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Corporate Ethos: A Standard for Imposing Corporate Criminal Liability

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INTRODUCTION

Responsible social policy mandates that we deter those who victimize society through egregious and dangerous acts. Historically, the criminal law has been the vehicle for such deterrence. Corporations are increasingly significant actors in our economy[1] and, to the extent their actions can victimize society, they too should be deterred. For this reason, criminal prosecution of corporations has routinely occurred in American courts for almost a century.[2] Commentators, however, have consistently questioned this use of the criminal law.[3] Moreover, the

1. For sources discussing the impact of corporations, see M.B. CLINARD, CORPORATE CORRUPTION 1-6 (1990); E. HERMAN, CORPORATE CONTROL, CORPORATE POWER 1-5 (1981); *Introduction: Corporate America*, in CORPORATIONS AND SOCIETY, POWER AND RESPONSIBILITY 1-8 (W. Samuels & A. Miller eds. 1987). *Cf.* R. MOKHIBER, CORPORATE CRIME AND VIOLENCE 14-20 (1988) (focusing on the costs of corporate crime).

2. 1 K. BRICKEY, CORPORATE CRIMINAL LIABILITY § 2.09 (1984). Brickey's three-volume treatise is an excellent work on all aspects of corporate criminal liability as well as on many aspects of white collar crime in general. For other sources discussing the historical evolution of corporate criminal liability, see Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L.Q. 393, 401-04, 405-21 (1982); Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 85-96 (1976); Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 288-93 (1985).

3. In addition to the sources in note 1, *supra*, scholarship on this debate includes H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 361-362 (1968); Canfield, *Corporate Responsibility for Crime*, 14 COLUM. L. REV. 469, 472-81 (1914); Fisse, *Restructuring Corporate Criminal Law*, 56 S. CAL. L. REV. 1141 (1983); Francis, *Criminal Responsibility of the Corporation*, 18 ILL. L. REV. 305

debate over corporate criminal liability will likely intensify as the government increasingly prosecutes prominent corporate defendants.[4] Two major issues have dominated this debate. One is the failure to identify or prove corporate intent. Traditionally, the criminal law has been reserved for intentional violations of the law.[5] Yet, our prosecutions of corporations have been marked by floundering efforts to identify the intent of intangible, fictional entities.[6] A second issue in the debate concerns sanctions.[7] In addition to proof of intent, a major distinguishing characteristic of the criminal law has been the threat of imprisonment.[8] Critics of corporate criminal liability

(1924); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957); Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501 (1980); *Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1365-75 (1979) [hereinafter *Developments*].

4. *See, e.g.*, United States v. Drexel Burnham Lambert, Criminal Case No. 89-41 (S.D.N.Y. filed Jan. 24, 1989); Cushman, *Exxon is Indicted by U.S. Grand Jury in Spill at Valdez*, N.Y. Times, Feb. 28, 1990, at A1, col. 6.

5. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 187 (1968) ("In all advanced legal systems liability to conviction for serious crimes is made dependent, not only on the offender having done those outward acts which the law forbids but on his having done them in a certain frame of mind or with a certain will . . . ."); *see also* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 11-13 (1947); Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 1-3 (1928) (arguing that imputing vicarious liability to corporations for their agents' acts violates traditional mens rea requirement). Considerable efforts have been devoted to defining "intent" or "mens rea." *See* 1 J. BISHOP, CRIMINAL LAW §§ 368-73 (1865); H.L.A. HART, *supra*, at 136-57. For purposes of this Article, mens rea is used to signify "the mental element necessary to convict for any crime." Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 n.1 (1932).

6. For scholars addressing this issue, see, e.g., Fisse, *supra* note 3, at 1183 ("Is it possible to attribute fault to a corporation on a genuinely corporate yet workable basis? This question has proven to be the blackest hole in the theory of corporate criminal law."); Mueller, *supra* note 3, at 38; *Developments*, *supra* note 3, at 1241 (mens rea "has no meaning when applied to a corporate defendant since an organization possesses no mental state"). Mueller refers to the substantive difficulties that must be overcome in devising a standard of corporate criminal liability. He states that one such difficulty is whether the corporation can "engage in conduct at all" but that the "more difficult question" is "whether it can entertain *mens rea*." *Id.*

7. Commentators who address the sanctioning issue include Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Lederman, *supra* note 2, at 309-24; McAdams, *The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative*, 46 U. CINN. L. REV. 989 (1977); Posner, *Optimal Sentences for White Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980).

8. J. HALL, *supra* note 5, at 191 ("At least since Plato, compensation has been distinguished from punishment.").

suggest that because a corporation cannot be imprisoned, the criminal law is not an appropriate vehicle for controlling corporate behavior. Much of the recent scholarship on corporate crime has addressed the sanctioning issue.[9] This Article, however, addresses corporate intent and suggests that a better resolution of this issue would eliminate much of the controversy concerning corporate criminal liability, including the controversy over sanctions.

Scholars have long decried the inability of our current standards of corporate criminal liability to address corporate intent. According to Gerhard O.W. Mueller, "[m]any weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these . . . is corporate criminal liability . . . . Nobody bred it, nobody cultivated it, nobody planted it. It just grew."[10] John Braithwaite is more succinct: "A criminology which remains fixed at the level of individualism is the criminology of a bygone era."[11] Brent Fisse calls the inability to address corporate fault "the blackest hole in the theory of

9. One factor focusing our attention on the sanctioning issue has been the United States Sentencing Commission's recent efforts to formulate guidelines for the sentencing of corporations in federal courts. This Commission was created under the Sentencing Reform Act of 1984, as amended, 18 U.S.C. §§ 3551-3559 (1988), and 28 U.S.C. §§ 991-998 (1988). It is an "independent commission in the judicial branch" and is charged with the task of establishing determinative sentencing guidelines for the federal judicial system and to "review and revise" the guidelines. 28 U.S.C. §§ 991, 994, *quoted in* Mistretta v. United States, 488 U.S. 361, 368-69 (1989). The guidelines are "binding on the courts, although . . . the judge [has] the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines." 488 U.S. at 367. In October 1986, the Commission issued its preliminary report on guidelines for corporate offenders. K. BRICKEY, *supra* note 2, § 1.07 (Supp. 1990). Public hearings were held regarding these guidelines on October 11, 1988 and December 2, 1988. On November 3, 1989, after receiving input from the public, the Department of Justice, and a working group of private defense attorneys appointed by the Commission's chairman, the Commission proposed new guidelines that included two alternative methods for calculating the amount of fines. U.S. Sentencing Comm'n, *Proposed Federal Guidelines for Sentencing of Organizations*, 46 Crim. L. Rep. (BNA) 2001, 2001-02, 2007-14 (Nov. 15, 1989). On October 26, 1990, again after soliciting public comment, the Commission issued a new set of proposed guidelines for sentencing organizations. The Commission solicited public comment on this proposal, U.S. Sentencing Comm'n, *Sentencing Guidelines For Organizational Defendants*, 48 Crim. L. Rep. (BNA) 2001 (Oct. 31, 1990), and submitted its final proposal to Congress on May 1, 1991. These proposed guidelines become law in 120 days unless rejected by Congress. *Id.*

10. Mueller, *supra* note 3, at 21.

11. J. BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 148 (1989).

corporate criminal law."[12]

This Article proposes a standard of corporate criminal liability that uses a new conceptual paradigm for identifying and proving corporate intent. This standard assumes that each corporate entity has a distinct and identifiable personality or "ethos." The government can convict a corporation under this standard only if it proves that the corporate ethos encouraged agents of the corporation to commit the criminal act. Central to this approach is the assumption that organizations possess an identity that is independent of specific individuals who control or work for the organization. This corporate identity, or "ethos," results from the dynamic of many individuals working together toward corporate goals. The living cell provides an apt analogy: Just as a living cell has an identity separate from the activities of its constituent molecules, a corporation has an identity separate from its individual agents.

In a sense, this corporate ethos standard takes its cue from notions of intent developed in the context of individual liability. When considering whether an individual should be held criminally liable we ask, did this person commit this act accidentally or purposely. If the individual committed the act purposely, we consider it to be a crime, while if the individual committed the act accidentally, we do not. Similarly, the standard proposed herein imposes criminal liability on a corporation only if the corporation encouraged the criminal conduct at issue. If it did, the criminal conduct is not an accident or the unpredictable act of a maverick employee. Instead, the criminal conduct is predictable and consistent with corporate goals, policies, and ethos. In the context of a fictional entity, this translates into intention.

This proposed standard offers the following four advantages over the current standards of liability. To the extent that historical and current standards of corporate criminal liability allow criminal convictions without proof of the corporation's intent, they encourage the blurring of criminal and civil liability. This blurring dilutes the impact of a criminal conviction,[13] and,

12. Fisse, *supra* note 3, at 1183.

13. For example, scholars have long discussed the problems that arise when the criminal sanction is used for what is essentially a regulatory matter, or when an inappropriately severe criminal sanction is imposed. *See, e.g.*, J. BRAITHWAITE, TO PUNISH OR PERSUADE, ENFORCEMENT OF COAL MINE SAFETY (1985). Braithwaite discusses the enforcement practice of the Mine Safety and Health Administration (MSHA) and its increasingly punitive approach. *Id.* at 3. He suggests that "nitpicking punitive enforcement of specific rules can even

ultimately, erodes the power of the criminal law. The theoretical and practical framework of the corporate ethos standard provides a method for identifying and proving the intent of corporate actors. This is its first and major advantage.

The second advantage of the corporate ethos standard is that it distinguishes among diverse corporations. The current standards of corporate criminal liability often treat all corporations alike by imposing criminal liability on corporations for the acts of their individual agents, regardless of the circumstances within a particular corporation. From Bentham on, scholars and practitioners have recognized that a fundamental requirement for any criminal justice system is that the system treat like actors alike and different actors differently.[14] Anyone, from the average person on the street to the most respected scholar in organizational behavior, recognizes that no two corporations are alike. Our criminal justice system should not treat them as if they were.

The third advantage of the corporate ethos standard is that it rewards those corporations that make efforts to educate and motivate their employees to follow the letter and spirit of the law. This encourages responsible corporate behavior. This advantage is in sharp contrast to the Model Penal Code's standard of liability that discourages higher echelon employees from properly supervising lower echelon employees.[15] This advan-

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corrupt the integrity of a total safety plan for a mine." *Id.* at 102. For fuller discussion of how this could occur, see *id.* at 102-12. Braithwaite concludes: "The trick of successful regulation . . . becomes that of imposing punishment when needed, without undermining the capacity of the [MSHA] inspectors to persuade." *Id.* at 117; *see also* J. BENTHAM, *Introduction to the Principles of Morals and Legislation*, in 1 J. BOWRING, THE WORKS OF JEREMY BENTHAM 95 (ch. 17, para. 23) (1843) (arguing that unneeded punishment should be avoided to prevent people from perceiving the law as unfair).

14. H.L.A. HART, THE CONCEPT OF LAWS 155 (1961) (arguing that the "leading precept" of justice "is often formulated as 'Treat like cases alike'; though we need to add . . . 'and treat different cases differently' "). As Mueller stated, "It is a poor legal system indeed which is unable to differentiate between the law breaker and the innocent victim of circumstances so that it must punish both alike." Mueller, *supra* note 3, at 45; *see also* L. FULLER, THE MORALITY OF LAWS 39 (1969) (implicit in Fuller's eight principles of legality is the premise that all like persons should be treated alike).

15. For criticisms of the Model Penal Code (MPC) standard of corporate criminal liability as contained in § 2.07(1)(c), see P. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 182 (1984) ("[I]dentification cannot always be restricted to high officials."); Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 626 (1988) ("In short, a liability rule requiring proof that a high managerial agent ratified a subordinate's misconduct is apt to be, in practice, a rule of no liability at all."); and *Developments*,

tage also contrasts with the minimal deterrence achieved by imposing criminal liability on individuals within the corporation. Convicting individual agents and employees of a corporation does not stop other corporate employees from committing future criminal acts if sufficient internal corporate pressure to violate the law continues to exist. In such an environment, the agents are cogs in a wheel. Those convicted are simply replaced by others whose original propensity to obey the law is similarly overcome by a corporate ethos that encourages illegal acts. Unless inside or outside forces change the lawless ethos, it will corrupt each generation of corporate agents. The proposed standard of liability addresses this problem by punishing any corporation that establishes a lawless ethos which overcomes its employees' propensity to obey the law.

The last advantage of the corporate ethos standard is that it is practical, workable, and provable, from concrete information already available in grand jury investigations of corporate crime. To ascertain the ethos of a corporation, and to determine if this ethos encouraged the criminal conduct at issue, the factfinder should examine: the corporate hierarchy, the corporate goals and policies, the corporation's historical treatment of prior offenses, the corporation's efforts to educate and monitor employees' compliance with the law, and the corporation's compensation scheme, especially its policy on indemnification of corporate employees. These facts are typically, or easily, examined in any criminal investigation of corporate misdeeds and are subject to proof in a courtroom.

Part I of this Article provides background. It sets forth the current standards of corporate criminal liability and describes their approach to intent. Part I then explains why proof of intent is essential to a criminal justice system, and provides an historical discussion of how American criminal law developed corporate criminal liability without this traditional emphasis on intent. Part II sets forth the corporate ethos standard, listing each of its elements and discussing how to prove each element. After examining the results in different types of cases when using the corporate ethos standard versus the current standards of corporate criminal liability, Part II compares the corporate

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supra note 3, at 1254 (corporate criminal liability can be evaded "as long as high officials remain ignorant of illegal activity"). Also, the MPC system "has an additional drawback in that large corporations can more easily evade liability than small ones" because the large corporations have more layers of managers who can remain shielded from information. *Id.*

ethos standard to other proposals for enhancing corporate responsibility. Part III addresses the procedural implications of adopting a standard such as corporate ethos, while Part IV answers potential criticisms of the corporate ethos standard.

I. BACKGROUND

A. THE CURRENT STANDARDS OF CORPORATE CRIMINAL LIABILITY

American jurisprudence has employed two major standards to determine when a corporation should be criminally liable. Both impose vicarious liability[16] by imputing the criminal acts and intent of corporate agents to the corporation. The traditional or respondeat superior approach is a common law rule developed primarily in the federal courts and adopted by some state courts.[17] Derived from agency principles in tort law,[18] it provides that a corporation "may be held criminally liable for the acts of any of its agents [who] (1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation."[19] As construed by most courts, the latter two requirements are almost meaningless.[20] Courts deem criminal conduct to be "within the scope of employment" even if the conduct was specifically forbidden by a corporate policy and the corporation made good faith efforts to prevent the crime.[21] Similarly, courts deem criminal conduct by an agent to be

16. Vicarious liability occurs when *B* is held liable for the actions of *A* "although B has played no part in [the actions], has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it." W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 499 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Vicarious liability is sometimes called imputed mens rea and "is given the Latin name of respondeat superior." *Id.*

17. Note, *Corporate Criminal Liability for Acts In Violation of Company Policy*, 50 GEO. L.J. 547, 547-51 (1962). States that have adopted the traditional respondeat superior standard of liability include Alaska (ALASKA STAT. § 11.16.130 (1989)); Georgia (GA. CODE ANN. § 16-2-22 (1988)); New Jersey (N.J. STAT. ANN. § 2C:2-7 (West 1982)); Indiana (IND. CODE ANN. § 35-41-2-3 (Burns 1985)); and Kansas (KAN. STAT. ANN. § 21-3206 (1988)).

18. New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493-94 (1909); Elkins, *supra* note 2, at 97.

19. *Developments*, *supra* note 3, at 1247; *see also* Note, *supra* note 17, at 547-48 (arguing that the courts have gone beyond vicarious liability in holding corporations criminally liable for actions by their employees which they have general policies prohibiting those acts).

20. *See infra* text accompanying notes 245-53.

21. K. BRICKEY, *supra* note 2, § 3.02; *Developments*, *supra* note 3, at 1149-50.

"with the intent to benefit the corporation" even when the corporation received no actual benefit from the offense and no one within the corporation knew of the criminal conduct at the time it occurred.[22] With these latter two requirements thus weakened, a corporation may be criminally liable whenever one of its agents (even an independent contractor in some circumstances) commits a crime related in almost any way to the agent's employment.[23]

The American Law Institute's Model Penal Code (MPC) provides the major alternative standard for corporate criminal liability currently found in American jurisprudence. In the 1950s, the American Law Institute addressed the issue of corporate criminal liability, ultimately agreeing on three standards for such liability.[24] The type of criminal offense charged determines which standard applies. The option that applies to the majority of criminal offenses[25] provides that a court may hold a corporation criminally liable if the criminal conduct was "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."[26] This standard still uses a respondeat superior model, but in a limited fashion: the corporation will be liable for conduct of only some agents (its directors, officers, or other higher echelon employees).

The critical weakness in both the traditional respondeat superior and MPC standards of liability is that they fail to sufficiently analyze corporate intent. Cases where a corporate employee acted contrary to express corporate policy and yet the court still held the corporation liable best exemplify this weak-

22. K. BRICKEY, *supra* note 2, § 4.02; *Developments*, *supra* note 3, at 1250.

23. *See infra* text accompanying notes 245-53.

24. MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962).

25. The MPC includes two additional standards of corporate liability. Section 2.07(1)(a) applies to minor infractions and non-Code penal offenses "in which a legislative purpose to impose liability on corporations plainly appears." *Id.* § 2.07(1)(a). The standard in § 2.07(1)(a) is broad respondeat superior, for the corporation is held liable whenever "the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment." *Id.* Section 2.07(1)(b) applies to omissions and provides strict liability for the corporation that fails to "discharge a specific duty" imposed by law. *Id.* § 2.07(1)(b).

For an excellent discussion of the tension created by these multiple standards of liability, especially between § 2.07(1)(a) and § 2.07(1)(c), see Brickey, *supra* note 15, at 604-11.

26. MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962).

ness. *United States v. Hilton Hotels Corp.*[27] provides an apt example. The purchasing agent at a Hilton Hotel in Portland, Oregon, threatened a supplier of goods with the loss of the hotel's business if the supplier did not contribute to an association that was formed to attract conventions to Portland.[28] The corporate president testified that such action was contrary to corporate policy.[29] Both the manager and assistant manager of the Portland Hilton Hotel also testified that they specifically told the purchasing agent not to threaten suppliers.[30] Nevertheless, the court convicted the Hilton Hotel Corporation of antitrust violations under the respondeat superior standard of liability.[31]

Because the respondeat superior standard focuses solely on an individual corporate agent's intent and automatically imputes that intent to the corporation, a corporation's efforts to prevent such conduct are irrelevant. Under this approach all corporations, honest or dishonest, good or bad, are convicted if the government can prove that even one maverick employee committed criminal conduct.

The MPC's requirement that a higher echelon employee commit, or recklessly supervise, the criminal conduct is an improvement over the traditional respondeat superior approach. Recognizing the unfairness of holding a corporation liable for the acts of all its agents, the MPC views the corporation as the embodiment of the acts and intent of only its "high managerial agent[s]."[32] High managerial agents are those individuals "having duties of such responsibility that [their] conduct may fairly be assumed to represent the policy of the corporation or association."[33]

The MPC's refinement of traditional respondeat superior suffers from three serious problems, however. The first problem, the maverick employee, still arises because the MPC uses the same conceptual paradigm as does respondeat superior —

27. 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

28. *Id.* at 1002.

29. *Id.* at 1004.

30. *Id.*

31. *Id.* The court noted that "Congress may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents within the scope of their employment." *Id.*

32. MODEL PENAL CODE § 2.07 (Proposed Offical Draft 1962).

33. " '[H]igh managerial agent' means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association." *Id.* § 2.07(4)(c).

that is, the MPC automatically imputes the intent of individual corporate agents (albeit only the higher echelon agents) to the corporation. According to the MPC standard, a corporation whose higher echelon official performed or supervised illegal conduct is criminally liable even if the higher echelon official was a maverick acting contrary to express corporate policy. For example, in *Hilton Hotels*, if the factfinder found that the purchasing agent had "duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association,"[34] the agent would be a "high managerial agent," and the Hilton Hotels Corporation would be criminally liable. By automatically imputing the intent of an individual within the corporation to the corporation, the MPC standard, like the traditional respondeat superior standard, provides for inappropriately broad liability.

The second problem with the MPC standard is that even if a clear corporate policy caused a lower echelon employee to commit an offense, the corporation is liable only if there is evidence that a specific higher echelon official recklessly tolerated this conduct. Injustice also results from this problem but here the liability is too narrow: a corporation is not held criminally liable when it should be.

The third problem with the MPC standard is commonly, and deservedly, identified. The MPC standard encourages higher echelon officials to insulate themselves from knowledge of corporate employee activity. Under this standard, if higher echelon officials can maintain unawareness of illegal conduct by corporate employees, it is difficult to prove that they tolerated such conduct, and therefore nearly impossible to hold the corporation criminally liable. By encouraging such unawareness, the MPC discourages corporations from policing themselves.[35] Thus, although the MPC is somewhat successful in refining the traditional respondeat superior standard, it still provides an inadequate approach to assessing corporate intent.

B. THE JURISPRUDENTIAL ROLE OF INTENT

The notion of intent has changed over time, primarily as the objectives of our criminal justice systems have changed.[36]

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34. *Id.*

35. *See supra* note 15 for other commentators who have discussed this weakness in the MPC.

36. Sayre, *supra* note 5, at 1016. For a critical analysis of Sayre's approach, see J. HALL, *supra* note 5, at 138-68. Despite his criticisms of Sayre's

Prior to the twelfth century, there apparently was no notion of criminal intent. Rather, liability was absolute. The law, however, rarely distinguished between tort and crime. The law simply attempted to induce the victim of a wrong (or his relatives) "to accept money payments in place of taking violent revenge."[37] Because of a rebirth of interest in Roman law[38] and the influence of canon law,[39] by the twelfth to thirteenth centuries punishment of evil-doing had become the objective of criminal justice. The notion of mens rea thus developed as a way of distinguishing those who should be criminally liable from those who should not.[40] Under this view, for example, parents who allowed a child to die because their religious views reject medicine were not guilty of a crime because, regardless of the danger to the child, the parents intended no evil.[41] During the thirteenth through seventeenth centuries, the notion of intent continued to evolve from "its old connotation of moral guilt" to a more precise notion of intent at a given time.[42] Technical definitions of mens rea developed for separate crimes.[43] Today,

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approach, Hall agrees with the basic point that our notion of mens rea has evolved, and will continue to evolve, over time. "There is no reason to believe that our understanding of *mens rea* is complete, and none to think that the meaning of the term will not continue to change." *Id.* at 165.

37. Sayre, *supra* note 5, at 976-77. Sayre cautions us in concluding that simply because the old records fail to show mens rea as an essential element for a finding of criminality, mens rea was entirely disregarded during this time. He notes that by definition, some crimes were impossible to commit without such a finding (e.g., robbery, arson). In addition, the defendant's intent "seems to have been a material factor, even from the very earliest times, in determining the extent of punishment." *Id.* at 981.

38. During this renewed interest in Roman law, thirteenth century scholars such as Bracton took up the Roman notions of "dolus" and "culpa" with interest. The study of these concepts "required careful consideration of the mental element in crime." *Id.* at 983; *see* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 267-86 (3d ed. 1923); Bodenstein, *Phases in the Development of Criminal Mens Rea*, 36 S. AFR. L.J. 323, 327-33 (1919).

39. Penitential books "made the measure of penance for various sins very largely dependent upon the state of mind." Sayre, *supra* note 5, at 983. Sayre provides several examples: "Whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart." *Id.* "If a cleric has planned in his heart to smite or kill his neighbor, he shall do penance half a year on bread and water according to the prescribed amount, and for a whole year abstain from wine and the eating of meat and then may he be permitted to approach the alter." *Id.* at 983 n.29 (citing Vinnian in J. AYER, SOURCE BOOK FOR ANCIENT CHURCH HISTORY 626-27 (1930)).

