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# Crime Incorporated

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# CRIME INCORPORATED

The problem of corporate criminal liability is one of comparatively recent origin. Originally at common law, both in America and in England, corporations could not be criminally liable.[1] There were several basic reasons for this. First, corporations as a form of business association had not approached the magnitude and significance which they reached during the succeeding three centuries,[2] most corporations of any note being little more than quasi-governmental organizations utilized by England in the administration and expansion of her colonial empire.[3] Injuries from associations of this type were to an extent sanctioned by or connected with the government and, in any event, were committed against native or colonial populations whose grievances would be given little weight in Whitehall.

In addition, there were some strong theoretical barriers to imposing criminal penalties on a corporation. Under the common law, mens rea was considered to be an essential element in the definition of any crime and had to be alleged and proved before a conviction could be had. This is of course still true today, with the exception of statutes imposing absolute liability for the commission of certain acts. Since a corporation, an artificial person, could not itself form or harbor the necessary evil intent or mens rea for the commission of a crime,[4] a corporation could not be found guilty. The guilty party, if any, would have to be a person purporting to act for the corporation. This logic was buttressed by the now nearly defunct doctrine of ultra vires. A corporation was chartered for a specific purpose and this purpose was set forth in the corporate charter. Thus, a corporation organized for the purpose of constructing and operating a railroad could not legally do any act unconnected with this function.[5] Naturally, no corporation was ever, at least officially, organized for the purpose of committing crimes and therefore, a corporation was incapable of engaging in criminal conduct. If a crime was committed by officers or agents of a corporation, even though done in its behalf the agents and not the corporation had to be the culpable parties since a crime was beyond the legal capacity of the corporate entity.[6]

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[1] Anonymous, 12 Mod. Rep. 559 (K.B. 1701); 1 Blackstone, Commentaries 476, 477 (1765); State v. Great Works Mill & Mfg. Co., 20 Me. 41 (1841); State v. General Fire Extinguisher Co., 9 Ohio N.P. (n.s.) 438 (Super. Ct. 1910).

[2] Williston, History of the Law of Business Corporations Before 1800, 2 Harv. L. Rev. 105 (1888).

[3] Id. E.g., the East Indian Company which governed India until the middle of the nineteenth century.

[4] Commonwealth v. New Bedford Bridge, 68 Mass. (2 Gray) 339 (1854); State v. Morris R.R., 23 N.J.L. 360 (1852).

[5] Guthrie v. Harkness, 199 U.S. 148 (1904); Sanderson v. White, 34 Mass. (18 Pick.) 328 (1836).

[6] Commonwealth v. New Bedford Bridge, supra note 4; State v. Morris R.R., supra note 4. The law of torts did not get entangled in the cobwebs of the ultra vires doctrine.

> If a subordinate agent or servant of a corporation engages in an ultra vires transaction without any authority from the managing officers, and commits a tort, the corporation is not liable because his act is not within the scope of

The history of the commercial and industrial revolutions and the concurrent utilization of joint stock companies with limited liability is too well known to repeat here. These economic developments were, of course, coupled with a gradual democratization and consequent growing social responsiveness of courts and governments, and this led, naturally enough, to a re-evaluation of the original notions of corporate criminal immunity. Society was now faced with the modern corporate leviathan with its vastly diffused ownership and multiplicity of functions. Criminal conduct was emanating from some of these leviathans regardless of who might be theoretically culpable, and the problem became too compelling for courts and legislatures to ignore. The problem, however, was dealt with on an ad hoc basis, whenever and wherever a situation arose which demanded attention, with little comprehensive evaluation of the entire area.[7]

The first leading case in the United States concerning the imposition of criminal sanctions upon a corporation was the 1909 Supreme Court decision in *New York Cent. & H. R.R. v. United States*.[8] The case arose under the Elkins Act,[9] which makes it a misdemeanor for any carrier to knowingly pay or receive a rebate and which further provides that the act of an agent within the scope of his employment shall be deemed to be the act of the carrier. The agent in this case was a shipping clerk. Although discussed in the context of the statute, the Court stated that there was no real reason why a corporation should be held immune from criminal liability. Both the decision and the statute were justified on the ground that since a corporation can act only through its agents the conduct of the latter can, and for effective law enforcement, must, be imputed to the former.[10]

This line of thinking quickly took root in both state[11] and federal courts.[12] Courts tended to place less and less emphasis on the position of the transgressing agent in the corporate hierarchy and to find the corporation guilty if the agent was acting within the scope of his employment when he violated the law.[13] One of the few jurisdictions which tended to modify the

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his employment, and not because it is beyond restrictions imposed on the business by the charter. A very different case is presented when the directors or managing officers, authorize or engage in an ultra vires business. In such a case the business becomes that of the corporation, though unauthorized by its charter, and for torts committed in the course of such business it is liable.

