



INDICTING CORPORATIONS REVISITED:
LESSONS OF THE
ARTHUR ANDERSEN PROSECUTION



WITH A PROPOSED CORPORATE
CRIMINAL LIABILITY JURY INSTRUCTION

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On May 31, 2005, the United States Supreme Court reversed the conviction of Arthur Andersen LLP (No. 04-0368) and remanded the case for further proceedings. The Court’s decision was based on error in the jury instructions defining the requisite criminal intent and, it is believed, has no bearing on the analysis provided in this paper.

INDICTING CORPORATIONS REVISITED: LESSONS OF THE ARTHUR ANDERSEN PROSECUTION

I. Introduction

In June, 2002, a federal jury in Houston, Texas convicted the major accounting firm of Arthur Andersen of obstruction of justice.¹ The company agreed to stop auditing public companies by the end of August, in effect closing its business. The Andersen firm was subsequently sentenced to pay a fine of \$500,000 and sentenced to five years probation. Approximately 28,000 people lost their jobs at the company in the United States alone. In June of 2004, the conviction was affirmed by the Fifth Circuit, *United States v. Andersen LLP*, 374 F.3d 281 (5th Cir. 2004).

By all accounts, many problems brought an end to what was once one of America's top accounting firms. Some of these are detailed in the factual summary, excerpted from the Court of Appeals opinion, which is set forth in Appendix A, and some others had previously been found to justify very serious civil sanctions. There was, however, a clear causal connection between the firm's conviction of a felony and its consequent inability to audit public companies, an inability that, for a public accounting firm, amounted to death.²

The prosecution that thus directly contributed to the demise of Arthur Andersen did not suggest at trial that the company's management as a whole or even in significant part was corrupt. It did not have to. The prosecution's only burden was to prove, beyond a reasonable doubt, that any one of Andersen's 28,000 U.S. employees "acted knowingly and with intent to cause or induce another person or persons to (a) withhold a record or document from an official proceeding, or (b) alter, destroy, mutilate or conceal an object with intent to impair the object's availability for use in an official proceeding."³ In order to prove the necessary intent, the government was not even required to prove that the Andersen employee in question acted solely for an improper purpose, so long as the action was taken "at least in part, with [the] improper purpose" of impeding an official proceeding.

And, as uncontroversially stated by the district judge, so long as this agent or employee "was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions, or against the partnership's policies [did] not relieve the partnership

¹ Arthur Andersen was a limited liability partnership. We will not be distinguishing, in this paper, among the various legal forms of business entities but will generally use the term "corporation" to encompass all legal fictions that govern business organizations.

² Melissa Klein, *Guilty Verdict Draws Mixed Reaction*, Accounting Today, July 8, 2002, at 1. The March 14, 2002 indictment itself, for obstruction of justice by knowingly, intentionally and corruptly persuading employees to shred Enron-related documents, may actually have been all that was truly needed to destroy the company. The day after the indictment, the government suspended all new business dealings with Arthur Andersen.

³ *United States v. Arthur Andersen, LLP*, Court's instructions to the jury at 10. (Appendix B hereto.)

of responsibility for the agent's acts."⁴ Furthermore, under the law, "the agent of a partnership who commits an act need not be a high-level or managerial agent in order for the act to be attributable to the firm. A partnership may be held responsible for the acts of agents who are subordinate or low-level employees."⁵ Finally, in a more debatable decision, when asked by the jurors if each one of them had to find the same Andersen employee guilty, the trial judge responded that a guilty verdict could be rendered even though the jurors could not all agree on which employee had the intent to commit obstruction.⁶

On balance, the public benefits generated by prosecuting Andersen criminally are minimal or, if they exist at all, are exceedingly subtle. No one went to jail as a result of its conviction, nor could they have under the law. The criminal fine paid by Andersen was the maximum under the criminal law but was still vastly less than the fines and penalties that might have been, and had been, levied against the firm in civil enforcement actions taken by various government agencies. Yet, the indictment, the conviction, and the consequent prohibition against appearing before the Securities and Exchange Commission were sufficient to kill the company, a company made up not only of partners and managers, but also, of course, of lower-level employees and shareholders. In 2001, Andersen employed 85,000 people in approximately 390 offices in 85 countries. By the end of the following year, only 3000 people remained.⁷

Andersen employees have found other jobs. This was especially true of higher-level partners or auditors who worked with those partners. Some of those, however, who worked in other positions, including administrative staff, had a much harder time finding new employment.⁸ Even in the case of the merger of Andersen's international subsidiaries, redundancy was inevitable, and many lost their jobs.⁹ This was experienced in all of Andersen's offices, many located far from Houston, the locus of the activities that resulted in the conviction.¹⁰

⁴ In accordance with most federal circuits' law, Judge Harmon instructed the jury that it could consider Andersen's policies and instructions as bearing on the issue whether the agent in question was acting within the scope of his or her employment. Having also been told that the partnership might still be responsible for the agent's acts even if the acts in question were contrary to the partnership's instructions or against the partnership's policies, the jury is unlikely to have made much sense of this instruction.

⁵ Jury instructions at 5.

Ironically, the guilty agent identified by the government in the trial of Arthur Andersen was David Duncan, one of the firm's Houston-based partners, and the culpable conduct was the widespread shredding of documents. According to contemporary newspaper accounts, the jury rejected the government's theory, but nevertheless convicted Andersen upon its finding that a different agent of the firm performed a different act of obstruction of justice within the course of her employment by Andersen. The jury focused on an e-mail drafted by Arthur Andersen attorney Nancy Temple asking that her name be removed from an internal draft memorandum in which Arthur Andersen warned its client Enron that Enron's earnings statements were misleading. As of the date of this paper, Nancy Temple has not been charged with any crime.

⁶ *Arthur Andersen Is Found Guilty of Obstructing Justice*, *The Accountant*, June 21, 2002, at 1.

⁷ Charles E. Ramirez, *Andersen Workers Settle Into New Careers*, *Detroit News*, December 1, 2002, at 1D.

⁸ See Linda Tucci, *Andersen Clears Out Office but Leaves Some Ex-staffers Behind*, *St. Louis Post-Dispatch*, Aug. 29, 2002, at B1.

⁹ Habhajan Singh, *150 Leave Andersen Malaysia*, *Bus. Times (Malaysia)*, July 22, 2002, at 5.

¹⁰ And what of those former employees now? Before these events, the name Arthur Andersen on a resume was a feather in a job seeker's cap. Although most of the firm's employees had no relation to the matter that was at issue for prosecution, they are tainted by association with a company now branded criminal. See *Death of the Firm*, *St. Louis Post-Dispatch*, June 18, 2002, at B6.

