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Corporations and the Criminal Law: An Uneasy Alliance

By James R. Elkins

Professor Elkins has a broad background in the academics and practice of criminal law. In addition to teaching criminal law at DePaul University in Chicago, he spent three years in the Justice Department as a trial attorney in the Economic Stabilization Section and as an Assistant U.S. Attorney.

In his article Professor Elkins traces the development of the criminal law as applied to corporations from the early days of 18th century England to the state of corporate criminal law in the United States today, including the proposed changes of the Model Penal Code and the Federal Criminal Code. He concentrates especially on doctrines imputing misconduct and intent of subordinate employees to the corporate entities, and the limits on doctrines of imputation borrowed largely from the law of agency. In the face of arguments that criminal sanctions should not be imposed on corporations, Professor Elkins concludes: "The social good now demands the use of all available means to control corporate power, including the use of criminal sanctions."

Recent news accounts of corporate bribes, slush funds, illegal political contributions and various consumer fraud schemes have underscored the reality of corporate abuses, ranging from questionable business practices to criminal wrongdoing.¹ These disclosures indicate that corporate crime is a "normal" occurrence in the American business community. As one sociologist

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¹ Recent disclosures of corporate wrongdoing have been described as a "corporate Watergate." The Courier-Journal & Times, June 8, 1975, § E, at 1, c. 1. This characterization was based upon charges of "Political payoffs, bribes of foreign officials, multimillion dollar cash slush funds, laundering operations, disguised or improperly kept accounts and other illegal—or at least questionable—business practices." Id.
notes, "[t]he nation's leading corporations appear to be committing destructive criminal acts systematically and repeatedly; not randomly and occasionally, but as a standard operating procedure. To ensure profits at a minimum of expense, these corporations are willfully engaging in crime. As legal entities, they, and some of the corporate officials who make decisions, are criminal." More importantly, illegal corporate practices seriously affect the well-being of the American public.

The social harm created by corporations takes various forms. Obvious examples are air and water pollution, manufacture and distribution of dangerous consumer products, such as mislabeled drugs and contaminated food, and consumer frauds. Less obvious, but no less injurious, are economic crimes such as monopolistic practices, restraint of trade, unfair trade practices, and the improper use of corporate funds. Here the social harm is of less direct social impact, but injurious in both an economic and political sense.

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3 Reserve Mining Company has recently been fined more than a $1 million in a water pollution case. The firm was charged with the pollution of Lake Superior by daily discharging 67,000 tons of finely ground waste rock into the lake. N.Y. Times, May 5, 1976, § C, at 34, col. 1. On the use of criminal prosecutions for environmental pollution, see F. Grad, Environmental Law 7-29 (1971); Glenn, The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions, 11 Am. Crim. L. Rev. 835 (1973); Laughran, The Law and the Corporate Polluter: Flexibility and Adaption in the Developing Law of the Environment, 23 Mercer L. Rev. 571 (1972); Manaster, Early Thoughts on Prosecuting Polluters, 2 Ecology L. Q. 471 (1972); Mix, The Misdemeanor Approach to Pollution Control, 10 Ariz. L. Rev. 90 (1968); Morris, Environmental Problems and the Use of the Criminal Sanction, 7 Land and Water L. Rev. 421 (1972); Nagel, Incentives for Compliance with Environmental Law, 17 Am. Behav. Sci. 690 (1974); Tripp & Hall, Federal Enforcement under the Refuse Act of 1899, 35 Albany L. Rev. 60 (1970); Comment, The Criminal Responsibility of Corporate Officials for Pollution of the Environment, 37 Albany L. Rev. 61 (1972).
4 There is little dispute that economic and corporate crime costs the consuming public. Anticompetitive practices in one industry which result in artificially high prices for goods create the impetus for price increases in other market areas. For example, the monopoly of the "big three" automotive companies in the manufacture of "crash parts" for replacement in damaged cars is reflected in increased auto repair bills and eventually in substantially higher insurance rates. N.Y. Times, Feb. 29, 1976, at 34. Every insured driver therefore pays the cost of the alleged antitrust activity regardless of whether his car needs repairs.

The maintenance of corporate slush funds for the payment of domestic and foreign bribes is also costly for the consuming public. The Internal Revenue Service is currently investigating the tax treatment of bribes paid by American corporations. The bribes were undoubtedly treated or disguised in some fashion as "business expenses"
Corporate criminal activities and individual criminal conduct are alike in that each creates an endangerment to safety, health, and financial well-being. Corporate crimes are distinguishable from individual criminal conduct chiefly in terms of social impact. Higher consumer costs, increased pollution, and more frequent physical injuries emanating from corporate activities result in societal harm far in excess of the harm caused by individual criminals. Given the capacity of corporate entities to inflict social harm and current disclosures as to corporate wrongdoing, a reevaluation of the application of criminal sanctions to corporate wrongdoing is necessary.

The purpose of this article is to examine the liability of corporations for the harm producing criminal activities of corporate management and corporate employees. The first section discusses current developments which indicate the dimensions for tax purposes. The costs of such payments are undoubtedly added to the price of products and services offered by the offending corporations. Also, to the extent that the corporate profits are based on markups over cost (i.e., a fixed percentage of their costs), consumers will pay not only for the bribe, but also the increased profits based on the bribe.

Corporations are unique in their ability to accumulate economic and political power. Unless checked by appropriate government intervention and public pressure, this power can be wielded to advance increasingly powerful private interests at the expense of democratic institutions. See P. Blumberg, THE MEGA-CORPORATION IN AMERICAN SOCIETY: THE SCOPE OF CORPORATE POWER 177-78 (1975). Corporate crime is one way corporations increase their power and influence the economic and political sectors of the social system.

There are, of course, legitimate means by which corporations can exert influence on the social system. Lobbying is a first amendment right extended to corporations as well as individuals. Corporations not only maintain a corps of resident lobbyists in Washington, but corporate officers themselves regularly descend on Capitol Hill when special clout is needed to pass or block a bill. See N.Y. Times, March, 7, 1976, § 3, at 3, col. 1. Even anticompetitive conduct is legally permissible as a means of preserving the fundamental rights of lobbying. See Eastern R.R. Presidents' Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

Corporations also exert influence by financing publicity campaigns promoting issues which affect their interests. For example, in a recent election the California ballot contained a referendum regarding restrictive controls on the nuclear-power industry. The utility companies opposing the controls were reportedly outspending the environmental groups during the campaign 10 to 1. See N.Y. Times, Feb. 29, 1976, § 1, at 27, col. 1.


of illegal corporate conduct and the theoretical arguments against imposing criminal liability on corporate entities. The second section traces the historical evolution and development of the doctrine of corporate criminal liability in both England and the United States. Subsequent sections analyze the judicial role in delineating the conditions under which criminal liability is ascribed to corporations and the limitations on the scope of the corporation's criminal liability.

I. INTRODUCTION

While practical and policy considerations may, in exceptional cases, militate against holding corporations liable for misconduct, it is submitted that the failure to punish corporate crimes poses a danger which far outweighs such difficulties in the vast majority of cases. Moreover, the failure to confront the societal problem presented by corporate crime presents a double standard in law enforcement. The imposition of criminal sanctions directly upon a corporation can be viewed as one means, although perhaps not the most effective, of governmental control over the diverse activities carried out in the name of the corporation.

The need for and the various means of imposing societal controls on the corporation have evolved historically in response to the proliferation of corporate activities in all sectors of social and economic life. The activities of early corporations were relatively well controlled. Until the 1830's corporations were individually chartered by specific legislation which delimited their activities. Early corporations were chartered to perform specific tasks. Given the narrow purposes and limited scope of activities, control was not a major problem.

The expanding need for capital formation during the industrial revolution was supported by state efforts to encourage the use of the corporate enterprise by "self-chartering." The appearance of general charter corporations resulted in structural changes necessitating additional controls over corporate activities. Governmental efforts to restrain the "free-wheeling" private enterprise of the early 19th century came with the ad-

* On the statutory development and evolving controls imposed on early corporations, see E. Dodd, American Business Corporations Until 1860 (1954).
vent of the first independent regulatory agency (the Interstate Commerce Commission in 1887) and curbs on economic practices (the Sherman Antitrust Act in 1890). Following this landmark legislation the government regulation of business during the early 20th century followed no consistent pattern, although it was characterized by "a growing amount of legislation designed to protect the public from the effects of detrimental business conduct. . . ." 10

While governmental regulation has, to some degree, controlled corporate power, it has neither prevented serious social harm nor promoted a sense of corporate social responsibility. It is apparent then that continued attention must be given to the reduction of unacceptable harm to private and public interest. 11 The public interest in the control of corporate activities justifies the imposition of criminal sanctions on the corporation as well as the individual actors directly responsible for the criminal conduct. Of course, the criminal law is not the sole means for furthering corporate social responsibility. That criminal sanctions are ill-designed to promote all socially desirable objectives for corporate enterprises fully does not support the argument that the use of criminal sanctions for corporations should be abandoned. If nothing more, the utilization of the criminal justice system serves to call public attention to the crying need to reduce harm-producing corporate activities.

The effectiveness of criminal sanctions imposed on corporations depends upon a number of factors, including their deterrent value. It is generally agreed that the use of heavy fines and imprisonment are highly effective in deterring criminal acts by individual businessmen. 12 The social stigma from in-

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9 One author has suggested that antitrust enforcement and public regulation of business following the creation of the Interstate Commerce Commission and enactment of the Sherman Anti-Trust Act in 1890 may have "ameliorated" the "most obviously antisocial activities of large-scale economic power" whereas "the general problem that was addressed—the domestication of the private social and economic power derived from the new technology organized in corporate form . . . continues unabated." Chayes, The Modern Corporation and the Rule of Law, in THE CORPORATION IN MODERN SOCIETY 25-45, at 37 (E. Mason ed. 1960).


11 For an extensive survey of remedies to curb corporate abuses, see Oleck, Remedies for Abuses of Corporate Status, 9 Wake Forest L. Rev. 463 (1973). See also C. Stone, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975).

12 See generally Chambliss, Types of Deviance and the Effectiveness of Legal
volvement in the criminal process is a mediating influence on business executives who value their social standing in the community.

The stigma of a criminal conviction and its derivative deterrent effect, however, does not so readily apply to the corporate entity. Absent a community of interactive individuals, a social stigma may not be present. The dissimilarity in the social milieu of the corporation and the individual creates an entirely different "stigma effect" for criminal prosecutions of corporations. Consequently, the deterrent value of such prosecutions is largely unknown.

While the corporation is not affected by "social stigma" from criminal prosecution to the same degree as an individual, corporations exist within a defined social and business milieu. Corporations, like individuals, have an "image" to maintain for their various "publics," which include consumers, employees, shareholders, and boards of directors, among others. The reputation of a business firm in this country is of no little concern to its employees; to its customers and its potential customers; to its creditors, suppliers, and vendors; to its business "neighbors;" and finally, if incorporated, to its stockholders. A criminal prosecution of the corporation tarnishes this


13 "Every major decision of a great corporation affects the public somehow, as workers, consumers, citizens; hence the public will react consciously to every move the company makes." P. Drucker, Concept of the Corporation 95 (2d ed. 1946).


13 The impact of criminal fines may have a direct impact on corporate employees. Following the electrical price conspiracy scandal and the judicial assessment of nearly $2 million in fines, a union publication asserted that the result of criminal conduct by the corporations "is . . . far more likely to hurt the average worker than the $300,000 or $400,000-a-year executive . . . [i]f anyone suffers it will be the workers, through smaller paychecks, layoffs, lower living scales." Carey, The Public Plunderers, The Story of the Largest Criminal Anti-trust Case in U.S. History, 4 Int. Union of Elect., Radio & Mach. Workers (undated) Washington, D.C.

14 Riley and Levy, The Image in Perspective, in Riley, supra note 14, at 176, 177.

The ultimate manifestation of shareholder unrest is a shareholder's derivative suit. The shareholder's derivative suit is a device for recovering damages from dishonest, disloyal or grossly negligent corporate managers. The suit is brought on behalf of the corporation and the recovery against the corporate managers is awarded directly to the corporation as opposed to the individual plaintiff shareholder. The fear of a derivative suit may serve as a deterrent to corporate crime as it shifts the financial
image for one or more of the corporation’s publics\textsuperscript{17} and affects the corporate reputation.\textsuperscript{18}

One response to the theory that the corporate “image” makes the corporation vulnerable to a “stigma” from criminal burden of the illegal conduct to the corporate personnel directly responsible. See Coleman, \textit{Is Corporate Criminal Liability Really Necessary?}, 29 Sw. L.J. 908, 921 (1975).

\textsuperscript{7} We know too little about the “psychological, social, and cultural contexts into which corporate images are projected. Few studies have tried to relate the acceptance or rejection of a corporate image to more generalized attitudes toward authority and power. Indeed, we are tempted to wonder whether or not large companies may not be so remote from the lives of ordinary individuals that they are no longer targets for strong, personal feelings of any sort.” Carlson, \textit{The Nature of Corporate Images}, in RILEY, \textit{supra} note 14, at 24, 47. See Flynn, \textit{Criminal Sanctions Under State and Federal Antitrust Laws}, 45 Tex. L. Rev. 1301, 1309-1310 (1967).

The problem is that the public has no definitive image of the corporation, and even where such an image exists as measured by public attitudes there is little reason to believe that this image is directly related to the public interaction with the firm, for “... avenues to action by the general public are limited and often never perceived as existing at all. Management has not yet answered the question of how it wants its publics to translate their favorable corporate attitudes into action.” \textit{Id.} at 44.

\textsuperscript{8} See W. FRIEDMANN, LAW IN A CHANGING Society 209, 211 (1972):

The main effect and usefulness of a criminal conviction imposed upon a corporation cannot be seen either in any personal injury or, in most cases, in the financial detriment, but in the public opprobrium and stigma that attaches to a criminal conviction. Hence, it is particularly important to limit criminal convictions of a corporation, for offenses other than those which are essentially of an administrative character, to those offenses that can properly and fairly expose the corporation to a moral opprobrium.