Ballantine, Corporations 273 (1946).

7 Mueller, Mens Rea and the Corporation, 19 U. Pitt. L. Rev. 21, 22 (1957).

8 212 U.S. 481 (1908).

9 Elkins Act, 34 Stat. 588 (1906), as amended, 49 U.S.C. § 41(2) (1958).

10 Supra note 8.

11 Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 54 N.E.2d 210 (1944). Joseph L. Sigretto & Sons v. State, 127 N.J.L. 578 (1942); State v. Western Union Tel. Co., N.J. Super. 172, 221 (1951).

12 Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir. 1945); Egan v. United States, 137 F.2d 369 (8th Cir.), cert. denied, 320 U.S. 788 (1943); United States v. New York Great A. & P. Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), aff'd, 173 F.2d 79 (7th Cir. 1949); United States v. Wilson, 59 F.2d 97 (W.D. Wash. 1932).

13 United States v. Steiner Plastics Co., 231 F.2d 149 (2d Cir. 1956); St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955); United States v. George

absoluteness of this line of cases was New York, although to what extent is by no means clear. The New York Court of Appeals in *People v. Canadian Fur Trappers Corp.*,[14] reversed a conviction on the grounds that "the mere . . . intent of the agent to steal would not be sufficient in and of itself . . . the evidence must go further than in the cases involving solely the violation of prohibitive statutes. The intent must be the intent of the corporation and not merely that of the agent."[15] A subsequent case extended liability to situations where:

> (1) the corporation has benefited or profited from the crime; or (2) its officers participated in the crime; or (3) its officers authorized, sanctioned or acquiesced in the commission of the crime by an agent or employee; or (4) it had knowledge of the crime; or (5) it was chargeable with negligence in not obtaining such knowledge through reasonable inquiry.[16]

However the court pointed out that something more than the mere fact of the agency must be shown to support a conviction.[17] Some form of corporate complicity is thus demanded.

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F. Fisk Inc., 154 F.2d 798 (2d Cir.), cert. denied, 328 U.S. 869 (1946); C. I. T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945); Egan v. United States, supra note 12.

[14] 248 N.Y. 159, 161 N.E. 455 (1928).

[15] Id. at 160, 161 N.E. at 456.

[16] People v. Raphael, 190 Misc. 582, 72 N.Y.S.2d 748 (1947).

[17] Supra note 8. But to establish the criminal intent of a corporation, courts have increasingly relied on a determination of whether the agent is performing his assigned duties. In *Continental Baking Company*, 281 F.2d 137, 149 (6th Cir. 1960) the court said, "that as long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also, and must be deeemd to have 'authorized' the criminal act." The court, in United States v. Steiner Plastics Mfg. Co., supra note 13, at 153, held it sufficient "to show that the agents of the corporation acting within the area entrusted to them had violated the law." However, the borrowing of the doctrine of respondeat superior has not allowed a satisfactory standard to develop from which to impute criminal liability to the corporations from the act of agents because, inherent in the doctrine is the preclusion of a corporate defense except on grounds of lack of agency. Thus in Old Monastery Co. v. United States, supra note 12, the court summarily rejected the corporate defense that the acts of its president in selling liquor at prices in excess of wartime ceilings not only had not benefited the corporation, but actually had worked a detriment to it. The corporation was found guilty on the grounds that, in selling the liquor, its president was performing his corporate functions. The court stated, "we do not accept benefit as a touchstone of criminal liability; benefit, at best, is an evidential, not an operative fact." The dilemma was more forcefully brought to the fore in Standard Oil v. United States, 307 F.2d 120 (5th Cir. 1962), where three corporate employees and their respective corporations were indicted for violations of the Connally Hot Oil Act, 49 Stat. 30 (1935), 15 U.S.C. § 715 (1958). There, C. J. Thompson Inc., an owner of a number of oil wells, had induced the employees of Pasotex Corporation, an oil pumping station, to falsify the records and credit the amount of crude oil pumped from various Thompson wells which overproduced, to Thompson wells which were under-producing. The Pasotex employees were also induced, with Standard Oil employees consenting, to credit Thompson's less productive wells with oil drawn from Standard Oil wells. The trial court rejected an argument that the employees were not operating within the scope of their employment and all three corporations were convicted. Although the court of appeals reversed as to Pasotex and Standard by holding that a corporation is not

