assume that the reputational loss does not

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155 See supra section V.B.1.
156 See Coffee, supra note 2, at 413–24.
157 Id. at 413.
158 See id. at 413–15 (noting that equity fines dilute share prices); Karpoff & Lott, supra note 64, at 772–73 (treating reputational penalties as harmful to a corporation's stock value).
159 This similarity follows from the premise that equity fines, like reputational sanctions, serve primarily to lower share value. See Coffee, supra note 2, at 413–15. If the two sanctions target the same source, then their upper limits are likely to be the same.
160 By definition, courts impose equity fines after calculating what effect they will have on share prices. See id. at 413.
161 Equity fines dilute share prices for existing shareholders. See Coffee, supra note 2, at 415; see also id. at 413–31 (discussing other advantages of equity fines). Note that the greater precision of equity fines means that the overdeterrence and underdeterrence concerns associated with reputational penalties, see supra note 142, are a lesser concern here.
162 At least one empirical study of reputational loss found that the largest part of such loss occurs at the time of the initial news report of legal troubles. See Karpoff & Lott, supra note 64, at 775–85.
vary with the later finding of guilt or innocence, which means that an overestimation of liability is rarely corrected. In this case, a reputational penalty may provide a higher expected sanction than would cash fines and equity fines or any other combination of penalties that courts impose after conviction, and it may also save enforcement costs by leading to an early resolution of the case.

I develop the higher expected sanction case by example and high-
light the critical factors in the analysis. Let us assume that the probability of detection and conviction (that is, the probability of a fine) is 10% and the probability of detection and discovery by the share market (that is, the probability of a reputational penalty) is 35%. In addition, assume that the optimal expected sanction is $800,000, the maximum cash fine is $1 million (the corporation’s net available assets), and the maximum reputational penalty (which is imposed before trial) is $2 million. The expected sanction in criminal proceedings is then the optimal expected sanction of $800,000 ($2,000,000 x 35% plus $1,000,000 x 10%). If instead we relied on a $1 million cash fine and a $2 million equity fine (also the maximum that can be imposed), then the expected sanction is only $300,000 ($3,000,000 x 10%). Because cash and equity fines cannot be increased any further, the greater reliance on reputational penalties provides a higher expected sanction and might be preferable in some cases for deterrence purposes. The critical factor in the analysis is not the timing of the reputational penalty per se, but the fact that the probability of imposing a reputational penalty is higher than the probability of imposing any other sanction. Because the expected value of a sanction equals the sanction times the probability that it will be imposed, a higher probability of imposing a sanction increases the expected sanction.

However, there may be other ways to increase the expected sanction without relying on reputational penalties. We could authorize the imposition of a cash fine on a corporation as soon as the corporation is charged with a crime (that is, at the same time the corporation becomes subject to reputational loss). This system, however, would im-

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163 See id. at 777 (suggesting that later announcements fail to correct initial reputational losses).

164 Note that we could try hybrid strategies as well. For example, the imposition of $1 million in cash fines, $1 million in equity fines, and $1 million in reputational penalties would result in an expected sanction of $550,000, an amount too low for optimal deterrence. This result might call into question the assumption that underlies this Part of the Article — that the optimal penalty structure should exhaust the cheapest sanctions first and then move on to the more costly sanctions. See supra p. 1497. The assumption seems questionable because, although equity fines are cheaper than reputational penalties, in the examples given we have not exhausted the total potential for equity fines (which is $2 million) before relying on reputational penalties. This apparent incongruity arises from the implicit assumption made throughout the Article that the probability of imposition for each type of sanction is the same. Here I have relaxed that assumption and have reached a different result. These varying results are not surprising — they indicate only that starting assumptions both clarify and restrict analysis.
pose a sanction without proof of violation of any law and thus seems unrealistic and probably unconstitutional. Instead, we might make corporate liability suits more expensive to defend or subject corporate officers to heavier penalties. These two options are better than reputational penalties because they often have lower sanctioning costs and can be measured more precisely. However, an important concern with these alternative sanctions is that many have yet to be tried. Developing them will undoubtedly prove valuable, but until then reputational sanctions remain desirable in a narrow range of cases — cases in which a high expected sanction is necessary but is not available through legally imposed penalties.

Alternatively, we might consider applying consent decrees, which are imposed earlier than cash fines, as substitutes for reputational penalties when a high expected sanction is needed. Consent decrees may indeed be valuable. However, because the probability of their imposition is most likely lower than the probability of the imposition of reputational penalties, consent decrees might also need to be supplemented by reputational penalties. Overall, reputational penalties may provide a benefit by allowing for higher expected sanctions.

In addition to increasing expected sanctions, the early imposition of a reputational penalty may encourage faster settlement and thereby avoid a costly trial. If the optimal sanction can be imposed using either post-trial cash fines or pretrial reputational sanctions, we should choose reputational sanctions when the litigation costs avoided by settling exceed the extra sanctioning costs of reputational penalties compared to cash fines. Assuming that this balance favors reliance on

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165 One option is to increase the costs of suit. Alternatively, we might stagger the times at which the defendant and prosecution incur the costs of suit in such a way that the defendant pays up front, whereas the prosecution pays later in the trial. I assume that the government brings the suit and that malicious suits are less likely in the public enforcement context than in the private civil enforcement context. I also assume that if the government brings a false suit and fails to obtain conviction, the corporation will not fully recover from the reputational loss inflicted early on because some consumers will remain doubtful that the corporation was truly innocent. Cf. Karpoff & Lott, supra note 64, at 777 (emphasizing the irreversibility of the reputational loss caused by initial news reports of fraud).


167 Karpoff and Lott’s study provides evidence relating to the probability of the imposition of consent decrees or settlements compared to the probability of imposition of reputational penalties. See Karpoff & Lott, supra note 64, at 769, 775–85. In the cases Karpoff and Lott examined, reports to the Wall Street Journal about the investigation preceded settlement, see id. at 769, and most reputational loss occurred at the earliest reporting of problems with the corporation, see id. at 775–85. This finding implies that most of a corporation’s reputational loss is suffered before a settlement is reached.

168 For example, let us assume that the probability of detecting a wrong is 40% and that the probability of convicting a corporation for the commission of that wrong is 5%. Further, the enforcement cost to detect the harm is $500,000 and the cost to obtain a successful conviction is an additional $3 million. The optimal expected penalty is $1 million; hence, the optimal cash sanction is $20 million and the optimal reputational loss is $2.5 million. Let us also assume that
reputational sanctions, we should note that trials can often be avoided by relying on any sanction that is imposed early on, such as the charging sanction or increased cost of suit. These sanctions are superior to reputational loss because they can realize the enforcement savings without the higher sanctioning costs associated with reputational sanctions. Again, because no legal framework for imposition of these other sanctions is yet in place, reputational sanctions may offer the best solution currently available.

Thus, the early imposition of reputational penalties renders these penalties desirable in certain narrow areas. This desirability alone, however, is not grounds for imposing corporate criminal liability, because we have the choice of imposing reputational loss through either civil or criminal proceedings.

3. A Comparison of Corporate Reputational Loss Due to Civil and Criminal Liability. — The literature suggests that reputational losses result both from criminal convictions and from civil liability. Before we conclude that imposing criminal reputational sanctions are preferable, we must first establish that the reputational consequences of a criminal conviction exceed those of an unfavorable civil judgment. One commentator who conducted a limited examination of the issue concludes that there was no significant difference between the corporation’s reputational sanctions in these two types of proceedings. Intuitively, this result seems proper; it is hard to believe that consumers would ascribe stigma to a corporation solely on the basis of the category of legal proceedings in which it was involved. For example, if Exxon is convicted of a criminal offense for violating environmental laws and is fined $1 billion, and Shell is found liable for violating the same environmental laws in the civil sphere and pays $1 billion in damages, society is unlikely to perceive any significant difference between the two corporations.

Discussions with government agency representatives and members of the legal community indicate, however, that this result may not al-

the sanctioning costs are $1 for every dollar in reputational loss and $0.05 for every dollar in cash fines. Finally, let us assume that the corporation has assets of $40 million to pay cash fines.

Under these assumptions, imposing the optimal cash fine has total costs of $4.5 million ($3.5 million enforcement costs plus $1 million sanctioning costs), whereas imposing the optimal reputational loss has total costs of $3 million ($500,000 enforcement costs (detection only) plus $2.5 million sanctioning costs). Assuming that reputational losses and cash fines are substitutable, relying on reputational loss is socially cheaper than relying on cash fines. I assume that the probability of detection without the use of government resources is very low. This assumption makes government enforcement necessary; without such enforcement, the reputational penalty by itself would not achieve optimal deterrence.


170 See id. Block also asserts that sentencing in criminal cases is less accurate than damage setting in civil cases. See id. at 415–17.

171 Cf. Posner, supra note 118, at 417 (discussing a similar issue in the context of individual criminal liability for white collar crime).
ways hold true, especially for cases that do not command the sort of sensational appeal of the Exxon Valdez case.\textsuperscript{172} If we desired a very severe sanction that could not be obtained either through other legally imposed sanctions or through the reputational loss penalty in civil cases, then we could obtain a greater reputational loss from corporate criminal liability. However, the type of grandiose corporate wrong that would call for such a response would probably fall into the “sensational” category — the category in which the reputational penalties are the same in both liability regimes.

If, on the other hand, we wish to save enforcement resources by imposing early penalties, then corporate criminal liability is desirable only when the reputational penalty of corporate civil liability is not large enough for optimal deterrence.\textsuperscript{173} This use of the criminal process, however, may seem rather perverse and unpalatable. This is because we normally view the availability of severe sanctions as a justification for the high costs of criminal trials, yet here we use the severe early reputational sanctions as a factor that decreases the need for a criminal trial. An alternative is to develop sanctions in civil proceedings that can be imposed early in the litigation process. For instance, increasing the costs of defending a suit encourages early settlement and avoids expensive trials, avoids the high sanctioning costs of criminal reputational penalties, and avoids the unseemly use of the criminal process to impose pretrial penalties. Clearly, this alternative is preferable.

4. A Comparison of Managers’ Reputational Loss Due to Civil and Criminal Liability. — Managers, as well as corporations, may incur reputational losses.\textsuperscript{174} It has been suggested that there is a rub-off effect on top management if a corporation is convicted, but that there is no rub-off effect if the corporation is found liable in civil court because civil cases are such common occurrences.\textsuperscript{175}

\textsuperscript{172} See Interview with Louis Kaplow, Professor, Harvard Law School, in Cambridge, Mass. (Mar. 5, 1995); Interview with Peter Kenyon, Regional Counsel’s Office, Environmental Protection Agency, in Boston, Mass. (Mar. 6, 1995). For example, a criminal conviction for a banking law violation, rather than a finding of civil liability, might result in higher reputational losses.

\textsuperscript{173} In order for society to benefit from the imposition of corporate criminal liability, the reputational penalty of corporate civil liability must be inadequate for optimal deterrence. Otherwise, we could rely on the reputational sanction of corporate civil liability and avoid the higher sanctioning costs of corporate criminal liability. See supra section V.B.2. I assume that sanctioning costs increase as reputational penalties increase.

\textsuperscript{174} See, e.g., Developments, supra note 2, at 1366 (noting the possibility of such a penalty, but considering it unlikely).

\textsuperscript{175} See Interview with Philip Heymann, Professor, Harvard Law School, former Deputy Attorney General of the United States, in Cambridge, Mass. (Mar. 8, 1995); Interview with Peter Kenyon, supra note 172. Some commentators are skeptical that this rub-off effect exists even in the criminal context. See Developments, supra note 2, at 1366 & nn.5–6. If there is indeed a rub-off effect associated only with criminal liability, it must be due to the criminal label itself rather than to the fact that the government is bringing suit. Otherwise, the reputational rub-off associated
Even if we make the highly questionable assumption that reputational rub-off exists in the criminal context, we must still determine whether we want to use this type of sanction to achieve deterrence. The use of a reputational rub-off penalty would be worthwhile only if corporate liability and individual liability together did not sufficiently deter the corporation and its agents. Such underdeterrence would occur if the corporation were judgment-proof and if the responsible manager were either judgment-proof or difficult to find and convict. If these conditions existed, then imposing a general reputational rub-off penalty on top management might encourage them to supervise the activities of their subordinates more carefully and dissuade them from masterminding corporate delicts.

Using corporate civil liability and individual civil liability, however, produces the same sanctioning effect as reputational rub-off and is socially cheaper. Civil liability might allow us to impose a sanction directly on members of top management without proving that they did anything wrong. For instance, we could impose a monetary penalty on top management, based on strict liability, for certain types of corporate wrongs. This method would be preferable to the indirect reputational rub-off for two reasons: fines are socially cheaper than reputational loss, and fines are more accurate than reputational loss. The latter is an important consideration because managers are risk averse and because overdeterrence is possible.

Reputational rub-off penalties may be more desirable, however, if the manager's available assets are less than the optimal damages, but the manager's available assets plus his potential reputational losses exceed or at least equal optimal damages. It is not clear, however, how often this is the case. Moreover, we need to assume that the manager cannot negotiate a higher salary to compensate him for this reputational rub-off penalty. If he can negotiate, then the corporation is in effect paying the penalty, and we can produce the same result by opt-

with public criminal enforcement would be the same as the rub-off associated with public civil enforcement.

176 See, e.g., Developments, supra note 2, at 1366.

177 I assume that imprisoning members of top management simply because their corporation has been convicted would be impermissible.

178 A strict liability fine is equivalent to a reputational penalty in the sense that neither requires proof that the manager was at fault.

179 See supra pp. 1503–04.

180 See supra pp. 1503–04. The rapidity with which top management turns over exacerbates the danger of inaccuracy. See Posner, supra note 2, at 422 (noting that personnel changes in corporations are frequent). For example, although the top management of corporation X may have been cavalier in 1987, the corporation might not be sued until 1993. The members of top management may have changed several times during this period. These changes would result in the reputational rub-off affecting the wrong individuals. A strict liability fine, in contrast, could target the responsible managers more effectively.

181 See supra p. 1496.
ing for a strict liability fine and allowing the corporation to insure top management.\textsuperscript{182} If the manager cannot negotiate, we still need to ask whether imposing this type of liability on top management is more desirable than imposing insurable strict liability fines.\textsuperscript{183} Finally, there may be a time lag between the harmful event and the suit (and, hence, the reputational penalty) in which the identity of top managers may have changed. When such a change occurs, reputational penalties affect the wrong people, thus exacerbating managerial risk aversion.\textsuperscript{184}

This analysis indicates that there are several preconditions for preferring a reputational rub-off penalty: corporate liability that is insufficient for deterrence; conditions in which managerial insurance is not optimal; judgment-proof top management; top management with the capacity to suffer some reputational loss; inability to find and convict the truly responsible manager; conditions in which the benefits of the reputational rub-off penalty would be greater than its costs (inaccuracy and sanctioning costs); and a net benefit that is greater than that of any other sanctioning option such as direct cash fines. Given the number of necessary conditions, such a situation is probably exceedingly rare.

The preceding analysis demonstrates that relying on a reputational sanction, regardless of whether it attaches to the corporation or to top management, is rarely socially desirable in the corporate context. We should therefore prefer the socially cheaper sanctions imposed by the law. Among legally imposed sanctions, we should prefer cash fines to other options, such as loss of license, because cash fines are the cheapest options. Consequently, we should rely on cash fines until their deterrent effect is exhausted and then use the other legally imposed sanctions until their deterrent effects are exhausted as well. If higher sanctions are still needed to achieve optimal deterrence, we could consider sanctioning managers and third parties or increasing the costs of proceedings. Reputational penalties could still prove desirable, however, because they take effect at an early point in the proceedings. Nonetheless, criminal reputational sanctions are probably not superior to civil reputational sanctions. Furthermore, reputational sanctions will likely lose this early penalty advantage if other early penalty sanctions with the same probability of imposition as the reputational penalty emerge.

Therefore, in most instances, corporate civil liability that permits the imposition of cash fines supplemented by loss of license and equity fines is more desirable than corporate criminal liability. Within this regime, loss of license and equity fines should generally be available to supplement cash fines if the court or agency believes that the optimal

\textsuperscript{182} See Kraakman, supra note 3, at 870–71.
\textsuperscript{183} See id. at 876–88 (discussing absolute liability for managers).
\textsuperscript{184} See supra note 180.
sanction is greater than corporate assets available for payment of a cash fine. We should not therefore rely on corporate criminal reputational penalties and reliance on any corporate reputational penalty should be minimal.

VI. PROCEDURAL CHARACTERISTICS

The norms of traditional criminal proceedings determine the procedural protections available to corporate criminal defendants. The primary purpose of these protections is the prevention or correction of false convictions; the system is far less concerned with correcting false acquittals. Although there may be many good reasons to offer these protections to individuals, false convictions of corporations are not as problematic to society as false convictions of individuals. This Part examines the desirability of four criminal procedural safeguards for corporate defendants: a higher standard of proof; the prohibition of double jeopardy; the right to a jury trial; and the requirement of grand jury indictment. This examination reveals that these protections are rarely, if ever, desirable in the corporate context.

A. Standard of Proof

In criminal proceedings, the prosecution must prove its case beyond a reasonable doubt to obtain a conviction. A more lenient preponderance of the evidence standard is used in civil cases. Because of the higher standard of proof, criminal cases are typically more costly than civil cases.

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185 See Developments, supra note 2, at 1276. Indeed, the typical corporate criminal case goes through essentially the same process as any other criminal case, save for the vast amount of documentary evidence required for a corporate conviction. See id. Given the constitutional nature of criminal procedural protections, I assume, for now, that these protections must attach whenever something is labeled criminal.

186 For works in which this proposition is the operating assumption, see POSNER, cited above in note 2, at 553, and Byam, cited above in note 2, at 601–02.

187 This Part focuses on the differences between the procedural protections available to corporations in criminal trials and the protections available to corporations in traditional civil proceedings. We want to narrow the analysis to those protections that we may be able to avoid if we decide to opt for civil instead of criminal corporate liability. Certain protections, such as the Fifth Amendment privilege against self-incrimination, the Fourth Amendment protection against unreasonable search and seizure, and attorney-client privilege, are available in both corporate civil and criminal cases. See Developments, supra note 2, at 1277–93. Some other constitutional protections of lesser significance, including substantive due process and equal protection of the laws, also apply in both contexts. See GRUNER, supra note 1, § 5.7.1–7.3, at 322–24.

188 See Developments, supra note 2, at 1302, 1341–50.

Optimally, the standard of proof should be set at the level that equates the marginal costs of false convictions and false acquittals. Assuming that the costs to society from a false conviction and a false acquittal are approximately the same, a higher standard of proof might be beneficial if it would reduce the number of false convictions by more than it would increase the number of false acquittals. The unique difficulties associated with detecting, investigating, and proving corporate criminality suggest, however, that the number of false corporate convictions is already very low and that the higher criminal standard of proof is thus unnecessary in the corporate context.

If we then assume that the number of false corporate acquittals exceeds the number of false corporate convictions, a higher standard of proof is only justifiable if the cost of a false corporate conviction exceeds the cost of a false acquittal. Posner argues that a false conviction wrongfully imposes socially costly penalties, such as imprisonment, on the individual defendant. Hence, the social cost of a false conviction of an individual is likely to exceed the cost of a false acquittal. The requirement of proof beyond a reasonable doubt therefore minimizes the costs of error to society by ensuring that the chance of a false conviction of an individual is less than the chance of false acquittal. However, for purely civil cases, the costs of a false finding of liability are about the same as the costs of a false finding of no liability because the sanction, such as a cash award, is a low-cost sanction. Its social costs may be merely the rather small transaction costs of transferring money from one party to another. Therefore, employing the preponderance of the evidence standard of proof for civil liability is desirable because the standard is only slightly weighted in favor of false findings of no liability.

The lower civil standard is socially desirable in the corporate context because cash fines imposed on risk-neutral corporations are essen-

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190. For example, let us assume that the civil standard of proof produces 40 incorrect decisions, each costing society $1, of which 25 are false convictions and 15 are false acquittals. The error cost to society is $40. Further, let us assume that under a higher standard of proof the number of false convictions falls to 18 and the number of false acquittals rises to 20. The higher standard thus decreases the error cost to society to $38.

191. See, e.g., GRUNER, supra note 1, § 1.7.1, at 29–36 (discussing problems of detection and investigation); Hughes, supra note 47, at 576–80 (explaining that compulsory process has developed in civil cases in response to the difficulty of investigating corporate offenses); see also infra sections VII.C.1–2 (discussing strategic benefits and error correction benefits).

192. See Posner, supra note 2, at 552. I assume that increasing the standard of proof results in one fewer false conviction and one more false acquittal (a one-for-one ratio).

193. See id.; see also Kaplow, supra note 189, at 560–61 & n.150 (discussing how socially costly sanctions may make a higher standard of proof optimal).

194. See Posner, supra note 2, at 553.

195. See id.

196. See id. at 550–53.

197. See id. at 552.

198. See id. at 553.
tially low-cost sanctions. Somewhat similar arguments can be made in the context of other sanctions imposed on corporations. Nevertheless, a monetary fine may have consequences outside of the simple transfer of funds involved. For example, the possibility of a severe sanction under an uncertain legal standard may chill desirable behavior (a problem commonly associated with antitrust cases and treble damages). A higher standard of proof may be useful to mitigate this chilling effect.

However, concern over the risk of chilling desirable behavior seems low. The recent increases in the severity of corporate sanctions in both the civil and criminal spheres may indicate a belief that sanctions are still not stiff enough to deter undesirable behavior. Because concern about the ill effects of undesirable behavior generally outweighs any concern about chilling desirable behavior, the possibility of

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199 See id. at 423; Byam, supra note 2, at 602. I assume that corporations are risk neutral. See Posner, supra note 2, at 422–23 (making the same assumption). Risk aversion can affect the analysis of the standard of proof. For example, Posner notes that risk aversion implies that “every reduction in the probability of apprehension and conviction, and corresponding increase in the fine for those who are apprehended and convicted, imposes a disutility not translated into revenue by the state. Thus, the real social cost of fines increases for risk-averse criminals as the fine increases.” Id. at 225–26. If risk aversion does indeed result in such increasing social costs, then the cost of a false conviction increases relative to the cost of a false acquittal and some adjustment to the standard of proof may be warranted. See id. at 553 (noting that as the costs of false convictions rise a higher standard of proof may become more desirable). The adjustment need not result in the criminal standard of proof; an intermediate standard may also suffice. See infra p. 1516.

200 The other sanctions that may flow from a corporate conviction include loss of license, equity fines, and reputational penalties. These other sanctions have somewhat higher costs than cash fines. See supra p. 1498 (discussing the costs of loss of license); supra pp. 1503–04 (discussing the costs of reputational penalties). The wrongful imposition of these sanctions thus entails higher social costs than the wrongful imposition of cash fines. If these social costs are high enough, a move away from the civil standard of proof may be optimal. For example, greater reliance on an intermediate standard may be optimal. See infra p. 1516. Note that this argument may be of minimal importance for reputational penalties if, as suggested, we rarely use them.


202 As an example, consider the following scenario. The number of false convictions is 15; each costs $2 ($1 for a wrong decision’s adverse impact on deterrence and $1 for the chilling of desirable behavior). The number of false acquittals is 25; each costs $1 for the impact on deterrence. This situation produces a cost to society of $\$55$. Under a higher standard of proof, the number of false convictions drops to 10 (still costing $2 each), and the number of false acquittals rises to 33 (still costing $1 each). The total cost to society under the higher standard of proof is then $\$53$. Even though the higher standard increases the number of erroneous decisions from 40 to 43, this standard actually lowers the total cost to society to $\$53$.

203 One of the primary reasons for the implementation of sentencing guidelines for organizations was that corporate penalties were, arguably, insufficient. See Gruner, supra note 1, § 8.2.1, at 427–28.
chilling is not a convincing justification for the higher standard of proof.

The higher criminal standard of proof would be justifiable, then, only in those cases in which there would otherwise be either chilling of desirable corporate behavior or an excess of false convictions over false acquittals. Given what we know about corporate sanctions and the difficulty of proof in the corporate context, the criminal standard of proof would simply not be desirable.\textsuperscript{204}

Moreover, even if there is some danger of a chilling effect or a higher number of false convictions than false acquittals, we should not necessarily opt for raising the standard of proof to the criminal standard. Raising the standard of proof “decreases the rate of [false] convictions,” but it also “increases the rate of [false] acquittals.”\textsuperscript{205} There are, however, ways in which we can reduce false convictions without increasing false acquittals.\textsuperscript{206} Examples include using the appeals system to correct false convictions and improving the accuracy of the original decision by increasing the information-gathering powers of government agencies.\textsuperscript{207} In addition, sanctioning actors other than the corporation could reduce the severity of errors. In this case, the threat of chilling might be lower — or, more generally, the social costs might be lower — but the social benefits would still exist.\textsuperscript{208} Thus, even if

\textsuperscript{204} Let us assume, however, that sometimes the criminal standard of proof is desirable in the corporate context. Even so, devising an enforcement apparatus that would impose this protection only in those cases in which it would be efficient would be difficult and perhaps not worth the necessary effort. Let us assume, more specifically, that for some subset of antitrust cases the criminal standard of proof will often be preferable. We do not know ex ante which cases fall into this category, but we may be able to tell whether the higher standard is desirable by examining the facts of each case. We might then leave to prosecutors the determination of whether the higher standard applies. In fact, we already give the prosecuting agency discretion to determine whether to pursue corporate criminal liability. See Developments, supra note 2, at 1307–08. Nonetheless, this option seems odd, because we would be giving the prosecution the option to impose upon itself a higher standard of proof — an action most prosecutors are unlikely to take. Moreover, prosecutorial discretion is subject to error and abuse. Thus, to cajole prosecutors to behave as desired, we may have to provide for criminal sanctions that are much more severe than available civil sanctions, or we may need to compel prosecutors to choose criminal proceedings when we have reason to believe that the system produces many more false convictions than false acquittals. The former approach may work insofar as we need high sanctions for effective deterrence. The latter approach, compelling prosecutors to choose the higher standard, appears more difficult because it might require delineating areas of law that have more false corporate convictions than false corporate acquittals. I am not aware of empirical evidence that indicates whether false corporate convictions are common in any particular area of law. If such evidence is not forthcoming, designing a system that would impose a higher standard of proof only when that standard is necessary seems very difficult.

\textsuperscript{205} Kaplow, supra note 189, at 356.

\textsuperscript{206} See id.

\textsuperscript{207} See id. (discussing information gathering and accuracy in relation to the standard of proof); Steven Shavell, The Appeals Process As a Means of Error Correction, 74 J. LEGAL STUD. 379 passim (1995).

\textsuperscript{208} I assume that spreading sanctions across actors creates the same level of deterrence with less chilling; no one defendant would face severe sanctions, but all would have some incentive to
the civil standard does not sufficiently reduce error costs, we must examine whether increasing the standard of proof is the most efficient way to reduce the total error cost to society.\textsuperscript{209}

Even if the standard needs to be strengthened, we need not raise it to the level of the criminal standard. Instead, we could reduce false convictions by using an intermediate clear and convincing evidence standard.\textsuperscript{210} I suggest that an intermediate standard is more appropriate when we are concerned with the social costs of chilling desirable behavior; the criminal standard is more appropriate when the concern is social costs of wrongful imprisonment.

The criminal standard is best left only to criminal proceedings against individuals. In drawing this conclusion, we should also remember that a high standard of proof is not the only procedural pro-

\textsuperscript{209} For example, assume that under a civil standard of proof in a society with average information-gathering powers there are 40 incorrect decisions, of which 25 are false convictions and 15 are false acquittals, each costing society $1. Under this standard, the total cost to society is $40 (system A). Assume further that with a higher standard of proof and average information-gathering powers the number of false convictions falls to 16, the number of false acquittals rises to 18, and the total cost to society is $34 (system B). Next assume that with a civil standard and high information-gathering powers the number of false convictions falls to 17, the number of false acquittals falls to 12, and the total cost to society is $29 (system C). Finally, assume that with a higher standard of proof and high information-gathering powers there are 15 false convictions, 15 false acquittals, and a total cost to society of $30 (system D). System C imposes the least total cost on society. Given these facts, reliance on the civil standard and higher information-gathering powers is optimal.

This fact pattern arises because error costs are not the only costs to society. Other relevant costs, such as enforcement costs, are higher with a higher standard of proof and greater information-gathering powers (for example, more hours of labor are necessary to get all of the necessary data). In addition, I assume that the government would use its powers to achieve correct decisions rather than simply to convict (in other words, although a minimal effort may result in a conviction and greater effort would be necessary to reveal that conviction is not justified, the government would go this extra mile). This analysis also indicates that the higher standard of proof is not tied to higher information-gathering powers — these two factors are essentially independent. See Kaplow, supra note 189, at 356.

\textsuperscript{210} Many statutes use the clear and convincing evidence standard as a requisite to the award of punitive damages. See, e.g., GA. CODE ANN. § 51-12-5.1(b) (Supp. 1995); KAN. STAT. ANN. § 60-3701(c) (Supp. 1996). The similarity between punitive damages and severe sanctions against corporations suggests that this intermediate standard (if appropriate for punitive damages) is also appropriate for corporate sanctions.
tection against erroneous imposition of corporate criminal liability. Other protections, such as double jeopardy, a jury trial, and the grand jury indictment process are discussed below. Nevertheless, as I demonstrate, the effects of these other procedural protections are likely to be more muted than the effect of a higher standard of proof.