Thus

the main purpose of a fine is not primarily to hurt the defendant financially.

It is to attach a stigma—pronounced by independent law courts—on the breach of legal obligations which have been imposed in the interest of the community. If a modern giant industrial concern is fined for a statutory offense, this does not normally hurt an individual. But an accumulation of such convictions will deservedly impair the standing and reputation of such a concern.

See also Flynn, \textit{supra} note 17, at 1310, and Million, \textit{Limitations on the Enforceability of Criminal Sanctions}, 28 Geo. L.J. 620, 644 (1940) where it is suggested that:

\textit{[t]he loss of social prestige could have an economic result (i.e., loss of “good will” in the economic sense) which would make a conviction more costly than a civil judgment for the same amount as the fine involved. Many directors would be little concerned with social approval of their enterprise, as such, but to those feeling a sense of personal identity with the corporation and having pride in its standing such an actual deterrent may be said to exist. Such a feeling often exists on the part of lesser employees who have served a number of years.}

One commentator has offered the unsupported argument that “it would be poor public policy to rely on the stigma of a conviction to deter corporate polluters.” Comment, \textit{The Criminal Responsibility of Corporate Officials for Pollution of the Environment}, \textit{supra} note 3, at 63.
prosecution is that some corporations are so large that they are immune from stigmatization. This argument is based on the notion that the larger the corporation the more diffuse and ambiguous the corporate "image," especially in view of the variety of "publics" it serves. The logic of the argument is sound but not totally persuasive. Phillip Blumberg, an observer of corporations, argues that the visibility of the mega-corporation acts as a social restraint:

[T]he very visibility of the mega-corporation renders it more likely to be the subject of public reaction and thus will tend to restrict its ability to act. The decision of the large corporation becomes a cause celebre while the more obscure action of the smaller firm is less likely to trigger aroused public attention, which may not be involved in the acts of smaller business.

But while corporate size may act to shield individual actors, it increases the visibility of the corporation in the public eye. Thus, the unfavorable public attention which is focused on the corporation as a result of criminal prosecution may deter illegal corporate activities and encourage the corporation to restrain the activities of its employees.

Other arguments have been raised to refute the position here that "image" conscious firms are adversely affected by criminal prosecutions. One commentator notes:

First, the extent to which a corporation will spend money so as to avoid being labelled "criminal" in the eyes of the public is totally uncertain. Second, the argument ignores the situation of corporations which market either anonymous products (i.e., nuts and bolts) or products under brand names totally unrelated to the corporate name, and corporations whose clientele consists solely of other corporations.

In small societies or communities where everyone tends to know each other, adversely publicizing wrongdoers can have a significant effect on changing their behavior. Such a system of social control normally would not work in an industrialized, urbanized society at least for individual misbehavior. Large firms selling widely known brand name products might, however, be substantially influenced by the threat of well-circulated adverse publicity.

"Such a system of publicizing misbehavior is partly behind the information circulation of the Securities and Exchange Commission, although the SEC merely provides
Further encouragement to curtail harm producing activities may be forthcoming from the board of directors and shareholders upon their learning of corporate misconduct. The Model Penal Code provides for corporate criminal liability on the theory that potential criminal sanctions encourage corporate supervision of company employees.22

The primary argument against the imposition of corporate criminal liability is that criminal fines, as presently applied, are hopelessly inadequate for deterring future criminal acts.23 The criminal fine is often so small that criminal violations are economically more advantageous than compliance. Thus, the fine has no deterrent effect. A fine of several thousand dollars, while it might destroy a small business, is a negligible factor in the budget of General Motors, and hardly overcomes the lure of large profits or increased political power to be gained from some forms of illegal activity.

There are two basic approaches to the use of criminal fines as sanctions which produce the maximum deterrent effect. The first approach would increase the statutorily authorized fines and persuade the courts to impose maximum fines in cases which warrant severe penalties.24 The second approach calls for a scale of fines keyed to the economic resources of the offending potential stock purchasers with information on specific companies without evaluating the companies.” Nagel, supra note, 3 at 699-700.

On the use of publicity as a deterrent to corporate crime see generally Fisse, The Use of Publicity as a Criminal Sanction Against Business Corporations, 8 MELB. UNIV. L. REV. 107 (1971); Fisse, Responsibility, Prevention & Corporate Crime, 7 N.Z. UNIV. L. REV. 256, (1973). The argument here favoring more extensive publication of corporate wrongdoing should be considered in the context of the publicity which is given to corporate crime.

"[T]he type of publicity given white-collar crimes, as contrasted with the more overt crimes like burglary or larceny, seldom creates much publicity. It is therefore difficult to create and sustain the kind of public pressure needed for the enactment of stronger legislation designating this type of behavior, however antisocial, as 'criminal.'"


22 Model Penal Code 52.07, Comment (Tent. Draft No. 4, 1955).

23 Flynn, supra note 17, at 1309; Community Control Over Corporate Crime, supra note 20, at 284-87; Davids, Penology and Corporate Crime, 58 J. CRIM. L.C. & P.S. 524, 528 (1967).

24 In the electrical equipment conspiracy cases, the average fine was $16,550, even though the Sherman Act authorized up to $50,000. Community Control Over Corporate Crime, supra note 20, at 287.
corporations. The fine would be a fixed percentage of gross profits, or of net income after taxes. With such an approach, the criminal fine would serve as an effective deterrent by itself, since it would have a profit-diminishing impact on the corporation.

Finally, we must consider who is actually punished when criminal sanctions are imposed upon a corporate entity. The continued use of the criminal sanction against corporations has been resisted on the theory that the criminal fine is absorbed by the corporation with the real punishment being passed on to shareholders and creditors. It is also argued that, the fine can be recouped in the form of higher prices,\textsuperscript{25} although there are other economic factors, competition, for example, which may make price increases impractical.\textsuperscript{26} Fines of sufficient magnitude to be profit-diminishing will in some instances be paid by shareholders in the form of decreased dividends. Such a burden on shareholders is not manifestly unfair, however, even where they could not have known or protected against the illegal corporate conduct. The law protects the shareholders with limited liability to induce risk capital in the corporate enterprise, and the loss of profits due to corporate criminal fines should be viewed as an investment risk.

One of the more persuasive arguments advanced against corporate criminal liability is that the greatest deterrent effort is achieved when individual actors responsible for criminal wrongdoing, as opposed to the corporate entity, are prosecuted.\textsuperscript{27} This argument does not undermine the case for corporate criminal liability. Obviously, every effort should be made to prosecute individuals responsible for illegal acts. On occasion, however, it will be clear that certain individuals in the

\textsuperscript{25} The Criminal Responsibility of Corporate Officials for Pollution of the Environment, supra note 3, at 62.

\textsuperscript{26} Fines levied against individuals may be equally ineffective if the corporation indemnifies the individuals. See Note, Indemnification of the Corporate Official for Fines and Expenses Resulting from Criminal Antitrust Litigation, 50 GEO. L.J. 566 (1962).

\textsuperscript{27} "What really matters is the effectiveness of placing criminal liability in the corporation rather than the individual who acts for it. There is absolutely no evidence that corporate criminal liability is any more effective than personal criminal liability. Indeed indications are that if the prevention of crime, as distinguished from mere ease of conviction, is our aim, individual liability is preferable." Mueller, Criminal Law and Administration, 34 N.Y.U.L. Rev. 83, 93-94 (1959).
corporate structure have committed or caused to be committed a crime benefitting the corporation without leaving sufficient evidence of their identity.

In other cases, where sufficient evidence for indictment of identified individuals within the corporation exists, it may be fundamentally unfair to proceed against them. This is especially true in cases where evidence is sufficient to proceed against lowlevel subordinates but not their complicitous supervisors or management personnel.28

The problem in identifying individuals within the corporation responsible for illegal conduct is further exacerbated by the range in size and structure in corporations. The size and structural diffusion of the modern corporation often masks "individual" responsibility and makes it extremely difficult to investigate and successfully prosecute corporate-related crimes.29 Smaller corporations present a greater opportunity for ferreting out and punishing the individual actors since in these cases the corporation does not effectively shield individuals

28 While the general consensus is that the more effective deterrent is the prosecution of individuals rather than the corporation, there may be an element of unfairness in proceeding against the subordinate employees individually when the very nature of the crime requires involvement or acquiescence of higher corporate officials. G. Williams, Criminal Law (2d ed. 1961). See Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423, 430-31 (1963).

In the case of a criminal antitrust prosecution it can be argued that responsibility in the modern corporation is diffused among so many executives that it is difficult, if not impossible, to fix personal responsibility for the corporation's crime. In these circumstances, it might be unfair to indict, for example, an assistant sales manager for participation in a meeting with representatives of his company's competitors at which prices were fixed, and impossible to obtain convincing proof that the assistant sales manager's agreement was authorized or ratified by the president or the vice-president in charge of sales. Under these circumstances, the Antitrust Division might well hesitate to seek an indictment against the subordinate and, hence, would prosecute only the corporation.


29 For cases in which corporate officers were acquitted and the corporation convicted see American Medical Ass'n. v. United States, 130 F.2d 233 (D.C. Cir. 1942), (aff'd. on other issues, 317 U.S. 519) United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941); United States v. Austin-Bagley Corp., 31 F.2d 229, 233 (2d Cir. 1929); United States v. American Socialist Soc'y, 260 Fed. 885 (S.D.N.Y. 1919). See also Model Penal Code § 2.07, Comment (Tent. Draft No. 4, 1955).
from detection and punishment. However, where the prosecutor determines that the corporation should be prosecuted in addition to the individuals, such prosecutions will undoubtedly be aided by the relative ease in associating the individuals with the corporation. The individuals will often be the corporate officers themselves. This "link" between the corporate officer and the corporation, which is most pronounced in a small corporation, has resulted in a disproportionate incidence of prosecutions against small corporations.

Finally, the very nature of corporate crime makes prosecution difficult:

It may range from the comparatively simple reciprocal relationships in a business transaction to the more complex procedures in the illegal activities among several large corporations. The latter may not only include another corporation, but may extend to many corporations and subsidiaries. The illegal activity may be quite informally organized, as in false advertising, it may be simply organized, though deliberate, as in black market activities, or it may be complex and involved, as in antitrust violations.

It is the thesis of this article that arguments typically raised in opposition to the imposition of criminal liability are misdirected. First, there is every indication that the critics of criminal sanctions for corporations have failed to recognize the

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30 The available statistics on criminal antitrust prosecutions suggest that the smaller the corporate defendant, the easier it is to impose criminal sanctions upon those responsible for the corporation's antitrust violation. In fact, attempts to impose criminal penalties upon the managers of large corporations have usually proved fruitless, particularly when the individuals and the corporation were tried together. Even though it is logically inconsistent to convict the corporation and exonerate those who control the corporation or act on its behalf, individual defendants and juries have often shifted the responsibility for a violation to the corporation.

Flynn, supra note 17, at 1305-06.

31 "Perhaps the most serious objection to current [Department of Justice, Antitrust] Division policy in criminal cases is that it, in effect, discriminates against the principal officers of small companies whose responsibility for the acts of their corporations is usually direct and readily ascertainable. In contrast, the responsibility of the principal officers of large corporations is usually indirect and diffused. Accordingly, it is this type of corporate officer who most usually escapes indictment." Criminal Prosecutions for Violations of the Sherman Act, supra note 28, at 540-41.

32 R. Quinney, supra note 2, at 137. On the relationship between modern corporate decisionmaking and the punishment of corporate crime, see Note, Decisionmaking Models and the Control of Corporate Crime, 85 YALE L.J. 1091 (1976).
full social impact of corporate crime. Secondly, the corporation has been viewed through models which inadequately account for the full panoply of societal forces which affect the modern corporation. If the corporation is viewed within its social milieu, the control of corporations by use of criminal sanctions can be justified. The crucial aspect of this approach is "that the enterprise reacts to the total societal environment and not merely to markets." This "social environment model" of the corporate enterprise recognizes the market and profit orientation of corporate behavior but is more inclusive in the consideration given to general corporate social responsibility.

II. HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY

A. England

The English historian Holdsworth places the historical appearance of the corporate form in England at the end of the 14th century. Although a "passive entity" during this period it "was received by the common lawyers because it supplied a useful explanation of certain associations which frequently appeared in the law courts as the owners of property or franchises, [and] a useful theory for the regulation of their activities. . . ." The corporation of medieval England bears little resemblance to the modern commercial corporation. The medieval predecessor of the modern business firm was either an ecclesiastical body designed to care for and manage church property or an organization of the public activities of the English boroughs and the craft and mercantile guilds which flourished at the time. Prior to the founding of our own country, how-

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32 W. HOLDSWORTH, 3 HISTORY OF ENGLISH LAW 470 (3rd ed. 1923). See also Chayes, supra note 9, at 33. One recent commentator has noted that the corporation had its genesis in the Roman Empire. Campbell, Limited Liability for Corporate Shareholders: Myth or Matter-of-Fact, 63 KY. L.J. 23, 23-24 (1975) (citing C. ABBOTT, RISE OF THE BUSINESS CORPORATION 20 (1936) and W. BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 498 (Chitty ed. 1832)).
33 HOLDSWORTH, supra note 34, at 474.
34 Id. at 470.
35 Id. at 471-74; Chayes, supra note 9. On ecclesiastical corporations and the influence of religion on the corporate form generally, see J. DAVIS, CORPORATIONS 35-87 (1961).
36 Chayes, supra note 9.
ever, the medieval corporate form had evolved sufficiently to be used in the organization of English mercantile groups. Thus, by the 17th century, the corporate enterprise in England could accurately be described as "an admirable instrument of a mercantilist economic policy."39 It is difficult to ascertain whether the early English corporation was subject to criminal sanctions at common law. It is generally reported that corporations of this era were not held criminally responsible. Holdsworth commented that corporations "could commit neither sin or crime; and some said no tort—truly suitable representatives for saints and churches."40 The judicial validation of Holdsworth's pithy statement of the common law came from Lord Holt, sitting Chief Justice on the King's Bench at the beginning of the 18th century. He is reported to have stated, "[a] corporation is not indictable, but the particular members of it are."41 In 1765, Blackstone in his Commentaries followed with the pronouncement that, "[a] corporation cannot commit treason, or felony, or other crime, in its corporate capacity; though its members may in their distinct individual capacities."42 The generally stated rule that corporations were not subject to indictment must be qualified, if not abandoned, in light of the criminal liability imposed on 18th century corporations for nuisance.43 The liability of early corporate entities for such "nonfeasance" (i.e. the failure to perform a public duty im-

40 Holdsworth, supra note 34, at 471-74.
41 Anonymous, 88 Eng. Rep. 1518 (K.B. 1701). This case is uniformly cited by legal writers as the basis of the early rule that corporations could not be held criminally liable. See, e.g., 1 J. Bishop, Criminal Law § 307 (1st ed. 1856).
42 1 W. Blackstone, Commentaries 476 (1765).

