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Is Corporate Criminal Liability Really Necessary

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IS CORPORATE CRIMINAL LIABILITY REALLY NECESSARY?

by Bruce Coleman

For as long as corporations have existed, individuals have used the corporate form to achieve illegal ends. In order to meet this problem, courts and lawmakers have had to answer several questions: Should the person responsible be punished or should the corporation itself be punished? Should both be punished? If the corporation is to be punished, what sanctions should be imposed? These questions pose difficult philosophical problems for the criminal law because a decision to prosecute a corporation may involve punishing some people who have no *mens rea*. Yet it also seems unfair to allow a corporation engaging in illegal conduct to escape all punishment. This Comment will examine the extent to which the law holds corporations criminally liable for the acts of their agents, the sanctions used against corporations, and the policy reasons for imposing criminal liability upon corporations. It will then seek an answer to the question: Is corporate criminal liability necessary or are there better alternatives?

I. EXTENT OF CRIMINAL RESPONSIBILITY OF CORPORATIONS

Individual agents of a corporation can engage in a wide variety of actions which will result in corporate criminal liability. They may violate economic or regulatory statutes, commit offenses involving criminal intent as well as strict liability offenses,[1] and even commit offenses involving personal violence. They may commit crimes which benefit them personally while injuring the corporation, crimes which benefit them personally without affecting the corporation, and crimes which benefit both themselves and the corporation. In all of these cases it is possible to hold the corporation criminally responsible for the actions of the agent.

A. *Development of the Common Law*

The earliest cases held that a corporation could not commit a crime.[2] However, this view has long been rejected. The leading case in this area is *New York Central & Hudson River Railroad v. United States*,[3] in which the Supreme Court first discussed the theories which underlie holding a corporation criminally liable for the acts of its agents. In this case, the corporation was convicted of violating the Elkins Act, which imputes to the corporation

1. "Strict liability" means criminal responsibility despite the lack of *mens rea* (criminal intent), as opposed to liability for "fault." J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 280 (1947).

2. Lord Holt, C.J., stated: "A corporation is not indictable, but the particular members of it are." Anonymous, 88 Eng. Rep. 1518 (K.B. 1701). *See also* 1 W. BLACKSTONE, COMMENTARIES *476: "A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities." Early American decisions also followed this line of reasoning. *See* Androscoggin Water Power Co. v. Bethel Steam Mill Co., 64 Me. 441 (1875); State v. Great Works Milling & Mfg. Co., 20 Me. 41 (1841).

3. 212 U.S. 481 (1909).

acts violative of the Interstate Commerce Act committed by its agent. The corporation argued that its punishment would have the effect of punishing innocent stockholders, thus depriving them of their property without due process of law. The corporation also pointed out that neither the board of directors nor the stockholders had authorized any of the illegal acts. In rejecting these arguments, the Court said:

> But there is a large class of offenses . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.[4]

The Court also noted that since a corporation can only act through its agents, public policy weighs in favor of fining a corporation which benefits from the illegal acts of an agent.[5]

Central Railroad left no doubt that a corporation could incur criminal liability, and since that time corporations have been held liable for an increasingly wide variety of crimes. Courts have had no problem holding corporations liable for strict liability offenses,[6] and a large number of cases have involved the violation of regulatory statutes and "public welfare" offenses.[7] A corporation is even capable of committing crimes involving personal violence, such as manslaughter.[8]

Early decisions in this area evidenced a reluctance to convict a corporation of a crime requiring criminal intent,[9] but now it is almost unquestioned that an agent's intent, knowledge, or willfulness may be imputed to the corporation. As one case states, "a corporation, through the conduct of its agents and employees, may be convicted of a crime, including a crime involving knowledge and willfulness."[10] When a corporation is to be held liable for

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4. *Id.* at 494-95.

5. *Id.* at 495.

6. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277 (1943) (Food and Drug Act violation); United States v. Parfait Powder Puff Co., 163 F.2d 1008 (7th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948) (Food and Drug Act violation); United States v. Gunn, 97 F. Supp. 476 (W.D. Ark. 1950) (violation of an ICC regulation). In the *Parfait Powder* case the court stated:

> [O]ne who owes a certain duty to the public and entrusts its performance to another, whether it be an independent contractor or agent, becomes responsible criminally for the failure of the person to whom he has delegated the obligation to comply with the law, if the nonperformance of such duty is a crime.

163 F.2d at 1010.

7. *See, e.g.*, Sherman v. United States, 282 U.S. 25 (1930) (violation of the Safety Appliance Act); United States v. Union Supply Co., 215 U.S. 50 (1909) (violation of a statute regulating oleomargarine dealers); Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958) (violation of ICC regulation); United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948) (violation of Emergency Price Control Act of 1942); United States v. Van Riper, 154 F.2d 492 (3d Cir. 1946) (violation of Office of Price Administration regulation).

8. *See* State v. Lehigh Valley R.R., 90 N.J.L. 372, 103 A. 685 (Sup. Ct. 1917); *cf.* People v. Rochester Ry. & Light Co., 195 N.Y. 102, 88 N.E. 22 (1909).

9. *See, e.g.*, Pearks, Gunston & Tee, Ltd. v. Ward, [1902] 2 K.B. 1.

10. Boise Dodge, Inc. v. United States, 406 F.2d 771, 772 (9th Cir. 1969). *See also* United States v. Knox Coal Co., 347 F.2d 33 (3d Cir.), *cert. denied*, 382 U.S. 904 (1965); Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963); United States v. Carter, 311 F.2d 934 (6th Cir.), *cert denied*, 373 U.S. 915 (1963); Magnolia Motor & Logging Co. v. United States, 264 F.2d 950 (9th Cir.), *cert. denied*, 361 U.S.

an offense requiring specific criminal intent, it must be shown that the agent was acting in the "course of his employment" and "under the scope of his authority."[11] It must also be shown that the agent intended to benefit the corporation,[12] but it is not necessary to show that the corporation actually benefited from the actions of the agent; it is sufficient to show that the agent merely intended that the corporation receive some benefit.[13] Although early cases held that only the actions of a high-ranking corporate officer could be imputed to the corporation,[14] it has now been established that even menial employees can bind the corporation through their actions.[15] It makes no difference that the corporation has instructed its employees to obey the law when performing their duties. If an agent violates these instructions and disobeys a law, the corporation will not be shielded from criminal liability.[16]

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815 (1959); Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951); United States v. Capitol Meats, Inc., 166 F.2d 537 (2d Cir.), *cert. denied*, 334 U.S. 812 (1948); C.I.T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945); Zito v. United States, 64 F.2d 772 (7th Cir. 1933); Joplin Mercantile Co. v. United States, 213 F. 926 (8th Cir. 1914), *aff'd*, 236 U.S. 531 (1915); United States v. Hougland Barge Line, Inc., 387 F. Supp. 1110 (W.D. Pa. 1974); United States v. American Socialist Soc'y, 260 F. 885 (S.D.N.Y. 1919), *aff'd*, 266 F. 212 (2d Cir.), *cert. denied*, 254 U.S. 637 (1920); United States v. Nearing, 252 F. 223 (S.D.N.Y. 1918).