40. Sayre, *supra* note 5, at 989-90, 993, 1017.

41. *Id.* at 1018 (citing Regina v. Wagstaffe, 10 Cox C. C. 530, 534 (1868); Regina v. Hines, 13 Cox C. C. 111, 114-15 (1875)).

42. Sayre, *supra* note 5, at 1000.

43. *Id.* at 994-1004, 1019-20. For example, "malice aforethought" distin-

the objectives of our modern criminal justice system focus less on "awarding adequate punishment for moral wrongdoing" than on "protecting social and public interests."[44] Consistent with this emphasis, our current notion of intent focuses less on technical gradations of evil than on the harm to society. Accordingly, under our modern view, parents who fail to seek necessary medical care for their child are guilty of manslaughter because their actions threaten society's interest in the child's health.[45]

With the rising prominence of corporate actors, our concept of intent must continue to evolve. Common to our past and present notions of intent is a focus on the individual actor.[46] Our attempts to apply this notion of individual intent to corporate actors, however, has failed. To date, our approach has been to impute an individual actor's criminal intent to the corporate actor. This Article suggests that this approach is not only inadequate, but also harmful because it erodes the power of the criminal law.

For hundreds of years, jurisprudential scholars have addressed the important functions that the intent requirement serves in a criminal justice system. One such function is greater social stability — requiring proof of intent enhances social stability by promoting voluntary compliance with the law.[47] If laws are to succeed in promoting social stability, the vast majority of citizens must comply with them.[48] Resources are not

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guished between murder, punishable by death, and other homicides, "practically punishable . . . by a year's imprisonment and branding on the brawn of the thumb." *Id.* at 996-97. If a person broke into another's house "feloniously," she committed burglary, but if she simply broke into another's house (i.e., not feloniously), she committed trespass. *Id.* at 1001.

44. *Id.* at 1017.

45. *Id.* at 1018 (citing Commonwealth v. Breth, 44 Pa. C. 56 (1915); Rex v. Brooks, 9 B.C.R. 13 (1902)).

46. As Fisse noted: "Modern corporate criminal law owes its origin and design more to crude borrowings from individual criminal and civil law than to any coherent assessment of the objectives of corporate criminal law and of how those objectives might be attained." Fisse, *supra* note 3, at 1143. *See also id.* at n.1 for a listing of other literature "recognizing the unsystematic historical development of corporate criminal law."

47. H.L.A. HART, *supra* note 5, at 50 ("[P]eople obey the law . . . because it offers a guarantee that the antisocial minority who would not otherwise obey will be coerced into obedience by fear.").

48. According to H.L.A. Hart, "two minimum conditions" are "necessary and sufficient for the existence of a legal system. . . . On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adju-

available, nor should they be, to fuel the large law enforcement machine that universal lawlessness would require. Voluntary compliance will wane, however, if people view laws as unjust, unfair, or arbitrary. People will perceive the criminal law as unjust, unfair, and arbitrary if the law punishes *A* for acts that occur despite *A*'s every attempt to avoid those acts (strict liability),[49] or if it punishes *A* for what *B* did even when *A* had no knowledge of *B*'s behavior (vicarious liability).[50] The intent requirement avoids both of these possibilities by narrowing liability to voluntary acts committed by a defendant.[51]

Realistically, a few exceptions of strict or vicarious liability will not so greatly pollute the public's perception of the criminal justice system that voluntary compliance is substantially curtailed. Extending these exceptions to most situations, however, creates this risk. Because vicarious liability is currently the universal rule of liability for the group of people most directly affected by corporate criminal liability, namely, corporate executives, this group may view the criminal justice system as unreasonable and unfair, and choose to disregard it.

Requiring proof of intent before imposing criminal liability also serves a second function: it enhances consistent enforcement of the law. Under the broad respondeat superior standards of liability, the government can prosecute corporations for the illegal conduct of any agent acting within the scope of his duties and with the intent to benefit the corporation. Such broad potential liability offers little guidance to prosecutors. Because resources are not available to prosecute every offend-

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dication must be effectively accepted as common public standards of official behaviour by its officials." H.L.A. HART, *supra* note 14, at 113.

49. "Strict liability . . . means liability that is imposed on an actor apart from either . . . an intent . . . or . . . a breach of duty. . . . This is often referred to as liability without fault." PROSSER & KEETON, *supra* note 16, § 75, at 534.

50. G. FLETCHER, RETHINKING CRIMINAL LAW 647 (1978) ("That liability is 'vicarious' simply expresses the conclusion that the defendant will be held liable for the acts of another.")

51. H.L.A. Hart discusses this point when he distinguishes the characteristics that separate legal rules from moral rules. Hart notes that a person who involuntarily abridged a moral rule is exempted from moral responsibility (saying "to blame him in these circumstances would itself be considered morally objectionable"). H.L.A. HART, *supra* note 14, at 173. By contrast, Hart notes that with objective standards of mens rea and notions like strict liability, it is possible for an individual to violate a legal rule involuntarily and still be held legally responsible. Although he notes this distinction, Hart cautions that "[i]n any developed legal system," the mens rea requirement must be an "element in criminal responsibility" for "[a] legal system would be open to serious moral condemnation if this were not so . . . ." *Id.* at 173-74.

ing corporation that meets this test, prosecutors must pick and choose which corporations to prosecute.[52] Even assuming all prosecutors attempt to make this decision responsibly, individual prosecutors are left to implement their personal, and therefore variable, views on when to indict a corporation.[53] Forcing prosecutors to select cases based on corporate criminal intent, however, would reign in this broad discretion and thus curtail the potential for abuse and arbitrariness.

By focusing corporate criminal prosecutions on corporations with criminal intent, the intent requirement also maximizes wise use of scarce prosecutive resources. The following hypothetical helps demonstrate this advantage. Assume two individuals commit bank larceny.[54] *A* is a mentally disoriented individual who did not intend to steal from the bank, but was delusional and believed that he was a wealthy person whose home was the bank. Assume also that once *A*'s medication is properly equilibrated, *A* is competent to stand trial.[55] *B*, on the

52. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533-34 (1970); Orland, *Reflections on Corporate Crime*, *supra* note 3, at 511 ("Thousands of corporate crime statutes are enacted by Congress but relatively few are actively enforced by federal prosecutors."); Vorenburg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525, 1548-49 (1981) (noting at 1525 that "prosecutors increasingly have been forced to allocate resources by deciding whether to charge and whether to offer leniency in exchange for guilty pleas"); *see also* Rakoff, *The Exercise of Prosecutorial Discretion in Federal Business Fraud Prosecutions*, in CORRIGIBLE CORPORATIONS AND UNRULY LAW 173-86 (1985) (detailing the numerous vague policies and guidelines prosecutors follow in deciding whether to press charges).

53. Although constitutional and ethical restrictions as well as Department of Justice guidelines and customs limit the exercise of prosecutorial discretion, *see* Rakoff, *supra* note 52, at 171, the exercise of such discretion remains the exercise of "one's own considered judgment and conscience." *Id.*; *see also* Vorenberg, *supra* note 52, at 1521 (arguing that current restraints on prosecutorial discretion are insufficient).

54. Bank larceny is defined at 18 U.S.C. § 2113(b) as:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both . . . .

18 U.S.C. § 2113(b) (1988).

55. A court may judge a defendant's competency to stand trial prior to or during trial. 18 U.S.C. § 4241 (1988). The statute directs the court to make a finding of incompetence if it determines by a preponderance of the evidence that the defendant is suffering from a mental disease or defect rendering him unable to "understand the nature and consequences of the proceedings against him or to assist properly in his defense . . . ." *Id.* If so found the statute directs the Attorney General to hospitalize the defendant until he is improved. *Id.*

other hand, impulsively took a stack of $20 bills when a teller stepped aside to answer a telephone. Reasonable jurors could easily find that because *A* believed the bank's money belonged to him, he did not have criminal intent. These jurors may well acquit *A* on grounds of insanity.[56] Reasonable jurors could also find that *B* could control her behavior when she believes that doing so is in her best interests and thus that she possessed criminal intent when she stole the money. These jurors would likely convict *B*.

Most district attorneys would not prosecute *A*, even if he is competent to stand trial. He may be acquitted but even if he is not, most prosecutors would recognize that professional therapy probably offers a better chance for helping him, and for protecting society from *A*, than does criminal prosecution. Moreover, prosecuting *A* provides relatively little deterrent value, even if prosecution were successful. Because of his mental deficiencies, *A* did not intend to steal money, and prosecution will not deter him from doing so again. Prosecution, however, may deter *B* from committing this crime again (if not all crimes) for now *B* can better assess the cost of unlawful conduct. Prosecution of *B* also may deter others who know of *B*'s punishment from committing larceny or other crimes.

The above scenario demonstrates Bentham's classic utilitarian argument in favor of the intent requirement: If the law is to deter violations in an efficient manner, only voluntary violations of the law should be punished.[57] H.L.A. Hart has criticized this rationale for intent,[58] and one cannot persuasively offer it without addressing Hart's criticism. Hart argues that allowing persons with "excusing" conditions, such as mental ill-

56. For purposes of prosecution in the American federal system, a defendant is insane if he proves by clear and convincing evidence that "as a result of severe mental disease or defect, [he] was unable to appreciate the nature and quality or wrongfulness of his acts." 18 U.S.C. § 17 (1988). Because the relevant inquiry and burden of proof differs for competency to stand trial and insanity as a defense, an individual may be competent to stand trial but insane. *See supra* note 55.

57. J. BENTHAM, *supra* note 13, at 84-85 (ch. 15, paras. 3-9). Bentham stated:

> It is plain, therefore, that in the following cases, punishment ought not to be inflicted. . . . Where the penal provision, though it were conveyed to a man's notice, *could produce no effect*, with respect to the preventing him from engaging in any act of the *sort* in question. Such is the case. . . . [i]n extreme *infancy* . . . [i]n *insanity* . . . [i]n *intoxication* . . . .

Id. (emphasis in original).

58. H.L.A. HART, *supra* note 5, at 42-44.

ness, to escape liability does not increase the efficiency of the laws as Bentham argued, but diminishes their efficiency for society at large. According to Hart, when society does not hold offenders liable because of an "excusing condition" that prevents the formation of intent, others will think that they too can escape liability on such grounds and will feign such excuses.[59] Thus, concludes Hart, while excusing conditions respect the right of an individual not to be held liable for something he cannot help, allowance for such conditions undermines, rather than promotes, compliance with the laws by many within the general population.[60]

Although Hart's criticism has some merit, it is primarily tweaking the utilitarian nose by pointing out that this argument is inconsistent with a basic tenet of utilitarianism, namely, that individuals should sacrifice their own good to further the welfare of society.[61] Hart correctly notes the inconsistency that excusing conditions pose for the utilitarians: To the extent that excusing conditions encourage false claims, allowing them is inefficient from a societal point of view.

When Hart's criticism goes beyond exposing an inconsistency in utilitarian thought and assaults the value of intent as a guide for maximum efficient use of resources, however, he is wrong. To an individual prosecutor, the intent requirement is an excellent guide for focusing prosecutorial resources. The above hypothetical, while extreme, demonstrates this benefit. Prosecution will not deter *A* from committing bank theft in the future because *A* does not appreciate the wrongfulness of his action. *B*, on the other hand, suffers from no such disability. Prosecution thus may deter *B* from future unlawful conduct. The intent requirement focuses our attention on this distinction and channels prosecutive resources toward those cases that better serve deterrence.

The third function of an intent requirement is promotion of more consistent sentences. To date, sentences given corpo-

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59. *Id.* at 43.

60. *Id.* at 43-44.

61. J. BENTHAM, *supra* note 13, at 2 (ch. 1, para. 9). Bentham observed that:

> A man may be said to be a partizan of the principle of utility, when the approbation or disapprobation he annexes to any action, or to any measure, is determined, by and proportioned to the tendency which he conceives it to have to augment or to diminish the happiness of the community: or in other words, to its conformity or unconformity to the laws or dictates of utility.

Id.

rate defendants have been notoriously erratic.[62] This inconsistency is due, certainly in part, to the lack of sentencing guidelines for organizational defendants.[63] It is also due to the broad liability that both the respondeat superior and MPC standards for imposing corporate criminal liability allow. Because of this broad liability, the corporate defendants that stand ready for sentencing range from those that made exemplary efforts to comply with the law[64] to those that openly defied the law.[65] This moral diversity, coupled with the broad discretion given sentencing courts, has led to widely ranging sentences.[66] Imposing a standard of liability that requires proof of intent would help standardize the corporate defendants that appear before the courts. This standardization, in turn, would promote consistency in sentences and likely facilitate passage of sentencing guidelines.

The fourth important function of the intent requirement derives from prosecutorial focus and sentencing consistency:

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62. Indeed, traditionally, serious discrepancies were common for criminal sentences in general. Mistretta v. United States, 109 S. Ct. 647, 650-51 (1989). The court in *Mistretta* noted that before the implementation of federal sentencing guidelines "the [sentencing] court and the [parole] officer were in positions to exercise, and usually did exercise, very broad discretion." *Id.* at 650.

63. The United States Sentencing Commission began formulating sentencing guidelines for organizational defendants in 1984 and submitted proposed guidelines on May 1, 1991. These guidelines become law in 120 days unless Congress rejects them. *See supra* note 9.

64. *See, e.g.*, Riss & Co. v. United States, 262 F.2d 245, 250 (8th Cir. 1958); United States v. Armour & Co., 168 F.2d 342, 342-43 (3d Cir. 1948).

65. *See, e.g.*, Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 721 (5th Cir. 1963).

66. General Electric addressed the moral diversity of convicted corporate defendants in its preliminary comments to the United States Sentencing Commission's Proposed Organizational Sanctions. G.E. suggested that the fact that corporations are currently convicted without proof of corporate intent was relevant to formation of sentencing guidelines:

> This is not the forum to argue the merits, or lack thereof, of the doctrine of imputed guilt or the extremes to which it is sometimes pushed. There are substantial reasons of policy and constitutional principle why the standards for finding a corporate person guilty of a crime should be narrowed substantially. This is the place, however, to point out that the current contours of the doctrine of imputed corporate criminal liability may permit a finding of guilt in the absence of real culpability of the sort the criminal law normally addresses. The Commission should appreciate this fundamental distinction when deciding the underpinnings for the corporate sanction guidelines.

P. Lacovara & V. Toensing, Preliminary Comments of General Electric on The United States Sentencing Commission's Proposed Organizational Sanctions 6 (Sept. 11, 1989) (available at offices of Hughes, Hubbard & Reed, Washington, D.C.).

An intent requirement allows potential defendants to better predict and plan their futures. Under the broad vicarious liability standards of respondeat superior and the MPC, a corporation has no way of predicting whether an individual prosecutor will seek criminal charges against it on any given day for any given crime. Nor, given current sentencing disparities, is a corporation able to assess the cost for a breach of the law by its employees and agents. However, when a corporation knows that liability depends on its own voluntary acts, and that a meaningful sentence will be imposed for illegal acts, it can better plan and predict its future fate[67] by choosing whether to engage in activities that limit — or expand — its exposure to criminal liability. Thus, by directing prosecutorial resources and promoting more consistent sentences, the intent requirement allows corporate executives to more accurately assess the costs of engaging in lawful, or unlawful, behavior.

In summary, requiring proof of intent bestows at least four advantages on a criminal justice system. First, it adds a sense of fairness to the system by focusing the criminal law on those who intended to break the law. Such fairness promotes voluntary compliance with the law and social stability. Second, imposing an intent requirement focuses criminal prosecution on corporations with a criminal intent, and thus directs prosecutorial discretion so as to maximize efficient use of limited law enforcement resources. Third, an intent requirement would lead to more consistent sentencing of corporate defendants. Such consistency likely would occur on an ad hoc basis simply because the corporate defendants that appear for sentencing will be more alike. More consistent sentences also would occur on a formal basis because greater uniformity among corporate defendants would facilitate sentencing guidelines. Fourth, the intent requirement allows actors to better predict and plan their futures. This advantage has special significance for the corporate actor that, in contrast to most individual actors, engages in substantial planning of its future conduct.

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67. *See* H.L.A. HART, *supra* note 5, at 23. Hart notes that in a system where individuals are punished for unintentional conduct, they "will be liable to have their plans frustrated by punishments for what they do unintentionally, in ignorance, by accident or mistake. Such a system . . . would diminish the individual's power to identify beforehand particular periods during which he will be free from [punishment]." *Id.*; *see also id.* at 181-82 (asserting that a system that punishes only voluntary acts permits individuals to determine their own fate).

C. How Corporate Criminal Liability Developed Without an Intent Requirement

If mens rea is essential to a fair and just criminal justice system, how did criminal liability of corporations develop without this element? The answer is amazingly simple: In devising the parameters of corporate criminal liability, courts borrowed the respondeat superior principle from tort law and applied it to criminal law. The problem is that they did so without addressing the jurisprudential questions of whether, or how, this principle has a place in criminal law. Analysis of the Supreme Court's opinion in *New York Central & Hudson River Railroad v. United States*[68] sheds light on this development. Not only is *New York Central* the premiere decision establishing criminal liability for corporations in American law,[69] but its flawed and outdated reasoning exemplifies the analysis of corporate criminal liability by many subsequent courts.[70]

The New York Central Railroad employed an assistant traffic manager who gave "rebates" on railroad rates to certain railroad users. As a result, the effective shipping rate for these users was less than the mandated rates.[71] New York Central was held criminally liable under bribery statutes for the acts of this assistant traffic manager.[72] Noting that the principle of respondeat superior was well established in civil tort law, the Court stated that "every reason in public policy" justified "go[ing] only a step farther" and applying respondeat superior to criminal law.[73] With this reasoning, the court established the traditional respondeat superior standard of criminal liability for corporations: A corporation is criminally liable for all acts of its agents committed while the agent was exercising the authority conferred upon him.[74]

The Court's reasoning in *New York Central* contains three major flaws that other courts have exacerbated over time. First

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68. 212 U.S. 481 (1909).

69. Note, *supra* note 17, at 548.

70. For other analyses critical of the reasoning in *New York Central*, see *id.* at 551-52, 556; Francis, *supra* note 3, at 313, 315, 320-23; Orland, *supra* note 3, at 502-04.

71. *New York Cent.*, 212 U.S. at 489-90.

72. The trial court fined New York Central & Hudson River Railroad $18,000 on each of six counts for a total fine of $108,000. The court fined the assistant manager $1,000 on each of the six counts for which he was convicted, resulting in a total fine of $6,000. *Id.* at 490.

73. *Id.* at 493-95.

74. *Id.* at 494.

is the Court's failure to appreciate the inherently different nature of civil and criminal law. Second is the Court's failure to consider the civil alternatives to corporate criminal liability. Third is the Court's failure to examine the alternative standards for imposing criminal liability upon corporations.

Tort lawsuits are designed primarily to compensate one party for the damage caused by another party.[75] The collection of damages, not deterrence of future conduct, is the paramount concern of any tort plaintiff.[76] While the threat of tort liability may well deter injurious conduct in some circumstances, such a deterrent effect is not the plaintiff's goal. Deterrence is simply a side-effect of the tort lawsuit. As compared to criminal liability, tort liability often carries no moral or punitive stigma; it is simply a cost of doing business.[77]

Criminal lawsuits, on the other hand, are selected and prosecuted precisely because of the impact a conviction will have on future conduct by the general public.[78] The fact that a public servant, not the victim, brings the criminal action aptly

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75. Hart refers to the criminal law as "conceived not only as restricting liberty but as providing protection from various sorts of harm," and to civil law as "conceived as offering redress for harm." H.L.A. HART, *supra* note 14, at 157. Jerome Hall, in *General Principles of Criminal Law*, discussed the historical efforts to distinguish torts from criminal law. J. HALL, *supra* note 5, at 188-214. Hall notes formal and "very important substantive" difficulties in comparing the disciplines. *Id.* at 191. After discussing these, he concludes by suggesting that "the economic function of torts does not rest upon the same ethical rationale that supports penal law." *Id.* at 214.

For a fascinating discussion on how punitive damages interface civil tort law and criminal law, see *Symposium: Punitive Damages*, 40 ALA. L. REV. 687 (1989).

76. Mueller, *supra* note 3, at 38.

77. As Jerome Hall stated: "Moral culpability is of secondary importance in tort law — immoral conduct is simply one of the various ways by which individuals suffer economic damage. But in penal law . . . the immorality of the actor's conduct is essential — whereas pecuniary damage is entirely irrelevant." J. HALL, *supra* note 5, at 203.

78. This utilitarian theory of punishment is discussed in J. BENTHAM, *supra* note 13, ch. 16; *see also* MODEL PENAL CODE, § 2.07 commentary at 148 (Tent. Draft No. 4, 1956) ("It would seem that the ultimate justification of corporate criminal responsibility must rest in large measure on an evaluation of the deterrent effects of corporate fines on the conduct of corporate agents."). Some would disagree that deterrence should be the reason for criminal punishment, arguing that criminal punishment should not be imposed because of its consequences on future behavior, but because an individual acted immorally. Kant sets forth the classic argument for this position. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99-107 (Bobbs-Merrill ed. 1965) (1st ed. 1791).

The positions are not incompatible. Some commentators suggest that both goals should be served by criminal punishment. *See, e.g.*, Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 406-11 (1958).

evidences this primary aim of the criminal law.[79] Compensation of the defendant's victim is subsidiary to the deterrent value of pursuing any given criminal case. Until recently, restitution to the victims was not a recognized consideration even at sentencing. Currently, the federal courts consider restitution in imposing sentences upon convicted defendants, but it is entirely within the court's discretion whether to award such compensation.[80] Moreover, unlike a verdict for the plaintiff in a tort action, a verdict for the plaintiff in a criminal action carries not only a moral stigma for the defendant, but also a loss of fundamental civic rights.[81]

The notion of respondeat superior is thus well suited to torts. It serves the compensation-to-the-victim goal well, for generally it is more equitable for the employer of the tortfeasor to absorb the financial loss caused by its agent's conduct than for the individual victim to do so.[82] Respondeat superior, however, is anathema to the criminal law which, we have seen, should focus on personal intent. Remarkably, the Supreme Court in *New York Central* boldly reached into the civil law for a model to apply to the criminal law, without addressing the

79. 1 J. AUSTIN, *Different Kinds of Sanctions,* in LECTURES ON JURISPRUDENCE 517-18, 520 (R. Campbell 4th ed. 1873).

80. In 1982, Congress passed the Victim and Witness Protection Act, § 5(a), 18 U.S.C. § 3663(a)(1) (1988), which provides: "The court, when sentencing a defendant [convicted of all title 18 offenses and certain title 49 offenses] may order . . . that the defendant make restitution to any victim of the offense."

81. As Henry M. Hart, Jr. stated, "What distinguishes a criminal from a civil sanction and all that distinguishes it, . . . is the judgment of community condemnation which accompanies and justifies its imposition." Hart, *supra* note 78, at 404; *see also, e.g.,* MODEL PENAL CODE § 2.07 commentary at 148 (Tent. Draft No. 4, 1956) (referring to the "opprobrium and incidental disabilities which normally follow a personal conviction"); J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 288 (Colum. Univ. ed. 1945) (referring to one circumstance distinguishing civil and criminal law as "the quantum of displeasure or disapprobation which is annexed, or thought to be annexed [to crimes] by the community in general").