Bishop, in the first edition of his treatise on the criminal law, indicated that "Some corporations, and probably all, have always been indictable in respect to some things." 1 J. Bishop, Criminal Law § 306 (1st ed. 1856). See Hitchler, The Criminal Responsibility of Corporations, 27 Dickinson L. Rev. 89, 90 (1923). See, e.g., Evans & C. Lts. v. L.C.C., Annon., 12 Mod. 559 (1700) (where a company was held to have committed a criminal offense by keeping open a shop in violation of a statute). See also Regina v. Saintiff, 6 Mod. 255 (1705).
posed by the state) dates to the 17th century when the Crown prosecuted counties and unincorporated boroughs to abate public nuisances. It was for such acts of nonfeasance, generally public nuisance, that the English courts first imposed corporate criminal liability. Thus, it appears that the common law view expressed by Chief Justice Holt and reiterated by Blackstone did not apply to certain quasi-corporate entities such as municipalities, boroughs, and counties, the common law duty to repair and maintain roads and bridges being sufficient to impose criminal sanctions on the corporate entity. These cases theorized that the neglected duty ran to the town or county as a collective entity representing all of its residents, rather than any individual office holder. Thus, the failure of a town to repair a highway constituted a breach of this duty which was viewed at law as a nuisance abatable by criminal proceedings.

The early common law view, which generally precluded corporate criminal liability except for public nuisance resulting from nonfeasance, was justifiable upon consideration of the societal and economic role of corporations at the time of Lord Holt’s announcement in the early 18th century. The use of the corporate enterprise was in its infancy and there was little need, therefore, to impose criminal sanctions to control organizations which had so little impact on the citizenry. With the growth of the corporate form and the increasingly important economic and societal role assumed by corporations, the view

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45 Chitty’s treatise on criminal law points out that:
At common law, the general charge of repairing all highways, lies on the parishes through which they pass. . . . No agreement can exonerate the parish from the common law liability to repair. . . ."
3 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 566a (5th Ed. 1847).

Any of these roads, which are common to all his majesty’s subjects—whether they be for the use of carriages, horses, or foot passengers only, or whether they lead directly to a market, or only from one town to another, or even from a hamlet may properly be termed high or common ways, and any default in those bound to repair them, or obstructions laid upon them, may be redressed by criminal process. . . . It has also been laid down, that an open river may be termed a highway, and is protected by similar proceedings.
Id. at 565.
44 It has been noted that “the evolution of the criminal law has been in response to deep-seated economic and social wants.” The doctrine of corporate criminal liability is no exception. Hall, The Substantive Law of Crimes, 1887-1936, 50 HARV. L. REV. 616
expounded by Lord Chief Justice Holt and Blackstone that corporations could not be held criminally liable was destined to be reconsidered by the courts.

England did not, however, finally determine whether corporate responsibility for criminal acts would be imposed upon commercial corporations until the 19th century. It was not until 1842, in *Queen v. Birmingham & Gloucester Railway Co.*, that a corporation's responsibility for criminal actions was expressly delineated. In *Birmingham & Gloucester Railway Co.*, the corporation itself was indicted for failure to comply with a legal mandate directing the corporation to remove a bridge which it had erected over a road. The English court found that where a statute has created a legal duty upon a corporation to carry out certain acts and the acts are not performed, the corporation may be indicted and fined for its nonfeasance. The imposition of criminal liability upon the defendant railroad corporation in that case represents the first major step in the evolution of the modern doctrine of criminal liability for commercial corporations. The case represents the first major inroad upon the reported 18th century common law view expressed by Chief Justice Holt that "a corporation is not indictable."

The next major development in the application of corporate criminal liability in the English courts came in *Queen v. Great North of England Railway*, in which a railway company was indicted for a nuisance in obstructing a highway by a railway line, an affirmative act. The corporation defended by an attempt to distinguish the acts of "nonfeasance" on the part of the corporation in *Queen v. Birmingham & Gloucester Railway Co.* from the misfeasance by affirmative act in the present case. Lord Denman ruled, however, that the corporate misfeasance was legally indistinguishable from previously considered cases involving nonfeasance since it is "as easy to charge one person or a body corporate with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission."


Id. at 1298.
Denman held that corporations as well as individuals were amenable to criminal prosecution and that the scope of corporate liability was not limited to acts of nonfeasance, but would include a case of public nuisance arising from misfeasance.

By 1850 the common law of corporate criminal liability had evolved as a means of sanctioning corporations for failure to perform a variety of duties imposed by law. These early decisions, however, with the exception of cases involving public nuisance, did not support the expansion of liability to include crimes which required criminal intent.50

The liability of English corporations for intentional crimes was judicially sanctioned in the early years of the 20th century,51 although not fully established until World War II.52

B. The United States

The historical evolution of the corporate form in the United States has followed much the same pattern as in England. The earliest corporate entities in this country were the towns, boroughs, and cities, or what today would be characterized as public corporations.53 In fact, the colonial legislatures were forbidden by the English Parliament from granting corporate privileges for business purposes54 and the colonists were notably slow in their development and use of the corporate form for commercial enterprises.55 As in England, a number of

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50 The prosecution of municipalities and counties in the 18th Century was designed to secure road repairs and removal of highway and watercourse obstruction. Such early prosecutions did not require a showing of criminal intent since the object of the prosecution was not punishment but the abatement of the nuisance. Chitty, supra note 45. For example, Chitty finds stage coach proprietors indictable "if stage coaches regularly stand in a public street of London, though for purposes of accommodating passengers, so as to obstruct the regular track of carriages . . . ." Id. at 606. In such cases Chitty argues that it is unnecessary "in order to fix the responsibility on the defendants, to show that he immediately obstructed the public way, or even intended to do so: it seems to be sufficient, if the inconvenience results . . . ." Id. at 607.


53 During the colonial period, the law did not differentiate between private and public corporations. See 2 J. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS ¶ 49, 75 (1917).

54 Baldwin, Private Corporations, in TWO CENTURIES GROWTH OF AMERICAN LAW 1701-1901 at 267-268 (1901).

55 "It took the descendants of the English colonists in America a long time to emancipate themselves from their inherited prejudices against private corporations."
the colonies had allowed the incorporation of religious societies for the support and maintenance of church property. The concept of the corporation in colonial society involved the organization of individuals based on residence and the performance of various public functions.

At the turn of the 18th century, private business corporations began to appear in increasing numbers and existed alongside the "early specimens" of the corporate form. In numerical terms, however, the business corporation was still in its infancy as there were reportedly only some 335 operative corporations at this time, and they were generally insignificant throughout the Colonial era.

The earliest corporations were clearly invested with public functions of interest to a developing nation. One writer has noted that bank and insurance companies, together with companies devoted to the development of transport by canal or turnpike, to water supply and to fire fighting, comprised most of the approximately 335 corporations that had been chartered in the United States by 1800.
It was the public and municipal corporation on which criminal liability was first imposed in this country. Prior to the widespread appearance of corporations engaged in commercial activities, the courts upheld criminal indictments and convictions of towns and municipalities for nuisance arising out of the neglect of statutory duties such as the repair of highways and bridges. For example, the city of Albany, N.Y., was indicted in 1834 for nuisance in permitting the basin of the Hudson River to fill with mud, rubbish, and the carcasses of dead animals and failure to remove these obstacles from the basin. The court stated that

[i]t is well settled that when a corporation or an individual are bound to repair a public highway or navigable river, they are liable to indictment for the neglect of their duty. An indictment and an information are the only remedies to which the public can resort for a redress of their grievances in this respect.

The early cases are significant because municipal corporations were the most prominent form of corporate entity during the first years of the republic.

The first decisions considering the question of criminal liability for corporations other than municipalities can be traced to the 1820's and 1830's when the first commercial corporations were involved in the construction and operation of
turnpikes, canals and bridges. The activities of these early private commercial ventures were closely related to the functions performed by municipalities and counties of that day,\textsuperscript{66} and it was not difficult for the courts to see the analogy in imposing criminal liability.\textsuperscript{67} These judicial decisions appeared before the English courts had firmly established the liability of English corporations beyond public nuisance and the American courts did not, therefore, have benefit of a settled rule of English common law. A number of our early cases suggested that a corporation was not indictable\textsuperscript{68} although the rule was never adopted by a majority of jurisdictions. As early as 1836 a private turnpike road company was indicted for common law nuisance in maintaining a road in a state of disrepair, the court finding "no room for doubt that the company was liable to be proceeded against by indictment."\textsuperscript{69}

The criminal liability of such quasi-public corporations was a creature not only of judicial decision but of legislative enactment. An act passed by Massachusetts in 1804 (The General Turnpike Act) specifically made turnpike corporations "liable to pay all damages, which may happen to any person from whom toll is demandable, for any damage which shall arise from defect of bridges or want of repair of said turnpike road; and also liable to presentment by a grand jury, for not keeping the same in good repair."\textsuperscript{70}


\textsuperscript{67} The extension of criminal liability from municipal corporations to the early commercial corporations did not require major shifts in legal reasoning. The quasi-public nature of the activities of the first commercial corporation and the characterization of their misdeeds as a nuisance permitted the imposition of criminal liability. In an early Pennsylvania case where the corporation had been charged with nuisance arising from negligently maintaining a canal in a manner so as to allow water to escape and form stagnant pools, the court pointed out:

[Corporations] other than municipalities may become amenable to the criminal law in the matter of the creation and maintenance of things which amount to or become public nuisances, and to be proceeded against by indictment . . . . As a general rule they are not indictable for misfeasances unless indeed they assume the shape of nuisances.

\textsuperscript{68} See McKim v. Odom, 3 Bland. 407, 421 (Md. 1828) (dicta); Orr v. Bank of the United States, 1 Ohio 28 (1822) (dicta) (citing Justice Holt's statements reported at 12 Mod. 559, the court rejected the argument that a corporation could be held liable for assault and battery); Commonwealth v. Swift Run Gap Turnpike Co., 2 Va. Cas. 362 (1823)(no indictment would lie for misfeasance in obstructing a highway).

\textsuperscript{69} Susquehannah & Bath Turnpike Co. v. People, 15 Wend. 267, 268 (N.Y. 1836).

\textsuperscript{70} Mass. St. 1804, Ch. 125, cited in Commonwealth v. Free Bridge Corp. 68 Mass.
The earliest cases in which corporate criminal liability was considered involved either incorporated municipalities or companies chartered to provide and maintain public thoroughfares. In such cases the criminal offense was characterized as nonfeasance since the corporate entity had failed to perform some function or maintain a standard commanded by common law or statute. This same distinction had been made by the English courts first recognizing corporate responsibility for criminal acts.\textsuperscript{71} Our courts apparently adopted the nonfeasance-misfeasance dichotomy, as legal commentators writing in the 1850's noted that corporations were indictable only for nonfeasance.\textsuperscript{72} For example, in \textit{State v. Great Works Milling & Manufacturing Co.},\textsuperscript{73} the court overturned the conviction of a corporation charged with a nuisance in the erection of a dam across the Penobscot River, on grounds that a corporation "can neither commit a crime or misdemeanor, by any positive or affirmative act, or incite others to do so, as a corporation."\textsuperscript{74} The court did recognize, however, that,

\begin{quote}
\textit{quasi} corporations are indictable for the neglect of duties imposed by law. Towns for instance, charged with the maintenance of the public highways, are by statute indictable, for any failure of duty in this respect.\textsuperscript{75}
\end{quote}

The distinction between nonfeasance and misfeasance accepted by the court in \textit{Great Works Milling & Manufacturing Co.} was abandoned some 10 years later in \textit{State v. Morris & Essex Railroad Co.}\textsuperscript{76} and finally put to rest in the Massachu-

\textsuperscript{58, 68 (1854). The court upheld an indictment for failure of the corporation to maintain the road in good repair. See E. DODD, \textit{AMERICAN BUSINESS CORPORATIONS UNTIL 1860}, at 346-47 (1954).}

\textsuperscript{71} \textit{See} text accompanying notes 48 and 49, \textit{supra.}

\textsuperscript{72} \textit{See}, \textit{e.g.}, the first edition of Bishop's \textit{COMMENTARIES ON THE CRIMINAL LAW} published in 1856 which found it "universally admitted" that corporations are indictable for nonfeasance. 1 \textit{BISHOP, COMMENTARIES ON THE CRIMINAL LAW, § 308}, (1st ed. 1856).

\textsuperscript{73} 20 Me. 41 (1841).

\textsuperscript{74} \textit{Id.} at 43. As late as 1864, the Supreme Court of Indiana commented: "Whatever may be the law in England and in those states in which the common law as to crimes is recognized, in this state, under the criminal law, a corporation cannot be prosecuted by information or otherwise for a misfeasance." \textit{State v. Ohio & Miss. R.R.}, 23 Ind. 362, 365 (1864), citing with approval \textit{State v. Great Works Milling and Mfg. Co.}, 20 Me. 41 (1841).

\textsuperscript{75} 20 Me. at 46 (1841).