11. *See, e.g.*, Shumate & Co. v. National Ass'n of Sec. Dealers, Inc., 509 F.2d 147 (5th Cir. 1975); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960); Mininsohn v. United States, 101 F.2d 477 (3d Cir. 1939).

12. *See, e.g.*, United States v. Northside Realty Associates, Inc., 474 F.2d 1164 (5th Cir. 1973); United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966); Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962); Egan v. United States, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943). The *Standard Oil* case holds that "the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation." 307 F.2d at 128.

13. *See, e.g.*, United States v. Carter, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962); United States v. Empire Packing Co., 174 F.2d 16 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949); Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945). The *Old Monastery* case held that benefit is not "a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact." 147 F.2d at 908. The *Standard Oil* court accepted this reasoning and went on to say:

> If [the act in question] is done with a view of furthering the master's business, of doing something for the master, then the expectation or hope of a benefit, whether direct or indirect, makes the act that of the principal. The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or, for that matter, the result turns out to be adverse.

307 F.2d at 128-29.

14. *See, e.g.*, People v. Canadian Fur Trappers' Corp., 248 N.Y. 159, 161 N.E. 455 (1928).

15. *See, e.g.*, Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962); United States v. Steiner Plastics Mfg. Co., 231 F.2d 149 (2d Cir. 1956); St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955) (concurring opinion); United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946); Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 54 N.E.2d 210 (1944). Virtually all modern cases agree with the statement in *George Fish* that "[n]o distinctions are made in these cases between officers and agents, or between persons holding positions involving varying degrees of responsibility." 154 F.2d at 801. And this is particularly true, the court points out, when the acts regulated by a statute will usually be performed by subordinate agents of the company. *Id.*

16. *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); United States v. Harry L. Young & Sons, 464 F.2d 1295 (10th Cir. 1972); Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962); United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948); United States v. E. Brooke Matlack, Inc., 149 F. Supp. 814 (D. Md. 1957); People v. Sheffield Farms-Slawson-

Violation of instructions is at best a factor militating against corporate criminal responsibility; it will not, however, exonerate the corporation because corporate conduct is reflected by the conduct of its employees.[17]

In cases where both the corporation and the corporate agent have been charged with a crime committed by the agent, courts have not been troubled by inconsistent verdicts. Juries frequently convict the corporation while acquitting the individual (and sometimes vice versa), but the courts have generally held that acquittal of the individual provides no defense to the corporation,[18] and acquittal of the corporation will not absolve the individual of liability.[19] At least one court has held that the voluntary dissolution of a corporation after indictment will not shield it from prosecution.[20]

In certain unusual circumstances a statute may subject corporations to criminal liability and allow their agents to escape unscathed.[21] A corporation may incur liability even if the acts of an employee exceeded his authority, if the employee's supervisors have ratified and adopted the acts.[22] There is some precedent for holding partnerships liable in the same manner as corporations. In the case of *United States v. A & P Trucking Co.*[23] the Supreme Court held a partnership liable for violating ICC regulations pertaining to the safe transport of dangerous articles. The Court held that it made no difference whether the violator was a corporation, a joint stock company, a partnership, or an individual proprietorship. "The mischief is the same, and we think that Congress intended to make the consequences of infraction the same."[24]

English law has taken the same course as American law. The early case of *Pearks, Gunston & Tee, Ltd. v. Ward*[25] held that corporations could not be held liable for offenses which have a *mens rea* requirement. However, in the case of strict liability offenses a corporation has been treated exactly the same as a natural person,[26] and by 1911 the English courts had decided

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Decker Co., 225 N.Y. 25, 121 N.E. 474 (1918). The *Matlack* case held that it is the duty of the principal officers of the corporation to supervise the subordinates and make sure that they perform all duties imposed by law. "Thus the corporation cannot avoid responsibility by merely saying that a subordinate agent neglected his duty." 149 F. Supp. at 820. In the *Sheffield Farms* case Judge Cardozo stated: "He [the principal officer] must then stand or fall with those whom he selects to act for him. . . . It is not an instance of respondeat superior. It is the case of the nonperformance of a nondelegable duty." 121 N.E. at 476.

17. United States v. Harry L. Young & Sons Inc., 464 F.2d 1295, 1297 (10th Cir. 1972).

18. *See, e.g.*, Magnolia Motor & Logging Co. v. United States, 264 F.2d 950 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959); United States v. Austin-Bagley Corp., 31 F.2d 229 (2d Cir.), *cert. denied*, 279 U.S. 863 (1929).

19. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277 (1943); United States v. American Socialist Soc'y, 260 F. 885 (S.D.N.Y. 1919), *aff'd*, 266 F. 212 (2d Cir.), *cert. denied*, 254 U.S. 637 (1920).

20. Alamo Fence Co. v. United States, 240 F.2d 179 (5th Cir. 1957).

21. *See* Sherman v. United States, 282 U.S. 25 (1930), which deals with the Safety Appliance Acts.

22. *See* Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960), which deals with a Sherman Act violation.

23. 358 U.S. 121 (1958).

24. *Id.* at 124. There were four dissenters who indicated that the partnership should not be held criminally liable because the statute did not specifically include partnerships.

25. [1902] 2 K.B. 1.

26. *Id.* at 11. The same result was reached in Mousell Bros. v. London & N.W. Ry., [1917] 2 K.B. 836, where the court held that in the case of quasi-criminal (strict

that an agent's knowledge and willfulness could be imputed to the corporation, and corporations were being held liable for offenses requiring *mens rea*.[27]

The civil law countries almost completely reject corporate criminal responsibility. With very few exceptions, corporations cannot incur criminal liability; only the persons acting for the corporation may be convicted of criminal offenses.[28] Occasionally, wartime economic legislation imposed criminal liability upon corporations, and some of these regulatory statutes have been retained. But even in these cases the corporation may exculpate itself by showing due diligence on its part, acting through its shareholders or management.[29]

B. *Statutory Law*

Every state now has a statute dealing with corporate criminal liability.[30] However, there is no federal statute specifically dealing with this problem. The United States Code does have a section dealing with rules of construction, and it provides as follows:

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liability) offenses "there is nothing to distinguish a limited company from any other principal . . . ." *Id.* at 845.

27. *See, e.g.*, Director of Pub. Prosecutions v. Kent & Sussex Contractors, Ltd., [1944] 1 K.B. 146; Moore v. I. Bresler, Ltd., [1944] 2 All E.R. 515 (K.B.); Chuter v. Freeth & Pocock, Ltd., [1911] 2 K.B. 832. For a discussion of the development of corporate criminal liability in England, see L. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW (1969).

28. *See* Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 28 (1957) [hereinafter cited as Mueller]. Professor Mueller has done extensive research on the criminal liability of corporations under the civil law. The positions of several major civil law countries are briefly examined below.

France—Corporations are not held criminally liable, with a few exceptions. The doctrine of *mens rea* is held in high esteem, and holding a corporation criminally liable cannot be reconciled with this principle. The limited number of exceptions are in the area of "penal-economic regulations," where corporate criminal responsibility is based on the protection of the public safety and order. Belgian law in this area is similar to that of France. Mueller 29-30.