The purpose of this paper is not to attack the particular exercise of prosecutorial discretion that led to the indictment of Arthur Andersen. We believe, however, that the Arthur Andersen prosecution was, in retrospect at least, misguided and that a thoughtful revisiting of the decision to prosecute generates at least four conclusions:

- Stringent civil sanctions can be imposed on renegade parts of business entities with far less collateral damage to innocent individuals than can criminal prosecutions of the business entity itself. Moreover, business entities, as legal fictions, cannot go to jail or feel shame, and these are the only sanctions that can be imposed exclusively through criminal prosecutions. For these reasons, criminal prosecution of business entities should be considered only when it is clear that no civil sanction or combination of civil sanctions will suffice to deter the corporate misconduct. A combination of civil sanctions would have been both more fair and more efficient than was criminal prosecution of the entire Andersen firm.
- Because it is far from clear that the federal statute under which Andersen was prosecuted was intended to apply to corporations or other business entities, and because the original judicial rationale for indicting corporations in the first place is outdated, the legal justification for charging Andersen criminally was and is dubious.
- Much of the collateral damage done by the Andersen prosecution was the result of the regulation linking criminal conviction with automatic debarment of the firm from practice before the Securities and Exchange Commission. 17 CFR § 201.102 (e) (2). Laws that thus impose mandatory, automatic and drastic civil sanctions in the wake of criminal convictions are unnecessarily harsh and rigid. They also give federal prosecutors life and death power over business entities, particularly over entities that are not sole-source providers of important commodities.

The instructions given to the Andersen jury permitted conviction of Andersen regardless of whether the agent in question was a low-level employee or a high-level officer and regardless of whether his conduct was condoned or prohibited by management. Although the Andersen instructions were typical of current pattern federal instructions, this federal standard, based on the civil notion of respondeat superior, is far looser than the standard generally employed in the various American states and other Western countries.

II. When, If Ever, Is Criminal Prosecution of a Legal Fiction Warranted?

A. Judicial Approval of Corporate Prosecutions in the Past Was Premised on Conditions That No Longer Exist.

In the United States, the only early instances of corporate criminal liability were related to non-feasance by quasi-public corporations, such as municipalities which shirked duties to the public,

thereby creating a nuisance.¹¹ This principle was gradually applied to commercial corporations as well as quasi-public ones. As Professor Coffee has pointed out, these cases presented no great theoretical difficulty at the time; in the first place, “no individual agent of the corporation was responsible for the corporation’s omission” and, in the second, “there was no imputation of guilt from agent to principal” because “only the corporation was under a duty to perform the specific act in question.”¹²

As time went on, American courts began to extend the principle to encompass instances of malfeasance as well as nonfeasance, so that, for instance, a corporation that had a duty to keep a public area clear could be charged criminally for its dumping in that area as well as for its failure to keep the area clear.¹³

The watershed was reached in 1909 when the United States Supreme Court held that Congress acted constitutionally in passing a criminal statute that regulated rebating by common carriers and that specifically provided that the acts of a common carrier’s officers, agents and employees, if amounting to misdemeanors, were to be considered the acts of the carrier. *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909). This was the first authoritative application to a corporation of a criminal violation requiring criminal intent.¹⁴

In the *New York Central* case, the Supreme Court seems to have been moved by the fact that, as of 1909 at least, there were few alternative sanctions available. If the Court refused to recognize respondeat superior liability in such cases, it said, “many offenses might go unpunished.” 212 U.S. at 495. The Court also pointed to the logic of having a fine paid by the corporation that benefited from the criminal act in question, and observed that “the great majority of business transactions in modern times are conducted through [corporations], and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.” 212 U.S. at 495-96.

The Supreme Court thus opened the door to prosecutions such as that of Arthur Andersen almost a century later because of a sense that, at least in 1909, federal laws needed to be brought to bear against corporations as well as individuals and in large part because, in 1909, there was no alternative arsenal of sanctions that could be used by the federal government in its efforts to curb rebating and other excesses, apart from fines imposed under the criminal law. Today, of course, the range of civil and regulatory sanctions is considerable, and the Supreme Court’s principal original rationale for imposing criminal liability on corporations based on the mental state of one of its agents is now moot.

¹¹ For instance, in *People v. Corporation of Albany*, 11 Wend. 539 (N.Y. Sup. Ct. 1834), the City of Albany was charged with having allowed the Hudson River basin to become “foul, filled and choked up with mud, rubbish and dead carcasses of animals.” (Quoted in Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 Wash. U.L.Q. 393 (1981).

¹² John C. Coffee, Jr., *Corporate Criminal Responsibility*, in 1 *Encyclopedia of Crime and Justice* 253, 253-54 (Sanford H. Kadish ed., 1983).

¹³ Most of this brief historical overview is derived from the excellent summary found in V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L.R. 1477, 1479-84 (May 1996).

¹⁴ The constitutional argument put forward by the railroad was based on the due process clause. Specifically it was argued that innocent shareholders were being deprived of their property without opportunity to be heard. It was also argued that the *respondeat superior* provisions deprived corporations of the presumption of innocence. 212 U.S. at 492. The Supreme Court never addressed these arguments directly.

B. The Two Punishments Which are Associated with the Criminal Law and Not with the Civil Law – Incarceration and Humiliation – Do Not Apply to Corporations; Hence, the Argument Goes, There is no Reason to Pursue Corporations Criminally.

It seems indisputable that, as legal fictions, corporations are incapable of having culpable states of mind, so they cannot, in the colloquial sense at least, be said to have acted “willfully,” “corruptly” or “intentionally.”¹⁵ It is also obvious that corporations cannot be incarcerated.¹⁶

It has been argued, however, that the other purely-criminal sanction, public humiliation, justifies prosecution of corporations. In addition to the potential financial consequences of prosecution, these commentators point out, criminal sanctions usually carry with them a stigma which many corporations, for the sake of continued business relations, would seek to avoid.¹⁷ These writers say that if only the individual responsible for the activity were held criminally liable, the corporation might avoid all such stigma or reputational harm, other than a circumstantial identification with the crime.¹⁸

It is probably true that an indictment stigmatizes a corporation more than does even the stiffest regulatory proceeding, but it is difficult to assess the benefits, if any, of this stigmatizing to the public at large. Presumably, when it learned that federal authorities had obtained an indictment of the Andersen firm, the general public inferred that federal law enforcement was very angry with the firm, and the firm thereby sustained serious reputational harm. But this reputational harm, as we have noted, may taint the reputations of all officers and employees of the indicted corporations, the vast majority of whom were completely innocent.

And for what? Stigmatizing an individual by means of a criminal prosecution will generally shame the individual, thus resulting in both punishment and deterrence. But a corporation feels no shame.

Nor, as a practical matter, can it be said that a corporation or its “bad” corporate officers will be more deterred by the prospect of an indictment that stigmatizes the corporation than by the financial crippling that can be visited upon those same corporations by federal regulatory agencies. If the federal authorities believed, for instance, that the Andersen firm was riddled with “bad” partners, and if they felt that they were unable for some reason to prosecute these “bad” partners individually, they might presumably have stigmatized those partners by suspending their authority to practice before the Securities and Exchange Commission. This might not have amounted to as significant a stigma in the eyes of the general public, but would have amounted to a significant stigma in the eyes of Andersen’s clientele at least in Texas, and would thus have served a significant deterrent function for all other accounting professionals.

¹⁵ This frequently-cited rationale apparently underlies the refusal of a number of foreign countries to prosecute corporations at all, as summarized in Appendix F.

¹⁶ But see the device, reportedly employed in Belgium, of a designated corporate “scapegoat,” paid extra to run the risk of incarceration for a corporate crime. Appendix F, page 5.

¹⁷ Ann Foershter, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 Cal. L. Rev. 1287, 1289 (1990).

¹⁸ *Id.* at 1290.

