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Some Reflections on the Corporation as Criminal Defendant

Howard M. Friedman*

I. Introduction

“White-collar crime” has become a catchall label for a wide variety of economic wrongdoing.¹ If necessary research into white collar crime is to be useful, it must focus precisely upon relevant parts of the problem. This article focuses upon one such part—wrongdoing by corporations. It is important to deal separately with corporate deviance because much of the literature has failed to separate the problems of organizational behavior from that of behavior of natural persons.² As one commentator has phrased the problem, “It is apparent that the present criminal process, which developed as a reaction to individual delinquency, has not yet reached a level of sophistication which enables it effectively to sort out the various components in the complex of legal relationships known as the corporation.”³

Instead of coming to grips with the corporate organization, the criminal law proceeded to apply the natural person model to the fictional corporate person. The anthropomorphization of the corporation has thoroughly infected legal thought. When Christopher Stone suggested that trees should have standing,⁴ readers—at least those east of the Rockies—reacted good-naturedly, albeit with disbelief, to a notion that must have been produced only by overexposure to the California sun. Yet when the President’s Commission on Law Enforcement and Administration of Justice wrote in a single sentence of “derelictions by corporations and their managers,”⁵ not an eyebrow was raised. The natural person’s relation to the corporate organization has gone beyond metaphor. A T & T has indeed become “Ma Bell,” and has a personhood in the law which is denied to other objects.⁶ This anthropomorphization of the corporation has facilitated application of traditional notions of criminality to the corporate organization.

To deal adequately with corporate deviance, the massive underbrush of doctrine stemming from the too-facile application of notions of individual

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1 One researcher has identified 61 different kinds of white-collar crime in four broad categories. See H. EDELHERTZ, *THE NATURE, IMPACT AND PROSECUTION OF WHITE COLLAR CRIME* 73-75 (1970).

2 A few notable exceptions which recognize the problem of organizational behavior do exist, e.g., M.D. ERMANN and R.J. LUNDMAN, *CORPORATE AND GOVERNMENTAL DEVIANCE* (1978); Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 *YALE L.J.* 1091 (1976).

3 Note, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 *YALE L.J.* 280, 303 (1961).

4 Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 *SO. CAL. L. REV.* 450 (1972).

5 PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT CRIME AND ITS IMPACT—AN ASSESSMENT* 104 (1967).

6 See A. MILLER, *THE MODERN CORPORATE STATE* 154-61 (1976).

responsibility to corporations must be cleared. To do so, an organizational model which has not been "personated" may be useful. Such a model, one with both historical roots and modern roles much like those of the modern business corporation, does exist. That model is the municipal corporation. This often forgotten organizational form may assist in some contexts in shedding light upon the appropriate treatment of its sibling, the large, publicly held, politically powerful modern corporation.

Two major areas are to be examined. One involves the issue of when the corporate organization is responsible for actions of its agents. Current law is confusing because established notions of responsibility developed in the law of agency are not consistently applied in criminal contexts. The second area involves the availability of constitutional criminal protections for the corporate entity. Current law fails consistently to take account of the peculiar characteristics of the large publicly held corporation in determining the applicability of bill of rights protection. The following analysis is not designed to analyze the current state of the law. Rather, it is directed at formulating a consistent framework for what the law should be in these areas, while suggesting that sufficient foundations exist in current case law to permit judicial implementation of the proposed model.

II. Some Preliminary Considerations

A. *The First Layer of Confusion—The Two Faces of the Corporation*

It is well understood that the large, powerful publicly held corporation poses substantially different problems of deviant behavior than does the tax-motivated incorporated small business partnership. Dean Blumberg has described the phenomenon effectively:

In addition to its predominant economic role in providing goods, services, and employment, the megacorporation has developed into a social and political organization of profound significance. In fact, it has become a basic social institution and a center of power resembling governmental structures.⁷

However, courts have often failed to take account of the special organizational attributes of the large publicly held corporation. Broad holdings, shaped upon the model of the individual entrepreneur, are applied without distinction to the impersonal large corporation as well.⁸ Two examples in the area of criminal constitutional protection illustrate the point.

In *Marshall v. Barlow's, Inc.*,⁹ the Supreme Court applied the fourth amendment's provisions to prohibit a warrantless inspection under the Occupational Safety and Health Act of the business premises of an apparently

⁷ P.I. BLUMBERG, *THE MEGACORPORATIONS IN AMERICAN SOCIETY: THE SCOPE OF CORPORATE POWER* 1 (1975).

⁸ This stems, in part, from the relative scarcity of prosecutions directed at publicly held companies. See Taubman, *U.S. Attack on Corporate Crime Yields Handful of Cases in 2 Years*, N.Y. Times, July 15, 1979, at 1, col. 5.

⁹ 436 U.S. 307 (1978).

small, local electrical, plumbing and air-conditioning contractor.¹⁰ In so holding the Court emphasized the historical origins of the fourth amendment:

The general warrant was a recurring point of contention in the colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists.¹¹

Whatever the concerns of the small colonial American businessman, his shop was a far cry from the large national and multinational corporation of the 1970's. However, two weeks after its decision in *Marshall v. Barlow's, Inc.*, the Supreme Court remanded for further consideration in light of *Barlow's* and of another opinion involving individual defendants,¹² the case of *Consolidation Coal Co. v. U.S.*¹³ Consolidation Coal Co. operated fifty-five mines in seven states and had an interest in a Canadian mine. Moreover, it was a wholly owned subsidiary of Continental Oil Co., a New York Stock Exchange listed company operating in thirty countries.¹⁴ Yet the Court gave no suggestion that Consolidation should be treated any differently as to searches of its premises in connection with alleged violations of the Federal Coal Mine Health and Safety Act of 1969 than if it were a natural person or small business.

The same refusal to take separate account of the large publicly held corporation can be seen in the Second Circuit's opinion in *United States v. Security National Bank*.¹⁵ Holding that the double jeopardy clause of the fifth amendment applies to corporations, the court remarked:

The small entrepreneur is not spared the embarrassment, expense, anxiety and insecurity resulting from repeated trials on criminal charges, simply because he has incorporated his modest business. That a large corporation may have more substantial financial resources is no more valid ground for depriving it of its constitutional rights than is possession of greater wealth by an individual.¹⁶

Rationales such as this fail to recognize the qualitative difference between a powerful economic-political corporate organization on the one hand and the small business on the other, where by contrast with the large corporation, the personality of its principals is retained.

Until courts recognize in the area of criminal law, the qualitative differences between the large, modern publicly held corporation and small business, analysis will be impeded.

10 Appellee's brief describes Barlow's, Inc., an Idaho corporation located in Pocatello, which for approximately seventeen years operated in the Pocatello vicinity. No aspect of the business was licensed by any federal agency. Brief for Appellee at 1, *Marshall v. Barlow's, Inc.*, *Id.*

11 436 U.S. at 311 (footnotes omitted).

12 *Michigan v. Tyler*, 436 U.S. 499 (1978).

13 436 U.S. 942 (1978).

14 [1978] STANDARD AND POOR'S CORPORATE RECORDS 5665 (figures as of December 31, 1977).

15 546 F.2d 492 (2d Cir. 1976).

16 *Id.* at 494.

B. *The Wages of Permissiveness: Frustrated Development of Internal Controls*

A primary theme of students of the large modern corporation is that of responsibility. The twin questions of the legitimacy and the accountability of those who control the corporation have been the center of raging debate.¹⁷ Despite massive efforts by the Securities and Exchange Commission through its proxy rules, effective shareholder control in large corporations remains elusive.¹⁸ Management self-perpetuation is the norm.

An examination of the related municipal corporation reveals some surprising contrasts. Cities of one million or more inhabitants are not governed by uncontrolled managers. Effective political systems operate in these municipal corporations. The very political power which seems most difficult to check in the modern business corporation is harnessed in the municipal corporation. Indeed, in its origin, the corporation was viewed as primarily a political organization. At the end of the eighteenth century, Stuart Kyd's classic British *Treatise on the Law of Corporations* made no significant distinction between municipal corporations created for the purpose of local government, and business corporations established for purposes of trade, manufacture or commerce.¹⁹

The development of effective political control in the municipal corporation can probably be traced to three differences between the contemporary government of municipal and business corporations. First, the municipal corporation adopted, and became constitutionally required to abide by, a one-person one-vote principle. Second, leaving the municipal constituency has often been more difficult than fleeing from the constituency of the business corporation. Third, the federal courts were enabled to exercise supervision over unreasonable municipal action by way of the fourteenth amendment and legislation enacted pursuant to it. The courts refused, by and large, to subject business corporations to the same constitutional constraints. As the following examination will demonstrate, in each of these situations parallel controls upon municipal and business corporations failed to develop. In each case, basic laissez-faire economic notions resulted in a governmental permissiveness which frustrated the development of effective internal political control in the business corporation.

The current voting pattern in business corporations of one-share one-vote did not become universally established until well into the 19th century. Prior to this, a one-person one-vote rule, or a modified version at least limiting the power of large shareholders, was prevalent.²⁰ The movement to one-share one-vote appears to have been motivated by pressure from the large shareholders²¹ and by the ease with which voting restrictions could be evaded through the transfer of shares to nominees.²² In the municipal corporation, similar

17 See, e.g., THE CORPORATION IN MODERN SOCIETY (E.S. Mason ed. 1960).

18 See, e.g., A.F. CONARD, CORPORATIONS IN PERSPECTIVE §§ 204, 206 (1976).

19 I.S. KYD, TREATISE ON THE LAW OF CORPORATIONS 28-29 (Garland Ser. 1978) (n.p. 1793). See also Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937).

20 See Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 CORNELL L. REV. 1, 3-11 (1970).

21 2 J. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATION 324 (1917).

