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# Corporate Criminal Liability for Intracorporate Conspiracy

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# Corporate Criminal Liability for Intracorporate Conspiracy

## INTRODUCTION

At one time, it was well established that a corporation could not be convicted of a crime.<sup>1</sup> One of the primary reasons for precluding liability was the theoretical difficulty of attributing *mens rea* to a fictional entity.<sup>2</sup> However, under present law, corporations can be held liable for most crimes,<sup>3</sup> including those requiring a specific intent.<sup>4</sup>

In the criminal conspiracy area,<sup>5</sup> corporate liability is complicated by the requirement that two or more persons must be in-

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<sup>1</sup> Anonymous, 88 Eng. Rep. 1518 (K.B. 1701) (Holt, C.J.); 2 W BLACKSTONE, COMMENTARIES 476, 476-77 (1803). For a discussion of the reasons why corporations were historically held immune from criminal liability, see Edgerton, *Corporate Criminal Responsibility*, YALE L.J. 827, 828-31 (1927).

<sup>2</sup> See *Commonwealth v. Illinois Cent. R.R.*, 153 S.W. 459, 460-61 (Ky. 1913); *Pearks, Gunston & Tee, Ltd v. Ward*, [1902] K.B. 91 (1901). See generally Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 38 (1957) (noting the "difficulty of reconciling the imposition of psycho-ethical legal guilt, blameworthiness, upon a brainless, soulless entity with the mandate of our law that all criminal liability must rest on personal conscious wrongdoing").

<sup>3</sup> In *New York Cent. & H.R. R.R. v. United States*, 212 U.S. 481, 494 (1909), the Supreme Court stated that "there are some crimes which in their nature cannot be committed by corporations." However, since that time, as Mueller states, "the law has rapidly moved to the stand that a corporation can be guilty of most, if not all, crimes." Mueller, *supra* note 2, at 22. See, e.g., *State v. Lehigh Valley R.*, 103 A. 685 (N.J. 1917) (corporation can be held guilty of manslaughter). For an in-depth discussion of corporate crime, see generally Coffee, *Beyond the Shut-Eyed Sentry*, 63 VA. L. REV. 1099 (1977).

<sup>4</sup> See *Boise Dodge, Inc. v. United States*, 406 F.2d 771, 772 (9th Cir. 1969) (corporation can be convicted of a crime involving knowledge and willfulness); *United States v. MacAndrews & Forbes Co.*, 149 F. 823, 835 (C.C. S.D.N.Y. 1906) ("[T]hese defendant corporations claim that since in conspiracy evil intent is of the essence of the crime, inherent impossibility renders the accusation futile. I think this is but the remnant of a theory always fanciful and in process of abandonment"). See also the authorities cited in Edgerton, *supra* note 1, at 828 n.11; Miller, *Corporate Criminal Liability: A Principle Extended to Its Limits*, 38 FED. B.J. 49, 52 (1979) ("The clear weight of authority has upheld corporate liability for specific intent crimes").

<sup>5</sup> A general discussion of the crime of conspiracy is beyond the scope of this Comment. See generally Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1958-59).

volved in the criminal activity.<sup>6</sup> When the offense has been committed solely by the agents<sup>7</sup> of a single corporation—intracorporate conspiracy—the courts have had difficulty in determining whether the requisite number of actors is satisfied. If the corporation and its agents are considered as a single entity, then a conspiracy cannot be shown.<sup>8</sup> To avoid this interpretation, the Eleventh Circuit recently held in *United States v. Hartley*<sup>9</sup> that it is possible for a corporation to conspire with its own employees.<sup>10</sup> In reaching this decision, the court analyzed the intracorporate conspiracy question improperly.

This Comment will focus on why it is incorrect to view the corporate entity as a conspirator. Initially, the standards governing corporate criminal liability will be discussed. The limited case law directly dealing with intracorporate conspiracy under the federal criminal conspiracy statute<sup>11</sup> will then be examined. In conclusion, a two-stage method for analyzing the issue of corporate criminal liability for acts of its agents that violate the federal conspiracy law<sup>12</sup> will be proposed.

<sup>6</sup> See *Morrison v. California*, 291 U.S. 82, 92 (1934); *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); 18 U.S.C. § 371 (1976).

<sup>7</sup> The term "agent" is defined in the Model Penal Code as "any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association." MODEL PENAL CODE § 2.07(4)(b) (Proposed Official Draft 1962). This Comment uses the term "agent" in accordance with the Model Penal Code definition.