Besides, there is something fundamentally wrong about condemnation of one person for the actions of another, and if this is true for individuals, it is at least somewhat true for corporations, consisting of many component parts, being blamed for the actions of one component part. This same disconnect can be temporal as well: the John Smith you are condemning is generally considered to be the “same” John Smith who committed the crime, but the Jones Company, having purged itself of its criminal agent or agents, is in pertinent ways no longer the same Jones Company.

C. Civil Sanctions Generally Provide More Sophisticated and Fairer Means of Detering and Punishing Corporate Misconduct.

As Professor, now District Judge, Gerard Lynch has succinctly put it, there are compelling reasons to look to the civil side of the law rather than the criminal in trying to deter, control and punish a corporation’s misdeeds. “Corporate conduct appears to be a particularly suitable area for the application of punitive civil sanctions for three reasons: monetary sanctions are appropriate, corporate plaintiffs are relatively abundant, and specialized agencies exist to facilitate public enforcement where that is necessary.”¹⁹

Judge Lynch’s first point is self-evident: monetary sanctions, the primary “punishment” on the civil side, are appropriate as punishment for corporations. In fact, as stated above, since corporations cannot go to prison, economic sanctions of various kinds are the only kind of criminal punishment that can be levied against corporations. But economic sanctions on the civil side have a huge advantage over sanctions on the criminal side: they can be tailored to the particular offense much more accurately. While it is true that nowadays a judge in a criminal case may impose a variety of conditions of probation on a corporation being sentenced, the array of government sanctions on the civil side is still much larger and more subtle: license suspension/revocation, exclusion from various government programs for varying numbers of years, independent monitors, corporate integrity agreements that provide for periodic audits of portions of the company’s activities—all of these are available on the civil side and seem effective in controlling corporate behavior without the (usually) unnecessary devastation caused by a criminal conviction.

Judge Lynch’s second point is less obvious but also very important. On the civil side there is a relative abundance of corporate plaintiffs, whereas despite the increase in prosecutorial resources in recent years, the ability of prosecutors to pursue corporate misconduct is limited. On the one hand, prosecutors have other crimes besides corporate misconduct to pursue, and white-collar investigations often take years of prosecutor and investigator time to complete. This means that even well-conceived prosecutions may appear to be arbitrary; if prosecutors only have the time and resources to target one company in an industry, then the employees and shareholders of that company may well perceive themselves as scapegoats.

On the other hand, the legal landscape is now dotted with numerous corporate plaintiffs on the civil side who were unheard-of in 1909 when the Supreme Court was first considering the issue of prosecuting organizations. Shareholders’ derivative suits are now available to challenge corporate waste and greed. Similarly, there are now private attorneys-general bringing antitrust lawsuits, encouraged

¹⁹ Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 *Law & Contemp. Probs.* 23, 31 (Summer 1997).

by treble damages, and class actions, encouraged by awards of attorneys' fees. Even more important in terms of fraudulent corporate behavior are whistleblower suits under the False Claims Act and other statutes.²⁰

The rise of specialized agencies for public enforcement, Judge Lynch's third point, is also undeniable. In 1909 the *New York Central*, the criminal defendant in that seminal Supreme Court case, faced little or no federal regulation. Nowadays it would be dealing with the Federal Railroad Administration, the Department of Transportation, and numerous other federal agencies such as the Environmental Protection Agency and the Occupational Safety and Health Administration. And as Judge Lynch points out, the specialists at these agencies necessarily have a much more sophisticated sense of law enforcement priorities when it comes to their specialty areas than does the average prosecutor. Hence, an environmental agency specialist, for instance, can go after types of pollution that make a genuine difference to the environment rather than focusing solely on instances that make an appealing and intelligible case for a jury in a criminal trial. See Lynch, *supra*, note 19, at 33.

Moreover, civil sanctions can generally be shaped far more precisely to meet the targeted evil. The government, in considering criminal prosecution for the conduct at issue in the Andersen case, had no intermediate choice between indicting the entire firm and indicting specific individuals, but the Securities and Exchange Commission, utilizing the lower burden of proof in civil matters as well as judicial deference to administrative decision making, could have tailored sanctions to fit the conduct it was seeking to punish, and no more. Criminal prosecutions tend to be black-and-white and one-size-fits-all, whereas civil sanctions are by and large more graduated and sophisticated. It seems likely, for instance, that the Houston office of Arthur Andersen had a different corporate culture from the Arthur Andersen office in Anchorage, Alaska, and it may well be, therefore, that a suspension of practice privileges before the SEC imposed upon many or perhaps all of the Houston partners would have been a very serious sanction without actually punishing offices whose corporate culture was not renegade.

D. Criminal Prosecution of Business Entities Does, However, Seem Warranted in Rare Circumstances.

Despite the strength and flexibility of civil sanctions, however, corporate criminal prosecutions may occasionally be necessary, when the corporate system itself helps produce criminal behavior. If only the individual actor-agent is prosecuted, corporate management may view officers and employees as expendable and may institute policies that encourage illegal but profitable behavior. In such instances, individual liability alone ignores the fact that pressures may be coming from within the organization itself.²¹ Corporate criminal liability identifies the corporate organization itself as the responsible party and points to the need for reform at the corporate level.²²

In the second place, we have recently seen instances in which an entire industry, or a large segment of it, appears to have been engaged for a long period of time in practices that violate criminal laws. In situations like these, prosecutions of individuals may seem arbitrary; fairness generally

²¹ J Foershler, *supra* note 17, at 1289.

²² *Id.* at 1290.

requires that people have some warning that certain conduct carries criminal consequences and if, truly, “everybody’s doing it” and has been doing it for years, it may be fairer to identify the corporate culture as the criminal actor.

Finally, it is probably wise to retain indictment of corporations as an option for prosecutors and defense lawyers when, as a practical matter, they agree that in the particular case a corporate conviction makes more sense than the conviction of individuals. Particularly in the area of regulatory offenses, juries may be reluctant to convict individuals, and in such instances a corporate conviction will at least demonstrate to the public that a significant criminal violation has been acknowledged. In addition, of course, many defense counsel find that a corporate guilty plea is much easier to sell to their clients than would be the guilty pleas of individual officers and employees, provided there are no disproportionate collateral consequences to a corporate plea.

III. Legislative Intent Matters.

By now all, or virtually all, criminal violations in the United States have been codified in written statutes. These statutes encompass a wide spectrum of human activity, from rape to misuse of the Smokey Bear logo, and a range of intentionality, from “corruptly” to “negligently,” but nothing we have seen has raised the issue of whether the familiar maxims of statutory interpretation can be utilized to determine whether the legislature that enacted a particular criminal statute intended corporations to be prosecuted for its violation.²³

Familiar techniques of statutory construction can also be used, once corporate criminal liability has been inferred, to determine the appropriate rules of attribution, i.e., whose conduct or state of mind can be attributed to the corporation so as to justify criminal sanctions being visited on the entire corporation.²⁴

Applying ordinary statutory construction rules, there is serious reason to question whether Congress intended organizations to be prosecuted under 18 U.S.C. § 1512(b), the statute which Arthur Andersen was indicted for violating. In pertinent part, Section 1512(b) provides:

Whoever...corruptly persuades another person,...with intent to...
cause...any person to...alter, destroy, mutilate, or conceal an object
with intent to impair the object’s integrity or availability for use in an
official proceeding...[shall be guilty of a federal offense].