\textsuperscript{76} 23 N.J.L. 360 (1852).
In the case of Commonwealth v. Proprietors of New Bedford Bridge, decided in 1854,

In State v. Morris & Essex Railroad Co., a railroad corporation was indicted for erecting and maintaining a building upon a public highway which obstructed the use of the highway and created a public nuisance. The question confronted directly in Morris & Essex was whether corporate criminal liability would be extended from neglect of duty or nonfeasance to positive and affirmative acts constituting a misfeasance. The court considered the conflict between State v. Great Works Milling & Manufacturing Co., holding that a corporation could not be indicted for criminal conduct consisting of an affirmative act, and the 1846 English case of Queen v. Great North of England Railroad Co., in which the court had upheld a corporation's indictment for misfeasance. The court rejected the corporation's position and found it guilty of creating a public nuisance.

In Commonwealth v. Proprietors of New Bedford Bridge, the corporation was indicted for a nuisance resulting from the erection and maintenance of a bridge, Justice Bigelow rejecting the corporate defendant's contention that a corporation was liable for nonfeasance, but not misfeasance, and writing:

that the distinction between a nonfeasance and a misfeasance is often one more of form than of substance. There are cases where it would be difficult to say whether the offense consisted in the doing of an unlawful act, or in the doing of a lawful act in an improper manner. In the case at bar it would be no great refinement to say, that the defendants are indicted for not constructing their draws in a suitable manner, and

77 68 Mass. (2 Gray) 339 (1854).
78 9 Q.B. 315 (1846).
79 The Court reviewed Blackstone's statement of the English common law and "conceded that a corporation cannot, from its nature, be guilty of treason, felony, or other crime involving malus animus in its commission; it is believed that there is no authority, ancient or modern, which denies the liability of a corporation aggregate to indictment, except an anonymous case said to have been decided by Chief Justice Holt, in the Court of King's Bench, in the 13 Will. 3 (1701)." 23 N.J.L. at 364.
80 Chief Justice Green expressed some doubt as to the accuracy of the rule emanating from the reported opinion of Chief Justice Holt. This doubt was premised on the fact that Chief Justice Holt had before him on the King's Bench cases of indictments "against quasi corporations for neglect to repair roads and bridges," and the reported rule would appear to be in conflict with the Justice's decisions in those cases. Id.
81 69 Mass. (2 Gray) 339 (1854).
thereby obstructing navigation which would be a nonfeasance, and not for unlawfully placing obstructions in the river, which would be a misfeasance. The difficulty in distinguishing the character of these offenses strongly illustrates the absurdity of the doctrine that a corporation is indictable for a nonfeasance, but not for a misfeasance. 81

Although criminal liability had been imposed on corporations prior to 1859, it was not until State v. Morris & Essex Railroad Co. in 1852 and Commonwealth v. Proprietors of New Bedford Bridge in 1854 that corporations were fully subject to criminal sanctions for acts resulting in a public nuisance without regard to the nonfeasance/misfeasance distinction.

The extension of corporate criminal liability to corporate misfeasance did not, however, establish corporations as individuals for all purposes of the criminal law. Following the English pattern the early decisions imposing criminal liability for misfeasance expressly declined in dicta to impose liability on corporations for crimes requiring intent. 82 During the period 1850-1875, the courts followed dicta pronounced in Morris & Essex Railroad Co., and Proprietors of New Bedford Bridge, and did not generally extend corporate criminal liability to crimes which required mens rea. 83 Courts limited the application of liability to offenses which did not require knowledge or intent of the actor. 84 The explanation for

81 Id. at 346.
82 For example, in State v. Morris & Essex R.R., 23 N.J.L. 360, 370 (1852) the court indicated that corporations are not "liable for any crime of which a corrupt intent or malus animus is an essential ingredient." Similarly, Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) at 345 (1854) held that "[c]orporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects."
83 Cf. Cumberland & Oxford Canal Corp. v. Portland, 56 Me. 77 (1868).
84 The treatise writers confirm that corporate criminal liability throughout most of the 19th Century was limited to crimes which did not require a specific intent. The 1885 edition of Wharton's treatise on criminal law states that the view expressed by Lord Holt on the immunity of corporations from criminal indictment would still apply to cases of malicious wrongs. 1 F. WHARTON, A TREATISE ON CRIMINAL LAW § 91 (9th ed. 1885). Morawetz, a commentator on the law of corporations writing in 1886, noted that public policy:

does not demand that a person or association should be punished by the State, through criminal proceedings, on account of a wrong committed by another. This would be contrary to the national sense of justice. Hence it is held that where the commission of a crime involves the intention of the
this limitation lies in the nature of the cases which had previously been before the courts. Early cases considering the question of criminal liability for corporations were primarily confined to public nuisance, and the violation of regulatory type statutes. Regulatory statutes created offenses which were similar to public nuisance in at least two respects. First, criminal intent was not required to establish a violation, and second, the statutes proscribed conduct which if engaged in by corporate actors would result in public harm. The rationale for applying criminal sanctions to corporations in the case of public nuisance was simply to abate the nuisance; in the case of regulatory statutes it was to prevent public harm without regard to the actor's intent in committing the violation.

The courts continued to struggle with the problem of corporate criminal liability for specific intent crimes, but during the period 1875-1910 both state and federal courts imposed criminal liability on corporations for crimes requiring a specific intent. Although even today there are lingering suggestions that crimes involving specific or malicious intent may not be imputed to corporations, the clear majority of cases have upheld liability.

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of a fiction; actual intention is required.

It follows, therefore, that a corporation cannot be charged criminally with a crime involving malice, or the intention of the offender.

2 V. MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 732, (2d ed. 1886).

55 On the historical development of the law of public nuisance, see Brenner, Nuisance Law and the Industrial Revolution, 3 J. of Legal Studies 403 (1974).

See, e.g., People v. Clark, 14 N.Y.S. 642 (1891).

57 "The principal object of an indictment for a nuisance, is to compel it to be abated . . . ." State v. Morris & Essex R.R., 23 N.J.L. at 370 (1852).


1. **Corporate Liability for Torts: Influence on the Development of Criminal Liability of Corporations**

The historical development of corporate criminal liability has been substantially influenced by parallel developments in the civil law applicable to corporations. The historical development of broad tort liability of corporations has found expression in court decisions resolving similar issues concerning the scope of liability of corporations for criminal acts of corporate employees.

It was not uncommon for the early federal court decisions to rationalize the imposition of corporate criminal liability on the basis of civil law principles. Tort law principles were explicitly recognized by the Supreme Court in *New York Central & Hudson River Railroad Co. v. United States,* one of the early American cases applying the fully developed doctrine of corporate criminal liability. The Supreme Court, in construing a statute imposing criminal liability on corporations for acts of its agents in making illegal rebates, reviewed applied principles of civil liability of corporations for torts. The evolution of the doctrine of corporate criminal liability cannot be effectively divorced from the development of theories of corporate responsibility for torts committed by those employed to carry on the business of the corporation.

2. **Legislative Influences on the Growth of Corporate Criminal Liability**

While the expansion of corporate criminal liability was based in part on tort principles, its growth was also influenced by trends in legislation. Contemporaneous with the first cases establishing corporate criminal liability in England in the mid-1850's, a class of criminal offenses appeared which were punishable without regard to the guilty intent of the actor. The

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82 U.S. 481 (1909).


83 It is not uncommon for modern courts to rationalize the imposition of corporate criminal liability on the basis of tort concepts. See, e.g., Egan v. United States, 137 F.2d 369, 379 (8th Cir.), cert. denied, 320 U.S. 788 (1943).
"public-welfare offense" imposed a type of strict liability on offenders regardless of the actor's intent to perform the proscribed act. The absence of a required intent made the offense conceptually easier to apply to corporations. The appearance of strict liability or "public-welfare offenses" and changing concepts of mens rea applicable to traditional criminal offenses have aided in the progressive imposition of greater criminal liability on corporations.

The first statutory provisions imposing criminal liability on corporations in the United States were in statutes enacted prior to 1900, which created standards of care for corporations operating railroads. Liability was soon expanded to the general class of regulatory statutes which create what has been referred to as "public-welfare offenses." All of these offenses were malum prohibitum in that the crime consisted simply of doing some act prohibited by the statute. Corporate criminal liability was thus based not only on public policy but the legislative intent expressed in the statute.

Today, both state and federal criminal law are statutory in origin. Thus, courts called upon to impose corporate criminal liability will generally consider as a threshold question

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93 See Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 56-59 (1933); Leigh, supra note 43, at 21-22.


The decisions permitting convictions of light police offenses without proof of a guilty mind came just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt; the movement also synchronized with the trend of the day away from nineteenth century individualism toward a new sense of the importance of collective interests.

Sayre, Public Welfare Offense, 33 Colum. L. Rev. 55, 67 (1933).

95 1 F. Wharton, A Treatise on Criminal Law § 116 (11th ed. 1912). In one of the early cases a railroad corporation was indicted for negligence and misconduct of its servants in causing a passenger's death in violation of a penal statute applicable to corporations. Boston, Concord & Montreal v. State, 32 N.H. 215 (1855). The court upheld the power of the legislature to regulate the rights and duties of a railroad corporation by providing "a new mode of enforcing the admitted duty of these bodies to conduct their business with such care and prudence as not to endanger the lives and limbs of those whom they undertake to transport . . . ." Id. at 225-26.

96 Sayre, supra note 93.
whether the statute which creates the offense charged contemplates corporate wrongdoing. The criminal statute involved may, by its terms, expressly apply to corporations and in such cases the courts have little difficulty in imposing liability.

The Supreme Court has specifically upheld the constitutionality of statutes requiring imputation of an agent's acts to the corporation. Today, there appear to be no constitutional impediments to statutes which attempt to impose criminal liability directly on a corporation for acts or omissions of its agents within the scope of their employment.

The imposition of criminal liability on corporations has not, however, been limited by the courts to those instances in which the statute by express provision applies to corporations. Statutes are commonly directed not at corporations but rather to "any person" or "whoever" performs or fails to perform certain acts. These statutes which do not by their terms expressly provide for corporate liability have been construed by the courts as imposing criminal liability on corporations.

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87 The United States Code expressly provides:
In determining the meaning of any Act of Congress unless the context indicates otherwise . . . the words "person" and "whoever" include corporations, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . .


88 See, e.g., State v. Adjustment Dep't Credit Bureau, Inc., 483 P.2d 687, 691 (Idaho 1971) (rev'd on other grounds) where the court imposed criminal liability on the corporation based on a general statutory provision which permitted an interpretation that the word "person" in a criminal extortion provision included corporations as well as natural persons.


91 See, e.g., United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973), where the court held that a corporation is liable under the Sherman Anti-Trust Act for the acts of agents in the scope of their employment notwithstanding the absence of any express intent to impose criminal liability on corporations.
III. THE SCOPE OF CORPORATE CRIMINAL LIABILITY FOR ACTS OF SUBORDINATE LEVEL EMPLOYEES

The criminal liability of corporations is theoretically based on imputing the acts and intent of members of the corporation to the corporation itself. The scope of corporate criminal liability will therefore depend in large part upon which individual criminal acts will be imputed or ascribed to the corporate entity. Two questions are raised. First, which members of the corporate hierarchy will have their acts imputed to the corporation, and second, whether the criminal intent of the actor will be imputed to the same extent as the act itself.

A. Status of the Actor in the Corporate Hierarchy

The most crucial determinant of the scope of corporate criminal liability is defining the individuals within the corporate structure who may subject the corporation to criminal liability. For purposes of delineating the scope of liability, the members of a corporation can be divided into essentially three groups. At the highest level, the corporation is governed by a board of directors and designated corporate officers who formulate corporate policy and run the corporation. At the middle level of the corporate hierarchy are individuals in a supervisory or managerial capacity who, by virtue of their position, are involved to a lesser extent with corporate decision-making. The combination of these two groups, the corporate officers and high managerial agents, have been referred to as the “inner-circle” of the corporation.102 The lowest level in the corporate hierarchy is composed of subordinate employees and agents of the corporation who are responsible generally for carrying out the corporate business and executing the various policies formulated by the “inner-circle.”

1. Officers

The corporation is often closely identified with its corporate officers, and in the case of relatively small corporations, the corporate entity may be comprised of little more than its officers. Regardless of whether we are dealing with a small,

102 See Mueller, supra note 62.
closely held, or a publicly held corporation, the position and
duty of the corporate officers is such that officers who commit
criminal acts within the scope of their employment will most
surely subject the corporation to liability. In *United States v.
Empire Packing Co.*, the corporation and its president were
indicted on 23 counts of filing false claims for government sub-
sidies. The court upheld the imposition of criminal liability on
the corporation based on its president’s illegal acts. The court
found that the corporation president

acted not as an individual, but in the role of president and
representative of the corporation within the scope of his cor-
porate capacity both actual and apparent. His illegal activi-
ties were carried on as an incident to the carrying on of the
corporation’s business and were made possible only through
the corporate authority with which he was clothed.\(^\text{104}^\)

The criminal liability of a corporation for the illegal acts
of its officers is not limited, however, to a pattern of illegal
conduct by the corporate president as was the case in *Empire
Packing*. In *United States v. Carter*, two corporations and
two corporate officers were charged with a violation of a provi-
sion of the Taft-Hartley Act which prohibited employers in
industries affecting interstate commerce from paying any
money to an official of a union representing its employees. The
corporate defendants in *Carter* were charged with a criminal
violation of the Taft-Hartley Act as a result of a *single instance*
of alleged payment of money in violation of the statute. The
court held that the corporation could be held criminally liable
for the isolated act of the corporation president since “the au-
thority of . . . [a corporation president] and the activity in
which he was engaged at the time of the offense involved,
brought criminal responsibility to the corporation of which he
was president.”\(^\text{106}^\) The court noted that Carter was the chief
officer with the general supervisory authority that attends such
an office and “was, in fact, the one who ran the company.”\(^\text{107}^\)
Thus, the corporate president’s single illegal payment in *Carter*

\(^{103}\) 174 F.2d 16 (7th Cir.), cert. denied, 337 U.S. 959 (1949).
\(^{104}\) Id. at 20.
\(^{105}\) 311 F.2d at 934 (6th Cir. 1963).
\(^{106}\) Id. at 942.
\(^{107}\) Id.
was imputed to the company for the purpose of imposing criminal liability in the same manner that *Empire Packing* was held responsible for 22 instances of false claims made by its corporate president.