<sup>8</sup> Under antitrust law, the corporation and its agents are generally treated as composing a single legal entity so that the corporation is not subject to liability for the acts of its agents. *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d at 914. See note 68 *infra* for other antitrust cases.

<sup>9</sup> 678 F.2d 961 (11th Cir. 1982).

<sup>10</sup> *Id.* at 972.

<sup>11</sup> The general federal conspiracy statute is 18 U.S.C. § 371 (1976). It provides: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Title 18 also includes 26 other conspiracy statutes.

<sup>12</sup> This Comment is limited to a study of intracorporate conspiracy under the federal law.

## I. THE RESPONDEAT SUPERIOR STANDARD

Respondeat superior is the standard for imposing corporate criminal liability under federal common law.<sup>13</sup> Under this doctrine, the acts and intent of the agents of the corporation will be imputed to the corporation if the agent was acting on behalf of the corporation within the scope of his employment.<sup>14</sup>

### A. *Development of the Respondeat Superior Standard*

The leading case first establishing respondeat superior as the basis of corporate criminal liability is *New York Central & Hudson River Railroad v. United States*.<sup>15</sup> The issue before the United States Supreme Court was the constitutionality of the Elkins Act,<sup>16</sup> which provided that acts committed by the agents of a corporate common carrier that violated the Interstate Commerce Act would be imputed to the corporation. The corporation argued that the law was unconstitutional because Congress lacked the power to impute criminal offenses to the corporation, or to subject a corporation to criminal prosecution.<sup>17</sup>

In rejecting the corporation's contentions, the Court first noted that it was well settled law that a corporation would be held responsible for the acts of its agents in tort actions, stating: "In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting

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<sup>13</sup> See *New York Cent. & H.R. R.R. v. United States*, 212 U.S. 481, 493-94 (1909); *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1158 (5th Cir. 1977). See generally *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1978-79) [hereinafter cited as *Developments—Corporate Crime*].

<sup>14</sup> *New York Cent. & H.R. R.R. v. United States*, 212 U.S. at 494-95; *Developments—Corporate Crime*, *supra* note 13, at 1247.

<sup>15</sup> 212 U.S. at 481.

<sup>16</sup> 49 U.S.C. § 41(1) (1976), *repealed by* Pub. L. 95-473 § 4(b), (c), 92 Stat. 1466, 1466-70 (1978).

<sup>17</sup> 212 U.S. at 492. The corporation also argued that the statute operated to deprive the innocent stockholders of their property without due process of law. In response to this contention, the Court stated that there was "no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable." *Id.* at 495.

within the scope of his employment. <sup>18</sup> The Court asserted that in applying the civil liability standards, it was only going "a step farther" to hold that the acts of an agent can be imputed to the corporation and criminal penalties imposed on the corporation.<sup>19</sup>

### B. *Application of Respondeat Superior*

*New York Central Railroad* and subsequent cases demonstrate that corporate criminal liability is founded on agency principles derived from tort law <sup>20</sup> Under respondeat superior, the acts and intent of the corporate agents are imputed to the corporation.<sup>21</sup> Consequently, corporate liability is necessarily vicarious.<sup>22</sup> In addition, the agents who committed the offense remain personally liable.<sup>23</sup> However, federal courts do not require consistency in verdicts, and the corporation can be convicted even though the individual defendants are acquitted.<sup>24</sup>

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<sup>18</sup> *Id.* at 493.

<sup>19</sup> *Id.* at 494.

<sup>20</sup> See *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) (corporate liability is "a part of the law of respondeat superior and accepted as [an] established [principle] in civil tort situations"); *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir.) ("the Supreme Court has long ago determined that the corporation may be held criminally liable for the acts of an agent within the scope of his employment"), *cert. denied*, 328 U.S. 869 (1946); *Egan v. United States*, 137 F.2d 369, 379 (8th Cir.) (noting that respondeat superior is the test of corporate liability for the acts of its agents "whether such acts be criminal or tortious"), *cert. denied*, 320 U.S. 788 (1943). See also *Developments—Corporate Crime*, *supra* note 13, at 1247 (respondeat superior is based on "agency principles of tort law"). For a discussion of the respondeat superior tort principles, see RESTATEMENT (SECOND) OF AGENCY § 219(1) comment a (1958); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 70, at 460-67 (4th ed. 1971).

<sup>21</sup> See *Miller*, *supra* note 4, at 52 ("The criminal liability of corporations is theoretically based on imputing the acts and intent of corporate employees and agents to the entity itself").