This line of judicial reasoning, as has been noted, stands as an exception to the respondeat superior theory enunciated in *New York Central.* The first question to be considered then, is whether respondeat superior can be theoretically transplanted from the field of torts to the field of crimes. In the case of a principal other than a corporation, there is no question that any such imposition of liability would violate the federal constitution[18] as well as our generally accepted principles of natural justice. No human master could be held to answer for the crimes of his servant unless he were in some way implicated in their commission. There is, however, no such constitutional impediment to the conviction of corporations.[19] Respondeat superior may at least legally be applied. The problem is, however, whether the doctrine and its justification have any relation to the criminal law and its underlying theories. The most widely accepted justification of the doctrine is known as the "Entrepreneur Theory."[20] Professor Mechem states it as follows:

> Every industry, it is suggested, takes a regular and more or less predictable annual toll, both in property and in flesh and blood. If, e.g., the records of the Shantytown & Southern Railroad were examined and subjected to a statistical computation, it could be predicted with considerable accuracy how many people would be killed and maimed in the coming year, how many cars wrecked, and the like. Restaurants doubtless have an accounting item named "breakage"; this is breakage, too, if on a bigger and more distressing scale. On whom should the replacement cost fall? Unlike the restaurant, the railroad can get new victims without cost; to do so, however, leaves a tragic list of innocent and uncompensated victims. Why not treat it as a cost of business, as the restaurant does? If the railroad pays, it will easily be able to spread the cost by raising its charges. The expense then ultimately rests, like other expenses of running a railroad, on that part of the public which needs, patronizes, and presumably profits by the existence of, a railroad. The cost to each individual member of the railroad-interested public, is, per accident, insignificant; if left to rest on the victim of the particular accident it may be ruinous.[21]

The doctrine, therefore, represents an allocation of loss consistent with the public interest in allowing these enterprises to exist. It does not, at least according to the above rationale, have as a direct objective the sanctioning of behavior. This is demonstrated by the fact that according to the federal and majority view, a corporation cannot be held for exemplary or punitive damages for the torts of its employees unless some degree of complicity is

guilty of criminal conduct of employees, who, although ostensibly acting within the scope of their employment, are acting with no intent to benefit their employer, the court did not establish any clearer guidelines for future lower court decisions.

[18] New York Cent. & H. R.R. v. United States, supra note 8.

[19] Ibid.

[20] Mechem, Outlines of the Laws of Agency § 360, at 243 (4th ed. 1952).

[21] Ibid. For a slightly different statement of this theory, and comment on it see Morris, The Torts of an Independent Contractor, 29 Ill. L. Rev. 339 (1935).

show on the part of the corporate executives.[22] The purpose of the criminal law, on the other hand, is to define socially intolerable conduct, *and to hold all conduct within limits which are reasonably acceptable from the social point of view*,[23] that is, criminal law is theoretically designed to deter certain behavior which society finds undesirable. Punishment is not the purpose of the criminal law, since, if it were entirely successful, there would be no one to punish. We thus have this dichotomy which arises when we consider the approach of the law to the torts of a corporate agent and the approach to his crimes. The theoretical justifications of respondeat superior which are quite valid in the field of torts do not admit of ready application to crimes. In addition, while both the majority of state jurisdictions and the federal courts will not apply punitive damages to a corporation for the tort of its agent, they will apply criminal liability for the agent's crime.

This is striking when one considers that punitive damages are designed, at least in part, to prevent commission of the tort, and not to compensate. There would seem to be a public policy to the effect that, although the party injured by an intentional tort committed by a corporate agent should be compensated for his injury, the imposition of exemplary damages would serve no useful purpose. The only apparent basis of such a public policy would be that the imposition of such damages would be futile and would not prevent such torts in the future. If this is correct, then the imposition of criminal liability is incorrect, unless criminal opprobrium will serve as an effective deterrent while mere money damages will not. There is, of course, the possibility that corporate criminal liability may rest on some form of social "vengeance" against the corporate entity for harboring criminal elements within it. However it would be totally inimical to our theories of jurisprudence for such a theory to form the basis of liability.