There is a tendency to treat officers as an extension of the corporate entity and to characterize the criminal acts of corporate officers as the acts of the corporation.¹⁰⁸ The special position of corporate officers in the corporate hierarchy results in the imposition of a form of primary liability,¹⁰⁹ which can be defined as the liability imposed on the corporation for the criminal conduct of individuals sufficiently high in the corporation to be considered the "alter ego" of the corporate enterprise.

2. **Managers and Supervisors**

The scope of corporate criminal liability has extended downward through the corporate hierarchy to the middle-level management and supervisory level.¹¹⁰ In *United States v. Armour & Co.*,¹¹¹ a corporation was charged with violating regulations prohibiting tie-in sales under the Emergency Price Control Act of 1942. The alleged violations resulted from the acts of managers, assistant managers and salesmen of the defendant corporation, and the court affirmed that a corporation can be held criminally liable for the acts of such middle-level management personnel.

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¹¹¹ 168 F.2d 342 (3d Cir. 1948).
In CIT Corp. v. United States, the corporate defendant argued that an area office manager was too low in the corporate hierarchy to bind the company by causing false credit application statements to be made to the Federal Housing Administration. The Ninth Circuit Court of Appeals rejected the defense and upheld the criminal conviction of the corporation. The court found the CIT area office manager to be an authorized agent for the corporation in carrying out the specific activity which resulted in criminal conduct, and noted that the manager had, in effect, been delegated the power to create corporate criminal responsibility on behalf of the corporation.  

3. Subordinate Employees

We have seen that courts have imputed to the corporation acts of both corporate officers and middle-level managers in imposing criminal liability on the corporate entity. The more difficult question is whether the acts and intent of subordinate employees and agents acting within the scope of their employment can be imputed to the corporation to the same degree as the acts and intent of officers and managers who "run" the corporation and who are readily identified with the decision making functions of the corporation. The initial consideration will concern the imputation of acts only. Because courts have given special consideration to imputing the intent of subordinate employees to the corporation, that problem will be considered separately.

a. "Links" Between the Subordinate Employee and Company Officials in a Management or Supervisory Position

The easiest case for imposing corporate criminal liability for acts of subordinate employees or agents is where the subordinate employee can be "linked" in some way with a member of the "inner-circle." In such cases, courts will often cite this relationship as a basis for imposing liability on the corporation. Similarly, the authorization or acquiescence of manag-

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112 150 F.2d 85 (9th Cir. 1945).
113 Id. at 89.
114 See, e.g., State v. Granziani, 158 A.2d 375 (N.J. App. Div. 1959), where officers' knowledge of the acts of salesmen was held to be knowledge imputable to the corpora-
ers in a supervisory capacity who have authority over the matter involved in the criminal violation may serve as a "link" between the subordinate employee and the corporation, binding the corporation for criminal acts of the subordinate actor.

Those courts which look for the authorization or acquiescence "link" between the subordinate employee and the "inner-circle" may uphold corporate criminal liability for acts of subordinate employees performed methodically and continuously, thereby permitting an inference of authorization or acquiescence by corporate officers and supervisory personnel. The rationale of courts in the authorization and acquiescence cases is frequently based on tort concepts of principal-agent. That is, whenever a principal of the corporation, either an officer or supervisory manager, authorizes an employee's act, then the corporation itself can be said to have acted through the agent.

The inquiry by courts into whether the criminal acts of the subordinate employee were authorized or acquiesced in by a responsible company official raises a question of whether this attempt to "link" the subordinate employee with someone higher in the corporate hierarchy operates as a substantial limitation in the application of corporate criminal liability. The following sections explore those cases in which the evidence before the court has not established a direct relationship be-

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See also People v. Raphael, 72 N.Y.S.2d 748, 750 (Magis. Ct. 1947) where the court found that

a corporation is chargeable with the crime of an agent or employee, acting in the scope of his employment, when: (1) The corporation has benefited or profited from the crime, or (2) its officers participated in the crime, or (3) its officers authorized, sanctioned or acquiesced in the commission of the crime by an agent or employee, or (4) it had knowledge of the crime, or (5) it was chargeable with negligence in not obtaining such knowledge, through reasonable inquiry.

In State v. Baltimore & Ohio R.R., 15 W.Va. 362 (1879), it was stated:

It is but a reasonable inference that acts which are habitually done by the authorized agents of a corporation are done with their approval; and this is indeed almost the only manner in which the approval by the corporation of the acts of its agents can ever be proven. The tacit appropriation by a corporation of the benefits of the acts of its agents, repeatedly occurring, is full and satisfactory proof of the assent of the corporation to the doing of such acts.

tween the wrongdoing employee and some member of the "inner-circle."

b. *Direct Imputation from Subordinate Actor to the Corporation*

While the courts may in some cases find evidence of high-level authorization of criminal acts of subordinate employees, criminal liability may be imposed in the absence of any "link" between the subordinate actor and the "inner-circle" of the corporation. Thus, the second circuit in *United States v. Steiner Plastics Manufacturing Co.*\(^\text{116}\) has held that:

[i]n order to prove the corporation guilty it was not necessary for the government to show that an officer or director was involved in the frauding scheme. It was enough to show that agents of the corporation acting within the area entrusted to them had violated the law.

Likewise, in *St. Johnsbury Trucking Co. v. United States*,\(^\text{117}\) the First Circuit found:

it would not be enough to absolve the corporation from liability for a criminal offense of the sort here in question, that no member of the board of directors or no one of the higher executives knew that a dangerous commodity was being transported by the company trucks in a forbidden quantity without markings required by the regulation.

In *United States v. George F. Fish, Inc.*\(^\text{118}\) the corporate defendant was held criminally liable for the tie-in sales of a salesman in violation of the maximum price regulations in effect during World War II. The court noted that the regulations were directed to acts which would necessarily be performed by subordinate employees rather than corporate officers. Therefore, any distinction between corporate officers and salesmen would have defeated the purpose of the statute if the acts of the employee salesmen were not imputed to the corporation for purposes of imposing liability. The public policy advanced in securing compliance with the regulations dictated that the court impose liability on the corporation.

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\(^{116}\) See *United States v. Steiner Plastics Mfg. Co.*, 231 F.2d 149, 151 (2d Cir. 1956).

\(^{117}\) 220 F.2d 393, 398 (1st Cir. 1955).

\(^{118}\) 154 F.2d 798, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).
The courts in *St. Johnsbury Trucking Co.*, *George F. Fish, Inc.*, and *Steiner Plastics* unanimously adopted the view that a corporation may be held criminally liable without any showing of a relationship which would "link" the wrongdoing subordinate actor and the "inner-circle" so long as the criminal acts are performed by agents within the scope of their employment.

In the absence of conduct of corporate officials such as authorization or acquiescence which would "link" the high-level corporate officer and the employee, the courts have generally adopted a "functional" test to determine whether a subordinate employee's act may result in corporate criminal liability. The "functional" test was explicitly articulated in *C.I.T. Corp. v. United States* where, in determining whether an area office manager's acts could be imputed to the corporation the court stated, "[i]t is the function delegated to the corporate officer or agent which determines his power to engage the corporation in a criminal transaction."

The general rule now established in the federal courts is that the status of the actor within the corporate hierarchy is not determinative of whether the individual may bring criminal sanctions upon the corporation and that no "link" is required between the subordinate actor and the "inner-circle."¹²⁰

**c. Imputation of Intent of Subordinate Actors to the Corporation**

The historical growth of the doctrine of corporate criminal liability has evolved in three stages.¹¹⁹ The first stage involved a "traditional approach" which imposed criminal liability on corporations only where the individual who committed the criminal act was an officer of the corporation, or otherwise possessed a high-level executive position. This approach was grounded in the notion that only those individuals who could be said to speak for the corporation could be held responsible for its actions. As a result, the courts generally held that a corporation could only be held criminally liable for the actions of its employees when those employees were acting within the scope of their employment and with the corporation's knowledge or consent. When there was no such "link," the corporation was generally not considered criminally responsible.

The second stage of the doctrine involved the adoption of a "functional approach" which sought to broaden the scope of criminal liability by focusing on the function or position of the individual who committed the criminal act rather than on their formal status within the corporation. This approach was based on the idea that it was the function or role of the individual that gave them the authority to act on behalf of the corporation, rather than their formal position. Under this approach, a corporation could be held criminally liable for the actions of its employees even if those employees were acting outside the scope of their employment, as long as their actions were within the scope of their function or role.

The third stage of the doctrine involved the adoption of a "structural approach" which sought to further broaden the scope of criminal liability by focusing on the structure of the corporation itself. This approach was based on the idea that the corporation could be held criminally liable for the actions of its employees even if those employees were acting outside the scope of their employment and without the corporation's knowledge or consent, if the actions were taken in the course of the corporation's business. Under this approach, a corporation could be held criminally liable for the actions of its employees even if those employees were acting outside the scope of their employment, as long as their actions were taken in the course of the corporation's business and were intended to further the corporation's interests.

¹¹⁹ 150 F.2d 85, 89 (9th Cir. 1945).

¹²⁰ See, e.g., *United States v. Illinois Cent. R.R.*, 303 U.S. 239 (1938); *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963); *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962)(dicta); *St. Johnsbury Trucking Co. v. United States*, 220 F.2d 398 (1st Cir. 1955); *United States v. VanRiper*, 154 F.2d 492 (3d Cir. 1946); *United States v. George F. Fish, Inc.*, 154 F.2d 798 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946); *Zito v. United States*, 64 F. 2d 772 (7th Cir. 1933); *United States v. E. Brooke Matlack, Inc.*, 149 F. Supp. 814 (D. Md. 1957). The English courts have not followed the example of the American courts in imposing corporate criminal liability on the basis of criminal activity of subordinate actors in the corporate hierarchy. The English courts impute to the corporation only those acts committed by actors who occupy a superior position in the corporation structure: "In general, he must represent the brains of the company. He must be someone of whom the courts can say that his acts were the acts of the company." *Leigh, supra* note 43, at 45. The English cases with notably few exceptions hold the corporation criminally liable only where the human actor occupied a high position in the corporate hierarchy, and exercised a superior executive function.
liability traced in Section III shows the early restrictions on the doctrine, one of which involved corporate immunity for crimes requiring an evil or malicious intent.\textsuperscript{121} Although corporations from the mid-1830's have been liable for crimes of agents which did not require intent, that was not true for specific intent crimes until the beginning of the 20th century. The early courts were willing to impute the criminal acts of employees and agents to the corporation only in cases of crimes which did not require specific intent. The first decisions which imposed corporate criminal liability did so to abate common law nuisances and secure compliance with regulatory type offenses which did not require a specific criminal intent for their violation. Beyond this, however, the courts were faced with conceptual difficulties. While it is relatively easy to conceive of the corporation acting through subordinate employees, agents, and officers, it is harder to conceptualize the deriving of the "intent" of a corporation from its subordinate employees. Because \textit{mens rea} required a personal conscience, the courts and writers found it difficult to conceive of a corporate entity's \textit{mens rea}. Traditional concepts of "intent," "willfulness," and "malice" derived from the application of criminal law to individuals are wholly inappropriate for conceptualizing corporate wrongdoing.

One of the earliest cases which surmounted this obstacle was \textit{Telegram Newspaper Co. v. Commonwealth}.\textsuperscript{122} There, the court upheld corporate liability for criminal contempt stating,

[W]e think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.\textsuperscript{123}

The evolution of corporate criminal liability to encompass specific intent crimes coupled with the federal courts' disregard for the status of the corporate actor in determining whether to

\textsuperscript{121} See text accompanying notes 82-89.
\textsuperscript{122} 52 N.E. 445 (Mass. 1899).
\textsuperscript{123} Id. at 446. In United States v. McAndrews & Forbes Co., 149 F. 823, 836 (S.D.N.Y. 1917), the court found it "as easy and logical to ascribe to a corporation an evil mind as to impute to it a sense of contractual obligation." See also New York Cent. & Harbor River R.R. v. United States, 212 U.S. 481 (1909); Joplin Mercantile Co. v. United States, 213 F. 926 (8th Cir. 1914), aff'd, 236 U.S. 531 (1915).
impose liability on the corporation has resulted in a clear line of decisions holding corporations criminally liable for specific intent crimes committed by subordinate employees.\textsuperscript{124}

1. \textit{Minority View: Restriction of Imputation of Intent of Subordinate Actors}

One early case which did not accept the prevailing view that a subordinate actor's intent may be directly imputed to the corporation was \textit{People v. Canadian Fur Trappers Corp.},\textsuperscript{125} in which the New York Court held that:

The mere knowledge and intent of the agent or the servant to steal would not be sufficient in and of itself to make the corporation guilty. While a corporation may be guilty of larceny, may be guilty of the intent to steal, the evidence must go further than in the cases involving solely the violation of prohibitive statutes. The intent must be the intent of the corporation and not merely that of the agent. How this intent may be proved or in what cases it becomes evident depends entirely upon the circumstance of each case.\textsuperscript{126}

The court in \textit{Canadian Fur Trappers} limited criminal liability for specific intent crimes committed by agents and employees to those authorized by or committed with the acquiescence of corporate officers.\textsuperscript{127}

\textsuperscript{124} United States v. Illinois Cent. R.R., 303 U.S. 239 (1938); Boise Dodge, Inc. v. United States, 406 F.2d 771 (9th Cir. 1969); Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963); Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958); United States v. Armour & Co. 168 F.2d 342 (3d Cir. 1948); United States v. George F. Fish, Inc., 154 F.2d 796 (2d Cir.), cert. denied, 328 U.S. 869 (1946). See also United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295 (10th Cir. 1972); Texas-Oklahoma Express, Inc., v. United States, 429 F.2d 100 (10th Cir. 1970); Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951); United States v. E. Brooke Matlack, Inc., 149 F. Supp. 814 (D. Md. 1957), and cases cited in Coleman, \textit{Is Corporate Criminal Liability Necessary?}, 29 Sw. L.J. 908, 909 n. 10 (1975).