<sup>22</sup> W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 33, at 231 (1972) ("It must be emphasized again that corporate criminal liability is a form of vicarious liability"); see also Fisse, *The Distinction Between Primary and Vicarious Corporate Criminal Liability*, 41 AUSTRALIAN L.J. 203, 205 (1967).

<sup>23</sup> See *United States v. Wise*, 370 U.S. 405, 407-09 (1962) (individual corporate officer held liable for acts of conspiracy). See generally Note, *Individual Liability of Agents for Corporate Crimes Under the Proposed Federal Criminal Code*, 31 VAND. L. REV. 965, 977-79 (1978).

<sup>24</sup> See *American Medical Ass'n v. United States*, 130 F.2d 233, 253 (D.C. Cir. 1942) (associations were convicted but jury acquitted all individual defendants), *aff'd*, 317 U.S.

The first element of respondeat superior requires that the agent must have been acting within the scope of his employment.<sup>25</sup> The criminal act must be directly related to duties which the agent has authority to perform<sup>26</sup> and must be done with the "intention to perform it as a part of or incident to a service on account of which he is employed."<sup>27</sup> The scope of employment principle has been interpreted broadly by the courts. That the agent's criminal activity was specifically forbidden by his superiors is not a defense to the corporation.<sup>28</sup> Nor is it a defense that the corporate officials acted in good faith to prevent the violations<sup>29</sup> or that the acts were claimed to be *ultra vires*<sup>30</sup> or "beyond the power of the corporation as defined by its charter or act of incorporation."<sup>31</sup>

The second element necessary for application of respondeat superior is that the agent must be acting on behalf of the corporation,<sup>32</sup> or with the intent to benefit the corporation.<sup>33</sup> The

519 (1943); *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir.) ("[A]lthough a corporation acts only through its agents, their indictment is not a condition precedent to prosecution against the corporation"), *cert. denied*, 314 U.S. 618 (1941); *United States v. Austin Bagley Corp.*, 31 F.2d 229, 233 (2d Cir. 1929) (conviction of numerous defendants of conspiracy is not reversible because of the inexplicable acquittal of other defendants).

<sup>25</sup> See *United States v. Carter*, 311 F.2d 934, 942 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); *Standard Oil Co. v. United States*, 307 F.2d at 127; *C.I.T. Corp. v. United States*, 150 F.2d 85, 89-90 (7th Cir. 1945).

<sup>26</sup> *Continental Baking Co. v. United States*, 281 F.2d 137, 149 (6th Cir. 1960).

<sup>27</sup> *Standard Oil Co. v. United States*, 307 F.2d at 128.

<sup>28</sup> See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1006-07 (9th Cir. 1972); *United States v. Harry L. Young & Sons, Inc.*, 464 F.2d 1295, 1296-97 (10th Cir. 1972); *United States v. Armour & Co.*, 168 F.2d 342, 343-44 (3d Cir. 1948).

<sup>29</sup> See *St. Johnsbury Trucking Co. v. United States*, 220 F.2d 393, 398-99 (1st Cir. 1955) (Magruder, J., concurring); *C.I.T. Corp. v. United States*, 150 F.2d at 90. Some commentators have argued that "due diligence" on the part of the corporation should be a defense. See generally *Miller, supra* note 4, at 66-68 (refusal of courts to accept a due diligence defense "undermines the goal of deterring future criminal conduct by corporations"); *Developments—Corporate Crime, supra* note 13, at 1257-58 (proposal for a new system of corporate liability where the corporation could rebut the presumption of liability under respondeat superior by proving that it "exercised due diligence to prevent the crime").

<sup>30</sup> E.g., *Louisville Ry. v. Commonwealth*, 114 S.W. 343, 344 (Ky. 1908). See 10 W FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 4959 (perm. ed. 1978) [hereinafter cited as *FLETCHER*].

<sup>31</sup> *LAFAVE & SCOTT, supra* note 22, § 33, at 234.

<sup>32</sup> See *United States v. Northside Realty Assocs., Inc.*, 474 F.2d 1164, 1168 (5th Cir. 1973); *United States v. Ridglea State Bank*, 357 F.2d 495, 498 (5th Cir. 1966).