Germany—The Germans also take a position similar to that of the French. Criminal liability of corporations is rejected except where the legislature has made express provisions to that effect. There are only two instances in which the legislature has provided for liability: Internal Revenue Code violations and Economic Penal Law violations. However, the corporation can exculpate itself from liability in the latter case if it shows that its supervisors exercised due care to prevent the violation. Mueller 31-32.

Japan—There is no liability for ordinary crimes involving *mens rea*, but corporations may be convicted of violating regulatory statutes. However, the doctrine of vicarious liability is not favored. The corporation is treated as identical to its governing body, so a corporation will be criminally liable only for the crimes of its managerial agents (in the area of regulatory offenses). Mueller 32-33.

Philippines—In spite of the fact that the Philippines have had extensive exposure to Anglo-American law, corporate criminal liability has not been accepted there. Mueller 33-34.

The principles outlined above also hold true in socialist countries. Two examples follow:

Yugoslavia—The only violations for which corporations may be held liable are foreign exchange, customs, and tax violations. But jurisdiction over these offenses is in administrative agencies rather than in criminal courts. Mueller 35.

Czechoslovakia—Corporations are not held liable, even for regulatory penal laws. Mueller 35.

29. Mueller 29.

30. *See* Hamilton, *Corporate Criminal Liability in Texas*, 47 TEXAS L. REV. 60 (1968). Professor Hamilton noted that as of 1968, all states except Texas permitted corporations to be subjected to criminal prosecution. Since this time Texas has also passed a statute allowing corporations to be held criminally liable for actions of their agents. *See* notes 46-48 *infra* and accompanying text.

> In determining the meaning of any Act of Congress, unless the context indicates otherwise-
>
> . . . .
>
> the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . .[31]

This statute has frequently been used by courts to apply criminal statutes to corporations in the absence of an express congressional intention to exempt corporations from the scope of the statute in question.[32] Corporations have also been held liable under statutes which contain a congressional intent to include corporations within their coverage.[33]

The Model Penal Code gives careful consideration to corporate crime.[34] Section 2.07(1)(a) imposes criminal liability upon a corporation if an offense in violation of the Code is committed by an agent of the corporation "acting in behalf of the corporation" and "within the scope of his office or employment."[35] If the violation is defined by a statute other than the Code, it must plainly appear that there is a legislative purpose to impose liability on corporations. This test is similar to that used by many courts.[36] Section 2.07(1)(b) imposes liability when "the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law."[37] And obviously, the corporation may be convicted if "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."[38]

In the case of strict liability offenses, the Model Penal Code includes corporations unless the contrary intention plainly appears.[39] Section 2.07(3) deals with unincorporated associations, which are treated basically in the same manner as corporations.[40] Section 2.07(4) defines several terms, with the most interesting feature being the fact that government agencies are not included in the definition of "corporation."[41] Section 2.07(5) is very important; it provides that in crimes other than strict liability offenses, the corporation is excused from liability if it proves that the corporate official with supervisory responsibility over the subject matter of the offense exercised due diligence to prevent its commission.[42] However, this section does not apply when it is "plainly inconsistent with the legislative purpose in defining the

31. 1 U.S.C. § 1 (1970).
32. *See, e.g.*, United States v. A & P Trucking Co., 358 U.S. 121 (1958); Alamo Fence Co. v. United States, 240 F.2d 179 (5th Cir. 1957).
33. *See* United States v. Union Supply Co., 215 U.S. 50 (1909) (statute regulating wholesale dealers in oleomargarine); United States v. Hougland Barge Line, Inc., 387 F. Supp. 1110 (W.D. Pa. 1974) (Water Pollution Control Act Amendments of 1972).
34. MODEL PENAL CODE § 2.07 (Proposed Official Draft, 1962).
35. *Id.* § 2.07(1)(a).
36. *See* note 11 *supra* and accompanying text.
37. MODEL PENAL CODE § 2.07(1)(b) (Proposed Official Draft, 1962).
38. *Id.* § 2.07(1)(c).
39. *Id.* § 2.07(2).
40. *Id.* § 2.07(3).
41. *Id.* § 2.07(4)(a). The authors of the Code state that governmental corporations are excluded because "corporate liability is generally pointless in such cases." *Id.* at 38.
42. *Id.* § 2.07(5).

particular offense."[43] Finally, section 2.07(6) states the well-accepted principle that a person is legally responsible for any offense he commits in the name of the corporation to the same extent as if he had performed the act in his own behalf.[44]

Texas has statutes in this area similar to the United States Code and the Model Penal Code. Like the United States Code, the Texas Penal Code contains a rule of construction which states: " 'Person' means an individual, corporation, or association."[45] The provisions concerning criminal liability are very similar to the Model Penal Code.[46] The only major difference is that in Texas a corporation may not be convicted of a felony unless the offense was "authorized, requested, commanded, performed, or recklessly tolerated" by the board of directors or a high ranking managerial agent acting in behalf of the corporation.[47] As in the Model Penal Code, the Texas Penal Code permits the corporation the defense of proving that it acted with due diligence to prevent the commission of the offense.[48]

II. CRIMINAL SANCTIONS IMPOSED ON CORPORATIONS

By far the most common sanction used against corporations is the criminal fine. In fact, it is the only purely criminal sanction imposed on corporations at the present time. It is an elementary proposition that corporations cannot be imprisoned or put to death,[49] so a criminal fine is the most obvious alternative. A fine is the only sanction contemplated by the Model Penal Code.[50] Courts are often faced with statutes which impose liability upon any "person" who commits the defined offense, and the punishment imposed is a fine and/or imprisonment. As seen earlier, courts have had no trouble applying the term "person" to corporations.[51] Similarly, it is no problem to ignore the imprisonment option and merely hold a convicted corporation liable to pay a fine. In *United States v. Hougland Barge Line, Inc.*[52] the defendant corporation argued that since the statute under which it was prosecuted, the Water Pollution Control Act, called for a fine and/or imprisonment, and since a corporation cannot be imprisoned, it followed that Congress did not intend to include corporations within the scope of this statute. In rejecting this argument, the federal district court held that this statute, like the antitrust and Internal Revenue statutes, was obviously intended to apply to both corporations and individuals. When a corporation is convicted, only the fine portion of the penalty may be imposed.[53]

The Supreme Court has taken a similar view. In one case the Court held

43. *Id.*
44. *Id.* § 2.07(6)(a).
45. TEX. PENAL CODE ANN. § 1.07(a)(27) (1974). It should be noted that many penal provisions apply to "individuals," which does not include corporations. *See id.* § 1.07(a)(17) (1974).
46. *Id.* §§ 7.21-.24.
47. *Id.* § 7.22(b).
48. *Id.* § 7.24.
49. *But see* notes 59-61 *infra*. This civil sanction is similar to "death."
50. MODEL PENAL CODE § 2.07, Comment at 146 (Tent. Draft No. 4, 1955).
51. *See* notes 31-32 *supra* and accompanying text.
52. 387 F. Supp. 1110 (W.D. Pa. 1974).
53. *Id.* at 1114.

that "when a statute prescribes two independent penalties . . . it means to inflict them so far as it can . . . ."[54] Therefore, if one penalty cannot be applied to a guilty defendant, he should not be allowed to escape without punishment, but the other penalty should be applied. Of course, if the only penalty prescribed by a statute is imprisonment, then following the reasoning of the above decision, a corporation could not be convicted.