The statute does not contain any definition of “whoever.” By contrast, Congress has explicitly defined “person” and “whoever” to include corporations and other organizations in a handful of other

²³ Some state laws governing imposition of corporate criminal liability explicitly direct judges and prosecutors to consider the legislature’s intent on a crime-by-crime basis. *E.g.*, Delaware: Del. Code Ann., tit. 11, § 281; N.Y. Penal § 20.20 (McKinney 2002).

²⁴ This subject will be revisited below, in Section V. The phrase “rule of attribution” and the importance of the concept in this context are derived from Lord Hoffmann’s thoughtful opinion in *Meridian Global Funds Management Asia Ltd. v. Securities Comm.*, 2 A.C. 500 (Privy Council 1995).

statutes, e.g., those dealing with chemical and biological warfare and weapons (18 U.S.C. § 229F), cyber terrorism, (18 U.S.C. § 1030), international terrorism (18 U.S.C. § 2331), monetary transactions (31 U.S.C. § 5312), and weapons (18 U.S.C. § 921). By accepted rules of statutory construction, it appears that Congress, wisely, may not have intended the more general criminal laws to be applied to corporations or other organizations.²⁵

This conclusion – that Congress did not intend the traditional *malum in se*, common-law crimes to apply to corporations – is bolstered by the language of Section 1512(b), requiring proof that the defendant acted “knowingly” and “corruptly.” These are states of mind that can only be attributed to a corporation through the device of agency, and the question then arises: what agent?

In the case of serious regulatory crimes, such as structured monetary transactions and weapons dealing, where Congress has specifically provided for corporate criminal responsibility, the agent in question will be relatively easy to identify: the person who normally handles that subject matter for the corporation.

By contrast, normally, no single person or group handles all corporate responses to all government investigations, the subject matter of Section 1512(b) – after all, anyone can shred documents – and the rule of attribution is therefore obscure. Whose shredding, and whose state of mind, should be attributed to the entire Andersen firm? The statute is too general to point us to an answer to that question and should therefore not be applied to corporations.²⁶

IV. The Fall-out of the Andersen Prosecution was Grossly Disproportionate to the Offense and Illustrates the Folly of Linking Conviction with Automatic Civil Sanctions.

The ramifications of the current state of our laws, where prosecutors have both criminal prosecutions of corporations and consequent or alternative civil sanctions against corporations in their arsenal, are deeply troubling to many observers, including current and former prosecutors.

This regime gives government, and especially the federal government, vast and irrationally shaped areas of power. False Claims Act cases, which often feature both criminal charges and civil claims, are classic examples. Defendant corporations, which more or less by False Claims definition do a lot of business with the federal government, often feel forced to pay exceedingly large settlements on the civil side, and to plead guilty to a carefully-orchestrated charge on the criminal side, simply to avoid “betting the company” in a criminal trial, the outcome of which might mean automatic exclusion from a federal program that provides a significant portion of the company’s livelihood.

²⁵ The counter-argument is that in Title 1, Chapter 1, Section 1, of the United States Code, Congress said that “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.” (Emphasis added.) It seems to us, however, that “the context indicates otherwise” in Title 18, the Criminal Code. Since the Criminal Code still revolves primarily around criminal intent, something that corporations are incapable of having, and since the Criminal Code includes a few statutory provisions that explicitly encompass corporations and other organizations (as noted above), we do not believe that 1 U.S.C. § 1 generally applies to the Criminal Code, Title 18.

²⁶ Even if courts are willing to tolerate prosecutions of corporations pursuant to such general-intent statutes, they should utilize legal standards and jury instructions that protect corporations from punishment for the conduct of genuinely rogue agents. See Section V, below.

Moreover, the smaller a portion of the relevant market the defendant occupies, the less its bargaining power with the government. A major aircraft manufacturer, or a pharmaceutical company which is the sole source of an important drug, is much less susceptible to a disastrous criminal outcome than is its much smaller or more generic competitor. The government recognizes, for example, that putting a sole-source pharmaceutical company out of business, by requiring a plea to a Medicare fraud count that mandates exclusion from the Medicare program, is not in the public interest because many citizens will thereby be deprived, at least for some time, of a needed prescription drug. If, on the other hand, many companies are providing similar medical products, the consequences for the public of one such company's exclusion from the Medicare program will be minimized, and prosecutors will consequently be less likely to listen sympathetically when that corporation pleads that its existence is at stake.

The wild card in the above scenarios, the factor that so significantly increases the prosecution's bargaining power, is Congress's and administrative agencies' coupling, in certain areas, of automatic and sweeping civil sanctions that follow criminal convictions for certain offenses.²⁷ This coupling is most frequently found in the government contracts arena, where Congress has in general decreed that those who are convicted of defrauding the government will automatically be debarred from contracts with the government. This may appear to be a rational decree at first blush, but as shown above, in practice it leads to vast dislocations of power as between the Department of Justice and businesses that deal with the government, particularly in the healthcare and defense industries.

Putting all this power in the hands of prosecutors flies in the face of one of the first precepts of legal education: that we are a nation ruled by laws rather than by individuals. While prosecutorial discretion is a time-honored and necessary fact of law-enforcement life, this discretion has historically been limited to issues on which prosecutors presumably have become experts. How serious was this individual's crime? Should the mitigating factors in this case cause the prosecutor to decline prosecution altogether, or should they rather affect only the seriousness of the charges or the recommended sentence? There is nothing in a federal prosecutor's training that prepares him or her either to make decisions about an economic entity's claim to exist, or to balance the personal and financial dislocation inflicted on innocent employees and shareholders against the possible incremental deterrence value of indicting the corporation as well as its officers.²⁸

We realize that not all decisions that prosecutors make about indicting corporations implicate the very survival of the corporation. But in our experience, the principal other instances in which prosecutors are seriously tempted to indict corporations occur when they are faced with a difficult prosecution of corporate officers and when corporate counsel makes a persuasive pitch that, if the prosecutor will refrain from prosecuting the individuals, the corporation will plead guilty and provide the prosecutor with a statistic and some deterrence value.²⁹ This kind of practical deal-making is not possible, of course, when serious collateral consequences to a guilty plea are mandatory.

²⁷ See, e.g., 42 U.S.C. § 1320a – 7(a): “The Secretary [of Health and Human Services] shall exclude...from participation in any Federal healthcare program...[a]ny individual or entity that has been convicted of a federal offense related to the delivery of an item or service under [the federal Medicare program] or under any State health care program.” (Emphasis added.)

²⁸ Still less, of course, is there anything in the training of the average juror that prepares him or her to make that decision. And this is a serious consideration where, as in the Andersen trial, the jury convicts on a theory that is different from the prosecution's.

²⁹ Sensible corporate counsel, of course, will only make this pitch when there are no significant collateral consequences to a guilty plea.

We cannot know if the Andersen firm would have survived its conviction on criminal charges in the absence of the regulation requiring that, upon any felony conviction, it be debarred from practicing before the Securities Exchange Commission.³⁰ But the mandatory nature of that debarment made the firm's death certain.

V. The Federal Courts Should Revisit the Issue of Prosecuting Business Organizations and Should Develop Uniform Jury Instructions Limiting the Circumstances Under Which Convictions May Be Had.

To the extent that Congress does now and continues in the future to impose criminal sanctions on corporations and other organizations, we respectfully suggest that the Judicial Conference of the United States, through its Advisory Committee On Criminal Rules, consider adopting the jury instruction, based on The American Law Institute's Model Penal Code, set forth in Appendix D. Such an action would bring the federal government into line with the majority of states that have legislated on this issue and more nearly in line with Western European jurisprudence.