The theoretical conflicts and the lack of a clearly enunciated policy in this area are apparent. The Model Penal Code of the American Law Institute has as an objective the formulation of logical and practical solutions to the criminal problems which face society. Let us examine its provisions on corporate criminal liability. Basically the Code subjects corporations to criminal liability for all offenses within the ambit of section 1.04.[24] This

[22] Ballantine, supra note 6, § 110 at 270. See also Pelton v. General Motors Acceptance Corp., 139 Ore. 198, 7 P.2d 263 (1932). Lake Shore and M.S. Ry. Co. v. Prentice, 147 U.S. 101 (1892) (explaining and distinguishing Denver and R.G. Ry. Co. v. Harris, 122 U.S. 625 (1866); Aetna Life Ins. Co. v. Brewer, 12 F.2d 818, 821 (C.A.D.C. 1926). But where the responsible officers of a corporation commit a tort while acting for the corporation, with wantonness or malice, or where they authorize or ratify such a tort by a subordinate employee, or where they employ or retain a subordinate, knowing that he is dishonest or malicious, and he commits a tort because of his dishonest or malicious nature, then his fraud or malice is attributable to the corporation. Lake Shore and M.S. Ry. Co. v. Prentice, supra; Memphis Press-Scimitar Co. v. Chapman, 62 F.2d 565 (6th Cir. 1933); Pacific Tel. & Tel. Co. v. White, 104 F.2d 923 (9th Cir. 1939); Lowe v. Yolo County Consol. Water Co., 157 Cal. 503, 108 Pac. 297 (1910); Cleghorn v. New York Cent. & H. River R.R., 56 N.Y. 44 (1874).

[23] Perkins, Criminal Law 4 (1957).

[24] Model Penal Code § 1.04 (1962). CLASSES OF CRIMES; VIOLATIONS.
(1) An offense defined by this Code or by any other statute of this State,

section grades offenses according to the penalty which attaches to a given act. The grades are *felony*, *misdemeanor*, *petty misdemeanor*, and *violation*. The first three are punishable by imprisonment and/or a fine and the fourth by fine only. Section 2.07 of the Code[25] deals with corporate liability di-

for which a sentence of [death or of] imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, misdemeanors or petty misdemeanors.

(2) A crime is a felony if it is so designated in this Code or if persons convicted thereof may be sentenced [to death or] to imprisonment for a term which, apart from an extended term, is in excess of one year.

(3) A crime is a misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto.

(4) A crime is a petty misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto or if it is defined by statute other than this Code which now provides that persons convicted thereof may be sentenced to imprisonment for a term, of which the maximum is less than one year.

(5) An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code which now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

(6) Any offense declared by law to constitute a crime, without specifications of the grade thereof or of the sentence authorized upon conviction, is a misdemeanor.

(7) An offense defined by any statute of this State other than this Code shall be classified as provided in this Section and the sentence that may be imposed upon conviction thereof shall hereafter be governed by this Code.

[25] Model Penal Code § 2.07 (1962). LIABILITY OF CORPORATIONS, UNINCORPORATED ASSOCIATIONS AND PERSONS ACTING, OR UNDER A DUTY TO ACT, IN THEIR BEHALF.

(1) A corporation may be convicted of the commission of an offense if:

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

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

(2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.

(3) An unincoroprated association may be convicted for the commission of an offense if:

(a) the offense is defined by a statute other than the Code which expressly provides for the liability of such an association and the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the association is account-

rectly. A corporation may be convicted if the offense falls within the definition of violation or is designated as such by the statute defining the crime.[26] Corporations may also be convicted in situations where a clearly defined legislative purpose imposes liability on corporations and the act is performed by an agent within the scope of his employment for the benefit of the corporation.[27] In addition, breaches of affirmative duties imposed by law on corporations are punishable, as well as all crimes which are sanctioned or committed by high corporate authority.[28] Offenses involving absolute liability, of course, are applicable to corporations as well as individuals.[29]

According to its draftsmen, the Model Penal Code attempts "no revolutionary change in the existing law of the subject" of corporate criminal liability.[30] In their comments to the section they state that paragraph (a) is designed to avoid repealing *pro tanto* existing provisions of law which legislatures apparently felt to be a necessary complement to various regula-

able or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.

(4) As used in this Section:

(a) "corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) "agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association, in the case of an unincorporated association, a member of such association;

(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

(5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1)(a) or Subsection (3)(a) of this Section other than an offense for which absolute liability has been imposed, it shall be a defense 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. This paragraph shall apply if it is not plainly inconsistent with the legislative purpose in defining the particular offense.

(6) (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

[26] Model Penal Code § 1.04 (1962).