B. Double Jeopardy

Although protection against double jeopardy applies to corporations as well as individuals, the rationales for its application are weaker in the corporate context. One plausible rationale for double jeopardy protection is that it prevents false convictions. This rationale is evidenced by the rule, unique to double jeopardy, that bars government appeals but not defendant appeals. However, as the discussion regarding the standard of proof demonstrates, a concern with false convictions is unwarranted in the corporate context. Another plausible rationale for double jeopardy protection is that it "restricts the ability of the government to use its power and resources to inflict the uncertainty and financial drain of trial on a defendant more than once." Again, however, this concern does not seem compelling in the context of cases involving large corporations. In any event, the application of double jeopardy protection may be of little consequence because legislation that clearly delineates different offenses can easily avoid double jeopardy.

211 See Developments, supra note 2, at 1344; cf. id. at 1341 & n.6 (discussing res judicata); id. at 1341-42 & n.7 (discussing collateral estoppel). Double jeopardy protection is only available against government suits brought with the object of punishment (a purpose attributed to criminal suits and some civil suits with "punitive sanctions"). In United States v. Halper, 490 U.S. 435 (1989), the Supreme Court held that defendants who have undergone criminal punishment cannot be subject to governmental civil sanctions for the same act if the sanctions "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." Id. at 448. Similarly, in Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994), the Court held that double jeopardy barred the levy of a tax based on criminal conduct after the imposition of criminal punishment. See id. at 1948. For further discussion of Halper and Kurth Ranch, see The Supreme Court, 1993 Term — Leading Cases, 108 Harv. L. Rev. 139, 171-81 (1994).

Some restrictions on double jeopardy protection are worth noting. "Simultaneous or successive prosecutions of corporate employees, managers, or directors and their firm do not raise double jeopardy issues as the corporation is deemed a separate party from the individuals and each is only subject to one prosecution." GRUNER, supra note 1, § 5.7.11, at 331-33. Parent and subsidiary corporations are also considered separate parties. See id. Further, double jeopardy does not prevent separate state and federal prosecutions for the same underlying conduct. See id.

212 See Developments, supra note 2, at 1343. I consider the rule unique because the doctrines of res judicata and collateral estoppel do not bar government appeals. See id.

213 Id. For further discussion, consult GRUNER, cited above in note 1, § 5.7.11, at 331-33, and Howard M. Friedman, Some Reflections on the Corporation as Criminal Defendant, 55 Notre Dame L. Rev. 173, 195-98 (1979).

214 See Friedman, supra note 213, at 196-97.

215 Double jeopardy protection applies only when two offenses are "the same," but the standard for determining the sameness of offenses is unclear. See Developments, supra note 2, at
C. Right to a Jury Trial

The Sixth Amendment right to a jury trial may, arguably, be available to corporate defendants. Assuming that jury trials are more expensive than nonjury trials due to jury selection, sequestering, and other costs, a criminal case will generally be more costly to prosecute than will a civil case. It is not clear that these extra costs are justified.

If our concern is with error reduction, we may argue, as in the higher standard of proof context, that false corporate convictions are infrequent. Thus, two other purposes of the right to a jury trial ought to be considered: defendants should be protected from government oppression by being judged by their peers, not by judges who may not fully appreciate the situation in which the defendants live; and the jury brings community standards to bear on the application of laws. Both of these reasons are inapplicable in the corporate context. First, individual jurors are not "peers" of a corporation, so they are unlikely to empathize with a corporate defendant. Further, concerns with government oppression do not seem as strong when the defendant is a large corporation. Also, because jurors may feel adverse to business

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1344. Consider the differing analyses in Blockburger v. United States, 284 U.S. 299 (1932), which held that in order to survive double jeopardy, each offense must require "proof of a fact which the other does not," id. at 304, and Grady v. Corbin, 495 U.S. 508 (1990), which supplemented Blockburger's "same elements" test with a consideration of the conduct that the state must prove, see id. at 521-23. In United States v. Dixon, 113 S. Ct. 2849 (1993), the Court overruled Grady. See id. at 2860. However, because the Dixon majority interpreted Blockburger in a new way, see id. at 2856-59, the current content of the Blockburger test is uncertain. For an extensive discussion of Dixon, see The Supreme Court, 1992 Term — Leading Cases, 107 HARV. L. REV. 144, 144-55 (1993).

216 See GRUNER, supra note 1, § 5.7.6, at 326-28; YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE 1388 (8th ed. 1994); Friedman, supra note 213, at 198-201. The Supreme Court has yet to decide whether a corporation has the right to a jury trial, although some circuits have recognized this right. See GRUNER, supra note 1, § 5.7.6, at 326-28. An issue that has arisen in the circuit courts is whether the "petty offense" doctrine, which deprives defendants accused of crimes with minor penalties of the right to a jury, should have a different scope when applied to corporate defendants. Id. The Second Circuit has elaborated a test based on the amount of monetary penalties: "[A] jury trial must be available whenever the organizational fine threatened . . . exceeds $100,000. For fines below $100,000, . . . a jury trial must still be offered if the maximum fine for a charged offense will have a significant financial impact on a corporate defendant." Id. § 5.7.6, at 327 (footnote omitted) (discussing United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 665 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990)).

217 The right to a jury trial is more likely to apply in criminal cases than in civil cases. See Developments, supra note 2, at 1302.

218 See KAMISAR, LAFAVE & ISRAEL, supra note 216, at 1388 (quoting Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968)).

219 See id. at 1395-97 (discussing jury nullification).

220 See Friedman, supra note 213, at 198.
interests, the jury is probably less "sympathetic than a judge."\textsuperscript{221} Finally, the availability of a jury trial probably makes little practical difference; many corporations might choose not to have a jury trial for the reasons just noted.

\section*{D. Grand Jury Indictment}

Grand juries serve at least two functions: screening out weak cases and gathering information.\textsuperscript{222} This section focuses on the grand jury's task of screening out cases that lack merit.\textsuperscript{223} Section VII.B discusses the grand jury's information-gathering powers.

It is unlikely that grand juries truly minimize the chance of false convictions. The vast majority of grand juries, at least at the federal level, indict.\textsuperscript{224} In addition, it is not clear that society needs to weed out false corporate convictions because, as the discussion regarding standards of proof indicated, false convictions do not appear to be frequent outcomes. Furthermore, any desirable information-gathering powers of the grand jury are, as demonstrated in section VII.B, obtainable without the grand jurors.

\textsuperscript{221} Id. However, a corporation might opt for a jury trial because corporate managers perceive that they have a better chance of avoiding liability if they face a jury rather than a judge. In many cases in which the jury has acquitted all corporate managers yet held the corporation liable, the judges have indicated their amazement. \textit{See Developments, supra} note 2, at 1249 & n.30; \textit{see also Gruner, supra} note 1, § 3.7.4, at 254–58 (explaining inconsistent verdicts by pointing to a jury's unwillingness to punish an individual disproportionately for a company's organizational wrongdoing). If judges and juries really have such different perspectives, then corporate managers may indeed have a preference for choosing juries. This rationale is not applicable, however, when the corporation is the only defendant.

\textsuperscript{222} \textit{See Kamisar, LaFave & Israel, supra} note 216, at 689. A grand jury indictment is not always required in a federal corporate criminal case; an information may be sufficient. \textit{See Gruner, supra} note 1, § 5.7.3, at 323–24.

\textsuperscript{223} I assume that the financial expense of the grand jury screening function is similar to that of the jury trial because the court must select and retain grand jurors, the jurors must listen to evidence, and so forth.

\textsuperscript{224} \textit{See Kamisar, LaFave & Israel, supra} note 216, at 992 (discussing a study that reported that in 1984 federal grand jurors returned 17,419 indictments and only 68 "no true bills" — a rejection rate of about 3 in 1000). The low rejection rate might arise because of poor screening by grand jurors or the careful exercise of prosecutorial discretion in selecting strong cases to bring before the grand jury. The latter explanation appears unlikely. \textit{See Jerold H. Israel, Grand Jury, in 1 Encyclopedia of Crime and Justice, supra} note 5, at 810, 815; Andrew D. Leipold, \textit{Why Grand Juries Do Not (and Cannot) Protect the Accused}, 80 CORNELL L. REV. 260, 264 (1995) (arguing that grand jurors must defer to prosecutorial judgments because the jurors are not qualified to make judgments of legal sufficiency). Grand juries have been severely criticized, even outside the corporate context. \textit{See Leipold, supra}, at 264. Many countries, including England, have abandoned the grand jury system altogether. \textit{See Hughes, supra} note 47, at 581 n.24. Graham Hughes suggests that "the volume of crime, the high degree of mobility, and a greater reluctance by citizens to cooperate with the police [might] make the use of compulsory process in the investigation of serious crimes a more urgent need in the United States than in England." \textit{Id.} at 581. \textit{See generally Kamisar, LaFave & Israel, supra} note 216, at 689–700, 987–93 (evaluating both the investigatory and screening roles of grand jury proceedings).
In sum, criminal procedural protections are rarely desirable for corporate defendants. These protections would be desirable if sanctions were so severe and legal standards so uncertain that chilling of desirable behavior would occur and if no other method of error correction or reduction, such as an intermediate standard of proof, would be more efficient. Alternatively, the protections would be desirable if false corporate convictions outnumbered false corporate acquittals of equal social cost and if no other method of error correction or reduction were more efficient. Because these conditions are not met, however, relying on criminal procedural protections would make obtaining convictions more difficult and costly, thereby weakening deterrence and increasing costs for society without any significant countervailing benefits.

In most instances, corporate civil liability without criminal procedural protections is desirable. However, in areas of law in which sanctions are high and legal standards are uncertain, increasing the accuracy of decisionmaking or allowing for a clear and convincing evidence standard may be preferable. An example of such an area is antitrust law, under which research and development joint ventures may face treble damages (high sanctions) for violation of the rule of reason standard (uncertain legal standard).

VII. ENFORCEMENT CHARACTERISTICS

This Part examines the enforcement characteristics of corporate criminal liability to determine when they may be desirable and how they are, or could be, replicated in corporate civil liability. There are four particularly important enforcement characteristics of corporate criminal liability: the use of public enforcement agents; information-gathering powers at the prelitigation stage; the presence of parallel criminal and civil liability; and cost savings from bringing two suits of the same type (that is, criminal suits against both the corporation and an individual manager, rather than a criminal suit against the manager and a civil suit against the corporation).

A. Public and Private Enforcement Compared

As a general matter, both public and private actors can enforce legal norms. Private enforcement maximizes efficiency when "corpo-

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225 When unnecessary, these protections are true costs of corporate criminal liability. Moreover, the added costs attributable to these protections take limited federal enforcement funds away from other proceedings. This resource drain reduces the number of civil cases against corporations that the government can pursue.

226 See supra p. 1514.

227 See Byam, supra note 2, at 594–95. For a more detailed discussion of public and private enforcement, see Posner, cited above in note 2, § 22.1–2, at 595–602, and Landes & Posner, cited above in note 45, at 30–33. Generally, the Justice Department brings a corporate criminal suit on
rate offenses . . . have identifiable victims, and . . . leave the victims aware of the violation and the violator’s identity."228 In this situation, private parties have both the knowledge and incentive to sue.229

Public enforcement is preferable, however, when these conditions are not met. If, for example, a firm emits toxic waste into a neighboring area, residents may not know that the waste is harming them. Even if they did, they would probably lack “the resources needed to single out the offending firm from surrounding nonoffending firms.”230 In this context, public enforcement would promote efficiency.

Public enforcement against corporations is available, however, in civil as well as criminal proceedings. Indeed, government agencies regularly use civil proceedings231 to achieve the advantages of public enforcement.232 However, detection and prosecution may sometimes be so difficult that public enforcement — whether civil or criminal — may not result in optimal deterrence. In such situations, supplemen-

the basis of a referral or another law enforcement agency’s investigation. See, e.g., John K. Villa, Banking Crimes: Fraud, Money Laundering, and Embezzlement §1.04[1] (Supp. 1993) (discussing enforcement in the banking crimes area); Andrea L. Ciota, Caroline S. Park, Valerie A. Potenza & Ernest A. Tuckett, III, Project, Ninth Survey of White Collar Crime: Securities Fraud, 31 AM. CRIM. L. REV. 827, 868, 871 (1994) (discussing enforcement in the securities fraud area); Developments, supra note 2, at 1307–08 (discussing the Justice Department’s discretion in determining whether to proceed with a criminal suit).

228 Byam, supra note 2, at 596.
229 Byam elaborates:

The cost of detection differs greatly for some corporate violations of legal rules depending upon which sector enforces the rules. When a corporation breaches an agreement with a private party, the “victim” detects the breach at zero or minimal cost. When a defective product causes injury to its buyer, the buyer/victim is likely to detect his injury and to know the identity of the injurer; the victim’s detection costs, therefore, will be close to zero. If the public (the government) were the exclusive “detector” of breaches of all rules, including those governing contractual obligations and products liability, society would spend more resources detecting some offenses, by hiring agents or compensating informers, than it would cost individual victims to detect these offenses themselves. . . .

If the victims . . . have litigation costs equal to or lower than the public’s, the victims also should have to bring private actions against corporate offenders.

Id. at 595.
230 Id. at 598. Giving private enforcers at least a portion of the fines imposed in successful suits or prosecutions may encourage individuals to incur the necessary costs. See Gary S. Becker & George J. Stigler, Law Enforcement, Malfeasance, and Compensation of Enforcers, 3 J. LEGAL STUD. 1, 13–16 (1974). However, commentators have already noted the defects of such an approach. See Posner, supra note 2, at 596–97; Landes & Posner, supra note 45, at 32; Byam, supra note 2, at 598–99; see also Polinsky, supra note 45, at 107 (discussing further refinements on the public-private enforcement debate).

231 See, e.g., Hughes, supra note 47, at 587–89 (discussing civil investigative demands and administrative agency enforcement); Byam, supra note 2, at 594.
232 A particular advantage of public criminal enforcement might be that private parties cannot bring or join a suit in the criminal sphere. Let us assume that barring private suits may prove efficient in some cases. This efficiency is not a unique benefit of criminal proceedings because standing requirements in civil litigation could presumably have a similar effect. Furthermore, criminal suits do not bar private parties or the government from bringing parallel civil suits unless double jeopardy would result. See supra note 211.
tary enforcement devices, such as strong information-gathering powers, may be necessary to enhance deterrence.

B. Information-Gathering Powers

In addition to asking whether public enforcement is sometimes preferable to private enforcement, we need to consider whether the government's information-gathering powers in the criminal process produce a higher level of deterrence than civil proceedings do. The recent emergence of a new legal tool — the civil investigative demand — suggests that public civil proceedings may allow for information-gathering powers similar to those available in criminal proceedings.

1. Comparison of Information-Gathering Powers in Criminal and Traditional Civil Proceedings. — Although enforcement agents can gather information before litigation, during discovery, or at trial, the prelitigation and discovery stages are the most relevant stages for the comparative analysis undertaken in this Article. At the prelitigation stage in federal criminal proceedings, the use of the grand jury provides a substantial information-gathering advantage over traditional civil proceedings. This prelitigation information-gathering advantage in criminal cases is partially offset, however, by the lesser information-gathering powers available during discovery. Although recently the scope of both civil and criminal discovery has broadened substantially, civil discovery is still more far-reaching than criminal discovery.

The information-gathering capabilities of enforcement agents under the criminal enforcement model are desirable when information available before litigation is more important than information that could be acquired through later discovery. A reasonable assumption is that at the prelitigation stage, the primary question is whether an offense has occurred, whereas at the discovery stage, the issue is whether the particular defendant is responsible for an offense already shown to have occurred. Cases against corporate defendants often, though not always, collapse at the former stage because corporations can conceal

233 Cf. Hughes, supra note 47, at 574–75 (focusing on the prelitigation and discovery stages).
234 See id. at 578.
235 See id.
236 See id. at 574–75. Initially there was some reluctance to expand criminal discovery. See 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 474–72 (1984).
237 See Hughes, supra note 47, at 574–75.
238 The enhanced prelitigation information-gathering powers available in criminal proceedings are desirable when the benefits outweigh the added enforcement costs and attendant reduction of information-gathering powers at discovery. Sometimes the civil discovery findings in one case make their way into criminal discovery in another case. Thus, it is possible that the scope of criminal discovery may in practice be nearly as broad as the scope of civil discovery. See Developments, supra note 2, at 1321–30. Sometimes government enforcers continue with civil litigation even when they see that criminal prosecution is likely. Whether this practice is appropriate is a debated issue. See Hughes, supra note 47, at 619–21; Developments, supra note 2, at 1335–36.
their activities and the harm. This risk of early collapse suggests that the criminal enforcement model may sometimes be more effective than traditional civil enforcement: the criminal model’s prelitigation information-gathering advantage may provide the crucial information necessary to sustain an otherwise ill-fated case.

2. The Rise of the CID. — Recognition of the importance of prelitigation information gathering does not resolve the debate, because it may yet be possible to increase information-gathering powers at the prelitigation stage in corporate civil liability regimes. The advent of the civil investigative demand (CID) provides a particularly compelling illustration that greater information-gathering powers are possible in the civil sphere. CID powers are vested in the Justice Department’s Antitrust division, the Securities and Exchange Commission

239 See Gruner, supra note 1, §1.7.1, at 29–36. As a general matter, different law enforcement priorities may require different emphases on information gathering. Let us assume that, because some environmental harms are difficult to detect, effective enforcement may require greater information-gathering powers than are available in traditional civil proceedings. However, other environmental harms, such as gigantic oil spills, may not be difficult to detect. This pattern presumably holds true in many broad areas of corporate crime, such as environmental and antitrust law; some wrongs will be difficult and others will be relatively easy to detect. Therefore, greater information-gathering powers will not be needed in every case.

Because an ex ante determination that these extra powers and costs are necessary may not be possible, the presence of parallel civil and criminal liability might be useful insofar as it allows prosecutors the opportunity to look at a case and decide whether the case requires the use of strong information-gathering tools.

It is not clear, however, that information-gathering concerns in fact play any role in a prosecutor’s decision to pursue corporate criminal liability. At the federal level, the Department of Justice determines in particular cases whether corporate criminal prosecution is desirable. In deciding whether to prosecute, the government enforcer must consider three factors: the availability and adequacy of alternate noncriminal proceedings; whether a “substantial federal interest would be served”; and whether the potential defendant would be “subject to effective prosecution in another jurisdiction.” 8 United States Dep’t Of Justice, The Department of Justice Manual § 9-27.220, at 9-504 (1995). The enforcers may also consider other factors, including federal enforcement priorities, the seriousness of the offense, and the availability and likelihood of sanctions in alternate proceedings. See id. §§ 9-27.230 to .250, at 9-506, 9-510, 9-511. In other words, the manual is silent on what role, if any, information-gathering concerns should play in the exercise of discretion.

240 See Hughes, supra note 47, at 587–89.

241 Hughes describes the powers of the CIDs used by the Justice Department’s Antitrust Division:

The Antitrust Civil Process Act . . . confers on the Attorney General and the Assistant Attorney General in charge of the Antitrust Division of the Justice Department power to compel the production of documents, to compel written answers to written interrogatories, and to compel oral testimony whenever they believe the person may have information relevant to a civil antitrust investigation.

. . . . The 1976 amendments provide that such material generally shall not be made available to third parties without the consent of the person from whom they were [sic] obtained.

Id. at 595–96 (citations and footnotes omitted) (summarizing 15 U.S.C. §§ 1312–1313 (1994)). Disclosure of materials obtained through a CID is less strictly limited than disclosure of materials collected for a grand jury. See id. at 596–97.
(SEC), among others. The power to compel oral testimony is fast becoming an attribute of CID authority, an authority that already includes the power to compel disclosure of documentary material. In addition, secrecy rules are more relaxed for information obtained from CIDs than for grand jury information. Furthermore, "judicial scrutiny of . . . civil investigative demands has been patterned on . . . principles applicable to the grand jury and, indeed, now almost exactly mirrors the standards for challenging a grand jury subpoena." Thus, in terms of information gathering at the prelitigation stage, public civil enforcement provides powers virtually identical to those provided by public criminal enforcement. Nonetheless, public civil enforcement may prove more effective because of the lower standard of proof in civil cases, the greater interagency sharing of information

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242 CIDs are also used in the securities law arena. The [Securities and Exchange] Commission may require any person to file a statement under oath and may also subpoena witnesses and require the production of books and documents. The Commission has broad authority to share the information it obtains with other governmental agencies. . . . [T]he Commission may authorize a disclosure if it finds that disclosure is not contrary to the public interest. Id. at 597–98 (footnotes omitted) (summarizing 15 U.S.C. § 78u (1994)).

243 See id. at 599–600. The Inspectors General can compel the production of documentary material, but not testimony. The Justice Department "has encouraged use of the Inspector's office for investigating purposes, in part to avoid problems that may arise from grand jury secrecy rules." Id. at 599; see also id. at 600 (discussing the likelihood of successful challenges to an Inspector General's subpoenas).

244 See id. at 594 n.73.

245 See id. at 593.

246 See id. at 600; see also Kamisar, LaFave & Israel, supra note 216, at 605 (noting that the secrecy surrounding grand jury testimony may encourage informants to come forward). Some information from CIDs can be kept confidential, see, e.g., Hughes, supra note 47, at 596, 601 n.116, and this may induce some informants to come forward.

247 Hughes, supra note 47, at 587 (citations omitted). Some differences remain between grand juries and CIDs, but these differences do not appear to be significant. See id. at 594–95. But see Developments, supra note 2, at 1321–13 (noting that there may still be some significant differences between a grand jury subpoena and a CID).

248 See Hughes, supra note 47, at 579. Greater investigative power does not necessarily correlate with a higher standard of proof; the decision about how much investigative power to provide to enforcement agencies and the decision about the standard of proof are not necessarily tied together. See Kaplow, supra note 189, at 356–58.
obtained through the CID, and the strong information-gathering powers available at the discovery stage of civil proceedings.

C. Benefits of Parallel Liability

Bringing two suits against a corporation (one criminal and one civil) may provide society with strategic and error-correction benefits.

1. Strategic Benefits. — Pursuing criminal liability along with civil liability against a corporation can place the corporation in a strategically poor position. First, the corporate defendant may in the initial court proceeding disclose some of its litigation strategies, and the government could use this knowledge to its advantage in the later proceedings. Second, the corporation may have an incentive to lose issues in the civil case in order to increase its chances of avoiding a criminal conviction. In both cases the prosecution/plaintiff benefits from the possibility of parallel liability, because that possibility provides the plaintiff/prosecution with extra leverage in the trial or in plea bargaining/settlement negotiations.

However, if we assume that parallel liability is more socially costly than public enforcement with high information-gathering powers, and that public enforcement with high information-gathering powers is more costly than public enforcement without such powers, then it follows that parallel liability is appropriate only when the other enforcement regimes have failed to achieve optimal deterrence. In other words, parallel liability may be needed when a conviction is difficult to obtain in a regime of public enforcement with high information-gathering powers. However, even when a conviction is difficult to ob-

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249 Hughes notes two limitations on the grand jury that do not apply to CID. First, "[t]he fruits of the grand jury's subpoenas (whether documents or testimony) are not automatically open for inspection by all government officers or agencies.... Thus, inspection of grand jury materials by other government officers is hedged about with restrictions and may only be obtained on application to the court." Hughes, supra note 47, at 577-78 (citations omitted) (discussing United States v. Procter & Gamble Co., 356 U.S. 677, 684-85 (1958)). Second, "the breadth of the grand jury's range of inquiry and powers of compulsion has been viewed as justifiable only in the context of a criminal investigation." Id. at 577. For further details on administrative access to information in the grand jury context, see Developments, cited above in note 2, at 1322-17.

250 See Hughes, supra note 47, at 574-75, 579.

251 See Developments, supra note 2, at 1333.

252 See id. at 1335-37.

253 See id. at 1333-34.

254 See id. at 1333. Although some commentators have noted that parallel liability prejudices the defendant, they have not explicitly described the nature of the prosecution's strategic benefits. See Hughes, supra note 47, at 589-93, 601-19, 635-36, Developments, supra note 2, at 1333.

255 This analysis assumes that high information-gathering powers are only available through public enforcement. If high information-gathering powers are available through private enforcement, then the calculus obviously would change.
tain, it is important to inquire whether two civil proceedings can achieve the same advantages as parallel liability.

One strategic advantage is revelation of the corporation's defense strategy. Such a revelation might facilitate a successful civil suit afterwards. But why must the first case be criminal? Another civil proceeding based on another legal claim would provide the same strategic advantage. Consequently, this benefit is not a reason to pursue both corporate criminal and corporate civil liability rather than simply bringing two corporate civil suits.

Another advantage of parallel liability for civil enforcement agents is that a corporation may sacrifice a civil issue to avoid losing a criminal case. But why would a corporation rather lose a civil case than a criminal one? Perhaps such a preference exists because criminal sanctions may be more severe than civil sanctions. However, as noted before, the possibly higher sanctions in criminal proceedings can be replicated in civil proceedings. Thus, the specter of severe civil sanctions might make corporate criminal and civil liability equally unattractive. In fact, relying solely on corporate civil liability is preferable if the high sanctions threatened in a single civil case induce a corporation to settle, obviating the need to threaten, and occasionally bring, a costly parallel suit.

2. Error-Correction Benefits. — The disclosure of the corporation's defense strategy illustrates parallel liability's possible error-correction benefits. By exploiting disclosures made in the initial case, the prosecution in the subsequent case may correct any errors — prior false acquittals or findings of no liability — that resulted from clever defense strategies. This section examines two ways in which later suits can correct errors. First, errors in an initial criminal trial might be corrected if the corporation is found liable in a later civil suit. Second, if an unsuccessful civil suit is brought first, a later criminal suit might, in theory, correct the error in the initial civil suit. In both scenarios, two civil suits, rather than one criminal and one civil suit, can achieve the error-correction benefits.

In the first scenario, when the criminal suit is brought first and the civil suit later, the only plausible advantage is that the prosecution may believe that it can win a civil case only if it has brought and lost an earlier criminal case. If bringing a criminal case is not necessary to

256 See, e.g., GRUNER, supra note 1, ¶ 1.7.1, at 29–36 (discussing the difficulty of detecting corporate crime).
257 Cf. Developments, supra note 2, at 1336–37 (discussing disclosure of strategy when the first case is civil and the second is criminal).
258 See id. at 1333–34.
259 See supra section V.A.
260 The second scenario is unlikely because government prosecutors rarely bring a criminal suit after having lost a civil suit. See Interview with Philip Heymann, supra note 175; Interview with Peter Kenyon, supra note 172. Nonetheless, I consider it here for analytical completeness.
win the civil suit, then the criminal case and its additional costs should be avoided. Assuming that a criminal case is necessary to enhance the chances of victory in the later civil case, the crucial question is why bringing a criminal case rather than a civil suit first would improve the chances of victory in the second civil case. One reason could be that holding the criminal trial first might result in the disclosure of the defense's strategy.\textsuperscript{261} However, as indicated in section VII.C.1, this disclosure would occur even if the first suit were civil. This first scenario, therefore, provides scant support for corporate criminal liability.\textsuperscript{262}

In the second scenario, the criminal suit is brought in order to correct an error in an earlier and unsuccessful civil suit. To more fully examine this scenario, it needs to be compared to other methods of correcting false acquittals or findings of no liability, such as appeals or improvements in trial accuracy.\textsuperscript{263} Under what circumstances, if any, does parallel liability correct errors more efficiently than the other alternatives?

The first level of comparison is between multiple adjudications (parallel liability or appeals) and policies to improve trial court accuracy.\textsuperscript{264} Clearly, policies to improve trial court accuracy involve "extra expenditure in every case" regardless of the presence of error.\textsuperscript{265} In contrast, multiple adjudications, whether on appeal or through a second suit brought by the government in a parallel liability regime, have the advantage of weeding out weak cases. Given litigation costs, parties will bring another suit if they feel that the first suit was incorrectly decided (the separation effect).\textsuperscript{266} The separation induced by

\textsuperscript{261} See Developments, supra note 2, at 1336–37.

\textsuperscript{262} The doctrines of collateral estoppel and res judicata may create another reason for bringing a criminal suit and then a civil suit rather than bringing two civil suits. See id. at 1341–42 & nn.6–7 (discussing collateral estoppel and res judicata in general). Because criminal trials involve a higher standard of proof than do civil trials, issues lost in a criminal case may be retried in a later civil suit. See id. at 1349–50. However, if both cases are civil, the standard of proof is the same in each, and the doctrines may bar the second civil suit. See id. This situation seems to indicate that bringing a criminal suit followed by a civil suit is necessary to achieve error correction.

This approach to error correction, however, is flawed. First, bringing a criminal suit followed by a civil suit may not violate res judicata or collateral estoppel rules, but it may infringe on double jeopardy protection. See supra note 211. Second, bringing two civil suits may not create res judicata and collateral estoppel problems; these doctrines may not apply if the second civil action is not the same as the first civil action. See Developments, supra note 2, at 1341–42 & nn.6–7.

\textsuperscript{263} These alternatives are not mutually exclusive. See Steven Shavell, The Appeals Process as a Means of Error Correction, 24 J. LEGAL STUD. 379, 387 (1995). The inquiry here is designed to determine when relying on parallel liability is desirable. The desirability of parallel liability does not, however, preclude the possibility that the other alternatives might also be desirable.

\textsuperscript{264} See id. at 381–82.

\textsuperscript{265} Id.