22 Williston, *History of the Law of Business Corporations Before 1800* (pt. 2), 2 HARV. L. REV. 149, 156-58 (1888).

pressures have been increasingly resisted. Limitation of voting rights to those who own substantial property, once prevalent, has been universally rejected.²³ Similarly, attempts to increase political voting power through the use of unqualified nominees has been vigorously prosecuted as vote buying and election fraud.²⁴

The conflict between the municipal and business corporation model of voting is illustrated by the case of *Salyer Land Co. v. Tulare Water District*.²⁵ The California Water Storage District Act authorized formation of water storage districts as governmental units to plan and execute water projects. In 1969, the board of the Tulare Lake Basin Water Storage District voted six-four to table a motion that would have required diversion of water which ultimately flooded the land and homes of residents. The vote was motivated by the interest of the dominant landowner in the district in avoiding interference that would have been caused to the following season's crop production by diversion.²⁶ As the California statute required, the board was elected pursuant to a business corporation model—one vote for each \$100 of land owned.²⁷ At issue was whether the governing body of the district must instead be elected on a one-person one-vote basis by its fifty-nine adult residents.²⁸ The majority opinion of the United States Supreme Court upheld against an equal protection clause challenge the business corporation model, with majority board control thus vested in one corporate landowner.²⁹

Not only does the municipality have a greater dispersion of political responsibility, but the municipality also poses greater barriers to departure from the relevant voting constituency. Professor Conard describes the degree of effective corporate shareholder control on the basis of "the switch-or-fight balance,"³⁰ *i.e.*, the easier it is to sell out one's stock holdings, the less one will fight through internal political mechanisms. It is, of course, not impossible to leave the municipal constituency, *e.g.*, by moving outside its political boundaries. The growth of attractive suburbs gives witness to this possibility. In the case of the large, publicly held business corporation, however, creating the ability to switch, *i.e.*, creating a strong liquid securities market which encourages trading has been a central feature of federal policy:

A major goal and ideal of the securities markets and the securities industry has been the creation of a strong central market system for securities of national importance, in which all buying and selling interest in these securities could participate and be represented under a competitive regime.³¹

This has been reflected in legislation creating the framework for a national

²³ See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 684-86 (1966) (Harlan, J., dissenting).

²⁴ See, *e.g.*, 29 C.J.S. *Elections* §§ 323-26 (1965).

²⁵ 410 U.S. 719 (1973).

²⁶ *Id.* at 737-38 (Douglas, J., dissenting).

²⁷ *Id.* at 724 n.6.

²⁸ See *id.* at 723.

²⁹ *Id.* at 735, 742 (Douglas, J., dissenting).

³⁰ A.F. CONARD, *supra* note 18, at § 203.

³¹ Letter from Richard B. Smith (SEC Commissioner) to the President of the Senate and the Speaker of the House of Representatives (March 10, 1971), reprinted in INSTITUTIONAL INVESTOR STUDY REPORT OF THE SEC AT XXIV (Summary Vol., 1971).

market system. Congressional findings embodied in statute establish "economically efficient execution of securities transactions" as a major goal.³²

Finally, the failure of the courts to subject corporate action generally to the constraints of the fourteenth amendment has often been commented upon.³³ The fact alone of incorporation by the state does not sufficiently implicate the state in activities of a business to trigger due process and equal protection limitation upon corporate action.³⁴ Municipal corporations, however, are viewed as state instrumentalities subject to fourteenth amendment constraints. The presence of a federal judicial forum in which to test the reasonableness of actions of municipal officials³⁵ has encouraged the development of internal controls in the municipality which have not developed in the business corporation. Beyond this, the failure to characterize the action of powerful corporations as state action for fourteenth amendment purposes reinforces the equation of such corporations with natural persons—a development which, as discussed below, has led to confusion in designing methods for restraining corporate deviance.

III. Applying Criminal Sanctions to the Corporation

A. *The Problem*

The lack of perceived internal checks on deviant behavior by business corporations makes the corporate entity a ready target for the imposition of external constraints. Increasingly, the external constraint of first choice is the criminal law. Public outcries against governmental wrongdoing invariably focus upon sanctioning of governmental *officials*.³⁶ Public outcries against business excesses generally focus in an indiscriminating manner on both corporate officials and the corporate entity as appropriate objects of punishment.³⁷

Among the earliest examples of criminal prosecution of corporations are indictments of municipalities,³⁸ and criminal sanctions continue to be an available alternative for municipal deviance, at least where the relevant criminal statute does not require intent.³⁹ However, the general public understands that municipalities and other governmental entities are organizations. The organizational nature of the business corporation, however, has become subsumed in its "personality." In the words, for example, of Judge Coffin:

It is true that corporations do not have human emotions, but that does not mean that they do not "suffer" during criminal trials in the sense of experiencing harm to a legitimate, protectible interest A corporation that falls out of favor with society will suffer. Its suffering may be of a different

32 Securities Exchange Act of 1934 § 11A(a)(1)(c)(i), 15 U.S.C. § 78k-1(a)(1)(c)(i) (1976).

33 *E.g.*, A. MILLER, *supra* note 6, at 182-87.

34 *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

35 *See, e.g.*, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

36 *See, e.g.*, Clinard & Quinney, *Crime by Government*, cited by M.D. ERMANN & R.J. LUNDMAN, *CORPORATE AND GOVERNMENTAL DEVIANCE* 137 (1978).

37 *See, e.g.*, Geis, *Deterring Corporate Crime*, cited by R. NADER & M. GREEN, *CORPORATE POWER IN AMERICA* 182 (1973).

38 *See* Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 85-96 (1976).

39 2 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 16.65 (1979). *See generally* Barnett, *The Criminal Liability of American Municipal Corporations*, 17 ORE. L. REV. 289 (1938).

character than an individual's, but that does not make those sufferings any the less real or hazardous Corporations can be made very insecure by prolonged periods of bad publicity.⁴⁰

With corporate personhood come the twin personal attributes of free will and moral responsibility.⁴¹ Much of the concern about corporate criminality turns upon how to conceptualize these corporate attributes. When does a corporation have the appropriate criminal intent to justify its being punished? What protections, beyond those available in civil actions, should be applicable to the process in which the corporation is branded an outlaw? Much of the desire to apply criminal rather than civil, sanctions to the corporation stems from the moral judgment implicit in conviction.

A phenomenon often noted is the lack of social stigma attached to criminal conviction of individual corporate officers for white collar crimes.⁴² This perception may be related to the notion that the corporate entity can be possessed of moral fault. The individual then becomes the "innocent victim" of an evil system, rather than the responsible moral cause.⁴³ Seldom does the perception of organizational guilt coupled with individual innocence occur in the case of municipal wrongdoing. Occasionally, however, as in the case of war crimes, the notion is seen in the context of governmental organizations.⁴⁴ It may not be coincidental that it is in time of war that the state is most nearly perceived as the "group-person."⁴⁵

B. *Clearing Some More Underbrush—The Overlapping Tests of Authority, Knowledge and Intent*

Corporate criminal liability developed originally only as to crimes for which no mens rea was required.⁴⁶ Criminal liability of municipal corporations is still limited to these situations.⁴⁷ In such cases of strict liability, despite the personification of the corporation, an additional evidentiary element usually not present when the defendant is a natural person is introduced. It must be determined whether the particular action involved was performed "on behalf of" the corporate entity. If it was, then criminal liability may result.⁴⁸

The law of organizations, *i.e.*, agency law, has a well-developed structure for determining whether an act was "on behalf of" an organization. When delictual conduct is at issue, the relevant test is whether the actor was in the scope of his employment. The *Restatement of Agency (Second)* describes the test as follows:

40 *United States v. Hospital Monteflores, Inc.*, 575 F.2d 332, 335 (1st Cir. 1978).

41 *See Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1241-43 (1979).

42 *See, e.g.*, Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, cited by G. GEIS & R.F. MEIER, *WHITE-COLLAR CRIME* 296, 304-08 (rev. ed. 1977).

43 *But see Developments in the Law, supra* note 41, at 1369-75 (proposing a movement primarily toward civil fines to deter corporate illegality).

44 *See, e.g.*, J. GOLDSTEIN, B. MARSHALL & J. SCHWARTZ, *THE MY LAI MASSACRE AND ITS COVER-UP* 7-10 (1976).

45 *See* A. MILLER, *supra* note 33, at 154-61.

46 *See* Elkins, *supra* note 38, at 85-96.

47 *See* 17 E. MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS* § 49.88 (3d ed. 1968); 2 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 16.65 (1979).

48 *See* *New York Central R.R. v. United States*, 212 U.S. 481 (1909).

Conduct of a servant is within the scope of employment if but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master; and, (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.⁴⁹

Thus in *Egan v. United States*,⁵⁰ Union Electric Co. was convicted of violating provisions of the Public Utility Holding Company Act prohibiting certain political contributions because its officers acted within the scope of their employment in making such contributions. In cases such as this where the relevant statute requires no mens rea, the question of imputing knowledge or intent to the corporation is irrelevant. When, however, a corporation is charged with a crime involving mens rea, additional complications are introduced. Not only must the actions be within the actor's scope of employment, but also the relevant state of mind must be found as to the corporate defendant. It is at this point that analytical obscurity has created massive confusion. One source of the confusion has resulted from the previously noted personification of the corporate entity. Instead of exploring the issue of when particular information or motivation is imputed to an impersonal organization, one approach sets upon the perplexing physiological chore of locating the corporation's "mind."

Those who have set out to locate the corporation's mind have had little difficulty in finding it: "Thus we can call all those officers, whether elected or appointed, who direct, supervise and manage the corporation within its business sphere and policy-wise, the 'inner circle.' They are the *mens*, the mind or brain, of the corporation."⁵¹ Those cases which focus upon the position in the corporate hierarchy of the actor for purposes of determining whether the corporation possessed the appropriate state of mind adopt this view of the corporation. The leading American case taking that position, *People v. Canadian Fur Trappers Corp.*,⁵² has not been widely followed. However, as discussed below, the Model Penal Code and states which have copied its provisions attempt to resurrect this approach.