[27] Model Penal Code § 2.07 (1962).

[28] Model Penal Code § 2.07(4)(c) (1962).

[29] Model Penal Code § 2.07(2) (1962).

[30] American Law Institute, 33rd Annual Meeting, Proceedings 127 (1956).

tory policies.[31] Paragraphs (a) and (c) construed together are drafted to provide a more restricted basis of liability than has hitherto been present under the respondeat superior doctrine.[32] In short, under the final draft of the Code many acts of an agent would no longer be imputed to the principal-corporation. For example, under the Code a corporation could not be convicted of receiving stolen property merely on the basis that an agent committed the crime in the scope of his employment. For corporate liability, the Code would either have to be amended so as to make the offense specifically applicable to corporations or the board of directors or some high corporate official would have to actually commit or sanction the crime. The reasoning of the commentators to the Code which justifies liability in the case of participation by management in the crime is that such participation makes it "reasonable to assume that their acts are in some substantial sense reflective of the policy of the corporate body."[33] Liability, they state, should be restricted in cases where corporate fines are of dubious value, but preserved in those instances where stockholders are most likely to be in a position to bring pressure to bear on the management to prevent criminal conduct.[34] This rationale is reflected in the clause of paragraph (c) which permits liability in cases where the offense was "recklessly tolerated" by management, thus suggesting an affirmative duty to exercise some sort of care to prevent the commission of crimes by employees.[35]

Sections 6.03[36] and 6.04[37] deal with the penalties which may be meted out to a corporation. In addition to the fines which may be imposed under section 6.03, section 6.04 authorizes the revocation of the corporate charter in situations where the corporate management was implicated in the commission of the offense and such revocation is felt to be in the public interest.[38]

The commentators state that they wish to use the "quo warranto" remedy as a complement to the use of fines as corporate punishment.[39] According to the drafters,[40] the section merely codifies and clarifies much of the existing case and statutory law on the subject.

The Code therefore retains the idea that a fine should be levied against a corporation, and assumes that this is a means of controlling corporate behavior. There are several questions which must be considered in connection with both the imposition of liability generally and the imposition of either fines or dissolution of a corporate entity. The questions are whether the proper party is being punished in this form of proceeding and whether the remedies which have found their way into the law and apparently gained such

[31] Model Penal Code, Comments 147 (Tent. Draft No. 4 1955).

[32] Supra note 31, at 147-151.

[33] Supra note 31, at 151.

[34] Supra note 31, at 151.

[35] Model Penal Code § 2.07(5) (1962). This section reinforces this position by raising an affirmative defense in those cases where the corporation can establish by a "preponderance of the evidence" that the high managerial agent exercised due diligence to prevent the crime.

[36] Model Penal Code § 6.03 (1962).

[37] Model Penal Code § 6.04 (1962).

[38] Model Penal Code §§ 6.03, 6.04 (1962).

[39] Model Penal Code, Comments 202 (Tent. Draft No. 5 1956).

[40] Ibid.

acceptance as to be included in what is termed a "Model Penal Code" are, in fact, effective to deter the behavior in question.

The first problem, of course, is to determine on whom the penalties imposed will fall. A fine, all other things being equal, would presumably fall on the stockholders.[41] If the fine is light in comparison to the size and profitability of the corporation, then its effect would probably be limited to a reduction in dividends.[42] If larger than the net profit for the fiscal year, then presumably it would entail a reduction in the stockholders equity in the corporation since the company would have to either sell assets or secure a loan in order to pay it. In either event, the basic situation would place the fine on the shareholders.[43] Although this would apparently be the ideal situation and the one contemplated by the drafters of the Model Penal Code,[44] it is not necessarily the consequence which would occur. The fine could, under given circumstances, be shifted either forward or backward—that is passed off to someone in the economic process other than the offending corporation. This ability to shift, of course, would depend on the nature of the corporation, its line of commerce and number of competitors, and the degree of competition, if any, among them. The simplest example of shifting was stated before the 1956 annual meeting of the American Law Institute by the English scholar, Professor Williams. He used two examples:

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[41] In discussing the dangers inherent in allowing punitive damages against corporations, because it can be carried to a "ruinous extreme," Ballantine states,

> But such penalties are deemed by many courts only a reasonable means of regulating the management of the business. Similar questions arise as to the criminal liability of corporations, and the uncertain rules as to punitive damages are frequently invoked in support of the infliction of vicarious criminal penalties. This overlooks the different basis of liability in criminal and tort cases. Exemplary damages may be regarded as a more liberal compensation, allowed in view of the aggravated and culpable nature of the wrong rather than as punishment.