<sup>33</sup> See *Standard Oil Co. v. United States*, 307 F.2d at 127 (quoting *New York Cent. & H.R. R.R.*, 212 U.S. at 493); *Egan v. United States*, 137 F.2d at 379.

criminal acts do not actually have to benefit the corporation;<sup>34</sup> it is the expectation of benefit that controls.<sup>35</sup> However, the agent's acts are not considered to be undertaken to benefit the corporation if they are performed "solely to advance the agent's own interests or interests of parties other than the corporate employer."<sup>36</sup>

The status of the agent in the corporate hierarchy is irrelevant to the determination of corporate liability.<sup>37</sup> As the Fifth Circuit stated in *Standard Oil Co. v. United States*,<sup>38</sup> "the corporation may be criminally bound by the acts of subordinate, even menial employees."<sup>39</sup>

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<sup>34</sup> See *United States v. Carter*, 311 F.2d at 942; *United States v. Empire Packing Co.*, 174 F.2d 16, 20 (7th Cir.) (quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), cert. denied, 326 U.S. 734 (1945)), cert. denied, 337 U.S. 959 (1949).

<sup>35</sup> 307 F.2d at 128. The Court stated that it is the "expectation or hope of a benefit, whether direct or indirect [that] makes the act that of the principal. The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is indiscernable, or, for that matter, the result turns out to be adverse." *Id.*

<sup>36</sup> LAFAVE & SCOTT, *supra* note 22, § 33, at 234. The Fifth Circuit in *Standard Oil Co. v. Texas* held that a corporation was not subject to criminal liability when the acts of its agents were performed for the benefit of a third party and actually resulted in a theft of the corporation's property. 307 F.2d at 129.

<sup>37</sup> See *United States v. George F. Fish, Inc.*, 154 F.2d at 801 ("No distinctions are made in these cases between officers and agents, or between persons holding positions involving varying degrees of responsibility"). See also Comment, *Is Corporate Criminal Liability Really Necessary?* 29 Sw. L.J. 908, 910 n.15 [hereinafter cited as Comment] (observing that "virtually all modern cases" are in accord with the *Fish* statement of the rule).

<sup>38</sup> 307 F.2d at 120.

<sup>39</sup> *Id.* at 127. Although this principle is the accepted rule in federal courts, the status of the agent necessary to impute criminal liability to the corporation is a matter of considerable commentary. Under the Model Penal Code, only the acts of high ranking officials within the corporation will be imputed to the corporation. MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962). The commission of the offense must be "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment." *Id.*

Mueller states that extending corporate liability to acts of menial employees "subjects the corporation to acts which 'it' (as represented by the inner circle) has not willed, not directed, not authorized. [H]ere the hand has moved without order from the brain." Mueller, *supra* note 2, at 41.

The counter argument is that under the Model Penal Code approach high level officials will simply delegate authority and make it clear that they want to remain ignorant as to any criminal acts, so that liability will easily be evaded. *Developments—Corporate Crime*, *supra* note 13, at 1254.

## II. THE INTRACORPORATE CONSPIRACY PROBLEM

The question in intracorporate conspiracy cases is whether the multiple entities necessary for a conspiracy exist when the corporation is charged with a crime committed solely by its own agents. This issue has not been addressed in most intracorporate criminal conspiracy cases. When the problem has not been raised, courts have consistently applied the respondeat superior principles and imputed liability to the corporation.<sup>40</sup> However, when confronted with this question, courts have had "conceptual difficulty"<sup>41</sup> in determining the proper basis for corporate liability.

A fundamental requirement of the criminal law of conspiracy is that two or more persons must be engaged in a criminal enterprise in order to have a conspiracy.<sup>42</sup> The term "person" in the federal conspiracy statutes<sup>43</sup> includes corporations.<sup>44</sup> Thus, some courts have stated the intracorporate conspiracy issue in terms of whether the corporation can be "counted" to satisfy the multiplicity of actors requirement,<sup>45</sup> or whether the corporation can conspire *with* its agents.<sup>46</sup> The case law has solved this problem by viewing the corporation as an actual participant in the conspiracy.

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<sup>40</sup> *E.g.*, *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982); *Egan v. United States*, 137 F.2d at 379; *Minns v. United States*, 101 F.2d 477, 478 (3d Cir. 1939).

<sup>41</sup> *Hartley v. United States*, 678 F.2d 961, 970-71 (11th Cir. 1982); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981).

<sup>42</sup> See note 6 *supra* for cases illustrating the requirement of multiple actors.

<sup>43</sup> See note 11 *supra* for the text of 18 U.S.C. § 371, the criminal conspiracy statute.

<sup>44</sup> 1 U.S.C. § 1 (1976) states: "In determining the meaning of any Act of Congress, unless the context indicates otherwise the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." See also *United States v. Consolidated Coal Co.*, 424 F. Supp. 577, 580-81 (S.D. Ohio 1976) ("Moreover, it is clear that the term 'person' within the meaning of 18 U.S.C. § 371 also includes corporations").