\textsuperscript{125} 161 N.E. 455 (N.Y. 1928).

\textsuperscript{126} \textit{Id.} at 456.

\textsuperscript{127} Gerhardt Mueller, an eminent criminal law professor at New York University, has made a similar argument. Mueller, \textit{supra} note 62. He objects to the extension of corporate criminal liability to acts of subordinate employees on the grounds that only the "inner-circle" is capable of acting and thinking for the corporation. His argument that a corporation acts and forms the requisite criminal intent to violate a statute only through its "inner-circle" has been adopted by other legal writers suggesting limitation of corporate criminal liability to acts of the "primary representatives," Winn, \textit{The Criminal Responsibility of Corporations}, 3 CAMB. L. J. 398, 414 (1928); "superior-
Acceptance of this minority position would not substantially limit the scope of liability as presently applied by the courts, since liability would continue to be imposed on the corporation where a "link" is established with the "inner-circle". Thus, where it is shown that the corporate officers, middle-level managers or supervisory personnel had actual or constructive knowledge of the acts of the subordinate employees or agents, the court would rely upon the "link" as a basis of imposing liability on the corporations.

As in the case of authorization, constructive knowledge of a subordinate actor's criminal activities may be charged where the criminal acts are an established practice or have become a course of business. Thus, where the wrongful acts attributed to the subordinate employees and agents are performed methodically or continuously over a period of time they may raise a presumption that the acts were sanctioned or were continued only with the acquiescence of the corporate "inner-circle." An established pattern of criminal acts may act as an estoppel of the corporation in the minority jurisdiction to interpose a defense against corporate liability for imputation of specific intent from the subordinate employee to the corporation. Of course, the corporation is not legally estopped from asserting such a defense, but the theory would in effect place a heavy and perhaps in many instances an insurmountable burden on the corporation to show that the members of the "inner-circle" indeed had no knowledge of the wrongdoing.

The minority view expressed in Canadian Fur Trappers and supported by Professor Mueller\textsuperscript{128} is of great significance in those cases where only a single instance of wrongdoing is charged. In such cases, the government does not have the advantages of a presumption of corporate knowledge, authoriza-


Professor Seney has offered a counter argument which suggests that "[B]asing 'crime' on mens rea exonerates major harm producers, groups without minds, and corporations whose profit purpose is praised not stigmatized." Seney, "A Pond as Deep as Hell"—Harm, Danger, and Dangerousness in our Criminal Law, 18 Wayne L. Rev. 569, 634 (1972).

\textsuperscript{128} Id.
tion, or acquiescence and thus has a greater burden in establishing the "link" with the "inner-circle." In fact the "link" may be impossible to establish in the absence of a pattern of wrongdoing. The adoption of this position would not affect the imposition of criminal liability for the single or isolated acts of corporate officers but would lessen corporate responsibility for the random and isolated specific intent crimes committed by subordinate employees of the corporation.

2. Purpose to Benefit the Corporation Required to Impute Intent of Subordinate Employees to the Corporation

The most significant restriction on imputation of a subordinate employee's intent to the corporation is found in Standard Oil Co. of Texas v. United States. In that case two corporations had been convicted for knowingly violating the Connally Hot Oil Act, which prohibits shipment of contraband oil in interstate commerce. On appeal the fifth circuit overturned the convictions on the grounds that the "corporation does not acquire that knowledge or possess the requisite 'state of mind essential for responsibility' through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer."

Two years later the fifth circuit again addressed the question of whether criminal liability would be imposed on a corporation for acts of subordinate employees committed solely for the employees' benefit in Steere Tank Lines, Inc. v. United States. The court held that a corporation could not knowingly and willfully violate Interstate Commerce Commission regulations by filing falsified driver logs where the drivers who filed the logs were acting for their own benefit. Thus, at least in the fifth circuit, a subordinate employee must be acting to "benefit" the corporation when committing the wrongful acts before the court will impute the employee's intent to the corporation.

The status of the "benefit" rule outside the fifth circuit is unclear. Courts have generally not required a showing that the

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129 307 F.2d 120 (5th Cir. 1962).
130 Id. at 129.
131 330 F.2d 719, 723 (5th Cir. 1969).
132 Standard Oil Co. of Texas v. United States, 307 F.2d at 128.
corporation received any actual benefit in order to hold the corporation responsible for the criminal acts of its employees,\textsuperscript{133} so long as the criminal act was not solely to benefit the employee.\textsuperscript{134} The court in \textit{Standard Oil} would go no further. In fact, corporate criminal liability may be upheld where the acts of the subordinate employee are actually detrimental to the corporation.\textsuperscript{135} In \textit{Old Monastery Co. v. United States},\textsuperscript{136} the fourth circuit declared that “[w]e do not accept benefit as a touchstone of corporate criminal liability; benefit at best, is an evidential, not an operative fact.”\textsuperscript{137} It should be noted, however, that the rejection of the “benefit” theory in \textit{Old Monastery Co.} came in a case involving a corporate president as opposed to a subordinate employee and thus the court was not called upon to decide the precise issue presented in \textit{Standard Oil} and \textit{Steere Tank Lines}.\textsuperscript{138}

The Model Penal Code contains a limitation on corporate liability similar to the \textit{Standard Oil} “benefit” requirement although drafted before the decision in \textit{Standard Oil}. The Model Penal Code provision would impose liability on the corporation for acts of an agent of the corporation “acting within the scope of his office or employment in behalf of the corporation . . . .”\textsuperscript{139} The final phrase was added to avoid the imposition of corporate liability for criminal conduct of employees detrimental to the corporation.\textsuperscript{140}

The Model Penal Code requirement of acts “in behalf of

\begin{itemize}
\item \textsuperscript{133} United States v. Carter, 311 F.2d 934 (6th Cir. 1963); United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir.), \textit{cert. denied}, 337 U.S. 959 (1949).
\item \textsuperscript{134} Id.
\item \textsuperscript{135} The requirement established in \textit{Standard Oil} that subordinate employees whose wrongful acts are imputed to the corporation must be acting to “benefit” the corporation rather than to line their own pockets does not establish a requirement that the corporation must be actually benefited as a result of the employee’s illegal act. The court in \textit{Standard Oil} expressly stated that a corporation may be held criminally liable “even though no benefit has been received in fact” from the illegal acts of the employee. Thus, rather than a requirement to show benefit to the corporation, \textit{Standard Oil} requires nothing more than a showing of “a purpose to benefit.”
\item \textsuperscript{136} See \textit{Old Monastery Co. v. United States}, 147 F.2d 905, 908 (4th Cir.), \textit{cert. denied}, 326 U.S. 734 (1945).
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id., \textit{cited with approval in} United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir.), \textit{cert. denied}, 337 U.S. 959 (1949).
\item \textsuperscript{139} See also United States v. Carter, 311 F.2d 934, 942 (6th Cir. 1963).
\item \textsuperscript{140} \textbf{MODEL PENAL CODE} § 2.07(1)(a)(Tent. Draft No. 4, 1955) (emphasis added).
\item \textsuperscript{141} Id., Comment.
\end{itemize}
the corporation” can be construed as defining the required agency relationship between the actor and the corporation, and not as requiring that the acts be performed with the intention of benefiting the corporation. Under this interpretation, an act by an agent may be “in behalf of the corporation” as required by the Model Penal Code even if the act was harmful to the corporation and was performed for the sole benefit of the actor. Therefore, the Model Penal Code does not, by this interpretation, support the “benefit” rule enunciated in Standard Oil, although the drafters may have intended a similar result.

Neither the “benefit rule” of the fifth circuit nor the Model Penal Code provision would preclude corporate responsibility for the criminal activities of subordinate employees and agents acting for their own benefit or the benefit of third parties where the “inner-circle” can be “linked” to the activities. This result is suggested by the fifth circuit itself in Steere Tank Lines, in which the court implies that truck drivers who falsify ICC required driver logs solely for their own benefit may subject the corporation to criminal liability for such acts where other corporate agents had knowledge of the violations.

Standard Oil and the Model Penal Code implicitly recognize, however, that certain acts of subordinate employees within the scope of their employment cannot realistically be viewed as emanating from the corporation itself. This attempt to limit the imposition of corporate criminal liability is reminiscent of the early view that certain crimes involving malicious or evil intent were so ultra vires that the corporation could not commit them. The limitation posed by the Model Penal Code is not as restrictive as the early ultra vires doctrine, but is certainly a partial return to that view.

3. **Limitations on Imputation of Intent of Subordinate Actors for Commission of Common Law Crimes**

At least one court which imputed criminal acts of subordinate employees directly to the corporation for the purpose of establishing corporate criminal liability for a substantive crime

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141 Such an interpretation was suggested in Hamilton, *Corporate Criminal Liability in Texas*, 47 Tex. L. Rev. 60, 79 (1968).

142 330 F.2d 719 (5th Cir. 1969).

143 *Id.* at 723, 724.
acquitted the corporation on the conspiracy counts. In *United States v. Thompson-Powell Drilling Co.*, the Government had indicted the corporation for a conspiracy based on an illegal agreement of subordinate employees which the government argued could be imputed to the corporation for purposes of establishing a conspiracy by the corporation. The court, however, distinguished the conspiracy and the substantive offense and questioned "whether the fact that the corporate employee may have acted in concert with other individuals in the commission of the substantive offense will similarly by imputation implicate the corporation in the conspiracy." The court viewed the imputation necessary for a conspiracy "a step removed from the imputation of the substantive offense" and held that "the assent of some agent in supervisory or executive authority would be necessary to commit a corporation to conspiracy." The *Thompson-Powell* decision has been supported on the grounds that there is a valid distinction between codified common law crimes requiring specific intent and more recent statutory offenses of a regulatory nature which are designed to prevent harm to the general public. The distinction is premised on the belief that a corporation's violation of statutes proscribing common law fraud and conspiracy do not directly inflict harm upon the general public as do corporate violations of pure statutory offenses. Absent a legislative purpose of preventing direct harm to the public, it is contended that the courts should not look beyond corporate management in deriving the "intent" of the corporation to commit the crime of fraud or conspiracy. Under this theory the nature of the crime, rather

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114 Id. at 578.
115 Id.
116 Id. at 562.
118 Id. at 562.
119 Id. This view would allow the courts to impute the intent of subordinate actors to the corporation for violations of purely statutory offenses committed within the scope of their employment, regardless of knowledge, authorization, or acquiescence of the "inner-circle." However, violations of statutory common law crimes which require *mens rea* would not be imputed to the corporation on the basis of the agency relationship alone.
than the status or function of the employee, restricts the imputation of intent.\textsuperscript{150}

This approach was adopted in \textit{State v. Adjustment Department Credit Bureau, Inc.},\textsuperscript{151} in which the Supreme Court of Idaho cited the statutory common law crimes/regulatory offenses distinction in reversing a corporate defendant's conviction for extortion. The court found that the extortion statute was a codification of the common law crime of extortion and black-mail which required a specific intent for conviction.

The distinction between purely statutory offenses and the common law crimes codified by statute raises a question of the extent to which the federal crime of common law conspiracy, now codified at 18 U.S.C. 371 (1970), can be imputed to a corporation based on the criminal acts of subordinate actors in the corporate hierarchy. From an early date corporations have been subject to indictment for the crime of conspiracy,\textsuperscript{152} and as in the case of substantive crimes involving corporate officers, criminal liability for conspiracy has been imposed on the corporation based on the criminal intent of the officers.\textsuperscript{153}

Although corporate conspiracies based on acts of subordi-

\textsuperscript{150} The most serious objection to this argument is the recognition that "whether or not the crime has been reduced to statutory form has no logical bearing upon whether or not the crime requires proof of a guilty mind. Innumerable statutory crimes require \textit{mens rea} and the necessity of \textit{mens rea} may be as readily dispensed with the case of common law offenses as statutory ones." Sayre, \textit{supra} note 93, at 70.

\textsuperscript{151} 483 P.2d 687 (Idaho 1971).

\textsuperscript{152} See, e.g., \textit{State v. Eastern Coal Co.}, 70 A. 1, 7 (R.I. 1908) in which the corporate defendant was charged with a conspiracy to fix the price of coal. The court held that "[i]f corporations have the capacity to engage in actionable conspiracy, they have the power to criminally conspire. We are of the opinion that the better reasoning supports the contention that corporations can conspire . . . ." \textit{See also United States v. MacAndrews & Forbes Co.}, 149 F. 823 (S.D.N.Y. 1906). \textit{See generally Hermann, Conspiracy, The Business Enterprise, White Collar Crime and Federal Prosecution: A Primer for Practice}, 9 CREIGHTON L. REV. 476 (1976).