Ballantine, supra note 6, at 272.

[42] Standard Oil Co. of Indiana v. United States, 164 Fed. 376 (7th Cir. 1908), same case, 155 Fed. 305 (7th Cir. 1907). The fine of over 29 million dollars, the maximum possible penalty was imposed. The judgment was reversed partly on the ground that such a penalty was excessive and an abuse of discretion. "Such a penalty might fall not only on the shareholders, but on the creditors by wiping out the assets to which its creditors or victims might look." Ballantine, supra note 6, at 281.

[43] United States v. Cotter, 60 F.2d 689 (2d Cir. 1932), cert. denied, 287 U.S. 666 (1933). Judge Learned Hand stated in this case involving perpetration of a corporate fraud upon the public by the use of the mails,

> The company protests against the fine levied against it. It argues that this merely takes from the victims of the fraud, assuming that there was a fraud, part of the little that was left them. We agree. Why it should promote observance of the law to put into the public treasury money of which innocent persons have been robbed, is not apparent. But it is a matter with which we have nothing to do; the company was a juristic person to which, by a fiction, criminal responsibility is imputed. It could commit a crime and be punished in the only way it could be made to suffer. Where the burden falls, the trial judge must consider; we have no power to change his decision. So far as our opinion may be thought of consequence in other cases, we may, however, say that when the company is insolvent, as it always is, we can see no good reason for more than nominal punishment.

60 F.2d at 690.

[44] Model Penal Code, Comments 151 (Tent. Draft No. 4 1955).

> This corporate liability has been applied to public corporations, so that when an officer of the railway executive was guilty of of cruelty to sheep, a stiff fine was imposed on the railroad executive, which presumably may mean that passenger fares tend to go up in order to meet the fine.
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> And when the Yorkshire Electric Board was found guilty of some technical breach of regulation, the Chief Justice imposed a fine I think of £20,000 or $60,000 on the Yorkshire Electric Board, which I suppose means that electric rates go up in Yorkshire more than in other parts of the country.[45]

These examples involved public monopolistic corporations in which, assuming the sanction of the regulatory authority, any increased cost, including a fine, may be passed forward to the consumer. Naturally in a highly competitive business such as the retail food market, a merchant could not readily raise his prices above those of his competitors. The ease of forward shifting would then depend to some extent, on the degree of competition with which the offending corporation is faced as well as the extent to which fines of this nature are imposed upon his competitors. If they are levied with some regularity among all members of a particular industry, they may be treated as a cost with consequent increase in price of the industry's product.[46] The facility with which this may be done ultimately depends on the degree of competition. Under perfect competition (assuming all the firms in the relevant line of commerce receive approximately the same number of fines each year) the fine cannot theoretically be shifted forward because no firm will have any control over the market price of its product—this is determined by the economic factors of supply and demand.[47] A good example of this would be trucking firms who regularly incur fines for overloading and treat them as an ordinary cost of doing business.[48] In pure competition, however, the price which a trucking firm could get for hauling a load a given number of miles would not depend on what he wished to charge but upon what he could get from his customer, which, in turn, would be dependent on a complex net of economic factors such as the need to have goods moved, the state of the economy, the location of various consumer and other materials, etc. An attempt to shift forward would simply raise his price above that which the market was willing to pay and deprive him of his customers.[49] The same

[45] Mueller, supra note 7, at 27.

[46] If a fine is applied to a number of firms which together constitute a monopolistic economic market—as can occur in a violation of price fixing—since the fine is generally fixed by degree of participation, which in turn is usually tied to production output or gross sales, the fine can be shifted. 50 Geo. L.J. 566, 577 (1962).

[47] Poole, Public Finance and Economic Welfare 124-26 (1956).

[48] Tank Truck Rentals, Inc. v. Comm'r, 356 U.S. 30 (1958); Poole, op. cit. supra note 47, at 122-27.