Section 12.51 of the Texas Penal Code specifically deals with the authorized punishments for corporations.[55] The first part of that section provides that if the offense carries a penalty consisting only of a fine, the court may set the amount of the fine, not to exceed the amount provided by the statute.[56] The second part provides that if the statute authorizes imprisonment, either exclusively or in combination with a fine, or if it makes no specific provision for a penalty, then the court is allowed only to fine the corporation.[57] The third part provides that if the corporation gained money or property while committing a felony or class A or class B misdemeanor, the court may impose a fine of up to double the amount gained by the corporation.[58]

Although fines seem to be the only criminal sanction used against corporations, several civil remedies are presently used in dealing with corporate crime. In Texas a civil statute[59] provides that if a corporation is convicted of a felony, or if a high managerial agent is convicted of a felony while performing his duties for the corporation, then the attorney general may file suit to involuntarily dissolve the corporation. The court is allowed to dissolve the corporation if it is shown that "[t]he corporation, or a high managerial agent acting in behalf of the corporation, has engaged in a persistent course of felonious conduct . . . ."[60] *and* if it is shown that dissolution is necessary to prevent future conduct of the same nature and to protect the public interest.[61] Another statute deals with foreign corporations and is identical to the above statute with the exception that the foreign corporation is not involuntarily dissolved; instead, its certificate of authority to do business in Texas is revoked.[62] Another civil remedy used to stop corporate crime is the private treble damage suit in antitrust cases.[63]

United States v. Ridglea State Bank[64] involved a misrepresentation made

54. United States v. Union Supply Co., 215 U.S. 50, 55 (1909). A similar result is reached in Joplin Mercantile Co. v. United States, 213 F. 926 (8th Cir. 1914), *aff'd*, 236 U.S. 531 (1915). The court noted that the trend was to subject corporations to the same "pains and penalties" as individuals, with the exception that corporations could not receive a death penalty or personal imprisonment. *Id.* at 936. In the *A & P* case, notes 23-24 *supra* and accompanying text, the Court (which was dealing with a partnership) stated: "As in the case of corporations, the conviction of the entity can lead only to a fine levied on the firm's assets." 358 U.S. at 127.

55. TEX. PENAL CODE ANN. § 12.51 (1974).

56. *Id.* § 12.51(a).

57. *Id.* § 12.51(b). The fines authorized are: $10,000 if the offense is a felony, $2000 if the offense is a class A or class B misdemeanor, and $200 if the offense is a class C misdemeanor.

58. *Id.* § 12.51(c).

59. TEX. BUS. CORP. ACT ANN. art. 7.01, § F (Supp. 1974).

60. *Id.* art. 7.01, § F(1).

61. *Id.* art. 7.01, § F(2).

62. *Id.* art. 8.16, § F.

63. Clayton Act § 4, 15 U.S.C. § 15 (1970).

64. 357 F.2d 495 (5th Cir. 1966).

by the corporation's agent in violation of the False Claims Act.[65] When the question arose as to whether the forfeiture and double damage provisions of the Act were "penal" or "civil," the Fifth Circuit discussed the different philosophies involved when deciding whether to inflict civil penalties or criminal penalties on a corporation for the acts of its agents. In a civil action the purpose is to recover actual damages caused by the agent's misrepresentation. The reasons that civil liability would be imposed on the corporation are: the third party reasonably thought that the agent was acting for the corporation, corporate liability encourages closer supervision of employees, and the corporation is more able to bear the loss than is the employee. The court noted that the third reason is the most important for holding a corporation civilly liable. In a criminal action, however, the employee's intent is sought to be imputed to the corporation. The purpose is not to restore the loss inflicted on the innocent third party, so the policy of "fair loss allocation" is not viable. The possible criminal liability of the corporation could deter employees who are "judgment proof" and who would not be deterred by a prospective civil suit against themselves.[66]

Another penalty has been used to deter corporate crime, but it does not result in either the criminal or civil liability of the corporation. Nevertheless, some have suggested that this is the best way to deal with corporate crime: hold the highest officer of the corporation vicariously liable for criminal acts of subordinates.[67] The landmark case in this area is *United States v. Dotterweich*.[68] The Buffalo Pharmacal Company and its president, Dotterweich, were charged with shipping adulterated and misbranded drugs in interstate commerce. Even though Dotterweich did not participate in the offense or have any knowledge of it, the Supreme Court upheld his conviction, basing its decision on the doctrine of vicarious liability. Since this was a strict liability offense there was no need to impute a criminal intent to the president. His conviction was based on the fact that as the president of the corporation, he was in a position to control his employees and the conditions which led to the commission of the offense. The Court stated: "In the interest of the larger good [the statute] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[69] This position has been upheld in several other cases, most of which dealt with matters of public health and safety.[70] In the *Dotterweich* case the Supreme

65. 31 U.S.C. § 231 (1970).

66. 357 F.2d at 499. In *Ridglea* a criminal charge was filed against the corporation, but it was acquitted because the employee was not acting with an intent to benefit the corporation.

67. *See, e.g.*, Geis, *Criminal Penalties for Corporate Criminals*, 8 CRIM. L. BULL. 377 (1972); Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALBANY L. REV. 61 (1972); Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 302-05 (1961).

68. 320 U.S. 277 (1943).

69. *Id.* at 281. There were four dissenters in this case. The dissenting Justices noted that Congress alone has the power to define crimes and specify the offenders. They felt that the statute could have held corporate officers vicariously liable for this crime, but that in fact it did not deal with corporate officers. *Id.* at 287.

70. *See, e.g.*, United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967) (fraud in advertising drugs); Carolene Products Co. v. United States, 140 F.2d 61 (4th Cir.), *aff'd*, 323 U.S. 18 (1944) (violations of the Filled Milk

Court refused to say how far down the corporate hierarchy vicarious liability could be imposed. Rather than establish a formula, the Court decided to leave this question to the lower courts to decide on a case-by-case basis.[71]

Of course, there is an obvious alternative to all of the above penalties. Instead of holding the corporation criminally or civilly liable or imposing vicarious liability upon a corporate officer, a criminal action could be brought against the corporate agent who committed the crime, whether he be an officer or a subordinate agent. This is the path most often taken by civil law countries,[72] with the few exceptions noted earlier.[73] But this is not a solution which will automatically resolve the complex problem of corporate crime; as will be shown, all of the above penalties have limitations.

III. CRIMINAL SANCTIONS AGAINST CORPORATIONS: ARE THEY EFFECTIVE?

It is evident that there are many approaches which a society may take in its quest to eliminate corporate crime. As pointed out earlier, our society has decided to hold corporations liable for a large number of crimes, and the punishment we have usually chosen is the criminal fine. Before determining whether this is the wisest course to follow, several factors should be examined. First, the reasons why corporate (or "white collar") crime exists are examined; second, the reasons for punishment in general and for punishing corporations in particular are considered; finally, an analysis is made of the effectiveness of the present criminal sanctions imposed on corporations, and suggestions are advanced concerning more effective ways to deal with the problem of corporate crime. For the purposes of this discussion, "corporate crime" will refer to "white collar" crimes, *i.e.*, business-related crimes such as antitrust violations, fraud and violations of regulatory statutes, as opposed to crimes of violence.