\textsuperscript{266} See id. at 381, 384–85.
litigation costs could result in lower costs than improving trial accuracy. Only a few cases — most likely the incorrectly decided cases — have the added expense of appeals, whereas the administrative costs of improving accuracy would apply to all cases.\textsuperscript{267}

Assuming that a later suit is sometimes more efficient than improving trial court accuracy, we need to determine when an appeal is more efficient than parallel liability. Because only the plaintiff/prosecution may bring the second suit in a two-suit regime, the second suit can only address false acquittals (or findings of no liability). In addition, most appeals are restricted to errors relating to questions of law,\textsuperscript{268} whereas second suits presumably could address errors relating to questions of fact. These factors indicate that litigants may use parallel liability to correct false acquittals and factual errors that are not subject to appeal.\textsuperscript{269} Because corporate cases, criminal or civil, likely create many false acquittals due to factual errors,\textsuperscript{270} they are tailored to a two-suit regime.

The next question is whether two civil suits can achieve the advantages of one criminal and one civil suit. Let us assume that the only difference between corporate criminal and civil liability is the standard of proof. Does anything justify the higher standard of proof in a second suit? Indeed, the argument that second suits may be useful in correcting errors seems counterintuitive because the higher standard of proof in the second criminal suit makes error correction more difficult. However, if litigation costs are low enough that separation may not occur naturally in a two-suit system, then the state may need to impose additional costs, such as a higher standard of proof, to encourage separation and obtain the benefit of any multiple suit system.\textsuperscript{271}

Although this benefit has some appeal, discussions with government officials suggest that the government rarely brings a criminal case after losing a civil one; it normally brings the criminal case first.\textsuperscript{272} In any event, we may achieve separation benefits through a second civil case by imposing a fee for bringing the second suit instead of by increasing the standard of proof and labeling the suit “crimi-

\textsuperscript{267} See id. at 381–81.

\textsuperscript{268} See id. at 418–19.

\textsuperscript{269} Presumably, second suits can concern a matter of law when the issues being litigated are nearly identical to those in an earlier case. However, under such circumstances double jeopardy may bar the second suit. See supra section VI.B.

\textsuperscript{270} See Gruner, supra note 1, § 1.7.1, at 29–36 (discussing the difficulty of detecting corporate crime). I assume that the difficulty of detection arises because gathering the necessary evidence is difficult or because the evidence is ambiguous (a factual error). However, I also assume that the evidence may become more compelling in the second trial because further information of relevance might be revealed at the first trial.

\textsuperscript{271} See Shavell, supra note 263, at 388, 421–22 (discussing appeal fees).

\textsuperscript{272} See Interview with Philip Heymann, supra note 175; Interview with Peter Kenyon, supra note 172.
nal.\textsuperscript{273} Thus, neither scenario supports corporate criminal liability over corporate civil liability for error-correction benefits.

\textbf{D. Cost Savings and Prosecutorial Convenience}

In many criminal suits against corporations, prosecutors also seek convictions of individual managers.\textsuperscript{274} When they do, it may be cheaper to file two criminal indictments (one against the corporation and the other against the manager) than to file a criminal suit against the employee and a civil suit against the corporation.\textsuperscript{275} If an individual manager is found criminally liable, the doctrine of respondeat superior makes imputing either civil or criminal liability to the corporation rather easy.\textsuperscript{276} Furthermore, if both suits (against the individual and the corporation) are criminal, then presumably only the Justice Department brings them and only one judge hears them.\textsuperscript{277} If one suit is criminal and the other is civil, then two agencies bring suits — the Justice Department and another government agency, such as the SEC — and two judges hear the cases. Thus, when pursuing individual criminal liability is optimal, pursuing corporate criminal liability rather than corporate civil liability economizes on prosecutorial and judicial resources and does not affect the level of deterrence.

However, if we assume that no liability regime can completely eliminate reputational losses and that the reputational loss associated with corporate criminal liability is greater than that associated with corporate civil liability, then corporate criminal liability may have higher sanctioning costs than civil liability. Therefore, we must trade off the enforcement cost savings with the sanctioning cost losses. This tradeoff often favors enforcement cost savings if reliance on reputational penalties is low.

Consequently, corporate criminal liability may be desirable when managerial criminal liability is optimal.\textsuperscript{278} The irony of this argument

\begin{footnotesize}
\textsuperscript{273} Using fees to weed out weak cases does not appear to be common. See Shavell, supra note 263, at 421.

\textsuperscript{274} See Gruner, supra note 1, § 1.9.2(d), at 53–54; see also id. § 13.6.1, at 794 (noting that about two-thirds of successful corporate prosecutions also resulted in convictions of individuals).

\textsuperscript{275} This analysis assumes that the indictments will be tried together. See Coffee, supra note 5, at 261 (noting that bringing two criminal suits at the same time and in front of the same judge is optimal).

\textsuperscript{276} See Developments, supra note 2, at 1255–56 (noting that respondeat superior is a broad standard and difficult to evade). Thus, because corporate liability of some sort is likely upon conviction of an agent, the difference between pursuing corporate criminal or civil liability is minimal because the standard of proof for the corporation is functionally irrelevant.

\textsuperscript{277} Cf. Coffee, supra note 5, at 261 (noting cost savings when two criminal trials are brought before the same judge at the same time instead of before separate judges).

\textsuperscript{278} One caveat to this argument is that when the government brings charges against both an individual and a corporation, there is often a possibility that the individual will be acquitted and the corporation found guilty. See Developments, supra note 2, at 1249. In such situations, the cost savings argument becomes tenuous. Seeking corporate criminal liability may reduce the like-
\end{footnotesize}
is that corporate criminal liability, which normally makes prosecutorial success difficult due to the defendant's procedural protections, is beneficial here because it is cheaper for the prosecution.

Nevertheless, corporate civil liability may, in the future, replicate the enforcement economies of corporate criminal liability. Assuming such replication is possible, corporate civil liability would be preferable to corporate criminal liability because civil liability imposes lower sanctioning costs.

A summary of the analysis in this section may prove useful. Generally, the cheapest enforcement device should be used first to obtain optimal deterrence; we should rely on more expensive mechanisms only if they are necessary for added deterrence. Thus, we may desire greater information-gathering powers when public enforcement would not suffice for deterrence purposes. If more information-gathering is not sufficient to obtain optimal deterrence, we should rely on the strategic benefits of parallel liability. Most of the enforcement features of corporate criminal liability are sometimes desirable, but corporate civil liability or other options that adopt only the enforcement features of corporate criminal liability are better vehicles for realizing the benefits of those features.

Thus, in most instances corporate civil liability enforced by government agencies with the discretion to use CIDs and to bring parallel civil suits is desirable. Allowing agencies to decide, on a case-by-case basis, whether CIDS or parallel suits are cost effective is also desirable. In this context, a government agency is probably a more effective decisionmaker than Congress because the agency can balance, on a case-by-case basis and in the context of its budgetary constraints, the costs of using more powerful and expensive enforcement tools against the likely deterrence benefits of using such tools.

On the other hand, the analysis identifies one benefit of corporate criminal liability — cost savings in situations in which pursuing managerial criminal liability is optimal — that has yet to be replicated in a civil corporate liability regime. Thus, we should rely on corporateelihood of the criminal conviction of the manager, and the possibility of such a conviction was the impetus for bringing a criminal rather than a civil suit in the first place.

Nevertheless, prior analysis indicates that punishing employees along with the corporation may be beneficial: "The magnitude of public sanctions — fines and imprisonment — may exceed the highest sanctions that a firm itself can impose on its employees; therefore, the threat of public sanctions can induce employees to exercise greater — and socially more appropriate — levels of care than they otherwise would." Polinsky & Shavell, supra note 104, at 239–40.

279 I suggest that we might consider adjusting the civil process by granting judges the power to hear corporate civil and employee criminal cases together and by granting agencies the power to bring both kinds of cases.

280 This reasoning is analogous to the reasoning in the discussion of the socially desirable penalty structure. See supra Part V.

281 See supra note 239.
criminal liability in these situations until an effective replacement comes into being.

VIII. MESSAGE-SENDING CHARACTERISTICS

One function of the criminal law is to shape preferences and convey society's condemnation of certain types of behavior. Thus, criminal liability may be warranted simply because criminal liability is a valuable mode of communication to society.

This view, however, seems flawed. Corporate criminal liability is not the only means of sending messages about corporate behavior to society. The government presumably could use many other tools, such as news conferences, corporate civil liability, and managerial criminal liability, to accomplish this end. The presence of alternatives is important because sending messages through corporate criminal liability may not be a precise way of conveying information. Labeling something criminal may send a message to society that the activity is undesirable. However, citizens might find imposing criminal liability on fictional entities farcical, and this response may decrease the criminal label's effect for other types of crimes.

In light of the alternatives, a few questions must be asked about the message-sending function. First, when do messages need to be sent? The answer is not clear. If everyone already thinks that an activity is undesirable or if no amount of message sending will create distaste for an activity, why send messages at all? Message sending

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282 See Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 Duke L.J. 1, 2–3. Message sending involves communicating information to society about the quality of a certain act, whereas a reputational penalty is directed at damaging the interests of the corporation and its top management. Undoubtedly, the two ideas may often go together; damaging the interests of certain parties may sometimes also communicate information to society. However, these two notions do not completely overlap. Message sending may be possible when imposing a reputational loss would not be. Consider the case of a new company that commits an illegal act when it enters a new area of business. Because the company is new, it is unlikely to have any reputation to speak of, and a reputational penalty is therefore unlikely. Furthermore, top management may not be implicated in the wrong in question, or the illegal act may have occurred under another manager's watch. Despite these problems with imposing a reputational penalty, sending a message to society that the act in question is socially disfavored may still be important.

283 In the Justice Department's manual on initiating criminal prosecution, the requirement that prosecutors consider the seriousness of the offense may be a proxy for determining when a message needs to be sent. See 8 United States Dep't of Justice, The Department of Justice Manual § 9-27.230, at 9-507 (Supp. 1993).

284 Cf. Packer, supra note 92, at 359–60 (noting that the use of the criminal sanction for morally neutral conduct has tended to decriminalize such conduct in the mind of the general public). For a pessimistic view about halting the trend of "overcriminalization," see John C. Coffee, Jr., Paradigms Lost: The Blurring of the Criminal and Civil Law Models — And What Can Be Done About It, 101 Yale L.J. 1875, 1877 (1992).

285 Sending a message, even about something society accepts as harmful, may be desirable simply because it is always important to condemn the activity. Nevertheless, in this case message
may only be desirable for activities about which we do not have relatively fixed views.

Second, which tools should be used to send the message? Let us assume that in some cases sending messages may actually be socially desirable. We should then assess whether society can send messages more effectively by attaching the criminal label to a corporation, using corporate civil liability and issuing a well publicized letter condemning the corporation’s activities, or simply using managerial criminal liability.286 Due to expensive procedural protections and sanctioning costs from higher reputational penalties, sending the message through corporate criminal proceedings costs society more than sending the message through civil liability, and we should assess whether we think the tradeoff is desirable. In most instances, corporate civil liability plus some publicity or individual criminal liability sends sufficiently effective messages.

IX. CONCLUSION

Corporate criminal liability is an institution of considerable antiquity. However, there is little understanding of what, if anything, it is designed to achieve. The historical development of corporate criminal liability suggests that it may have arisen in order to use public enforcement and later developed to exploit the greater information-gathering powers it possessed relative to corporate civil liability. However, as time passed, corporate civil liability acquired a public enforcement apparatus and made strong prelitigation information-gathering possible. Thus, the question has become whether corporate criminal liability serves any purpose now.

To determine the purpose of corporate criminal liability, we must realize that it is only one of a number of different liability strategies that can regulate behavior in and around corporations. Therefore, we must compare corporate criminal liability against other liability strategies. The analysis in this Article indicates that corporate criminal liability is socially desirable when substantially all of its traits are socially desirable. If only some traits are desirable, we should prefer another corporate liability regime.

This Article concludes that the circumstances in which substantially all of the traits of corporate criminal liability are socially desirable are nearly nonexistent. Corporate criminal liability is socially desirable when corporate liability is optimal, when detection and pros-

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286 Imposing criminal liability on the manager instead of the corporation may also send a message. Because a corporation is a complex organization, however, convicting a particular manager of a crime may be difficult. See supra p. 1486. In order to maintain some deterrence and still send a message, corporate criminal liability may be necessary as well.
ecution are difficult, when sanctions on corporations need to be extremely high to maintain deterrence (yet not so high that parties other than the corporation should be sanctioned as well), and when these extremely high sanctions chill desirable behavior or there are a large number of false convictions compared to false acquittals that cannot be efficiently remedied other than through the protections of criminal procedure. All of these events must occur at about the same time that we want to send messages to society about the propriety of certain activities. This analysis suggests that corporate criminal liability would only be socially desirable in the rarest of circumstances. Therefore, pursuing corporate criminal liability results in society bearing the higher sanctioning costs of stigma penalties and the increased costs of deterring corporate misbehavior created by the procedural protections of criminal law.

To avoid these costs, we must consider the other corporate liability strategies examined in this Article. The analysis suggests that, in most cases, corporate civil liability is socially desirable. A desirable system should permit the imposition of cash fines and supplementary sanctions, such as equity fines or a loss of license, when cash fines are insufficient. Both private parties and government agencies should be able to enforce the law. Government agencies should have the discretion to utilize stronger enforcement tools, such as CID's and parallel

287 The existence of a natural constituency that would oppose corporate criminal liability and desire to replace it with corporate civil liability is doubtful. For example, because juries sometimes convict only the corporation when both managers and the corporation are tried criminally, see Developments, supra note 2, at 1249, managers have little incentive to object to corporate criminal liability or to prefer corporate civil liability. Shareholders have little reason to object to corporate criminal liability because sanctions are nearly identical under corporate criminal and civil liability. See supra note 125. Although reputational losses may differ under the various regimes, if reliance on reputational sanctions is minimal, then the difference may not matter much. In addition, corporations and shareholders do not object to corporate criminal liability because procedural protections make it more difficult to impose liability in criminal cases than in civil cases. In fact, the advantages conferred by these procedural protections may outweigh the danger of the higher reputational penalty associated with criminal proceedings. Prosecutors who oppose corporate criminal liability because of its procedural protections can pursue corporate civil liability instead. See Developments, supra note 2, at 1307-08 (discussing administrative discretion in deciding whether to pursue corporate criminal liability). Why then might a prosecutor actually bring a criminal prosecution? There is no definitive answer, but two reasons can be posited: some prosecutors may wish to send a message, and others may be politically ambitious. Neither rationale is appealing. Furthermore, Congress incurs almost no cost in making the corporation criminally as well as civilly liable. In fact, society suffers from the higher costs and weakened deterrence accompanying corporate criminal liability. However, this analysis assumes that, because of a considerable collective action problem, society is unable to prevent these costs and hence is unlikely to oppose corporate criminal liability. Of course, the picture is not this bleak; there are signs that corporate civil liability is becoming a more powerful and popular tool. See Hughes, supra note 47, at 579-80, 587-89; Mann, supra note 88, at 1798. The rise in popularity of publicly enforced corporate civil liability and punitive civil sanctions appears, at least to one commentator, to be motivated by the fact that, because "they are not constrained by criminal procedure, imposing them is cheaper and more efficient than imposing criminal sanctions." Mann, supra note 88, at 1798. I encourage the trend toward civil liability.
liability, when needed. Finally, the same judge should hear a civil case against a corporation and a criminal case against a manager for related wrongs. Also, the same agency (or multiple agencies sharing files and expertise freely to achieve cost savings) should bring both cases. The SEC is a very good current, albeit imperfect, model of the system just described.\textsuperscript{288} A desirable improvement to the SEC model would be to allow the same judge to hear and the same agency to bring the different types of cases to achieve cost savings.

In the absence of such an improvement to corporate civil liability systems, corporate criminal liability may continue to provide enforcement cost savings in situations in which pursuing managerial criminal liability is optimal. However, we should adapt corporate civil liability to replicate these cost savings.

Thus, some justification for corporate criminal liability may have existed in the past, when civil enforcement techniques were not well developed, but from a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations. Indeed, the answer to the question the title poses — "corporate criminal liability: what purpose does it serve?" — is "almost none."

\textsuperscript{288} See Ciota, Park, Potenza & Tuckett, supra note 227, at 872 (noting that the SEC may bring parallel civil and administrative proceedings); id. at 869–70 (noting the variety of penalties available to the SEC in securities fraud cases and implicitly suggesting that sanctions other than cash fines are harder to impose); Hughes, supra note 47, at 597–98 (discussing the CID powers of the SEC).
Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle

Eliezer Lederman


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CRIMINAL LAW

CRIMINAL LAW, PERPETRATOR AND CORPORATION: RETHINKING A COMPLEX TRIANGLE

ELIEZER LEDERMAN*

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I. INTRODUCTION

The increasingly active role that corporations assume in all aspects of modern life is accompanied by their correspondingly increased participation in criminal activities. Although most of their delinquent activity is confined to white-collar offenses, it also has spread to other fields of criminality. To contend with this phenomenon, the Anglo-American legal system has transformed the concept of corporate criminal liability into a major legal tool.

The theory of corporate criminal liability has raised difficult issues regarding various aspects of criminal law. These issues became prominent a few years ago when a large automobile corporation was tried for reckless homicide after being charged with recklessly failing to repair known lethal defects in the manufacture of cars which caused the death of three persons.¹

The trial and acquittal that followed provoked great public reaction. This response, however, did not exhaust the analysis of the criminal aspects involved in subjecting corporate bodies to criminal liability. The press was directed mostly to the economic aspects of the manufacturer's product liability,² a subject also addressed by

civil law. Even legal scholars did not take much advantage of the opportunity to make a new and thorough evaluation of the practical and especially the normative questions involved in imposing criminal liability on corporations, particularly with regard to such a serious offense. ³ Thus, significant problems concerning this subject received inadequate consideration, including: analyzing which goals of criminal law are achieved by indicting the corporate body; determining the practical and doctrinal significance of labeling the corporate entity a "killer"; and interpreting the meaning of merely imposing a fine as a penalty for such a severe offense as manslaughter. ⁴

The purpose of this study is to re-examine the general range of questions spawned by the doctrine which views the corporate entity as an offender capable of violating the most severe prohibitions of substantive criminal law. First, this Article will present a summary of the main attitudes prevalent in the Anglo-American legal system on this subject. It will then outline some of the theoretical and practical problems which follow from making the corporation an object of criminal liability. Finally, this study will present basic guidelines to an alternative solution to the problem of criminal conduct within the framework of corporate entities. The proposed solution will focus on the direct responsibility of the perpetrators of the offenses and on the liability of various levels of corporate management and supervision involved. In addition, the proposed solution will suggest supplementary measures for dealing with the corporate body itself which do not entail conviction. This solution will conclude by


II. THE Anglo-American Approach

The theory that a corporation may be subject to criminal liability has grown in stages, starting from the mid-19th century. There are many parallels in the consolidation of this theory in the English and American legal systems. In both systems, the penetration of civil law doctrines into the criminal arena has contributed greatly to the advancement of the principles of corporate criminal liability.\(^5\)

One commentator has compared the development of the theory of corporate criminal liability in the Anglo-American system to the growth of weeds because "nobody bred it, nobody cultivated it, nobody planted it, it just grew."\(^6\) Referring to the origin of the theory, this pictorial statement is undoubtedly true. The evolutionary process of the theory was not, however, altogether wild and accidental, nor did it lack internal legal reasoning and legal direction. Three major directions in the development of corporate criminal liability are evident. The first involves the expansion of corporate criminal liability from situations of nonfeasance to situations of positive actions;\(^7\) the second extends the scope of corporate liability from areas of strict liability to those requiring *mens rea;*\(^8\) and the third

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In England, the possibility of imputing intent to a legal entity was mentioned in Chuter v. Freeth and Pocock Co., [1911] 2 K.B. 832, 836; see also Mousell Bros. Ltd. v. London and North-Western Ry. Co., [1917] 2 Q.B. 836, 846. In the United States, the possibility of imposing criminal liability on a corporation for *mens rea* offences was referred to in *United States v. John Kelso Co.,* 85 F. 364, 366 (N.D. Cal. 1898). Since the
expands the basis for establishing corporate criminal liability from vicarious responsibility to direct liability. These developments have undermined all the restrictions originally present in the theory of corporate criminal liability. The theory has evolved into one with almost no limitations, and corporate bodies are being charged and convicted routinely for serious offenses against property and even for offenses against the person.

The imputation of criminal liability on the corporation has reached its extreme in American case law. The mainstream of that law transfers the doctrine of respondeat superior from the law of torts to the realm of criminal law. The respondeat superior doctrine, which governs inter alia civil corporate liability, is based on the theory of vicarious responsibility which imputes the acts of the agent to the principal. The Supreme Court asserts that establishing respondeat superior as the base of corporate criminal liability amounts to carrying the civil doctrine "only a step farther . . . in the interest of public policy" to "control" the conduct of an agent by "imputing his act to his employer and imposing penalties upon the corporation for which he is acting." According to the respondeat superior doctrine, the corporation is liable for the criminal act of its agent if the agent, who is himself culpable, acted "within the scope of his employment and with the intent to benefit the corporation."


9 The alter ego theory, which deals with the corporation's direct responsibility and identifies, under certain conditions, the conduct of the corporation's managerial figures with that of the corporate entity, was developed in England in Mowatt Bros. Ltd. (1917) 2 K.B. at 846. The theory reached its maturity in the criminal law area in D.P.P. v. Kent and Sussex Contractors Ltd. (1944) K.B. 146, 155-56; R. v. I.C.R. Haulage Ltd. (1944) K.B. 551, 559; Moore v. L. Bresler Ltd. (1944) 2 All E.R. 515, 516-17.


10 Mueller, supra note 6, at 22-23. (according to prevailing approach, there is no logical reason why corporations should not bear responsibility—even for murder).


13 Id. at 494-95; see also United States v. Ingerdient Technology Corp., 698 F.2d 88, 99 (2d Cir. 1983); United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir.), cert. denied,
Under this approach, the corporation can be held liable for the conduct of any of its employees or agents, irrespective of the positions they hold.\textsuperscript{14} Yet, case law has expanded this doctrine even further. It has been decided, for example, that a precise identification of the agent is not a precondition to holding the corporation liable as long as there is general proof that one of its agents committed the offense.\textsuperscript{15} Moreover, even when no individual agent has sufficient knowledge to form the mens rea requirement of the offense, courts have convicted the corporation by "piecing together" the knowledge of several employees and ascribing their "collective knowledge" to the entity.\textsuperscript{16} Courts also have found the corporate body liable under the respondeat superior theory even though the corporation's agents were acquitted\textsuperscript{17} of the same offense.

Furthermore, courts have held that a corporation cannot defend itself by claiming that the criminal conduct of a corporation's employee or agent would not have benefitted the corporation.\textsuperscript{18} The argument often advanced for denying the corporation this defense is that the theory focuses on the agent's motivation rather than on the advantages of the agent's conduct to the corporation.\textsuperscript{19}

The judiciary has interpreted the term "scope of employment" to include those acts of employees which do not exceed the limits of their position.\textsuperscript{20} Yet, the courts have held corporations liable for acts of employees notwithstanding that the employee acted against

\footnotesize{459} U.S. 991 (1982); Steere Tank Lines Inc. v. United States, 390 F.2d 719, 723 (5th Cir. 1968); Egan v. United States, 137 F.2d 369, 379 (8th Cir.), cert. denied, 32 U.S. 788 (1943).

14 United States v. Hangar One Inc., 563 F.2d 1155, 1158 (5th Cir. 1977); Standard Oil Co. of Texas v. United States, 307 F.2d 120, 127 (5th Cir. 1962); United States v. George F. Fish Inc., 134 F.2d 798, 801 (2d Cir.), cert. denied, 328 U.S. 669 (1946).

15 United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir.), cert. denied, 314 U.S. 618 (1941).


17 Magnolia Motor and Logging Co. v. United States, 264 F.2d 950, 953 (9th Cir.), cert. denied, 361 U.S. 815 (1959); American Medical Ass'n v. United States, 130 F.2d 233, 253 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943); United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir.), cert. denied, 314 U.S. 613 (1941).


19 The Court should acquit the corporate entity only if the agent's action was intended to advance any interest other than his corporate employer's. See Steere Tank Lines Inc. v. United States, 330 F.2d 719, 723 (5th Cir. 1968); Standard Oil Co. of Texas v. United States, 307 F.2d 120, 127, 129 (5th Cir. 1962) Bat of Moore v. I. Bresler Ltd., [1944] 2 All E.R. 515, 516 (England); R. v. McNamara, (1981) 56 C.C.C. 2d 193, 315 (Canada).

corporate policy and was specifically instructed not to perform the act in question. Moreover, when an agent oversteps the limits of the position, subsequent ratification of the act by an authorized principal is sufficient to render the corporation liable for the criminal acts of its agent.

In comparison with American law, English law has adopted a significantly narrower approach, imposing on corporations either vicarious or direct criminal liability. Each of these doctrines is applied to different categories of offences. A corporation is vicariously liable, according to English law, for the acts of its agent only in situations in which individuals would be held similarly liable. The limits, requirements and method of application of the doctrine of vicarious liability apply equally whether the individual’s or the corporation’s liability is of issue. Lord Atkin stated: "Once it is decided that this is one of those cases where a principal may be held criminally liable for the act of his servant, there is no difficulty in holding that a corporation may be the principal." In line with American decisions, English courts also will find a corporation vicariously liable for the acts of an agent if those acts are performed within the scope of employment, although in opposition to the ex-

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Some courts have indicated, however, that acts done contrary to express instructions or policies of the corporation may raise the question whether the employee in fact acts to benefit the corporate body. See United States v. Basic Construction Co., 711 F.2d 570, 573 (4th Cir.), cert. denied, 104 S. Ct. 371 (1983); United States v. Beusich, 596 F.2d 871, 876 (9th Cir. 1979). See generally Friedman, Some Reflections on the Corporation as Criminal Defendant, 55 Notre Dame Law. 173, 182 (1979); Miller & Levine, Recent Developments in Corporate Criminal Liability, 24 Santa Clara L. Rev. 41, 43-46 (1984).

22 See Continental Baking Co., 281 F.2d at 149-51.


24 Similar to the prevailing legal approach in the United States, the English law requires that the agent or employee must act within the course of his employment for the doctrine of vicarious liability to apply. See Coppen v. Moore (No. 2), [1898] 2 Q.B. 396, 312. The technique often used by English courts in interpreting criminal provisions as imposing vicarious liability in addition to direct liability was termed "extension of verbs." It is based on constructing the verb used by the legislature to describe the forbidden conduct so that it refers to the person who performed it as well as to those in whose service he acted. This technique was described as the formation of "a new judicial dictionary." See G. Williams, Criminal Law—The General Part 281 (2d ed. 1961).

press direction of superiors.\textsuperscript{26}

Vicarious responsibility, however, has limited scope in English criminal law. It applies chiefly to the exceptional category of strict liability offenses—offenses with questionable affiliation to criminal law.\textsuperscript{27} To expand this restrictive application of the vicarious liability doctrine, English law has adopted another doctrine from the law of torts, the theory of the organs of the corporation (i.e., the alter ego theory).\textsuperscript{28} The theory of the organs of the corporation identifies the acts and thoughts of prominent figures in the corporation's hierarchy (known as organs) when acting within the scope of their authority as those of the corporate entity itself. By assigning the organ's mens rea to the corporation, this technique serves as a device for the personification of the corporate body, thus enabling the conviction of the corporation as directly liable for offenses which require criminal intent.\textsuperscript{29} This process of identification is so deeply rooted that Lord Reid has commented that it is misleading to refer to a person acting on behalf of the corporation as its alter ego: "The person who speaks and acts as the company is not alter. He is identified with the company."\textsuperscript{30}

The proponents of the theory of the organs of the corporation have had to grapple with the problem of defining the organs by formulating a criterion to distinguish them from other employees of the corporation. No clear test has evolved, however, and many difficulties have been encountered in the attempt to apply the theory.\textsuperscript{31} Nevertheless, the theory is utilized in most of the legal systems influenced by English law, including New Zealand,\textsuperscript{32} Canada,\textsuperscript{33} India\textsuperscript{34}


\textsuperscript{30} Tesco Supermarkets Ltd., [1972] A.C. at 171.


\textsuperscript{32} See Nordik Industries Ltd. v. Regional Controller of Inland Revenue, [1976] 1 N.Z.L.R. 194; Morris v. Wellington City, [1969] N.Z.L.R. 1038; Muir, Tesco Supermar-
and Israel. Australian law is less clear, whereas the South African system appears to adopt principles more similar to those of the respondeat superior doctrine. A similar school of thought exists in the United States as a minority view and imputes the criminal intent only of the corporation’s managerial hierarchy to the corporate entity. Some major guidelines of this approach have been adopted by the Model Penal Code and several states.