[49] Poole, op. cit. supra note 47, at 141-43. The effects may vary significantly among different countries. Thus in France business firms appear to be especially prone to mark up all additions to cost without worrying much about reactions in sales volume. In the more aggressive business relations which characterize American industry, the uncertainties of oligopoly seem to favor more complex pricing policies. Eastman, The Economic Effects of French Minimum Wage Law, Am. Econ. Rev. 369-76 (June 1954).

would be true of backward shifting under these conditions. Backward shifting occurs when the firm is able to reduce its costs by the amount of the fine or other added cost, by paying less for labor, materials, plant costs or some other product or service used by the firm. In a state of pure competition, an attempt to shift the fines backward to labor might be successful providing the relevant labor market is not mobile and unionization is not an important factor.[50] The interplay of a free market would tend to hinder the backward shifting to the sources of goods used in the industry.[51]

In cases, however, where there is a state of pure competition and the fine is not levied generally throughout a given line of commerce but is merely laid upon one firm within that line, shifting becomes impossible. The only possible haven for solace would be labor and this could occur only where the labor force is poorly organized and unable for some reason to move between firms within or out of the industry.[52] One example of such a situation would be the one company town where it would be inconvenient for an individual worker to move to another location for a slight increase in wages.

In cases of monopolistic or oligopolistic competition the outlook for shifting is somewhat brighter, since demand for the product usually remains steady.[53] Product differentiation gives each producer a degree of control over price.[54] Prices, however, are usually maximized to yield the greatest overall profit at a given rate of production.[55] The demand for the product is usually steady. Treating the fine as an additional cost factor, a fined firm might merely restrict output and raise prices,[56] and still be able, in consequence of its somewhat monopolistic situation, to continue to maximize profits.[57] In the case of a fine levied for price fixing, however, all the given members of a particular line of commerce are likely to be fined at the same time and in approximately the same amount. This facilitates forward shifting of the fine, particularly in cases where price leadership of one kind or another prevails in the field.[58] Although it seems incongruous and somewhat discouraging to postulate that a fine levied for price fixing will be passed to the consumer by a more sophisticated continuation of the price fixing, this appears to be the economic result.[59]

In the cases where the fine cannot be shifted, its burden must fall on the stockholders. This, in fact, seems to be the expected and desired result, the theory being that the shareholders will excercise due diligence to prevent malfeasance by the management if a loss of dividends is their only alternative.[60] Of course, this assumes that the shareholders are capable of

[50] Reynolds, Labor Economics and Labor Relations 528-29 (2d ed. 1958).
[51] Poole, op. cit. supra note 47, at 124-26.
[52] Reynolds, op. cit. supra note 50, at 544-51.
[53] Poole, op. cit. supra note 47, at 129-30.
[54] Id. at 127-28.
[55] Id. at 135.
[56] Id. at 129-30.
[57] Ibid.
[58] Poole, op. cit. supra note 47, at 129-31.
[59] Id. at 117-31.
[60] Model Penal Code § 2.07 (1962); Edgerton, Corporate Criminal Responsibility, 36 Yale L.J. 827, 837 (1927); Proxy Contest Expenses and Shareholder Democracy, 4 W. Res. L. Rev. 5 (1952).

exercising some form of control over the actions of the corporate management, that they are able to discover wrongdoing within the corporation and that the law will aid them in their attempts to correct it. Are these assumptions correct?

The first point to be considered is the control which shareholders actually exercise over corporate affairs. Unquestionably, in any closely held corporation, the stockholders exercise a great deal of control over the affairs and policies of the corporation and are usually substantially represented on the board of directors or in management itself. Under these circumstances, wrongdoing by the management or upper echelon employees would have an immediate and radical effect if it were to cost the corporation money. Criminal activity may also be internally proscribed to a large degree in these corporations by the close connection between ownership and management and the consequent immediate supervision stockholders have over corporate affairs. In these situations, then, a fine is an appropriate remedy both to prevent crime and to punish the culpable parties when it has occurred. If the stockholders wish to avoid financial loss they need simply scrutinize corporate activities with a more attentive eye.

The large, non-closely held company has a different nature. Although these are a minority of the total number of corporations, they represent the vast majority of corporate wealth and are economically the most significant.[61] It may be questioned whether the simple precepts which apparently work so well in controlling the behavior of their smaller brethren will do the same for them. The Berle and Means study, conducted in 1932,[62] classed only thirty-four per cent of the two hundred largest corporations in America as being controlled through ownership.[63] Subsequent studies, although disagreeing on particular percentage points, have substantially borne out this conclusion.[64] The study states:

> Frequently . . . ownership is so widely scattered that working control can be maintained with but a minority interest. Separation becomes complete when not even a substantial minority interest exists, as in the American Telephone and Telegraph Company. Under such conditions control may be held by the directors or titular managers who can employ the proxy machinery to become a self perpetuating body, even though as a group, they own but a small fraction of the stock outstanding.
>
> A large body of security holders has been created who exercise virtually no control over the wealth which they or their predecessors in interest have contributed to the enterprise.[65]

In a later study[66] Berle states:

[61] Berle and Means, The Modern Corporation and Private Property 18-46 (1932).
[62] Ibid.
[63] Id. at 94, 115.
[64] The Distribution of Ownership in the Two Hundred Largest Non-Financial Corporations (TNEC Monograph No. 29).
[65] Berle, supra note 62, at 5.
[66] Berle, Economic Power and the Free Society (Pamphlet printed for the Fund for the Republic 1958).