As stated above, the law in the Fifth Circuit, where the Andersen firm was prosecuted, basically incorporates the rules of respondeat superior from civil cases into criminal cases without any significant modification. Thus, Judge Melinda Harmon instructed the jury that (1) Andersen was legally bound by the acts and statements of its agents made within the scope of their employment; (2) although the agent in question must be acting with the intent, at least in part, to benefit the partnership, it was not necessary that the agent's primary motive was to benefit the partnership; (3) although the agent's criminal act must have related directly to the performance of the agent's general duties for the partnership, it was not necessary for the particular act itself to have been authorized by the partnership; (4) a partnership may be held responsible for its agents' acts performed within the scope of their employment even though the agents' conduct is contrary to the partnership's actual instructions or stated policies; and (5) the agent in question need not be a high level or managerial agent in order for his or her act to be attributable to the firm. (United States v. Arthur Andersen LLP, Court's Instructions to the Jury, at 4-5.)

There is, we submit, no reason why the doctrine of respondeat superior should be imported in its totality into the criminal law. The purpose of the doctrine on the civil side of the law is fairly clear: if an employee injures a third party in the course of his duties on behalf of an employer, that injured party should be able to obtain economic compensation from the employer on whose behalf the economic conduct occurred.

On the criminal side, however, it makes absolutely no sense to enable a jury to convict an entire organization on the basis of conduct of a lower-level employee nor does it make sense to convict an organization on the basis of a rogue employee's conduct where that conduct was contrary to a genuine corporate policy.

The American Law Institute recognized this some decades ago in drafting and adopting Model Penal Code, Section 2.07, governing the liability of corporations, unincorporated associations and

³⁰ 17 CFR § 201.102 (e)(2): "[A]ny person who has been convicted of a felony...shall be forthwith suspended from appearing or practicing before the Commission."

persons acting, or under a duty to act, in their behalf. (Set forth in its entirety at Appendix C.) Broadly speaking, Section 2.07 permits convictions of corporations (a) if the offense is minor, or (b) if the offense consists of an omission to discharge a specific duty, or (c) 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 on behalf of the corporation within the scope of his office or employment.” “High managerial agent” is defined as “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.” Finally, under Section 2.07(d), “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.”

The Model Penal Code has been adopted, either wholly or in part, by twenty-five state jurisdictions, including such commercially important jurisdictions as Delaware and New York. (Summary of state laws attached as Appendix E.)

Paragraph 1 of the Model Penal Code provision covers the three categories of circumstances in which corporations may be convicted of crimes performed by their agents.

The first set of circumstances are those in which:

the offense is a violation or the offense is defined by a statute other than the [criminal] 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...

This category encompasses minor offenses, such as “petty offenses,” 18 U.S.C. § 19, as well as felonies and misdemeanors which can loosely be described as “regulatory,” where the regulatory offense is such that the legislature can be clearly seen to have intended to impose criminal liability on corporations. For these petty offenses and regulatory crimes, the Model Penal Code provides for conviction upon a showing merely that “the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment”, i.e., the familiar *respondeat superior* standard.³¹

Thus, the broadest rule of attribution is applied under the Model Penal Code where the criminal conduct is not considered serious or where the legislature clearly considered criminal conviction of a corporation to be appropriate in furthering a particular regulatory scheme.

³¹ An exception is provided for those instances in which the rule of attribution is spelled out in the statute.

The second category under Paragraph 1 encompasses those offenses that consist of “an omission to discharge a specific duty of affirmative performance imposed on corporations by law.” In this category, as we read it, it is unnecessary for the prosecution to specify any individual whose conduct will be attributed to the corporation for criminal purposes, and strict liability is thus imposed.

Non-regulatory crimes, the traditional common law felonies and misdemeanors, constitute the third category. Here the rule of attribution is that the corporation may only 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.” The phrase “high managerial agent” is defined in Section 4(c): “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.”

This is the section that would most nearly apply to the Arthur Andersen prosecution.³² If the Andersen firm had been prosecuted under this standard, it might still have been convicted since both David Duncan and Nancy Temple might have been considered by the jury to be high managerial agents of the firm. We believe, however, that this standard would have focused the jury’s attention, more appropriately, on the level of responsibility of the agent in question (in Duncan’s case, his partnership status) or the type of responsibility vis-à-vis the offense conduct (in Nancy Temple’s case, her role as an attorney supervising, in part at least, the firm’s response to the Enron investigation).

VI. Conclusion

Congress would be well advised, we believe, to consider enacting some version of the Model Penal Code, or the thoughtful solution recently enacted by the Canadian Parliament (Appendix F), to govern the prosecution of corporations, but we do not believe that this is necessary in order to achieve some significant reform. Instead, we believe that the Judicial Conference of the United States could, in its general supervisory role, draft and adopt a suggested model jury instruction on this subject. (See example at Appendix D.)³³ The jury instruction given by Judge Harmon to the Andersen jury was derived from the federal common law, not from any statute. We see no reason why the federal judiciary, having allowed the respondeat superior doctrine to grow from the civil side onto the criminal side, could not take steps to reverse this growth and to rationalize and improve the jury instruction used in this area. If and when the Judicial Conference initiates such a review, we hope that the foregoing analysis proves helpful.

³² Interestingly enough, a partnership such as Arthur Andersen would technically fall under subsection (3) of the Model Penal Code provision, and in paragraph (3) there is no liability whatsoever for non-regulatory felonies, such as 18 U.S.C. § 1512, which the Andersen firm was prosecuted for violating. Most of the states that have followed the Model Penal Code, however, have omitted this section and have treated unincorporated associations in the same manner as corporations or have made no provision whatsoever for prosecuting associations. E.g., N.J. Stat. Ann. § 2C: 2-7, 720 I.L.C.S. § 5/5/4; Ill. Comp. Stat. 5/5-4.

APPENDIX A

FACTUAL SUMMARY

Excerpt From *US v. Arthur Andersen L.L.P.*, 374 F.3d 281, 284-87 (5th Cir. 2004)

During the 1990's, Enron transformed itself from a natural gas pipeline operator into a trading and investment conglomerate with a large volume of trading in the energy business. Andersen both audited Enron's publicly filed financial statements and provided internal audit and consulting services. By the late 1990's, Andersen's "engagement team" for its Enron account included more than 100 people, a significant number of which worked exclusively in Enron quarters in Houston, Texas. From 1997 through 2001 the engagement team's leader was David Duncan. He was in turn subject to certain managing partners and accounting experts in Andersen's Chicago office. Enron was a valued client producing 58 million dollars in revenue in 2000 for Andersen with projections of 100 million for the next year. Enron's chief Accounting Officer and Treasurer throughout this period came to the employ of Enron from the accounting staffs of Andersen, as did dozens of others. This was a close relationship. Indeed, the jury heard evidence that Andersen removed at Enron's request at least one accountant from his assignment with Enron after Enron disagreed with his accounting advice.