III. DEFICIENCIES OF IMPOSING CRIMINAL LIABILITY ON CORPORATE BODIES

A. DEFINING THE PROBLEM

Subjecting non-corporal legal entities to criminal liability is a broad theory that is usually a starting point for deliberation rather than its outcome. Even the English Law Commission that stated decisively that the courts “have made little attempt to define the nature and purpose of the [criminal] liability [of corporations] which they established” did not thoroughly evaluate those matters. The


theoretical basis for imposing criminal liability on the corporation remains unclear. The rationale occasionally suggested for imposing this type of liability emphasizes the corporation's moral responsibility for what goes on within it,42 and presents pragmatic arguments concerning its effectiveness,43 often without examining whether the deterrent goal can be achieved in alternative ways. It is no wonder that this subject is considered "the less familiar and more esoteric area of the law of criminal liability."44

Perhaps this uncertainty has encouraged the trend toward a slight restriction in the scope of corporate criminal liability. In the United States, the Model Penal Code and some state statutes have suggested, with regard to mens rea offenses of affirmative conduct, that unless "legislative purpose to impose liability on corporation plainly appears," the corporate entity is criminally liable only for offenses which were "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent, acting on behalf of the corporation within the scope of his office or employment."45

A similar trend of limitation can be observed in England as well. In the 1940's, the group of organs was held to include all "responsible agents"46 and "important officials,"47 but in the 1970's the House of Lords narrowed the group to include only those who "constitute the directing mind and will of the company,"48 thus somewhat restricting corporate criminal liability. These restrictions, however, do not offer a solution to either doctrinal or practical problems that underlie corporate criminal liability.

B. DOCTRINAL-CONCEPTUAL DIFFICULTIES

1. Prescription and Human Consciousness

Penal law, being a prescriptive branch of law, purports to direct the behavior of individuals in accordance with society's interests and values.49 A prerequisite for the achievement of this goal is transmit-

42 See, e.g., Edgerton, supra note 5, at 840-44.
49 See generally H.L.A. Hart, Punishment and Responsibility (1968); H.M. Hart, The
ting the criminal law dictates to an addressee capable of grasping the message, namely the human consciousness. Indeed, the direct and sharp connection with human consciousness is apparent in all major aspects of criminal law: behavior, defenses and punishment. Offenses deal with the individual’s conscious deviation from permitted modes of behavior. Defenses are offered to those who act under lack of or diminished or disturbed consciousness. Similarly, the justification for punishing violators rests mainly on the assumption that it will deter future conscious violations by the transgressor and others. Hale, the renowned English jurist, described the inseparable connection between criminal liability and human consciousness almost 250 years ago:

Man is naturally endowed with these two great faculties, understanding and liberty of will, and, therefore, is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath capacity to obey.  

This cohesive link within criminal law, between the commanding authority and the conscious individual who alone is susceptible to guidance, is threatened when confronted with the imputation of criminal liability to corporations, which by their very nature lack any consciousness.

Indeed, the very substance of the corporate body is controversial and various views concerning it have emerged. There are those who treat the corporate body as a mere legal fiction devoid of the ability to function independently and requiring permanent representation by human beings (the fictitious approach). Others treat corporations as real entities claiming that the law merely recognizes the existence of corporate bodies rather than creates the corporate entities (the realist approach). A third group of jurists rejects both these approaches and offers additional explanations.

Even the staunchest proponents of the realist approach, however, would concede that from a physical standpoint, distinctions must be made between human beings and corporate bodies. Even

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assuming that the individual desires of a group of people working in concert can form a "collective will" as a result of the interdependence and mutual influence within the group, and even assuming that this synthesis of desires is distinct from the separate wills forming it (because the mutual interest supposedly created is not necessarily identical to the individual interests from which it has originated), the problem of personifying the corporate body is not thereby brought to a clear-cut solution. The corporate entity is an enterprise devoid of the physical ability characteristics of the human race. Man possesses both consciousness and physical aptitude, as well as the power to exercise them. Corporate bodies, in contrast, are bereft of those capacities and depend totally on a human source in order to function. The theory which views the corporation as subject to criminal liability challenges, therefore, the ideological and normative basis of criminal law and its mode of expression and operation.

2. The Perpetrator-Corporation Relationship

a. Defining the Problem

The theory of the organs of the corporation describes the perpetrator-corporation relationship using the term "identification" while the theory of respondeat superior speaks of "imputation." These terms suggest that the organ's or the agent's conduct performed within his scope of authority is the conduct of the corporate entity and it may serve, therefore, as a base for imposing criminal liability on the corporation. The term "identification" more clearly illustrates this approach. In English law, the use of this term often crystallizes the distinction between vicarious and direct corporate lia-

52 Fisse, supra note 11, 1190-92 n.235.

53 The reasoning behind the proposition that a separate "collective will" emerges from the incorporation of a number of individuals is even more doubtful in the case of a closely held corporation established by a sole promoter: See Woods, Lifting the Corporate Veil in Canada, 35 CAN. B. REV. 1176, 1177 (1957) (when corporation is controlled by single person "the distinct social reality of a corporate personality may be nonexistent").

54 Many commentators emphasize that "mind" has no meaning when applied to a corporate body and that it lacks the prerequisites for moral culpability. See, e.g., Comment, supra note 43, at 1241; Comment, Corporate Criminal Liability, 28 COLUM. L. REV. 1, 6-7 (1928); Comment, The Economic Inefficiency of Corporate Criminal Liability, 73 J. CRIM. L. & CRIMINOLOGY 582, 584 (1982).


bility,\textsuperscript{57} the scopes of which are completely different in that legal system.\textsuperscript{58} The difference between imputation and identification seems to lose its significance, however, in the analysis of the legal-theoretical relationship between the perpetrator and the corporate entity. American law regards imputation as a form of both personification and identification and employs the term to explain that the conduct and especially the \textit{mens rea} of the agent are the criminal act and intent of the corporation as well.\textsuperscript{59} The case law has reached the same result in England\textsuperscript{60} and Canada.\textsuperscript{61} When the agent and the principal are two legally competent individuals, imputation (usually limited to impose vicarious liability for minor strict liability offenses)\textsuperscript{62} serves solely as a transferring device through which the principal is regarded as the one who has committed the offense. When the principal is a corporate body, devoid of any human characteristics, imputation also serves as a personification device which enables the transformation of the human characteristics to the corporation in order to consider it the performer of the offense.

In the area of substantive criminal law (as opposed to the realm of strict liability administrative offenses) neither imputation nor identification is supportable. Penal law, which emphasizes the personal aspect of liability, is hesitant to regard the illegal conduct of one person as the conduct of another.

Therefore, attributing the conduct of an organ or an agent to the corporation for the purpose of imposing liability on both brings into existence a doctrinal limitation. Where a specific statutory provision prescribes such identification, as in several jurisdictions in the


\textsuperscript{58} See \textit{supra} text accompanying notes 22-30.


\textsuperscript{60} \textit{Kent and Sussex Contractors}, [1944] K.B. at 156.


United States, the status of the relationship is delineated from the outset. Creating a normative basis for this relationship, however, does not reconcile the doctrinal and conceptual aspects of the legal problem itself. Efforts have been made, therefore, to draw analogies to the perpetrator-corporation relationship from other contexts in which liability for substantial criminal offenses is imposed on two separate personalities following the commission of a single offense, as in the cases of conspiracy and complicity. While supporters have argued that the perpetrator-corporation relationship can be defined in terms of the above mentioned relationships, it is very doubtful whether this approach presents a convincing solution to the issue.

b. The Conspiratorial Relationship

One attempt to comprehend the attribution of the perpetrator's offense to the corporation suggests comparing their relationship to that of conspirators. The theory of conspiracy holds any conspirator liable for crimes committed by fellow conspirators in the furtherance of the conspiracy, even if the conspirator was not capable of committing the offense himself. The analogy to the theory of corporate criminal liability suggests that each breach of law the corporate body has been accused of is in furtherance of an offense previously plotted between the corporation and the perpetrator. Hence, the corporation is criminally liable for the acts of the perpetrator in execution of the plan of the conspiracy.

The underlying assumption that a corporation and a perpetrator can be partners to a criminal conspiracy is questionable. The difficulties in applying the rules of conspiracy to the corporation-perpetrator relationship are inherent in the differences between the prospective natures of the relationships being compared. Conspiracy requires an agreement between separate parties to perform an illegal act for which each party must have the necessary criminal intent. The question is, therefore, whether the perpetrator and the

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63 See, e.g., ILL. REV. STAT. ANN. ch. 38, § 5-4 (a) (Smith-Hurd 1978); N.Y. PENAL LAW § 20.20(2) (McKinney 1980); TEXAS PENAL CODE § 7.22(b) (Verson 1974).
64 See infra text accompanying notes 65-87.
corporation, which are actually one, can be separate parties to a conspiracy.

Few courts have answered this question affirmatively. A Canadian court found that a corporation can be convicted of conspiring with its director when the director acts in distinctly different functions. The court stated that:

it is not necessarily a defence to an indictment against a corporation... (for conspiracy)... that only one human being intended to break the law. That person might act in more than one legal capacity. For instance, he might be a director of more than one corporation, or he might have personal interests of the same kind as that of a corporation of which he is a director. Thus, he may be regarded as though he were two separate persons and two separate minds.68

A United States federal court followed this line of reasoning with regard to conspiracy, and stated: "[E]mployment alone by a corporation does not so merge the employee's mind and being with that of the corporation so that one person's cognition remains rather than more than one..."69

This, however, does not seem to be the prevailing view. Many jurists agree that a corporation cannot be convicted for conspiracy with its organ or agent, nor can it be convicted for conspiracy with another corporation through a common agent.70 The rationale behind this approach is that despite the legal perception that the perpetrator and the corporation are separate legal personalities, the corporation is incapable of either thinking or acting independently; whereas the requirement for plurality of offenders in conspiracy is fulfilled only where at least two minds meet, each of which is capable of contributing to the furtherance of the conspiracy. This theory has been adopted in England71 and Canada,72 and finds substantial


71 R. v. McDonnell, [1965] 3 W.L.R. 1198, 1148. See also ENGLISH LAW COMMISSION (REPORT), supra note 67; ENGLISH LAW COMMISSION (Working Paper), supra note 67; Calvert, supra note 70.

72 R. v. Martin, [1933] 1 D.L.R. 434, 440. See also Caroline, supra note 33, at 252; Goode, supra note 70.
support in the United States.\textsuperscript{73}

Conspiracy is an independent offense and does not depend upon the actual execution of what was agreed upon. It is condemned, however, primarily because the conspiracy might have resulted in such criminal performance. Although even latent thoughts of legal infractions are potentially dangerous, penal law interferes only when an overt act is performed because only then does the danger to society become tangible. In the context of conspiracy, an overt agreement to perform an illegal act has a more obligatory effect on its parties and makes retreat from the idea more difficult. Viewed in this way, the suggested comparison between conspirators and perpetrator and corporation seems implausible. Even if the perpetrator represents the corporation as well as himself in his thoughts, these thoughts are anchored in a single human consciousness. There need not have been any expression of the plan at its formation, and if the perpetrator withdraws afterwards from the idea of committing the offense, the plan will cease to exist. Therefore, the practical implication of treating the perpetrator-corporation relationship as a conspiracy amounts to punishing thoughts, a notion that stands in contradiction to fundamental principles of criminal law and poses impossible problems of proof.

Moreover, conceptualizing the perpetrator-corporation as a conspiratorial relationship based upon the distinct functions allegedly performed by the single human mind during the perpetrator-corporation relationship might have far-reaching consequences. Such a line of argument might justify imposing criminal liability for conspiracy by developing a theory of "legal schizophrenia" whereby a human mind fulfilling diverse functions is viewed as a split mechanism. For example, a trustee, a custodian, a bailee, or an agent might be convicted for conspiracy for making a decision to breach their duty of trust, although the person never acted upon this decision.\textsuperscript{74}

When the organ involved in the criminal activity consists of a group of people (for example, directors of a corporation) with whom the corporate body is identified with by the doctrines of identification or imputation, the situation is not fundamentally different. A federal court's decision holding a corporation liable for conspiracy with two of its own agents, who had conspired between them-

\textsuperscript{73} Union Pacific Co. v. United States, 173 F. 737, 745 (8th Cir. 1909); United States v. Carroll, 144 F. Supp. 939, 941 (S.D.N.Y. 1956); United States v. Santa Rita Store Co., 16 N.M. 3, 113 P. 620 (1911). See also Hall, supra note 70; Welling, supra note 70; Comment, supra note 70.

\textsuperscript{74} Calvert, supra note 70, at 232.
selves,\textsuperscript{75} therefore, raised severe doctrinal difficulties about how the conspiracy was established.\textsuperscript{76} Even assuming that the cooperation of the group produces a new entity, as proposed by the realist approach, a new separate consciousness or independent thinking center does not evolve. The plurality of agents involved in an agreement to commit an offense would justify conviction for conspiracy among themselves.\textsuperscript{77} The corporate entity might serve as a convenient instrument for carrying out the criminal plan, or it might open new horizons for the perpetrators of the crime, but this does not change the substance of the issue,\textsuperscript{78} nor does it render the corporation a conspirator. It is difficult, therefore, to explain the relationship between the perpetrator and the corporation (and the resulting expansion of criminal law) on the basis of the conspiracy theory. By definition, the doctrines of identification and imputation are incompatible with the conspiracy relationship. The distinctive feature of these doctrines is that they lift the legal veil which separates the perpetrator from the corporation, and they view both the corporal and the legal entities as one. The criminal conspiracy, on the other hand, focuses on the coordination between two totally separate and independent parties.

Thus, the theory of conspiracy is incompatible with the perpetrator-corporation relationship. Any interference with the mental independence of the individual conspirators or any increase in their mutual dependence gives rise to doubts as to their ability to conspire among themselves. For example, the common law questions the ability of one to conspire with a minor or someone who is incapable of forming the criminal intent required for conspiracy.\textsuperscript{79} Even the capacity of spouses to conspire with each other has been

\textsuperscript{75} United States v. Hartley, 678 F.2d 961, 970-72 (11th Cir. 1982); see also United States v. Consolidated Coal Co., 424 F. Supp. 577, 581 (S.D. Ohio 1976). For a similar basic opinion expressed in English law, see De Jetley, Marks v. Greenwood (Lord), [1936] 1 All E.R. 963, 972-73; G. Williams, supra note 24, at 861.

\textsuperscript{76} The court avoided such an analysis and found that the "conceptual difficulty" was "easily overcome" by policy considerations. Hartley, 678 F.2d at 970. For a criticism of the decision, see Comment, supra note 70, at 234-38.

\textsuperscript{77} The director's argument in People v. Duke, 19 Misc. 292, 44 N.Y.S. 356, 357-38 (1897), that they can be considered as "fingers of one hand" and should, therefore, be acquitted of conspiracy among themselves, was promptly rejected by the court. See also American Medical Ass'n v. United States, 130 F.2d 233, 253 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943); State v. Parker, 114 Conn. 354, 158 A. 797, 800 (1932); Welling, supra note 70, at 1196-99; Comment, supra note 70, at 233-37.

\textsuperscript{78} Note, supra note 70, at 953.

\textsuperscript{79} ENGLISH LAW COMMISSION (REPORT), supra note 67, at 21-23; ENGLISH LAW COMMISSION (Working Paper), supra note 67, at 25.
doubted. If uncertainty as to the independence of one party to an alleged conspiracy can call into question his capacity to conspire with the party upon whom he is dependent, similar doubt must exist when the mind of the alleged party to the conspiracy is in effect the mind of the other party as well.

c. The Complicity Relationship

Another approach is to define the perpetrator-corporation relationship in terms of criminal complicity. Some support for this idea can be found in legal literature and case law. This approach raises difficulties as well because some of the features of the participants' relationship contradict those of the identification or imputation doctrines upon which the perpetrator-corporation relationship is based.

Criminal complicity concerns the performance of a single offense by a number of participants, each of whom takes a distinct part in its performance. Only the behavior of the principal offender must include all the elements of the offense. The accomplices fulfill diverse functions and their respective contribution to the crime is individually defined. The counsellor or procurer is absent from the scene of the crime even though he usually is the originator of the offense, an advisor prior to its commission, and the motivating force behind the commission of the crime. The aider-and-abettor, on the other hand, is actually or constructively present at the scene of the crime and assists the principal offender in its commission. The actus reus for accomplice liability consists of persuading, instigating or encouraging the principal offender to commit the offense (referring to the counsellor or procurer) or assisting him in any way in its commission including by words, gestures and even mute presence (referring to the aider-and-abettor).

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81 See, e.g., P. Gillies, THE LAW OF CRIMINAL COMPLICITY 149-51 (1980); G. Williams, supra note 24, at 865-66; Comment, Corporate Criminal Liability, 28 Colum. L. Rev. 1, 24-25 (1928).


83 See generally P. Gillies, supra note 81; W. LaFave & A. Scott, HANDBOOK OF CRIMINAL LAW 495-521 (1972); G. Williams supra note 24, at 346-422, Perkins, Putative in Crime, 89 U. Pa. L. Rev. 581 (1941); Smith, Aid, Abet, Counsel or Promise, in RESHAPING CRIMINAL LAW 120 (P. R. Gbezebrok ed. 1978).

84 P. Gillies, supra note 81, at 51-56; W. LaFave & A. Scott, supra note 83, at 502-05.
plice liability consists of two types: (1) the state of mind rendering encouragement or assistance, which is confined to the accomplice's intention to persuade, instigate, encourage (in case of a counsellor or procurer) or assist (in case of an aider-and-abettor) the principal offender in committing the offense, or at least the accomplice's awareness of the possible results of his conduct; and (2) the state of mind required for the offense committed, which, according to one approach, consists of the appropriate kind and degree of mental element vital to the crystallization of the subject offense, or, according to another view, consists of the mere awareness of the possible occurrence of the offense.85

Analyzing the perpetrator-corporation relationship in terms of criminal complicity raises similar problems to those encountered when considering the comparison to conspiracy. The lack of the necessary plurality of offenders, each of whom has independent physical and mental capacities, is fatal to both comparisons. The human consciousness operative in events involving the corporation and the perpetrator is one-dimensional in the sense that it can be only the persuasive force or, alternatively, the persuaded agent—it cannot be both. A functional analysis suggesting that the same intelligence can be construed as performing a double role, at once instigation and being instigated to commit the offense, is completely artificial. The arguments which counteract a similar attempt to compare the corporation-perpetrator relationship to conspiracy are also effective here. Though a similar process of first weighing and then determining whether to commit an offense usually occurs in the mind of every criminal, an individual offender cannot be both an inciter and a performer. The logical conclusion of such a line of reasoning could again lead to the penalizing of thoughts.

The same conclusion results when comparing the perpetrator-corporation relationship to that of the aider-and-abettor and the principal. One physical and mental organism cannot at the same time perform a forbidden act and assist in its performance. One organism cannot intend to execute the crime totally alone and simultaneously intend to support another in doing the same act. By definition, the actus reus of the aider-and-abettor is not the performance of the intended offense, but rather, the act of helping another to commit it. Similarly, no form of legal acrobatics can interpret the mens rea of a single mental state in ways that differ substantively. The single mental state of the perpetrator corporation cannot be

85 P. Gillies, supra note 81, at 56-59; W. LaFave & A. Scott, supra note 83, at 502-12.
interpreted with respect to the corporation as the intention to perform the offense single-handedly, and, at the same time, with respect to the perpetrator, now in the guise of the aider-and-abettor, as the intent to aid another in committing the offense. An American court rejected this possibility and declared unhesitatingly that: "if a corporation can act only through its agent, and thereby become in law completely identified with its agent, how can it be an accessory to this act? For in such a case, it must be accessory to its own act, which is a legal absurdity."86

Nonetheless, a functional examination of the above perpetrator-corporation relationship can sometimes be significant, for example, when a manager breaches a law applicable by definition only to the corporate owner or to the corporate licensee of a business. Such a situation illustrates a difficulty in arguing that the same party both committed the forbidden act and assisted in its commission, or that he intended to perform it singly and at the same time to carry it out through another. From a functional point of view, the counseling or procuring in such an event perhaps can be distinguished from the performance. The manager’s actions lack the elements required of the principal offender of the crime. The manager is not the persona to whom the provision in question applies; therefore, he can neither violate the specific provision nor possess the necessary mental element to do so. Yet, when he operates as an organ or an agent—namely, as the corporation itself, in accordance with the identification doctrine—the manager’s conduct might be viewed as that of the principal.

Even under these circumstances, however, the lack of the necessary characteristic of plurality of offenders in the perpetrator-corporation relationship makes it difficult to consider the relationship in terms of the criminal participant theory. Each party within the criminal partnership must be capable of individually fulfilling at least one role in the partnership, otherwise he cannot be defined as a party. In order to view the perpetrator as an aider-and-abettor to the corporation, it would be necessary to prove that the body corporate could independently fulfill the function of one of the parties to the crime. Clearly, the corporate entity cannot satisfy such a condition.

An apparent resemblance seems to exist between the perpetrator-corporation relationship during the commission of the crime and the relationship of two offenders acting concurrently as joint principals with the same intent to perform the offense. A closer analysis will disclose, however, that the disparities override the ap-

parent similarities. Joint principal offenders of an offense affect their common purpose through mutual understanding and coordination. Therefore, the actual criminal outcome of their activity may be viewed as a single unit. Yet, the physical and mental elements of the offense exist independently in each offender and are individually manifest in obvious and concrete forms. The separate formulation by each of the performers of both the actus reus and the mens rea of the offense distinguishes, therefore, their mutual relationship from that of the perpetrator and the corporation as well as from that of the aider-and-abettor and principal.

The perpetrator-corporation relationship is more similar to that of the innocent agent and his principal than it is to that of parties to a crime. However, even this comparison is not fully satisfactory. The dependence of the corporation on the perpetrator is even greater than the dependence of the innocent agent on his principal. The innocent agent has the ability (and sometimes even the capacity) to operate independently, but the corporation, by its very nature, lacks any ability to function independently and is manipulated by the principal just as raw material is molded by a craftsman.

3. Over-Personification

Excessive adherence to the doctrines of identification and imputation, upon which the perpetrator-corporation relationship is based, could lead to the development of ideas that contradict basic principles of penal law. In American case law, there is an emerging approach according to which a corporation is convicted by combining the separate elements of conduct of its various agents to form a single crime. This approach includes not only circumstances in which B's knowledge combines with A's ignorant act, performed unhindered by B, to constitute an offense, as for instance, where one manager intentionally does not prevent another from purchasing goods for the company which the former knows to be stolen. Also included are situations in which one agent is actually unaware of the acts or knowledge of another agent.

A United States federal court followed such an approach and

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87 As to the doctrine of innocent agency, see P. Gillies, supra note 81, at 138; W. Laffave & A. Scott, supra note 83, at 496-97; J. Smith & B. Hogan, Criminal Law 119-20 (5th ed. 1983); G. Williams, Textbook of Criminal Law 358 (2d ed. 1983).
88 Comment, supra note 43, at 1248.
found a carrier liable for violating an Interstate Commerce regulation by knowingly permitting a driver to operate a vehicle while ill.\textsuperscript{90} One employee put a driver on duty at his request knowing that previously the driver had asked to be discharged from work for medical reasons but had changed his mind after hearing of the company’s new absentee procedure.\textsuperscript{91} Other agents of the corporate body were aware that the new policy procedure was likely to have significant effect on a driver’s decision not to work due to illness.\textsuperscript{92} Neither agent had actual knowledge of the driver’s impaired ability to drive, and yet the court held that:

\begin{quote}
\begin{quote}
a corporation cannot plea innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.\textsuperscript{93}
\end{quote}
\end{quote}

A Michigan court was even more direct and explicit, recently stating with regard to Medicaid fraud offenses: “The combined knowledge of . . . employees may be imputed to a corporation to find it liable for fraudulent acts.”\textsuperscript{94}

Following the approach taken by the courts mentioned above, however, might lead to the conviction of legal bodies under far-reaching and absurd circumstances. For example, a corporation might be held liable for knowingly accepting stolen property that organ A acquired in good faith for the company, but which organ B knows to be stolen, though he knows nothing about the purchase.

The trend that allows the conviction of a corporation by piecing together the conduct of different agents so as to form the elements of one offense is the result of over-personification of corporate bodies. The proponents of this approach regard the actions and thoughts of the separate organs or agents of the corporation as the activities of distinct parts of a single consciousness. This analysis would be accurate if the object under consideration were a human organism. An individual is formed so that information is concentrated in one central intersection—the mind—which operates and supervises the movements of the limbs. When the system functions normally, behavior is controlled by a central intelligence system. Consequently, a claim that the movements of various limbs were un-

\textsuperscript{91} Id. at 735, 739.
\textsuperscript{92} Id. at 739.
\textsuperscript{93} Id. at 738.
\textsuperscript{94} People v. American Medical Centers of Michigan, Ltd., 118 Mich. App. 135, 156, 324 N.W.2d 782, 793 (1982).
coordinated normally would be rejected. Indeed, the practical reason underlying some of the criminal law defenses such as insanity, intoxication and lack of volition, is that malfunctioning of the controlling intelligence system should not be a cause for imposing liability. This line of argument cannot be applied to corporations. The corporate entity lacks the corporal organ that centralizes information and controls the activities of the limbs. It is artificial to argue in such circumstances that the total sum of the agents’ information exists in the “mind of the corporation,” because this “mind” is a fiction. The proponents of this approach are held captive by the legal presumption they have created, and refer to it as if it were a reality, without discerning its limitations.95

Moreover, piecing together the knowledge of the different agents to form the knowledge of the corporation does not conform with the need to integrate the various elements of the offense as a condition to its formation. This need to integrate expresses the requirement of a casual connection between the conduct, as part of the actus reus and the mens rea, and is known as the principle of concurrence. It emphasizes that, in mens rea offenses, criminal liability arises only when the forbidden act or omission is the consequence of the criminal intent.96 The artificial process of “piecing together” whereby the mens rea and actus reus of an offense are attributed to the corporation cannot satisfy the demands of the principle of concurrence. Even the proponents of corporate criminal liability concede that the corporate entity cannot by itself produce the elements necessary to consummate the crime. These elements must first evolve in the minds and actions of the perpetrators and only then, by way of a legal fiction of identification or imputation, are they attributed to the corporation. Hence, the link required by the concurrence principle must also be supplied first by the organ or agent and only then can it be ascribed to the corporation. However, when the knowledge vital to the formation of the link is scattered in more than one mind, the necessary link is obviously not manufactured by any

95 The English Law Commission opposed, therefore, the possibility “of piecing together several minds among the controlling officers of a company to render the company liable” and expressed the view that corporate criminal liability can be imposed only when “at least one of its controlling officers has the elements” required. English Law Commission, Codification of the Criminal Law, supra note 41, at 27.

human consciousness and it cannot, therefore, be claimed that the
criminal mind stimulated the forbidden act.

4. The Defenses

The criminal defenses define circumstances that absolve the act
of its criminal character. If the perpetrator-corporation relationship
can confer liability on the corporate body by ascribing to it criminal
acts and intents of the perpetrator, the corporation must be granted
access to the criminal defenses available to the perpetrator. However,
criminal defenses which, when applied to human behavior, ex-
pose the sensitivity of the penal law to extraordinary situations lead
to absurd results when applied to situations where corporate liabil-
ity is in question.

Supporters of corporate criminal liability probably would allow
a claim of ignorance or mistake of fact in defense of the corporation.
Such a claim might be made, for example, when a manager author-
izes an illegal act in a reasonable though mistaken belief concern-
ing a material fact. But the corporation cannot raise other
defenses. To establish the defense of duress, for example, the ac-
cused must prove that he acted under the threat of death or serious
bodily harm. Yet, it is impossible to "threaten" the body or the life
of a corporate entity nor is it reasonable to assume that a threat to
the life or body of the manager translates into a threat on the "life"
or "body" of the corporation. The doctrines of identification or im-
putation ascribe only the actions of the organ or agent to the corpo-
ration; they do not argue that they are physiologically identical.
Similarly and notwithstanding the ascription of the knowledge of or-
gan or agent to the corporation according to the identification or
imputation doctrine, it is illogical to hold the corporation insane or
intoxicated.

These absurd results are avoided if the doctrines of identifica-
tion and imputation are limited to determine that the corporate
body is responsible for criminal conduct performed. Thus, the iden-
tification or imputation doctrines are applied only after the conduct
of the perpetrators has been held criminal, or in other words, only
after it is determined that an offense has been committed. The term
offense in this analysis would include not only the particular ele-
ments in the specific provision, but also the absence of conditions
and circumstances upon which a defense can be grounded. The cor-

97 See Chuter v. Freeth & Pocock Ltd., [1911] 2 K.B. 832, 836 (holding that corpora-
tion can believe statements in warranty given by its agent and thus be liable for those
statements if false).

98 See infra note 117.
poration could be found liable accordingly only if the perpetrator could be convicted for the activity ascribed to the corporation. Conversely, where a valid defense is available to the perpetrator so that his act is absolved from criminality, the question of ascribing his conduct to the corporate body becomes irrelevant. From a practical standpoint, this approach appears to solve the difficulties inherent in extending general defenses to corporate entities. Yet, from a doctrinal perspective, this analysis again makes clear that the common vocabulary of the criminal law becomes foreign language when applied to the body corporate.

C. PRACTICAL WEAKNESSES—SANCTIONING CORPORATIONS

To forward the basic goals of punishment, primarily retribution and deterrence, the penal law contains a wide range of sanctions. The system does not function efficiently, however, when applied to the corporate body. The difficulties encountered become manifest in two ways: the first relates to the palpable inability to impose several modes of punishment on corporations; and the second accentuates the ineffectiveness of sanctioning corporations.