Civic rights may be lost when one is convicted of a crime. For example, 29 U.S.C. § 504(a) (1988) provides that persons convicted of certain offenses may not serve in a variety of labor union positions. 18 U.S.C. § 922(g)(1) (1988) makes it a crime, punishable by a sentence not to exceed ten years, *id.* at § 924(a)(2), for any person convicted of a felony to ship, transport, possess or receive any firearm that has been shipped in interstate commerce. 5 U.S.C. § 7313 (1988) renders persons convicted of certain offenses ineligible to "accept or hold any position in the Government of the United States or in the government of the District of Columbia for the five years immediately following the date upon which his conviction becomes final."

82. PROSSER & KEETON, *supra* note 16, § 69.

differences between these spheres. The only indication that the Court recognized that the difference between civil and criminal law may be relevant is when it asserted, with little analysis or discussion,[83] that "no good reason can be seen" for not applying the civil concept of respondeat superior to criminal corporate liability.[84] Lower courts have followed the Supreme Court's lead. For example, the United States Court of Appeals for the Eighth Circuit, in affirming the conviction of a utilities corporation, stated that "[i]f the act was . . . done [by a corporate employee] it will be imputed to the corporation. . . . There is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose."[85]

The second flaw in the *New York Central* reasoning is its failure to consider the civil options to criminal liability of corporations. The Court stated that failure to impose criminal liability on corporations would "virtually take away the *only* means of effectually controlling the subject matter and correcting the abuses aimed at."[86] This statement is, of course, inaccurate. There are two major options to criminal liability of corporations: criminal liability of the responsible individuals within the corporation,[87] and civil remedies against the corporation.[88] If the Supreme Court's statement regarding the role of criminal liability of corporations is accurate, both of these options must be ineffectual. This Article submits that civil remedies against the corporation are effective, and although individual criminal liability may be ineffective in some circumstances, its failing does not justify corporate criminal liability on broad respondeat superior principles.

Arguably, we should forgive the Supreme Court for dismissing civil liability of corporations as an "ineffectual" response to violations of the law. When the Supreme Court decided *New York Central*, administrative regulation and supervision was in its infancy. Since 1909, however, administrative

83. The Court's only justification for making corporations vicariously liable for their agents' acts was that deciding otherwise would cause many offenses to go unpunished. New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 495 (1909).

84. *Id.* at 494.

85. Egan v. United States, 137 F.2d 369, 379 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943).

86. *New York Cent.*, 212 U.S. at 496 (emphasis added).

87. Brickey, *supra* note 15, at 621-22; Canfield, *supra* note 3, at 472.

88. *Developments*, *supra* note 3, at 1301-11.

agencies have grown dramatically in size, expertise, and power to regulate.[89] As President Kennedy stated in a 1961 message to Congress, "[t]he responsibilities with which [the regulatory agencies] have been entrusted permeate every sphere and almost every activity of our national life."[90] Today, 116 federal agencies have a huge impact on our economy.[91] Although the growth of state agencies has been slower, "[t]he average state probably has more than one hundred agencies with powers of adjudication or rulemaking or both."[92]

Between federal agencies such as the SEC, EPA, EEOC, OSHA, IRS, ICC, FTC, NLRB, SBA and various state tax, employment, and consumer agencies, layers of government regulate virtually every corporation. Although there are many criticisms of administrative regulation, agencies potentially provide the continuity criminal enforcement lacks. By definition, criminal enforcement occurs only after an egregious failure to

89. During its first 100 years, the federal government established agencies mainly to promote the country and to facilitate commerce. CONGRESSIONAL QUARTERLY, INC., FEDERAL REGULATORY DIRECTORY 13 (5th ed. 1986). These agencies included the Army Corps of Engineers (1824), Patent and Trademark Office (1836), Internal Revenue Service (1862), Comptroller of the Currency (1863), Copyright Office of the Library of Congress (1870), Bureau of Fisheries (1871), and Civil Service Commission (1883). *Id.* The Interstate Commerce Commission (ICC), created in 1887, was the federal government's first attempt "to exercise its constitutional authority to regulate interstate commerce." *Id.* at 13. It was twenty-three years, however, before the ICC achieved even the power to set original rates or investigate new rate proposals. *Id.* at 14.

Between 1915 and the New Deal, Congress established seven additional agencies, including the Coast Guard (1915), Tariff Commission (1916), Commodities Exchange Authority (1922), Customs Service (1927), Federal Radio Commission (1927), Federal Power Commission (1930), and Food and Drug Administration (1931). *Id.* at 15. With the 1929 depression, there was "an unprecedented surge of administrative regulation," *id.* at 15, and social programs that marked a fundamental shift away from the limited role that the federal government had previously filled in the nation's economic and social life. *Id.* at 17. This surge set the stage for the Great Society programs of the 1960s, which set forth another burst of growth in administrative agencies, *id.* at 17: "The 1970s witnessed the most dramatic increase in federal regulatory activity ever." *Id.* at 3.

90. 107 CONG. REC. 5847 (1961).

91. CONGRESSIONAL QUARTERLY, INC., *supra* note 89, at 2. The General Accounting Office tabulated the number of agencies in a 1978 report that focused on regulatory programs that "have an impact on the private sector without categorizing them by specific regulatory definition." *Id.* Various statistics emphasize the impact of these agencies on today's economy: The "Federal Register which publishes all proposed and final regulations [has] skyrocketed from 9,562 pages in 1960 to 74,120 pages in 1980." *Id.* at 3. "One survey found that currently federal departments and agencies send out more than 9,800 different types of forms and received 556 million responses." *Id.*

92. K. DAVIS, ADMINISTRATIVE LAW 4 (5th ed. 1973).

comply with the law. Agencies, on the other hand, have the power to monitor continuing corporate activity before lapses become egregious. In short, a strong argument can be made that because agencies have the expertise and ability to police corporations, we should rely on agencies to shoulder most of the enforcement responsibility. As a corollary, to the extent agencies lack adequate resources to realize their enforcement potential, we should see that they get more resources.

Unfortunately, many courts still parrot the Supreme Court's view that criminal liability is the only available governmental response to corporate misbehavior. For example, the United States Court of Appeals for the Second Circuit, in affirming the conviction of a corporate wholesaler of fruits and vegetables, noted that to not impose criminal liability in this case "[was] to immunize the offender who really benefits and open wide the door for evasion."[93]

As noted, controlling corporate behavior through the imposition of criminal liability on individuals within the corporation is a second option to corporate criminal liability. The government should criminally prosecute individuals within an organization who violate the law. It must be acknowledged, however, that this avenue has limited ability to deter corporate agents from future illegal activity. This is true for two reasons. First, internal corporate pressure that can overcome the deterrent value of individual criminal liability often exists.[94] This pressure may be the subtle indoctrination of employees so that they do not perceive their conduct as illegal, or it may consist of more draconian measures such as replacing employees who do not succumb to such pressure. Second, it is often difficult to decipher which individuals within an organization are responsible for the criminal act.[95] When this is the case, there can be no criminal prosecution of individual corporate employees.

There is, however, a response to each of these problems. The corporate ethos standard of liability proposed herein helps remedy the first problem by holding criminally liable any cor-

93. United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).

94. MODEL PENAL CODE § 2.07 commentary at 148-49 (Tent. Draft No. 4, 1956) ("For there are probably cases in which the economic pressures within the corporate body are sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain . . . .").

95. Note, *supra* note 17, at 553-554 & n.35; *see, e.g.*, MODEL PENAL CODE § 2.07 commentary at 149-50 (Tent. Draft No. 4, 1956); Bucy, *Fraud by Fright: White Collar Crime by Health Care Providers*, 67 N.C.L. REV. 855, 878 (1989).

poration that pressures employees to violate the law. The second problem, that it is often difficult to determine which corporate agents are responsible for the criminal act, although factually correct, does not justify use of a standard of liability that allows convictions of law-abiding corporation.

The third flaw in the *New York Central* reasoning is its failure to consider the conceptual alternatives to broad respondeat superior as the standard for corporate criminal liability. The Supreme Court assumed it had two options for imposing criminal liability on corporations: respondeat superior[96] or no criminal liability.[97] Such a rigid view of its options is understandable given the posture of the case before the Court and the historical place of this opinion. Almost a full century has passed since this decision, however. During this time, there has been considerable experience with and substantial scholarship on the nature of organizations. The *New York Central* Court's simplistic choice between two options, while understandable, ignores the subtleties of organizational behavior that courts are now better able to identify and appreciate.

In conclusion, the Supreme Court in *New York Central* was presented with a broad vicarious liability standard of corporate criminal liability and asked to reject it in favor of no liability. The Court opted for the former, thereby giving our criminal justice system the tool of respondeat superior to confront the theoretical morass presented by corporate criminal liability. In adopting this approach, the Court uncritically borrowed a concept appropriate for one type of legal problem and used it for another, overgeneralized the need for corporate criminal liability, and failed to assess the options to its chosen approach. The

96. In this case, New York Central could be liable for acts of its assistant traffic manager because of the language in the Elkins Act, under which the railroad was prosecuted. The applicable portion of this statute provided a broad respondeat superior standard:

> In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any common carrier or shipper, acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person.

49 U.S.C. § 41(2) (1906), *repealed by* Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 4(a)-(b), 92 Stat. 1466, 1470, *quoted in New York Cent.*, 212 U.S. at 496.

97. In 1909, the question whether corporations should be liable for crimes of intent was seriously debated. *Cf.* Brickey, *supra* note 2, at 413 (stating that only certain classes of crimes could be committed by corporations); Canfield, *supra* note 3, at 472-77 (discussion whether corporation could be liable for crimes involving mens rea).

Court did so because it determined that practical necessity demanded criminal liability of corporations, but the Court's ends-justify-the-means approach was short-sighted and has created more problems than it solved. The *New York Central* opinion short-circuited a critical and thorough search for an appropriate standard of corporate criminal liability, condemned the criminal justice system and corporate actors to groping efforts, at best, to apply this standard, and provided ammunition to those who would decry any corporate criminal liability. In short, the Court gave as precedent a sledgehammer, when a scalpel is needed. As in other areas where sophisticated tools have replaced primitive ones, the criminal law needs a more sophisticated and refined mechanism for imposing corporate criminal liability.

II. THE CORPORATE ETHOS STANDARD OF CORPORATE CRIMINAL LIABILITY

The standard of corporate criminal liability proposed herein focuses on the "ethos"[98] of a corporation and provides as follows: A corporation should be held criminally liable only when its ethos encourages criminal conduct by agents of the corporation. Under this standard, the government must prove, beyond a reasonable doubt, four elements: (1) a corporate ethos (2) that encourages (3) criminal conduct (4) by agents of the corporation.

A. PROVING THE ELEMENTS

1. The Existence of a Corporate Ethos

Aristotle developed the rich concept "ethos" to describe one component of a successful orator. In the third century B.C.,[99] the study of rhetoric was so popular in Greece that it dominated the traditional education of young men preparing for public life.[100] Several factors contributed to rhetoric's importance. Most young men aspired to be a politician or statesman, and public speaking was an "indispensable accom-

98. This test focuses on corporate "ethos" rather than more popular terms such as corporate culture or corporate personality. These latter terms both have specialized meanings within their originating disciplines of anthropology and psychology, respectively, that may prove limiting. Also, in their popularity, both terms have become homogenized, losing much of their clarity.

99. A. GRANT, ARISTOTLE, A (1880).

100. E. COPE, AN INTRODUCTION TO ARISTOTLE'S RHETORIC 2 (1867).

plishment"[101] for any politician. In addition, Athens was an "unusually litigious" society, and the law required that every citizen plead his own case in a court of law.[102] In this environment, oratorical skills were necessary, advantageous, and cherished.[103] Some citizens, including Aristotle, were not pleased with this emphasis on rhetoric, believing that young men cultivated "quickness and dexterity" at the expense of sound logic, scientific inquiry, veracity and sincerity.[104] In Aristotle's years as a young adult, Isocrates' school of rhetoric was at the height of its popularity.[105] The factitious and vacuous approach that this school fostered apparently so moved Aristotle that he established a rival school of oratory.[106] In his three part work entitled *Rhetoric*, Aristotle advanced his views on oratory, and distinguished the views of his rivals'. Aristotle argued that the most important ingredient of successful oratory was systematic logic and scientific exposition.[107] He identified three modes of persuasion by which a speaker communicated his logic and exposition.[108] One was the content of the speech.[109] Another was putting the audience in a frame of mind responsive to the arguments made,[110] a mode that required an analysis of the human character, motives, and feelings of the audience. The third mode of persuasion — "ἦθος" or ethos — "depend[ed] on the personal character of the speaker."[111] According to one Aristotelean scholar,

> This kind of ἦθος is most important . . . to the success of the speech: for the opinion of any audience as to the credibility of the speaker depends mainly upon the view they take of his intentions and character intellectual and moral; his ability to form a judgment, his integrity and truthfulness and his disposition toward themselves, to one they

101. *Id.* at 1.
102. *Id.* at 2.
103. *Id.*
104. *Id.* at 2-3.
105. *Id.* at x.
106. *Id.*
107. *Id.* at 4.
108. ARISTOTLE, *Rhetoric*, in THE BASIC WORKS OF ARISTOTLE 1329 (R. McKeon ed. 1941) (bk. I, ch. 1)).
109. *Id.*
110. *Id.* at 1379-1412 (bk. II, ch. 1-19). Aristotle terms this component of Public Speaking as ἤθη and devoted some attention to distinguishing between ἦθος and ἤθη. E. COPE, *supra* note 100, at 108-13. Aristotle also distinguished another variety of ἦθος, which appears only in *Rhetoric*, Book III. It is a painting or ornament and aids in the proof. *Id.* at 112; ARISTOTLE, *supra* note 108, at 1442 (bk. III, ch. 16.8-9).
111. ARISTOTLE, *supra* note 108, at 1329 (bk. I, ch. 2); *see also id.* at 1353-54 (further discussion of the speaker's character).

> will listen with attention, respect and favor; another if they look upon him as of the opposite character, they will regard with dislike and impatience and an inclination to disbelief and criticism.[112]

Aristotle's notion of ethos has continued in our modern society. Today, the term refers to the characteristic spirit or prevalent tone of sentiment of a community, institution or system.[113] The historical concept of ethos is appropriate for our consideration of a corporation's characteristic spirit or prevalent tone of sentiment. Aristotle's "ethos" focused on the abstract, intangible character of a speaker that was separate from the substance of the speaker's words. So too, the notion of corporate ethos is the abstract, and intangible, character of a corporation separate from the substance of what it actually does, whether manufacturing, retailing, finance or other activity. And like Aristotle's speakers, each corporation has a distinctive ethos or "characteristic spirit." Superficial things such as the manner of dress and the camaraderie of the employees as well as formal, written goals and policies evidence this ethos. Additionally, a corporation's ethos may be tied to one or a few individuals or it may transcend individuals and even generations.

Scholars and practitioners of organizational theory have long recognized that organizations differ from each other: "It is not true that all big companies are the same — they aren't. . . . Companies develop their own distinctive personality and ethos which is so ingrained, so much a part of them, that the corporate identity expresses itself in their every action."[114]

Much of the voluminous business literature on corporate culture is premised on the notion that organizations have distinctive cultures.[115] For example, one commentator has described the distinct personalities of the world's dominant oil

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112. E. COPE, *supra* note 100, at 109-10.

113. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 781 (1971).

114. W. OLINS, THE CORPORATE PERSONALITY 82 (1978).

115. Generally, corporate culture is used to signify "the pattern of shared beliefs and values that give the members of an institution meaning and provide them with the rules for behavior in their organization." S. DAVIS, MANAGING CORPORATE CULTURE 1 n.1 (1984). Business literature has exploded with panaceas for assessing and manipulating a corporation's culture. *See, e.g.*, F. SCHUSTER, THE SCHUSTER REPORT ix (1986) ("Do you want your employees to be more productive? . . . The Schuster Report presents a strategy for implementing change in an organization's culture to promote innovation, productivity, excellence, and success."); *see also* S. DAVIS, *supra*, at 1-2 ("My purpose in writing this book is to share what I have learned about managing corporate cultures."); D. GRAVES, CORPORATE CULTURE-DIAGNOSIS AND CHANGE 129 (1986) ("Changing the culture: . . . Is there an easy solution?"); *id.* at viii ("In [this book] there is . . . some advice about changing the culture . . .").

companies[116] as follows: Texaco "with its selfishness and greed cultivates a reputation for meanness and secrecy";[117] Mobil "is in many ways the most sophisticated of American [oil companies] . . . much concerned with communications and image";[118] Exxon maintains a "tranquil style."[119] Its headquarters are "silent" and "elegant," its atmosphere "rarefied,"[120] Exxon is "full of rhetorics of global responsibilities [and] likes to stress that it serves not only its American shareholders but all the nations where it operates."[121] Shell, "lordly and sedate," demonstrates an "obsessive introversion" and "self containment"[122] — "Shellmen . . . cultivate . . . diplomacy [and]. . . prefer not to talk about anything as squalid as profits."[123]

In their popular work, *Corporate Cultures*, Deal and Kennedy identify five elements of a company's culture: business environment, values, heroes, rites and rituals, and cultural network.[124] By analyzing these elements, these authors develop four types of corporate cultures: the "Tough-guy, Macho" culture, where stakes are high and feedback is quick (construction and entertainment companies);[125] the "Work hard/Play hard" culture, where the employees live in a world of small risks — no one sale will make or break a player (real estate and door-to-door sales);[126] the "Bet-Your-Company" culture, where high risk but slow feedback prevails because players often must invest millions in a project that takes years to develop (capital goods and oil companies);[127] and the "process" culture where the low risk and slow feedback forces employees to focus on how they do something, not what they do (utilities and insurance companies).[128]

Peters and Waterman are two organizational scholars whose work builds on the premise that corporations have dis-

116. A. SAMPSON, THE SEVEN SISTERS 185 (1975).
117. *Id.* at 196-97.
118. *Id.* at 193.
119. *Id.* at 8. In 1973, when Sampson researched Exxon, Exxon was by assets the largest company in the world. It had 300,000 shareholders, its subsidiaries operated in a hundred countries, and its profits were a world record for any company in history — $2.5 billion. *Id.*
120. *Id.* at 9.
121. *Id.* at 191.
122. *Id.* at 11.
123. *Id.*
124. T. DEAL & A. KENNEDY, CORPORATE CULTURES 13-15 (1982).
125. *Id.* at 108-11.
126. *Id.* at 113-16.
127. *Id.* at 116-19.
128. *Id.* at 119-23.

tinct cultures. Their study of companies that demonstrated organizational effectiveness and management excellence[129] uncovered eight characteristics of the "excellent company."[130] The "excellent" companies maintain cultures that incorporate certain values, such as a strong recognition and respect for the customer's needs as well as the needs of employees to control their own destiny.[131] Poorer performing companies also often have strong cultures, but dysfunctional ones that usually focus on internal politics rather than on the customer, or on "the numbers" rather than on the product and the people who make and sell it.[132]

Sometimes the culture of a corporation is visible in very specific contexts. Christopher Stone demonstrates this point through a comparison of worker safety records in coal mines owned by traditional coal mining companies and those owned and operated by steel firms.[133] The mining companies experienced an average of 0.78 deaths and 40.61 injuries per million man-hours worked whereas the steel companies experienced an average of 0.36 deaths and 7.50 injuries per million man-hours worked.[134] Stone attributes this tremendous disparity to a difference in culture and values: The coal companies were accustomed to accepting a great loss of life and limbs; the steel companies were not and would not tolerate poor safety performance.[135]

For criminal justice purposes, some of the most interesting work on organizational character has been conducted by sociologists who have examined the commission of corporate crime to determine the characteristics of lawful and unlawful organizations.[136] These scholars suggest that certain social structures

129. T. PETERS & R. WATERMAN, IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST RUN CORPORATIONS 13-15 (1982).

130. *Id.* at 26, 80.

131. *Id.* at 80.

132. *Id.* at 13.

133. C. STONE, WHERE THE LAW ENDS 238 (1975).

134. *Id.*

135. *Id.*

136. Philosopher Peter French wrote a fascinating work on organizational character. French points out that corporate decisions are sometimes made by "intentional actors that are not all of the same biological species." P. FRENCH, *supra* note 15, at 46. As French notes:

> When the corporate act is consistent with an instantiation or implementation of established corporate policy; then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.

and processes internal to an organization encourage unlawful behavior.[137]

Marshall Clinard interviewed sixty-four retired middle management employees of fifty-one Fortune 500 corporations[138] engaged in industrial manufacturing.[139] Clinard focused his study on unethical as well as unlawful behavior.[140] Through his interviews, Clinard found that most of the executives believed that "unethical corporate behavior can usually be traced to internal rather than external forces."[141] The interviewees identified two internal factors as primarily determinative of whether the corporation promoted lawful or unlawful behavior. The first was top management.[142] The interviewees portrayed top management as generally knowledgeable about the unethical or unlawful activity before or after it occurred. Not surprisingly, they therefore deemed top management to be "largely responsible for the unethical or illegal behavior within a corporation."[143] The interviewees also associated the following management characteristics with the law-abiding corporation: an appreciation of applicable government regulations, explicit instructions and enforcement of these regulations, open lines of communication between top and middle management about compliance problems, and stable and respected leadership that came from within the corporate ranks.[144] The second factor identified by the interviewees as influencing a corporation's propensity to comply with the law was the internal pressure on middle management to show a profit and maintain satisfactory employee relations.[145]

Interestingly, the executives thought that these two internal factors contributed more to whether a corporation complied with the law than did the external factors such as a poor finan-

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Id. at 44.

137. M. CLINARD, CORPORATE ETHICS AND CRIME 122 (1983); Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REV. 1377, 1378 (1982); *see also* Fisse, *supra* note 3, at 1163 (offenses committed attributed to defective checking and communications procedures).

138. M. CLINARD, *supra* note 137, at 24.

139. *Id.*

140. *Id.* at 35. When studying illegal behavior, such co-mingling may be problematic but it seems appropriate given the lack of legal training of the managers in Clinard's sample. As one executive stated: "Law violations are about the same as ethics except in the former you go to jail." *Id.* at 132.

141. *Id.* at 69.

142. *Id.* at 132.

143. *Id.* at 71.

144. *Id.* at 74, 132, 138-39, 150-51.

145. *Id.* at 91, 140-44.

cial situation, unfair practices of competitors, or the type of industry.[146] This focus on internal rather than external factors supports the view that an ethos developed within a corporation can encourage, or discourage, criminal conduct by corporate employees.

In *Controlling Unlawful Organizational Behavior*,[147] Diane Vaughan examines one case study of organizational crime: Revco Inc., which in 1977, pled guilty to submitting false medicaid claims totalling $521,521.12.[148] Drawing on this case study, Vaughan analyzes the relationship between corporate structural factors and unlawful behavior.[149] She concludes that the "[o]rganizational processes . . . create an internal moral and intellectual world" in which individuals within the organization are encouraged to engage in unlawful behavior.[150] These organizational processes include internal education and training, reward mechanisms, and informational processing and recording methods.[151] Vaughan notes that the organizational processes that encourage unlawful behavior "may vary by subunit of an organization, or by position within a subunit and over time."[152]

One can draw several clear conclusions from these works on corporate culture: (1) each corporation is distinctive and draws its uniqueness from a complex combination of formal and informal factors; (2) the formal and informal structure of a corporation can promote, or discourage, violations of the law; and (3) this structure is identifiable, observable, and malleable. In light of such conclusions, a standard of criminal liability that fails to recognize the unique character of corporations or fails to promote law-abiding behavior by such corporations is unjustified.