A. *Why Corporate Crime Exists*

In 1949 Edwin Sutherland released his celebrated study of "white collar" crime, an in-depth analysis of corporate crime which still has validity today.[74] Sutherland realized that a complete explanation of corporate crime would be impossible, but he concluded that the general theory of "differential association" applies to "white collar" crime as well as to other types of crime. This theory hypothesizes "that criminal behavior is learned in association with those who define such behavior favorably and in isolation from those who define it unfavorably, and that a person in an appropriate situation engages in such behavior if, and only if, the weight of the favorable definitions exceeds the weight of the unfavorable definitions."[75] This theory would hold

Act of 1923); United States v. Laffal, 83 A.2d 871 (D.C. Mun. Ct. of App. 1951) (prosecution for keeping a disorderly house).

71. 320 U.S. 277, 285 (1943).
72. Mueller 28; *see* note 28 *supra* and accompanying text.
73. *See* note 29 *supra* and accompanying text.
74. E. SUTHERLAND, WHITE COLLAR CRIME (1949).
75. *Id.* at 234.

that lawbreaking is normal behavior in some businesses as a result of several factors inherent in our culture, such as excessive competition, the emphasis on succeeding at any cost, and the impersonal nature of urban business practices. Those who are employed in these businesses are often isolated from businesses where illegal behavior is not common; therefore, their values and attitudes become permeated with the idea that criminal behavior is normal. Through their associations with others in the same business who justify their offenses as being normal, these people learn to accept these practices. The result is more "white collar" crime.[76] Other theories stress personality traits of individual violators, subcultural value divergencies, and the "exploitive" nature of our society.[77] Regardless of which theory is believed, it is generally recognized that "white collar" or corporate crime is a problem sociological in nature, reaching our most basic culture patterns.[78]

Sutherland notes several points of similarity between "white collar" crime and professional theft. First, like professional thieves, a large number of the corporations convicted of crimes are recidivists. Obviously, the punishments meted out serve neither to deter nor to rehabilitate. Second, the number of criminal acts committed by corporations is much more extensive than the prosecutions and complaints indicate. Many types of violations are industry-wide, and most companies are never caught and prosecuted. Third, businessmen who violate regulatory statutes often lose no prestige among their peers. The business code often differs from the criminal code, and a businessman will lose prestige only when his actions violate both codes. Fourth, the businessman often feels contempt for the law and the government because they impede his behavior. Similarly, professional thieves feel contempt for the law, policemen, and judges.[79] But there are two significant differences between "white collar" crime and professional theft. The differences are in the conceptions which the offenders have of themselves and in the public's conceptions of them. The thief thinks of himself as a criminal, and the public

76. *See* Newman, *White-Collar Crime*, 23 LAW & CONTEMP. PROB. 735, 748 (1958).

77. *Id.* at 749-50. Newman has compiled the theories of several other sociologists concerning the reasons underlying "white collar" crime. Robert Lane, like Sutherland, supports the differential association hypothesis, noting that some companies consistently violate the law even though their management may have changed several times. Such crimes result from the position of the firm rather than from the personalities of the managers. However, a strong president may exert some influence, in either a positive or negative sense, over the criminal activities of his corporation. Lane, *Why Business Men Violate the Law*, 44 J. CRIM. L.C. & P.S. 151, 163 (1953).

Marshall Clinard agrees with the basic concept of the differential association hypothesis, but believes that it does not account for all instances of corporate crime. He feels that it is necessary to examine the personality traits of individual violators in order to get a more complete picture of white collar crime. M. CLINARD, THE BLACK MARKET 309-10 (1952). Walter Reckless also stresses the importance of examining personality traits. He looks for "differential responses" to similar situations and an "inner readiness" to disobey the law in the violators which he studies. W. RECKLESS, THE CRIME PROBLEM 223 (2d ed. 1955). Sutherland disagrees with these theories. E. SUTHERLAND, *supra* note 74, at 266.

Other criminologists have attempted to explain "white collar" crime in societal rather than individual terms. Frank Hartung theorizes that the basis of "white collar" crime is divergencies of values among different subcultures of the upper class. *See* Newman, *supra* note 76, at 749. Donald Taft points out the "exploitive" nature of our society; people have a need to succeed in order to gain prestige, and they will often exploit others and commit illegal acts to gain these ends. D. TAFT, CRIMINOLOGY 339 (3d ed. 1956).

78. *See* E. SUTHERLAND, *supra* note 74, at 217; Newman, *supra* note 76, at 750.

79. E. SUTHERLAND, *supra* note 74, at 218-20.

also thinks he is a criminal. But the businessman regards himself as a respectable citizen and he is so regarded by the public.[80]

Sutherland mentions three methods employed by corporations seeking to avoid conviction for illegal conduct. First, corporations often commit crimes which are hard to detect, and they usually victimize consumers, who are least likely to fight due to a lack of organization and information.[81] Second, corporations often commit crimes in which proof is difficult.[82] Third, corporations often use various methods to "fix" cases.[83] With these points in mind, it will be easier to analyze the nature and effectiveness of corporate punishment.

B. *Purposes and Efficacy of Criminal Sanctions Against Corporations*

Most authorities agree that protection of society is the ultimate end of punishment.[84] Traditionally, three purposes have been ascribed to criminal sanctions: deterrence, retribution, and reformation.[85] In operation, punishment may control behavior in several ways. Some people will not engage in prohibited behavior for fear of being punished. Others are not deterred by this threat, but punishment serves to remove them from society in order to prevent them from committing further crimes. Another group may not be deterred by the threat of punishment but is deterred when its members observe the actual imposition of punishment on offenders. Finally, some persons will not engage in behavior for which the statutes prescribe punishment because they desire to conform their behavior to the norms set by society. They are not deterred so much by the fear of punishment as they are by the fear of incurring the disapproval of their community.[86] It must be kept in mind that punishment alone is not the purpose of criminal law. "The purpose of criminal law is to define socially intolerable conduct, and to hold conduct within limits which are reasonably acceptable from the social point of view."[87]

Society has moved away from using punishment strictly for retribution, and "rehabilitation" is not generally thought of in connection with corporations. Therefore, deterrence should be the main reason that corporations are held

80. *Id.* at 223.
81. *Id.* at 230-31.
82. Some examples are antitrust violations, unfair labor practices, and false advertising. *Id.* at 231-32.
83. Four methods which Sutherland lists are: (1) making a settlement, (2) pressuring a senator or representative to influence the government agency which has brought charges against the corporation, possibly resulting in dismissal or reduction of the charges, (3) developing a general good will before any charges are made, and (4) even preventing the implementation of the law. *Id.* at 232.
84. W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES 56 (6th ed. 1958).
85. *Id.* at 61-62. Some writers enlarge this list by including prevention, disablement, education, retaliation, or indignation. However, these are merely aspects of the three basic purposes already mentioned. *Id.* at 62-63.
86. *Id.* at 56.
87. R. PERKINS, CRIMINAL LAW 4 (1957). Perkins notes that if the criminal law were one hundred percent effective, there would be no need for punishment because nobody would step outside the boundaries of socially acceptable conduct prescribed by the criminal law. *Id.*; *cf.* Sauer v. United States, 241 F.2d 640, 648 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957), *overruled on other grounds*, Wade v. United States, 426 F.2d 64 (9th Cir. 1970).