1. Non-Economic Sanctions

Non-economic sanctions by their very nature are inapplicable to corporate entities. The threat to life or liberty inherent in these sanctions has validity and significance only within the human context. Some 300 years ago, when corporal punishment was the only criminal sanction, a defense counsel queried: "Must they hang up the Common Seal?" In a similar vein, the second Baron Thurlow remarked that the corporation "has no soul to be damned and no body to be kicked." Widening the spectrum of non-economic sanctions has not altered the state of affairs. The most obvious example is imprisonment. However, some other restraining measures are also intrinsically inapplicable; and the present form of the probation system cannot be employed fully against corporations, although legislators and courts have taken practical steps to

100 R. Cross & P. Jones, supra note 57, at 122.
102 See United States v. Nu-Triumph, Inc., 500 F.2d 594 (9th Cir. 1974); United States v. Atlantic Richfield Co., 465 F.2d 58, 69-61 (7th Cir. 1972); see also Apex Oil Co. v. United States, 530 F.2d 1291, 1292 (8th Cir.), cert. denied, 429 U.S. 827 (1976).
enlarge the scope of this measure in order to adapt it to corporate entities.\textsuperscript{103}

This inappropriateness practically narrows the scope of applicable legal sanctions. Moreover, it \textit{a priori} limits the capacity of the penal system to achieve the goals to which punishment in general is directed, for under certain circumstances (or with regard to certain offenses) these ends could be better reached by using the inapplicable non-economic sanctions.

2. Economic Sanctions

Economic sanctions consist of varieties of fines and supplementary economic measures. There is no obstacle to subjecting corporate entities to this type of sanction because corporations usually own property and are involved in economic activities. But the effectiveness of applying economic sanctions to corporations, as well as the fairness, necessity or the extent to which such application advances the purpose of punishment, is questionable.

Supplementary economic measures include forfeiture of property or profits, temporary or permanent restraining orders, and the revocation of licenses. These measures, however, supplement the main punishment prescribed, and conviction usually is not a precondition for their imposition.\textsuperscript{104}

a. Pragmatic and Inherent Limitations

Fines are arguably the most appropriate punishment for corporations. The purpose of corporations is economic profit and business operations almost always benefit, directly or indirectly, from the criminal activity undertaken within the corporate framework.


\textsuperscript{104} See infra text accompanying notes 178-91.
Thus, taxing the corporation will attack a vulnerable and appropriate target. It would seem, therefore, that fines act as deterrents to criminal negligence. Similarly, in cases of intentional criminal conduct, it is argued that the fine constitutes an appropriate levy on the profits that the corporation sought to attain as a consequence of the offense, thereby achieving the penal system’s goals of both retribution and deterrence. Moreover, fines should affect non-profit corporations because these firms also have to act economically and rationally. A more thorough analysis reveals, however, that imposing fines on corporations does not always advance the goals of punishment.

The maximum penalties provided by the specific criminal provisions often are relatively low. Yet, low fines lack deterrent value. Occasionally, a corporation might find it economically feasible to risk that its activities might involve criminal transgressions, rather than make the effort to prevent a breach of the law. For example, the financial loss resulting from fines imposed by ordinances prohibiting adulteration of food products is often considerably smaller than the cost of replacing or improving the company’s production system. Moreover, the technique of accumulating offenses or indictments to be tried together reduces even further the cost of a single violation because in many cases the fine does not increase proportionately to the number of violations considered at trial. Supposedly, while this dilemma can be solved by increasing the rates of the fines, this solution is not problem-free.

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108 Davids, Penology and Corporate Crime, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 524, 527-29 (1967); Fisse, supra note 11, at 1215; Fisse, supra note 55, at 250-51; Geis, Criminal Penalties for Corporate Criminals, 8 CRIM. L. BULL. 377, 381 (1972); Metzger, supra note 43, at 65-66; Comment, Criminal Sanctions for Corporate Illegality, 69 J. CRIM. L. & CRIMINOLOGY 40, 48 (1978); Note, supra note 107, at 287-88.
110 Some jurists suggest the imposition of fines scaled according to a corporation’s annual income or stock. See Davids, supra note 108, at 530; Elkins, supra note 5, at 81-82; Spurgeon & Fagan, supra note 106, at 427; Note, supra note 107, at 295.

Another commentator has suggested that heavier fines should be collected in securities rather than in cash and that “[t]he convicted corporation should be required to
The size of the fine is not the only difficulty in this matter. Sometimes it is illogical to impose a fine, however large, on the corporation even when the offense committed had clear economic overtones. Frequently, corporate giants discover ways to transfer the burden of the fine to their consumers by raising the prices of their products or services.¹¹¹

Market forces, though, generally inhibit the transfer of the entire burden of the fine to the consumers, particularly when competition is heavy and a price increase may lead the consumer to purchase a competing product. Corporate manufacturers of products whose demand is elastic will hesitate to place the burden of the fine on the public. Even monopolists may be disinclined to raise prices because of possible decreases in sales and governmental regulation. Under other circumstances, however, fines will not have this inhibiting effect on corporate bodies. In the absence of governmental supervision, a corporation that manufactures an inexpensive, commonly used item (and therefore is able to absorb the cost of the fine by a small increase in price per unit) or a corporation that supplies products or services which are in steady demand, can easily transfer the burden of the penalty to the consumer. Any attempt to prevent such apportionment of the fine, for example, by authorizing the courts to prohibit such a price increase,¹¹² probably would not be successful. Such a prohibition would necessarily be confined to authorize and issue such number of shares to the state’s crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity.¹¹³ Coffee, supra note 103, at 413. See also Fisse, supra note 11, at 1233-37; Metzger, supra note 43, at 69-70.

Most of the Scandinavian countries have adopted the “day-fine” system in which the number of the day-fines imposed on the convicted person represents the measure of the punishment and the amount of each day is estimated on the basis of their income. See Thomsen, The Day-Fine System in Sweden, 1975 CRIM. L. REV. 307.

A common denominator underlying most of these various suggestions is their flexibility. Though they may affect an overall increase in the rates of fines, they would introduce a new element to the penal system, the offender’s financial ability. This element is appropriate in legal and administrative systems where the mode of progressive liability is central to the system, e.g., in assessment and collection of tax or national social security payments, but it is doubtful whether it is suitable in the realm of criminal law. The severity of punishment must relate only to the severity of conduct. From this point of view, the convict’s wealth is relevant to the assessment of penalty only where it is directly related to the profits accrued by the crime. A different approach would discriminate against any wealthy offender whose capital may have been obtained in legal ways.¹¹¹²

¹¹¹ G. Williams, supra note 24, at 863-64; Coffee, Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions, 17 AM. CRIM. L. REV. 419 (1980); Coffee, supra note 103, at 401-02; Fisse, supra note 11, at 1219-20; Orland, supra note 103, at 516.

the costs of the fine and not to a price increase motivated by other factors, and therefore the corporation easily could circumvent it.

Another deficiency of fines, especially relatively low ones, is that in the business community they lose part of their criminal-punitive impact. Many businessmen regard monetary penalties imposed on corporations for a wide range of illegitimate activities as a "license fee" or the cost of conducting business.

Furthermore, sometimes the intrinsic nature of fines exposes a severe limitation on their imposition on corporations. Some supporters of corporate criminal liability claim that the corporate entity potentially can be involved in almost the full range of offenses in which individuals can be involved. But economic sanctions are not a suitable reaction for all types of violations. If they were, the other modes of punishment developed by the system would not be needed. Thus, even assuming that corporations can be convicted of grave offenses against the person or of severe harm caused to public interest such as manslaughter or endangering national security, a fine is not of comparable penal value to the more severe punishments imposed on human transgressors under similar circumstances.

For this reason, many proponents of corporate criminal liability concede that it is impossible to charge the corporation with offenses for which the sole punishments meted out by the law are death or compulsory incarcerations. Some legal systems feel that this is a

115 See supra note 10 and accompanying text.

The English Law Commission made the ostensibly logical proposition that "if... the person identified with the company is an embodiment of it, and his guilty mind is the guilty mind of the company, it ought to follow that imprisonment of that individual is imprisonment of the company with which he is identified." ENGLISH LAW COMMISSION, CODIFICATION OF THE CRIMINAL LAW, supra note 41, at 27. Yet, the Commission went on to say that "however logical, this seems to be absurd and cannot be regarded as an acceptable result in practice." See supra text accompanying note 98.
technical barrier only, easily circumvented by enacting express provisions substituting imprisonment for a fine when the accused is a corporation.\textsuperscript{118} Such legislation, however, expresses a lack of sensitivity to the real significance of the corporal punishment imposed by criminal law in cases of severe offenses which recognizes and emphasizes that such violations cannot be absolved by monetary sanctions alone.

b. Effectiveness of the Punishment

From the perspective of legal policy, the process of expanding the scope of criminal law to include corporations can be justified only if such expansion causes increased obedience to the provisions of criminal law. Corporate delinquency is only a metaphorical term, despite the fact that certain categories of offenses can be violated primarily within the corporate framework (for example, infractions of the banking law, insurance law, and antitrust law). Such delinquency is merely the result of illegal human conduct because "companies are not delinquent, only people are."\textsuperscript{119} Therefore, the question is whether imposing criminal liability on the corporation will be a deterrent or retributive force that might inhibit the criminal activity of the individuals involved in the operation of the corporate entity.\textsuperscript{120} Without empirical data, this problem can be examined only theoretically.

i. Retribution:

Retribution is probably not a significant justification for imposing liability on corporations.\textsuperscript{121} The possibility of justifying the punishment of corporations on the basis of the principle of retribution is limited for two reasons. First, many jurists tend to belittle the value of the principle of retribution because of its inherent emotional ingredient which stands in direct opposition to the practical


The same line of reasoning exists in other penal codes. See, e.g., New Zealand Criminal Justice Act § 44(3) (1954). See also Comment, supra note 32, at 93-95 (no substantive objection for committing a corporation for trial, even on charge of murder).

\textsuperscript{119} Andrews, Reform in the Law of Corporate Liability, 1973 Crim. L. Rev. 91, 94.

\textsuperscript{120} Many commentators argue that corporate personnel are not amenable to rehabilitation, which is regarded as another goal of criminal sanction. See, e.g., H. Packer, The Limits of the Criminal Sanction 856 (1968); McAdams, supra note 112, at 992.

\textsuperscript{121} Braithwaite, Challenging Just Deserts: Punishing White-Collar Criminals, 73 J. Crim. L. & Criminology 723, 724-30 (1982); Coffee, supra note 103, at 448; Comment, supra note 54, at 582-85; Note, supra note 103, at 360-61; Note, supra note 43, at 1234.
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corporate entity can be deterred by the threat of "suffering." Deterrence is aimed primarily, however, at human consciousness. It is a utilitarian concept based on the assumption that the individual is a rational creature who chooses paths of action which will result in the greatest benefit. One researcher has maintained that deterrence efficiency is not identical under all circumstances and with regard to all offenses. Yet, even when deterrence is relatively effective, it is doubtful whether imposing criminal liability on the corporation, as well as on the perpetrator, makes it more effective.

In small closely-held firms, where power is concentrated in the hands of a few promoters or shareholders, the perpetrator generally will be among them. In such cases, imposing a fine on the corporation amounts to a circuitous path to a goal which could be attained by increasing the fine imposed directly on the perpetrator of the offense. The argument that liability should be imposed on the corporate entity, because the perpetrator may not have sufficient means with which to pay off the fine, becomes less significant under these circumstances. In most closely-held enterprises, the actual performer of the offense also owns stock in the corporate body and if necessary, can liquidate it.

On the other hand, large corporations are characterized by divisions of authority, ownership and performance. The multitude of stockholders are physically distant from, and uninvolved in, the activities taking place at the power center of the organization. Deterrence then becomes discredited because often the corporate liability does not supplement the liability of the perpetrators but rather replaces it.

125 United States v. Hospital Montefiores, Inc., 575 F.2d 332, 335 (1st Cir. 1978). Fisse analyzes the deterrent value of criminal stigma, supra note 11, at 1147-54, and reaches the conclusion that "deterrence in corporate criminal law depends not only on the infliction of monetary loss but also on criminal stigma, impact upon nonfinancial motivations of corporate decisionmakers, and activation of internal discipline and organizational reform." Id. at 1166 (emphasis added). But see H. Packer, supra note 120, at 561; Elkins, supra note 5, at 78; Note, supra note 43, at 1365-66.

126 See E. Sutherland, WHITE COLLAR CRIME 217-33 (1961); Sutherland, CRIME OF CORPORATIONS, in WHITE-COLLAR CRIMINAL 57-70 (G. Geis ed. 1968).


128 For a discussion concerning the distinction between large corporations and other corporations, see Rostow, To Whom and for What Ends is Corporate Management Responsible?, in THE CORPORATION IN THE MODERN SOCIETY 308 (E. Mason ed. 1959). The writer calls the large corporations "endocratic corporations," defined as "large, publicly-held corporation[s], whose stock is scattered in small fractions among thousands of stockholders." All other corporations he entitles "exocratic corporations," characterized by being controlled by a small group of shareholders. The same terminology was used in Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 277-78, 275 N.E.2d 53, 84 (1971); Note, supra note 107, at 291.
In legal systems that apply the doctrine of the organs of the corporation, such replacement generally is limited to administrative offenses. As to _mens rea_ offenses, since corporate criminal liability is imposed only after proving that all the elements of the offense exist with respect to the organ, the organ who performed the crime must be identified. In the United States, however, the replacement of the perpetrator's liability with that of the corporation has spread to offenses of criminal intent too. The courts have admitted the possibility of imposing liability on the corporation when the _mens rea_ offense clearly was carried out within the corporate framework, yet the perpetrator cannot be pinpointed.\(^{129}\) Consequently, for example, there are fewer cases in which directors, managers or other supervisors or officers stand trial side by side with the corporation for violations of the antitrust law.\(^{130}\)

Prosecuting the corporation alone usually is a direct result of the difficulties in identifying the perpetrator, a problem which is proportional to the size and complexity of the corporation.\(^{131}\) The process of recognizing and legitimizing the prosecution of the corporation alone has, however, strong internal dynamics of its own. The police and other investigative authorities are liable to be satisfied with a less thorough examination in the attempt to discover the actual perpetrators of the crime, content that they have fulfilled their duties by placing the corporation on trial.\(^{132}\) Some jurists have defended imposing liability on the corporation alone on grounds of justice, convenience and economic considerations exclusively, and see no flaw in such reasoning even when the identity of the perpetrator is known.\(^{133}\) This attitude provides fertile ground for plea-bargaining deals between the managers or directors and the prosecution, whereby the corporate entity will admit guilt on the condition that its managers or directors will not stand trial.

The available means of investigation are possibly less effective in uncovering the actual performers of a criminal offense within

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\(^{131}\) ENGLISH LAW COMMISSION, CODIFICATION OF THE CRIMINAL LAW, supra note 41, at 31-32; E. Sutherland, supra note 126, at 228-29; G. Williams, supra note 24, at 865; Elkins, supra note 5, at 83-84; Maakiesiad, supra note 3, at 879; Mergner, supra note 43, at 56; Note, supra note 103, at 357-59.


\(^{133}\) See Elkins, supra note 5, at 82-83. But see Edgerton, supra note 5, at 834-35; Note, supra 107, at 292; See also L. Leith, supra note 5, at 142-43.
large corporate bodies. The authorities, therefore, prefer to turn to easier prey — the corporation — especially where petty offenses are involved. However, concentration on the liability of the corporation rather than on that of the human offenders indicates that the authorities have capitulated to the problem, which makes matters worse. Thus, perpetrators may believe that even when they are to be identified, they would not be tried and the police and prosecution would be satisfied with convicting the corporation. This phenomenon undoubtedly has a powerful anti-deterrent effect. 134

Another argument advanced in favor of corporate liability is that it is an additional deterrent to the perpetrator when he is exposed to a hostile reaction on the part of the shareholders or his supervisors following the predicament of the corporation due to his offense. This argument is also questionable. Such a reaction against the perpetrator can take only one of two forms: either firing the perpetrator or filing a derivative suit against him for reimbursement of the damage resulting from the conviction of the corporate body. 135 Nothing, however, prevents criminal law from exposing the perpetrator directly to punishments similar to the threat of the derivative suit or dismissal.

An appropriate substitute for the threat of being dismissed would be a prohibition against the perpetrator from serving in a directive or managerial capacity in corporate entities. Such a sanction is even more efficient than mere dismissal. Stockholders can discharge the perpetrator only from their specific corporation, but if convicted criminally, a general prohibition would prevent him from holding similar positions in other corporate bodies as well. 136

Similarly, the personal criminal summons has greater deterrent effect on the perpetrator than the derivative suit. A criminal summons contains broader possibilities of operation and, following conviction, the appropriate sanction can be chosen from a wide arsenal of punishments. The derivative suit, on the other hand, only exposes the perpetrator to monetary sanctions and is used infrequently because the perpetrator often does not have the financial ability to make good the damage caused to a large corporation.


136 See infra text accompanying notes 175-77.
c. Fairness of the Punishment

Taking punitive measures against large corporations in response to the offenses of its organs or agents is unfair and raises a moral issue. Due to the distinction between perpetrators and owners in these corporate bodies, the burden of sanctions for the criminal conduct of the former must be borne by the latter.137

- Dubious arguments are proposed by corporate criminal liability proponents to justify the injury to shareholders. One approach suggests that shareholders usually are directly involved in the delinquent activity because the determination of basic policy often is made after consulting them and obtaining their approval.138 However, only a few of the offenses committed within the framework of big corporations concern basic policy decisions requiring the involvement of stockholders. When this occurs the stockholders become parties to the offense and are directly responsible for its commission. Therefore, punishing them indirectly by rendering the corporation liable is unnecessary; direct conviction is much more effective and offers a wider range of possible punishments.

Another approach contends that stockholders are liable due to negligence. The theory is that stockholders have direct—or at least indirect—power to choose and supervise the high echelons of the corporation and the commission of the offense proves that they acted negligently in exercising their authority.139 This reasoning is problematic. Even assuming such negligence, which is questionable, it would merely justify enacting a specific provision dealing with it. Such a provision would impose on the shareholders direct criminal responsibility upon proving both their negligence in the direct or indirect choice or supervision of the directors or managers, and the causal connection between that negligence and the criminal act committed. Nevertheless, this argument cannot be the basis for imposing on the shareholders any responsibility beyond that of negligence. The stockholders should not be burdened with liability for the reckless or intentional conduct of the directors or the managers. Rendering the corporation liable for offenses performed by the directors or the managers involving the elements of intent or recklessness will injure the negligent stockholders to a greater extent than that justified by the gravity of their conduct.140

Moreover, the “fault” theory is dubious because the larger the

137 Edgerton, supra note 5, at 836-40; Fisse, supra note 11, at 1219.
138 See Winn, supra note 5, at 410-412.
139 See Mueller, supra note 6, at 39.
140 But see Mueller, supra note 6, at 39-41.
size of the corporate body the more it becomes remote from reality. Although a stock certificate represents ownership, individual stockholders of small amounts in large corporations lack the power to control or supervise—directly or indirectly—the activities of the entity. Stockholders have only scanty knowledge of the corporate structure, the flow of daily transactions, the process of decision making and the performance of those who fulfill the directive or managerial positions. The physical separation of the stockholders from each other and from the corporation, their inability to communicate with one another, the complexity of the business transactions, and the minimal amount of knowledge offered by the entity to the stockholders has caused the stockholders' power to be merely theoretical and has made the argument concerning their ability to control the corporation fictional.\(^\text{141}\)

The absurdity in the suggestion that the stockholder is somewhat "at fault" is even more salient when an offense is performed by an underling of the corporation over whom the stockholders do not have even theoretical indirect control. Furthermore, this argument certainly is inapplicable when the shareholder purchased stock after the offense had occurred, but prior to the conviction and sentencing of the corporation. Similarly, this argument provides no answer to situations in which the shareholder opposed the appointment of the director or manager who perpetrated the offense for which the corporation eventually was convicted. Under these circumstances, there is no justification for placing the burden of the penalty on the individual stockholder whose actions are without blame.

Another claim has been made that associating with corporations, which are commercial entities, is a gamble involving risks as well as opportunities.\(^\text{142}\) When making an investment decision, the shareholder must weigh, among other things, the risk that the corporation might be convicted of illegal activity. According to this approach there is no distinction between the injurious effect of criminal conviction and other possible injuries resulting from mismanagement of the corporation or from civil liability imposed on the corporation in tort or contract. The supporters of this reasoning argue that the harm to an individual shareholder resulting from

\(^{141}\) Model Penal Code § 2.07 comment at 148 (Tent. Draft No. 4, 1955); Nat'l Comm'n on Reform of Federal Criminal Laws, supra note 40, at 191; English Law Commission, supra note 41, at 32-33; L. Leigh, supra note 5, at 151; G. Williams, supra note 24, at 863; Burrows, supra note 5, at 4; Edgerton, supra note 5, at 836-37; Metzger, supra note 43, at 2; Comment, supra note 5, at 187; Note, supra note 103, at 355-56.

\(^{142}\) See, e.g., Elkins, supra note 5, at 82; McAdams, supra note 112, at 995; Note, supra note 43, at 1242-43.
corporate criminal liability is not serious and is limited to a part of the investment. Furthermore, the impact of this harm is spread among the stockholders proportionate to their share in the profits.143

Yet, the imposition of small injustices is also not justifiable. The techniques of dividing the total harm into small portions and separately examining the injury caused to each stockholder distorts the general picture. Only the examination of the damage to stockholders as a whole evaluates its gravity correctly. As for the assumption of risk by the shareholders, its relevance declines as the offense committed within the corporation’s framework becomes more grave. The stockholder hardly can be expected to foresee the possibility of the management’s or employee’s conscious entanglement in grave criminal activity.144

Neither the comparison of the damage to stockholders ensuing from the imposition of a criminal fine on the corporation to the burden they must bear when tortious damages are awarded against the corporation nor the attempt to view both as costs of doing business is convincing.145 Both the criminal and the civil proceedings result in a financial loss, but the concept of compensation is different from the concept of the criminal fine. The injury to the stockholder which is the outcome of a tort claim, even though it may be unjustified, forwards the goals of the law of torts. The award of compensation constitutes an attempt to limit, in the fairest manner, the general harm caused by the tortious conduct, and to ameliorate the damage caused to the injured party. The economic capacity of corporate entities to contribute to the advancement of this policy is significant. On the other hand, serious doubts exist whether burdening the shareholders advances the aims of penal law. Criminal proceedings are meant to examine the responsibility of the accused with respect to the illegal outcome of his conduct and to punish him if found guilty. There is no reason to cause damage to those who did not participate in the prohibited act and who, in most cases, did not even have the power to prevent it.

Some commentators claim that fining a corporation is merely a form of withholding illegally accumulated profits.146 Corporate

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143 See generally Model Penal Code § 2.07 comment at 148 (Tent. Draft No. 4, 1955); ENGLISH LAW COMMISSION, supra note 41, at 33; W. FRIEDMANN, LAW IN A CHANGING SOCIETY 209 (2d ed. 1972); Edgerton, supra note 5, at 837; Elkins, supra note 5, at 82; Winn, supra note 5, at 412-13; Comment, supra note 5, at 185.

144 ENGLISH LAW COMMISSION, supra note 41, at 33.

145 See also supra notes 113-14 and accompanying text.

146 See, e.g., Friedman, supra note 21, at 186; Metzger, supra note 43, at 65; Comment, supra note 3, at 921; see also Fisse, supra note 11, at 1171.
bodies should be deprived of their unlawful profits and in this context the issue of unfairly harming the innocent shareholders absolutely does not arise. However, to combine fining with forfeiture of illegal profits is improper and reveals a difficulty. First, the intent to deprive the corporate body of its illegal profits cannot serve as a sweeping justification to fine it in every case following its conviction, because only in some instances is the unlawful activity within the corporate framework profitable. Moreover, a fine is a rough and unsuitable tool for absorbing illegal gains. It is a purely punitive measure and should be reserved solely for achieving sanctioned ends. Therefore, there is no necessary connection between the size of the fine and the amount of the accumulated illegal profits. The goal of abrogating the corporation of its unlawful profits is achieved better by using forfeiture proceedings, which are adjusted and designated for this aim and do not require the conviction of the corporate body as a prerequisite for its application.\(^{147}\)

Some jurists have belittled the harm caused to the stockholders by comparing it to the suffering of the family of a convicted criminal who must serve his sentence.\(^{148}\) A certain similarity does exist between the two groups. Neither a stockholder of a corporation nor the accused's family stand trial and the judgement is not directed personally against them. But, the similarity ends there. The suffering of the family is a side effect and the convicted offender personally carries the heaviest burden of the punishment. The situation of the shareholders differs greatly. The corporation itself is incapable of absorbing the punishment, therefore, the stockholders must pay the price. Moreover, the obligations cannot be compared because the willingness and the devotion inherent in the human relationships of the family unit are not part of the relationship between the stockholder and the corporation. Most people are prepared, under most circumstances, to sacrifice and suffer injuries on behalf of a family member, and therefore, their sense of injustice is not heavy. In contrast, the relationship between the corporation and the shareholder, especially that between a small investor and a large corporation, is purely economic and lacks emotional content.

d. Necessity of the Punishment

The supporters of imposing criminal liability on large corporations argue that often the violation of law cannot be attributed to an

\(^{147}\) See supra text accompanying notes 178-89.

\(^{148}\) Brinkwarne, supra note 121, at 729; Fisse, supra note 11, at 1174-75; Wiin, supra note 5, at 412
individual's initiative and conduct only, but rather is the result of the policy of the corporation or of the basic defects in the mode of operation and organization of the corporate entity. Sometimes the atmosphere at the enterprise exerts pressures and indirectly encourages illegal activity. Frequently, the illegal activities are directed by the management hierarchy and augmented by pressures that can be traced to interested parties behind the scenes. The difficulty arises, the proponents argue, because those who are really responsible find shelter behind the corporate veil or in the labyrinth of its complicated structure and cannot be located. According to this viewpoint, punishing the actual perpetrator of the offense is not sufficient and the harm done to the interest of the corporate body as a whole is a good substitute for the inability of the penal law to locate and strike the real offenders.

The deficiency of this argument lies in its generalizations as well as in the spirit of the solution it offers. The attempt to explain the violations of law within the framework of corporate bodies as the outcome of a conspiracy of hidden pressures seems to be based on assumption and speculation rather than on serious empirical study. If the directors, managers or stockholders exerted pressures and created an unhealthy climate of improper working methods, then the individuals involved should be charged on the basis of personal and direct liability as accomplices to the offense. This method of direct liability is a more effective deterrent than punishing those figures indirectly via the medium of corporate liability.

Moreover, if the leading officers of the corporation encourage criminal activity and are able to muster the support of stockholders for such activity, then the remedy is the liquidation of the entire framework. There is no justification for the existence of a corporation which operates and advances its business goals by way of regular and frequent criminal activity. The state is responsible for dissolving it. Yet, such a measure could be taken without subjecting the corporation as such to criminal proceedings; rather, dissolution could be a complementary measure taken after the trial of the actual perpetrator of the offense. If, on the other hand, the suspicions against the stockholders and the high echelons of the corporate hi-

149 See, e.g., Fisse, supra note 11, at 1180-92; see also Note, supra note 43, at 1243.

150 Model Penal Code § 2.07 comment at 148-49 (Tent. Draft No. 4, 1955); English Law Commission, supra note 41, at 31-32; Burrows, supra note 5, at 19; Radish, supra note 130, at 431; Watkins, Electrical Equipment Antitrust Cases—Their Implications for Government and for Business, 29 U. Chi. L. Rev. 97, 106 (1961).

151 See infra text accompanying and following note 190.
erarchy are unfounded, there is no legal basis for harming them by
punishing the corporate body.

The argument that because it is impossible to identify the true
offenders in the absence of proof of guilt on the part of the direc-
tors, managers or stockholders, criminal liability must be imposed
on the corporation, is incompatible with the principle of personal
liability. It is stretching the point to consider penalizing the corpo-
rate body as a collective punishment in every respect,\footnote{152} because the
shareholders are not directly punished. However, corporate lia-
ibility, like collective liability, imposes the burden of the sanction on
individuals whose involvement in the transgression has not been
proven and whose sole fault lies in their being part of a group con-
ected to the offender. But it is a basic principle of criminal law that
collective punishment is strictly prohibited, for as one jurist aptly
stated, collective responsibility "may be an effective way of enfor-
cing law and order, but it does violence to our more sophisticated
present-day conceptions of justice."\footnote{153}

IV. TOWARDS PERSONAL LIABILITY

A. IMPOSING PERSONAL LIABILITY

1. The Suggested Approach

The alternative theory to imposing criminal liability on the cor-
poration emphasizes the personal liability of the individual actually
involved in the violation of the law. Commensurate with directly
punishing the perpetrator of the crime or those responsible for it,
the alternative approach suggests that, where appropriate, compe-
mentary actions be taken against the corporation. Beyond these
general propositions, an exception has been made with respect to
penal legislation of a regulatory or an administrative character.

There are two closely connected basic starting points of the
suggested approach. First, the penal system is designed to protect
the public order by directing its commands to individuals and
threatening them with punishment in case of violation. It should
strive to achieve its goal in a similar manner where human activity
within the framework of the corporate bodies is concerned. Sec-
ondly, it follows that corporations are not an object of criminal law

\footnote{152} Some jurists argue that collective punishment is the proper starting point for ex-
amining corporate criminal liability. See, e.g., S. Hurwitz, Bidrag til Laeren om Kol-
lertive Enheders Ponale Ansvar (Copenhagen, 1933); see also J. Anderaes, The
General Part of the Criminal Law of Norway 245 (1966); H. Mannheim, Group
\footnote{153} Comment, supra note 11, at 717 n.102.
and should not be treated as offenders, at least with respect to substantive criminal law as opposed to administrative strict liability provisions.\textsuperscript{154} The corporate entity is a tool in the hands of the actual perpetrator and should be dealt with accordingly.