\textsuperscript{153} Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir. 1945) (conspiracy to violate the Emergency Price Control Act of 1942) (acts of a corporation president); Egan v. United States, 137 F.2d 369 (8th Cir. 1943) (conspiracy of a registered public utility holding company to make political contributions in violation of § 12(h) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 (1970))(acts of president); Mininsohn v. United States, 101 F.2d 477 (3d Cir. 1939) (conspiracy to defraud the United States by obtaining the payment of false and fraudulent claims)(acts of "controlling" officers); United States v. Kemmel, 160 F.Supp. 718 (M.D. Penn. 1958)(conspiracy to defraud the United States by applying less paint than provided for in corporation's subcontract for painting buildings at military installation)(acts of corporation president and job superintendent).
nate employees have arisen infrequently, and there is some doubt created by the Thompson-Powell decision, courts have generally upheld corporate liability for conspiracies based on acts of subordinate employees and agents.\textsuperscript{154}

In Zito v. United States,\textsuperscript{155} for example, a corporation was charged with entering into an unlawful conspiracy for the purpose of violating the National Prohibition Act. The court, in determining whether the corporation was a member of the alleged conspiracy, looked to the "act," "speech" and "conduct of the actors" since "corporations speak and act through their agents."\textsuperscript{156} The court then held that the determination of whether the corporation was a member of a conspiracy was for the jury where the proof showed that an agent with authority to sell a corporation's products entered an illegal conspiracy in the course of business.\textsuperscript{157}

Although the court in Zito allowed the imposition of corporate criminal liability for a conspiracy entered by a salesman, this decision, standing alone, does not support the proposition that a subordinate employee's acts will always subject the corporation to such liability. In Zito, the court noted that "other individuals connected with" the corporation could have been included in the indictment,\textsuperscript{158} and found, in addition to the actions of the salesman, other corporate actions which suggested that the corporation was a part of the conspiracy. These considerations cast some doubt on whether the agent's activities in the conspiracy, without more, would have prompted the court to reach the same result.

\textsuperscript{154} See, e.g., C.I.T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945) (conspiracy to make and pass false statements to the Federal Housing Administration)(acts of branch manager); Zito v. United States, 64 F.2d 772 (7th Cir. 1933) (conspiracy to violate the National Prohibition Act)(acts of an agent, salesman); United States v. Uniroyal, Inc., 300 F. Supp. 84 (S.D.N.Y. 1969)(conspiracy to fix prices of rubber-soled canvas footwear in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970))(acts of salesmen and branch managers).

\textsuperscript{155} 64 F.2d 772 (7th Cir. 1933).

\textsuperscript{156} Id. at 775.

\textsuperscript{157} The scope of the agent's duties and exact position in the corporate hierarchy are not set forth in the opinion.

\textsuperscript{158} 64 F.2d at 775.
IV. CORPORATE DEFENSES TO IMPOSITION OF CRIMINAL LIABILITY FOR ACTS OF SUBORDINATE EMPLOYEES

A. Lack of Knowledge by Corporate Officers

One defense raised by corporations to the imposition of criminal liability based on acts of subordinate employees is that the corporation, through its corporate officers and supervisory personnel, not only did not participate in the wrongdoing charged to the corporation, but had no knowledge of the activities of the employee sought to be imputed to the corporation. In holding a partnership entity liable for "knowingly" violating ICC regulations for safe transportation of explosives, the Supreme Court in United States v. A & P Trucking Co. stated that business entities can be guilty of "knowing" violations of regulatory statutes. The court observed that

[t]he business entity cannot be left free to break the law merely because its owners . . . do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment.

A defense by the corporation that its officers lacked knowledge of the subordinate employee's wrongdoing goes to the very heart of the doctrine of corporate criminal liability since the corporation can gain knowledge only by way of some human actor within the corporation. Thus, if the knowledge of subordinate employees could not be imputed directly to the corpora-

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161 Id. at 126.

162 The knowledge imputed to the corporation may not be limited to that of a single employee but may be derived from the collective knowledge of several employees. See, e.g., Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951)(rev'd on other grounds) where the corporate defendant contended that the corporation, a motor common carrier, was not criminally liable for falsifications of its drivers in the preparation of logs required by the ICC unless it had actual knowledge of the falsifications. The corporate defendant was able to show that the logs and reports containing the falsifications were not seen by a single agent or representative of the company after they were filed and that no single agent or representative had actual
tion, the scope of corporate criminal liability would be severely restricted. The federal courts have not generally restricted imputation by requiring knowledge of corporate officers, managers, or supervisors. Rather "it is usually held to be enough to charge the corporation with guilt if any agent or servant of the corporation, acting for the corporation in the scope of his employment, has the guilty knowledge, in accordance with the general principles of the law of agency as applied in determining civil liability."163

B. Scope of Employment

The primary limitation on corporate criminal liability is the traditional requirement adopted from the tort concept of respondeat superior that acts be committed by employees and agents within the scope of their employment in order to impose sanctions upon the corporation. Courts have, however, rarely discussed the scope of employment in the criminal context.164 Although the phrase has generated a substantial volume of litigation in the torts area, it has not been a source of major dispute in corporate criminal liability decisions since corporate wrongdoing generally involves regulatory offenses in which there is no real question of the employees' conduct being within the scope of employment.165

knowledge of the false statements. The court held that the knowledge required to impose criminal liability on the corporation may be imputed from more than one agent where the knowledge of any single agent was insufficient.


163 St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955); Cf. Holland Furnace Co. v. United States, 158 F.2d 2 (6th Cir. 1946).


165 The scope of employment limitation on corporate criminal liability would apparently limit the corporation's responsibility for crimes such as bigamy, perjury, rape and murder. See Rex v. Cory Brothers & Co., 1 K.B. 810 (1927); New York Cent. & Harbor R.R. v. United States, 212 U.S. 481, 494 (1909); United States v. John Kelso Co., 86 F. 304, 306 (N.D. Cal. 1899); State v. First Nat'l Bank, 51 N.W. 587 (S.D. 1892), writ of error dismissed, 163 U.S. 686 (1896). In surveying the case law of corporate criminal liability the drafters of the Model Penal Code found no case in which a corporation was sought to be held criminally liable for such crimes as murder, treason, rape or bigamy. MODEL PENAL CODE, § 2.07, Comment (Tent. Draft No. 4. (1955). But
Corporations have advanced a number of defenses related to the scope of employment limitation. First, they question whether an employee or agent who commits an illegal act can ever be acting within the scope of employment where the corporation, through its officers, has not sought to engage in criminal activity. This argument resembles the old doctrine of ultra vires, which would, if literally applied, absolve the corporation of all criminal acts.\textsuperscript{66}

The "fiction" theory of corporate existence\textsuperscript{67} which prevailed in the last century, asserted that

since a corporation is only a fictitious person created and invested with certain functions by the state, it was capable of doing only acts expressly permitted in its charter; that anything further, being \textit{ultra vires}, was not the act of the corporation; and hence there would be no corporate liability for torts or crimes.\textsuperscript{68}

Modern courts, with no allegiance to the "fiction" theory of corporate existence, and recognizing the restrictive role of ultra vires in tort law, have not employed the ultra vires doctrine to restrict the imposition of criminal liability.\textsuperscript{69}

\textsuperscript{66} See \textit{People v. Rochester Ry. & Light Co.}, 88 N.E. 22 (N.Y. 1909), in which a corporation was indicted for second degree manslaughter. Before reaching the dispositive question as to whether the statutory provision for manslaughter would impose criminal liability on the corporation, the court reviewed the more general question of whether a corporation was capable of committing the crime. The court concluded that a corporation could be held criminally liable for manslaughter although such liability would not be imposed in the case before the court since the definition of manslaughter in the statute precluded the commission of the offense by a corporation.


The position of the English courts regarding the ultra vires limitation is unclear. \textit{See Leigh, supra} note 43, at 48.
The *ultra vires* doctrine has often been invoked by corporations as a defense to prosecutions, with an increasing lack of success. While crime is always an *ultra vires* act, this does not relieve the corporation from responsibility for such crimes if committed in the course of *intra vires* business, or even in the course of an *ultra vires* business if the servant committing the crime was acting within the scope of his authority.\textsuperscript{170}

It is obvious that a theory holding that criminal acts fall outside the scope of employment would effectively emasculate the doctrine of corporate criminal liability. Accordingly, such a theory has been rejected. The federal courts have established that the illegality of the corporate employee's conduct does not by itself place such conduct outside the scope of employment.

C. Exercise of Due Care by Corporation to Secure Employees' Compliance

A number of commentators have argued that due diligence and care by the corporation in preventing criminal acts of employees and agents should be a defense to a criminal action.\textsuperscript{171} The principal argument in favor of a defense of due diligence is that the purpose for imposing liability is to encourage the corporation's efforts to secure statutory compliance by its employees.\textsuperscript{172} That purpose is not served, this argument concludes, where the corporation has in fact diligently supervised its employees and they violate the statute contrary to express instructions. But the defense of due diligence has not, with the exception of one notable case,\textsuperscript{173} been adopted in the federal courts.\textsuperscript{174}


\textsuperscript{172} The failure to allow a corporate defense of good faith has also been criticized on the grounds that the force of any stigma attached to a criminal conviction is diminished when the public realizes that "corporate liability does not signify lack of good faith on the part of corporate management." Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 Harv. L. Rev. 283, 286 (1946).

\textsuperscript{173} Holland Furnace Co. v. United States, 158 F.2d 2 (6th Cir. 1946). There a corporation was charged with knowingly violating a War Production Board order by fraudulently selling a new furnace on the misrepresentation that the customer's old furnace was damaged beyond repair. The court overturned the conviction of the corporation and held that due diligence and care of corporations to ensure compliance with
For example, in *United States v. Armour and Co.*\(^{175}\) the corporate defendant established that it familiarized employees with the particular regulations violated. The court rejected the due care defense and emphasized that the case involved the non-performance of a nondelegable duty and that it was the function delegated to the employee which determined the employee's power to engage the corporation in criminal activity.\(^{176}\)

In *St. Johnsbury Truck Co. v. United States*,\(^{177}\) Chief Judge Magruder in a concurring opinion noted that with regard to certain ICC regulations requiring labelling of motor vehicles and trailers transporting dangerous substances, the corporate defendant could not avoid liability by showing that the higher executives of the corporation "took the utmost care to lay down for the guidance of the subordinate employees procedures designed to assure compliance with the regulation."\(^{178}\)

In *Continental Baking Co. v. United States*,\(^{179}\) the Sixth Circuit approved a jury charge to the effect that:

> When the act of the agent is within the scope of his apparent authority, the corporation is held legally responsible for it, although it may be contrary to his actual instructions and although it may be unlawful.\(^{180}\)

The corporation in *Continental Baking Co.* was charged with conspiring to fix prices of bakery products in violation of the Sherman Anti-Trust Act. The price-fixing was engineered by a general manager of a branch plant contrary to directions from the "Home Office." Under these circumstances the court held that:

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\(^{174}\) See, e.g., *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir.) cert. denied, 409 U.S. 1125 (1972); *United States v. Harry L. Young & Sons*, 464 F.2d 1295 (10th Cir. 1972); *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962); *United States v. Armour & Co.*, 168 F.2d 342 (3d Cir. 1948); *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943); *United States v. E. Brooke Matlack, Inc.*, 149 F. Supp. 814 (D. Md. 1957).

\(^{175}\) 168 F.2d 342 (3d Cir. 1948).

\(^{176}\) Id. at 344.

\(^{177}\) 220 F.2d 339 (1st Cir. 1955).

\(^{178}\) Id. at 397.

\(^{179}\) 281 F.2d 137 (6th Cir. 1960).

\(^{180}\) Id. at 151.
If in the performance of his corporate principal's business he engaged in illegal price-fixing agreements and condoned or encouraged activities of those under his supervision in contravention of written directions from the "Home Office" the corporation cannot deny its liability for his actions. Continental cannot divorce itself from its responsible agent to insulate itself from criminal prosecution.  

A review of the cases suggests that the crimes of employees and agents within the scope of employment will be imputed to the corporate employer regardless of the corporation's good faith efforts and explicit instructions given to secure compliance. The same result is reached even though the statute requires a "knowing and willful" violation and provides that the good faith of the defendant is a defense. Thus, the prevailing view in the federal courts has rejected corporate defenses based on the exercise of diligence in preventing criminal acts by subordinate employees.

V. CRIMINAL LAW REFORM AND CORPORATE CRIMINAL LIABILITY

The scope of corporate criminal liability as defined by the federal courts is more extensive than the liability which would be imposed under the proposed new Federal Criminal Code or the Model Penal Code drafted by the American Law Institute.  

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1. Id. at 150. See also State v. Louisville & Nashville R.R., 195 S.W. 229 (Tenn. 1892); contra, Gund Brewing Co. v. United States, 204 F. 17 (8th Cir. 1913).

2. F. Lee Bailey & Henry Rothblatt in their manual for practitioners, DEFENDING BUSINESS AND WHITE COLLAR CRIMES 415 (1969), state that "[t]he corporation will not be criminally liable if, in the particular act, its agent deliberately violated his instructions and his act was not ratified or approved by the corporation." The conclusion reached by this author is that this statement does not accurately reflect the judicial decisions.

3. A contrary position is expressed in the proposed FEDERAL CRIMINAL CODE which does not, with the exception of strict liability offenses, follow the prevailing view. It would restrict the imposition of corporate criminal liability arising from the acts of subordinate employees by allowing as a defense the exercise of due diligence by the high managerial agent having supervisory responsibility over the subject matter of the offense. The burden of proving due diligence is on the corporation. See 1 WORKING PAPERS OF THE UNITED STATES NATIONAL COMMITTEE ON REFORM OF FEDERAL CRIMINAL LAWS, 180-81 (July 1970).


The proposed Federal Criminal Code limits corporate liability for felonies to acts of management personnel, acts or omissions by persons whom the statute defines as capable of creating liability, or situations in which the duty of affirmative conduct is imposed on the corporation by law. Liability for misdemeanors and offenses which do not require culpability is imposed for conduct of any agent of the corporation who commits the offense within the scope of his employment. Thus, absent an express statutory provision, the corporation's liability under the proposed Federal Criminal Code is somewhat narrower than presently imposed by the federal courts.

An alternative provision in the proposed code provides for more extensive liability. The alternative liability provision would increase the scope to include acts of agents "done, authorized, requested, commanded, ratified or recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs" on the part of management. The ALI Model Penal Code formulation is in large part reflective of liability as presently imposed by the courts. The Model Penal Code would impose criminal liability on the corporation only where: (1) The statute violated expresses a legislative intent to impose liability on the corporation, (2) the act in question is performed by an agent acting within the scope of his office or employment, or (3) the criminal act is committed on behalf of the corporation.