With Enron's move to energy trading and rapid growth came aggressive accounting, pushing Generally Accepted Accounting Principles to its advantage. Part of this picture included Enron's use of "special purpose entities," SPEs. These were "surrogate" companies whose purpose was to engage in business activity with no obligation to account for the activity on Enron's balance sheet. Four of these SPEs – called Raptors – play a large role in this story. They were created in 1999 and 2001, with the assistance of Andersen, largely capitalized with Enron Stock. The Raptors engaged in transactions with "LJM," an entity run by Andrew Fastow, Enron's Chief financial Officer. By late 2000 and early 2001, the traded price of Enron's stock was dropping and some of the Raptor's investments were also turning downward. Some of the SPEs were profitable and some were experiencing sharp losses. But aggregated they reflected a positive return to Enron. GAAP would not permit such an aggregation of the four entities and Andersen's Chicago office told David Duncan that it would not – that it was a "black and white" violation. That advice was ignored and the losses were buried under the profits of the group in the public reporting for the first quarter 2001.

The summer of 2001 brought problems to Andersen on other fronts, and these "unrelated" events later become important to the issues before us. In June 2001 Andersen settled a dispute with the SEC regarding Andersen's accounting and auditing work for Waste Management Corporation. Andersen was required to pay some \$7 million, the largest monetary settlement ever exacted by the SEC, and Andersen suffered censure under SEC Rule 102(e). Then in July 2001, the SEC used five officers of Sunbeam Corporation and the lead Andersen partner on its audit.

Meanwhile, events at Enron began to accelerate. On August 14, 2001, Jeffrey Skilling, Enron's CEO, resigned, pushing Enron stock further downward. Within days, Sherron Watkins, a senior accountant at Enron, formerly at Andersen, warned Enron's Chairman, Kenneth Lay, that Enron "could implode in a wave of accounting scandals." She also warned David Duncan and Michael Odom, an Andersen partner in Houston who had oversight responsibility for Duncan. Chairman Lay promptly asked Enron's principal outside legal counsel to examine the accused transactions. And by early September, senior Andersen officials and members of its legal department formed a "crisis-response" group, including, among others, its top risk manager and Nancy Temple, an in-house lawyer in Chicago assigned to Enron matters on September 28, 2001.

Possible proceedings became a reality on November 8, 2001, when Andersen received an SEC subpoena. The time line between September 28 and November 8, from a possibility of a proceeding to fact, is important and we turn briefly to that narrative.¹

On October 8, Andersen contacted a litigation partner at Davis, Polk and Wardwell in New York regarding representation of Andersen. The following day, Nancy Temple discussed the problem of Enron with senior in-house counsel at Andersen. Her notes from this meeting refer to an SEC investigation as “highly probable” and to a “reasonable possibility” of a restatement of earnings. Her notes also recorded, “without PSG agreement, restatement and probability of charge of violating cease and desist in Waste Management.” Two days later, on October 10, Michael Odom urged Andersen personnel to comply with the document retention policy, noting “if it’s destroyed in the course of normal policy and litigation is filed the next day, that’s great . . . we’ve followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable.”

On October 12, Temple entered the Enron crisis into Andersen’s internal tracking system for legal matters, labeling it “government regulatory investigation,” and asked Odom if the engagement team was in compliance with Andersen’s document policy. Odom forwarded the email to Duncan in Houston.

Meanwhile, Enron was facing an October 16 date for announcing its third quarter results. That release had to disclose a \$1.01 billion charge to earnings and, to correct an accounting error, a \$1.2 billion reduction in shareholder equity. Enron’s draft of the proposed release described the charge to earnings as “non-recurring.” Andersen’s Chicago personnel advised that this phrase was misleading, but Enron did not change it. With one exception, Andersen took no action when its advice was not followed: Temple suggested that Andersen’s characterization of the draft release as misleading be deleted from the email exchanges.

An SEC letter to Enron quickly followed the releases of October 16. In the letter the SEC advised that it had opened an informal investigation in August and an additional accounting letter would follow. Andersen received a copy of the letter on Friday, October 19. A Saturday morning conference of Andersen’s Enron crisis group followed. While the meeting traversed a range of issues, Temple again reminded all “to make sure to follow the policy.” The following Tuesday, October 23, Enron had a telephone conference with security analysts. At the same time, Duncan scheduled an “urgent” and “mandatory” meeting in Houston at which, following lengthy discussion of technical accounting issues, he directed the engagement team to comply with Andersen’s records retention policy.

On October 26, a senior partner at Andersen circulated an article from the New York Times discussing the SEC’s response to Enron. In an email, he commented that “the problems are just beginning and we will be in the cross-hairs. The marketplace is going to keep the pressure on this and it’s going to force the SEC to be tough.” Evidence that this prediction of SEC toughness was sound came quickly. On October 30, the SEC sent Enron a second letter requesting accounting documents - a letter signed by the two top enforcement division officials.

¹ The indictment alleged that the acts of obstruction took place between October 16 and November 9, 2001.

Throughout this period Andersen's Houston office shredded documents. Government witnesses detailed the steady shredding and deletion of documents and the quantity of paper trucked away from the Houston office. Almost two tons of paper were shipped to Andersen's main office in Houston for shredding. The government produced an exhibit at trial charting the time and quantity of the carted waste paper from January 2001 through December of that year. The pounds carted remained fairly steady at a rate under 500 pounds, but spiked on October 25 to just under 2500 pounds. The shredding continued until the SEC served its subpoena for records on November 8. Temple advised Duncan that the subpoenae had been served. The next day Duncan's assistant advised the Houston team: "Per DAVE - No more shredding. . . We have been officially served for our documents."

Enron filed for bankruptcy on December 2, 2001. The following April, David Duncan pleaded guilty to obstructing the SEC.

APPENDIX B

ARTHUR ANDERSEN JURY INSTRUCTION (EXCERPT)

The defendant in this case is a partnership rather than an individual. Under the law, a partnership is a person and may be liable for violating the criminal laws. However, as an entity, a partnership can only act through its agents – such as its officers, partners, and employees – and a partnership is legally bound by the acts and statements its agents do or make within the scope of their employment. Thus, in order to establish that Andersen is guilty as charged in the indictment, the government must prove, beyond a reasonable doubt, that each of the elements of the offense, as I will later explain them to you, was committed by one or more agents of Andersen acting within the scope of their employment with the firm.

In order for a partnership agent to be acting within the scope of his or her employment, the agent must be acting with the intent, at least in part, to benefit the partnership. It is not necessary, however, for the government to prove that the agent's sole or even primary motive was to benefit the partnership. Furthermore, the government need not prove that the partnership was actually benefited by the agent's actions. You may consider the presence or absence of actual benefit to the firm from the agent's actions in determining whether the agent acted with an intent to benefit the firm. But ultimately the question you must answer is whether the agent intended, in part, that the partnership benefit from his or her actions, whether or not any benefit actually resulted.

An agent must also be acting in line with his or her duties as an agent of the partnership in order to be acting within the scope of his or her employment. An agent is acting in line with his or her duties when the agent's acts deal with a matter the performance of which is generally entrusted to the agent. Stated another way, an act is in line with an agent's duties if it relates directly to the performance of the agent's general duties for the partnership. It is not, however, necessary for the particular act itself to have been authorized by the partnership.