This line of reasoning, which corresponds with the trends of European-Continental Law,\textsuperscript{155} assumes that if criminal law "takes care of individual responsibility the group will take care of itself."\textsuperscript{156} The theory of corporate criminal liability likewise does not preclude the imposition of personal liability on the perpetrator. Its supporters have consistently emphasized that the threat to the corporate body serves only as an additional deterrent aimed at influencing the behavior of its human constituents.\textsuperscript{157} However, notwithstanding this proclaimed objective, attention often has strayed and focused on the corporation as a target of the legal sanctions. To a considerable extent, this tendency has dulled the impact of direct personal liability of the perpetrator.\textsuperscript{158}

2. Perpetration on Behalf of the Corporation

The suggested approach, like the core of criminal law, focuses primarily on the personal liability of the perpetrator. It asserts that every director, manager, employee, agent, stockholder or other functionary of the corporation whose behavior warrants the imposition of criminal liability should stand trial personally for his activities. It is irrelevant whether the individual acted in the name of the corporate entity or on its behalf. When the issue is the personal liability of the perpetrator, no distinction should be made between sole perpetrators who have committed the offense personally and those who are bound up in a web of complicity or conspiracy.\textsuperscript{159} The question of personal liability must be determined as if the perpetrator acted on his own behalf, regardless of whether the conduct

154 Andrews, supra note 119, at 94.
155 See ENGLISH LAW COMMISSION, supra note 41, at 12-15; Mueller, supra note 6, at 28-35. For a description of the situation in Continental Europe, see J. ANDENAES, supra note 132, at 244 (Norway); H. JESCHECK, LEHRBUCH DES STRAFRECHTS (Allgemeiner Teil) 171 (2. Aufl. 1974) (Germany); V. MANZINI, TRATTATO DI DIRITTO PENALE ITALIANO 535 (1961) (Italy); G. STEFANI & G. Evasseur, DROIT PÉNAL GENERAL ET PROCEDURE PENALE para. 245 (6. ed. 1972) (France).
156 Francis, Criminal Responsibility of the Corporation, 18 ILL. L. REV. 305, 319 (1924).
158 See supra text accompanying notes 128-34.
was performed allegedly in the name of the corporation or on its behalf.160

The aforesaid principle, which is incorporated in several proposed codes,161 is designed primarily to clarify the issues. It precludes any attempt by the perpetrator to avoid liability when all the elements of the offense originate in his behavior. Yet, precise legal interpretation of the verbs, terms or provisions of a specific criminal statute may raise doubts as to whether a particular act, which was allegedly performed in the name of the legal body or on its behalf, can be considered the performer's individual act.162 The principle stated would preclude, for example, a manager of a real estate leasing corporation who signs a rental contract in the name of the corporation while knowing that the property would be used for immoral purposes from claiming that the corporation that owned the property was the lessor and that he is not personally responsible. Similarly, an employee of a legal entity, who sells unlawfully manufactured goods belonging to the corporation and deposits the money into the corporation's cash register would be prevented from claiming that he was not the seller.

3. Offenses Attributed Solely to the Corporation

Occasionally, the criminal norm is directed only towards a party who has fulfilled a particular prerequisite, and sometimes it is the corporate body which answers to the condition. Examples are where the criminal legislation refers to licensees or property owners who happen to be corporations, or where the definition of the offense applies to the employer, a title which, in the particular case, fits only the corporation and not the human being who carried out the offense. If the individual who perpetrated the offense in the employment were brought to trial, the individual might argue that the governing statute does not apply to him. In other words, the accused might argue that he lacks the power, status, capacity or authority referred to in the statute. The argument appears even more persuasive when raised with respect to omissions, i.e., where the statute imposes a positive duty which, under the circumstances, is directed at the corporation.


161 Model Penal Code, § 2.07(6)(a) (1962); Nat'l Comm'n on Reform of Federal Criminal Laws, supra note 101, § 403(1).

This argument could be counteracted by specific legislation explicitness stating that where a provision refers to a condition or description which in the particular case suits only the corporate body, the law ascribes that condition or description to certain functionaries within the corporate hierarchy, such as directors, managers and other officers. An alternate legislative technique would be to maintain that each member of the corporate hierarchy falling into one of the specific categories is deemed liable for such a transgression, unless the person can prove that they were not involved in its commission. In the case of crimes of omission, the individual will have to show that he took all necessary precautions to ensure compliance with the law.

These two proposals are similar but not identical, as becomes evident when analyzing crimes of commission as opposed to crimes of omission. The first alternative does not deviate from the traditional principle of the onus of proof in criminal law. It merely suggests that responsibility be attributed to those personnel whose thoughts and actions are proved by the prosecution to form the elements of the specific offense. The second alternative is much broader. It establishes a presumption of guilt, albeit rebuttable, upon proof of both an actus reus and the defendant's fulfillment of one of the roles specified in the statute. In accordance with the subject at hand, the legislator should determine which technique is more appropriate and whether the categories of persons potentially liable for the offense should be widened or narrowed.

4. Managerial and Supervisory Responsibility

The suggested approach acknowledges the importance of increasing the supervision and involvement of the senior officers of the corporation by emphasizing their personal and direct liability for the events taking place in the corporate body which they supervise. Prima facie there is no room to distinguish in this regard between the senior officials of incorporated and unincorporated enterprises. Such a generalization, however, deserves a more thorough examination than is possible within the scope of this study.

a. Knowledge of Subordinates' Intent

When corporate supervisors are aware of a subordinate's criminal design, they should be required to employ all possible means to

\footnote{163 See MODEL PENAL CODE § 2.07(6)(b) (1962), NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, supra note 101, § 403(2).}

\footnote{164 See Metzger, supra note 43, at 53; Note, supra note 43, at 1261.}
prevent a transgression. Although legal systems tend to limit the resort to statutory offenses of omission, an exception should be made here. The corporate body is a closed system with a defined hierarchy. Imposing duties upon the figures in authority will increase and emphasize their particular responsibility for the events taking place within the corporate entity. The power to control and supervise, which carries many advantages, must also entail duties.\footnote{See generally W. LaFave & A. Scott, supra note 83, at 186.}

There is no intention to impose liability on directors, managers and other supervisors for all offenses which happen to occur during working hours (such as petty thefts of one worker from another at work). The suggested duty should extend only to offenses directly connected to work. Moreover, in order to prevent an atmosphere of informing and eavesdropping, the positive duty imposed on the senior officers should not necessitate divulging to the authorities the identities of the designers of the offense. Rather, the duty should focus on the undertaking to prevent the illegal act or to curtail it. Under most circumstances, those obliged to act can do so without depending on police assistance because of their status and relationship with the designers.

Directors, managers or other supervisors who did not fulfill the duty under discussion can be incriminated, within the context of the complicity doctrine, because they are aiders-and-abettors. The duty of the senior officers to act derives from their relationship with their subordinates as well as from obligations imposed by public interest.\footnote{See, e.g., Brickey, supra note 160, at 1342; Note, supra note 43, at 1266-70; Note, Individual Liabilities of Agents for Corporate Crimes Under the Proposed Federal Criminal Code, 31 Vand. L. Rev. 965, 970-71 (1978).} Therefore, in terms of the actus reus, any director, manager, or other supervisor who is aware of an employee’s criminal design and is able to take preventive measures but does nothing contributes to the performance of the offense. With respect to the mens rea, such a conscious failure to take preventive measures is an omission which reflects that person’s intent to aid in the commission of the offense.\footnote{See Morgan v. United States, 149 F.2d 185, 187 (5th Cir.), cert. denied, 326 U.S. 731 (1945); Moreland v. State, 164 Ga. 467, 471-72, 139 S.E. 77, 78-79 (1927); State v. Gilbert, 213 Wis. 196, 216-17, 251 N.W. 478, 485 (1933); Tuck v. Robson, [1970] 1 All E.R. 1171, 1174-75 (Q.B.); Rubie v. Faulkner, [1949] 1 K.B. 571, 574-75; Gough v. Rees, 29 Cox C.C. 74, 78-80 (K.B. 1929); Du Cros v. Lambourne, [1907] 1 K.B. 40, 45-46; Howells v. Wynne, 143 Eng. Rep. 682, 688 (C.P. 1869). See also W. LaFave & A. Scott, supra note 83, at 504; G. Williams, supra note 24, at 361, 866.}

Alternatively, similar results can be reached by adopting a general principle that would specifically establish the direct and independent responsibility of the managerial and supervisory ech-
ions for offenses committed within the scope of their supervision and authority in cases where they were aware of the criminal design but did not take reasonable measures to prevent its completion.

b. Recklessness or Negligence

In addition, legislatures should enact general provisions to address defective supervision or management of the corporate body and impose, as a result thereof, separate and independent responsibility. Such legislation, which might be divided into separate categories of recklessness and negligence, supplements the other form of management and supervisory liability discussed above.\textsuperscript{168}

The proposal suggested would be applicable only if the prosecution proves that the director, manager or supervisor deviated from reasonable standards of supervision or management within the scope of their authority and that they deviated while aware that the outcome might be a criminal violation. The main difference between this and the other type of management or supervisory responsibility discussed previously lies in the domain of \textit{mens rea}. The proposed offense of reckless supervision would not require the extreme criminal intent (e.g., actual knowledge) which is a component of the other offense.

The impact of offenses of reckless management or supervision would be reinforced by transferring the burden of proof from the prosecution to the director, manager or supervisor. Thus, a rebuttable presumption would exist that with respect to offenses carried out within the corporate entity, there was a deviation from reasonable methods of supervision or management.

Several commentators have recommended expanding even further the responsibility of managers and supervisors by enacting an additional provision which would specifically address negligent management or supervision of the corporate body.\textsuperscript{169} According to this approach, the director, manager or supervisor would be liable for negligence if they could objectively have foreseen the violation of law that took place within the scope of their authority. This approach has found some support in those decisions of the United States Supreme Court that analyze managerial and supervisory re-

\textsuperscript{168} See the Criminal Code Reform Bill, S. 1437, 95th Cong., 2d Sess. \S 403(c) (1978), which makes it a misdemeanor for a "person responsible for supervising particular activities on behalf of an organization" to contribute to the commission of an offense by "reckless failure to supervise adequately those activities." \textit{Cf. NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAW, supra note 101, \S 403(4).}

\textsuperscript{169} Davids, \textit{supra} note 108, at 530-31; Note, \textit{supra} note 107, at 903-04.
sponsibility for corporate violation of strict liability offenses.\textsuperscript{170} Some jurists claim that these decisions can be interpreted as broadening the prerequisites for imposing liability on the manager or supervisor by requiring proof of some basic elements of "guilt," i.e., "a departure from a standard of care."\textsuperscript{171}

Such a broad statutory provision imposing liability for negligent management or supervision, however, raises difficulties. The absence of due diligence on the part of the directors, managers or other supervisors may indicate that they have not developed an efficient method for the prevention of offenses, or it may indicate the negligent operation of an existing efficient system.\textsuperscript{172} The first alternative presented raises questions as to which method can be considered effective and how much effort must be invested in establishing and operating it, including the weight that should be given to economic considerations. The other alternative, concerning negligent operation of an existing efficient control system, entails undesirable effects on the supervision and management of corporations. Consequently, directors, managers and other supervisors who are fearful of indictment might become overly cautious and inhibited, thus hindering their own efficiency and the initiatives of their subordinates. Yet, effective operation in the economic system requires great flexibility and room for maneuvering.\textsuperscript{173} Such considerations have led many jurists to the conclusion that statutory criminal intervention in negligent behavior of directors, managers and other supervisors should be abandoned,\textsuperscript{174} and that criminal law should be preserved in imposing liability for reckless management or supervision alone.

B. SUPPLEMENTARY AND PREVENTIVE MEASURES

Many legal systems apply supplementary and preventive measures. The value of these measures is increased due to their flexibility. Traditionally, penalties are administered against a convicted


\textsuperscript{173} Note, supra note 48, at 1270-72.

party after trial. Supplementary and preventive measures, however, also can be exercised against entities who have not been convicted. Such measures can be taken, therefore, according to the suggested approach, not only against the perpetrators but, in appropriate circumstances, even against corporate entities.

1. Measures Against Directors, Managers and Supervisors

a. Disqualification

Courts should be empowered to prohibit convicted managerial or supervisory personnel of a corporation from continuing to act in such capacities. This measure is central to the suggested approach which views the corporation as a tool, because it is necessary to restrain unreliable and dangerous persons from manipulating such powerful instruments. This sanction would be in addition to other penalties to which the functionaries may be subject. The court should have broad discretion in setting the duration of the disqualification and its scope.\textsuperscript{125}

Disqualification is a measure with personal penal overtones, yet its general preventive aspects are also apparent. Courts should use this measure where there are reasons to fear recurrent abuses of power and authority to the detriment of the public. The laws of many countries authorize the disqualification of a convicted criminal from particular professions, usually referring to abuse of position or severe breach of duties as the appropriate circumstances under which this measure should be applied.\textsuperscript{126} Some of these provisions, as that of the English Companies Act, are directed explicitly to the managerial and supervisory personnel of corporations.\textsuperscript{127}

Disqualification is more effective against the highest echelons of corporate management and supervision than it is when employed against lower ranking officials, because the latter usually enjoy greater flexibility in finding alternative employment. Naturally, courts most frequently would exercise this measure against direc-

\textsuperscript{125} The court must decide whether the official should be disqualified from serving in a certain capacity only in the corporation in which the offense was perpetrated or in a certain category of corporate entities, or perhaps in all corporations.


\textsuperscript{127} The Companies Act, 1985, §§ 295-302. See also Nat'l Comm'n on Reform of Federal Criminal Law, supra note 101, § 3502. But see Panel Discussion, supra note 174, at 182.
tors and managers of larger corporations. The unique structure of corporate bodies often makes the measure of disqualification vulnerable to circumventing tactics, especially in small closely-held corporations. Even if the defendant were forbidden from managing a small corporation, he would be able to do so indirectly through his family or other figurehead directors or managers. It is illogical to extend the prohibition to include management or supervision through others because it would be impossible to enforce such a prohibition.

2. Measures Against the Corporation

The impersonal character of some supplementary measures makes them available for use against parties not indicted in the offense. By implementing such measures, the criminal law does not limit itself to dealing with the offense and the offender directly. After punishing the perpetrator, it concentrates, where necessary, on eliminating the results of the delinquent activity and reforming the system and framework which bred the offense.

a. Forfeiture

Forfeiture of profits is another supplementary measure whose adoption is essential to the suggested approach. The rationale for depriving the corporate body of the fruits of its offense is clear. This goal can be achieved through forfeiture of profits accumulated by illegal means without resort to a conviction, which one jurist described as "a rough instrument for this purpose." Forfeiture represents a convergence of the objectives of the criminal and tort laws, and is justified by the principle of restoration. From the perspective of criminal law, forfeiting the fruits of the offense annuls the results of the criminal activity and restores the original situation. Such a measure is necessary because leaving those fruits in the hands of the offender or another harms the public interest and our sense of justice and often creates a dangerous situation (e.g., leaving a weapon or drugs in the hands of a criminal).

Many penal codes allow for the forfeiture of illegal profits as a supplementary measure to punishment, and most apply the remedy of forfeiture even to the fruits of crime held by a third party.

178 See generally McAdams, supra note 112, at 997-98; Note, supra note 107, at 298-300.
179 Andrews, supra note 119, at 94.
beneficiary.\textsuperscript{181} American federal legislation lacks a general provision concerning forfeiture, even though specific federal laws authorize forfeiture of real property or tangible or intangible personal property constituting or deriving from a prescribed illegal activity and the forfeiture of any interests acquired or maintained in violation of these laws.\textsuperscript{182} Moreover, one of these laws provides for the forfeiting of "any . . . interest . . . security . . . claim . . . or property or contractual right" that the accused person might have in any enterprise that he has "established, operated, controlled or conducted" in a pattern of racketeering activity.\textsuperscript{183} Another federal law, concerned with drug abuse, allows for the forfeiture of "property that is . . . transferred to a person other than the defendant."\textsuperscript{184}

Depriving the corporate body of its illegal profits, as a supplementary measure to punishing the convicted perpetrator, is in essence a forfeiture of a third party, the corporation. It should be emphasized, however, that the forfeiture of illegal profits of a corporation is much more justifiable than the forfeiture of an innocent party due to its instrumentality in the offense committed by the perpetrator\textsuperscript{185} or from a third party who purchased the property after the commission of the offense.\textsuperscript{186} Where unlawful profits of the corporation are usurped, the protected rights of the corporate entity are not affected, because property acquired in a legal manner will remain untouched. The forfeiture cannot be considered, therefore,

\begin{footnotesize}
\begin{enumerate}
\item 21 U.S.C.A. § 853(c) and (n) (West Supp. 1985).
\end{enumerate}
\end{footnotesize}
an unfair harm to innocent shareholders.\textsuperscript{187}

In using forfeiture as an instrument to abrogate illegal profits, care should be taken not to affect the rights of the parties from whom the profits or goods were illegally acquired. The power of the court to issue an order of forfeiture ought to be constrained in circumstances where the original owner requests return of what has been appropriated from him, or its equivalent. Therefore, the prosecution usually would request the forfeiture of illegal profits, and especially those of a corporation, when the harm done by the illegal activity is spread among a large number of people. In such circumstances, the actual damage to each individual seems to be small, and hence, they are not likely to sue the corporation.

A practical problem with respect to the forfeiture of illegal profits is assessing their size. In some cases approximation of those profits raises merely technical difficulties requiring the consolidation of various factors. Other situations are more complicated and involve approximation, as for instance, the determination of the profit resulting from the sale of a product falsely claimed to contain a particular ingredient. The tendency should be towards simplifying the methods of evaluation. There ought to be a compromise between the contention that all profits or even receipts from sale of the product are illegal because consumers would not have bought the product had they known its true content, and the assertion that illegal profits consist of the difference in cost between the ingredient falsely claimed to be included in the product and the amount of that ingredient actually included therein.\textsuperscript{188}

Forfeiture proceedings against a corporation for illegal profits may be held separately from the trial of the individual accused. Another possibility is to combine the forfeiture proceedings with the proceedings against the accused agent.\textsuperscript{189} If the latter alternative is implemented, special legislation would have to be enacted to regulate such trials, and the corporation, which might be affected by the deliberation, should be allowed appropriate representation.

b. Dissolution

An order to commence dissolution proceedings is the most extreme preventive measure available.\textsuperscript{190} Its use must be reserved

\textsuperscript{187} See supra text accompanying notes 146-47.
\textsuperscript{188} But see Note, supra note 107, at 298-99.
\textsuperscript{189} Cf. 21 U.S.C.A. § 853 (West Supp. 1985). See also supra note 107, at 299.
\textsuperscript{190} Model Penal Code § 6.04, 2(a)-(b) (1962); Model Penal Code § 6.04 comment at 202-04 (Tent. Draft No. 4, 1955); Nat'l Comm'n on Reform of Federal Criminal Laws, supra note 40, at 193; see also L. Leigh, supra note 5, at 157-58.
only for extreme situations in which the most severe kind of criminal action has been exposed and it is established that the offense committed is a symptom of a severe disease which has spread throughout the corporate body that has been corrupted beyond correction. Once such a decision has been made, civil dissolution proceedings can be instituted.

Small corporations occasionally could be dissolved. The injury to those who depend economically on a closely-held corporate entity would not be greater than the injury caused when a regular offender is incarcerated and his business collapses. The position is different, however, when a large corporation is involved. In such a case the burden will fall not only on the shareholders, but also on the many employees whose source of income will be eliminated. In some instances, consumers too may be injured by the dissolution. Moreover, dissolving a large corporation may cause a chain reaction leading to the collapse of other financially related institutions. The dissolution of a large corporation, therefore, should be undertaken even more carefully.

In view of the numerous manners of circumventing a dissolution order, its effectiveness as a preventive measure seems questionable. It is theoretically possible for the dissolved corporation to be resurrected because it is difficult to prevent shareholders from reincorporating and even adopting the name of the dissolved corporation and engaging again in the same line of business. This loophole does not necessitate an a priori abandonment of dissolution as a preventive measure. Instead, it would necessitate improvement of precautionary and supervisory methods, such as disqualifying shareholders of the dissolved corporation from reincorporating. Concurrently, the legislature could enact measures to expose persons hiding behind the corporate veil and to reveal the interconnection among different corporate entities.

c. Restriction of Activity

A court order prohibiting corporate activity in the sphere in which the offense was committed is another preventive measure, although more moderate in impact than the dissolution of the corporation. An injunction of this kind would not affect the existence of the corporate entity. Nevertheless, a prohibitive injunction that would limit or stop the corporation's activity in a certain field is a drastic measure that should be used rarely, especially if it might adversely affect the corporation's operation.

While deliberating whether to resort to this measure, the court
should address two basic issues. First, it should examine the chances of altering the basic conditions that spawned the criminal activity. Second, the court should assess the public interest in the matter. Where severe damage to the public interest is unavoidable and the danger of recurrence cannot be eliminated by less drastic measures, a restriction on corporate activity in the area within which the offense was committed is in order.

V. THE EXCEPTIONAL CATEGORY—STRICT LIABILITY

An exception to the suggested approach, which generally disapproves of penalizing corporate bodies as a means of contesting criminal activity in their framework, occurs where criminal provisions of an administrative character are concerned. Substantive criminal law regulates the modes of behavior shaped to protect the basic social values. Without these laws, society’s ability to function would be jeopardized. On the other hand, administrative offenses are strict liability violations characterized by eliminating the element of \textit{mens rea} as a prerequisite to the formation of criminal liability.\textsuperscript{191} These provisions regulate the convenience and welfare of society by forming a system dictated mostly by the process of modernization to govern technical patterns of behavior.\textsuperscript{192} Examples include traffic violations, sanitation regulations and safety ordinances.

The unique nature of strict liability violations markedly affects the subject under discussion. Some of the arguments against imposing corporate criminal liability are less convincing when strict liability offenses are involved. For example, the contention that an indicted corporation is at a disadvantage due to the unavailability of the complete range of defenses open to its human counterpart weakens its impact because some defenses are inapplicable to strict liability violations. Similarly, the argument that emphasizes that fines are the only penalty available against the corporation, although the severity of the offense committed normally would dictate a heavier punishment, becomes irrelevant. The reason is that in most cases, a fine is the only sanction applied by the courts for infringements of administrative penal violations.


Moreover, strict liability greatly differs in character and substance from the liability imposed by substantive criminal law. The relatively moderate fine that usually follows the violation of the strict liability provisions often is designed only to act as a reminder to the offender that he has veered from the correct path and that he should take greater care in the future. Therefore, jurists have referred to strict liability offenses by various epithets such as: "quasi crimes,"\(^{193}\) "civil offenses,"\(^ {194}\) "administrative misdemeanors,"\(^ {195}\) "public torts,"\(^ {196}\) or "pseudo-criminal offenses."\(^ {197}\) Professor Hall expresses the view of many that "it is clear that whatever sort of liability strict liability may be, it is not criminal liability."\(^ {198}\)

Thus, the tendency of some legal systems to detach strict liability violations from substantive criminal law becomes clearer. Penal codes proposed in the United States explicitly distinguish between criminal offenses in the traditional sense and those breaches of the law that lack any element of fault, defining the latter as "violations"\(^ {199}\) or "infractions."\(^ {200}\) A more extreme suggestion separates strict liability violations from criminal law and establishes an autonomous branch of "corrective law" in which those violations would be compiled.\(^ {201}\) For example, in Germany, there is a separate category of regulatory ordinance infraction termed "Ordnungswidrigkeiten,"\(^ {202}\) and the French Criminal Code views "contraventions" as a subject of administrative regulations.\(^ {203}\)

Strict liability violations are located on the border between criminal and public law. Therefore, the issue of corporate criminal liability in this context is less objectionable than in the context of the substantive criminal offenses.\(^ {204}\) Apparently, this is the reason many European countries which uphold the Latin proposition \textit{societas delinquire non potest} (corporations do not commit crimes) have


\(^{194}\) W. Friedmann, \textit{supra} note 143, at 207.


\(^{199}\) Model Penal Code §§ 1.04(5), 2.05(2)(a) (1962).

\(^{200}\) \textit{Nat'l Comm'n on Reform of Federal Criminal Law}, \textit{supra} note 101, at § 302(2).


\(^{203}\) H. Silving, \textit{supra} note 201.

\(^{204}\) Cantfield, \textit{supra} note 5; Note, Criminal Liability of Corporations for Acts of Their Agents, 60 Harv. L. Rev. 283 (1946).
created exceptions to this principle, mostly in the area of criminal administrative legislation and in the periphery of substantive criminal legislation. Among the exceptions are violations of fiscal law, price gouging and trade regulations.\textsuperscript{205}

Therefore, an allowance made with respect to corporate criminal liability in the area of strict liability violations does not invalidate the thesis that corporate bodies are inappropriate objects of substantive criminal liability.\textsuperscript{206} Perhaps the exception proves the rule. Conceding this exception implies that only violations of this particular nature, which are so different from substantive offenses, demonstrate the basic principle that only individuals can be liable in criminal law.

VI. CONCLUSION

The purpose of this Article has been to re-examine the Anglo-American approach that routinely imposes, with almost no limitations, criminal liability on corporations. This approach has resulted in the extension of the boundaries of the penal law—the substance, structure, goals and means of which were traditionally formulated to regulate the behavior of individuals only. This extension has led to several theoretical problems, including: the potential harm to the ideological basis of criminal law; the deviation from the recognized framework of relationships which might serve as a basis for widening criminal liability; and the possible damage to other basic principles of the criminal system. Other difficulties are practical and result from defects and inefficiencies ensuing from the punishment of corporate bodies.

The presented approach emphasizes that the corporation is merely an economic and social enterprise, namely a tool for perpetrating offenses. The possible manipulation of the corporate body by human offenders does not transform it, however, into a criminal. Criminal law, therefore, should concentrate on the responsibility of the individuals operating the corporate entity and should determine that only an individual who commits or is involved in an offense can be considered an offender.

The human characteristics sometimes attributed to the corporate entity should apply only in the civil law. The determination that a corporation manufactured a product, sold a commodity, signed a

\textsuperscript{205} See P. Bouzat et J. Pinatel, Traité de Droit Pénal et de Criminologie 232 (1963) (France); A. Schönke Strafgesetzbuch (Kommmentar) 356 (16. Aufl. 1972); Strafgesetzbuch 16 (E. Dreher 37. Aufl. 1977) (Germany); J. Andenaes, \textit{supra} note 152, at 246 (Norway); V. Manzini, \textit{supra} note 155, at 546 (Italy).

\textsuperscript{206} Andrews, \textit{supra} note 119, at 94.
contract, or even committed a tort, does not necessarily mean that it has the capacity to be held guilty for infractions that occurred as a result of those actions. This distinction between the respective branches of substantive criminal law and the civil law is the direct outcome of the goals that differentiate the criminal system from others. In civil law, direct dictation to the human consciousness is not the cornerstone upon which the entire corpus of regulations is built, therefore, personification of the corporate entity seems less artificial within its framework. Furthermore, the corporate entity is a creation of economic activity and therefore is subject to the rules of civil law. In order to enable a party to do business with a corporation and sue it where necessary, the corporation must be personified so that it can become a party to a contract or a tortfeasor.

Criminal activity carried out within the corporate framework presents unique challenges to criminal law. Corporate bodies are powerful tools and their manipulation for criminal purposes can cause great harm to the public. Moreover, the structure of the corporation and its modes of operation often provide convenient screens for perpetrators, thereby obstructing the process of their detection. Thus, enforcement authorities need to increase precautionary and investigative measures. Furthermore, legislation is needed to improve the quality of supervision within the corporate framework by imposing additional legal duties on officers in supervisory and management positions. The cumulative effect of these efforts would be to convince all actors inside the corporate framework that the penal system focuses on the individual perpetrator.

The preventive and supplementary measures of the penal law also should be applied to the corporation in appropriate circumstances. Resorting to these measures is not a deviation from the principles outlined in this Article because they can be employed without first requiring the legal body to stand trial and assume criminal liability. Of those measures, forfeiture should be most used. More severe decrees, such as restraining orders or orders of dissolution, should be resorted to only in the most extreme cases.

Strict liability offenses are an exception to this general solution. Infringement of such provisions should result in imposition of liability on the corporation and on the person who committed the violation. In any event, this possible exception does not affect the basis of the rule. On the contrary, the exception reinforces the rule by emphasizing that a deviation from the basic principle that criminal liability may be imposed solely upon individuals should occur only where the statutory provision differs in substance and purpose from substantive criminal law.
The suggested approach is not a panacea for all problems. The accumulated information and experience may be insufficient for a comprehensive investigation of all aspects of the issue. Also, it may be impossible to reach a completely satisfactory resolution to this difficult dilemma. Nevertheless, the proposed solution has advantages over those theories that view the corporation as a proper defendant to almost all criminal indictments. It confines the doubts and the subjects of controversy to a discussion whose contentions, limitations and problems are familiar to the criminal system as a whole.