Beyond the imposition of liability for acts of agents in violation of regulatory offenses and those statutes which are specifically made applicable to corporations, the Model Penal Code restricts further liability to the conduct of servants or agents authorized, ratified, adopted, or tolerated by the corporate officers and "high managerial agents" who are sufficiently high in the corporate hierarchy to warrant the assumption that their acts reflect corporate policy.

The approach outlined in the Model Penal Code restricting the scope of corporate criminal liability has been followed by at least one state court. In State v. Adjustment Department

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186 Federal Criminal Code § 402(1).
188 Federal Criminal Code § 432.
Credit Bureau, Inc., a corporation's conviction for extortion, a specific intent crime, was reversed on grounds that a bill collector's extortion could not be charged to the corporation without establishing managerial capacity or that a corporate officer or high managerial agent had authorized the act.

The court adopted the view that:

A corporation may be convicted if (a) legislative purpose plainly appears to impose liability on the corporation for the offense; or (b) the offense consists of an omission to perform an act which the corporation is required by law to perform; or (c) the commission of the offense was authorized, requested, commanded or performed (i) by the board of directors, or (ii) by an agent having responsibility for formation of corporate policy or (iii) by a 'high managerial agent' having supervisory responsibility over the subject matter of the offense and acting within the scope of his employment in behalf of the corporation.

The Model Penal Code provision on corporate criminal liability was also considered in Commonwealth v. Beneficial Finance Co. in which the corporate defendants argued that a corporation should not be held criminally liable for the acts of subordinate employees or agents unless authorized, ratified, adopted, or tolerated by the corporate officers or other "high managerial agents" who are sufficiently high in the corporate hierarchy to warrant the assumption that their acts in some substantial sense reflect corporate policy. The defendant's position was based on the ALI Model Penal Code standard. The trial court in its instructions to the jury had focused "on the authority of the corporate agent in relation to the particular corporate business in which the agent was engaged." The instructions did not require the jury to find authorization or reckless toleration by a corporate representative responsible for corporate policy, but the appeals court found that the instructions "did preserve the underlying corporate policy rationale [of] the Code by allowing the jury to infer 'corporate policy' from the position in which the corporation placed the agent in

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190 483 P.2d 687 (Idaho 1971).
191 Id. at 691.
193 Id. at 73.
commissioning him to handle the particular corporate affairs in which he was engaged at the time of the criminal act."

The Court pointed out that:

[We do not think that the Model Penal Code standard really purports to deal with the evidentiary problems which are inherent in establishing the quantum of proof necessary to show that the directors or officers of a corporation authorize, ratify, tolerate or participate in the criminal acts of an agent when such acts are apparently performed on behalf of the corporation. Evidence of such authorization or ratification is too easily susceptible of concealment.]

Of necessity, the proof [of] authority to so act must rest on all the circumstances and conduct in a given situation and the reasonable inferences to be drawn therefrom.\textsuperscript{105}

VI. CONCLUSION

The imposition of criminal liability has no inherent limitations once the conceptual barriers are surmounted. The "fiction theory" of corporations and the doctrine of ultra vires were conceptual barriers which arguably restricted or entirely precluded the imposition of liability, but they were eventually discredited or discarded, and the corporation was viewed as an entity capable of acting in its own right. It was at this point that the corporation was held responsible for both torts and crimes of its members. In order to accommodate the corporation within a legal system designed to deal with individuals, however, the corporation was treated as a legal person whose actions were controlled by its members. It was only a short step then to ascribe to the corporation—that is, the legal person—the acts of its members. Since the liability of the corporation is in fact derived solely from the acts of its members, these acts are said to be imputed to the corporation. This fictional process of imputation has no real legal significance except as a formal bridge from the individuals who \textit{act} and \textit{think} to a legal entity or legal person which can do neither. The decisions which impose criminal liability on corporations have never developed a comprehensive theory as to the process of

\textsuperscript{104} Id.
\textsuperscript{105} Id. at 82.
imputation or the limitations on its use. Rather, the courts have concerned themselves with statutory interpretation, the nature of the acts sought to be imputed to the corporation, and the actor's relationship with the corporation. Therefore, the process of imputation by itself poses no barrier to the extension of corporate criminal liability to encompass illegal activities of subordinate actors.

Although the theory of imputation poses no limitations on liability, it does not suggest a rationale. The decision to impose liability on the corporation may depend upon the type of legislation involved. For example, in the case of regulatory offenses, the basis for liability appears to lie in the legal duty imposed upon the corporation to observe the statutory mandate strictly. It is argued that these "public welfare offenses" should not go unpunished simply because the corporate officers did not know of or condone the violations.

The second class of offenses involved are those imposed by statute which require specific intent (mens rea) for their violation and a smaller number of common law crimes—such as conspiracy, extortion, and fraud—which have been codified by statute and also require mens rea. In general, the federal courts have not attempted to distinguish between welfare offenses and common law crimes such as conspiracy, fraud, and extortion, which have been codified. The courts have employed the same functional test in each case to determine the scope of liability; that is, whether the criminal act was committed within the scope of employment.

It is the contention of this writer that courts have properly rejected the view of commentators who argue that the corporation should be held criminally liable only for acts of the board of directors, and of officers and managerial agents who comprise the "inner-circle." A respondeat superior standard, which results in holding the corporation criminally liable for the acts of agents and subordinate employees without the requirement of proof as to active illegal conduct by members of

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18 Leigh, supra, note 43, at 115.
197 It was early suggested that "the corporation can become liable only for acts of shareholder-elected officers, i.e., the board of directors, acting jointly, or the individual members of the board acting separately within their proper spheres." Note, 21 Harv. L. Rev. 535 (1908).
188 See Mueller, supra note 62, and commentators cited in note 127 supra.
the "inner-circle," is an effective means for placing the ultimate responsibility for the conduct of corporate business fully upon the entity most responsible to society for the ultimate harm.

Since corporate activities are performed by corporate employees at every level of the corporate hierarchy, the title or position of the employee or agent should not be determinative for imputing criminal responsibility to the corporation.

To permit corporations to conceal the nefarious acts of their underlings by using the shield of corporate armour to deflect corporate responsibility, and to separate the subordinate from the executive, would be to permit "endocratic" corporations to inflict wide-spread public harm without hope of redress. It would merely serve to ignore the scramble and realities of the market place. . . . Stringent standards must be adopted to discourage any attempt by "endocratic" corporations' executives to place the sole responsibility for criminal acts on the shoulders of their subordinates.199

The unwillingness of the courts to restrict criminal liability solely on the basis of the corporate actor's status is well considered in view of the size and complexity of modern corporations.200 Clearly defined flowcharts which designate and describe with legal precision the position and authority of each corporate actor generally do not exist. Even if such organiza-

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199 Commonwealth v. Beneficial Finance Co., 275 N.E.2d 33 (Mass. 1971). Further, the argument that the individual ought to be held responsible supposes that there is an individual who can justly be dealt with. Sometimes the division of responsibility within the corporation is so great that it is difficult to fix on an individual. In any case, an individual cannot be made responsible for a mere omission unless there is a legal rule attaching the duty to act to him personally. Again, where the offense results from habits common to the organization as a whole, it may not be just to single out one person for substantial punishment, even though he may be shown to be the actual offender in the concrete case, since the individual is frequently subject to severe economic pressure to conform to the practices of the organization.

200 The difficulties posed by the size and complexity of modern corporations for antitrust prosecutions has been fully explored by legal commentators. See Flynn, Criminal Sanctions under State and Federal Antitrust Laws, 45 Tex. L. Rev. 1301, 1322-1324 (1967); Watkins, Electrical Equipment Antitrust Cases—Their Implication for Government and Business, 29 U. Chi. L. Rev. 97, 104-08 (1961); Comment, Criminal Prosecution for Violations of the Sherman Antitrust Act: In Search of a Policy, 48 Geo. L.J. 530 (1960); "[I]n the bewildering complexity and intricate ramifications of the administrative set-up in the modern 'big business' corporation, the spheres of delegated authority and of managerial discretion are virtually impossible to disentangle." Watkins, supra, at 107.
tion charts were to be found, there is little reason to expect that the actual authority of any corporate agent would coincide with the authority prescribed therein. One court has pointed out that:

In a large corporation, with many numerous and distinct departments, a high ranking corporate officer or agent may have no authority or involvement in a particular sphere of corporate activity, whereas a lower ranking corporate executive might have much broader power in dealing with a matter peculiarly within the scope of his authority. Employees who are in the lower echelon of the corporate hierarchy often exercise more responsibility in the everyday operations of the corporation than the directors or officers.291

The criminal law now "concentrate[s] almost exclusively on individualistic transactions"202 and does not focus on the major harms visited on society by corporate actors in the name of the corporation.203 The societal harm inflicted by corporations may in fact be qualitatively greater than the harm inflicted by individuals. If the criminal law is to remain relevant to a society dominated by corporations, it will be necessary to identify those corporations producing societal harms as a result of criminal acts and apply appropriate sanctions to reduce such harm effectively. Until such time as effective non-criminal sanctions are devised the criminal prosecution serves as a less desirable but necessary alternative.

The difficulties encountered in applying the criminal law

202 Seney, supra note 94, at 806, 821:
Although only the individual can be a moral agent, most significant action today is performed not by individuals but by collectivities . . . . how moral responsibility is to be assigned to men engaged in collective action remains a real problem.
The rise of the modern corporation has confronted traditional modes of sanctioning with problems whose solution remains for the future. Traditional sanctions designed to influence conduct in the market were originally aimed at highly individualized targets.
203 It has been suggested that the "systematic immunity" of collective entities such as the giant private corporation is the "profound political problem of all capitalist nations in our century." Taylor, Is the Corporation Above the Law?, 43 Harv. Bus. Rev. 119, 128 (1955).
to reduce illegal activities of modern corporations may suggest the need for reappraisal of our criminal law system.\textsuperscript{204} Our individual-oriented criminal law may be unable to reduce the public harm from corporate crime effectively.\textsuperscript{205} If the societal cost of corporate and white-collar crime does in fact exceed the cost for crimes of violence, the need may exist for a more functional approach to crime reduction. The problem may be resolved only when we devise "sensible functional sanctions to promote duty fulfillment."\textsuperscript{206}

Obviously the need exists to devise sanctions which "strike at more vital corporate interest" than the fine.\textsuperscript{207} Corporate sanctions could be devised which would have an impact upon the corporation beyond any criminal fine which may be imposed. A criminal prosecution can be joined with state action to review licenses and perhaps more importantly, to review the corporation's present dealings with government. For example, sanctions could be devised which would require

A corporation to include in its advertising campaigns the fact that it has violated the anti-trust laws by price fixing, or it might be refused permission to bid on Government contracts or partake of other forms of Government largess. Corporate officers, managers, and directors responsible for corporate antitrust violations might be penalized by ouster from office, much in the same manner that the Landrum-Griffin Act penalized union officials with a criminal record.\textsuperscript{208}

\textsuperscript{204} See Seney, supra note 93, at 847.

\textsuperscript{205} The suggested reappraisal of our criminal law system may in the final analysis be an ineffectual response to the major societal problem posed by corporate crime. Richard Quinney, the sociologist, has suggested that "[o]nly fundamental change in our political economy will make a solution to corporate crime possible." Quinney, \textit{Crimes of Business in the American Economy}, in \textit{CRIMINOLOGY, ANALYSIS AND CRITIQUE OF CRIME IN AMERICA} 131-37, at 136 (R. Quinney ed. 1975). This suggestion is undoubtedly premised on an economic and political analysis of crime. Quinney notes that:

\textit{C}rime in the United States rests ultimately on a materialistic, objective base. The law that defines behavior as criminal serves the social, economic, and political order, and is used by the state and those who control it to preserve the capitalist system. \textit{Id.} at 279.

\textsuperscript{206} Seney, supra note 94, at 793 n. 77.

\textsuperscript{207} Flynn, supra note 17, at 1332-33.

\textsuperscript{208} \textit{Id.} The use of sanctions collateral to criminal fines was recently used by the Federal Highway Administration in a highway construction bid-rigging case. The agency originally barred three firms convicted in a 1969 bid-rigging conspiracy that involved work on Interstate 64 in Kentucky for a period of 3 years. The bidding ban was later reduced to 6 months, in part because of the impact of the ban on the firms. \textit{See} Courier-Journal, June 15, 1976, at C1, col. 1.
In the absence of a fundamental reappraisal of our criminal law and the creation of a harm-based sanctioning system, the criminal liability imposed on corporations can be taken as a public policy properly symbolic of a level of responsibility for corporations commensurate with their ability to commit harmful acts.

One early commentator who opposed the imposition of criminal liability on corporations stated that:

Until and unless it is demonstrated that the social good demands that corporations be held responsible for crimes, there is no sound reason for so holding them.\textsuperscript{209}

The social good now demands the use of all available means to control corporate power, including the use of criminal sanctions.\textsuperscript{210}

\textsuperscript{209} Francis, Criminal Responsibility of the Corporation, 18 ILL. L. REV. 305, 323 (1924).

\textsuperscript{210} The social control of corporate power and wrongdoing is by no means confined to criminal sanctions. The public pressure and legislative incentives recommended by commentators on corporate social responsibility, N. Jacoby, Corporate Power and Social Responsibility: A Blueprint for the Future (1973); new statutory controls on the corporate structure and internal procedures of corporations proposed to create a positive legal duty upon boards of directors and corporate officers to act in the public interest, Stone, Cracking the Corporate Shell, The Nation, Aug. 2, 1975, at 74-75; and the insistence upon higher ethical standards to govern the conduct of business by corporate leaders, N.Y. Times, March 7, 1976, § 3, at 7, cols. 1-3, are a sample of the variety currently being offered. See also Oleck, Remedies for Abuses of Corporate Status, 9 Wake Forest L. REV. 463 (1973). On the use of the Federal securities laws to control corporate payments to domestic and foreign government officials, see Lown- fels, Questionable Corporate Payments and the Federal Securities Laws, 51 N.Y.U.L. REV. 1 (1976).