> For practical purposes . . . the control or power element in most large corporations rests in its group of directors and it is autonomous—or autonomous if taken together with a control bloc. And inheritance-tax distribution of stock being what it is, the trend is increasingly to management autonomy. This is a self perpetuating oligarchy.[67]

If this is the case in the large corporations, then the ability of the stockholder to either participate in the affairs of the corporation for the purpose of preventing criminal activity or to correct it afterwards is quite limited. There is, of course, the possibility of a stockholders' derivative suit against the offending officers or directors. Although this remedy is legally available, various procedural devices severely limit its utilization. The most prominent of these is the security for expense statutes which exist in many states. The New York Business Corporation Law, for example, provides that, unless the stockholder owns five per cent of the total stock or his stock is of the value of fifty thousand dollars or more, he may be required by the corporation to give security to the corporation for the expenses of defending the action.[68] The effect of such a statute has been so drastic as to cause one commentator to conclude: "Security for expense statutes have sanctioned the virtual elimination of the stockholder's suit, heretofore the principal device for intracorporate control of large corporations."[69]

Thus, we find the stockholders are apparently not in the same position in these large corporations as they were in the smaller or more closely held ones. On this basis, it would seem that a fine, falling as it does on the stockholders, would in no way prevent corporate criminal activity and would, in fact, punish the parties who are least culpable. Professor Ballantine suggests that the shareholders are merely treated as convenient hostages,[70] and this analysis, in large, loosely held companies, seems very close to the truth. It has, of course, been argued, that responsibility in the modern corporation is so diffused that it would be virtually impossible to fix personal responsibility for the corporate crime.[71] This still would leave us with the incongruous result that when we are unable to detect the guilty, we must punish the innocent. As aptly stated earlier,[72] the object of the criminal law is prevention, not punishment—if the law were entirely sucessful there would be no one to punish.[73]

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[67] Id. at 10-12.

[68] New York Business Corporation Law § 627.

[69] Hornstein, The Future of Corporate Control, 63 Harv. L. Rev. 476 (1950).

[70] Ballantine, Corporations 280 (1946).

[71] Comment, Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy, 48 Geo. L.J. 530, 540 (1960).

[72] Supra note 23 and accompanying text.

[73] Mueller, Mens Rea and the Corporation, 19 U. Pitt. L. Rev. 21, 27 (1957). Professor Mueller states in commenting upon the American Law Institute, 33rd Annual Meeting, Proceedings, supra note 30,

> Other statements are far less positive, e.g., "affirmative considerations . . . tend to justify the recognition of corporate criminal liability for the commission of . . . regulatory offenses"; and "the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effect regulatory policy." "It is not

The remedy of dissolution, codified in the Model Penal Code,[74] offers certain advantages—the fact that the use of the remedy is contingent on the public interest precludes its use in the case of a large company (assuming dissolution would even be considered in such an instance) and in a smaller one it could effectively curtail the illegal activities, particularly if the dissolution order is coupled with an injunction forbidding the parties from forming another company for the same purpose.

Other suggestions include the involuntary dismissal of the major officers and board of directors of a convicted corporation—necessitating a complete change in management. This would only be effective if coupled with an injunction forbidding the parties in question from ever holding an office of trust or profit under the corporation or a subsidiary. In conclusion then, the doctrine of corporate criminal liability seems to have little justification in either logic or legal history. Its only justification would seem to be in its practical application and even this is apparently in doubt. Formed as a weapon against large complex business organizations its usefulness would appear to be outlived and the area should be reexamined by legislatures and courts, and at least the harsher aspects of the doctrine repealed.

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clear just what conclusions are to be drawn from the cited cases." "It would be hoped," the subject reporter finally said, "that more could be pointed to in justification of placing the pecuniary burdens of criminal fines on the innocent than the difficulties of proving the guilt of the culpable individual." This, I respectfully submit, is not the ground upon which to perpetuate and enlarge corporate criminal liability!

[74] Model Penal Code § 6.04 (1962).