criminally liable and punished.[88] Today the question is no longer whether it is possible to impute the acts of corporate agents to the corporation; the real question to be asked when determining the criminal responsibility of corporations is one of policy: Will the criminal sanction imposed on the corporation deter it from committing these wrongful acts in the future?[89] One writer feels that the question is not who has the guilty mind, but who should be held criminally responsible in order to best serve this deterrent purpose. The argument is that corporate responsibility added to the criminal liability of the corporation's representatives will best serve this purpose. Otherwise the corporate agent may risk his own liability for the sake of the corporation.[90] Whether or not the above argument is accepted, the Model Penal Code agrees that the "ultimate justification" for imposing fines on corporations must be the deterrence of illegal activities of corporate agents. If fines do deter this type of behavior, it must be determined whether they are more effective than proceeding directly against the guilty agent.[91]

The first objection to corporate liability is that it punishes innocent people. It is the shareholders who bear the burden of a corporate fine, and in most cases they have not participated in the crime. Practically speaking, most shareholders have little or no control over the corporate management and are unable to supervise corporate agents to prevent misconduct.[92] Why are they punished? If public policy dictates that shareholders be punished, one writer questions why we stop with a fine.[93] If the corporation commits larceny, should not shareholders be punished as thieves? As it now stands, the punishment does not fit the crime, it is "unscientific," and it is uncertain, in that one could avoid punishment by selling the stock or receive punishment by buying stock with no notice that the corporation had committed a crime.[94] "It is a poor legal system indeed which is unable to differentiate between the law breaker and the innocent victim of circumstances so that it must punish both alike."[95] It might be argued that the shareholder has consented to the fact that he may be punished if the corporation is convicted of a crime, but this merely forces the shareholder to take a legal gamble along with the economic gamble which he is already taking when he buys the stock.[96]

Several justifications for punishing innocent shareholders have been advanced. The Model Penal Code suggests that since the corporation is the one who was convicted, the shareholders are spared the "opprobrium and incidental disabilities" which follow a personal conviction or indictment. Also, the shareholder's loss is limited to what he invested in the corporation. He would not have to go to jail, and his assets would not ordinarily be subject to levy.[97] Another writer points out that this type of injury is the same as

88. *See* Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 833 (1927).
89. W. CLARK & W. MARSHALL, *supra* note 84, at 402.
90. Edgerton, *supra* note 88, at 833.
91. MODEL PENAL CODE § 2.07, Comment at 148 (Tent. Draft No. 4, 1955).
92. *Id.*
93. Francis, *Criminal Responsibility of the Corporation*, 18 ILL. L. REV. 305, 321 (1924).
94. *Id.*
95. Mueller 45.
96. *Id.* at 40.
97. MODEL PENAL CODE § 2.07, Comment at 148 (Tent. Draft No. 4, 1955).

results from imposing tort, contract, or workmen's compensation responsibility on the corporation. In each case the shareholder suffers a monetary loss. It is argued that when all interests are considered, the shareholders must subordinate their interests to the public interest.[98]

Even if one is able to rationalize the punishment of innocent shareholders, the question still remains: Do corporate fines deter corporate agents from committing crimes? Most people believe they do. In a closely held corporation, fines probably do deter because the shareholders are usually the managers of the corporation; therefore, the fine would probably be imposed upon the people who performed the criminal act. But do fines deter the agents of a public corporation? There are some crimes for which a fine is all that could be imposed on an individual who is convicted; if a fine is also imposed on the corporation, it will provide an additional deterrent. This is especially true when the guilty individual is insolvent and would not be deterred by a personal fine.[99]

The Model Penal Code states that a primary purpose of fining the corporation is to encourage the managers to supervise corporate personnel closely.[100] Several courts and commentators agree on this point.[101] Another possible deterrent effect of corporate fines is the corporation's fear of derivative suits. If the managers fear that a derivative suit will be filed after conviction of the corporation (to shift the cost of the fine to the managers), then they may be deterred from criminal conduct.[102] Finally, corporate fines have been justified on the basis that they prevent unjust enrichment by forcing the corporation to pay an amount which may be more, less, or equal to the illegally acquired profits.[103]

These points are countered with several arguments. While it is true that fines may to some extent prevent the acquisition of illegal profits, they are useful mainly in instances where civil actions for restitution are not feasible. However, the criminal law is not meant to be used for purposes of restitution, and "it is a rough instrument for the purpose."[104] Fines are ineffective as deterrents because they are usually so small that they do not diminish profits to any substantial degree. In some cases the fine is no more than a "license fee" for engaging in the illegal conduct.[105] As an example, the

98. Edgerton, *supra* note 88, at 837.

99. *See* United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966); Edgerton, *supra* note 88, at 834.

100. MODEL PENAL CODE § 2.07, Comment at 154 (Tent. Draft No. 4, 1955).

101. *See, e.g.*, United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005-06 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); Edgerton, *supra* note 88, at 835.

102. Hamilton, *supra* note 30, at 74-75. Derivative suits seek to shift the cost of the fine from the corporation (in which case the shareholder would eventually pay it) to any officers who condoned or should have known of the violation. The court can shift the fine to an officer if it is proven that he did not exercise "due care." This is much easier to prove than direct involvement in the crime, which is what would have to be proven if the officer himself were a defendant in the original criminal proceeding. *Id.*

103. MODEL PENAL CODE § 2.07, Comment at 150 (Tent. Draft No. 4, 1955).

104. Andrews, *Reform in the Law of Corporate Liability*, 1973 CRIM. L. REV. 91, 94.

105. *See* Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 285-87 (1961). Similarly, the private treble damage suit in antitrust actions has not worked well because it has been successfully employed very infrequently. *Id.* at 288-90.

$437,500 fine against General Electric in 1961 was equivalent to a $3 fine for a man earning $175,000 a year.[106]

Advocates of corporate criminal liability advance other arguments to support their position. Sometimes economic pressures from within the corporation are strong enough to cause individuals to risk their own liability for the sake of corporate gain. This may be especially true where the penalties are moderate, the crime is not classified as immoral, proof of guilt is difficult, and/or the individual knows the jury will be sympathetic.[107] In these cases it may seem more "just" to prosecute the corporation rather than the individual. However, Mueller does not feel that this argument is persuasive because no one has yet proven the prevalence of *sub rosa* encouragement for violations by employees for the benefit of the corporation. He does not believe that the employee could be talked into committing crimes for the corporation if persons were held liable rather than corporations; he advocates holding the guilty individual liable rather than his corporation.[108]

Another justification given for holding corporations criminally liable is that it is often difficult to identify and convict the guilty individual, due to complexities in the structures of large organizations. It is often easy to tell that some individuals within a corporation have committed a crime, but it may not be clear who those people are. Modern corporations are characterized by decentralization and delegation of authority, and in actions such as antitrust violations it is hard to identify the guilty agents.[109] Often the only identifiable participants are menial employees who were acting on the instructions of unidentifiable higher officials of the corporation; juries are reluctant to convict these employees.[110] Another difficulty arises where the guilty corporate agent is outside the state and not amenable to prosecution. This is frequently the case in antitrust and fraud cases.[111] The Model Penal Code admits that the difficulty of convicting the guilty corporate agent is not a very persuasive justification for prosecuting the corporation and imposing fines which will be borne by innocent shareholders, but where these difficulties are great enough, the Code states that corporate fines are justified.[112]