<sup>45</sup> See *State v. Parker*, 158 A. 797, 801 (Conn. 1932) ("[A] corporation may be a party to a conspiracy, counted in computing the number necessary to constitute it, and indicted and convicted therefore").

<sup>46</sup> See *United States v. Consolidated Coal Co.*, 424 F. Supp. at 579-81; *United States v. Allied Chem. Corp.*, No. 76-0129 slip op. at 2 (E.D. Va. July 6, 1976) ("In light of the fact that a corporation can only act through its agents, the effect of a charge of conspiracy as between Allied Chemical and its agents is, insofar as Allied is involved, a charge of conspiracy with itself") (*Allied Chem. Corp.* has been reported at 420 F. Supp. 122 (E.D. Va. 1976), but the preceding quote is not in the published opinion).

### A. *United States v Consolidated Coal: An Issue of First Impression*

The first case directly dealing with the intracorporate criminal conspiracy problem was *United States v. Consolidated Coal Co.*<sup>47</sup> In that case, the corporation and eight of its agents were charged with conspiring to defraud the government.<sup>48</sup> The court phrased the issue in these terms: "Can a corporation be charged and convicted of conspiring solely with its own employees?"<sup>49</sup> The court distinguished another criminal conspiracy case,<sup>50</sup> *United States v. Carroll*,<sup>51</sup> which held that no conspiracy had been established between the corporation and an individual officer who had so dominated the corporation that there was "no organization and no one other than the sole criminal to deter or punish."<sup>52</sup> The court also recognized that it would be inappropriate to rely on cases concerning conspiracy under other substantive areas of the law.<sup>53</sup>

Although the court in *Consolidated Coal* found no direct precedent for the question before it, the court believed that a number of cases had implicitly acknowledged that "a corporation can be prosecuted for conspiring with its corporate personnel."<sup>54</sup> After

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<sup>47</sup> 424 F Supp. 577 (S.D. Ohio 1976). The court stated: "In researching this issue the court did not find any case which analyzed the precise question presented herein." *Id.* at 580.

<sup>48</sup> The defendants were charged in a 172-count indictment. *Id.* at 578. The defendants' motion to dismiss the counts against them was denied by the court in its entirety. *Id.* at 588. This discussion of the case is limited to the intracorporate conspiracy issue.

<sup>49</sup> *Id.* at 579.

<sup>50</sup> *Id.* at 579-80.

<sup>51</sup> 144 F Supp. 939 (S.D.N.Y. 1956).

<sup>52</sup> *Id.* at 941.

<sup>53</sup> 424 F Supp. at 579. The defendants in *Consolidated Coal* argued that a corporation could not be convicted of conspiring with its own employees, citing antitrust cases and cases alleging conspiracy to breach a contract. *Id.* The court disagreed, distinguishing the antitrust cases as based on a restraint of trade rationale, and relied on *United States v. Wise*, 370 U.S. 405, 417 (1962), for the proposition that freedom from contract liability should not shield corporate officers from criminal prosecution. 424 F Supp. at 579.

<sup>54</sup> 424 F Supp. at 581. The court relied upon the following: *United States v. Wise*, 370 U.S. at 415-16 (corporate officer could be prosecuted for conspiracy under § 1 of the Sherman Act); *Nye & Nissen v. United States*, 336 U.S. 613, 620 (1949) (convictions of a corporation and four of its agents for conspiracy in violation of 18 U.S.C. § 371 affirmed with no discussion of intracorporate conspiracy issue); *United States v. Sherrick*, 512 F.2d 1361, 1367 n.7 (D.C. Cir. 1975) (allegations in the indictment insufficient to charge

noting that a corporation is included in the statutory definition of "person" and can act only through its agents,<sup>55</sup> the court concluded:

[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. When separate individual judgments and decisions are capable of being made by both a corporation and one or more of its employees, there is a vast dissimilarity to the facts of *Carroll* in which one man used the corporate form to commit a criminal act. The Court concludes then that a corporation can be charged with conspiring with its corporate personnel.<sup>56</sup>

The court's analysis is troubling. The implication of the court's language is that if only one individual was involved, but that person did not dominate the corporation as in *Carroll*, then a conspiracy could be established. The better approach is that the two or more persons necessary for a conspiracy should be determined by reference to the number of natural persons engaged in the criminal activity, without considering the corporation as an actor.<sup>57</sup> Since there were eight individuals charged with the con-