Most American courts, unwilling to limit corporate liability to situations involving high management officials, seek ways of imputing the mens rea of a broader group of employees to the corporation. In so doing these courts often fail to make crucial distinctions relating to state of mind requirements in the criminal law. In particular, they fail to distinguish between the requirement of intent and the requirement of knowledge. The distinction may be largely academic in the context of natural persons, since as an evidentiary matter, awareness of the nature of one's conduct and its likely impact often implies the intent to engage in the conduct and achieve its likely results.⁵³ However, as a question of organizational law, the distinction is important.

49 RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

50 137 F.2d 369 (8th Cir. 1943).

51 Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 41 (1957). See also L. LEIGH, THE CRIMINAL LIABILITY OF CORPORATION IN ENGLISH LAW 45, 91-112 (1969).

52 248 N.Y. 159, 161 N.E. 455, 226 N.Y.S. 876 (1928).

53 See W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 202-03 (1972). For an extensive discussion of the imputation of criminal intent to the corporate entity, see S. Miller, *Corporate Criminal Liability: A Principle Extended to Its Limits*, 38 FED. B.J. 49, 52-61 (1979).

The law of agency has worked out an elaborate system to determine when knowledge should be imputed to a principal. In general, the knowledge of an agent who is acting in a manner which will bind his principal is imputed to the principal.⁵⁴ This results from the expectation that normally an agent will, or should, communicate relevant information to his employer. However, where that expectation is not justified because the agent is acting adversely to the principal and entirely for his own or another person's purposes, generally knowledge will not be imputed to the principal.⁵⁵ The tests for imputation of knowledge in some ways resemble, and are sometimes confused with, the tests for whether an employee is acting on behalf of the employer at all.

*Standard Oil Company of Texas v. United States*⁵⁶ is an example of an adverse agent case. Standard and its affiliate, Pasotex, were charged with violating the Connally Hot Oil Act. The Act prohibited the interstate shipment of oil produced in excess of amounts permitted by state law. Criminal penalties were imposed for "knowingly" violating the Act. Employees of the defendants were paid in cash or merchandise by Thompson, the owner of certain oil wells, to falsify papers indicating the source of oil purchased and transported by the corporate defendants. Some of the falsifications merely reallocated oil among different wells owned by Thompson. Others resulted in Standard purchasing oil from Thompson that in fact it did not receive from the Thompson wells. In reversing the conviction of Standard and Pasotex, the adverse interest of the employees was critical to the court's refusal to impute knowledge to their principals, the corporate defendants.

The adverse agent exception to the rule imputing knowledge to the principal is limited. Except in unusual circumstances,⁵⁷ a principal may not deny the knowledge of an adverse agent while retaining benefits from the agent's act. Thus benefit to the corporation may be sufficient to impute knowledge to the corporate defendant even where an agent is acting adversely.⁵⁸

However, cases which have debated the question of benefit to the corporation have invariably been directed to a very different issue. "Benefit" has been an issue because of claims that the violation was not in fact committed on behalf of the corporation, that the agent was not in fact in the scope of his employment.⁵⁹ For this reason, the court in *Standard Oil* was correct in distinguishing *Old Monastery Co. v. United States*,⁶⁰ which was concerned with whether the corporation's president was acting personally or on behalf of the corporation in conspiring to violate price regulations.⁶¹

Some substantive crimes require not merely knowledge, but willfulness or intent on the part of the defendant. In such cases the question is one of the defendant's conscious objective or desire. Determining organizational intent

54 RESTATEMENT (SECOND) OF AGENCY §§ 272, 275, 283 (1958). *But see id.* § 273.

55 *Id.* § 279.

56 307 F.2d 120 (5th Cir. 1962).

57 *E.g.*, RESTATEMENT (SECOND) OF AGENCY § 282(2)(c) (1958), where the principal has changed his position.

58 *Id.* § 282.

59 *Cf. supra* note 38, at 110-12 (the contrary interpretation of these cases in *Elkins*).

60 147 F.2d 905 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945).

61 Numerous other cases raise the same issue of whether actions were on behalf of a corporation. *See United States v. Demauro*, 581 F.2d 50 (2d Cir. 1978).

may pose different problems than determining organizational knowledge. While in the absence of evidence to the contrary, the intent of the employee within the scope of his employment may logically be imputed to the corporation, such corporate intent ought not to be found when a good faith company policy conflicts with the suggested intent.⁶² Where the policymaking body or a high official of a corporation creates in good faith a group of procedures that could reasonably be expected to implement a clearly articulated policy, and these procedures are consistently carried out, it cannot reasonably be said that the corporate entity consciously desires or intends the proscribed action or result.

There are, of course, difficult problems of proof. An elaborate policy on paper can be implemented ineffectively or in bad faith.⁶³ A strong directive can be read to employees with a "wink of the eye."⁶⁴ Inaction can signal corporate acceptance of contrary action. But proof problems ought not to disguise the substantive issue of the availability of the defense.

Thus in *Holland Furnace Co. v. United States*,⁶⁵ the corporation was acquitted of willful violations of orders of the War Production Board because of consistent corporate attempts to insure compliance with such orders. While commentators often state that *Holland Furnace* has been rejected by the courts,⁶⁶ an examination of some of the relevant cases suggests that in those cases the corporate policies against violation were not bona fide ones.⁶⁷ For example, in *United States v. Armour & Co.*, the court commented upon the widespread disregard of corporate instructions,⁶⁸ suggesting that the policy was not adequately enforced by the corporation.

C. *The Attempts at Codification*

There have been two major attempts to codify the rules relating to corporate criminal liability—the Model Penal Code and proposed revisions of the Federal Criminal Code. Each of the proposals perpetuates, to a greater or lesser degree, existing analytical confusion. None of the proposals distinguish between small and large corporations.⁶⁹ All of the proposals fail to make clear distinctions between tests relating to whether persons are acting on behalf of the corporation and those relating to imputation of mens rea to the corporation.

62 See generally Note, *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 GEO. L. REV. 547 (1962); Elkins, *supra* note 38, at 119-21; Miller, *supra* note 53, at 61-68.

63 See, e.g., *United States v. Hilton Hotels, Corp.*, 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." *Id.* at 1007.

64 See D. VAGTS, *BASIC CORPORATION LAW* 306-07 (2d ed. 1979); Miller, *supra* note 53, at 66.

65 158 F.2d 2 (6th Cir. 1946). Compare, *John Gund Brewing Co. v. United States*, 204 F. 17 (8th Cir.), modified, 206 F. 386 (1913).

66 See Note, *supra* note 62, at 556; Elkins, *supra* note 38, at 119-21.

67 See I WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 165 (1970) [hereinafter cited as I WORKING PAPERS].

68 168 F.2d 342, 344 (3d Cir. 1948).

69 The Staff Memorandum of the National Commission of Reform of Federal Criminal Laws states in part: "In all cases in which ownership and operation are divided, and the operation is performed by managers and employees who are not identical with the owners, the problems with respect to where to place responsibility are the same." I WORKING PAPERS, *supra* note 67, at 182 n.58.

The Criminal Code Reform Bill of 1978⁷⁰ most nearly codifies the current judicially developed doctrines. Section 402 provides:

Except as otherwise expressly provided, an organization is criminally liable for an offense if conduct constituting the offense:

- (a) is conduct of the agent, and such conduct:
 - (1) occurs in the performance of matters within the scope of the agent's employment, or within the scope of the agent's actual, implied, or apparent authority, and is intended to benefit the organization; or
 - (2) is thereafter ratified or adopted by the organization; or
- (b) involves a failure by the organization or its agent to discharge a specific duty of conduct imposed on the organization by law.

This formulation creates confusion in several respects. It requires an agent's action to be *both* in the scope of employment *and* intended to benefit the corporation. The Committee Report accompanying the bill explains this by reference to the case of *Old Monastery Co. v. United States*,⁷¹ and states:

In general, the principle that may be distilled from the cases is that the organization will be held criminally liable if it was the intended beneficiary of the act, even though the act was misguided and the organization does not benefit therefrom.⁷²

Old Monastery, however, was concerned with whether acts of the corporation's president were carried out on behalf of the corporation. In response to the contention that the corporation did not benefit from the acts, the court stated that "benefit, at best, is an evidential, not an operative fact."⁷³ Section 402 has made it an operative fact.

Intent to benefit the corporation is important as an operative fact on the issue of whether an agent's knowledge is to be imputed to the corporation. Where *mens rea* is necessary, an agent acting in the scope of employment but without intent to benefit the corporation should not have his knowledge imputed to the corporation. Section 402(a), however, fails to distinguish between issues of agency and issues of corporate intent.

Similar confusion is evidenced by the provisions of section 402(b). It is unclear when a person not in the scope of his employment would nevertheless be covered by section 402(b) in cases involving affirmative acts. While the section might be seen as applying only to cases of nonfeasance, this interpretation

⁷⁰ S. 1722, 96th Cong., 1st Sess. § 111 (1979). See *Developments in the Law*, *supra* note 41, at 1247-51. S. 1437 passed in the Senate but failed to pass in the House during the 95th Congress. A modified version has been introduced in the 96th Congress as S. 1722 and S. 1723 (96th Cong., 1st Sess., 1979). Section 402 of S. 1722 is identical to § 402 of the earlier S. 1437.

⁷¹ 147 F.2d 905 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945).

⁷² SENATE COMMITTEE ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1977, S. REP. NO. 95-605 (Pt. 1), 95th Cong., 1st Sess. 76 (1977).