2. A Corporate Ethos that "Encourages"

To apply this standard of liability, it is not necessary to ascertain the overall and complete ethos of an organization. The corporate ethos standard is concerned only with the ethos relevant to the criminal conduct in question. Thus, a corporation's ethos or "characteristic spirit" toward employees' rights, com-

146. *Id.* at 69, 144.
147. D. VAUGHAN, CONTROLLING UNLAWFUL ORGANIZATIONAL BEHAVIOR (1983).
148. *Id.* at 17.
149. *Id.* at 68-78.
150. *Id.* at 70-71.
151. *Id.* at 68-78.
152. *Id.* at 87.

petitors, research and development, marketing, and the like is relevant only to the extent it sheds light on whether there exists a corporate ethos that encouraged the particular criminal conduct at issue.

Identifying the corporate ethos relevant to the criminal behavior in question will require a resort to circumstantial evidence, as does proof of intent in every criminal case. Although the actual evidence available will always turn on the particular facts of each case, there are certain guides for every factfinder. When the defendant is an individual, the factfinder looks to the statements and actions of the defendant before, during, and after the crime as well as corroboration for and explanations of such statements and actions. From this information, the factfinder assesses the defendant's mens rea for the criminal conduct charged. By comparison, in applying the corporate ethos standard of liability, the factfinder should look to the following types of facts to determine whether a corporate ethos existed which encouraged corporate employees to commit the criminal conduct. If so, the government has proven the corporate mens rea. These facts concern the internal, formal and informal, structure of the corporation.

Two practical points should be borne in mind when applying the following factors. First, as noted, sometimes it may not be possible to determine which individual within an organization actually performed the illegal conduct, much less encouraged it. The corporate ethos test does not require that the government prove which individual is at fault. It does, however, require the government to prove that the criminal conduct was committed by a corporate agent and that a corporate ethos existed that encouraged the criminal conduct. Thus, if the government shows that the criminal conduct occurred in the accounting department, proof of a corporate ethos that encourages criminal conduct in the research and development division is not sufficient; only evidence of such an ethos in the accounting department will suffice. Second, like Aristotle's speakers who were taught to identify and then to control and alter their own character to suit their audience, a corporation can manipulate and control its corporate ethos from within. Accordingly, the factfinder using a corporate ethos standard of liability, like an audience listening to a politician, must determine whether they are observing fact or fiction.

a. *The Hierarchy*

The inquiry into corporate hierarchy should begin with the board of directors' role. Does the board operate as a figurehead or does it, or any member of it, monitor the corporation's efforts to comply with the law? If the board or any member allegedly performs this function, does the board or the member have the access and resources to do so effectively?

Lockheed provides an example of how a defective board can contribute to corporate crime. Investigations initiated in the 1970s revealed that Lockheed regularly bribed foreign officials.[153] Between 1970 and 1975, corporate agents made $30 million to $38 million in questionable payments to win foreign aircraft sales.[154] Investigators' inquiries revealed that one of the factors contributing to this bribery was a deficiency in Lockheed's board of directors. Although the board had an audit committee, this committee "failed to function as it should because it was shielded from critical information."[155]

Lockheed's subsequent reforms demonstrate the powerful and productive role that a board can play in establishing a law abiding ethos. In response to the scandal, the Lockheed board appointed additional directors, including an auditing director, who came from outside the corporate structure;[156] substantially increased the staff assigned to the board's auditing committee;[157] made the audit group's budget independent of the groups that it audited;[158] and, opened the lines of communication so that auditors no longer reported to the heads of their local divisions, but to the Director of Auditing who reported directly to the Chairman.[159] These reforms led to intangible changes as well: "[N]ow [Lockheed] directors ask probing questions and demand more detailed information in audit committee reports that they previously passed without challenge."[160]

In addition to examining the role played by the board of directors, the factfinder should also examine management's organizational structure. As Braithwaite stated: "The key to understanding so much organizational crime . . . is the way that

153. B. FISSE & J. BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS 144 (1983).
154. *Id.*
155. *Id.* at 155.
156. *Id.*
157. *Id.* at 155-56.
158. *Id.*
159. *Id.* at 155.
160. *Id.* at 156.

organizational complexity can be used to protect people from . . . exposure to criminal liability."[161] The factfinder should focus its inquiries on whether management left unattended or inaccessible positions within the corporation where illegal behavior could have easily occurred. If positions were left unattended, the factfinder should scrutinize the reason for this: was there an honest and good faith oversight, or a callous recognition that if corporate employees commit illegal activity, it is best done outside the usual channels of supervision? Braithwaite's study of the pharmaceutical industry provides a graphic example of the latter. He found that many companies have systemic policies to protect the chief executive from the taint of knowledge of illegalities.[162] They do so by having "vice-presidents responsible for going to jail."[163] The corporate directors tell the vice presidents: " 'I don't want to know how you do it . . . just get the job done.' "[164]

The Revco case, discussed by Vaughan, provides a less dramatic, but probably more common example of structural deficiencies that engender criminal conduct. Revco was a pharmaceutical retailer that filled prescriptions for patients with Medicaid coverage.[165] The Revco drugstores did not require Medicaid patients to pay, upon receipt, for their prescriptions; rather, Revco filled the patients' prescriptions and submitted the claims to the Medicaid program for reimbursement.[166] Medicaid then paid Revco directly for all Medicaid prescriptions filled. By 1975, the Revco stores had a backlog of approximately $500,000 in Medicaid claims that it had submitted for reimbursement but that the Medicaid program had rejected, primarily for clerical reasons such as improperly completed forms.[167] Instead of correcting the forms, Revco employees (with the help of temporary employees) falsified information on the forms and resubmitted the claims to Medicaid for payment.[168] When indicted, Revco, along with two of its employees, pled no contest to misdemeanor charges of falsification.[169]

161. J. BRAITHWAITE, *supra* note 11, at 147.
162. J. BRAITHWAITE, CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY 355-58, 365, 370 (1984).
163. *Id.* at 308.
164. *Id.* at 322 (quoting the chief executive of an American corporation).
165. D. VAUGHAN, *supra* note 147, at xii, 137.
166. *Id.* at 1, 3.
167. *Id.* at 8-9.
168. *Id.*
169. *Id.* at 16.

Although neither the corporate minutes nor other official communications evidenced an official Revco policy supporting falsification of Medicaid forms,[170] an important structural deficiency in Revco's billing system existed. Historically, Revco had a higher rate of rejection for defective claims than did its peer companies. Revco's rejection rate ranged from 5.4% to 56.3% of monthly claims filed, for an average monthly rejection rate of 24.04%. The peer companies had an average monthly rejection rate of 2% to 6%.[171] Applying the corporate ethos standard, a reasonable factfinder could conclude that Revco's hierarchy was deficient because it sanctioned the initial filing of defective Medicaid claims, which led to the rejection of the claims, which in turn led to claim falsifications in an attempt to recoup the resulting losses.

Christopher Stone provides another example of a systemic failure in organizational structure that led to criminal conduct. In the 1960s, Goodrich was developing brakes for the A-7D, a military aircraft.[172] The corporate structure entrusted the testing of the new brake system to the same personnel who had designed it.[173] A junior engineer calculated that the brake system was defective, and repeated safety tests supported his calculation.[174] Despite these poor reports, the project went forward because "test data were apparently fudged."[175] Although the Congressional inquiry found that Goodrich's top management did not know about the false test data, as Stone points out, the inadequate system of checks and balances made Goodrich's organization defective.[176] Again, applying the corporate ethos standard, a reasonable factfinder could find that Goodrich's hierarchial structure was deficient because it allowed the same individuals to design and test new aircraft. Although less dramatically probative than the hierarchial structure of the pharmaceutical companies studied by Braithwaite, both Revco and Goodrich's structural deficiencies weigh in favor of finding a corporate ethos that encouraged the subsequent criminal fraud.

170. In fact, the evidence showed that no one within Revco Inc., other than the two executives and the temporary employees, knew of the fraud. *Id.* at 9-10.

171. *Id.* at 11.

172. C. STONE, *supra* note 133, at 165.

173. *Id.* at 166.

174. *Id.* at 165.

175. *Id.*

176. *Id.* at 166.

Allied and Exxon illustrate how corporations can strengthen the management hierarchy to discourage, or at least not encourage, criminal conduct by corporate employees. For example, Allied formed a committee on Toxic Risk Assessment, partly in response to its conviction for discharging Kepone into the James River, and partly in response to new environmental statutes.[177] Composed of a vice-president for medical affairs, a senior attorney, and personnel from various relevant disciplines (such as toxicology),[178] the committee requires all operating plants to submit a monthly report detailing any environmental risk that has occurred. In addition, "all personnel, irrespective of rank, have an obligation" to report any risk "they believe to be substantial."[179] The committee investigates all complaints and reports back to the person filing the complaint.[180]

Similarly, after a bribery scandal in the 1970s,[181] Exxon revamped its management hierarchy by giving each of its regions a controller who, aided by an audit team,[182] conducts operational as well as financial audits. These audits "incorporate an assessment of whether standard operating procedures are adequate to ensure compliance with company policies are in place, and whether these procedures are being consistently followed."[183] The Exxon restructuring also opened the lines of communication. Auditors can by-pass the controller and report violations directly to the board of directors. Whenever the controller or the board receives a violation report, the recipient must send to the person who reported the violation a finding on

177. B. FISSE & J. BRAITHWAITE, *supra* note 153, at 73.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 168-81.

182. Because of the scope of the audit, engineers as well as financial auditors comprise the audit teams. *Id.* at 173.

183. *Id.* In addition to increasing the ability to monitor compliance with the law, there are other advantages to expanding the audits' scope beyond finances. Because the audit also assesses efficiency, findings are useful in improving the performance of the organization. *Id.* at 179. In addition, managers will be more willing to endure the inconvenience of an audit; further, the comprehensiveness of the control system discourages employee thefts, or enhances the company's ability to discover those thefts more quickly. *Id.* at 179-80.

One potential drawback to a system with as much control as Exxon's is that "the 'environment of control,' which Exxon has so successfully created, might inhibit lateral thinking toward solutions for improving . . . or risk-prevention." *Id.* at 181. The corporate environment should also be of "imaginative problem solving." *Id.*

whether a violation has occurred, and if it has, what action will be taken.[184] Moreover, the controller must ensure that any needed remedial action is, in fact, implemented.

In conclusion, the factfinder should examine the corporate hierarchy to determine if a corporate ethos existed that encouraged the criminal conduct at issue. If either the board of directors or the management were organized in a way that encouraged criminal activity, even indirectly as in the Revco and Goodrich examples, the factfinder should weigh this factor in favor of finding the existence of such an ethos, and thus, of finding the corporation criminally liable. On the other hand, the factfinder should weigh the implementation of procedures, such as those employed at Allied and Exxon, against finding the existence of such an ethos and, consequently, against finding corporate criminal liability, even though corporate agents committed the criminal act.

b. *Corporate Goals*

When considering the corporate goals, the factfinder should examine whether the goals set by the corporation for the relevant division, subsidiary, or employee promote lawful behavior or are so unrealistic that they encourage illegal behavior. As the American Law Institute noted in devising the Model Penal Code's standard of corporate criminal liability, "the economic pressures within the corporate body [may be] sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain."[185]

An apt example of this was Ford's ambitious production and earnings goals for 1973: It was imperative that Ford obtain EPA certification of its emission testing standards if it was to meet these goals.[186] The Company was unable to obtain certification legitimately, so Ford employees tampered with its 1973 engines to obtain the needed certification.[187] By comparison Exxon, following its bribery scandal, demonstrates goals a corporation can establish to promote compliance with the law. In a memorandum sent to all employees, Exxon stated:

> An overly-ambitious employee might have the mistaken idea that we do not care how results are obtained, as long as he gets results. He might think it best not to tell higher management all that he is doing,

184. *Id.* at 175.

185. MODEL PENAL CODE § 2.07 commentary at 158-59 (Tent. Draft No. 4, 1956) 174.

186. B. FISSE & J. BRAITHWAITE, *supra* note 153, at 56.

187. *Id.* at 55.

> not to record all transactions accurately in his books and records, and to deceive the Corporation's internal and external auditors. He would be wrong on all counts.
>
> We do care how we get results. We expect compliance with our standard of integrity throughout the organization. We will not tolerate an employee who achieves results at the cost of violation of laws or unscrupulous dealing. By the same token, we will support, and we expect you to support, an employee who passes up an opportunity or advantage which can only be secured at the sacrifice of principle. . . .[188]

Rarely will cases be as extreme as the Ford and Exxon examples. The point, however, is that institutional goals can encourage, or discourage, illegal activity by corporate employees. When illegal activity is encouraged, such goals weigh in favor of imposing criminal liability on a corporation. When the goals discourage illegal activity, they mitigate against a finding of criminal liability, even though corporate employees committed illegal acts.

c. *Educating Corporate Employees about Legal Requirements*

In some corporations, employees have the opportunity to disobey, or comply with, the law many times each day. The duty of such corporations to educate their employees about legal requirements is greater than that of corporations where employees do not have such opportunities. Likewise, a corporation's duty to educate its employees about legal requirements varies with the type of employee. For example, few would disagree that a banking corporation has a duty to educate all of its tellers about reporting requirements for cash transactions, but that it has no duty to so educate its janitorial employees. The factfinder, therefore, should consider whether the corporation has made *reasonable* efforts to educate its employees about legal requirements. The following types of inquiries are rele-

188. *Id.* at 171. It is interesting to compare the directness of Exxon's statement to its employees to the ambiguous language of the *Standards of Business Ethics and Conduct* that McDonnell Douglas distributed to its employees. The McDonnell Douglas "vague and platitudinous" document consists of 1500 words and covers eleven topics ranging from conflicts of interests to equal opportunity working conditions. *Id.* at 166.

Exxon's communique to its employees, like all of the Exxon reforms discussed herein, *see supra* text accompanying notes 181-84, came in the wake of its 1970s bribery scandal. As this communique aptly demonstrates, the reforms were geared to financial malfeasance. One has to wonder whether the 1990 oil spill at Valdez, Alaska, with resulting criminal liability for Exxon, would have occurred if Exxon had given the same attention to environmental responsibilities. *See* Cushman, *supra* note 4.

vant in assessing this factor: Are the appropriate employees informed of regulatory changes that affect their duties? Are the new regulations explained in a comprehensible manner? Do middle management executives hold regular meetings to discuss problems of compliance? Is the corporate legal staff available for discussions on compliance? Does middle management have specific training programs in the areas of ethics and government regulation?

Like the other internal controls discussed herein, educational programs are viable mechanisms for controlling criminal conduct. Fisse and Braithwaite's study of corporate offenders aptly demonstrates this point. After its bribery scandal, Lockheed assumed the responsibility of educating its staff: "Annually, the senior vice-president and general counsel, chief counsel, and assistant chief counsel tour all operating facilities to refresh managers' consciousness of compliance responsibilities and to answer questions about law observance."[189] Such efforts must affect employees. As Fisse and Braithwaite noted, "[i]t is unusual in large corporations for the three top lawyers to be given an educational mission as a primary part of their responsibilities."[190]

Exxon made a similar effort to educate its employees after its bribery scandal. Every three years, each Exxon subsidiary has a "business practice review" in which managers review the objectives of corporate ethics policies and assess current practices.[191] A beneficial side effect, according to the controller responsible for the reviews, was that the reviews "helped the managers in the field to understand the reasons for many of the requirements imposed on them."[192]

The corporate ethos standard of liability does not require all corporations to institute educational efforts similar to those at Lockheed and Exxon. This standard, however, does reward a corporation that does so, if and when its employees commit criminal acts. Applying this standard, the factfinder is less likely to hold criminally liable a corporation that has implemented viable educational programs than a corporation that has no such programs.

189. B. FISSE & J. BRAITHWAITE, *supra* note 153, at 158.
190. *Id.*
191. *Id.* at 178.
192. *Id.*

d. *Monitoring Compliance with Legal Requirements*

In Clinard's study, middle managers cited effective employee monitoring as one of the practices important in cultivating an ethical corporation.[193] A factfinder applying the corporate ethos standard thus should determine how well the corporation monitors employee compliance with applicable legal requirements. Are internal audits conducted? Are channels of communication open throughout the management hierarchy? Are employees required to sign a statement each year indicating that they are familiar with pertinent government regulations *and* indicating that they realize such violations will result in dismissal? Is there an ombudsman?

The internal audit is an important monitoring device. Virtually every corporation, regardless of size, performs some type of internal audit. The factfinder applying the corporate ethos standard should focus on the effectiveness of this audit. The corporate offenders Fisse and Braithwaite studied often instituted reforms to enhance the credibility of the internal audit and auditors.[194] In eleven of the seventeen case studies they examined, "compliance in the organization was strengthened either through increased staff, seniority, or added powers, or all three."[195] In some cases, management gave increased power to those responsible for monitoring compliance.[196] For example, after its Kepone crisis, Allied management upgraded its environmental affairs manager to vice-president level,[197] selected a vice-president to supervise a Toxic Risk Assessment Committee,[198] and added an Environmental Committee to the Board of Directors.[199]

Effective internal monitoring also requires open channels of communication. Factfinders must determine whether there is an open door policy that encourages employees to consult with top management regarding problems of ethics and compliance with government regulations and if not, why not. One of the surprising findings of Clinard's study of middle managers was that top management knew about violations before or shortly after they occurred.[200] If this is true, poor channels of

193. M. CLINARD, *supra* note 137, at 159.
194. B. FISSE & J. BRAITHWAITE, *supra* note 153, at 156, 234.
195. *Id.* at 233.
196. *See id.* at 234.
197. *Id.* at 72.
198. *Id.* at 73.
199. *Id.*
200. M. CLINARD, *supra* note 137, at 138.

communication to top management should be a red flag to factfinders applying the corporate ethos standard: Factfinders should ascertain whether channels of communication are open and effective. If not, is the ineffectiveness accidental or planned?

Compliance letters are one way to communicate legal responsibilities to corporate employees.[201] For example, Lockheed requires that all personnel with financial responsibilities "sign a letter twice a year indicating that to the best of their knowledge, the business . . . of the company under their control has been conducted in accordance with Lockheed's *Principles of Business Conduct*."[202] General Electric started similar requirements after its price fixing scandal in the early 1960s,[203] as did Allied Chemical after its Kepone crisis,[204] Ford after its prosecution for fraudulent emission testing,[205] Exxon[206] and McDonnell Douglas[207] after their bribery scandals, ITT after its disclosure of covert actions in Chili,[208] IBM after its antitrust prosecution,[209] and Searle after the FDA, Senate and grand jury investigations of its drug testing procedures.[210] Through these compliance letters, the signing officer establishes herself as the person responsible if illegality does occur.

Finally, the factfinder should consider whether a corporation has an ombudsman to receive employee complaints and concerns about legal compliance. If there is such an ombudsman, the factfinder should assess the ombudsman's effectiveness and the protection afforded those employees who bring information to the ombudsman. Factfinders should bear in mind that an ombudsman outside the corporate hierarchy provides greater employee protection.[211]

In conclusion, a corporation's efforts to monitor employee

201. *See* B. FISSE & J. BRAITHWAITE, *supra* note 153, at 234.
202. *Id.* at 156.
203. *Id.* at 182, 234.
204. *Id.* at 63, 234.
205. *Id.* at 55, 234.
206. *Id.* at 168, 234.
207. *Id.* at 161, 234.
208. *Id.* at 124, 234.
209. *Id.* at 197, 234.
210. *Id.* at 136-39, 234.
211. For a discussion of the need for an ombudsman that "whistle-blowers" can consult, see WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY 190-91, 194-96 (R. Nader, P. Petkas & K. Blackwell eds. 1972). *Cf.* Whistle Blower Protection Act of 1989, § 2, 5 U.S.C. § 1201 (Supp. 1990) (providing protection for employees who report wrongdoing to the government).

compliance with the law is relevant in assessing whether there exists a corporate ethos that encouraged corporate employees to commit criminal conduct. The factfinder should examine the caliber of the internal audit and auditors, the structural lines of communication, the use of compliance letters, and the role of an ombudsman when evaluating these monitoring efforts.

e. *Investigating the Current Offense*

The factfinder also should examine the criminal violation at issue to determine who did it, who contributed to its success, and which (if any) higher echelon officials "recklessly tolerated" it. At this point, the corporate ethos standard deviates from current standards for corporate criminal liability. Under traditional respondeat superior doctrine, if a corporate agent intentionally commits a criminal offense while acting within the scope of her duties and for the benefit of the corporation, the corporation is guilty.[212] Under the MPC standard, if higher echelon officials participate in or recklessly tolerate the offense, corporate liability results.[213] Under the corporate ethos standard, however, such facts are not conclusive. The government must go further and demonstrate that the corporation encouraged this conduct. Admittedly, the chances of finding a corporate ethos that encouraged the criminal conduct increase if higher echelon officials are involved, but such officials' participation or acquiescence is not decisive. Rather, the higher level officials' conduct is simply more relevant than lower level officials' participation.

f. *Corporate Reaction to Past Violations and Violators*

According to Clinard's study, a corporation's reaction to a prior violation of the law can be one of the more important factors encouraging ethical patterns in the corporation: "[P]rior enforcement actions . . . not only affected compliance in the particular area where it was brought but also had tended to affect compliance with government regulations generally."[214] Clearly, the factfinder should consider as relevant the prior treatment of employees who violated the law. Were the violators disciplined, or promoted? Did the corporation reimburse the violators for criminal or civil fines assessed in their individual capacity or pay their attorneys fees? What steps did the

212. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.10(a) (2d ed. 1986).
213. MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962).
214. M. CLINARD, *supra* note 137, at 157.

corporation take to prevent such action from occurring in the future: Did the corporation make efforts to rectify the situation that led to the violations, or did it attempt to conceal the violations? If the corporation conscientiously and in good faith attempted to remove the cause of the prior violation, it is unlikely that an ethos that encourages criminal conduct exists. However, if the corporation took little or no steps to remedy the situation, or attempted to conceal misconduct, it is likely that a corporate ethos exists that should subject the corporation to liability.

g. *Compensation Incentives for Legally Appropriate Behavior*

Another factor that affects the corporate ethos is whether the corporate compensation scheme awards unlawful or lawful behavior with bonuses, stock options, or other fringe benefits. For example, is the vice president who was convicted of offering bribes to foreign businesses promoted because his division profits were up or, is he fired? Who is rewarded: The plant manager who has the highest accident rate, or the plant manager who has the best compliance with environmental requirements? Is the whistle blower fired, or protected and rewarded? The values reflected in compensation will permeate an entire corporation and communicate to employees what behavior on their part the corporation favors or dislikes.

Allied provides an example of how a corporation can promote compliance with the law through compensation practices. After its Kepone conviction, Allied introduced a safety incentive scheme. One third of executives' bonuses relate "to environmental compliance, safety, antitrust, civil rights and other non-fiscal goals."[215] After instituting this bonus scheme, Allied experienced a 75% decline in its plant injury record.[216] Searle[217] and Exxon[218] provide other examples. At both corporations, bonuses and salaries depend in part on compliance with corporate ethics or safety policies. When such a compensation scheme exists, a finding that the corporate ethos encouraged the criminal conduct at issue is less likely.

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215. B. FISSE & J. BRAITHWAITE, *supra* note 153, at 73.

216. Hayes, *Complying With E.P.A. Rules*, N.Y. Times, Jan. 16, 1980, at D1, col. 3.

217. B. FISSE & J. BRAITHWAITE, *supra* note 153, at 141.

218. *See id.* at 176.

h. *Indemnification*

One of the more difficult criteria to weigh under the corporate ethos test relates to the issue of compensation, namely, a corporation's position on indemnification (or its surrogate, Directors & Officers Liability Insurance). The difficulty arises because the current indemnification practice of most corporations encourages criminal conduct by corporate employees.[219] Taking this factor into account thus weighs in favor of finding almost every corporation guilty. For this reason, before the factfinders can fairly weigh a corporation's indemnification policy as part of the corporate ethos test, corporations must change their current indemnification practices. Before suggesting a different approach toward indemnification — one that does not encourage criminal conduct, it is necessary to briefly review the current indemnification policy that most corporations follow.