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corporation with conspiracy); *Alamo Fence Co. v. United States*, 240 F.2d 179 (5th Cir. 1957) (question of intracorporate conspiracy not presented on appeal and conviction of the corporation and its agents for conspiracy under 18 U.S.C. § 371 affirmed); *United States v. Bridell*, 180 F Supp. 268, 279 (N.D. Ill. 1960) (evidence insufficient against corporation and two officers to establish conspiracy to evade income taxes); *United States v. Kemmel*, 160 F Supp. 718, 720-21 (M.D. Pa. 1958) (conspiracy properly charged against corporation and two agents for violation of 18 U.S.C. § 371). For an excellent discussion of these cases, see Welling, *Intracorporate Plurality In Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155, 1184-94 (1982) (noting that only one case has held that multiple agents of a single corporation cannot constitute a plurality: *United States v. Allied Chem. Corp.*, No. 76-0129).

In several other cases, the intracorporate conspiracy issue was not presented on appeal and the convictions of the corporate defendants were affirmed with no analysis of the question. See *United States v. Cincotta*, 689 F.2d 238, 241 (1st Cir. 1982); *Egan v. United States*, 137 F.2d at 369; *Minns v. United States*, 101 F.2d 477 (3d Cir. 1939).

<sup>55</sup> 424 F Supp. at 581. See note 44 *supra* for the text of 1 U.S.C. § 1 which includes corporations within the definition of the word "person."

<sup>56</sup> 424 F Supp. at 581.

<sup>57</sup> For an excellent discussion of conspiracy between a single agent and the corporation under criminal conspiracy law, see Welling, *supra* note 54, at 1185-91. Welling states that "cases addressing this question support the point of view that criminal conspiratorial liability cannot be established by a single agent of a corporation." *Id.* at 1191.

spiracy in *Consolidated Coal*, the multiplicity of actors was satisfied without regard to the corporation. This is the crucial fact that should distinguish the case from *Carroll*, not the amount of control the employees exerted over the corporation.

After the court in *Consolidated Coal* observed that a corporation is statutorily encompassed within the word "person," it proceeded on the assumption that a corporation is capable of thinking and acting.<sup>58</sup> However, the fact that a corporation is subject to criminal liability as if it were a person does not invest a lifeless entity with human attributes. As the Supreme Court cautioned in *New York Central*, the appropriate basis for determining liability is respondeat superior. Under this concept, whether "the principal actually participated in the malice or fraud"<sup>59</sup> is irrelevant. For this reason, the court erred in holding that a corporation can conspire with its agents.

#### B. *United States v Hartley*: A Reaffirmation of Consolidated Coal

In *United States v. Hartley*,<sup>60</sup> the Eleventh Circuit Court of Appeals affirmed the conviction of a corporation and two of its officers for conspiracy to defraud the United States government.<sup>61</sup> The court viewed the issue in terms of [w]hether a corporation can conspire with its officers, agents, and employees.<sup>62</sup> The court began its analysis with these statements:

The difficulty in accepting the theory of intracorporate conspiracy is conceptual. Under elementary agency principles, a corporation is personified through the acts of its agents. Thus, the acts of its agents become the acts of the corporation as a single entity. The conceptual difficulty is easily overcome, however,

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<sup>58</sup> 424 F. Supp. at 580-81.

<sup>59</sup> 212 U.S. at 493. See the text accompanying notes 16-19 *supra* for a discussion of respondeat superior and criminal liability.

<sup>60</sup> 678 F.2d at 961.

<sup>61</sup> *Id.* at 992. At trial, the jury convicted the defendants on all thirty-three counts of the indictment. The Eleventh Circuit affirmed the convictions. *Id.* This discussion of the case is limited to the court's analysis of the intracorporate conspiracy issue.

<sup>62</sup> *Id.* at 968.

by acknowledging the underlying purpose for the creation of this fiction—to expand corporate responsibility. We decline to *expand* the fiction only to *limit* corporate responsibility in the context of the criminal conspiracy now before us.<sup>63</sup>

These remarks are confusing because the court established no basis for corporate liability. The court referred to the corporation and its agents as composing a single entity, but seemingly disregarded the liability problem because of the desirability of corporate responsibility. The court quoted a statement made by Justice Harlan in *United States v. Wise*:<sup>64</sup> “[T]he fiction of corporate entity, operative to protect officers from contract liability, had never been applied as a shield against criminal prosecutions.”<sup>65</sup> Considering this language “most persuasive,” the court concluded that corporations should not be allowed to escape liability by “the fiction of corporate personification.”<sup>66</sup> With no analysis of how the conspiracy was established, the court found its “conceptual difficulty” was “easily overcome” by policy concerns.<sup>67</sup>