⁷³ 147 F.2d. at 908.

is problematic. Section 111 defines "conduct," a term used in section 402(a), as including "any omission." In addition, the Senate Report on section 402(b) indicates that the provision may apply to failure to discharge a duty "to refrain from taking certain action, as well as to act affirmatively."⁷⁴ Alternatively, section 402(b) might be seen as applying to affirmative acts which constitute offenses even when no mens rea is present. However, the Senate Report states, "Often, *but not always*, such a duty will be associated with a statute imposing strict criminal liability."⁷⁵ Three examples are given in the Senate Report⁷⁶—violations of food and drug laws,⁷⁷ violations of price control regulations,⁷⁸ and compliance with safety regulations in connection with highly dangerous work.⁷⁹ *Armour & Co.*, the price control case cited, involved a violation requiring willfulness. Section 402(b) might be seen as imposing corporate liability in such a case even if the corporate agent did not have mens rea. However, this seems inconsistent with section 404(b) which bars prosecution of the corporation where all its responsible agents have been acquitted because of insufficient evidence not occasioned by a suppression order.

Both the Model Penal Code⁸⁰ and early versions of proposals for Federal Criminal Code reform restrict corporate criminal liability more severely than do most current judicially developed rules. In result, these provisions resemble the position that views high management as the corporation's "mind" for purposes of formulating criminal intent. However, the motivation for such provisions is in part very different. It turns upon an assessment of the effectiveness of sanctions against the corporation as a deterrent. Anthropomorphization was specifically rejected by drafters of the Federal Criminal Code proposals:

[A] corporation is nothing more than a "convenient legal device." . . . It is possible to "personify" the corporate entity in order to "rationalize" the application to it of the criminal law, but to do so does not give it the capability of acting or of being deterred or coerced which it lacks in fact. Many arguments have been advanced in support of the corporate fine but they neither depend upon nor require acceptance of the fiction that a corporation is capable of acting. There would appear to be no substantial reason for perpetuating the fiction and allowing it to find its way into a new Federal Criminal Code.⁸¹

By accepting the possibility of imputing mens rea to the corporate entity, but focusing upon the efficacy of sanctions, an anomalous result is reached. The corporate entity is least criminally responsible for the most serious offenses committed on its behalf. An examination of the complex structure of the provisions of the Model Penal Code and the proposed new Federal Criminal Code

74 *Supra* note 72, at 78 n.81.

75 *Id.* at 78 n.80 (emphasis added).

76 *Id.* at 78 n.81.

77 *Citing* *United States v. Parfait Powder Puff Co.*, 163 F.2d 1008 (7th Cir. 1947), *cert. denied*, 336 U.S. 851 (1948).

78 *Citing* *United States v. Armour & Co.*, 168 F.2d 342 (3d Cir. 1948).

79 *Citing* *Thorne v. United States*, 479 F.2d 804 (9th Cir. 1973).

80 *See Developments in the Law*, *supra* note 41, at 1251-53. The Model Penal Code approach has been adopted in whole or part by some states, *see e.g.*, ILL. ANN. STAT. ch. 38, § 5-4 (Smith-Hurd 1972); N.Y. PENAL LAW § 20.20 (McKinney 1975); TEXAS PENAL CODE ANN. tit. 2, § 7.22 (Vernon 1974).

81 1 WORKING PAPERS, *supra* note 67, at 184-85. The Staff Report imputes an anthropomorphic model to the drafter of the Model Penal Code. *Id.* at 185 n.67. As is suggested in the text, *see* text accompanying note 98 *infra*, elements of this do appear in the Model Penal Code.

as finally reported by the National Commission on Reform of the Federal Criminal Laws illustrates the approach. Both codifications impose criminal liability on the corporation for offenses which require no mens rea whenever committed by an agent acting within the scope of his employment.⁸² The Model Penal Code, however, complicates the issue because offenses involving absolute liability are treated as part of a larger group of offenses as to which "a legislative purpose to impose liability on corporations plainly appears."⁸³ For all offenses in that latter category, the Code requires that a person's conduct be "in behalf of the corporation" as well as "in the scope of his office employment." This requirement that the corporation receive a benefit is explained as a way "to avoid the problem presented in *Moore v. Bressler Ltd.* [1944] 2 A.E.R. 515, in which the corporation was held liable for criminal conduct committed by officers within the scope of their duties but for the purpose of concealing a fraud perpetrated by the same officers against the corporation."⁸⁴ *Moore*, however, was a case in which criminal intent was required in order to violate the relevant tax law. The court there incorrectly imputed to the corporation the mens rea of an adverse agent. Had no mens rea been required, if the actions were in fact in the scope of employment, corporate liability would have been appropriate.

Both codifications impose criminal liability on corporations for omissions to discharge specific duties imposed by law.⁸⁵ This is the thrust in part of section 402(b) discussed above. The provision as it relates to omissions is explained by the drafters of the federal proposals as follows: "Paragraph (b) is the easy case: where a duty to act is expressly imposed on the corporation, no inquiry into its internal distribution of responsibility is called for."⁸⁶ The result is, of course, correct as to any question of whether the omission was on behalf of the corporation. The added question of when mens rea is to be imputed to the corporation in omission cases remains unanswered. Where an omission is criminal only if accompanied by knowledge or intent, as suggested above for affirmative acts, it is questionable whether a corporation should be liable if none of its agents possessed the requisite state of mind.⁸⁷

When the issue is corporate liability for other offenses, an additional distinction is made by these codifications based upon the seriousness of the offense. In both codes, minor offenses committed by any agent in the scope of employment are chargeable to the corporation. The proposed Federal Code applies this rule to any misdemeanor.⁸⁸ The Model Penal Code applies it to any "violation,"⁸⁹ a category that is defined as a noncriminal infraction of law.⁹⁰

82 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 402(1)(d) (1971) [hereinafter cited as FINAL REPORT]; MODEL PENAL CODE §§ 2.07(1)(a), 2.07(2) (Proposed Official Draft, 1962).

83 MODEL PENAL CODE § 2.07(1)(a) (Proposed Official Draft, 1962). Section 2.07(2) creates a presumption that absolute liability provisions come within this description of offenses.

84 MODEL PENAL CODE § 2.07, Comment at 147 (Tent. Draft No. 4, 1955).

85 FINAL REPORT, *supra* note 82, at § 402(1)(b); MODEL PENAL CODE § 2.07(1)(b) (Proposed Official Draft, 1962).

86 I WORKING PAPERS, *supra* note 67, at 164.

87 *But compare* FINAL REPORT, *supra* note 82, at § 402(2).

88 FINAL REPORT, *supra* note 82, at § 402(1)(c).

89 MODEL PENAL CODE § 2.07(1)(a) (Proposed Official Draft, 1962).

90 "Violation" is defined in *id.* § 1.04(5).

The rationale here is a complex one. Corporate liability for minor offenses seems based upon the judgment that, in this area, limiting prosecutions to individual agents would not sufficiently deter the prohibited conduct. The drafters of the Model Penal Code suggest:

[T]here 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, especially where the penalties threatened are moderate and where the offense does not involve behavior condemned as highly immoral by the individual's associates. This tendency may be particularly strong where the individual knows that his guilt may be difficult to prove or where a favorable reaction to his position by a jury may be anticipated even where proof of guilt is strong.⁹¹

For more serious offenses, the drafters of these codifications began with the notion that direct sanctions placed upon the guilty individual actors would deter illegal conduct. In their view extending liability to the corporate entity creates two negative effects, sometimes without achieving greater deterrence. First, it creates the possibility that prosecutors or juries will use corporate liability as an excuse to fail to prosecute or to acquit guilty individuals.⁹² Second, the sanction imposed upon the corporate entity, a monetary fine, ultimately impacts shareholders who were personally innocent of criminal conduct.⁹³

On the other hand, several reasons are identified as remaining to impose corporate liability for serious corporate crime by the drafters of these codes. First, in some cases, the threat of adverse publicity for the corporation may be the most effective deterrent. This is especially true where the corporation is heavily dependent upon public trust and confidence in its products, services, or management.⁹⁴ Second, corporate fines are a method of preventing unjust enrichment of the corporation.⁹⁵ Alternative methods are, however, available for this purpose.⁹⁶ Finally, at levels of high management, shareholders may be able to bring pressure to bear to prevent illegal corporate activity.⁹⁷

These considerations have led the drafters of these codes to limit corporate liability to situations involving high corporate management. The rationale for drawing the line at this point, as articulated by the drafters of the Model Penal Code, seems to involve an anthropomorphic model in order to assess moral responsibility:

[C]orporate liability is confined to situations in which the criminal conduct is performed or participated in by the board of directors or by corporate officers

91 MODEL PENAL CODE § 2.07, Comment at 148-49 (Tent. Draft No. 4, 1955). For similar statements in connection with the Federal Criminal Code proposals, see I WORKING PAPERS, *supra* note 67, at 190, 200-01.

92 MODEL PENAL CODE § 2.07, Comment at 149-50 (Tent. Draft No. 4, 1955); I WORKING PAPERS, *supra* note 67, at 163, 165, 190, 197.

93 MODEL PENAL CODE § 2.07, Comment at 148 (Tent. Draft No. 4, 1955); I WORKING PAPERS, *supra* note 67, at 163, 184, 189.

94 I WORKING PAPERS, *supra* note 67, at 164, 166, 191-92, 197. See also Elkins, *supra* note 38, at 77-85.

95 MODEL PENAL CODE § 2.07, Comment at 150 (Tent. Draft No. 4, 1955); I WORKING PAPERS, *supra* note 67, at 196.

96 See I WORKING PAPERS, *supra* note 67, at 197-98, 203-06.

97 MODEL PENAL CODE § 2.07, Comment at 151 (Tent. Draft No. 4, 1955). Compare I WORKING PAPERS, *supra* note 67, at 189-90.

and agents sufficiently high in the hierarchy to make it reasonable to assume that their acts are in some substantial sense reflective of the policy of the corporate body.⁹⁸

Thus, if management is not the corporation's "mind," it is at least its conscience.