Corporations can protect their executives from the financial burden of legal liability incurred in the exercise of their corporate duties through two major avenues: (1) indemnification by the corporation under authorizing statutes, by-laws, or ad hoc agreements negotiated between the executive and the corporation,[220] or (2) insurance coverage provided through a Directors and Officers (D&O) liability policy purchased by the corporation.[221] In the former, the corporation pays the execu-

219. For a discussion of the problems created by current indemnification practices, see *infra* notes 230-31 and accompanying text.

220. As part of their incorporation statute, every state has enacted provisions dealing with indemnification of corporate executives for costs associated with litigation involving executives. J. BISHOP, LAW OF CORPORATE OFFICERS AND DIRECTORS, INDEMNIFICATION AND INSURANCE ¶ 6.02 (1985). According to most statutes, management may indemnify corporate employees under circumstances even beyond those set forth in the statute. For example, the Delaware incorporation statute (the prototype in a majority of the states, *see id.* ¶ 6.03) provides: "The indemnification . . . provided by . . . this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any by law, agreement, vote of stockholders or disinterested directors or otherwise . . . ." DEL. CODE ANN. tit. 8, § 145(f) (Supp. 1990).

221. Directors and Officers (D&O) liability insurance has spread quickly since the first policies were sold in the 1960s. Johnston, *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 BUS. LAW. 1993, 2012 (1978). By 1989, 80% of the 1,537 American corporations surveyed carried D&O insurance. WYATT CO., 1989 WYATT DIRECTORS AND OFFICERS LIABILITY SURVEY 39 (1989).

D&O insurance generally provides two types of coverage. The first type provides for payment directly to directors and officers in situations when the corporation cannot reimburse — for example, if the corporation is insolvent or if the applicable indemnification statute, by-law, or contract does not permit

tive directly for costs incurred by the executive; in the latter, the insurer pays the executive for covered costs she incurred, but the corporation pays the insurance premiums.

Regardless of whether indemnification or D&O Insurance is the employee's source of reimbursement, two basic types of costs arise when corporate employees are civilly or criminally sued regarding their corporate duties: fines or penalties assessed after a judgment of guilty, and attorney fees incurred in defending the lawsuit. When an executive is acquitted, courts assess no fine or penalty but the executive will have incurred attorneys fees. Currently, corporate indemnification practices and D&O insurance reimburse the acquitted executive for these attorney fees.[222] There can be little question that such reimbursement to an acquitted executive is proper. The problem with current indemnification practice arises only when the executive is found guilty. Although not explicitly allowed, loopholes often permit corporations to indemnify criminally convicted executives[223] for fines, penalties, and attorney fees.

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reimbursement and, when the corporation will not indemnify, such as after a hostile take-over. The second type of coverage provides for payment directly to the corporation as reimbursement for amounts the corporation has paid its executives pursuant to its indemnification obligations. J. BISHOP, *supra* note 220, ¶ 8.04 (1990); Kerns, *Current Developments in Directors' and Officers' Liability Insurance: Duty to Defend, Allocation of Loss, and Advancement of Expenses*, in PRACTICING LAW INSTITUTE, COMMERCIAL LAW & PRACTICE HANDBOOK SERIES NO. 454, DIRECTORS AND OFFICERS LIABILITY INSURANCE 600-601 (1988).

222. For example, under the Delaware statute, indemnification is mandatory when the executive has been "successful on the merits or otherwise." DEL. CODE ANN. tit. 8, § 145(c) (1983).

223. Virtually no indemnification statute, by-law, or ad hoc agreement directly states that an employee will be indemnified for fines and penalties assessed after judgment, civil or criminal. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279, 287-326 (1991). In practice, however, such reimbursement occurs with frequency. *Id.*

For example, the Delaware Statute prohibits indemnification only when the executive or employee is "adjudged" liable for a breach of duty to the corporation. DEL. CODE ANN. tit. 8, § 145(b) (Supp. 1990). The word "adjudged" is significant: If a case never progresses to the point of judgment, this provision does not bar indemnification. *See* J. BISHOP, *supra* note 220, ¶ 6.03 [7]. Thus, if a civil law suit settles, there is no judgment and the executive may be reimbursed fully. In the criminal lawsuit, if the executive pleads guilty to some charges while others are dismissed, the executive has not been "adjudged" guilty as to the dismissed charges, and is entitled to indemnification as to a portion of the expenses attributable to the dismissed charges. *See* Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138, 141 (Del. Super. Ct. 1974); J. BISHOP, *supra* note 220, ¶ 6.03 [7].

Furthermore, according to this statutory scheme, even when a corporate

By comparison and with one possible caveat, D&O insurers generally do not reimburse a convicted executive for any costs (fines, penalties, or attorney fees).[224] The law, however, is unsettled as to whether the D&O insurer must reimburse the corporate executive for attorney fees as those fees are incurred, that is, before a finding of guilt or innocence. The court opinions addressing this issue are split. Although they focus on similar language in insurance policies, courts have interpreted this language differently. The courts that hold that an insurer has a pre-judgment duty to reimburse the defendant for attorney fees find the pertinent contractual language ambiguous and resolve the ambiguity against the insurer.[225] The courts holding other-

executive is convicted of criminal violations, such conviction "shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation" and "had reasonable cause to believe that his conduct was unlawful." DEL. CODE ANN. tit. 8, § 145(a) (1983). A disinterested director, independent legal counsel or shareholders, in this order, are to make this "reasonableness" determination. *Id.* § 145(d). The fact that the insider has been convicted or pled nolo contendere does not restrict their findings. *Id.* § 145(a). The United States Court of Appeals for the Second Circuit has expressed its skepticism about the impartiality of a review by such individuals. Lasker v. Burks, 567 F.2d 1208, 1212 (2d Cir. 1978), *rev'd on other grounds*, 441 U.S. 471 (1979).

By-laws also tend to be very generous toward corporate executives. Generally they only limit indemnity coverage if an insider has been "finally adjudged" liable to the corporation for negligence or misconduct in the performance of his duty. J. BISHOP, *supra* note 220, ¶ 7.09 (1988).

Finally, as might be imagined, ad hoc agreements between the corporation and employee/officer/director allow corporations and corporate executives the widest possible discretion to negotiate terms of full indemnification for any type of fine or penalty. Thus far, courts have only imposed one requirement: new and independent consideration from that already negotiated between the parties must support the agreement. *See, e.g.*, Mooney v. Willys-Overland, 204 F.2d 888, 891 (3d Cir. 1953); Koster v. Warren, 176 F. Supp. 459, 461-62 (N.D. Cal.), *aff'd*, 297 F.2d 419 (9th Cir. 1961); Choate, Hall & Stewart v. SCA Serv., Inc., 22 Mass. App. 522, 527-28 n.7, 495 N.E.2d 562, 565 n.7 (Ct. App. 1986).

224. The definition of "loss" covered in most policies excludes fines or penalties imposed in a criminal suit or action.

225. *See* Gon v. First State Ins. Co., 871 F.2d 863, 868 (9th Cir. 1989); Okada v. MGIC Indem. Corp., 823 F.2d 276, 281 (9th Cir. 1987); Little v. MGIC Indem. Corp., 649 F. Supp. 1460, 1465 (W.D. Pa. 1986), *aff'd*, 836 F.2d 789 (3d Cir. 1987); Pepsico, Inc. v. Continental Casualty Co., 640 F. Supp. 656, 660 (S.D.N.Y. 1986). The *Gon* policy language was identical to that in *Okada*. *Gon*, 871 F.2d at 868. The *Little* language was also similar to that in *Okada*. *Little*, 649 F. Supp. at 665. The policy language in *Pepsico*, unlike the policies in *Okada*, *Little* and *Gon*, did not contain language that expressly allowed the insurer to advance defense costs at its option. *Pepsico*, 640 F. Supp. at 660. Thus, the insurer had agreed to reimburse Pepsico for defense cases "whenever Pepsico 'may be required or permitted by law' to indemnify its directors and officers." *Id.* The court found that Pepsico, through a by-law, "broadened its ability to

wise have found that the policies are unambiguous. According to these courts, insurers must reimburse executives for their attorney fees as the bills for these fees become due, rather than after judgment, only when the policy language specifically provides for this obligation.[226]

Whether insurance or indemnification is the source of reimbursement, the size of attorney fees makes their immediate reimbursement an important issue to the executive suspected or charged with a criminal offense. One expert has estimated that the *average* attorney fee for a case involving corporate executives is approximately $693,000.[227] The potential defense costs, however, can be much higher: The Wyatt survey reported one legal defense fee of $3.5 million.[228] Given this level of expense, it is not surprising that corporate executives seek recovery from insurers and corporations as the bills for their legal expenses become due.[229]

If the factfinders ultimately acquit the executive, the prejudgment payment of her legal expenses is no problem; this executive has simply received reimbursement to which she is entitled. The problem occurs if the factfinders ultimately convict the executive, because then she has received reimbursement to which she is not entitled. Although the corporation or D&O insurer could seek return of the monies advanced, realistically, the chances of recovery are slim.

An assessment of the public policy ramifications of reimbursing corporate executives is difficult. There are legitimate business reasons for corporations and insurers to reimburse corporate directors, officers and employees for legal costs and penalties incurred in their corporate capacity. In today's litig-

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indemnify its directors and officers" so that the advanced attorney fees were covered. *Id.* at 661.

226. *See, e.g.*, Zaborac v. American Casualty Co., 663 F. Supp. 330, 334 (C.D. Ill. 1987).

227. WYATT CO., THE 1988 WYATT DIRECTORS & OFFICERS LIABILITY SURVEY 12 (1988). The Wyatt Survey noted that only 421 of the 759 claims reported (55.4%) disclosed defense costs. The surveyors did not know if companies otherwise participating in the survey were reluctant, or unable, to disclose costs. *Id.* at 14. The average defense expenses associated with claims filed but dropped were $146,150; the average defense expenses for settled claims were $396,881; and the average defense expenses for claims closed through litigation were $330,906. *Id.* at 15.

228. WYATT CO., THE 1982 WYATT COMPREHENSIVE REPORT, DIRECTORS & OFFICERS LIABILITY/FIDUCIARY LIABILITY SURVEY 9 (1982).

229. *See* Note, *Practical Aspects of Directors' and Officers' Liability Insurance-Allocating and Advancing Legal Fees and the Duty to Defend*, 32 UCLA L. REV. 690, 709 (1985).

ious environment, the promise of such reimbursement often is necessary to attract qualified individuals.[230] Yet, indemnification of convicted defendants could meet these needs without going as far as it currently does. Reimbursement of expenses incurred by an acquitted executive is unquestionably appropriate, but allowing corporations or insurers to indemnify executives guilty of criminal offenses for fines, penalties or attorney fees is not. The injustice of allowing indemnification to a defendant who has been convicted by a jury or a court is glaring. Either we respect the factfinders' conclusion of guilt or we do not. When a corporation or insurer reimburses a convicted defendant, the defendant is significantly relieved of the conviction, and the factfinders' verdict is not honored. Two levels of justice result: one for those with indemnification, and one for the rest of us. Furthermore, executives who know that they can escape liability for their own misconduct through indemnification have less incentive to be truthful, honest, and law-abiding.[231]

Whether courts should allow corporations and D&O insurers to reimburse executives for attorney fees as those fees accumulate, or whether they should allow such reimbursement only after an adjudication of guilt or innocence is an even more complex issue. The argument against such reimbursement is that any advance payment of attorney fees, especially when the obligation to repay is illusory or non-existent, contravenes public policy for the same reasons listed above. Two arguments, however, exist that support advance reimbursement of attorney fees. First, the sixth amendment guarantees every defendant the right to counsel.[232] This right includes the right to reasonably effective counsel.[233] It is conceivable that because of the skill and time required of counsel in the typical white collar

230. *Id.* at 690; Johnston, *supra* note 221, at 1993-94. *But see* Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1102-03 (1968) (arguing that corporate directors and officers should be exposed to civil liability to deter misconduct, and that current insurance law over-protects directors and officers).

231. For a discussion of the hazards resulting from indemnity or insurance coverage of intentional wrongdoing, see Pillai & Tractenberg, *Corporate Indemnification of Directors & Officers: Time for A Reappraisal*, 15 U. MICH. J.L. REF. 101, 120-21 (1981); Note, *Liability Insurance For Corporate Executives*, 80 HARV. L. REV. 648, 656 (1967). For a forceful argument in favor of clearly addressing the issue of advancement of fees in D&O policies, see Note, *supra* note 229, at 713-15, 717-18.

232. U.S. CONST. amend. VI.

233. *See* Strickland v. Washington, 466 U.S. 668, 684-87 (1984) (requiring that assistance of counsel be effective to meet the sixth amendment standard).

criminal case,[234] some indicted corporate executive will not have sufficient funds to hire "effective" counsel within the sixth amendment.

The second argument arises from the corporation's and insurer's self-interest: If found guilty of criminal charges, the corporate executive's conviction may detrimentally influence civil judgments for which the corporation or D&O insurer may be liable.[235] Thus, to minimize potential losses in the future, both a corporation and D&O insurer may find that their best interests dictate hiring the most effective counsel money can buy to represent the executive.

To accommodate these competing considerations, corporations and D&O insurers should be allowed to advance attorney fees to corporate executives who are grand jury targets or who have been indicted on criminal offenses, subject to a clear, definite, and secured obligation on the part of the corporate employee to repay all funds advanced if ultimately convicted. Such a requirement is workable and practical — at least one court has apparently already imposed it.[236]

In conclusion, a corporation or D&O insurer that reimburses corporate executives convicted of criminal conduct for fines, penalties, or attorney fees sends a message to its other employees that such conduct is favored. As such, it evidences a corporate ethos that should subject the corporation to criminal liability. The problem, however, is that such reimbursement is the current practice of many corporations. This Article endorses the view that no indemnification should be allowed of convicted corporate executives. The only caveat concerns payment for attorney fees as those fees are incurred. This Article suggests that corporations and insurers may advance these fees, but only if the advance is fully collateralized. If convicted, the corporate executive should repay the advanced funds. In apply-

234. *See supra* text accompanying notes 227-29.

235. The Supreme Court first decided that the litigation of issues in a criminal case could foreclose their relitigation in a related criminal action in Ashe v. Swenson, 397 U.S. 436, 447 (1970). Lower federal courts have applied this doctrine in civil proceedings, allowing parties to argue that findings in criminal cases cannot be relitigated in a subsequent civil case. *See, e.g.*, Wolfson v. Baker, 623 F.2d 1074, 1079 (5th Cir. 1980); United States v. Frank, 494 F.2d 145, 160 (2d Cir. 1973), *cert. denied*, 419 U.S. 828 (1974); Cardillo v. Zyla, 486 F.2d 473, 475 (1st Cir. 1973); Coffee, *supra* note 7, at 442-44; Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 321-37 (1980).

236. Professional Ins. Co. v. Barry, 60 Misc. 2d 424, 429, 303 N.Y.S.2d 556, 561 (Sup. Ct. 1969) (construing what type of "undertaking" is appropriate), *aff'd* 32 A.D.2d 898, 302 N.Y.S.2d 722 (App. Div. 1969).

ing the corporate ethos standard, factfinders may consider indemnification beyond that suggested here to be a factor encouraging the criminal conduct at issue.

i. *Conclusion*

Most of the factfinders' work in applying the corporate ethos standard of liability will occur in the analysis of whether there existed a corporate ethos that encouraged the criminal conduct. The factfinders should examine the corporation's internal structure to make this finding. Beginning with the corporate hierarchy, the factfinders should determine whether the directors' supervision of officers, or management's supervision of employees was dilatory. Next, factfinders should examine the corporate goals, as communicated to the employees, to determine whether these goals could be achieved only by disregarding the law. The third and fourth factors focus on the corporation's affirmative steps to educate and monitor employees and are more relevant in some fields than others. In highly technical fields where corporate employees daily decide issues involving legal compliance or violation, the factfinders should view the corporation's failure to educate its employees as encouraging criminal acts. In other fields where few corporate employees deal in issues affected by law and regulations, the corporation has a minimal duty to educate its employees and its failure to do so is less relevant. In examining the fifth factor, the commission of the present offense, the factfinders should examine the facts considered under the traditional respondeat superior and MPC standards. Unlike these current standards that look to these facts as the sine qua non in imposing liability, however, the corporate ethos standard considers these facts to be relevant, but not conclusive indicia, of corporate liability. The factfinders should assess the sixth factor, how the corporation has reacted to past violations, to further evaluate whether the corporation encourages or discourages illegal behavior. Consideration of the last factor, compensation by the corporation, is extremely important because often a corporation's compensation policies most directly influence its employees' behavior. Assessing the message inherent in compensation is complicated because most corporations use at least one form of compensation, indemnification, in a way that encourages corporate crime, thus making most corporations criminally liable under the corporate ethos standard. This Article suggests a different approach toward indemnification and insurance coverage

of convicted executives: If corporations follow this approach, the factfinder can more fairly weigh this component of a corporation's compensation package.

3. Criminal Conduct

The third element of the corporate ethos standard is whether the ethos encourages *criminal conduct.* This element is not as simple as it may appear; phrasing this element as "conduct that is determined to be criminal" may be more accurate. The type of offense for which corporations are often prosecuted, white collar crime, necessitates this distinction.

It is apparent that burglary, homicide, and distributing cocaine, for example, are criminal conduct. With white collar crime, however, it is often not apparent that conduct is criminal until after a jury and an appellate court have spoken.[237] The jurisprudence of white collar crime is replete with examples of courts and legislatures struggling to clarify what is, or is not, a crime. For example, in *McNally v. United States,*[238] the Supreme Court reversed a mail fraud conviction and held that conduct that all of the federal appellate courts had considered mail fraud for forty years,[239] was not.[240] Similarly, in *Williams v. United States,*[241] the Supreme Court reversed a bank fraud conviction; in so doing, the Court found the relevant conduct was not bank fraud,[242] even though courts had for many years held that such conduct constituted bank fraud.[243] In considering payments made between health care providers, the federal courts of appeal have disagreed over the legality under kickback statutes of certain long-standing payment practices.[244] The list could go on and on.

A criminal defendant may be aided in two ways when the legality of the conduct at issue is not clear. First, a court may agree that the conduct is not a crime and acquit the defendant on that basis. Second, even if the court deems the conduct to be

237. A. REISS & A. BIDERMAN, DATA SOURCES ON WHITE-COLLAR LAW BREAKING 2 (1980).

238. 483 U.S. 350 (1987).

239. *Id.* at 362 n.1, 363-64 n.3, 365 n.5 (Stevens, J., dissenting).

240. *Id.* at 361.

241. 458 U.S. 279 (1982).

242. *Id.* at 284. Williams's conduct involved a check citing scheme. *Id.* at 279. The Court held that this conduct did not constitute a " '[f]alse statement or report' in the language of 18 U.S.C. § 1014." *Id.*

243. *Id.* at 301 (Marshall, J., dissenting).

244. Bucy, *supra* note 95, at 915-16.

criminal, the factfinders may decide that because the defendant did not know the criminal nature of his act at the time he acted, he did not have the requisite intent to violate the law, and thus acquit the defendant.

The corporate ethos standard of liability allows for this nuance in white collar crimes. Although the facts may clearly show the existence of a corporate ethos that encouraged certain conduct ultimately found to be criminal, the factfinders may appropriately acquit the corporate defendant (just as they may acquit an individual defendant) if they believe it reasonable not to have known that such conduct was criminal. This is one of the ways the intent requirement introduces flexibility into corporate criminal law. Given the ambiguity surrounding what constitutes white collar crime, such flexibility seems especially appropriate for defendants, whether individual or corporate, charged with white collar crimes.

4. By Agents of the Corporation

Historically, before courts would hold a corporation liable, they required that an agent of the corporation acting within the scope of employment and with the intent to benefit the corporation perform the illegal activity.[245] The corporate ethos standard of liability retains only the requirement that an agent of the corporation perform the illegal activity.

Over the years, the "within the scope of employment" requirement has evolved to mean "little more than that the act occurred while the offending employee was carrying out a job related activity."[246] The cases where corporations were held liable even though the corporate employee acted in disregard of specific instructions best demonstrate this minimal interpretation.[247] Commentators who support this broad interpretation argue that it is necessary, since otherwise every corporation could avoid liability by issuing a directive from the board of directors prohibiting all illegal activity.[248] The corporate ethos standard does not disregard the requirement "within the scope of employment;" rather, it is a rigorous application of this re-

245. New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494-95 (1909); *Developments*, *supra* note 3, at 1247.

246. *Developments*, *supra* note 3, at 1250.

247. *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1000-07 (9th Cir. 1972); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); United States v. Armour & Co., 168 F.2d 342, 343-44 (3d Cir. 1948).

248. *Developments*, *supra* note 3, at 1250.

quirement. If the ethos of the corporation encouraged the agent to commit the illegal conduct, the agent's acts are within her de facto authority. If the corporate ethos did not encourage her acts, they are outside her authority.

Courts have also interpreted the element "for the benefit of the corporation" almost out of existence. As one court noted, "[t]here have been many cases . . . in which the corporation is criminally liable even though no benefit [to the corporation] has been received in fact."[249] Given current interpretations, all this element now means is that courts cannot hold a corporation liable for the illegal acts of its agents when the corporation is the intended victim of the illegality.[250] *Standard Oil Co. v. United States*[251] provides an example. Various individuals engaged in a scheme to pump more oil from wells than Texas law allowed. Working with a third party, employees of a Standard subsidiary stole oil from Standard to facilitate the scheme.[252] The United States Court of Appeals for the Fifth Circuit reversed the conviction of Standard and its corporate subsidiary, finding that Standard was the victim of the theft and did not realize a benefit from the illegality.[253]

Even if courts wanted to stringently impose this requirement, it is unclear how they could. It seems impossible to apply literally. For example, if an employee takes bribes for favors to corporate customers, has the corporation benefited? If so, how do courts measure the benefit? Do the disadvantages, such as poor relationships with other customers, a criminal conviction, detrimental publicity, internal dissension, and poor morale, outweigh the benefit?

In conclusion, the corporate ethos standard explicitly retains only the first portion of the traditional requirement that a court can hold a corporation criminally liable only for the conduct of an agent acting within the scope of employment and with the intent to benefit the corporation, namely, that an agent of the corporation perform the criminal act. A corporation should not be liable for every person in the world who might stumble in and use corporate resources to commit a crime. The corporate ethos test does not explicitly include the requirement "within the scope of employment" because simply

249. Standard Oil Co. v. United States, 307 F.2d 120, 128 (5th Cir. 1962).
250. K. BRICKEY, *supra* note 2, § 4.02.
251. 307 F.2d 120 (5th Cir. 1962).
252. *Id.* at 123-24.
253. *Id.* at 128-29.

applying the corporate ethos standard will include this proof. Nor does the corporate ethos standard explicitly require proof that the agent at issue was acting "for the benefit of the corporation." Historically, this requirement has been read into nonexistence with one caveat: Corporate liability cannot result when the corporation itself is the victim of the illegality. This seems to be such an obvious caveat for corporate liability that it needs no emphasizing and certainly does not warrant the currently broad overstatement. Moreover, it is not clear how courts could reasonably apply a "benefit" element. For all of these reasons, the third element of the corporate ethos standard is simply that an agent of the corporation perform the criminal act.