If an agent was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions, or against the partnership's policies does not relieve the partnership of responsibility for the agent's acts. A partnership may be held responsible for the acts its agents perform within the scope of their employment even though the agent's conduct may be contrary to the partnership's actual instructions or contrary to the partnership's stated policies. You may, however, consider the existence of Andersen's policies and instructions, and the diligence of its efforts to enforce any such policies and instructions, in determining whether the firm's agents were acting within the scope of their employment. The fact that some agents of the partnership may not have committed any improper acts or possessed any improper intent does not relieve the partnership of responsibility for the improper acts or intents of other agents of the firm. Finally, the agent of a partnership who commits an act need not be a high-level or managerial agent in order for the act to be attributable to the firm. A partnership may be held responsible for the acts of agents who are subordinate or low-level employees.

APPENDIX C

MODEL PENAL CODE
SECTION 2.07

Section 2.07. 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 unincorporated association may be convicted of the commission of an offense if:
 - (a) The offense is defined by a statute other than the Code that 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 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 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 and, 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

(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 and, 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 not apply if it is 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.

APPENDIX D

**PROPOSED JURY INSTRUCTION FOR PROSECUTIONS OF CORPORATIONS
AND UNINCORPORATED ASSOCIATION**

The defendant in this case is a [corporation] [partnership] [trade union] [etc.] rather than an individual. Under the law such entities are sometimes considered persons and may in some instances be liable for violating the criminal laws. However, as an entity, the defendant can only act through its agents, such as its officers, partners, and employees. Here [where the defendant is charged with a felony under the criminal code], the defendant may only be convicted if you find beyond a reasonable doubt that 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.

You have been given a list of the members of the board of directors. If you find that the board of directors of the defendant authorized, requested, commanded, performed or recklessly tolerated the commission of the offense, and you find this beyond a reasonable doubt, you may convict the defendant of the offense charged. Otherwise you must find the defendant not guilty.

As I have just told you, the defendant may also be convicted if the offense was committed by a “high managerial agent”. This means an officer or partner of the defendant, or any other agent of the defendant having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the defendant. The government takes the position that [X] is a “high managerial agent” of the defendant; the defendant denies this.

In this prosecution, the defendant has argued that the high managerial agent who had supervisory responsibility over the subject matter of this offense, that is, [Y], used due diligence to prevent the commission of the offense. If you find that the defendant has proven this by a preponderance of the evidence, you should acquit the defendant.

If, however, you find beyond a reasonable doubt that the offense, as I have defined it, was authorized, requested, commanded, performed or recklessly tolerated by a number of the board of directors by a high managerial agent as I have defined that term, and if you find that the defendant has not proven by a preponderance of the evidence that it exercised due diligence to prevent commission of the offense, you should convict the defendant company.

APPENDIX E

STATE POLICIES ON CORPORATE CRIMINAL LIABILITY

This memorandum discusses the law regarding corporate criminal liability in each of the fifty states, Puerto Rico, Guam, and the Virgin Islands. Some states have clearly defined the scope of corporate criminal liability in general, many modeling their statutes after the Model Penal Code § 2.07 (“MPC”). Other states have enacted statutes that impose criminal liability on corporations through individual statutes addressing specific actions, or that define “person” to include corporations and other business entities. Of those states that have not addressed corporate criminal liability by statute, some have addressed the issue in case law, while others have yet to develop this area of law.

ALABAMA

There is no specific statute in Alabama assigning general criminal liability to corporations. Therefore, liability arises from individual statutes and the common law. Section 13A-2-26 of the Alabama Code, modeled after MPC, § 2.07(6), holds an individual liable for any actions he commits or causes to be committed in the name of a corporation. Ala. Code § 13A-2-26 (2003).

The Alabama Court of Criminal Appeals, in 2002, addressed the question of whether an insurance company could be found criminally liable for perjury. *State v. St. Paul Fire and Marine Ins. Co.*, 835 So. 2d 230 (Ala. Crim. App. 2000). While holding that the corporation could not be indicted for perjury, the court did establish a framework for determining when a corporation can be held criminally liable. *Id.* at 234. The court noted that while the definition of “person” in the criminal code (Ala. Code § 13A-1-2(6) (1975)) includes corporations, its applicability is limited by the words “where appropriate.” *Id.* Therefore, the court held criminal liability of corporations is limited to those sections of the “Criminal Code in which the Legislature has expressly provided for corporate criminal liability.” *Id.*

Based on the lack of a general statute assigning corporate criminal liability, and the holding in *State v. St. Paul*, the criminal liability of corporations stems from specific sections of the criminal code.

ALASKA

Alaska’s statutes and judicial opinions do not explicitly discuss corporate criminal liability. However, the Alaska Criminal Code defines “person” as “a natural person and, when appropriate, an organization, government, or governmental instrumentality...” Alaska Stat. § 11-81-900(b)(44) (2003).

ARIZONA

Section 13-305 of the Arizona Revised Statutes differs slightly from the MPC; however, as a practical matter, Arizona has enacted only MPC § 207(1). Ariz. Rev. Stat. § 13-305. This section provides that an “enterprise commits an offense if:

- (1) The conduct constituting the offense consists of a failure to discharge a specific duty imposed by law; or
- (2) The conduct undertaken in behalf of the enterprise and constituting the offense is engaged in, authorized, solicited, commanded or recklessly tolerated by the directors of the enterprise in any manner or by a high managerial agent acting within the scope of employment; or
- (3) The conduct constituting the offense is engaged in by an agent of the enterprise while acting within the scope of employment and in behalf of the enterprise; and

- (a) The offense is a misdemeanor or petty offense; or
- (b) The offense is defined by a statute which imposes criminal liability on an enterprise.

Id. “Enterprise” is defined as any corporation, association, labor union or other legal entity. Ariz. Rev. Stat. § 13-105(15).

Further, the Arizona Court of Appeals implied in dicta that a corporation could be held criminally liable for failure to file tax returns. *State v. Angelo*, 166 Ariz. 24 (Ariz. Ct. App. 1990). The court was addressing the issue of whether individual corporate officers could be held criminally liable for the failure of a corporation to file certain tax returns. *Id.* The court noted “under the present and former code, the ‘person’ who does not file a transaction privilege return is the party subject to criminal liability. A ‘person’ can be either an individual or a corporation.” *Id.* at 26.

ARKANSAS

The Arkansas Criminal Code expressly assigns criminal liability to corporations in a general statute entitled “Liability of organizations.” Ark. Code Ann. § 5-2-502 (2003). Arkansas appears to have used the MPC as a model, having enacted MPC § 2.07(1), (4), and (6) with some changes. Section 5-2-502 provides: “(a) An organization commits an offense when:

- (1) It omits to discharge a specific duty of affirmative performance imposed on organizations by law and the omission is prohibited by criminal law; or
- (2) The conduct or result specified in the definition of the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors of a corporation or by the executive board of other types of organizations or by a high managerial agent acting within the scope of his office or employment and in behalf of the organization; or
- (3) The conduct or result specified in the definition of the offense is engaged in or caused by an agent of the organization while acting within the scope of his office or employment and in behalf of the organization and:
 - (A) The offense is a misdemeanor of any class or a violation; or
 - (B) The offense is one defined by a statute that clearly indicates a legislative purpose to impose such criminal liability on an organization.

Arkansas holds criminally liable “organizations,” which is defined to include, *inter alia*, corporations, “or any other group of persons organized for any purpose.” Ark. Code Ann. §§ 5-2-501(1), 5-2-502. Arkansas also has enacted the MPC subsection providing for individual criminal liability for corporate acts, although it has restricted sentencing for such crimes. *Id.*; Ark. Code. Ann. § 5-2-503.