The formulations of provisions relating to participation by high management officials differ. The Model Penal Code applies its provisions to offenses "authorized, requested, commanded, performed or recklessly tolerated" by management.⁹⁹ The Federal Criminal Code proposal contains alternative language. The minority alternative is similar to that of the Model Penal Code, and adds conduct "ratified" by management to the coverage. The majority draft excludes liability for conduct "recklessly tolerated" by management, and imposes liability only for conduct "authorized, requested, or commanded" by management.¹⁰⁰ In addition, the two codifications differ in their definitions of high management officials.¹⁰¹

As discussed above, actions by agents in contravention of a bona fide, enforced corporate policy ought to negate an imputation of willfulness to the corporation. The Model Penal Code has provided a defense in certain cases "if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."¹⁰² This defense applies only to commissions of noncriminal "violations," and to offenses as to which "a legislative purpose to impose liability on corporations plainly appears" if such offense is not one as to which absolute liability had been imposed. Since under the Model Penal Code other offenses requiring mens rea are not chargeable to the corporation absent involvement of high management officials, this defense need not be broader.¹⁰³

It is particularly interesting to note that all attempts to codify the principles of corporate criminal liability exclude municipal corporations from their coverage.¹⁰⁴ The Model Penal Code drafters state merely that "corporate liability is generally pointless in such cases."¹⁰⁵ The drafters of the Federal pro-

98 MODEL PENAL CODE § 2.07, Comment at 151 (Tent. Draft No. 4, 1955).

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

100 FINAL REPORT, *supra* note 82, at § 402(1)(a).

101 The Model Penal Code includes the board of directors and officers or agents having duties of such responsibility that their actions may fairly be assumed to represent the policy of the corporation. MODEL PENAL CODE §§ 2.07(1)(c), 2.07(4)(c) (Proposed Official Draft, 1962).

The Federal proposal covers conduct of directors, executive officers or other agents in positions of comparable authority with respect to the formulation of corporate policy or supervision in a managerial capacity of subordinate employees, and any other person who controls the corporation or is responsibly involved in forming its policy. FINAL REPORT, *supra* note 82, at § 402(1)(a).

Both codifications also impose corporate liability where a statute specifies it on account of the conduct of other persons. *Id.* at § 402(1)(a)(iv); MODEL PENAL CODE § 2.07(1)(a) (Proposed Official Draft, 1962).

102 MODEL PENAL CODE § 2.07(5) (Proposed Official Draft, 1962).

103 The Staff Memorandum on the Federal Criminal Code proposals suggested inserting two defenses: "exceptional occurrence without fault in supervision or management" and a defense that "the responsible individuals acted contrary to corporate policy and are convicted." I WORKING PAPERS, *supra* note 67, at 165. See also *Developments in the Law*, *supra* note 41, at 1257-58.

104 See S. 1722, 96th Cong., 1st Sess. § 111 (1979) (definition of "organization"); FINAL REPORT, *supra* note 82, at § 409(1)(a), but see Comment to § 409(1)(a), at 36; see also MODEL PENAL CODE, § 2.07(4)(a) (Proposed Official Draft, 1962).

105 Model Penal Code § 2.07, Status of Section at 38 (Proposed Official Draft, 1962).

posal describe their reasons at greater length, but with little more clarity. "The problems of diffusion of responsibility are not unlike those in the commercial corporate world. . . . On the other hand, public agencies are generally subject to closer scrutiny than are private corporations, so that the publicity sanctions of section 405(1)(a) might be less needful."¹⁰⁶ This comment may instinctively recognize the difference in internal checks in the municipal and business corporation, discussed above.

IV. The Corporation and The Bill of Rights

A. An Overview of the Problem

A critical component of American criminal jurisprudence has been the federal constitutional protections granted to criminal defendants. The extent to which these protections ought to apply to corporate criminal defendants has not been well thought out. Again the anthropomorphization of the corporation is in part responsible for obscuring well-reasoned analysis.

The application of the bill of rights provisions and the fourteenth amendment of the Constitution to corporations has been ineluctably shaped by the state action-private action dichotomy which pervades this area of the law. Business corporations are not, by the fact of incorporation, state instrumentalities limited by the fourteenth amendment.¹⁰⁷ They are conversely, as "private" actors, shielded from arbitrary governmental power by the Bill of Rights and fourteenth amendment. This simplistic pigeonholing has obscured a number of more complex questions.

The early concerns of business corporations were often ones of economic discrimination. Inspired by Charles and Mary Beard,¹⁰⁸ many historians identify the corporate victory on this issue in *Santa Clara County v. Southern Pacific Railroad*¹⁰⁹ as the decisive turning point in the protection of corporate rights.¹¹⁰ If that were so, there would be ample justification for puzzlement over Chief Justice Waite's statement in *Santa Clara County* that the Court did not wish to hear argument on the applicability of the equal protection clause of the fourteenth amendment to corporations since the justices were unanimous in agreeing that it applied.¹¹¹ However, this unanimity of opinion is not puzzling when it is recognized that the Supreme Court had taken the crucial step sixty-seven years earlier in *Trustees of Dartmouth College v. Woodward*.¹¹² The critical determination as to corporate rights was made at this earlier time through the sever-

106 I WORKING PAPERS, *supra* note 67, at 165-66. Section 405(1)(a), referred to in the excerpt, permits the court to impose as a sanction the requirement that the organization give appropriate publicity to the convictions. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE 32 (1970).

107 See text accompanying notes 33-35 *supra*.

108 2 C. BEARD & M. BEARD, RISE OF AMERICAN CIVILIZATION 111-14 (1927).

109 118 U.S. 394 (1886).

110 See Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938); Miller, *Toward "Constitutionalizing" the Corporation: A Speculative Essay*, 80 W. VA. L. REV. 187, 190-93 (1978).

111 118 U.S. at 396.

112 17 U.S. (4 Wheat.) 517 (1819). For other recognition of the importance of the decision in this regard, see Newmyer, *Justice Joseph Story's Doctrine of "Public and Private Corporation" and the Rise of the American Business Corporation*, 25 DEPAUL L. REV. 825 (1976).

ing of the doctrinal links between the business corporation and the municipal corporation.

The corporation became the object of constitutional protection when its political nature was suppressed. Chief Justice Marshall, in the *Dartmouth College* case, undertook that suppression:

If the act of incorporation be a grant of political power, . . . the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

. . . But this being does not share in the civil government of the country, unless that be the purpose for which it was created It is no more a state instrument, than a natural person exercising the same powers would be.¹¹³

Thus Marshall transformed the basic legal framework governing business corporations.¹¹⁴

In *Dartmouth College*, Marshall not only created a new path for the nongovernmental corporation by emphasizing its non-political nature, but he also personified it by obscuring its organizational aspects. In concluding his opinion, he wrote:

[T]he court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders Yet, it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves, as the law may respect. . . . But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, *the body corporate* . . . has rights which are protected by the constitution.¹¹⁵

The concept of the business corporation as an institution governed by principles different from the municipal corporation rapidly became accepted. By 1831, the need for a treatise dealing separately with the business corporation led to the publication by Angell and Ames of *Treatise on the Law of Private Corporations Aggregate*.¹¹⁶ However, it is not clear that this legal separation has led to a more effective legal system for the governance of business corporations.

In the case of municipal corporations, the law has been able to deal with both their rights and their obligations. While subjecting the political power of municipalities to constraints of the fourteenth amendment, at the same time the courts have developed doctrines to prevent some types of economic discrimination against municipalities. The courts have thus held that municipalities, as state entities, may not be subjected to discriminatory federal

113 17 U.S. (4 Wheat.) at 629-30, 636.

114 For the impact of Justice Story's *Dartmouth College* concurrence on this, see Newmyer, *supra* note 112.

115 17 U.S. (4 Wheat.) at 653-54 (emphasis added).

116 J. ANGELL & S. AMES, *TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE* (1st ed. 1831). The Preface to the First Edition of Angell and Ames specifically identifies this need as the reason for their treatise.

taxation.¹¹⁷ While the protection is similar to that granted to business corporations as to state taxes under the equal protection clause, the doctrine as to municipalities has developed as a principle of intergovernmental relations. The flexibility to pick and choose, to protect against arbitrary economic deprivations when policies specifically applicable to the corporation suggest the wisdom of the course, but to avoid cluttering corporate legal doctrine with principles designed for the particular interests of individual natural persons, was soon lost as to business corporations. Instead the business corporation was forced into awkward categories of personal constitutional jurisprudence.

While the corporation as "person" admirably served to protect against discriminatory taxation within a state, its status as "person" did not always provide other kinds of economic protection. Fear of out-of-state domination of a state's economy was seen in 1868 as sufficient to permit discriminatory licensing provisions to be applied to foreign corporations. Although corporations may be "persons," they need not be called "citizens," so the privileges and immunities clause of article IV, section 2 of the Constitution was of no avail.¹¹⁸

This epithetical jurisprudence became the basis upon which the courts were to encounter the question of the applicability of the Bill of Rights provisions to corporate defendants in criminal cases. Was the corporation as a "person" fully protected by the Bill of Rights? It became clear that the corporation would not be fully analogized to the natural person as the Supreme Court held in the early part of the twentieth century that the liberty right guaranteed by the fourteenth amendment "is the liberty of natural, not artificial, persons."¹¹⁹ That formulation, however, was of little assistance, for it was enunciated in cases in which the corporations seemed clearly concerned with vindicating economic, *i.e.*, property, rights. Thus, even in *Western Turf Association v. Greenberg* which appears initially to be a corporate assertion of the right to privacy and association, economic considerations were predominant. The corporation asserted the right to exclude a patron from its race track because the individual was publishing a racing form in violation of the exclusive right granted by the corporation to a different publisher.¹²⁰

The physical inability to imprison a corporation is, of course, the most obvious example in which the individual has a different kind of liberty interest than does the corporation. Corporations have no occasion to assert those protections, such as the eighth amendment bail provisions, which apply solely to the incarceration of individuals. Beyond this, however, the question of what Bill of Rights provisions ought to apply to the corporation becomes more complex. Two major areas can be identified in which the large publicly held corporation may be distinguished from the individual for purposes of constitutional protection. One relates to the absence historically of corporate rights to privacy and to those aspects of personal autonomy which have been subsumed under

¹¹⁷ For the basic doctrine, *see* *Massachusetts v. United States*, 435 U.S. 444 (1978); *New York v. United States*, 326 U.S. 572 (1946). As to municipalities specifically, *see* *Wilmette Park Dist. v. Campbell*, 338 U.S. 411 (1949).