B. A COMPARISON OF THE CORPORATE ETHOS STANDARD TO STANDARDS CURRENTLY USED TO IMPOSE CORPORATE CRIMINAL LIABILITY

As noted, both the traditional respondeat superior standard and, in a more limited sense, the MPC standard impute an individual's intent to a corporation. The corporate ethos standard, like both of these tests, looks to the criminal act and to the corresponding intent of individual corporate agents. It does not, however, simply transfer this intent to an entity; rather, the corporate ethos standard looks beyond the corporate agent's intent to all aspects of the corporation that could have encouraged the criminal act. This corporate ethos analysis will result in both more, and less, convictions than the current standards, depending on the category of the case. For purposes of this comparison, corporate criminal liability cases can be grouped into five categories: (1) cases where the corporation is closely held; (2) cases where higher echelon corporate agents commit the criminal act; (3) cases where lower echelon corporate agents commit the criminal act; (4) cases where corporate agents commit the criminal act in contravention of corporate policy or express instructions; and (5) cases where the court cannot identify the corporate agent who commits the criminal act.

Courts will almost certainly convict closely held corporations[254] under the traditional respondeat superior test, the MPC

254. O'Neal, *Recent Legislation Affecting Close Corporations*, 23 LAW & CONTEMP. PROBS. 341, 341 n.1 (1958). O'Neal writes:

> The term "close corporation" has been defined in various ways — as a corporation with a relatively small number of shareholders, as a cor-

test, and the corporate ethos test. Applying all of these tests to this category is straightforward. Under the traditional respondeat superior standard, corporate liability will result if the government proves criminal intent on the part of any individual who acts for the corporation. Under the MPC standard, corporate liability will result because so few individuals are associated with a closely held corporation that any one of them likely constitutes a higher echelon official. Under the corporate ethos test, liability will also result: When the corporation is synonymous with one or a few individuals, its ethos is also synonymous with the criminal intent of those individuals.

With closely held corporations, the real question is not under what test a court should convict a corporation, but why. Because criminal liability of the individual owner(s) is present in virtually every instance, conviction of the corporate shell is generally superfluous. Unlike the large corporate entity that could continue to encourage new generations of executives to commit criminal acts, the closely held corporation generally has no identity apart from the convicted individual. Thus, following conviction of this individual, the government gains no further deterrence by convicting the corporation. Moreover, given the availability of statutes like RICO,[255] the government need not include the corporation as a defendant to enhance the forfeitable assets.

> poration in which ownership and management are substantially identical, and as a corporation whose shares are not traded on an exchange or an over-the-counter market. One-[person] companies and family corporations are examples of close corporations, but many close corporations are not owned by one person or a single family.

Id.

255. 18 U.S.C. §§ 1961-1968 (1988). Pursuant to 18 U.S.C. § 1963, any interest acquired in violation of 18 U.S.C. § 1962 is subject to criminal forfeiture and "[a]ll right, title and interest in [such] property . . . vests in the United States upon the commission of the act giving rise to forfeiture." *Id.* § 1963(c). Property is acquired in violation of 18 U.S.C. § 1962 and thus subject to forfeiture if any person uses or invests any income acquired from a "pattern of racketeering activity" in an "enterprise," *id.* § 1962(a), if any person acquiring or maintaining any interest in or control of an "enterprise" through a "pattern of racketeering activity," *id.* § 1962(b), if any person employed by or associated with an enterprise to conduct or participate in the conduct of an "enterprises" affairs through a "pattern of racketeering activity," *id.* § 1962(c), or, if any person conspires to do any of the above, *id.* § 1962(d). Because both the "person" capable of committing this offense and the "enterprise" can be corporations, *id.* § 1961(3)-(4), corporate assets may be subject to forfeiture for violations of this statute if the assets were otherwise acquired or maintained in violation of any provision of § 1962, even if the corporation is never charged or convicted of a crime. *See, e.g.*, United States v. Zang, 703 F.2d 1186, 1195 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983).

Under all three standards courts are also likely to convict corporations whose higher echelon corporate agents commit the criminal conduct. The facts of *United States v. Empire Packing Co.*[256] aptly demonstrate this outcome. Empire Packing's president, Samuel Chapman, filed false claims regarding the number of cattle slaughtered in order to receive improper government subsidies.[257] Applying traditional respondeat superior to these facts is, as always, straightforward: If the government proves Chapman had criminal intent, it has proven Empire's liability. Empire is also liable under the MPC standard because Chapman, who directed the illegal activity, is clearly a high managerial agent and thus a court will impute his criminal intent to Empire. Lastly, Empire should, and would, be liable under the corporate ethos test because Chapman apparently established a pervasive corporate ethos that encouraged criminal conduct: he was in charge of all plant operations and all buying, slaughtering, and selling of cattle; he was the final authority in all corporate affairs; and he instructed other employees how to commit the fraud and often did it himself.[258]

Riss & Co. v. United States,[259] and *Steere Tank Lines, Inc. v. United States*[260] exemplify how the three tests would apply in the third category of cases, where lower echelon corporate agents perform the illegal conduct. Riss & Company (Riss), a common carrier, employed drivers who exceeded the maximum driving time set forth in Interstate Commerce Commission (ICC) regulations.[261] Willful violations constituted criminal offenses.[262] Because an investigation indisputably proved that some of the drivers willfully violated this regulation, the court affirmed the corporation's conviction, using the rationale of respondeat superior.[263] Whether the corporation also would be liable under the MPC standard is unclear. The terminal

256. 174 F.2d 16 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949).

257. *Id.* at 17-18.

258. *Id.* at 19.

259. 262 F.2d 245 (8th Cir. 1958).

260. 330 F.2d 719 (5th Cir. 1963).

261. *Riss*, 262 F.2d at 246.

262. The government prosecuted Riss under the following provision of the Interstate Commerce Act: "Any person knowingly and willfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined." 49 U.S.C. § 322(a), *repealed by* Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 4(b), 92 Stat. 1377, 1466.

263. *Riss*, 262 F.2d at 249-51.

manager who supervised the drivers in question apparently failed to watch their driving times carefully. If this manager were deemed to be a high managerial agent, the corporation[264] would be liable.

By contrast, the corporation probably would not be criminally liable under the corporate ethos test. No evidence suggests that Riss knew its drivers exceeded the ICC regulations on maximum driving times. On the contrary, Riss employed a "Director of Safety and Personnel" to supervise the driving and duty hours of all drivers. Riss also sent its drivers to seminars on ICC regulations, conducted a continuing program of instruction in ICC and company regulations, operated its own safety patrol cars that stopped drivers on the road to check their log books, and operated under a "safety incentive award program" whereby the company gave "bonus points" to drivers without safety violations.[265] The drivers' excess hours resulted from one terminal supervisor's failure to adequately perform her duties.[266] Because Riss took steps to encourage compliance with applicable regulations, it is hard to imagine that a corporate ethos existed within Riss that encouraged its drivers to willfully violate ICC regulations. Thus, factfinders using the corporate ethos standard would likely find Riss & Company not liable.

Steere Tank Lines (Steere), another motor carrier convicted for the same offense as Riss, provides an interesting contrast.[267] Because the government was able to prove that a Steere employee willfully violated the ICC regulation, the court imputed the employee's willfulness to Steere using the traditional respondeat superior standard, and thus convicted Steere.[268] Like Riss, Steere's liability under the MPC Standard would depend on whether the government could show that specific high managerial agents authorized, or at least recklessly tolerated, the ICC violations. Unlike Riss, however, Steere would be liable under the corporate ethos test. In this case,

264. A "high managerial agent" includes any agent "having duties of such responsibility that [her] conduct may fairly be assumed to represent the policy of the corporation or association." MODEL PENAL CODE § 2.07(4)(c) (Proposed Official Draft 1962). Because of the log clerk's supervisory duties, *Riss*, 262 F.2d at 250, she could have been a high managerial agent within this definition.

265. *Riss*, 262 F.2d at 247.

266. *Id.* at 250.

267. *See supra* note 262 and accompanying text.

268. Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 724 (5th Cir. 1963).

there was evidence that the extra hours logged by Steere's drivers were necessary to "handle the business on hand with the available equipment and manpower";[269] that at least one driver was told to run extra hours "if he was to keep his job";[270] and, that the ICC had warned Steere repeatedly of this problem.[271] Given the pervasiveness of this law-flouting mentality at Steere, factfinders would likely determine that a corporate ethos existed which encouraged the violations.

The cases where a corporate agent commits the criminal acts in disregard of corporate policy or express instructions most dramatically reveal the infirmities of the current standards of liability.[272] In this fourth category, the corporation is almost always liable under the traditional respondeat superior test.[273] Under the MPC standard, again liability would depend on whether a high managerial agent commits or recklessly supervises the offense. It is conceivable that this category of cases often would result in liability under the MPC standard since a high managerial agent usually is better placed than a lower echelon employee to act in derogation of corporate policy: The high managerial agent can better conceal lawless activity.

By contrast, under the corporate ethos test, liability almost certainly would not attach to the corporation in this category of cases. *United States v. Hilton Hotels Corp.*[274] provides one of the best examples. In *Hilton*, the company's purchasing agent committed antitrust violations[275] in disregard of corporate policy and contrary to express instructions.[276] Despite the corpo-

269. *Id.* at 719.
270. *Id.* at 724.
271. *Id.*
272. *See supra* text accompanying notes 27-31.
273. K. BRICKEY, *supra* note 2, § 3.07; Note, *supra* note 17, at 547-48.
274. 467 F.2d 1000 (9th Cir. 1972).
275. The court found that an antitrust violation occurred as follows: "Operators of hotels [and other related businesses] organized an association to attract conventions . . . ." To help finance the association, "[c]ompanies selling supplies to hotels were asked to contribute . . . . To aid collections, hotel members . . . agreed to give preferential treatment to suppliers who paid their assessments and to curtail purchases from those who did not." *Id.* at 1002. The government showed that the purchasing agent at the Portland, Oregon hotel "threatened a supplier with loss of the hotel's business unless the supplier paid the association assessment." *Id.* at 1004.
276. The President of Hilton Hotels Corporation testified that corporate policy prohibited "the manager of one of its hotels to condition purchases upon payment of a contribution to a local association by the Supplier." *Id.* The Portland hotel's manager and his assistant testified that "on two occasions they told the hotel's purchasing agent that he was to take no part in the boycott." *Id.*

ration's efforts to prevent such behavior, the district court convicted the corporation under the traditional respondeat superior standard.[277] Although the MPC Standard was not used in this particular case, criminal liability would result under it for the Hilton Corporation if the purchasing agent is deemed to be a high managerial agent.[278] Liability, however, should not result under the corporate ethos test. Not only was there no ethos at Hilton that encouraged the purchasing agent's illegal behavior, but there was specific testimony of an ethos discouraging such activity.[279]

United States v. Armour & Co.[280] provides another comparison of how the three standards of liability operate in a case where the corporate agent commits the criminal act against corporate policy or express instructions. Armour was convicted for forcing customers into "tie-in" sales that violated the Emergency Price Control Act of 1942.[281] "Tie-in" sales occur when a customer is "force[d] . . . to buy one product in order to obtain another product . . . ."[282] The evidence showed that Armour, by letters and personal meetings, specifically instructed its employees about price regulations and repeatedly cautioned them against making tie-in sales.[283] Nevertheless an Armour manager, assistant manager, and one salesperson forced customers into tie-in sales.[284] Although Armour argued that it should not be liable because its agents acted in disregard of specific instructions, the court found Armour guilty under the respondeat superior standard.[285] Armour would also be liable if the MPC standard of corporate criminal liability is applied. Given the

277. *Id.*

278. MODEL PENAL CODE § 2.07(4)(c) (Proposed Official Draft 1962); *see supra* notes 24-33 and accompanying text.

279. 467 F.2d at 1004.

280. 168 F.2d 342 (3d Cir. 1948).

281. Ch. 26, § 1, 56 Stat. 23, *repealed by* Act of July 25, 1946, ch. 671, § 1, 60 Stat. 664.

282. *Armour*, 168 F.2d at 342.

283. *Id.* at 342-43.

284. *Id.*

285. The *Armour* opinion uses language that suggests Armour was guilty because it negligently failed in it "duty to be aware." *Id.* at 344. The relevant statute in *Armour*, the Emergency Price Control Act of 1942, required willful intent, *see* Zimberg v. United States, 142 F.2d 132, 137 (1st Cir. 1944), thus the court's finding of negligence was insufficient to prove an Emergency Price Control Act violation. The court, however, found that the Armour employees committed the criminal conduct "deliberately and with knowledge of the pertinent regulations." *Armour*, 168 F.2d at 343. By finding Armour guilty on these facts, the court apparently imputed the employees' wilful conduct to Armour, thereby employing a respondeat superior standard of liability.

position and duties of at least two of the individual defendants (the branch manager of one office and the assistant branch manager of another office), factfinders would likely find that both individuals were "high managerial agents"[286] and thus that Armour is guilty.

Under the corporate ethos standard, however, no liability would result for Armour. Armour's efforts to educate employees about the illegality of tie-in sales and its efforts to discourage such sales demonstrates not just the absence of an ethos encouraging this illegal conduct, but that the prevailing ethos actively discouraged such activity.

In the fifth category of cases, it is not possible to identify the corporate agents responsible for the criminal conduct. Accordingly, corporate liability should not result under either the traditional respondeat superior standard or under the MPC standard because both standards depend on proving criminal intent on the part of at least one corporate agent and imputing that agent's criminal intent to the corporation to obtain a corporate intent. When the court cannot identify an individual with criminal intent, there is nothing to impute. The courts, however, have circumvented this problem with the fiction of collective knowledge,[287] and held corporations liable.[288]

United States v. Sawyer Transport, Inc.[289] illustrates the use of this fiction. Although the evidence clearly showed that Sawyer's drivers submitted false daily logs of the hours they drove, the court found that no one employee at Sawyer possessed enough knowledge of the falsity to form a criminal intent.[290] Nevertheless, the court found that when combined, the employees' bits of information were sufficient to constitute collective intent and "wilfulness," which the court then imputed to the corporation.[291] Interestingly, the court also applied something similar to the corporate ethos standard, noting that "willfulness . . . is established by proof that the [corporate] defendant is plainly indifferent to the requirements of the statute and regulations."[292]

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286. MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962).

287. *See, e.g.*, Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951); United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974).

288. *See supra* note 287.

289. 337 F. Supp. 29 (D. Minn. 1971), *aff'd*, 463 F.2d 175 (8th Cir. 1972).

290. *Id.* at 31.

291. *Id.*

292. *Id.* at 30.

The *Sawyer* result and its use of a collective intent fiction reveals the inadequacy of corporate liability standards that depend on an initial finding of individual intent. Corporate liability should not attach when such standards are literally applied because there is no individual agent's intent to impute to the corporation. The fiction of collective intent, although perhaps needed, is simply a desperate, but disingenuous, application of the respondeat superior or MPC standards.

The corporate ethos standard remedies this problem for it does not depend on a finding of individual intent, but rather allows, as the *Sawyer* court attempted to do, an examination of corporate actions that make corporate liability appropriate. Thus, in the fifth category of cases, liability would attach under the corporate ethos standard that would not attach under the terms of either the respondeat superior or MPC standards.

In summary, the practical impact of the corporate ethos test depends on which category of cases is at issue. Although similar results would occur in some categories of cases regardless of the standard of liability used, this fact should not obscure the significantly different process by which the factfinders reach their results. Using respondeat superior to prove and assess criminal liability of corporations essentially requires only proof that the corporation employed the miscreant actor. In this way, respondeat superior treats all corporations as if they were alike, and holds them all responsible for their agents, no matter what.[293] Likewise, the MPC standard requires only proof that a high managerial agent committed the unlawful act, or supervised the miscreant agent.[294] Although the MPC thus narrows the broad swath of the traditional respondeat superior standard, it still fails to sufficiently distinguish among corporations. Additionally, the MPC standard discourages corporate executives from properly supervising their subordinates. By comparison, the corporate ethos standard directs criminal liability toward only those corporations which are "deserving" of prosecution as demonstrated by their lawless ethos. In this way the corporate ethos standard rewards corporations that police themselves.

293. *See supra* notes 17-23 and accompanying text.

294. MODEL PENAL CODE § 2.07(4)(c) (Proposed Official Draft 1962); *see supra* notes 24-33 and accompanying text.

C. A Comparison of the Corporate Ethos Standard to Other Proposed Standards for Imposing Corporate Criminal Liability

The corporate ethos standard relies heavily on the substantial existing scholarship on corporate crime, especially the work of Christopher Stone, John Coffee, John Braithwaite, Brent Fisse, and Peter French. The corporate ethos standard builds most clearly on these scholars' notion that internal controls are the most effective way to achieve corporate responsibility.[295] The corporate ethos standard, however, differs from these scholars' proposals.

Christopher Stone has focused on building, within an organization, many of the internal systems discussed herein but he advocates imposing them on corporations by law and prior to any violation.[296] For example, Stone recommends "impacting corporate behavior directly,"[297] by requiring corporations to appoint specific corporate officers whose duties are to represent environmental or consumer interests,[298] and by requiring that certain "categories of information" be brought to the attention of the board of directors.[299] Once the government establishes these requirements, Stone suggests that failure to comply with them should result in effective sanctions.[300]

For years, John Coffee also has advocated use of these internal controls. He proposes that courts impose these controls on corporations following conviction as conditions of probation.[301] As Coffee acknowledges, however, his suggestions are "dangerous" because "they interfere in unpredictable ways

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295. *See, e.g., Corporate Rights and Responsibilities: Hearings Before the Senate Comm. on Commerce*, 94th Cong., 2d Sess. 297-301 (1976) (testimony of Christopher Stone) [hereinafter *Hearings*]; J. BRAITHWAITE, *supra* note 11, at 143; C. STONE, *supra* note 133, at 35; Fisse, *supra* note 3, at 1221-46; *cf.* Coffee, *supra* note 7, at 448 (supporting criminal sanctions against corporations as a means for encouraging corporations to police themselves).

296. *Hearings*, *supra* note 295, at 297-301; C. STONE, *supra* note 133, at 35.

297. C. STONE, *supra* note 133, at 124.

298. *Id.*

299. *Id.* at 151.

300. *Id.* at 190.

301. Coffee, *supra* note 7, at 448-59. For example, Coffee proposes adopting conditions of probation that require the corporation to "design and implement new auditing and monitoring controls," *id.* at 450, activating discipline within a corporation (such as dismissal or demotion) for those employees "whose negligence or indifference made possible the illegal conduct," *id.* at 455, and "realigning the manager's interests" through compensation schemes that reward meeting safety goals, *id.* at 456.

with the dictates of efficiency."[302] In addition, because an outsider, i.e. a court, imposes the internal controls as conditions of probation, Coffee's proposal is intrusive — although not as intrusive as Stone's. Whereas Stone would require all corporations to implement the same internal controls, Coffee's proposal applies only to corporations that by their criminal behavior demonstrate inadequate leadership.[303] Further, Coffee's proposal allows the court to tailor the internal controls to each corporate defendant.[304]

The corporate ethos standard is not as intrusive as either Stone's or Coffee's proposals. Under this standard, no entity outside the corporation dictates that a corporation should institute internal procedures. Rather, the standard encourages corporations to implement internal controls on their own since doing so offers an opportunity to avoid criminal liability.[305] The corporate ethos standard also allows corporations to choose and design procedures best suited to them.[306] The more effective the chosen procedures are, the better chance the corporation has of avoiding criminal liability if a corporate agent later violates the law. Lastly, because the corporate ethos standard addresses criminal liability in the first instance rather than after the criminal conduct has occurred,[307] the internal controls that this standard encourages are more likely to actually reduce corporate crime.

In this last regard, the corporate ethos standard is similar to sentencing guidelines the United States Sentencing Commission recently sent to Congress.[308] Under this sentencing proposal, the amount of fine levied against the convicted corporation depends upon whether the corporate defendant utilized many of the internal controls discussed herein.[309] Thus, both the corporate ethos standard and the United States Sentencing Com-

302. *Id.* at 457.
303. *Id.* at 455.
304. *Id.*
305. *See supra* notes 192-210 and accompanying text.
306. *See supra* notes 188-91 and accompanying text.
307. *See supra* notes 135-51.
308. U.S. Sentencing Comm'n, *supra* note 9, at 2001-24.
309. The Sentencing Commission's most recent proposed sentencing guidelines for organizations require the sentencing court to assess a convicted corporation's "culpability score," which helps to determine the amount of fine to impose. Courts are directed to evaluate the involvement in or tolerance of criminal activity by high-level personnel within the organization, the prior criminal history of the organization, whether the organization obstructed or impeded the investigation, and whether the organization had in place an "effective program to prevent and detect violations of the law." U.S. Sentencing

mission's proposal, with the promise of more lenient treatment from the criminal justice system, encourage corporations to voluntarily implement internal controls that will reduce corporate crime. The sentencing proposal is commendable from this public policy point of view. From a criminal justice point of view, however, the Sentencing Commission's proposal comes too late in the process to rectify the initial inappropriate use of the criminal law. Under current standards of corporate liability, by the time the Sentencing Commission's guidelines impact on a corporation, the factfinders have already convicted the corporation without adequate evidence of corporate intent.

The corporate ethos standard is similar to John Braithwaite's theory of "reintegrative shaming"[310] because both approaches promote corporate self-determination. Braithwaite suggests that "[c]rime is best controlled when members of the community are the primary controllers through active participation in shaming offenders, and . . . reintegrating the offender back into the community of law abiding citizens."[311] This view eschews formal punishment in favor of incentives for corporate offenders to regulate themselves. Braithwaite explains: "Once organizational reforms internalize this abhorrence [of crime], then the self regulation of managerial consciences and organizational ethics and compliance policies will do most of the work for the government."[312]

Both reintegrative shaming and the corporate ethos standard of liability are mechanisms for encouraging corporations to implement, on their own, prophylactic procedures that reduce the potential for criminal activity. Their focus, however, differs. Reintegrative shaming is a sociological theory of crime that "implies that solutions to the crime problem" are found in a moral education of society, not in the criminal justice system.[313] In this sense, reintegrative shaming is a paradigm for transforming society's propensity to break the law. By comparison, the corporate ethos test addresses only the criminal justice system and becomes relevant only when this system has to pick up the pieces of society's failed moral education.[314]

Comm'n, *Sentencing Guidelines for Organizational Defendants*, 49 Crim L. Rep. (BNA) 2059, 2071 (May 8, 1991) (§ 8C2.5).

310. J. BRAITHWAITE, *supra* note 11, at 8.

311. *Id.*

312. *Id.* at 143.

313. *Id.* at 177-78.

314. Braithwaite's theory is optimistic, but not naive. He readily concedes that "formal punishments are inevitable up to a point," *id.* at 179; he is simply

Brent Fisse and Peter French have focused on the failure of current standards of criminal liability to identify corporate intent and have suggested a paradigm that identifies corporate intent.[315] The corporate ethos standard most clearly builds on this paradigm when it directs factfinders to a corporation's reaction to past violations.

Fisse and French suggest that we can ascertain a corporate mens rea through the concept of "reactive corporate fault."[316] In a recent work, Fisse terms corporate mens rea "strategic mens rea."[317] As with the corporate ethos test, the government bears the burden of proving strategic mens rea.[318] Acknowledging that such a mens rea would be "very difficult" to prove, Fisse suggests allowing the corporate defendant a "reasonable opportunity to formulate a legal compliance policy *after* the *actus reus* of an offense is brought to the attention of the policymaking officials."[319] In this way, the "corporation's fault can be assessed on the basis of its present reactions [to the prior offense] rather than its previously designed formal policy directives."[320]

Although this Article endorses Fisse and French's notion that a corporation manifests its mens rea through its express or implied policies, relying on reactive corporate fault seems inadequate for two reasons. First, reactive corporate fault automatically gives a corporation a second chance. By definition, reactive corporate fault depends on a corporation inappropriately responding to the first violation. Waiting for the second shoe to fall is too precarious given the potential harm that the second "shoe" could cause. Fisse's response to this criticism is three-fold: first, that most violations of the law are handled by settlement; second, that civil remedies are available for the first violation; and third, that he is not advocating use of reactive corporate fault as the exclusive approach to corporate mens rea, only when feasible.[321] These responses beg the question. When negotiations and civil remedies are inadequate responses to the first violation, how can the government prove mens rea

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urging that we should use the advantages of reintegrative shaming in our punishments.