The court devoted most of its analysis to a discussion of the results reached in cases dealing with intracorporate conspiracy under antitrust law.<sup>68</sup> The court relied heavily upon *Dussouy v. Gulf Coast Investment Corp.*,<sup>69</sup> a conspiracy in restraint of trade case where the Fifth Circuit held that “in certain circumstances a corporation can conspire with its employees.”<sup>70</sup>

The *Hartley* court noted that the general rule developed under federal antitrust cases is that the corporation is not subject to liability when only its own agents are involved in a conspiracy.<sup>71</sup>

<sup>63</sup> *Id.* at 970 (emphasis in original).

<sup>64</sup> 370 U.S. at 405.

<sup>65</sup> *Id.* at 417 (Harlan, J., concurring).

<sup>66</sup> 678 F.2d at 972.

<sup>67</sup> *Id.* at 970.

<sup>68</sup> *Id.* at 969-71. Many courts have relied on precedent from the antitrust law. See *United States v. Allied Chem. Corp.*, No. 76-0129, slip op. at 2; *United States v. Kemmel*, 160 F. Supp. at 721; *United States v. Carroll*, 144 F. Supp. at 942.

<sup>69</sup> 660 F.2d at 594. The court cited to *Dussouy* four times and quoted several passages from that opinion. 678 F.2d at 970-72.

<sup>70</sup> 660 F.2d at 602.

<sup>71</sup> 678 F.2d at 970. The leading case precluding corporate liability for intracorporate conspiracy under the Sherman Act, 15 U.S.C. § 1 (1976), is *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914-15 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953). This case has been consistently followed by the other circuits in antitrust actions. See H

Although the court distinguished these cases as based on the restraint of trade concept,<sup>72</sup> it adopted an exception to the rule under antitrust law.<sup>73</sup> According to this exception, the corporation will be held liable "when the officer has an independent stake in achieving the corporation's illegal objective."<sup>74</sup> The court added: "We now adopt this exception and hold that it is possible for a corporation to conspire with its own officers, agents and employees in violation of 18 U.S.C. § 371."<sup>75</sup>

The court's reasoning is contradictory. After purporting to distinguish the antitrust cases, the court adopted an exception formulated under antitrust law. This exception (that the agent has to be acting for his own benefit) is in direct conflict with the respondeat superior principle that the agent must act to benefit the corporation.<sup>76</sup> Since respondeat superior is the accepted stan-

& B Equip. Co. v. International Harvester, 577 F.2d 239, 244 (5th Cir. 1978); Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 917 (8th Cir. 1976); Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974); Marion County Coop. Ass'n v. Carnation Co., 114 F. Supp. 58, 62 (W.D. Ark. 1953), *aff'd*, 214 F.2d 557 (8th Cir. 1954). *But see* White Bear Theatre Corp. v. State Theatre Corp., 129 F.2d 600, 605 (8th Cir. 1942); Patterson v. United States, 222 F.599, 619, 632-33 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915). For a discussion of plurality under the antitrust laws, see generally Stengel, *Intra-Enterprise Conspiracy Under § 1 of the Sherman Act*, 35 Miss. L.J. 5 (1963); Note, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372 (1954).

Corporate liability for intracorporate conspiracy is also an issue in the civil rights cases under 42 U.S.C. § 1985(3) (Supp. V 1981). The cases are conflicting. *Compare* Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1257-59 (3d Cir. 1978) (en banc) (coordinated actions by corporate officers and directors could satisfy the conspiracy requirements of 42 U.S.C. § 1985(3)), *vacated and remanded on other grounds*, 442 U.S. 366 (1979) *with* Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (conspiracy not established when only agents of the corporation are involved). *See generally* Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c): The Impact of Novotny v. Great American Federal Savings & Loan Ass'n*, 13 GA. L. REV. 591 (1979); Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, 92 HARV. L. REV. 470 (1978).

<sup>72</sup> 678 F.2d at 470-71.

<sup>73</sup> *Id.* at 972. *See also* Spectrofluorimeter Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 289 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); Greenville Publishing Co. v. The Daily Reflector, Inc., 496 F.2d at 399; Johnston v. Baker, 445 F.2d 424, 427 (3d Cir. 1971); Jewel Foliage Co. v. Uniflora Overseas Florida, Inc., 497 F. Supp. 513, 518 (M.D. Fla. 1980). *See generally* 10 FLETCHER, *supra* note 30, at § 4884; 10A FLETCHER, *supra* note 14, at § 5032.1.