This justification has met with strong opposition. One writer suggests that "difficulty of proof is a human weakness in our machinery of justice that we

106. *See* Geis, *supra* note 67, at 381. From 1890 to 1955 the Sherman Act provided for a maximum fine of $5000 per violation; in 1955 it was increased to $50,000 per violation. The actual fines imposed are usually below the maximum allowable. Between 1946 and 1953 the average fine for Sherman Act violations was $2600. Between 1955 and 1965 (after the maximum fine was increased tenfold) the average fine was $13,420. The inadequacy of these fines is obvious when compared to corporate profits. In 1966 the average profit of the 500 top industrial firms was $48 million. M. GREEN, B. MOORE, & B. WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM 169-70 (1972).

107. MODEL PENAL CODE § 2.07, Comment at 148-49 (Tent. Draft No. 4, 1955).

108. Mueller 45.

109. *See* United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); Edgerton, *supra* note 88, at 834; Hamilton, *supra* note 30, at 71-72. The court in *Hilton Hotels* justified conviction of the corporation for an antitrust violation on the grounds that high management officials most likely participated in the violation or were at least aware of the violation. Also, it was the corporation, rather than the corporate agents, which benefited from the violation. 467 F.2d at 1006.

110. Hamilton, *supra* note 30, at 72.

111. *Id.* at 71.

112. MODEL PENAL CODE § 2.07, Comment at 150 (Tent. Draft No. 4, 1955).

must generally face as a fact."[113] When a principal authorizes his agents to commit illegal acts we do not convict him unless his guilt is proven. Why should there be a different rule for corporations?[114] Mueller asks whether the difficulty of proof involved in this problem is any greater than proving the necessary *mens rea* on the part of the defendant charged with murder. "The argument of the difficulty of proof is the most desperate and uncertain justification . . . which could possibly be made."[115]

Another justification for corporate criminal liability is that juries are more likely to convict corporations in cases where they are reluctant to convict individuals.[116] There are several possible explanations for this. Juries may feel that the penalties are too high for individuals convicted of these crimes, most of which are *mala prohibita* offenses rather than offenses of an "immoral" nature.[117] Juries realize that an individual has his liberty at stake, while corporations will only be fined upon conviction.[118] Some juries might believe that the corporate agent is just "taking the rap" for a higher corporate official.[119] It is not clear what conclusions may be drawn from this type of jury behavior. In all of these cases the jury had the option of electing corporate liability rather than individual liability. It is possible that if corporate liability had not been available the juries would have convicted the individuals. The Model Penal Code admits that corporate liability may thus encourage erratic jury behavior.[120]

Many people who do not ordinarily favor corporate criminal liability recognize that it can be useful when applied to regulatory offenses (*mala prohibita*), public welfare offenses, and strict liability offenses.[121] The Model Penal Code states that corporate liability can best be justified in these *mala prohibita* offenses.[122] Regulatory and public welfare offenses are intended to prevent harm to the general public. Harm will result to the public whether the offense was committed intentionally or not, and many people believe that

113. Edgerton, *supra* note 88, at 321.
114. *Id.*
115. Mueller 46.
116. *See, e.g.*, American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941), where the court remarked, "We can not understand how the jury could have acquitted all of the individual defendants"; United States v. Austin-Bagley Corp., 31 F.2d 229, 233 (2d Cir.), *cert. denied*, 279 U.S. 863 (1929), where the court observed, "How an intelligent jury could have acquitted any of the defendants we cannot conceive." Newman, *supra* note 76, hypothesized that the general public would be just as likely to impose long prison terms on "white collar" criminals as they would in an ordinary criminal case. However, his studies proved otherwise. Only one-fifth of those questioned would sentence white collar violators to more than one year in prison. The rest would impose fines, warnings, seizures, and shorter jail terms on these people. Newman, *supra* note 76, at 751.
117. MODEL PENAL CODE § 2.07, Comment at 149 (Tent. Draft No. 4, 1955). *Mala prohibita* offenses include all acts which are wrong *only* because they are prohibited by statute. *See* J. MILLER, HANDBOOK OF CRIMINAL LAW 23 (1934). These acts would not otherwise be punishable under the common law of the jurisdiction. *See* W. CLARK & W. MARSHALL, *supra* note 84, at 102.
118. *See* United States v. American Socialist Soc'y, 260 F. 885, 888 (S.D.N.Y. 1919), *aff'd*, 266 F. 212 (2d Cir.), *cert. denied*, 254 U.S. 637 (1920).
119. Hamilton, *supra* note 30, at 72.
120. MODEL PENAL CODE § 2.07, Comment at 150 (Tent. Draft No. 4, 1955).
121. *See* Francis, *supra* note 93, at 321-22.
122. MODEL PENAL CODE § 2.07, Comment at 149 (Tent. Draft No. 4, 1955); *cf.* Andrews, *supra* note 104, at 94.

the only way to prevent this public harm is to impose penalties upon the guilty corporations, regardless of the guilt of the corporate management.[123] The Supreme Court has stated that imposing corporate liability is virtually the only way to correct the abuses to which these statutes are directed.[124] Objections have been raised, however, when corporate liability is imposed for crimes with a *mens rea* requirement. Critics suggest that a better deterrent would be to proceed against the guilty corporate agent. One writer objects that corporations do not commit crimes, only people do. Therefore, imposing liability on corporations deters no one.[125] Advocates of corporate liability claim that the damage to the corporation's reputation after a conviction will deter criminal conduct. Mueller states: "There is absolutely no evidence that corporate criminal liability is any more effective than personal criminal liability."[126] In civil law countries everyone is aware that the corporate form cannot be used to escape criminal liability; only individuals are prosecuted. There is no chance for erratic jury behavior, and innocent shareholders and consumers are not punished. Mueller suggests that this results in greater deterrence.[127] Gilbert Geis argues convincingly that since corporate executives are backed by the power and money of their corporations, their violations of the law represent a greater harm to society than violations by those less well-situated.[128] Quotes from convicted corporate officers indicate that holding them personally liable is a very effective deterrent. They fear conviction, and those who go to jail feel a deep sense of shame, guilt, and injured pride.[129] Geis believes that the public will not begin to regard corporate crime in the same light as traditional crimes until those who commit them are punished in the same manner as other criminals.[130] Another proposal made by some who object to corporate criminal liability is holding the corporate president liable for the crimes committed by corporate agents. While this will admittedly cause some hardship, it is argued that at least the corporate officials are in a position to prevent crime, whereas the general public is not. When executives realize that they may be prosecuted, they will supervise their employees and make sure that no illegal activity is taking place. The fact that subordinates may be hard to control should merely be regarded as a "hazard of the occupation" of being a corporate official.[131] There is some support for this opinion in *United States v. Dotterweich*.[132]

123. *See* Note, *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 GEO. L.J. 547, 561 (1962); Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 HARV. L. REV. 283, 286 (1946).