¹¹⁸ *Paul v. Virginia*, 76 U.S. (8 Wall.) 168, 178-82 (1868).

¹¹⁹ *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907); *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906).

¹²⁰ 204 U.S. at 360. *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906), involved a freedom of contract assertion.

that rubric. Second, the vast disparity in power, influence and resources between the government and the criminal defendant which are a basis of a number of Bill of Rights provisions is less pronounced in the large corporate context. It is essentially these differences which the courts have been called upon to consider in determining the applicability of Bill of Rights provisions to corporations.

B. *The Irrelevance of the First Amendment Cases—A Digression*

In writing for the Supreme Court in *First National Bank of Boston v. Bellotti*, Justice Powell considered as relevant to the question of the corporate first amendment right to speak on public issues the determination that certain Bill of Rights provisions other than the first amendment had been applied to corporations.¹²¹ However, the special nature of the doctrines developed under the first amendment makes the corporate and commercial speech cases largely inappropriate precedent in dealing with rights of corporations as criminal defendants. Again, in order to clarify the appropriate issues, irrelevant approaches must be discarded.

Three kinds of cases raise the issue of the applicability of the first amendment to corporations. First are cases involving the professional press. In such cases, the power and resources of large corporations are a crucial factor, and to that extent the considerations have relevance to the problems of corporate criminal defendants. However, in these press cases, the courts are essentially being asked to choose between two legal models in a context peculiar to the first amendment. One model is that of the established press as part of the dominant political-business structure which should be restrained by government in order to protect the voices of the small, dissenting speaker. The competing model is that of the press not as an ally, but as an adversary, of the established political order. This model requires a large and powerful press, totally free from governmental control, in order to preserve effective checks on large and powerful government. It was the latter model for which the Supreme Court opted in *Miami Herald Publishing Co. v. Tornillo*¹²² in striking down a state statute requiring newspapers to furnish political candidates a free right of reply in some circumstances.¹²³

The second kind of corporate speech case involves corporations (other than the professional press) speaking out on political issues or issues of general public concern. Here corporate speech is chosen, generally, because federal tax laws make it more costly to distribute corporate profits to shareholders for the purpose of shareholders engaging in the relevant communication. The expenditure may be a tax deductible business expense for the corporation, but not for the shareholder. In any event, distributions to shareholders are subject to income tax at the shareholder level as well as the corporate level. In *First National*

121 435 U.S. 765, 778-79 n.14 (1978).

122 418 U.S. 241 (1974).

123 A different result obtains as to the electronic media because of the peculiar limitation of airwave channels in that medium. See *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

Bank of Boston v. Bellotti,¹²⁴ the Supreme Court upheld the applicability of the first amendment to such corporate speech on public issues.

Finally, a group of cases deal with purely commercial speech—the dissemination by corporations and by noncorporate businesses of truthful factual information relating to proposed business transactions.¹²⁵ Here the application of the first amendment to protect truthful advertising turns on the role of information in the functioning of a free-market economic system.¹²⁶

The rationales underlying these lines of cases are far removed from the considerations relevant to protecting rights of corporate criminal defendants. Any attempt to equate application of first amendment guarantees to corporations with application of other Bill of Rights provisions to them ignores basic underlying differences in the cases.

C. *Privacy-Based Protections and the Corporation*

Various guarantees of the Bill of Rights are based upon the protection of personal privacy. Justice Douglas has described this notion:

Various guarantees create zones of privacy. . . . The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender.¹²⁷

The corporation has historically never been viewed as possessing any comparable privacy right. It is well accepted that affairs of municipal corporations are treated as matters of public interest. Municipal records are generally available for public inspection.¹²⁸ The same principle is reflected for the business corporation in the traditional visitatorial jurisdiction of the courts. General governmental power to look into the affairs of a corporation has been assumed.¹²⁹ The Supreme Court has accepted this lack of privacy interests in the corporation as basic in interpreting the bill of rights. In rejecting a claim of unreasonable search and seizure and denial of due process of law, the Court held:

[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. . . . They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. . . . Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy

124 435 U.S. 765 (1978).

125 See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-15 (1978).

126 See *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 763-65 (1976).

127 *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

128 See 2 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* 701-12 (1979).

129 See Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 HARV. L. REV. 369 (1936).

themselves that corporate behavior is consistent with the law and the public interest.¹³⁰

It is on this basis that corporations have been denied the privilege against self-incrimination. In *Hale v. Henkel*, the Supreme Court emphasized that creation by the state and special privileges and benefits granted to corporations give the state the right to investigate the corporation: "While an individual may lawfully refuse to answer incriminating questions . . . , it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."¹³¹ The Court went on to hold that the federal government has comparable power over state corporations in connection with questions of interstate commerce.¹³²

A similar rationale, linking the denial of the privilege to the historical visitatorial power over corporations, as well, was articulated several years later by the Supreme Court in *Wilson v. United States*:

Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress.¹³³

Although often analyzed as a separate problem, it would seem that the absence of a corporate interest in privacy should also affect the applicability of the fourth amendment search and seizure provisions in the case of large publicly held corporations. The courts have not adequately discussed the interrelationship of the fourth amendment provisions in the corporate context with the general denial of privacy protections to corporations. Iconoclastic elimination of pigeonholing between fourth and fifth amendment cases, and between kinds of fourth amendment cases, is necessary to create a consistent notion of constitutional rights of corporations.

Initially, insofar as the fourth amendment generally prohibits the seizure of items testimonial in nature that could not be directly obtained from a defendant because of fifth amendment protections,¹³⁴ in the case of corporations no bar should be present.¹³⁵ Since the corporation lacks a fifth amendment privilege, no distinctions should be made between testimonial and non-testimonial evidence belonging to the corporation. Whatever the rule as to the seizure of an individual's incriminating diary, no comparable problem exists in the seizure of a corporation's incriminating minute books.¹³⁶

130 *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *quoted with approval in California Bankers Ass'n v. Shultz*, 416 U.S. 21, 65-66 (1974). *See also Bell v. Maryland*, 378 U.S. 226, 260-71 (1964) (Appendix I to Opinion of Douglas, J.).

131 201 U.S. 43, 75 (1906).

132 *Id.*

133 221 U.S. 361, 382 (1911).

134 *See Andresen v. Maryland*, 427 U.S. 463 (1976); *Boyd v. United States*, 116 U.S. 616, 633 (1886).

135 *See Note, The Applicability of the Double Jeopardy Right to Corporations*, 1977 DUKE L.J. 726, 740 n.80. *Cf. Developments in the Law, supra* note 41, at 1276-89 (suggesting that business documents are never privileged).

136 *See* 1 W.R. LAFAVE, SEARCH AND SEIZURE § 2.6 (1978).

But the absence of corporate privacy interests casts a longer shadow on the application of the fourth amendment to corporations. In applying the fourth amendment to corporations, the courts have failed to deal carefully with underlying rationales. A more particularized examination will disclose the necessity of making distinctions which the courts have often ignored.

Some cases applying the fourth amendment to corporations involve small closely held businesses which are the alter ego of their owners, and which share the privacy interests of these owners. Thus in *G.M. Leasing Corp. v. United States*,¹³⁷ the corporation had no employees and apparently was doing no business. The Supreme Court described it as the "alter ego" of its owner "and a repository of at least some of his personal assets."¹³⁸ In such cases, it is appropriate to apply to such closely held corporations the same protections available to its individual principals.

For the large publicly held corporation, however, different considerations apply. Were the only interest protected by the fourth amendment the interest in privacy, the precedents discussed above ought to make the fourth amendment inapplicable. But the Supreme Court has recognized that the fourth amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."¹³⁹ One of these other protections is that of the business corporation's property interest in the smooth and continued functioning of its commercial operations. Unreasonable intrusions interfere with the day-to-day conduct of business.¹⁴⁰ In *Federal Trade Commission v. American Tobacco Co.*,¹⁴¹ the Supreme Court identified the relevant concerns as the "interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause."¹⁴²

It is this business interest which should be viewed as the basis of the Supreme Court's holdings relating to the appropriate scope of corporate searches and to limitations upon the scope of demands for corporate information. Fourth amendment jurisprudence need not depart from the general notion that corporations have no legitimate expectations of privacy, in the sense of nondisclosure of information. Rather, it is the fourth amendment's protection of valuable business operations—a protection probably also implicit in the due process guarantee—which leads to the holding that "when an administrative agency subpoenas corporate books and records, the fourth amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."¹⁴³ Similarly, it would seem to be this concept that has led the Supreme Court to find that although a corporate employer has no reasonable expectation of privacy (*i.e.*, nondisclosure) as to matters which employees observe in their daily functions, nevertheless a government inspector has no

137 429 U.S. 338 (1977).

138 *Id.* at 343.

139 *Katz v. United States*, 389 U.S. 347, 350 (1967) (footnote omitted).

140 *See* 2 W.R. LaFave, *SEARCH AND SEIZURE* § 4.13, especially at 208 (1978).

141 264 U.S. 298 (1924).

142 *Id.* at 306.