The practical problems of this approach of identifying the perpetrator of a crime within a complex corporate structure, or determining the actual amount of illegal profit derived from the offense in question, or trying to prevent the corporation from compensating the convicted agent might be no easier to resolve than the practical problems inherent in imposing corporate criminal liability. But the difference is in the ramifications to the entire system. The current approach requires overstepping the boundaries of criminal law and deviating from its principles and basic structure, while the suggested alternative reflects a complete and consistent application of criminal law.
CORPORATE CRIMINAL LIABILITY: A COMPARATIVE PERSPECTIVE

GUY STESESENS*

I. INTRODUCTION

Today's society is increasingly faced with types of economic criminality unknown to the nineteenth-century society in which most European criminal justice systems were shaped. In our days prosecutors and courts have to deal with economic and environmental criminality phenomena previously not heard of. An important aspect of this trend is the role of corporations in white-collar criminality and the consequences it has on the punishment of this particular type of wrongdoing. As the bulk of economic activity nowadays takes place through corporations, so does economic criminality.

A logical reaction to this phenomenon seems to be, as has happened for that matter in torts law, to sanction corporations for the wrongdoing for which they are responsible. Logical though this solution may be, it does not take into account the traditional hesitation of criminal law and criminal lawyers with regard to change. In fact, though the role of corporations in society has been expanding ever since the nineteenth century, it was only after the Second World War that the criminal law came to recognise the concept of corporate criminal liability. Though some jurisdictions (e.g. the United States) have taken this step earlier, other criminal law systems in Europe apparently still have not been able to incorporate the concept of corporate liability into their criminal law system.

This article aims to examine the question of how to punish corporate criminality in a comparative perspective. This way of studying the problem has advantages. Comparing national law systems, some of which are familiar with corporate criminal liability, some of which are not, enables us to get a clearer view of the advantages and disadvantages of corporate criminal liability. It also creates a "supranational", European perspective: by highlighting the differences between the respective national solutions to the same question (i.e. how to punish corporate criminality), it may give some hints towards a (European) harmonisation of the legal solutions. Although it would be presumptuous on our part to propose any "European" solution, it merits attention that such a solution may in time

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become desirable. Not only has the face of crime changed in that it now involves a lot of white-collars instead of blue-collars, it has also become increasingly international, and these two trends intermingle. Indeed, as Lord Griffiths stated in a judgment of the Judicial Committee of the Privy Council: “Unfortunately in this century crime has ceased to be largely local in origin and in effect. Crime is now established on an international scale and the common law must face this new reality.” International co-operation in criminal matters (especially with regard to economic or financial crime) may some day or another necessitate a harmonisation of the law of corporate liability. With regard to specific aspects of international economic crime, the desirability of such harmonisation has already been stressed on different occasions. In 1988 the Council of Europe asked those member States whose criminal law had not yet provided for corporate criminal liability to reconsider the matter.

For all these reasons, we will try to contrast the solutions of different jurisdictions, namely France, Belgium, the Netherlands, Germany, England and Wales, the United States and Canada. This article is essentially divided into two parts. In the first part, we will look at the historical evolution of corporate sanctioning in Europe, paying attention to the different types that have developed. The second part concentrates on the differences between the respective national systems of corporate liability as they function today.

II. THE HISTORY OF CORPORATE CRIMINAL LIABILITY

A. The Beginning of Corporate Sanctioning

Before the French Revolution took place, criminal sanctioning of corporations was generally accepted on the continent. The French Grande Ordonnance Criminelle of 1670 mentioned the subject in great detail. The French Revolution ideal of individualism, however, did away with the concept. The fact that the French Code Pénal of 1810 kept silent on the subject may be explained in two different ways. First, it can be seen as an

implicit wish of the drafters of the Code Pénal to reject the very idea of corporations being submitted to criminal sanctions. Another and more balanced explanation, which is becoming more and more accepted, is that, given the near absence of corporations (guilds and monasteries had been cleared away during and after the French Revolution) and given the prevailing economic liberalism, the drafters of the Code simply did not pay any attention to the idea of corporate liability.  

As Belgium adopted the French Penal Code, the same went there: corporate criminal liability was not accepted. The Belgian Supreme Court, the Cour de Cassation, repeatedly stated: *societas delinquere non potest.* The corporation being a legal fiction, it could fulfil neither the *actus reus* nor the *mens rea* requirement. Punishing a corporation was thought to be devoid of any meaning and contrary to Section 39 of the Penal Code, which embodied the principle of individual punishment.

The Dutch Penal Code which came into force in 1886 also excluded the possibility of corporations undergoing any kind of criminal punishment.

The growing industrialisation of the nineteenth century, however, would not leave the criminal law untouched. Not surprisingly, this influence first became clear in those countries which were first touched by this economic change: England and Wales, the United States and Canada.

Although English courts originally rejected the very idea of corporate liability, they would gradually move away from this position. The reasons for the English courts' refusal to impose criminal sanctions on corporations are well known. Three theoretical grounds prevented them from doing so. As a corporation is a legal fiction, it can do only such acts as is legally empowered to do (*ultra vires* rule). Further, a corporation could not possess the required *mens rea*. Moreover, it was difficult to devise an adapted punishment for corporations. Apart from these theoretical objections, practical difficulties impeded the imposition of criminal sanctions. Personal appearance was required at the Crown Courts or assizes: this was impossible for a corporation. A second practical difficulty arose with regard to punishment; as all felonies were at one time punished by death or deportation, it was simply not legally possible to punish a company.

The gradual development of corporate sanctioning knew different stages. The first step taken by the courts was to accept corporate liability


in the case of a breach of a statutory duty. In 1842 a corporation was convicted for failing to fulfil a statutory duty.\textsuperscript{10} Four years later\textsuperscript{11} the effect of that decision was expanded from non-feasance to misfeasance. After that, the courts seemed confident enough to impose vicarious liability on corporations in those instances in which natural persons could be vicariously liable as well.\textsuperscript{12} It was only in 1944, however, in three landmark cases,\textsuperscript{13} that direct liability was imposed on corporations, i.e. liability because corporations were deemed to have acted themselves and not because their employees had acted (vicarious liability). The corporations were prosecuted and convicted for tax evasion, common law conspiracy and using a false document. Although the rationales of these cases have been criticised for being vague and ambiguous, the three decisions managed to surmount the so-called "mens rea hurdle". Before these cases the courts had succeeded in evading this conceptual problem since neither in the case of breach of a statutory duty nor in the case of vicarious liability did mens rea need to be attributed to the company.\textsuperscript{14} In the three 1944 cases, however, it was established that the mens rea of certain employees of the company was to be considered as that of the company itself.\textsuperscript{15}

In another common law jurisdiction, the United States, the evolution of corporate sanctioning started in a similar way but eventually developed itself in a distinctly different manner. The same theoretical objections were being put forward against the concept of corporate criminal liability as in England. The pressure of the changing economy removed the reluctance of the courts which, just as in England, began by accepting corporate liability in the case of breach of a statutory duty, later expanding it to vicarious liability.\textsuperscript{16} This evolution was inspired by the civil tort doctrine of respondeat superior (the principle that an individual is civilly liable for the acts of his agents). Whereas the courts initially confined the application of this doctrine to cases which did not make it necessary to attribute mens rea, early in the twentieth century some American courts changed their attitude and began to expand the concept of corporate criminal liability to

\textsuperscript{10} Birmingham & Gloucester Railway Co. (1842) 3 Q.B. 223.
\textsuperscript{11} Gt. North of England Railway Co. (1846) 9 Q.B. 315.
\textsuperscript{12} Smith and Hogan, \textit{op. cit. supra} n 8, at p 171.
\textsuperscript{15} The further case law development of the criteria through which both actus reus and mens rea of natural persons acting within the company can be attributed to the corporation is discussed \textit{infra}.
mens rea offences, thus radically departing from the position held by their English counterparts.

This radical move was confirmed in the leading case before the American Supreme Court: New York Central & Hudson River Railroad Company v. US.17 Against the background of the economic boom in the United States in the early years of the twentieth century, Congress had specifically provided, in the Elkins Act, that the acts and omissions of an officer acting within the scope of his employment were considered to be those of the corporation. This clear imputation of mens rea of natural persons to the corporation was, almost enthusiastically, endorsed by the Supreme Court. The policy reasons for this were formulated by the court as follows: "many offences might go unpunished ... We see no valid objection in law and every reason in public policy why the corporation ... shall be punishable by fine because of the knowledge and intent of its agents."18 Even though, strictly speaking, the impact of this decision could have been confined to statutory offences, the lower courts rapidly expanded its scope to offences at common law.19 Thus the US courts, at the beginning of this century, already applied the concept of corporate criminal liability in a very broad way.

In Canada judicial acceptance of the concept of corporate criminal liability also showed its first signs with prosecutions for statutory omissions20 and strict or absolute liability offences. Both absolute and strict liability allow natural persons and corporations to be held criminally liable without the proof of mens rea but whereas strict liability provides the possibility for the defendant to exculpate himself by demonstrating due diligence on his part, this possibility is excluded under an absolute liability regime.21 The Canadian Supreme Court pointed out that, to hold a corporation liable for a strict or absolute liability offence, it suffices that the act has been committed by a person on behalf of and within the capacity of the corporation.22 Strict liability is still important today as some aspects of Canadian law, e.g. environmental law,23 contain strict liability offences.

18. Ibid.
21. See e.g. on this point N. Roy, "Les intérêts économiques corporatifs et la Charte cana-
In 1909 the Canadian legislature introduced notions of corporate criminal liability in the Canadian federal Criminal Code by providing that, when a corporation was found guilty, a fine could be substituted for a sentence of imprisonment.24 When, in 1941, a court fully acknowledged that a corporation could commit a crime, it referred to this provision of the Criminal Code and to the general definitions of the Code, which also contained some notions of corporate liability.25

B. Continental Jurisdictions: the Twentieth-Century Evolution

By contrast, most continental jurisdictions showed a greater reluctance in accepting the very idea of imposing criminal sanctions on corporations. As the continental economy too became more and more industrialised, courts and legislators were forced to move away from their refusal to sanction corporations other than by tort law. This evolution shaped itself in different ways. While some countries in the end would adapt the concept of corporate criminal liability as such, others still refuse to do so even today. Corporate criminality in these jurisdictions has to be sanctioned in other ways. This can be done either by holding solely natural persons criminally liable or by creating substitute (ersatz) corporate sanctioning systems which result in some kind of (pecuniary) corporate sanctioning, without attaching a "criminal" label to it.

It was only in 1934, for example, that the Belgian Cour de Cassation acknowledged that a corporate body could be the subject of a criminal law statute.26 It would not be until after the Second World War before the Cour de Cassation accepted the idea that a corporation could commit a crime. The opinion of Procureur-Général R. Hayoit de Termicourt27 is often cited to demonstrate the theoretical position in which Belgian criminal law still finds itself today28: even though a corporation can commit a...
crime, it cannot be criminally sanctioned for it. Societas delinquere, sed non puniri potest. 29

This leaves Belgian prosecutors with no alternative other than to indict corporate officers who have acted within the company if they want to impose criminal sanctions on these forms of corporate criminality. Besides the inherent unfairness one may discern in prosecuting alone individuals for acts carried out when acting within the capacity and on behalf of a corporation, this poses considerable technical legal difficulties. An important hurdle prosecutors have to take is to decide who to indict. Of course this problem can be easily solved by indicating the persons who materially carried out the act in question. As corporations are complex structures, however, where orders are passed from the top to the bottom and superiors can be said to have at least a moral responsibility for what is happening in the corporation, this answer is not completely satisfactory. Therefore, both courts and legislators have sought to circumvent this problem by punishing the superior officers of corporations. Belgian doctrine characterises this as “judicial and legislative imputation” of the acts of a corporation to a natural person, as opposed to “material imputation” (in which case the actual perpetrator is punished). 30 In some statutes, mostly in the field of economic, financial and labour law, the legislature has indicated which natural persons are to be held criminally liable for the specific offences it creates. In the main these persons are senior officers, such as members of the board of directors or the human resources manager. 31 It should be stressed, however, that this legislative technique does not result in the creation of strict liability offences. The proof of mens rea is still required; in these cases it is mostly understood that the required mens rea comes down to a lack of surveillance on the part of the senior officer. 32

29. This radical refusal to recognise corporate criminal liability is somehow “weakened” by a few exceptions. The Special Act of 29 June 1946 (Moniteur Belge, 4 July 1946) and s.59 of the Walloon Decree of 29 Oct. 1985 (Moniteur Belge, 10 Jan. 1986) with regard to the protection of surface water both provide criminal sanctions for corporations. These and other, repealed provisions are benignly considered by Belgian authors to be “legislative mistakes”. See F. Deruyck, “Sociétés delinquentes potest ... en wat dan nog? Over het ontbreken van strafrechtelijke verantwoordelijkheid van rechtspersonen” (1991) Panopticon 250–251; Delatte, op. cit. supra n.26, at p.219.


31. Often penal provisions of statutes contain an enumeration of natural persons to be punished for offences committed through the company, (e.g. “the members of the board of directors”). For an example of this “statutory imputation”, see s.17 of the Act of 12 July 1975 on the accountancy of companies (Loi du 17 juillet 1975 relative à la comptabilité et aux comptes annuels des entreprises, Moniteur Belge, 4 Sept. 1975). For other examples see J. Spruvelts, “Droit pénal des affaires. Chronique de jurisprudence” (1990) Rev. dr. comm. belge/lijdschrift voor Belgisch Handelsrecht 726.

32. C. Hennau and J. Verhaegen, Droit pénal général (1991), pp.230–231. This implies that the senior officer will always be able to defend himself by arguing that there was no lack of
When the relevant statute does not provide for such "statutory imputation", the courts in many instances have not hesitated to do this themselves. It is worthwhile to note that the use of this technique of imputation often comes down to the imposition of vicarious liability on senior officers.

This solution of holding corporate officers criminally liable for acts which have been committed within the company has for long been applied in France as well.\(^{33}\)

Some continental jurisdictions, however, developed corporate criminal liability. For example, in the Netherlands the concepts of criminal liability began to change in the 1920s and 1930s. This was especially reflected in the changing case law on criminal liability of natural persons. The courts started to impose sanctions on persons who were in a social position to order the act prohibited.\(^{34}\) This is sometimes called the "intellectual (or functional) perpetratorship" doctrine. Another important factor was that, during both the First and Second World Wars, some statutes, in limited areas, provided for corporate criminal liability. The important legislative breakthrough took place in 1950, however, when the Economic Offences Act was enacted, which in section 15 stated that those economic offences to which the Act applied could be committed by human beings as well as by corporate bodies.\(^{35}\) This provision familiarised Dutch lawyers with the notion of corporate criminal liability and thus cleared the way for the introduction of a general system of corporate liability, not restricted to economic offences. This happened in 1976, when section 51 of the Penal Code was changed so that crimes from then on could be committed by corporations as well.

surveillance on his part, or that his surveillance could not have prevented the offence from being committed (absence of causal link). See also P. Troisfontaines, "La responsabilité des dirigeants d'entreprise" (1983) Ann. Dr. Louvain 53-57. Although the statutory definitions of the persons to be held liable are exhaustive, they may be construed in an extensive manner. If e.g. the text of the statute mentions only "company director", this may be construed to cover a de facto director ("dirigeant de fait"). On the other hand, delegation of tasks by the persons mentioned in the statute to employees not so mentioned cannot exonerate them from their criminal liability. Only within the group of persons mentioned in the statute, delegation may exonerate one of the persons of his criminal liability (Dupont and Verstraeten, op. cit. supra n.30, at p.246).


34. This allowed e.g. in the case of penal provisions directed towards the "printer" (statutaries governing the press) the director of the printing company to be held liable rather than the machine operator. The notion of intellectual perpetratorship therefore implies an element of vicarious liability. See e.g. Hoge Raad, 13 Mar. 1933 (1933) Nederlandse Jurisprudentie 1385; R. A. Torringa, De rechtspersoon als dader: strafbaar leidinggeven aan rechtspersonen (1984), p.19.

France, which ever since the French Revolution had resisted the idea of corporate criminal liability, gave up its resistance by enacting the new *Code Pénal*, in 1992, which explicitly provides for the possibility of imposing criminal sanctions on corporations (section 121-2). The criticism of the lacunae that until then existed in French criminal law had grown stronger and stronger. Both in the case law of the courts and in the legislation, exceptions to this refusal were to be found. Proposals to amend the *Code* had been circulating for a long time, and in 1982 the Conseil Constitutionnel had stated in clear terms that the French Constitution did not prohibit corporations being fined.

C. Substitute Models of Corporate Sanctioning

Some legal systems developed substitute (ersatz) systems to “punish” corporations. Civil liability for criminal fines imposed on corporate officers and administrative sanctioning are two popular alternatives to corporate criminal liability.

The technique of holding a corporation civilly liable for criminal fines imposed on natural persons acting on its behalf is widespread in continental legal systems. Its origins probably date back to tax law, where the legislature wanted to guarantee a more effective collection of tax fines by making corporations civilly liable for them, given their financially more powerful position. In the Netherlands, for example, the Tax Act of 1870 created civil corporate liability for criminal fines that were imposed on

36. Although the possibility of corporate liability as such is recognized in s 121-2, its practical application is limited to those penal sections of the new *Code Pénal* that stipulate that corporations can be punished.

37. The courts used two indirect ways to introduce limited forms of corporate liability. In many instances where statutory offences refer to the legal capacity of the offender, such as “owner” or “company director”, the courts have taken these to apply to corporations as well as to natural persons (see J. Pradel, *Droit pénal général* (1992), p.505). *Ubi lex non distinguens, nec distinguere debemus.* A second “hidden” way the courts have used is to sanction corporations criminally for having committed so-called *infractions matérielles*. The status of these offences is vague and unclear. Although it is not required to prove *mens rea*, their status cannot be equated to that of strict liability offences as *mens rea* is simply presumed and can be rebutted by demonstrating justification. This is clearly the reason the courts in a few instances have felt able to impose criminal sanctions on corporations for this category of offences. See the decision of the French Cour de Cassation, 6 Mar. 1958 (1958) Recueil Dalloz 468; Levasseur, *op. cit. supra* n.5, at pp.47-48; Pradel, *idem*, pp.505-506.

38. The best-known examples in this regard are the *Ordonnances* of 5 and 30 June 1945, which set up a system of criminal sanctions on acts of collaboration with the enemy, which applied to both natural persons and corporate bodies (G. Stefani, G. Levasseur and B. Bouloc, *Droit pénal général* (1980), p.356).


employees acting within the scope of the corporation.\textsuperscript{41} This technique, which has become popular with other legislators as well,\textsuperscript{42} is undoubtedly very suitable in tax law and related matters, where the ultimate goal of the government is to recover as much money as possible. Applying the same technique to reprimand criminal activities may, however, rightly be criticised. It comes down to a form of “legal schizophrenia” by which the corporate officer is said to be criminally responsible, but the corporation eventually has to endure the sanctions. This criticism is especially valid in those countries, like Belgium,\textsuperscript{43} where one of the main arguments always put forward against corporate criminal liability is that it creates a collective punishment, contrary to the principle of individual punishment. One can also question the civil nature of this type of liability, by which the burden of a criminal sanction is placed on the corporation, but the corporation is not the defendant in the criminal procedure. The applicability of criminal procedure guarantees in non-criminal-labelled procedures will be discussed later. For all these reasons this means of sanctioning corporations cannot be called anything else but an \textit{Ersatz} for corporate criminal liability.

A second model which has been used frequently in various legal systems to punish corporations, without having recourse to the criminal law, is the imposition of administrative sanctions, notably fines. An administrative sanction can conceivably be defined as a sanction which is imposed by an administrative body, i.e. a body which is part of the executive branch of government, as opposed to courts, which are part of the judiciary. The reasons legislators choose to have sanctions imposed by administrative bodies, rather than by courts, may be diverse. Legislators may think it will make law enforcement more efficient and flexible. They may consider it is unnecessary or even undesirable to impose the stigma that goes with criminal sanctions\textsuperscript{44} or they may even think that the matters which have to be dealt with are of such a specialised nature that they can be better handled by specialised administrative bodies. The basic reason for this growth


\textsuperscript{42} In Belgium the technique of civil corporate liability for the fines imposed on corporate officers is used mainly in labour law and some branches of economic law. In France the technique is well known in customs law and in Luxembourg it is used to secure the collection of VAT fines. This form of civil liability for tax fines should, however, be sharply distinguished from purely civil liability of corporations for fiscal debts (which is not a punitive sanction but merely a compensatory measure).

\textsuperscript{43} For some examples of this biting criticism, see L. François, “Remarques sur quelques questions de droit pénal social, particulièrement sur l’imputabilité” (1968–69) Rev. Dr. Pénal 51:3; Legros (1977), \textit{op. cit. supra n.33}, at p.177. See especially J. Colaes, “De onder- neming een uitdaging voor het recht” (1979–80) Rechtskundig Weekblad nn.15–19, who gives a host of examples of applications of this technique in Belgian law.

\textsuperscript{44} Very often administrative procedures can be found in the economic sphere. The offences which are dealt with there are \textit{mala qua prohibita} rather than \textit{mala per se}. 
of administrative procedures is of course to be found in the evolution of the État-Gendarmerie to the twentieth-century welfare State, resulting in an enormous expansion of the domain of the State; although the same probably goes for the expansion of criminal sanctions.

The manner in which civil law legislators have devised administrative sanctioning systems also differs widely. Whereas some civil law countries, such as France and Belgium, have instituted administrative sanctions on an ad hoc basis whenever, in the course of drafting a statute, it seemed suitable to do so, others, notably Germany, have devised an elaborate structure of administrative sanctions.

Germany, for example, has put in place a system of so-called Ordnungswidrigkeiten, which make it possible for administrative bodies to impose administrative fines (Geldbussen) not just on natural persons but on corporations as well. These Ordnungswidrigkeiten are the successors of the decriminalised Übertretungen, which were a category of petty offences.45 This, together with the fact that in some instances the Verbandsgeldbussen may still be imposed by a criminal court,46 indicates that their seemingly non-criminal nature can be questioned. The imposition of an administrative fine under this system does not imply any kind of moral judgment stigma47 and this consideration seems to have been the most important for the German legislature in opting for administrative sanctions rather than leaving the matter under the aegis of the criminal law.48

Other countries such as Belgium do not have such a comprehensive administrative sanctioning system. Administrative sanctions are scattered through a host of statutes, with no clear common factor except that Parliament, at the time of drafting the statutes in question, thought it wise to provide for administrative sanctions. The impact that these administrative sanctions may have is easily demonstrated by a recent example. Section 22

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45. The German legal system never recognised corporate criminal liability as such apart from some exceptions, e.g. in tax, exchange control and competition law (see K. Tiedemann, “Die Begasung von Unternehmen nach dem 2. WKG” (1988) N.J.W. 1170), the Besat- zungstrafrecht (the criminal law regime imposed by the Allied Powers after the Second World War), which did provide for corporate liability, was considered to be contrary to the underlying principles of German criminal law (see the judgment of the Bundesgerichtshof of 27 Oct. 1953 (1953) N.J.W. 1838). See extensively on the historical background K. Tiede- mann, "Strafbarkeit und Bussgeldhaftung juristischer Personen", in A. Eser and J. Thoro- mundsson (Eds.), Old Ways and New Needs in Criminal Legislation (1989), pp.157–185.


47. It follows from this that no mention is made on the criminal record.

48. See on this discussion E. Göhler, "Die strafrechtliche Verantwortlichkeit juristischer Personen", in H.-H. Jescheck (Ed.), Deutsche strafrechtliche Landesreferate zum X. Interna- tionalen Kongress für Rechtsvergleichung, p.102; H.-H. Jescheck, Lehrbuch des Strafrechts, p.52. Ordnungswidrigkeiten can especially be found in the field of economic law, but are not restricted to this branch of the law. Speeding and some labour law regulations are also sanc- tioned by Geldbussen.
of the Belgian Money Laundering Act of 11 January 1993 allows for the banking supervising authority (the Commission Bancaire et Financière/Commissie voor Bank- en Financiewezen) to impose fines up to 50 million Belgian francs on banks that have violated the provisions of the Act aimed at preventing the use of banks for money-laundering purposes.\(^{49}\)

This example also sheds a light on the question as to the procedural guarantees that accompany the imposition of these and other sanctions that are labelled non-criminal but may have a strong impact. The imposition of punitive sanctions through the criminal law is accompanied by the guarantees of criminal procedure. These or similar guarantees are not always present in administrative procedures. Sometimes, as in Germany’s Ordnungswidrigkeiten system, the rights of the defence are guaranteed;\(^{50}\) but often they are not, as is the case in some of the ad hoc Belgian administrative sanctioning systems.

Article 6 of the European Convention on Human Rights defines the rights that should be guaranteed to every accused person. The applicability of these procedural rights therefore depends upon the concept of “a criminal charge”.\(^{51}\) The European Court of Human Rights has elaborated an autonomous concept of “a criminal charge” under Article 6,\(^{52}\) indepen-

\(^{49}\) Loi du 11 janvier 1993 relatif à l’utilisation du système financier aux fins du blanchiment de capitaux, Moniteur Belge, 28 Jan. 1993. S.22 not only makes it possible for the Commission Bancaire et Financière/Commissie voor Bank- en Financiewezen to sanction banks, but allows other supervising authorities similar powers over the companies and institutions they supervise.

\(^{50}\) Although the Geldbussen are imposed by administrative bodies, an appeal lies to a criminal court.

\(^{51}\) It should be pointed out that the first para. of Art 6 also applies to the determination of civil rights and obligations, in contrast with the second and third paras., which apply only when an individual has been charged with a criminal offence.

\(^{52}\) In Engel (E.C.H.R. Ser. A, No. 22, judgment of 8 June 1976), Ozturk (E.C.H.R. Ser. A, No. 73, judgment of 21 Feb. 1984) and Lutz (E.C.H.R. Ser. A, No. 123, judgment of 23 Aug. 1987) the European Court of Human Rights outlined the criteria by which the autonomous concept of a criminal charge may be applied. Three alternative tests were developed, which if fulfilled, make clear that the charge is indeed criminal in nature and that the procedural guarantees of Art 6 ECHR have to be applied. The first factor is whether or not the charge, according to the national law system, is criminal. This is clearly not the case with administrative sanctions. Accordingly, the two other tests have to be applied. They relate to the nature of the offence and the nature and degree of severity of the penalty threatened. The question when an offence by its nature belongs to the “criminal sphere” was clarified by the Court in Ozturk: “It is a rule that is directed, not towards a given group possessing a special status—in the manner, for example, of disciplinary law—but towards all citizens in their capacity as road-users; it prescribes conduct of a certain kind and makes the resulting requirement subject to a sanction that is punitive.” Thus formulated, this criterion does not allow a uniform statement with regard to the criminal nature of “administrative offences”. Whereas some administrative offences on the basis of this test clearly fall within this category, others probably do not. It may be doubted e.g. that the above-mentioned Belgian administrative sanctions on banks can be considered as being directed towards “all citizens”. The third criterion may often be decisive. Indeed the nature of the administrative sanction will often be “to punish as well to deter” (Ozturk). See in general on the question of the applicability of the procedural guarantees of Art.6 ECHR. M. Delmas-Marty, “La ‘matière pénale’ au sens de la Convention européenne des droits de l’homme, flou du droit pénal” (1987) Rev. sc. crim et
dent of the national denomination of the charge. With regard to administrative fining of corporations, it is interesting to note that the European Commission of Human Rights in *Sternuit v. France* decided that an administrative fine of 50,000 French francs imposed on a company by the French Minister of Economic and Financial Affairs, after consultation with the Competition Commission, for having violated competition rules, was criminal in nature.

A final comment on administrative corporate fining relates to European law and European competition law in particular. The fines that the European Commission can impose on companies for violating competition law can amount to dazzling sums. An almost unanimous doctrine has held that these fines are criminal in nature and that their imposition should be accompanied by the procedural guarantees of Article 6 of the European Convention on Human Rights. The explicit statement in section 15 of Regulation 17/62 that the fines concerned are of an administrative, not criminal, nature is said to be no more than *une sauce pour faire passer le poisson*. It is important to note, however, that the imposition of competition fines can be judicially reviewed by the Court of Justice in Luxembourg, which in its case law has proved itself a vigilant guardian of the protection of human rights and the rights of the defence. Last but not

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53. The reason for this autonomous concept is clear; otherwise States would be able, by classifying an offence as non-criminal, to exclude the protection provided by Art.6 of the Convention. This was expressly stated by the European Court of Human Rights in *Ozark*, *idem*, para.49.


58. Although the case law of the Court of Justice over the years has developed a comprehensive human rights protection, this protection does not totally equal that provided under the European Convention on Human Rights as construed by the European Court of Human Rights. See *in extenso* on this subject A. Clapham, *Human Rights and the European Com-
least, it may well be that the European Commission will in the future radically extend the application of these administrative fines, beyond the field of competition law. In its judgment of 27 October 1992 the Court of Justice accepted the idea of punitive sanctions outside the field of competition law. 59

From this general overview of the evolution of corporate sanctioning, the following picture emerges. Some countries have put in place a system of corporate criminal liability. Others have not, and for that reason, besides prosecuting the individuals who carried out the offence, have no other choice than to have recourse to ersonal systems, notably administrative fining procedures and civil corporate liability for criminal fines imposed on corporate officers. The eventual result of this will often be the same (inflicting a fine on the corporation), but without the certainty of the guarantees of a criminal procedure.