315. P. FRENCH, *supra* note 15, at 31-47; Fisse, *supra* note 3, at 1195-1213.

316. Fisse, *supra* note 3, at 1190.

317. *Id.* at 1190-92.

318. *See id.* at 1191-92.

319. *Id.* (emphasis supplied).

320. *Id.* at 1210.

321. *Id.*

for the first violation? Reactive corporate fault provides no answer. The corporate ethos standard of liability attempts to do so.

The second, and more fundamental, problem with reactive corporate fault is that it does not solve the jurisprudential dilemma of proving corporate mens rea for each actus reus. Certainly, a corporation's failure to respond appropriately to a first violation smacks of evil intent for the second violation, but it does not prove intent for the first violation. What if a corporation that admittedly responded inappropriately to a first violation experienced a turnover in management after its first violation? To treat all actions regarding the two violations as one continuous act would be wholly inappropriate, yet reactive corporate fault apparently does so. Bootstrapping intent backwards to a previous violation inappropriately exploits the fiction that intent is continuous. By contrast, the corporate ethos test, while considering the corporate response to prior violations as one factor relevant in assessing corporate intent, still requires proof of corporate intent *at the time* each offense occurred.

Another conceptual approach toward corporate criminal liability that respected scholars have advocated for years is a due diligence defense.[322] A due diligence standard would allow a corporation, otherwise criminally liable under respondeat superior, to "rebut [the] presumption of liability by proving by a preponderance of the evidence that it, as an organization, exercised due diligence to prevent the crime."[323] Under the corpo-

322. *See, e.g.*, Note, *supra* note 17, at 563 & n.73 (suggesting that the corporation should be allowed to "rebut a presumption of responsibility for all such crimes by those in its employ by showing that the corporation in good faith did everything within its power to prevent the commission of the offense").

The Model Penal Code recognizes a due diligence defense, but only for the commission of violations or offenses outside the criminal code. MODEL PENAL CODE § 2.07(5) (Proposed Official Draft 1962). Ohio recognizes a due diligence defense for all categories of corporate prosecutions unless "it plainly appears inconsistent with the purpose of the section defining the offense." OHIO REV. CODE ANN. § 2901.23(c) (Anderson 1987). Other states also recognize a due diligence defense, but only as to liability for minor infractions. *See, e.g.*, ILL. REV. STAT. ch. 38, para. 5-4(b) (1972); MONT. CODE ANN. § 45-2-311(2) (1985); N.J. STAT. ANN. § 2C:2-7c (West 1982); 18 PA. CONS. STAT. ANN. § 307(d) (Purdon 1983); TEX. PENAL CODE ANN. § 7.24 (Vernon 1974).

At least one federal court has recognized this defense. *See, e.g.*, Holland Ins. Co. v. United States, 158 F.2d 2, 8 (6th Cir. 1946) (holding that because no corporate officer was "particeps criminis" with the wrongdoer, the corporation should not be liable). Few federal courts have followed the *Holland* rationale. Note, *supra* note 17, at 556-58.

323. *Developments*, *supra* note 3, at 1257 (citations omitted).

rate ethos test, due diligence is a relevant issue,[324] but the burden of raising and proving such diligence differs from that required if due diligence were an affirmative defense. Because of this difference, the corporate ethos standard more consistently and clearly provides a mechanism for finding corporate intent than does the due diligence affirmative defense.

The following example may help demonstrate this difference. ABC, Inc. (ABC) is indicted along with Ed, one of its many sales managers, for bribing a foreign government to obtain relief from trade import quotas. Sam, CEO of ABC, heard rumors of such bribes and, prior to Ed's action, announced at a general sales meeting: "I have heard rumors about improper actions by our sales managers to get the quotas down. Don't anybody do anything that is going to get us in trouble." Assume that Sam was quite sincere in dissuading bribes when he gave this admonition but was distracted by other pressing matters so his admonition was rather feeble.

If due diligence is an affirmative defense, ABC would produce, at trial, the above testimony by Sam and perhaps even testimony from several witnesses who heard the announcement, as evidence of due diligence. ABC's attorney would argue that, after all, Sam took the trouble of addressing the issue at an important meeting with all significant players present. After this testimony and argument, assume the government successfully argues that Sam's vague and informal admonition did not constitute a duly diligent effort to prevent the criminal conduct. Agreeing with the government, the factfinders convict ABC of violating the Foreign Corrupt Practices Act (FCPA).[325]

The government's ability to rebut a claim of due diligence, however, does not mean that the government also can prove that ABC *encouraged* the bribe. To prevail under the corporate ethos test, the government would have to do more than rebut ABC's evidence of due diligence. Rather, the government would have to introduce evidence of an ethos within ABC that encouraged Ed's illegal activity. The presence of such an ethos could be shown by such practices as: pressure to generate an unrealistic profit from sales to the foreign country given current import quotas, tacit approval within ABC of prior bribes or full indemnification of employees convicted of bribery in the past. The government would have to prove this ethos beyond a reasonable doubt.

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324. *See supra* notes 153-236 and accompanying text.
325. 15 U.S.C. §§ 78dd-1, 78dd-2, 78ff (1988).

The significant difference that results when the due diligence defense is allowed, versus when the corporate ethos standard applies, is the demonstrated moral culpability of ABC. With the due diligence defense, the government proves its case simply by showing that the bribe occurred and by rebutting ABC's claim of due diligence. ABC is convicted for the act of one agent who was instructed (albeit not very effectively, but instructed nevertheless) not to undertake the criminal conduct. There is no evidence suggesting that anything or anyone in ABC "caused" this criminal activity to occur. By contrast, under the corporate ethos test, the government must prove, beyond a reasonable doubt, that a pervasive mentality existed among ABC's employees that foreign bribery was an acceptable way of doing business, and that this mentality, or ethos, encouraged Ed's criminal act.

Thus, although both the corporate ethos test and the due diligence defense reward corporations that effectively police themselves by absolving them of criminal liability for the criminal acts of their employees, the corporate ethos test goes further than does the due diligence defense. By placing the burden of proving encouragement of criminal conduct on the government, the corporate ethos test forces the government to prove the equivalent of a corporation's moral culpability before the corporation can be convicted.

In conclusion, the corporate ethos standard is not as intrusive as Stone's proposal and, to a lesser extent, Coffee's proposal. The corporate ethos standard impacts earlier in the criminal justice system than do the proposals of Coffee and the United States Sentencing Commission and, for that reason, it is a more appropriate use of the criminal law. Also, because corporate ethos is primarily an effort to use the criminal law appropriately, it has a narrower focus than Braithwaite's theory of reintegrative shaming, but a broader focus than Fisse and French's theory of reactive corporate fault. Because the corporate ethos standard imposes a meaningful burden of proof on the government rather than simply allowing corporations to raise a defense of diligence, it ensures that criminal intent is proven before a conviction can result, and thus more effectively restricts criminal liability to its proper arena of intentional conduct. Because of these unique features, the corporate ethos standard is preferable to these other proposals if we are going to employ the criminal law to control corporate actors.

III. PROCEDURAL IMPLICATIONS OF A CORPORATE ETHOS STANDARD OF LIABILITY

If the corporate ethos standard is implemented, courts will probably see an increase in the use of a defense strategy that pits the corporate executive as target/defendant against the corporation as target/defendant. As a result, there will be a greater likelihood of a conflict of interest for counsel who represents both the corporation and the corporate executive. In addition, there will be a greater need to protect the corporation's right to confront witnesses in trials where the corporation and corporate executive are co-defendants.

A. IMPACT ON DEFENSE STRATEGY

The defense that will become more viable under the corporate ethos standard of liability is unique to white collar crime. To pursue this defense, a defendant admits that she voluntarily engaged in the conduct at issue but asserts that she did not know her conduct was unlawful and, therefore, did not have the intent to violate the law.[326] Evidence demonstrating that other individuals similarly situated also engaged in such conduct is highly relevant and helpful to maintaining this defense. For example, assume Ed of ABC, Inc. admitted that he made payments to foreign officials, but claimed that he did so because it was the expected, well-known, and widely-practiced custom of salespersons in his business. With such an argument and appropriate supporting evidence, Ed may convince a jury that

326. A longstanding maxim in criminal law is that ignorance of the law is not an excuse for violating the law. *See generally* O.W. HOLMES, THE COMMON LAW 47-48 (1881) (concluding that the purpose of the maxim is to deter deliberate ignorance of the law). The general rule also has exceptions. For example, once a crime is deemed to have the element of specific intent, ignorance of the law may be a defense. Thus, the jury instruction on specific intent often given in federal courts is:

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, [knowingly failed to do an act which the law requires] purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
>
> An act or a failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.03 (1977).

although he clearly engaged in prohibited conduct under the FCPA, he did not knowingly and willfully break the law, but, rather, thought that his behavior was appropriate and customary.[327]

This defense would not be credible for a defendant charged with a street crime. The house burglar who asserts that he should not be criminally liable because everyone he knows breaks into houses and steals VCRs, televisions, and stereos would not fare well. With white collar crime, however, the line between legitimate and illegitimate behavior, or civil and criminal transgressions, is unclear, overlapping, and often fluctuating.[328] This fact, coupled with the complexity of many white collar criminal transactions, makes it quite credible that an individual could engage in criminal conduct and never know of its criminal nature.

A defense of compliance with prevailing customs and standards has always been possible when corporate employees are targets or defendants.[329] It can be difficult for corporate employees to pursue, however. Collecting the evidence to support the defense can be problematic, using this defense may necessitate that the corporate executive personally finance her legal fees, and often, this defense is particularly emotionally draining for the defendant who asserts it. The corporate ethos test, coupled with the growth in D&O insurance, however, makes it easier for corporate executives to assert this defense.

The first, if not biggest, hurdle for the defendant who pursues this defense is collecting sufficient evidence to convince factfinders that the criminal conduct was part of customary and prevailing standards of behavior. Although the executive may have an intuitive feel for the customs and practices of his profession, translating this "intuitive feel" into persuasive, admissible evidence can be difficult and time-consuming. Successful presentation of this defense requires documentation and testimony by other employees that such practices exist, and that these employees participated in them.

The corporate ethos standard of liability goes far toward overcoming this first hurdle. To prevail against the corporate

327. The Foreign Corrupt Practices Act of 1977, § 104(g)(2)(B), 15 U.S.C. § 78dd-2(g)(2)(b), *as amended by* Act of Aug. 23, 1988, Pub. L. No. 100-418, tit. V, § 5003(c), 102 Stat. 1419, provides penalties for corporate agents who "willfully violat[e]" the Foreign Corrupt Practices Act.

328. *See supra* text accompanying notes 238-43.

329. *See, e.g.*, United States v. Bernstein, 533 F.2d 775, 788 (2d Cir.), *cert. denied*, 429 U.S. 988 (1976).

defendant under this standard of liability, the government must prove the existence of a corporate ethos that encouraged the criminal conduct. The government, therefore, must essentially show the existence of customs and standards within the corporation. To meet this burden, the government will issue subpoenas, litigate motions to quash filed in response to the subpoenas, and obtain and analyze hundreds of documents including many internal memoranda that may not be readily accessible to employees. The government will present witnesses to a grand jury, where they are subject to perjury for false or misleading testimony, and may offer leniency or even immunity to some witnesses. A corporate executive can "piggy back" this investigative effort and argue that she did not intend to commit crimes, but was simply complying with the ethos that the government has just proven.

A second hurdle in presenting this defense is financial: Pursuing a defense antagonistic to the corporation may require the corporate executive to sacrifice corporate payment of her defense costs and obtain independent counsel. Because some executives do not want to personally pay the attorney fees incurred in their defense, they would choose not to obtain independent counsel and thus would not pursue this defense even when it was appropriate.

In recent years, however, D&O insurance has made this hurdle less of a problem. When the corporation and its executives, as co-targets or co-defendants, share the same counsel, the executives are understandably reluctant to pursue a defense antagonistic to the corporation. When the corporation and corporate executives have separate counsel, but the corporation is paying the defense costs for the employees, this reluctance remains, although to a lesser extent. A corporate executive's attorney, whose fees are being paid by the corporation, is well aware of who pays the bill and not oblivious to the chance of future legal work from the corporation. If the corporate executive whom the attorney represents incriminates the corporation, this attorney knows that her chances of future retainer by the corporation are jeopardized.

D&O liability insurance, which has expanded tremendously in the last decade,[330] has altered this financial arrangement. Although the corporation pays the insurance premiums, the corporate executive covered by the insurance is allowed to

330. *See supra* note 221 and accompanying text.

select his own counsel.[331] Moreover, because the D&O insurer covers liabilities incurred by the covered executive but *not* those incurred by the corporation,[332] the D&O insurer has a financial incentive to pursue defenses that shift liability from the executive to the corporation. Under the corporate ethos standard of liability, this shift more readily occurs once an executive attempts to exculpate herself by pointing to corporate customs and practices.

The third hurdle for an executive in using the defense of compliance with corporate custom is the emotional trauma it may cause. A loyal corporate executive may find it wrenching to pursue a defense that pits him against his employer. The criminal justice system can never fully overcome this hurdle, but the use of independent counsel and the chance of success can ease this emotional hardship.

In short, the corporate ethos test, combined with the growth of D&O insurance, makes it easier for the corporate executive to pursue a defense strategy antagonistic to his corporate employer. The emerging viability of this defense exacerbates the potential for a conflict of interest on the part of the attorney who represents both the executive and the corporation. If the corporate ethos standard of liability is implemented, courts must be sensitive to its effect on this conflict of interest problem.

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331. Although the insurer may not have a duty to defend, it can still retain some control over the choice of defense through counsel clauses "that forbid the incurring of 'costs, charges, and expenses' without the company's consent." Note, *supra* note 229, at 704. Such control could still be a problem if the insurer can exert control over the course of the case by encouraging settlement when the director may prefer not to settle. Bishop, *New Cure for an Old Ailment: Insurance Against Directors & Officers Liability/Fiduciary Liability*, 22 BUS. LAW 92, 106 (1966). The corporation may also encourage a finding that excludes policy coverage because of dishonest behavior. *See supra* note 224 and accompanying text. Recognizing this conflict, some courts have held that in a conflict of interest situation, "the insurer's obligation to defend extends to paying the reasonable value of the legal services and costs performed by independent counsel selected by the insured." Previews, Inc. v. California Union Ins. Co., 640 F.2d 1026, 1028 (9th Cir. 1981).

332. Note, *supra* note 229, at 692 (D&O policies "reimburse the corporation *only* for indemnifying directors, not for any legal expenses it incurs in its own defense" (emphasis in original)); *see also id.* at 700 (noting that a D&O policy does not cover any claims or suits against the corporation itself, only indemnification payments to directors"); Johnston, *supra* note 221, at 2013 ("It is important to understand that the Corporate Reimbursement form covers *only* the corporation's obligation to indemnify its directors and officers. It does *not* cover any liability which the corporation itself may have to the plaintiff in any given action." (emphasis in original)).

B. CONFLICT OF INTEREST

To fully discuss the effect of the corporate ethos standard on the conflict of interest issue, it is necessary to briefly review the pertinent law. Representation of conflicting interests, whether at the grand jury investigative stage or at trial, can occur in the following ways: (1) representation of more than one grand jury target or defendant;[333] (2) representation of the target or defendant while simultaneously representing a non-target or non-defendant witness;[334] (3) representation of multiple witnesses and some tie to the target/defendant, as when the target/defendant pays for the representation.[335] In analyzing each of these situations, courts seek to determine whether a conflict of sufficient magnitude exists that requires disqualifying counsel from representing at least some of her clients.[336]

Conflict of interest analysis begins with the sixth amendment's guarantee that "in all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense."[337] This right to counsel includes the right to "effective" assistance of counsel,[338] which encompasses representation free from conflicting interests.[339] Because the sixth amendment's right to counsel also includes counsel of one's choice,[340] the question in conflict of interest cases becomes one of waiver, namely, whether the client disadvantaged by the actual or potential conflict of interest may waive the right to conflict-free counsel and continue with counsel of choice.[341]

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333. *See, e.g., Bernstein*, 533 F.2d 788-89; United States v. Agosto, 675 F.2d 965, 973 (8th Cir.) (on remand disqualification ordered, United States v. Agosto, 538 F. Supp. 1149 (D. Minn. 1982)), *cert. denied*, 459 U.S. 934 (1982).

334. *See, e.g., In re* Grand Jury Investigation, 436 F. Supp. 818, 821 (W.D. Pa. 1977); Pirillo v. Takiff, 462 Pa. 511, 526-29, 341 A. 2d 896, 903-04 (1975), *cert. denied*, 423 U.S. 1083 (1976).

335. *See, e.g.*, United States v. R.M.I. Co., 467 F. Supp. 915, 921 (W.D. Pa. 1979). *But see In re* Investigation Before April 1975 Grand Jury, 531 F.2d 600, 608 (D.C. Cir. 1976) (union paid one attorney to represent 21 union members subpoenaed as witnesses; held not to be a conflict necessitating disqualification).

336. *See supra* cases cited in notes 333-35.

337. U.S. CONST. amend. VI.

338. Glasser v. United States, 315 U.S. 60, 70 (1942).

339. Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978).

340. *See, e.g.*, United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979).

341. *See, e.g.*, United States v. Agosto, 675 F.2d 965, 969-70 (8th Cir.), *cert. denied*, 459 U.S. 934 (1982); *In re* Taylor, 567 F.2d 1183, 1186 (2d Cir. 1977); *In re* Grand Jury, 446 F. Supp. 1132, 1139 (N.D. Tex. 1978) (and cases cited therein). The MODEL RULES OF PROFESSIONAL CONDUCT 1.7, 1.8 & 1.13 (Dis-

The courts generally agree that when counsel represents co-defendants pursuing antagonistic defenses, a conflict of interest that violates a defendant's sixth amendment right to effective assistance of counsel is present,[342] and such a conflict necessitates a new trial absent a waiver of the conflict of interest problem. To avoid reversal, courts try to prevent such a conflict from occurring by seeking an effective waiver or by disqualifying counsel from representing one or some of her clients. The courts are not consistent in how they approach this situation, however. They disagree over what constitutes a conflict of interest; whether a particular situation presents an actual or potential conflict of interest; and over the circumstances under which a client may waive a conflict of interest.[343] Some courts have disqualified counsel in cases presenting only "potential" conflicts of interests, even when the client has waived his right to conflict-free counsel.[344] Other courts appear to require the existence of an actual conflict of interest before ordering disqualification.[345] Most courts have held that the client cannot waive an actual conflict of interest,[346] although dicta in a few cases has indicated that the client may even waive actual conflicts of interest.[347]

In 1988, the United States Supreme Court, in a 5-4 decision, gave some guidance to the lower federal appellate courts'

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cussion Draft 1983) provide some guidance for attorneys in this situation, but no clear answers.

342. *See, e.g.*, United States v. Bernstein, 533 F.2d 775, 788 (2d Cir.), *cert. denied*, 429 U.S. 988 (1976).

343. *See* Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. REV. 1, 5-6 (1979) (discussing fully this inconsistency).

344. *In re* Gopman, 531 F.2d 262, 267 n.6 (5th Cir. 1976); Pirllo v. Takiff, 462 Pa. 511, 517-18, 341 A.2d 896, 899, 906 (1975).

345. *Grand Jury*, 446 F. Supp. at 1140 (court refused to grant government's motion to disqualify attorney representing grand jury witnesses on the ground only a potential, not an actual, conflict of interest was shown to exist in counsel's representation); *In re* Grand Jury Investigation, 436 F. Supp. 818, 823 (W.D. Pa. 1977) (court indicates motion for disqualification is not ripe until there is an actual conflict of interest).

346. United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978); *Grand Jury Investigation*, 436 F. Supp. at 822 (court holds that waiver of actual conflict existing in this case would be "purely illusory").

347. *See* United States v. Armedo-Sarmiento, 524 F.2d 591, 592 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272, 276 (5th Cir. 1975); *cf. In re* Taylor, 567 F.2d 1183, 1186 (2d Cir. 1977) (holding that "each suspect or accused may knowingly and intelligently waive *any* claims which might arise from counsel's conflict of interest" (emphasis supplied)).

murky treatment of this issue.[348] Noting that "the Courts of Appeals have expressed substantial disagreement about when a district court may override a defendant's waiver of his attorney's conflict of interest,"[349] the Court held that district courts have broad discretion to disqualify attorneys in cases of actual conflict, as well as in cases where there is "a showing of a serious potential for conflict."[350] Although the Court recognized a defendant's sixth amendment right to counsel of choice, it held that "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant."[351] For this reason, a court can disqualify counsel, even when all interested parties waive any future claims of a conflict of interest.[352]

Interestingly, the Supreme Court has specifically discussed the special problems presented by counsel's joint representation of an organization and individuals within the organization. In *Wood v. Georgia*,[353] the Court recognized the "inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid for by a third party."[354] One risk the Court noted in this fee relationship is that the lawyer may "prevent his client from . . . offering testimony against his . . . employer or from taking actions contrary to the employer's interest."[355] This risk could become common if courts adopt the corporate ethos standard of liability, because under this standard the employee who argues that he was merely conforming to prevailing custom and standards will be offering evidence against his employer.

In short, a criminal system that uses the corporate ethos standard of liability and is populated by attorneys reimbursed by D&O insurance poses a high risk that a conflict will arise for counsel who jointly represents a corporation and its executives. The advent of D&O insurance has weakened the economic web

348. Wheat v. United States, 486 U.S. 153 (1988).
349. *Id.* at 158.
350. *Id.* at 164.
351. *Id.* at 159.
352. *Id.* at 159-60.
353. 450 U.S. 261 (1981).
354. *Id.* at 268-69.
355. *Id.* at 269. Several courts have recognized the pressure placed on employees jointly represented with their employers. *See, e.g., In re* Grand Jury Investigation, 436 F. Supp. 818, 821 (W.D. Pa. 1977) (holding that an attorney may not represent a target corporation and its employees, who appear as witnesses); *In re* Abrams, 56 N.J. 271, 276, 266 A.2d 275, 278 (1970) (holding that an attorney may not represent both a corporation and its employee when it is in the employee's self-interest to disclose a corporation's criminal conduct).

that historically bound the corporation and the corporate executive together in pursuit of a joint defense.[356] Adoption of the corporate ethos standard of liability, and the bootstrap it provides to the corporate executive who wishes to pursue a defense resulting in harm to his corporate employer, will further erode this bond. The Supreme Court's current approach to the conflict of interest problem — that courts may order disqualification in cases of actual or potential conflicts of interest, even with waivers by the parties — need not change.[357] Although the corporate ethos standard of liability and D&O insurance present an increased danger of a conflict of interest, adopting a per se rule against joint representation of a corporate defendant and corporate employees who are co-defendants is not wise or appropriate. Significant and legitimate advantages to joint representation exist when the potential for antagonistic defenses is not present: the client may suffer delay, inconvenience, and expense if forced, unnecessarily, to obtain separate counsel; new counsel may be unable to reconstruct evidence that prior counsel assembled; and the pooling of the memories of several clients may elucidate nuances a single memory cannot.[358] Rather, if a corporate ethos standard of liability is adopted, courts should incorporate a greater sensitivity to the changing topography of defense strategies when they analyze criminal cases where a corporation and a corporate executive are co-defendants.

C. CONFRONTATION OF WITNESSES

Another concern arises if executives become more willing, for whatever reason, to pursue a defense that exculpates them at the expense of their corporate employer. Corporate executives may make unfounded claims that there existed a corporate ethos that encouraged their conduct and overcame their ability to see that their conduct was criminal. To guard against such claims, the courts must be vigilant in protecting another sixth amendment right — the right to confrontation of witnesses.