143 *See v. City of Seattle*, 387 U.S. 541, 544 (1967) (footnote omitted).

right to enter premises from which the general public is excluded in order to discover the same things.¹⁴⁴

D. Power-Based Protections and the Corporation

The disparity between the vast power of government and the assumed powerlessness of criminal defendants is the basis for certain of the Bill of Rights protections. Special constraints are necessary to check governmental arbitrariness, repression and overzealousness. Especially when the stigma of criminality is involved and when loss of liberty as well as property is at stake, procedural and structural scrupulousness is mandated. In the case of the large publicly held corporation, it is clear that the disparity in power and resources between government and defendant is diminished. Certainly that is true, for example, when one compares the state of Delaware with many of its publicly held corporate creations.¹⁴⁵ Even at the federal level, however, disparity between the power of large multinational corporations and federal governmental power is diminished from the norm envisioned by drafters of the special criminal law protections of the Bill of Rights.

The most obvious distinction between the corporation and the individual is the inability to imprison the corporation. Therefore, the potential impact of governmental sanctions is reduced. Even as to fines, the large publicly held corporation is usually less threatened by government. Generally being wealthier than the individual defendant, the impact of fines, limited in amount by statute, is less severe on corporations.¹⁴⁶ The large corporation's access to investigative and legal personnel lessens the government's advantage in resources. Finally, the large corporation's ability to influence public opinion through advertising and public relations efforts reduces the potential stigmatizing impact of conviction on the corporation.¹⁴⁷ These considerations become particularly relevant in considering the applicability to the corporation of the fifth amendment's double jeopardy provisions and the sixth amendment's criminal jury trial provisions.

The Supreme Court has on at least two occasions in recent years applied the double jeopardy provisions of the fifth amendment to protect corporations, without discussing the questions raised by that application.¹⁴⁸ Several lower courts have specifically addressed the question and have, likewise, concluded

144 *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314-15 (1978).

145 *See, e.g.*, J. PHELAN & R. POZEN, *THE COMPANY STATE* (1973).

146 *Cf.* Criminal Code Reform Bill, S. 1437, 95th Cong., 2d Sess. § 2201(c) (1978) (permitting alternative fine not exceeding twice the gain derived or twice the loss caused).

147 *Compare* J.K. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* 134-45 (1973); *but see* Elkins, *supra* note 38, at 77-80.

148 *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), *Foo Fong v. United States*, 369 U.S. 141 (1962). It is interesting to note that Justice Powell's opinion for the court in *First Nat'l Bank of Boston v. Bellotti*, as it appeared in slip opinion, cited *Martin Linen Supply* as standing for the proposition that the double jeopardy provision applies to corporations, 98 S.Ct. 1407, 1417 n.14 (1978). In the official version of the same opinion appearing in *United States Reports*, the citation to *Martin Linen Supply* disappeared, 435 U.S. 765, 778 n.14 (1978). In other cases, the Supreme Court has considered and rejected on the merits corporate claims of double jeopardy without discussion of the threshold question, *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), and has assumed its applicability in other contexts, *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937).

that the provision applies to corporations.¹⁴⁹ Rationalizing the question of the applicability of double jeopardy provisions to corporations is difficult in part because of the confused state of the general law of double jeopardy.¹⁵⁰

One of the major policies underlying the double jeopardy provision is the prohibition of double punishment.¹⁵¹ If this fifth amendment protection were not available, often the doctrines of *res judicata* and collateral estoppel would operate to achieve a similar limitation on double punishment of corporations.¹⁵² However, even the full application of the double jeopardy doctrine has not prevented the imposition of one type of double sanction—the civil penalty followed or preceded by a criminal fine for the same activity.¹⁵³ For the corporate defendant, a civil penalty followed by a criminal fine appears to be double punishment in anything but a Pickwickian sense. However, in many cases the courts have found no double jeopardy violation.¹⁵⁴ The civil penalty-criminal fine combination is not a uniquely corporate problem. However, the combination in regulatory and tax statutes often impacts the corporation. Because of the inability to imprison the corporation, the potential sanctions appear more nearly duplicative. The courts have focused primarily on questions of legislative intent to punish as determinative of whether a “civil” penalty is in fact criminal and therefore triggers the double jeopardy provision of the fifth amendment.¹⁵⁵

That this civil penalty-criminal fine combination continues to be accepted suggests that current levels of criminal fines, at least for large corporations, are significantly lower than appropriate. By itself, multiple punishment hardly shocks the conscience if the cumulative level is appropriate. This is particularly true where the punishments consist of two smaller monetary exactions, rather than one larger fine. Leaving aside for the moment the question of the “ordeal” of two trials, merely the writing of two corporate checks rather than one seems hardly to rise to the level of constitutional significance. Hence the technicality of the civil-criminal distinction is used to avoid the technical application of double jeopardy concepts when the limitations so imposed would prevent the accomplishment of appropriate levels of punishment and deterrence.

A second type of double jeopardy issue arises in the context of attempts to re prosecute after a mistrial.¹⁵⁶ The policies which come into play in this kind of case pose the most difficult issues as to corporate rights, for it is here that assumptions relating to disparities in power and resources between the state

149 *United States v. Hospital Monteflores, Inc.*, 575 F.2d 332 (1st Cir. 1978); *United States v. Security Nat'l Bank*, 546 F.2d 492 (2d Cir. 1976), *cert. denied*, 430 U.S. 950 (1977); *United States v. Southern Ry.* 485 F.2d 309 (4th Cir. 1973); *United States v. Armco Steel Corp.*, 252 F.Supp. 364 (S.D. Cal. 1966).

150 See Westin & Drubel, *Toward A General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81; *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 108-20 (1978); *Developments in the Law*, *supra* note 41, at 1342-50.

151 Westin & Drubel, *supra* note 150, at 106-22.

152 See Note, *Double Jeopardy and Corporations: "Lurking In the Record" and "Ripe for Decision,"* 28 STAN. L. REV. 805, 812-14 (1976).

153 See Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); *Developments in the Law*, *supra* note 41, at 1300-51, Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

154 See Annot., 42 A.L.R.2d 634 (1955).

155 See, e.g., *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *Helvering v. Mitchell*, 303 U.S. 391 (1938).

156 See Westin & Drubel, *supra* note 150, at 85-106.

and the defendant are most critical. Justice Black's statement in the Supreme Court's opinion in *Green v. United States* has been seen as the starting point analysis in this type of case.¹⁵⁷

The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.¹⁵⁸

For the individual, two separate kinds of ordeals are identified—a material expenditure of money and effort, and a psychological pressure creating anxiety, insecurity and embarrassment. For the large publicly held corporation, these considerations merge. There is no separate psychological pressure,¹⁵⁹ but merely the insecurity that the corporate entity may suffer a monetary fine or a loss of value because of damage to its corporate image.¹⁶⁰ The size of resources available to the large corporation may reduce the ordeal-like nature of this economic risk.¹⁶¹

A review of the cases which have discussed the issue indicates that courts have not adverted to many of the relevant distinctions relating to corporate defendants. The failure to distinguish large publicly held corporations from closely held companies in which the individual owners are in fact personally affected by corporate prosecutions is one problem evidenced by the cases.¹⁶² Beyond this, courts suggest that even in the large corporation, individual shareholders are affected.¹⁶³ This analysis, however, ignores the distance between shareholders and their publicly held companies.¹⁶⁴ Certainly the shareholder will not feel psychologically attacked merely because a large company, some of whose stock he owns, is being tried. Finally, courts focus upon the impact of prosecutions upon corporate image and good will.¹⁶⁵ There is little question that such economic impact exists, although perhaps it may be reduced by prudent corporate image promotion. The importance of this economic good-will impairment to the general doctrine of double jeopardy requires further clarification by the courts.

157 This is so even though *Green* was a case involving acquittal rather than mistrial, see *Westen & Drubel*, *supra* note 150, at 86.

158 355 U.S. 184, 187-88 (1957).

159 See Note, *supra* note 152, at 825-27.

160 Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, wrote in his dissent in *Crist v. Bretz*: ". . . the central concern of the Double Jeopardy Clause cannot be regarded solely as protecting against repeated expenditures of the defendant's efforts and resources." This conclusion was based upon the fact that significant efforts and expenditures are often required in pre-trial proceedings before jeopardy attaches. 437 U.S. 28, 50 (1978).

161 *But cf.* Note, *supra* note 135, at 743 (suggesting the inappropriateness of a case-by-case inquiry into the degree of harassment involved).

162 See *United States v. Security Nat'l Bank*, 546 F.2d 492, 494-95 (2d Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

163 *Id.* at 494; *United States v. Armco Steel Corp.*, 252 F.Supp. 364, 368 (S.D. Cal. 1966).

164 Note, *supra* note 152, at 823-24. See also Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw. L. Rev. 908, 920-21 (1975); MODEL PENAL CODE § 2.07, Comment at 148 (Tent. Draft No. 4, 1955).

165 *United States v. Hospital Monteflores, Inc.*, 575 F.2d at 335; *United States v. Security Nat'l Bank*, 546 F.2d at 494-95. See also Note, *supra* note 135, at 747-48.

A third type of double jeopardy case involves appeal by the government and attempted re prosecution after acquittal where legal error has occurred at the first trial. In addition to the policies involved in the mistrial situation, here an additional policy is involved. This may be described as protection of the power of the jury or other fact finder in the first trial to express the consensus of the community by ignoring the evidence or the appropriate rules of law, and to acquit the defendant.¹⁶⁶ If this was the basis of an initial acquittal, the presence of legal error should be irrelevant. The defendant is "entitled" to the "erroneous" acquittal. Preserving this right to "nullification" may be particularly appropriate in the case of corporate criminal defendants. Since juries at least are not likely to have empathy as a peer with the corporate entity, an acquittal based upon jury nullification will express a stronger than usual sense of the community. It will be in the face of a likely antagonism to, or at least of no particular personal sympathy for, the defendant.