<sup>74</sup> 678 F.2d at 971.

<sup>75</sup> *Id.* at 972.

<sup>76</sup> *See* notes 32-39 *supra* and accompanying text for a discussion of this requirement.

dard in the federal courts for corporate criminal liability,<sup>77</sup> it is unwise to adopt a theory that is inconsistent with that doctrine.

Antitrust rules and exceptions to those rules have no application in the criminal conspiracy area. The antitrust principles were developed to deal with unique policies of the law under the Sherman Act.<sup>78</sup> As one commentator notes, intracorporate conspiracy "does not raise any of the anticompetitive concerns that the antitrust laws were designed to eliminate."<sup>79</sup> Courts should avoid reliance on inapplicable precedent from other substantive areas of law. Focusing on these principles only confuses the issue.

*Hartley* reaffirmed the position first taken by *Consolidated Coal* that a corporation can conspire with its agents.<sup>80</sup> The courts have engaged in this fiction of the corporation as an actual participant in the conspiracy to achieve the desired result of corporate liability. However, in cases where two or more individual agents are involved in the crime, resort to this fiction is unnecessary because the multiplicity of actors could be demonstrated without regard to the corporation.

Thus, although the analysis in *Hartley* is unsound in several respects, the court reaches the correct result in ultimately holding the corporation liable for the acts of its agents.<sup>81</sup> As recognized by the courts in both *Dussouy* and *Hartley*, "the action by an incorporated collection of individuals creates the 'group danger' at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose."<sup>82</sup>

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<sup>77</sup> See notes 13-39 *supra* and accompanying text for a formulation of this standard.

<sup>78</sup> 15 U.S.C. § 1 deals with conspiracies "in restraint of trade" and 15 U.S.C. § 2 prohibits monopolies.

<sup>79</sup> Welling, *supra* note 54, at 1164-65.

<sup>80</sup> See notes 47-58 *supra* and accompanying text for a discussion of the court's holding in *Consolidated Coal*.

<sup>81</sup> The literature is replete with discussions of the justifications and criticisms of imposing criminal liability on the corporation in general. For a persuasive defense of corporate criminal liability, see Edgerton, *supra* note 1, at 832-44. Several commentators have argued that the deterrence goal of the criminal law would be better served by imposing liability on the guilty actor. See Mueller, *supra* note 2, at 45; Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 HARV. L. REV. 283, 286 (1946); Comment, *supra* note 37, at 927. For a concise summary of the arguments on both sides, see LAFAVE & SCOTT, *supra* note 22, § 33, at 231-32.

<sup>82</sup> *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d at 603, *quoted in Hartley v. United States*, 678 F.2d at 970.

## CONCLUSION

Courts should use a two-stage method of analysis to resolve the problem of intracorporate conspiracy. The question of whether the two or more persons necessary to establish a conspiracy has been shown is a distinct inquiry from the issue of corporate responsibility.<sup>83</sup> At the first stage of analysis, whether the actors are corporate employees is irrelevant. The only consideration should be whether the requisite number of natural persons participated in the crime. If this multiplicity of actors exists, then a conspiracy is substantiated. Once the conspiracy is demonstrated, the question at the second stage of analysis is whether the corporation may be held responsible for the acts of its agents. If the agents were acting within the scope of their employment with the intent to benefit the corporation, then the acts and intent of the agents should be imputed to the corporation under the doctrine of respondeat superior. At this stage, corporate liability may thus be established without reference to the number of persons involved in the criminal act.

This method of analysis simply applies the basic concepts of the criminal law of conspiracy and the agency doctrine of respondeat superior. The approach suggested thus avoids the "conceptual difficulty"<sup>84</sup> courts have had in determining the proper basis for corporate criminal liability.

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<sup>83</sup> Other commentators have also suggested that the analysis of intracorporate conspiracy should be in two distinct stages. See Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158, 184 (1962) (the analysis under the antitrust law should be "whether a conspiracy can exist between the officers of a corporation acting among themselves in its behalf; and if so, whether the corporation can be held liable"); Welling, *supra* note 54, at 1195 ("Properly posed, the question is in two parts: whether multiple agents of a single corporation constitute a plurality; and, if so, whether the standards of corporate criminal liability are met so that the corporation is vicariously liable for the conspiracies of its agents"); Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, *supra* note 71 at 487.

<sup>84</sup> 678 F.2d at 970; 660 F.2d at 603.