Assume that the FBI investigates ABC, Inc. and several of its employees for fraud. Early in the investigation, FBI agents interview employee *X*, who freely admits that he engaged in

356. *See supra* notes 220-34 and accompanying text.

357. *See supra* notes 344-48 and accompanying text.

358. *See Developments in the Law — Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1380, 1380-84 (1981).

the conduct for which he and ABC are later indicted. In this interview, *X* explains that "everyone" in ABC knows of, and is expected to assist in, the conduct in question. Once trial commences, *X* declines to take the stand. The court, however, allows one of the FBI agents who interviewed *X* to testify about *X*'s earlier statement as a party admission.[359] *X*'s statement does not affect ABC's criminal liability under the traditional respondeat superior test, because the existence of an ethos that encouraged *X*'s action is irrelevant to ABC's liability.[360] *X*'s statement may affect ABC's liability under the MPC test if the statement demonstrates that a high managerial agent within ABC directed, performed, or recklessly tolerated the criminal conduct.[361] If the corporate ethos standard applies, however, *X*'s statement is powerful and incriminating evidence of ABC's criminal liability.[362] Although *X*'s testimony incriminates ABC, ABC will never get the opportunity to confront or cross-examine *X* since *X* does not take the stand.

In 1968, the Supreme Court recognized this confrontation problem when it reversed George Williams Bruton's conviction for armed postal robbery.[363] Federal agents had interviewed Bruton's co-defendant, Evans, during the investigation of the robbery. Evans orally confessed that he and Bruton committed the robbery.[364] At trial, Evans did not take the stand; one of the agents who earlier interviewed him, however, testified about Evans' statement, thus inculpating both Evans and Bruton.[365] Because Evans did not take the stand, Bruton had no opportunity to cross-examine him.[366] The Court held that this prejudiced Bruton's sixth amendment right to confrontation of witnesses and constituted reversible error. Moreover, the Court held that instructing the jury to disregard as inadmissible hearsay Evans' statement about Bruton's conduct could not cure the error.[367]

Bruton, however, has never been an absolute rule. The Supreme Court recognized that "not every admission of inadmissible hearsay or other evidence can be considered to be re-

359. *See* FED. R. EVID. 801(d)(2)(A).
360. *See supra* notes 17-23 and accompanying text.
361. *See supra* notes 24-33 and accompanying text.
362. *See supra* notes 254-94 and accompanying text.
363. Bruton v. United States, 391 U.S. 123 (1968).
364. *Id.* at 124.
365. *Id.*
366. *See id.* at 137.
367. *Id.*

versible error unavoidable through limiting instructions."[368] In analyzing the seriousness of a *Bruton* problem, courts have considered the reliability[369] and the significance[370] of the testimony at issue. Courts will not admit such testimony, even if reliable, if it is devastating to the defendant.[371] To avoid *Bruton* reversals, the proponent of a statement by one defendant inculpating a co-defendant will generally "Brutonize" the statement, deleting all references to the co-defendant prior to seeking admission of the statement.

This method of analyzing the right to confrontation need not change if courts implement the corporate ethos standard. It is important to recognize, however, that statements once irrelevant to a corporate defendant's liability will become powerfully incriminating evidence against the corporate defendant under a corporate ethos standard. Further, once it becomes more advantageous for corporate executives to pursue a defense antagonistic to their corporate employers, corporate executives will have an incentive to exculpate themselves by fabricating testimony that incriminates their corporate employers. Thus, a greater need for confrontation and cross-examination arises if the corporate ethos standard of liability is implemented.

For example, Judge Friendly's approach in *United States v. Southland Corp.*[372] would be inappropriate if the court were applying the corporate ethos standard of liability. Southland, a large retailer, and an attorney were convicted on conspiracy to commit bribery charges. During trial, the government introduced notes of Southland's general counsel as evidence that attorney fees paid and deducted as a business expense were in fact bribes.[373] The general counsel invoked his fifth amendment right against self-incrimination and thus was unavailable

368. *Id.* at 135.

369. *See* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980); Marcusi v. Stubbs, 408 U.S. 204, 213 (1972); *Bruton*, 391 U.S. at 136.

370. Cruz v. New York, 481 U.S. 186, 191 (1987) (citing Parker v. Randolph, 442 U.S. 62, 75 (1979)); *Bruton*, 391 U.S. at 136.

371. *Cruz*, 481 U.S. at 191-92. The *Cruz* Court reversed Cruz's conviction because the trial court admitted the confession of Cruz's co-defendant implicating them both, even though the trial court also admitted Cruz's own confession. Noting that the co-defendant's confession "corroborate[d] the defendant's confession," the Court held that the problem was not reliability, *id.* at 192, but the statement's "devastating" impact, particularly because Cruz now claimed that he had never confessed, *id. But see Parker*, 442 U.S. at 74 (holding that possible prejudice from the jury failing to follow limiting instructions of trial court is not so "devastating" as to require exclusion of evidence).

372. 760 F.2d 1366 (2d Cir.), *cert. denied*, 474 U.S. 825 (1985).

373. *Id.* at 1375.

as a witness.[374] Southland argued that admitting the general counsel's notes violated its sixth amendment confrontation rights.[375] Judge Friendly rejected Southland's argument, noting that it "seems hardly appropriate when voiced by Southland since the witness it wishes to confront is, in the eyes of the law, itself."[376] In the *Southland* case, such reasoning made sense, because by incriminating the general counsel, the statement at issue also incriminated Southland. Thus, it was accurate to view the corporation and its employee as one. With the corporate ethos test, however, there is a greater likelihood that the interests of the corporation and the corporate executive will be antagonistic. When this is the case, denying a corporation the right to confront its employee on the ground that the corporation and corporate employee share a common identity will be unjust.

In summary, both the corporate ethos standard of liability and the increase in D&O insurance supply incentives for an accused corporate executive to claim that, because she was acting in conformity with corporate customs and practices, she lacked knowledge of her illegality and thus had no intent to violate the law. Under current standards of liability, such a defense does not inculpate the corporate employer. Under the corporate ethos standard of liability, it does. D&O insurance adds further incentive for the executive to attempt to shift liability to the corporation. Although D&O insurance covers a corporate executive's liability, it does not cover the corporation's liability. Thus, by shifting liability from the executive to the corporation, the D&O insurer benefits.

In some cases, the pursuit of a defense that one was unaware of the criminal nature of his acts because of an overpowering corporate ethos will be well founded and appropriately freed by changing standards of liability and methods of reimbursement. In other cases, the executive's use of this defense will be purely opportunistic and unfounded. In either case, however, greater use of this defense increases the danger of conflict in the joint representation of a corporate executive and her corporate employer and necessitates stringent protection of the corporate defendant's need to confront witnesses.

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374. *Id.*

375. *Id.*

376. *Id.* at 1377 (citing United States v. Dotterweich, 320 U.S. 277, 281 (1943)).

IV. A RESPONSE TO CRITICS

The corporate ethos standard, like most new proposals for change, will likely draw criticism. This section addresses this potential criticism and explains how these supposed weaknesses are, in some respects, actually strengths. In other respects, the criminal justice system will need to recognize the ramifications of adopting the corporate ethos standard and adjust accordingly.

One likely criticism of the corporate ethos test is that it is not workable. It is, theoretically and practically. Several analogous legal standards that demonstrate courts' effective use of the organizational liability concept already exist.

One analogy is the Pinkerton Rule in conspiracy law. Daniel and Walter Pinkerton were moonshiners in rural Alabama in the 1940s.[377] When Daniel was incarcerated for previous offenses, his brother continued to make the contraband whiskey and failed to pay the applicable taxes.[378] Both Daniel and Walter were thereafter indicted and convicted on conspiracy and tax evasion charges.[379] Both were convicted on the conspiracy charge. Walter was convicted on the substantive tax evasion charges. To Daniel's surprise, so was he even though the alleged tax evasion occurred while Daniel was in jail.[380] On appeal, Daniel argued that he should not be liable for the substantive violations of the tax laws when he clearly could not have committed or even participated in them.[381] The Supreme Court disagreed. It held that because of Daniel's *own* act of joining the conspiracy and failing to disavow his association with the conspiracy, he became vicariously liable for all substantive offenses that other co-conspirators committed in furtherance of the conspiracy.[382]

Similarly, by a corporation's *own* act of creating and continuing an ethos that encourages criminal conduct, it becomes liable for the criminal offenses committed by its agents. The corporate ethos standard still employs, of course, vicarious liability since it holds the corporate defendant liable for the acts of others. It is, however, a more fine-tuned form of vicarious

377. Pinkerton v. United States, 328 U.S. 640, 641 (1946).

378. Pinkerton v. United States, 151 F.2d 499, 500 (5th Cir. 1945), *aff'd*, 328 U.S. 640 (1946).

379. *Pinkerton*, 328 U.S. at 641.

380. *Pinkerton*, 151 F.2d at 500.

381. *Pinkerton*, 328 U.S. at 645-46.

382. *Id.* at 646.

liability than the traditional respondeat superior or MPC standards because it alone provides a mechanism for focusing criminal liability only on those corporations that manifest an intent to violate the law.[383]

Another analogy can be found in municipal liability under 42 U.S.C. § 1983, which provides that persons, including fictional persons, who deprive citizens of certain rights are liable to the injured person.[384] In *Monell v. New York City Department of Social Services*,[385] the Supreme Court held that this section clearly envisions liability of municipal corporations "only where the municipality *itself* causes the constitutional violation at issue."[386] Section 1983 does not utilize traditional respondeat theory, whereby a municipality can be found liable for an employee's isolated act.[387] Rather, like the corporate ethos standard for corporate criminal liability, it provides a "fault-based analysis for imposing . . . liability."[388] It does so by focusing on the municipal "custom" or "policy"[389] that is the "moving force"[390] of the constitutional deprivation, and imposes liability only if the evidence shows that "some official policy 'causes' an employee to violate another's constitutional rights."[391] Since the *Monell* decision in 1978, therefore, courts and juries have worked with and applied the notion that a fictional entity can devise a policy that makes it responsible for illegal acts by its employees.[392]

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383. *See supra* notes 252-88 and accompanying text.

384. 42 U.S.C. § 1983 provides in pertinent part:

> Every person [including fictional persons] who, under color of any statute, ordinance, regulation, custom or usage . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983 (1988).

385. 436 U.S. 658 (1978).

386. City of Canton v. Harris, 109 S. Ct. 1197, 1203 (1989) (citing *Monell*, 436 U.S. at 694-95) (emphasis in original). The *Monell* Court overruled Monroe v. Pape, 365 U.S. 167 (1961), and held that "persons" within Section 1983 includes municipal corporations. 436 U.S. at 690, 701.

387. *Monell*, 436 U.S. at 691 ("In particular we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." (emphasis in original)).

388. Oklahoma City v. Tuttle, 471 U.S. 808, 818 (1985).

389. *Monell*, 436 U.S. at 691.

390. *Id.* at 694.

391. *Id.* at 692.

392. *See, e.g.*, City of Canton v. Harris, 109 S. Ct. 1197, 1203 (1989); City of Springfield v. Kibble, 480 U.S. 257, 267 (1987). It should be noted that although this line of cases, like the corporate ethos standard of liability, re-

Presumably, commentators will direct the major thrust of their workability criticism at the "ethos" element — namely, that it is not possible to fully, completely, and accurately ascertain a corporate ethos. This is true; it is not possible. But who are we fooling? The criminal law has long imposed a factually impossible burden on the government with its requirement of mens rea. We are accustomed to this burden, however, and so do not easily realize that, truly, direct proof of intent is impossible and we have simply become comfortable with approximations that do not overcome the impossibility of our task. Assume *X* has been indicted on mail fraud charges for devising a scheme to defraud investors. *X*'s consistent defense is that he never intended to defraud anyone, but his good plans, like many business ventures, simply went awry. *Y* is indicted for murder. Her consistent defense is that she did not purposely kill the victim; it was an accident. The government will present circumstantial evidence from which factfinders can attempt to infer these defendants' true mental states. In both instances, however, no one — not the grand jury, prosecutor, petit jury, or judge — will ever know what was in *X* or *Y*'s minds. However, our inability to directly prove intent does not cause us to reject the entire concept, or given sufficient circumstantial evidence, to question whether the factfinders have accurately deduced a person's intent. So it is with corporate ethos. When the government presents sufficient circumstantial evidence, we can

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flects the view that fictional entities are capable of promulgating a policy or custom for which the entity itself should be held liable, they do not clearly reflect a mechanism for determining what this policy or custom is.

The *Monell* Court states that "formal approval through the body's official decision making channels" is not required before finding the existence of a policy subjecting a municipality to § 1983 liability. 436 U.S. at 690-91. In later cases, however, the Court appears to be doing just that. In *Tuttle*, the Court held that an isolated incident by a single low-level officer was insufficient to subject the municipality to liability. 471 U.S. at 833. In Pembaur v. Cincinnati, 475 U.S. 469 (1986), the Court held that the four-word response by a single county employee (a county prosecutor) was sufficient to constitute county policy. *Id.* at 484. The Court's discussions in both cases focused on formal aspects of the decision-making process surrounding both of the alleged municipal policies. In *Tuttle*, the Court emphasized the lack of involvement by official policymakers. 471 U.S. at 831-33. In *Pembaur*, the Court emphasized the prosecutor's authority as described in state statutes. 475 U.S. at 484-85.

By contrast, the corporate ethos standard focuses on many aspects of a corporation's structure in seeking to identify the corporate ethos, custom or policy. The formal decision making process and the status of participants involved in the activity are but two relevant factors. *See supra* notes 252-88 and accompanying text.

and should feel confident in the factfinders' deduction of a corporation's ethos.

Another criticism of the corporate ethos test may be that the government will invade corporate privacy in its search to gather evidence of a corporate ethos that encourages unlawful behavior. In fact, the corporate ethos test would not encourage this invasion of corporate privacy any more than do current standards of liability. In virtually every criminal investigation of corporate misdeeds, the government also investigates the potential criminal liability of corporate officers. To fully investigate this potential individual liability, agents, prosecutors, and the grand jury must delve into the inner machinations of the corporation.[393] Moreover, even when corporate criminal liability (and not individual criminal liability) is the issue and due diligence is allowed as an affirmative defense, the government should fully investigate the inner workings of the corporation for two reasons. The first is to determine if the corporation is indictable. If the corporation will have a strong due diligence defense,[394] it may well be inappropriate for the grand jury to return an indictment. Second, assuming the government will be able to indict the corporation, it will use the investigative resources of the grand jury to gather evidence to overcome any due diligence defense. Thus, criminal investigations of corporate targets have been as broad under current standards as they would be under the corporate ethos test.

A third criticism of the corporate ethos standard may be that using this test will result in fewer criminal prosecutions of corporate defendants. This criticism is probably true, and may appear to be a weakness to those who favor relentless pursuit of miscreant corporations. Upon full reflection, however, critics should see this fact not as a weakness, but as a strength of the standard. Criminal prosecution is only part of the arsenal

393. *See, e.g.*, Hale v. Henkel, 201 U.S. 43 (1906); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.110 (1988). In holding that a corporation may not assert a fifth amendment privilege when served with a grand jury subpoena for corporate records, the *Hale* Court noted the reason for the grand jury's broad powers to investigate corporations: "[T]he corporation is a creature of the state. . . . It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused." 201 U.S. at 74-75.

394. The due diligence defense complicates the inquiry into corporate criminal liability and becomes more like the inquiry under the corporate ethos standard. Although popular with scholars, courts have rarely allowed this defense.

available to combat corporate misbehavior. Specialized agencies exist to monitor and regulate corporations.[395] An honest appraisal of the limited role that the criminal law should play in regulating corporate misbehavior could help channel additional resources to these agencies. Beyond this, the crucial point of the corporate ethos test is that it will target only the morally culpable corporation for criminal prosecution. Thus, the corporations indicted will be the "bad" corporations that have demonstrated an intent to violate the law. As such, the exercise of prosecutorial discretion will be more consistent, the sentences rendered will be harsher, and greater deterrence of unlawful behavior will result.

A fourth criticism of the corporate ethos standard — that courts will find it more difficult to administer than current standards of liability — is both a weakness and a strength. In part, the difficulty will stem from unfamiliarity with a new standard of liability. Such difficulty also will stem from the fact that the corporate ethos standard is more fact-sensitive than are the current standards of liability. Assessing the many facets of a corporation's ethos to determine whether it encouraged the particular criminal conduct at issue is a complicated task. Certainly, this inquiry is more complex than simply assessing whether a corporate agent committed the conduct (the traditional respondeat superior test), or whether a high managerial agent performed, authorized, or recklessly tolerated the conduct (the MPC test). In the context of criminal law, however, such sensitivity is a strength, not a weakness. Justice requires the criminal justice system to treat like parties alike.[396] Tests based on crude versions of vicarious liability do not allow for this symmetry. Under the traditional respondeat superior standard of liability, and to a lesser extent, under the MPC standard, it is irrelevant whether a corporation made vigilant efforts to encourage its employees to comply with the spirit as well as the letter of the law, or whether a corporation boldly encouraged its employees to flout the law at every turn. By comparison, the corporate ethos standard of liability strives to distinguish between such corporations, and subjects only the latter to criminal liability.

Another likely criticism and a true weakness in the corporate ethos standard is that by enhancing the efficacy of a particular defense strategy, the corporate ethos standard may

395. *See supra* notes 89-92 and accompanying text.
396. *See supra* note 14.

encourage executives to falsely incriminate the corporate defendant. Courts can remedy this weakness only by diligent enforcement of sixth amendment rights.[397]

Another valid criticism of the corporate ethos standard is that it addresses only one of the jurisprudential problems concerning corporate criminal liability — intent. The corporate ethos test does not address the issue of what type of conduct the criminal law should focus upon. Murder for hire, kidnapping, rape, and arson for profit are all evil and immoral acts, and most people would agree that public resources and the stigma of the criminal law should be brought to bear on those who commit such acts. Similarly, most people would vehemently oppose legislation that makes criminal the driving of a dirty automobile (however intentionally) or the failure to mow one's grass on a certain schedule (again, however intentionally). We would agree that these trivial matters are unworthy of the resources or power of the criminal law. When the criminal law is turned toward corporate actors, however, the type of conduct appropriate for its attention presents a particularly poignant problem. More so than with individual criminal conduct, the public does not always perceive the conduct for which a corporation is potentially criminally liable as morally bad or evil. Often, the conduct only jeopardizes a particular economic model. Antitrust laws are an example: If corporations willfully engage in certain monopolistic behavior in a market economy, they have committed a crime.[398] By contrast, if business persons in communist economies dare to compete with the government approved monopolies, they have committed a crime. If conduct is truly evil, then surely our perception of it as evil and criminal will not blow with the winds of economic change.

The morally neutral content of many of the criminal statutes that apply to corporations raises a separate jurisprudential problem: How much and how often can the government prosecute corporations for morally neutral behavior (however intentional the behavior), before use of the criminal law becomes inappropriate? An obvious question follows: If the criminal justice system should attempt to reserve the criminal law for morally evil conduct, how are we to decide whether conduct is morally evil?

This Article does not address this morality of conduct con-

397. *See supra* notes 333-51 and accompanying text.

398. *See* Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

troversy beyond noting that when we say the criminal law is to punish only morally culpable behavior we mean two things: that only certain types of conduct should be punished, and then only when such conduct is committed intentionally. These two components are inextricably intertwined. Any progress that this Article makes toward resolving the intent issue is limited until we also resolve the issue of what type of corporate conduct is appropriately subjected to criminal liability.

CONCLUSION

American jurisprudence currently utilizes two general standards for imposing criminal liability on corporations: traditional respondeat superior and the Model Penal Code. The traditional respondeat superior standard holds a corporation liable if any corporate agent committed a criminal offense while acting within the scope of his employment and for the purpose of benefitting the corporation.[399] The MPC standard provides that a corporation is liable if a high managerial agent performed or recklessly authorized the criminal conduct.[400] Both of these standards employ vicarious liability by imputing the intent of an individual corporate agent to the corporation. This Article suggests that proof of intent is too essential to the nature, and power, of the criminal law to employ crude standards of vicarious liability that poorly focus on intent. Just as the notion of intent has evolved in the past, it must continue to evolve if the criminal law is to be used to convict fictional entities.

This Article proposes a new paradigm of corporate intent that builds upon the traditional respondeat superior and MPC standards as well as on criticisms of these approaches. Like both of the current standards, the corporate ethos standard of liability looks to the acts and intent of individuals within the corporation. Like Fisse's notion of reactive corporate fault,[401] the corporate ethos standard looks to the remedial efforts (or lack thereof) that a corporation takes after a first violation. Like the due diligence affirmative defense, the corporate ethos standard considers the corporation's diligence in preventing criminal conduct by its agents. Although all of these factors are relevant under the corporate ethos standard, none is sufficient to determine a corporation's criminal liability. Rather, the factfinder will examine each of these facts, along with a

399. *See supra* notes 17-23 and accompanying text.
400. *See supra* notes 24-33 and accompanying text.
401. *See* Fisse, *supra* note 3, at 1190.

corporation's formal and informal corporate hierarchy, its goals and policies, its compensation scheme, and the education and monitoring it provides for corporate employees. If this examination shows that a corporation whose employees violated the law perpetuated an ethos that encouraged this violation, the corporation is criminally liable for the acts of its agents. If no such ethos exists, the corporation is not criminally liable even though its agents violated the law.

By providing a theoretical and practical framework for identifying and proving corporate intent, the corporate ethos standard of liability offers advantages over our current standards for holding corporations criminally liable. It enhances our ability to distinguish among diverse corporations, and encourages corporations to implement meaningful internal controls that reduce the potential for corporate crime. Further, it compensates for deficiencies in controlling corporate misbehavior through imposing criminal liability on individuals within corporations. Finally, it is practical, workable, and provable from information already available through criminal discovery and trials.

The criminal justice system is a potent vehicle for protecting society and putting lives back on course, but like an old car used to carry too much too far, it will burn out if we force it to do that which it cannot. Accordingly, courts should use the criminal law only for those problems that can benefit from its unique power.[402] Because this power comes from applying the criminal law only to intentional acts, we must respect this limitation in our pursuit of corporate criminal defendants. Historically, however, we have not sought, or proven, corporate intent.

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402. Rosenberg, *The Kingdom of Cocaine*, NEW REPUBLIC, Nov. 7, 1989, at 26, 26-34. Rosenberg argues that the criminal law cannot solve all of society's problems in the context of stopping the flood of cocaine from Columbia. *Id.* at 33-34. She argues that socioeconomic and cultural problems are causing this illegal exportation of cocaine, not law enforcement problems. *Id.* at 30-33. She explains that illegal drug traffic has taken over every segment of Columbian society. As a result, "[l]aw enforcement doesn't work . . . because as presently implemented it is in the interests of practically nobody in Columbia." *Id.* at 27. Rosenberg suggests that if we want to curb this illegal exportation of cocaine, we should negotiate more favorable trade agreements for Columbia's legitimate exports, rather than using law enforcement strategies of arresting traffickers, crop eradication, and dismantling of labs. *Id.* at 26, 33-34.

The analogy in Rosenberg's article to corporate crime is not complete. Corporate crime still demands a response from law enforcement; the export of cocaine from Columbia may not. But, to the extent our approaches to both problems have been rigidly fixed in our current ways of proceeding with little creativity for more appropriate responses, the analogy is apt.

As a result, we have done a poor job of policing corporate misdeeds and have squandered the power of the criminal law. The standard of liability proposed in this Article is a conceptual and practical suggestion for remedying this deficiency.