The application of the sixth amendment's jury trial provisions to corporations also poses special problems. The role of the petit criminal jury has been described by the Supreme Court in *Duncan v. Louisiana*.¹⁶⁷

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority Providing an accused with the right to be tried by his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.¹⁶⁸

This concern with governmental power thus suggests that where the power disparity is reduced, less reason for a jury trial exists. However, as discussed in the context of the double jeopardy provisions, the structural bias against jury nullification in the case of the corporate defendant—the unlikelihood that a jury of individuals will be more sympathetic than a judge—suggests that when the corporate defendant desires a jury trial a real potential of governmental abuse of power exists.

The courts have in fact been presented with the issue of corporate jury trial rights in a slightly different context. In *Duncan*, the Supreme Court went on to emphasize an additional reason for jury trial guarantees. They reflect "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges."¹⁶⁹ The emphasis upon jury trial as a protection against arbitrary deprivation of life or liberty raises questions about the applicability of the right where the only available sanction is a monetary fine. *Duncan* was ambiguous on the issue. It referred to jury trial rights attaching when "the length of the authorized prison term or the seriousness of other punish-

166 See Westen & Drubel, *supra* note 150, at 122-54.

167 391 U.S. 145 (1968).

168 *Id.* at 155-56.

169 *Id.* at 156.

ment"¹⁷⁰ is sufficiently great. It went on to refer to the federal definition of petty crimes as those punishable by no more than six months' imprisonment or a \$500 fine, suggested that objective criteria are important, but concluded that "[w]e need not . . . settle in this case the exact location of the line between petty offenses and serious crimes," since a potential two-year prison sentence was clearly sufficiently serious to call for a jury trial.¹⁷¹ In a companion case, *Bloom v. Illinois*,¹⁷² the Supreme Court reached the same result in regard to the imposition of a two-year prison sentence for criminal contempt.

In *Duncan*, the Court focused upon the potential punishment which an individual faced. Duncan had in fact been sentenced only to sixty days' imprisonment and a fine of \$150.¹⁷³ It was, however, the *potential* sentence of two years, consistent with the Court's emphasis in *Duncan* upon objective standards, which triggered the sixth amendment. Only in *Bloom*, when no maximum sentence for contempt existed, did the *actual* sentence imposed become critical.¹⁷⁴

Subsequently, however, the Supreme Court seems to have focused upon the actual sentence, rather than the potential sentence, as the relevant determinant in assessing when constitutional protections are triggered. *Scott v. Illinois*¹⁷⁵ involved the sixth amendment right to appointed counsel, rather than jury trial. While the plurality opinion¹⁷⁶ rejected wholesale transposition of criteria between the jury trial and counsel provisions of the sixth amendment, it suggested that this was because of a broader availability of right to counsel. The Court then held that the sentence actually imposed (here only a \$50 fine) rather than the potential sentence (\$500 fine or one year in jail or both) controlled, and that counsel need not be appointed unless some actual imprisonment is imposed. If actual sentence controls for the broader counsel provisions, *a fortiori* it should control for the narrower jury trial guarantee. Indeed that problem was the point of Justice Blackmun's dissent. He assumed, however, that authorized rather than actual sentence sufficed for purposes of the jury trial guarantee; he argued that the right to appointed counsel "extends at least as far" as the right to jury trial.¹⁷⁷ The plurality appears to agree that right to counsel is at least as broad as the right to jury trial. The plurality, however, appears to reject the notion that authorized sentence, rather than actual sentence, still controls for jury trial determinations.

If this analysis of *Scott* is accurate, it carries important implications when read together with the earlier Supreme Court case of *Muniz v. Hoffman*.¹⁷⁸ *Muniz* involved a jury trial claim by a labor union. The Court, however, made it clear that the sixth amendment considerations were similar to those applied

170 *Id.* at 161 (emphasis added).

171 *Id.* at 161-62.

172 391 U.S. 194 (1968).

173 391 U.S. at 146.

174 391 U.S. at 211.

175 99 S. Ct. 1158 (1979).

176 Justice Powell, whose vote was necessary to make a majority, concurred on the basis of the stare decisis effect of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), although he continued to disagree with *Argersinger*. 99 S. Ct. at 1162-63.

177 *Id.* at 1170-71.

178 422 U.S. 454 (1975).

to large corporations.¹⁷⁹ *Muniz* involved a criminal contempt charge. Of course, under *Bloom*, the Court had always focused upon the actual penalty imposed, rather than the potential penalty, in contempt cases because of the absence of specified maximum sanctions for criminal contempt. After *Scott*, however, this focus upon actual sentence would appear to apply to all types of criminal charges. In *Muniz*, the Court held that the imposition of a \$10,000 fine against a labor union was not sufficiently serious to require a jury trial:

It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than \$500 is contemplated. From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different. It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual, but it is not tenable to argue that the possibility of a \$501 fine would be considered a serious risk to a large corporation or labor union. Indeed although we do not reach or decide the issue tendered by the respondent—that there is no constitutional right to a jury trial in any criminal contempt case where only a fine is imposed on a corporation or labor union . . . we cannot say that the fine of \$10,000 imposed on Local 70 in this case was a deprivation of such magnitude that a jury should have been interposed to guard against bias or mistake.¹⁸⁰

The results of *Muniz* and *Scott* suggest that in many criminal prosecutions where the fine imposed is small in comparison to the resources of a large corporation, no jury trial right exists. Since, of course, a corporation never faces imprisonment, a jury trial denial based upon magnitude of fine becomes a possible issue in most corporate prosecutions. Such an approach, however, is subject to two types of criticism. The first relates to the difficulties in making a case-by-case determination of the impact of a fine of a particular amount on a specific corporate defendant.¹⁸¹ It is problematic, however, whether the difficulty involved requires a greater expenditure of resources than is involved in the added cumbrousness of a jury trial. At any rate, the Supreme Court in *Muniz* rejected the bright line drawn by federal statute between fines of not more than \$500 and fines of a greater amount. It stated that this statutory line has "no talismanic significance."¹⁸²

The second criticism is more serious. If a preliminary decision is made to deny a request for jury trial, the judge has decided before considering the relevant evidence that the sentence imposed will be limited. In so doing, he has "abandon[ed] his responsibility to consider the full range of punishments established by the legislature."¹⁸³ This objection, however, may be met in the corporate context by basing the jury decision upon the maximum authorized penalty that may in fact be imposed in the case upon any state of the evidence.

179 *Id.* at 477.

180 *Id.*

181 *See* *United States v. Hamdan*, 552 F.2d 276 (9th Cir. 1977); *Douglass v. First Nat'l Rlty. Corp.*, 543 F.2d 894 (D.C. Cir. 1976).

182 *Id.* at 477. The statutory provision is found at 18 U.S.C. § 1(3) (1976).

183 *Argersinger v. Hamlin*, 407 U.S. at 53 (Powell, J., concurring).

Thus a charge under a statute providing for sentences of up to one year imprisonment or a fine not exceeding \$10,000, or both, could lead at most to a \$10,000 fine for a corporate defendant. An assessment of the impact of that potential fine could be made in determining the right, *vel non*, to a jury trial.

This approach poses one additional anomaly, suggested by Justice Douglas's dissent in *Muniz*.¹⁸⁴ Insofar as a governmental action to impose a civil penalty is provided as an alternative enforcement mechanism for the same conduct that is the subject of a criminal prosecution, the seventh amendment may provide a jury trial for cases involving a civil penalty of over \$20. The Supreme Court has since held in *Atlas Roofing Co. v. Occupational Safety Commission*¹⁸⁵ that the seventh amendment does not bar Congress from assigning to an administrative agency, without jury, the right to impose civil penalties for violation of statutorily created public rights. However, the opinion suggests that if Congress vests original jurisdiction in the courts in actions to impose such penalties, a jury trial will be required.¹⁸⁶ This anomaly, of course, extends further. Any definition of petty criminal offenses that permits a fine of over \$20 to be imposed without jury trial creates the same anomaly. It may well be an insoluble problem resulting from the peculiarly rigid dollar amount drafted into the seventh amendment, and from the insistence upon the noncriminal nature of "civil" penalties. The Court in *Atlas Roofing* concludes with a footnote that recognizes the dilemma:

[I]f the fines involved in these cases were made criminal fines instead of civil fines, the Seventh Amendment would be inapplicable by its terms. The Sixth Amendment would then govern . . . and . . . no jury trial would be required. . . . It would be odd to hold that Congress could avoid the jury-trial requirement by labeling the civil penalties criminal fines but not by assigning their adjudication to an administrative agency.¹⁸⁷

V. Conclusion

A justifiable analysis of the criminal liability of the corporate entity may be elusive. No such analysis will be found unless the appropriate questions are asked. The corporation is a legal creation permitting the association of numerous individuals to carry out an economic enterprise. Its organizational nature is often overlooked. If the corporation's true form is hidden by legal fictions relating to "personhood," proper analysis for purposes of the criminal law is impaired. A "cult of personality" may be at least as dangerous here as in contexts less hospitable to the business corporation.

Large publicly held corporations assume a type of power and influence which is qualitatively different from those obtainable even by wealthy in-

¹⁸⁴ 422 U.S. at 478-81.

¹⁸⁵ 430 U.S. 442 (1977).

¹⁸⁶ *Id.* at 458-61. *See also* United States v. Regan, 232 U.S. 37, 47 (1914); *Hepner v. United States*, 213 U.S. 103, 115 (1909); *United States v. Jepson*, 90 F.Supp. 983 (D.N.J. 1950); Note, 53 TEX. L. REV. 387, 392 (1975).

¹⁸⁷ 430 U.S. at 460 n.15. The penalties at issue were in amounts of \$5,000 and \$600 respectively imposed on corporations.

dividuals. This is often relevant to legal determinations relating to traditional questions of "corporate law." It is often overlooked when courts deal instead with "criminal law" matters. A rational system of criminal justice cannot ignore factors that appear so clearly relevant in civil law contexts.