III. THE APPLICATION OF CORPORATE SANCTIONING SYSTEMS

Corporations being legal fictions,60 they can, notwithstanding their enormous impact in today's society, act only through individuals. Thus an essential element in every model of corporate liability is the question of attribution: which acts and which wrongful states of mind of which natural persons can be attributed (imputed) to the corporation in such a way as to make the corporation criminally liable? This question is in turn connected with other, collateral questions, such as the extent to which the natural person was acting on behalf and within the capacity of the corporation and whether those acts were intended to benefit the corporation on whose behalf he or she acted. Consideration will also be given to different types of sanctions and the possibility of cumulative prosecution of a corporation and corporate officers.

A. Which Natural Persons Can Make the Corporation Criminally Liable?

Overall, two models can be distinguished. According to the first, only the


60. L. François, "Implications du delinquere sed puniri non posset", in Mélanges offertes à Robert Legros (1985), pp.198-199.
acts of certain senior officers of a corporation can be taken into account in determining the corporation's liability. Under the opposite model, a corporation is criminally liable for the acts of every individual acting on its behalf. These are two theoretical models; in practice some merged models exist by which the acts of every corporate officer who meets certain criteria may make the corporation criminally liable.⁶¹

The difference between these two models is rooted in two fundamentally different approaches to corporate liability: liability under the first may be called direct, whereas under the second it may be called derivative, as it is derived from the employees' acts. The first model starts with the concept of the corporation's direct liability, in contrast with the second, which relies on the concept of vicarious liability, i.e., the corporation being liable not for its own acts but for those of its employees. This difference explains why under the first model only the acts of the most senior officers are taken into account: it is they who represent the "corporation" when they have acted, the corporation is deemed to have acted. The second model, on the other hand, does not need to limit itself in such a way as it is based on vicarious liability.⁶²

The first model is to be found in France's new Code Pénal (1992), Germany's system of Ordnungswidrigkeiten, and the corporate criminal liability of England and Wales and of Canada. The Dutch criminal law and US federal criminal law, on the other hand, operate a concept of corporate criminal liability which falls under the second model. It may be pointed out that Community competition law also operates according to the second model.

Under section 121-2 of the new French Code, corporations can be held criminally liable only when one of the legal representatives or organs of the corporation has acted. It is thus the most restrictive model of the jurisdictions researched.

Section 30 of the Ordnungswidrigkeitengesetz (OWiG—Administrative Offences Act) limits the class of natural persons whose acts may make the corporation liable. Liability is limited to those instances in which

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⁶¹ Wells, op. cit. supra n.9, at pp 94–95, recognises a third model which accepts corporate criminal liability whenever the procedures and practices of a corporation have failed to prevent a criminal offence from taking place. It is submitted that this "third model" is a variant of the second model which is based on the concept of vicarious liability.


⁶³ From a certain point of view, it may be said that both models are based on the notion of vicarious liability as, under both, it is the shareholders who will ultimately have to bear the financial consequences of a conviction of the corporation.

⁶⁴ Although a corporation can be sanctioned only administratively, by a Verbandsgeldbuße, the acts committed by corporate officers which make the corporation liable may be criminal offences or Ordnungswidrigkeiten.
the corporation's legal representatives or directors have acted. This limitation is strongly criticised by German commentators.65

The limited field of application is, however, extended in two ways. First, the courts have not considered it necessary to name the persons who have acted provided it is clear that someone in the class described in section 30 of the OWiG has.66 Second, by virtue of section 130 of the OWiG a lack of surveillance (Aufsichtspflichtverletzung) is itself considered to be an Ordnungswidrigkeit. When an employee outside the limited scope of section 30 commits an act which could have been prevented by a senior officer within the section 30 class, this lack of surveillance may in turn give rise to a Verbandsgeldbusse. The lack of surveillance may spring from flaws in the corporation's organisation (e.g. that no one within the corporation was responsible for carrying out legal duties of the company or that there was no clear division of powers within the corporation).67 According to some commentators, this extension is narrower than it seems: the complexities of a modern company make it very difficult to demonstrate that better surveillance on the part of the senior officers mentioned in section 30 could have prevented the offence or Ordnungswidrigkeit from taking place.68 Closely scrutinised, this technique of punishing the corporation because of a lack of surveillance on the part of the most senior officers comes down to a disguised form of vicarious liability.

As was shown earlier, the English and Welsh law of corporate criminal liability has developed from a system of vicarious liability to a system of direct, primary liability of the corporation. In 1944 the courts departed from the vicarious liability approach by imposing corporate liability for mens rea offences. The courts were inspired by the alter ego doctrine of the civil law of tort, by which acts of the most senior officers of the corporation were identified as being acts of the corporation itself.69 The 1944 decisions imported this theory into criminal law. It remained rather unclear, however, which natural persons could make the corporation criminally liable.70 This was said to depend on "the nature of the charge, the position of the officer or agent and other relevant facts and the circumstances of the

66. This is a non-negligible advantage: the complex economy makes it often very difficult to indicate one specific person who is responsible for a certain act. K. Tiedemann, "Vorbe- merkung vor §38, 39", in U. Immenga and J.-E. Mestmächer (Eds.), Gesetz gegen Wettbewerbsbeschränkungen (1992), No.53, p.1591.
70. Welsh, op. cit. supra n.14, at pp.356 et seq.
case." Not until 30 years later, in 
Tesco Supermarkets Ltd v. Natrass, were the problems clarified. Tesco had been charged with an offence under the Trade Descriptions Act 1968. It was clear from the facts that the local manager was responsible for the alleged facts and that Tesco had done everything possible to train its local managers. The House of Lords held that a local manager could not be equated with the corporation so that Tesco avoided any criminal liability. Reference was made to a dictum of Lord Denning in a civil case in which he compared a corporation to a human body; while some individuals working in the corporation represented the brains of the corporation, others represented the hands. Only the brains represent the company.

Whether an officer can be said to represent the corporation depends on the controlling officer test: does the person control the corporation as the brains control the human body? According to Lord Reid, this is a question of law, once the facts have been proved. The category usually encompasses the members of the board of directors, the managing director, and some other persons responsible for the general management of the corporation. If these persons delegate some parts of their management functions to someone else in the corporation, that person would be a controlling officer as well, provided he was acting independently of any instructions. The determining factor in the controlling officer test thus seems to be whether the senior officer could act independently or not.

Although still narrow-based, the English and Welsh concept is somewhat broader than the French or German one, in that it is not based on the individual's title or position, but asks if the person is part of the directing mind and will of the corporation, regardless of his or her formal status.

As is the case in Germany, this limited model of corporate liability meets with much resistance. First, it does not correspond with today's economic realities. Corporations are highly complex structures with collective decision-making processes, in which many persons other than the most senior officers are involved. More important, it allows corporations to evade corporate liability by structuring themselves in such a way that almost no decisions are taken by controlling officers. The validity of this

75. [1972] A.C. 153, 171 (per Lord Reid).
criticism became painfully clear after the Zeebrugge disaster: as there was no obligation to allocate responsibilities within the company, it was impossible for the prosecution to prove which controlling officer was responsible for carrying out certain duties or for preventing certain acts.\textsuperscript{80} A final disadvantage of this model lies in the fact that it is impossible to aggregate the acts or the \textit{mens rea} of two or more controlling officers.\textsuperscript{81}

The decisions of the Canadian courts regarding the criminal liability of corporations have developed in a way very analogous to the English case law and indeed in some instances based on it. As in England and Wales, Canadian courts have made use of the \textit{alter ego} doctrine to attribute \textit{mens rea} offences to corporations.\textsuperscript{82} Only the acts of the directing mind of the company could be equated to the acts of the company itself. This doctrine, applied on many occasions before, was clarified in a 1985 case before the Canadian Supreme Court: \textit{Canadian Dredge & Dock Co. v. R.}.\textsuperscript{83} Judge Estey stressed that not only the board of directors could be seen as the directing mind of a company but also the managing director or any other person to whom authority has been delegated by the board.\textsuperscript{84} In 1962 the Court of Appeal of Quebec had established the criminal liability of a company on the basis that one of its foremen had committed a fraud, by taking into consideration the fact that he exercised control over the department where the fraud took place.\textsuperscript{85}

The history of corporate criminal liability in the Netherlands clearly shows that its system belongs to the second model. On the question as to whose acts and wrongful state of mind could be relied on in determining the corporation’s criminal liability, section 15 of the Economic Offences Act stipulated that the person should have acted “within the scope of the corporation”.\textsuperscript{86} And even though this clarification was not retained in the wording of section 51 of the Penal Code, its legislative history results in it still holding true.\textsuperscript{87}

\begin{thebibliography}{99}
\bibitem{83} [1985] 1 R.C.S.C. 662.
\bibitem{84} \textit{Idem,} p.693.
\bibitem{86} See Hoge Raad, 27 Feb. 1951 (1951) Nederlandse Jurisprudentie 474. Under the wartime legislation, it had also been decided that the acts of an employee who did not follow his superior’s instructions could nevertheless be attributed to the corporation.
\bibitem{87} \textit{Memorie van Toelichting, Handelingen}, 1975-76, 13655.
\end{thebibliography}
There is one major difference though; under the Economic Offences Act, most offences involved failures to carry out specific duties (omissions). Now that corporate liability has been extended to all crimes this no longer applies. The problem was eventually resolved by turning to the criteria developed by the courts with regard to the so-called “intellectual perpetration”, which as we said earlier, implies a form of vicarious liability. In 1954, in the “iron wire” case,88 the Dutch Hoge Raad developed a test to decide whether certain acts of employees can make the employer criminally liable. To do so, two criteria must be fulfilled. First, it must have been within the corporation’s power to determine whether the employee should act in this (wrongful) way. Second, the employee’s acts must belong to a category of acts normally “accepted” by the company and thus able to be seen as part of the normal course of its business.89 In the two “fishery” cases,90 the Hoge Raad clearly established that these criteria applied to corporate liability as well.91

If the case law development of these two criteria has not yet made clear their vicarious liability origin, an analysis of their practical consequences most certainly will. As corporations are hierarchically structured and thus have the power to prevent employees from committing certain acts, the first criterion will almost always be fulfilled. It is sufficient the corporation has the power, it is not required that it has effectively used it. The second criterion has been applied by the courts in a rather broad way; in the Rijksuniversiteit Groningen case, it was accepted that decisions not only of top-level organs but also of middle-level ones may make the corporation criminally liable.92 It follows from this that even the lowest-ranking employee can make a corporation criminally liable if the two criteria are fulfilled. In addition, it has been accepted that the mens rea of different persons acting within the scope of the corporation can be aggregated so that the required wrongful state of mind can be attributed to the corpor-

88. Hoge Raad, 24 Feb. 1954 (1954) Nederlandse Jurisprudentie 378. The defendant was the owner of an unincorporated company. He was charged with violating certain exchange control rules, because one of his employees had filed a false export return. See on this case Torringa, op. cit. supra n.34, at p.23.
ation, in instances where one individual alone would not possess the required mens rea. In the Hospital case a hospital was convicted of manslaughter after a patient had died during surgery due to the use of outdated anaesthetic equipment. As well as being the first instance in which a corporation was convicted of manslaughter in the Netherlands, the case is interesting because the conviction resulted from an aggregation of mens rea of different individuals involved (not only those who performed the surgery but also the hospital management, which was responsible for the presence of the outdated equipment). In this way the court also stressed the fact that the management could and should have prevented the use of such unsafe equipment.

Since the concept of corporate criminal liability in American federal criminal law is derived from the civil theory of respondeat superior, its roots clearly go back to vicarious liability. This implies that not only acts of the management but also those of subordinate employees can impose criminal liability on the corporation. The breadth of the American concept is expanded by other factors. It is not mandatory that the same individual provide the actus reus and mens rea. In the same way as in the Netherlands, mens rea can be aggregated. It is not even required that the management knew about the illegal activities in the corporation.

The American federal law concept of corporate criminal liability thus contrasts with many of the concepts that are known under State law and which more resemble the first model. One of the major explanations for this difference is the influence of the Model Penal Code. On the question of corporate liability, the Code has especially been inspired by the English alter ego doctrine. The Code stipulates that corporations are to be held criminally liable only if one of the top managers of the corporation has acted. By way of exception though, the Code accepts the theory of respondeat superior in those instances in which the legislature clearly intended to punish corporations.

B. Capacity of the Acting Individuals

It goes without saying that for an individual's actus reus and mens rea to be

95. Coffee, op. cit. supra n.16, at p.1856.
96. US v. T.I.M.E.-D.C. 381 F.Supp. 730; see also Inland Freight Lines v. US 191 F.2d 313 (10th Cir. 1951). See also Walt and Laufer, op. cit. supra n.62, at p.266.
97. US v. George F. Fish, Inc. 154 F.2d 798 (2nd Cir. 1946); Standard Oil Co. v. US 307 F.2d 120 (5th Cir. 1962).
imputed to a corporation, that individual needs to have acted within the scope of the corporation. Acts of an employee in a private capacity can never be so attributed. To what extent, however, should the individual have acted not only within the scope of the corporation, but also within the powers delegated to him by it? Two elements may be distinguished in this question. First, did the acting individual have the authority, the capacity to act and, second, did his acts comply with the internal regulations of the corporation? The two elements are closely linked and the answer to the first will often imply the answer to the second and vice versa. *Grosso modo*, two diverging answers are possible. One answer, influenced by legal formalism, takes into account only acts that are strictly legally binding upon the corporation: i.e. acts by individuals competent to act and in accordance with company policies. The opposite, realistic view asks which acts, as a matter of corporate reality, were *de facto* mandated by the corporation. The jurisdictions that follow the vicarious liability model tend to adhere to the realistic view, whereas those that operate the narrower concept of corporate criminal liability also take a more limited view in this respect. The Canadian criminal law system seems to take a position in between.

According to German law, the acts of legal representatives and company directors can be attributed to the corporation only if they have acted in these capacities, i.e. *qualitate qua.*

The same condition is imposed by English and Welsh courts.

Under Canadian criminal law, it is also held that the acts of a person representing the directing mind of the company can be imputed to the company only when the person acted within the limits of the powers granted to him. This rule is, however, construed broadly so as not to restrain the very concept of corporate criminal liability. Precisely because of the restrictive character of the Canadian identification doctrine, a company cannot escape its criminal liability by invoking a breach of internal rules: the persons representing the directing mind of the company are deemed to be the company and they are thereby excluded from invoking a breach of internal rules created by the company itself.

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99. H. Demuth and T. Schneider, "Die besondere Bedeutung der Gesetzes über Ordnungswidrigkeiten für Betrieb und Unternehmen" (1970) Betriebsberater 651. The acts of *de facto* company directors can be attributed to the corporation only if there was a clear, albeit implicit designation by the company of this "directorship" (Tiedemann, *op. cit. supra* n.65, at p.1845).


101. See *Canadian Dredge*, *supra* n.83, at p.684; *St Lawrence Corp.*, *supra* n.85; Côté-Harper, Manganas and Turgeon, *op. cit. supra* n.21, at p.292.

102. As the persons representing the directing mind of the company are in a position of authority within the company they cannot avail themselves of a breach of internal rules. See Côté-Harper, Manganas and Turgeon, *idem*, p.293.
American federal criminal law, on the other hand, does not impose this requirement. Individuals can make a corporation criminally liable even if they have violated the limits of powers attributed to them by the corporation. It suffices if the employees are acting with apparent authority. Corporate criminal liability can be imposed even if the conduct violates company instructions forbidding the act.

The same goes for the Netherlands, where the criterion operated by the courts not only refers to the official company policies but encompasses unofficial methods of doing business as well. Few companies have an official policy to disregard safety procedures, yet this may be allowed as a matter of routine.

The question has not been answered in the 1992 French Code Pénal and consequently will have to be decided by the courts, just as the question whether de facto company directors (dirigeants de fait) can render a corporation criminally liable.

C. The Benefit Criterion

Should the relevant conduct have benefited, or have been intended to benefit, the corporation? Or may even the acts of an employee who defrauds the corporation he works for be attributed to it?

Section 121–2 of the 1992 French Code Pénal requires that the relevant conduct to have been carried out on behalf ("pour le compte") of the corporation. This may encompass any kind of benefit to the corporation.

German law requires that the offence be capable of being qualified as Verbandsunrecht, which means that the wrongful act (either a criminal offence or an Ordnungswidrigkeit) has to be linked with the corporation's activities. Section 30 of the OWiG defines two alternative criteria in this respect: the conduct must either have violated certain legal duties of the

103. See e.g. US v. Bank of New England, N.A. 821 F.2d 844 (1st Cir. 1987).
104. See e.g. United States v. Beusch 596 F.2d 871 (9th Cir. 1979). For further examples, see Walt and Lauter, op. cit. supra n.62, at p.266.
105. Namely that the conduct should have been "accepted" by the corporation. It may be noted that under the wartime legislation, corporate criminal liability was already accepted in the case of an employee who had acted contrary to the company's directions. See the so-called V&D case: Hoge Raad, 27 Jan. 1948 (1948) Nederlands Jurisprudentie 197.
107. Under the above-mentioned Ordonnance of 5 May 1945, the requirements with regard to the persons that could provide actus reus were similar to those in the new Code Pénal. The courts then accepted that de facto company directors could provide actus reus as well (Paris, 21 Dec. 1949 (1950) Recueil Dalloz 434, comment by Donnedieu de Vabres). This solution is defended by Delmas-Marty, op. cit. supra n.40, at pp.305–306. Whether the case law will now evolve in the same way remains to be seen.
corporation (the so-called betriebsbezogene Pflichten)\textsuperscript{108} or have resulted (or been intended to result) in financial benefit to the company.\textsuperscript{109}

At the time Section 51 of the Dutch Penal Code was drafted it was made explicitly clear that it contained no requirement that the corporation obtain a pecuniary advantage through the offence.\textsuperscript{110}

In \textit{DPP v. Kent and Sussex Contractors Ltd}\textsuperscript{111} it was held that notwithstanding that the corporation itself has been defrauded, it is still criminally liable if the person who committed the offence was acting within the scope of his office. This English case has been the subject of biting criticism.\textsuperscript{112}

The Canadian position on this point differs significantly from English law. The acts of a representative can be attributed to the company only if they have, at least in part, benefited \textit{and} were intended to benefit the company (possibly combined with an intent to obtain personal enrichment).\textsuperscript{113}

American federal criminal law requires the persons acting to have intended to benefit the corporation.\textsuperscript{114} If they intended to benefit themselves, their acts cannot be attributed to the corporation,\textsuperscript{115} save for strict liability offences, however, where the corporation will be criminally liable.\textsuperscript{116}

\section*{D. Sanctioning Corporations}

Certain traditional criminal sanctions (e.g. imprisonment) are by their nature not applicable to corporations, while others (e.g. winding up) are specifically targeted at corporate criminality. Special attention should be paid to sanctions that result in the deprivation of the proceeds of crime, the ill-gotten gains. As corporate criminality often involves crimes without a victim, it is material that criminal law itself provides sufficient means

\textsuperscript{108} E.g. legal duties as employer.

\textsuperscript{109} This second criterion begs the question of the causal link between the relevant conduct and the corporation’s benefit. This question is often solved under German law by taking recourse to the Schutzzweck der Norm theory. This means that a causal link can be retained only if the rule violated was intended to prevent the kind of benefit which eventually occurred. See on this point Deruyck, \textit{op. cit. supra} n.46, at pp.1262–1263.

\textsuperscript{110} \textit{Supra} n.87, at p.14.

\textsuperscript{111} [1944] K.B. 146.


\textsuperscript{113} \textit{Canadian Dredge, supra} n.83, at pp.712–713; Côté-Harper, Manganas and Turgeon, \textit{op. cit. supra} n.21, at p.294.

\textsuperscript{114} \textit{Old Monastery Co. v. US} 147 F.2d 905, 908 (4th Cir. 1944); Coffee, \textit{op. cit. supra} n.16, at p.1856.

\textsuperscript{115} \textit{Standard Oil Company of Texas v. US} 307 F.2d 120, 128 (5th Cir. 1962). Employees of Standard Oil had defrauded their own company for the benefit of a competitor (by whom they had been bribed). To hold Standard Oil criminally liable would have been contrary to the very idea of \textit{respondeat superior}.

to deprive the offenders of the fruits of their crimes. Civil compensatory suits which, at least in some legal systems, are available to victims of crime, are of no avail here: in most cases of corporate criminality there are no identifiable victims. Every legal system discussed here provides in some way for this possibility.

Under the regime of the 1992 French Code Pénal, in every case the penal provisions have to be checked to ascertain the sanctions applicable, but the general part of the Code lists in detail all the possible sanctions that can be applied to corporations (sections 131–37 to 131–49 and 132–12 to 132–15). Corporations can be fined up to five times the maximum for individual offenders. For repeated offences the maximum is ten times that for individuals. Besides fines, numerous other types of sanction are possible: dissolution of the corporation, disqualification from carrying on specific economic activities, closing down plants that have been used to commit the offence charged, publication of the judgment. Corporations can even be temporarily placed under judicial supervision.

Section 51 of the Dutch Penal Code provides succinctly that any criminal sanction may be applied to a corporation save for those that, by their nature, cannot be.

Under German law, the maximum fine (Verbandsgeldbusse) varies according to whether the conduct attributed to the corporation was a criminal offence (Straftat) or an administrative one (Ordnungswidrigkeit). In the case of deliberate criminal offences the maximum is DM 1 million, for non-intentional offences DM 500,000. For Ordnungswidrigkeiten the maximum is laid down by the provision defining the Ordnungswidrigkeit committed. By section 30 of the OWiG (juncto section 17(4)), however, these amounts should be increased if they are less than the ill-gotten gains. Süddeutsche Zementindustrie seems to hold the record in this respect: on a charge of price fixing it has been fined DM 224 million.

Section 718 of the Canadian Criminal Code lays down the fines to be applied to corporate offenders. In the case of an indictable offence, the amount of the fine is left to the discretion of the court (the same goes for natural persons). Where the prosecution relates to a summary offence, the maximum is $25,000. These general rules do not derogate from any other sanctions provided for in particular legislation. It is generally accepted that the amount of the fine should be such as to encompass the proceeds from crime and needs to have a deterrent effect. To hold otherwise would create a de facto incentive for crime. Section 720 of the Criminal Code

117. See on this point Deruyck, op. cit. supra n.46, at pp.1263–1264.
creates a special enforcement procedure for fines on corporations. When the corporation does not immediately pay the fine, the prosecutor may, by filing the conviction, have the amount of the fine and costs entered as a judgment in the superior court of the province in which the trial was held. The criminal judgment then becomes enforceable against the corporation in the same manner as a civil judgment.

In England and Wales fines are the most common sanction. It should be noted, however, that the amount of the fine is often not high enough to have a real deterrent effect on corporations.\textsuperscript{120} Confiscation of the proceeds of crime and withdrawal of licences are also possible.\textsuperscript{121}

In the United States as well, the criticism is often heard that fines are far too low to have any deterrent effect on corporations. It may be, however, that the stigma that accompanies a criminal conviction is an important deterrent factor to corporations, regardless of the amount they can be fined.\textsuperscript{122}

Apart from fines, an alternative sentencing system has been developed in the case law of US courts, aimed not so much at punishing (i.e. inflicting harm on) corporations as at restructuring them. The retributive and deterrent aspects of a fine are thus replaced by a more positive, rehabilitative sanctioning system. This alternative approach is especially warranted in that corporate crime is often structural crime, i.e. crime which finds its origin in a structural malfunctioning of the corporation.\textsuperscript{123} This "corporate probation" can take different forms.\textsuperscript{124} Certain control procedures or reporting systems can be ordered or the company may be required to establish safety committees (or appoint safety officers). The court may also appoint a consultant to investigate the situation that gave rise to the offence and recommend appropriate (restructuring) measures. In \textit{US v. Atlantic Richfield Co.}, for example, the court ordered the company to set up a programme to stop the oil pollution, within 45 days.\textsuperscript{125}

\textbf{E. Cumulative Prosecution of Corporate and Individual Offenders}

One of the arguments most frequently put forward against corporate criminal liability is that it provides a free ride to individuals acting within

\textsuperscript{120} Wells, \textit{op. cit. supra} n.79, at pp.794–795.

\textsuperscript{121} Williams, \textit{op. cit. supra} n.112, at p.950.

\textsuperscript{122} E.g. in the much publicised Pinto case (\textit{State v. Ford Motor Co. 47 USLW 2178}). Ford could be fined a maximum of $30,000 for reckless corporate homicide because of the dangerous construction of the Pinto automobile. This did not prevent Ford from spending $3 million on their defence, trying to prevent any damage to their corporate image (\textit{Ottley, op. cit. supra} n.98, at p.158).


\textsuperscript{124} Idem, pp.353–371. The term "probation" means that for a certain period of time the corporate offender is required to comply with certain conditions laid down by the court.

\textsuperscript{125} \textit{US v. Atlantic Richfield Co.} 465 F.2d 58.
the capacity of a corporation as it will always be the corporation that would be punished. This assertion does not hold water, however, as most systems that recognise corporate criminal liability, or a substitute model, provide for both the corporation and the relevant individuals to be prosecuted. Section 121-2(3) of the 1992 French Code Pénal and section 51 of the Dutch Penal Code, for example, both expressly provide for this. 126 In England and Wales the possible sanctioning of company directors acknowledged by the courts, is often confirmed by provisions to be found in statutes that create offences likely to be committed by corporations. 127 Here the criticism is heard that too often prosecutors indict only natural persons and leave the corporation untouched. 128 Again the Canadian position is almost identical to the English one: natural persons can be prosecuted alone, or together with the company, for offences which took place within the company. Several statutes expressly provide for the liability of company directors for offences committed by corporations. 129 Also in the United States, the possibility of sanctioning company directors is generally accepted. 130

As described earlier, Belgian law functions the other way round. As corporate criminal liability does not exist, only individuals can be criminally sanctioned. This may be combined, however, with the application of a substitute model of corporate sanctioning.

IV. CONCLUSIONS

The fact that an important part of crime nowadays takes place through corporations, compels every legal order to take action. The only effective way to combat corporate crime is to direct punitive sanctions against corporations. To prosecute individuals only is not simply unfair, it is inefficient too. Even if the prosecution of a corporate officer results in a conviction, it will seldom affect the way the corporation (not to mention other corporations) will behave itself in the future; structural flaws in the

126. For the Netherlands, see the study by J. Vervaete, “Rechtshandhaving van het milieurecht en strafrechtelijke aansprakelijkheid van de bedrijfssfeer” (1992) Rev. dr. comm. belge/Tijdschrift voor Belgisch Handelsrecht 648-658, on the criminal liability of company directors for environmental offences.

127. See e.g. s.18 of the Theft Act 1968: “Where an offence ... committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.” If, on the contrary, the crime were carried out by a subordinate employee, only the employee would be liable to criminal sanctions. See Smith and Hogan, op. cit. supra n.8, at p.175.


129. See e.g. s.49 of the Immigration Act 1970. See on this point Fortin and Viau, op. cit. supra n.20, at p.386.

functioning of an organisation will not cease to exist because one of its members has been brought to trial. Even the jurisdictions that do not accept the concept of corporate criminal liability as such have come to realise this and try to target the corporation by introducing ersonal models of corporate liability. Efficient though these substitute models may sometimes be, often they do not provide the same procedural guarantees as criminal procedure. It follows from this that the best way to impose punitive sanctions on corporations is through a model of corporate criminal liability. This conclusion is also induced by the fact that the reasons to deny corporate criminal liability are oblique. The imputation of a mental element to a corporation is also implied in most tort law systems based on a fault element. The ultra vires rule (known in continental jurisdictions as the specialty rule) is derived from civil law and therefore does not have to impede the imposition of criminal sanctions. It will often be that a corporation commits an offence within the sphere of its normal activities (e.g. the Zeebrugge disaster). In addition, the imposition of a criminal fine is no more or less nonsensical than the award of civil damages. A last important reason to opt for criminal rather than administrative (or other seemingly non-criminal) sanctions lies in the fact that, on an international scale, mutual legal assistance is often confined to criminal matters.131

The application of the respective corporate sanctioning systems still differs considerably. It was shown that, by and large, two models may be discerned: a restrictive model based on direct liability, and a wide model based on vicarious liability, of the corporation. The wider model is more appropriate to combat corporate criminality effectively and for that reason preferable. It also better reflects the social responsibility of corporations in today’s society. The Dutch system is an excellent example of this: corporations are held criminally liable if and when they accept the conduct of the employee acting (and had the power to prevent it). Thus their legal criminal liability is equal to their social responsibility.

It may be questioned whether the sanctions provided for are always capable of deterring corporate offenders. In each case, depriving them of the proceeds of crime has to be permitted and consistently applied. Especially laudable are the American efforts to elaborate a system of corporate probation, because this type of sanction, more than any other, may result in structural adaptations in the corporation.

It results from this general but far too short overview that many differences still subsist with regard to the sanctioning of corporations. Even within the group of countries that recognise corporate criminal liability, the chance of punishment is considerably less in some countries than in others. It is material to realise that in the future large-scale white-collar

131. Although this problem can of course also be coped with by extending mutual assistance to administrative offences, an evolution already shaping itself.
operations, such as EC fraud, money laundering or illegal arms sales, will increasingly be carried out via corporations. The differences mentioned above may thus result in “a Delaware effect”\textsuperscript{132} by which one country in Europe may attract a host of corporations whose activities would not be tolerated elsewhere. That country will be the one which does not have a comprehensive corporate sanctioning system.

\textsuperscript{132} The “Delaware effect” refers to the attraction the American State Delaware holds for companies because of its very favourable company law regime. See H. Sevenster, “Criminal Law and EC Law” (1992) C.M.L. 59–60.