124. New York Cent. & Hudson R.R.R. v. United States, 212 U.S. 481, 495-96 (1909).

125. *See* Andrews, *supra* note 104, at 94.

126. Mueller, *Criminal Law and Administration*, 34 N.Y.U.L. REV. 83, 94 (1959).

127. Mueller 28.

128. This is obvious, because one who has the money and power of a corporation behind him can do much more damage than the average person. *See* Geis, *supra* note 67, at 381.

129. *Id.* at 378-80, 383. Geis notes that these people were model prisoners, and actually helped introduce modern business techniques in the administration of the jails. *Id.* at 380.

130. *Id.* at 384.

131. *See* Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALBANY L. REV. 61, 71 (1972).

132. 320 U.S. 277 (1943); *see* notes 68-71 *supra* and accompanying text.

C. *Proposed Limitations on Corporate Criminal Liability*

The purpose of criminal sanctions, especially the ones discussed in this Comment, is to deter future criminal behavior. This purpose is not being achieved by holding corporations criminally responsible for the acts of their agents. It has not been demonstrated that criminal fines deter corporate crime, mainly because of the uncertainty of their application and because they are usually small in comparison with the gross profits of the corporation. While it is possible that fines make corporate officials try to keep closer control over subordinates in order to prevent illegal activities, it is at least equally possible that punishing the subordinates themselves would prevent them from engaging in these illegal activities. Even in the case of *mala prohibita* offenses, fines are often just a fee which the corporation pays to engage in the prohibited activity. A much better deterrent effect would be achieved by punishing the responsible individuals.

Originally it was thought that adding the liability of corporations to the liability of individuals would serve to doubly deter criminal behavior of corporate agents. But in practice this has not held true because juries are prone to convict the corporation and acquit the individual corporate agents. This results in less deterrence than before. Additionally, the effectiveness of public censure after conviction as a deterrent force is very debatable in the case of corporations. Another valid reason against corporate criminal liability is its tendency to punish innocent shareholders. The arguments that innocent shareholders are punished just as much when tort liability is imposed on corporations or that the shareholder's loss is limited to his investment provide no justification for punishing shareholders in the first place.

The distinction between crimes which are *mala prohibita* and those which are *mala in se*[133] should not be used to determine when to impose corporate criminal liability. This distinction is becoming less significant as more and more crimes are being defined by legislation and regulations.[134] If corporate criminal liability is to be limited, a better solution can be found than merely eliminating corporate liability for offenses *mala in se* and retaining it for *mala prohibita* offenses. It would be more effective to eliminate corporate criminal liability for all offenses which carry a possible jail sentence for the guilty actor. When juries no longer have the choice between fining a corporation and sending the guilty individual to jail, they will be less reluctant to subject the individual to a jail term. This would be a more effective way to deal with the problem of corporate crime because the prospect of going to jail is an effective deterrent, particularly in the case of "white collar" criminals.

Prison sentences for individuals are available in antitrust cases, but they are imposed infrequently.[135] It is difficult to prove that a particular executive formulated a policy which resulted in antitrust violations. As a consequence, the only individuals prosecuted in most antitrust cases (if indeed any are prosecuted) are those who implemented the policy. This does not serve

133. An offense *mala in se* is one which is wrong in itself, apart from any statute. *See* J. HALL, *supra* note 1, at 293.
134. J. MILLER, *supra* note 117 at 23; *cf.* R. PERKINS, *supra* note 87, at 4.
135. *See* Comment, *supra* note 105, at 291-92.

to deter antitrust violations as effectively as would conviction of the policy formulators. Possibly the law should be changed to allow conviction of corporate policy formulators when it is proven that they knew of or condoned the illegal behavior of those who implemented corporate policies.[136] While it is true that in some cases it may be difficult to locate and convict the guilty individual, we are confronted with the following question: Should we seek to prosecute individual law-breakers and as a result allow some who are guilty to escape, or should we prosecute the corporation, usually obtaining a conviction, but as a consequence punish innocent shareholders? It is submitted that the former alternative is more desirable.

Although individual liability would usually serve as a better deterrent, there are some instances in which corporate criminal liability is useful. In cases where the guilty individual would only receive a fine, he might be deterred more by a corporate fine. The prospect of losing his job could be more crucial to the corporate employee than having to pay an individual fine. Even in these cases where corporate criminal liability is to be retained, the corporation should be allowed the defense of showing that it used due diligence to prevent the commission of the crime. Both the Model Penal Code and the Texas Penal Code contain this defense.[137] However, both of these codes limit the application of this defense by providing that it shall not apply to strict liability offenses or where "it is plainly inconsistent with the legislative purpose in defining the particular offense."[138] This reduces the effectiveness of the defense and is unacceptable because it will again result in the punishment of innocent shareholders.[139]

The suggestion that the corporate president should be held liable for the criminal acts of any corporate employee, even if he knew nothing about such acts, seems too harsh. While this suggestion is intended to force the president to supervise his corporation more closely, it places an unreasonable burden on him. Many occasions would arise where supervision is impossible. For example, if a truck driver hauling explosives leaves his truck unattended (thus violating an ICC regulation), it would be unjust to hold the president of the trucking company, who is many miles away, criminally liable. Similar injustices would frequently arise under any such plan.

IV. CONCLUSION

Corporate criminal liability has progressed from the time when it was inconceivable to hold a corporation criminally responsible to the present time,

136. In United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the court noted that it is often hard to identify the corporate agents responsible for antitrust violations. However, the court pointed out that high management officials "are likely to have participated in the policy decisions underlying Sherman Act violations, or at least to have become aware of them." *Id.* at 1006. While the court used this reasoning as a basis for imposing criminal liability upon the corporation, it could also be used as the basis for imposing individual liability on the corporate officers.

137. MODEL PENAL CODE § 2.07(5) (Proposed Official Draft, 1962); TEX. PENAL CODE ANN. § 7.24 (1974).

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

139. *See* Mueller 43-44.

where corporate criminal liability is an accepted fact. If a corporate agent commits a crime while acting under the scope of his authority and with the intent to benefit the corporation, then the corporation will usually be held criminally responsible for these acts. It is suggested that this is not the ideal solution to the problem of deterring corporate crime. Perhaps there is no ideal solution, but this "solution" has the obvious drawback of punishing innocent shareholders, and the deterrent effects of corporate criminal liability have not fully been proven. A better policy would be to punish the guilty individuals within the corporation, especially if the offense involves a jail sentence. This will serve as a better deterrent than merely fining the corporation, which will pass the costs on to consumers and shareholders. Corporate liability could be retained for crimes which would result in only a fine to the individual, but even then the corporation should be allowed the defense of showing that it exercised due diligence to prevent the commission of the crime.

This plan would be more just than the present method of dealing with corporate crime, and at the same time it would better effectuate our expressed purpose of deterring future illegal corporate conduct. Individual corporate agents would realize that they would have to answer for their actions; they could no longer hide behind the corporate veil. Juries would no longer act so erratically because they would not have to choose between corporate and individual liability. This plan should come closer to dealing effectively with corporate crime than the present plan of simply imposing criminal liability on corporations for the acts of their agents.