CALIFORNIA

The California Penal Code defines “person” to include “a corporation as well as a natural person;... .”

COLORADO

The Colorado Criminal Code defines the criminal liability of corporations in the subsection entitled “Criminal liability of business entities.” Colo. Rev. Stat. § 18-1-606 (2003).

Business entities can be held criminally liable for failure to discharge a duty imposed by law, or for conduct that constitutes an offense, carried out by a “high managerial agent” acting within the scope of his employment, or authorized by the governing body of the business entity. Col. Rev. Stat. § 18-1-606(1)(a)-(b). These subsections are modeled after MPC § 2.07(1)(b) and (1)(c). Pursuant to Section 18-1-606(2)(b) of the Colorado Criminal Code, Colorado appears to have limited the scope of those organizations subject to the statute to organizations doing business. Further, Colorado imposes fines upon business entities for criminal violations. Colo. Rev. Stat. § 18-1-606(3).

CONNECTICUT

It is unclear whether general corporate criminal liability exists in Connecticut. Section 53-303c of the criminal code imposes criminal penalties on corporations that violate particular provisions of the criminal code, mainly the restriction on operating certain businesses on Sundays. Conn. Gen. Stat. §§ 53-303c (2003). Moreover, the code lays out specific punishment for corporations that engage in money laundering. Conn. Gen. Stat. § 53a-281. Although Connecticut defines “person” to include, “where appropriate, a public or private corporation, a limited liability company, an unincorporated association...,” Conn. Gen. Stat. § 53a-3(1), there is no all-purpose statute addressing corporate criminal liability and there is no case law dealing explicitly with the topic.

DELAWARE

Delaware has enacted MPC § 2.07(1) with some minor changes. Liability is imposed on a “private corporation, a trust, a firm, a joint stock company, a union, an unincorporated association, a partnership, a government or a governmental instrumentality.” Del. Code Ann. tit. 11 §§ 222(21), 284 (2003). Del. Code Ann. tit. 11 § 281 (2003) provides: “An organization is guilty of an offense when:

- (1) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on organizations by law; or
- (2) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of employment and in behalf of the organization; or
- (3) The conduct constituting the offense is engaged in by an agent of the organization while acting within the scope of employment and in behalf of the organization and:
 - (a) The offense is a misdemeanor or a violation; or
 - (b) The offense is one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on a organization.

DISTRICT OF COLUMBIA

Certain specific District of Columbia statutes impose criminal liability on business entities. For example, the District of Columbia’s criminal code, entitled “Criminal Offenses,” imposes criminal liability on “any person, firm, association, corporation, or advertising agency” for fraudulent advertising. D.C. Code Ann. § 22-1511.

FLORIDA

The laws of Florida do not address criminal liability for corporations.

GEORGIA

A Georgia statute, Ga. Code Ann. § 16-2-22 closely tracks the MPC § 2.07(1), with the exception that Georgia did not enact subsection MPC § 2.07(1)(b), which provides for liability in cases where the offense “consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law;” MPC § 2.07(1)(b). Georgia also enacted the MPC definition of “agent” and “high managerial agent,” with small changes.

GUAM

Guam has enacted a statute very similar to MPC § 2.07(1). It provides:

“(a) A corporation may be convicted of:

- (1) any offense committed in furtherance of its affairs on the basis of conduct performed, authorized, requested, commanded or recklessly tolerated by (A) the board of directors; (B) a managerial agent acting in the scope of his employment; or (C) any other person for whose conduct the statute defining the offense provides criminal responsibility;
- (2) any offense consisting of a failure to perform a duty imposed by law; or
- (3) any petty misdemeanor or violation committed by an agent of the corporation acting in the scope of his employment in furtherance of its affairs.

9 Guam Code Ann. § 4.80 (2003).

HAWAII

The Hawaii Penal Code clearly defines the criminal liability of corporations and unincorporated associations, modeling its statute after MPC § 2.07(1). The Hawaii statute, entitled “Penal liability of corporations and unincorporated associations.” provides:

“A corporation or unincorporated association is guilty of an offense when:

- (1) It omits to discharge a specific duty of affirmative performance imposed on corporations or unincorporated associations by law and the omission is prohibited by penal law; or
- (2) The conduct or result specified in the definition of the offense is engaged in, caused, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors of the corporation or by the executive board of the unincorporated association or by a high managerial agent acting within the scope of the agent’s office or employment and in behalf of the corporation or the unincorporated association; or
- (3) The conduct or result specified in the definition of the offense is engaged in or caused by an agent of the corporation or the unincorporated association while acting within the scope of the agent’s office or employment and in behalf of the corporation or the unincorporated association and:
 - (a) The offense is a misdemeanor, petty misdemeanor, or violation; or
 - (b) The offense is one defined by a statute which clearly indicates a legislative purpose to impose such criminal liability on a corporation or unincorporated association.

IDAHO

While there is no explicit statute defining corporate criminal liability in Idaho, Idaho’s penal code defines “person” to include a public or private corporation. Idaho Code § 18-101(7). In addition, case law describes the situations in which a corporation may be held liable. In *State v. Adjustment Dep’t Credit Bureau*, 94 Idaho 156 (Idaho 1971). The court laid out the following

test to determine corporate criminal liability.

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

Id. at 160. The test established by the court is similar to the general statutes enacted in many states.

ILLINOIS

Illinois has enacted MPC § 2.07(1), with the exception of subsection (b), which provides for liability upon the failure to discharge a specific duty. 720 Ill. Comp. Stat. 5/5-4 (2002). Illinois enacted further MPC § 2.07(5), which provides corporations a defense to criminal liability. Additionally, Illinois’ definitions of “agent” and “high managerial agent” are very similar to those found in the MPC.

INDIANA

The Indiana Criminal Code allows a corporation, limited liability company, partnership, or unincorporated association to be convicted of any offense, “only if it is proved that the offense was committed by its agent acting within the scope of his authority.” Ind. Code § 35-41-2-3 (a) (2003).

IOWA

The Iowa Criminal Code describes corporate criminal liability in a section entitled “Liability of corporations, partnerships and voluntary associations.” Iowa Code § 703.5 (2003). Iowa attributes to corporations and other business entities “the same level of culpability as an individual committing the crime” when the offense consists of a failure to discharge a duty imposed by law, or when the conduct was committed by an agent of the corporation if the agent is acting within the scope of his authority and the act is authorized by the board of directors or a “high managerial agent.” *Id.*

KANSAS

Kansas has adopted a limited version of the MPC. The Kansas Criminal Code holds corporations criminally liable for “acts committed by its agents within the scope of their authority.” Kan. Stat. Ann. § 21-3206 (2002).

KENTUCKY

The Kentucky Criminal Code, following the first section of MPC § 2.07, imposes general corporate criminal liability. Ky. Rev. Stat. Ann. § 502.050 (2002). The statute assigns criminal liability if a corporation fails to fulfill a legal duty or if the board of directors authorizes, engages in or wantonly tolerates an illegal action. *Id.* A corporation may also be held criminally liable if an agent of the corporation engages in illegal conduct while acting within the scope of

his employment and the offense is a misdemeanor or the statute defining the offense “indicates a legislative intent to impose such criminal liability on a corporation.” *Id.* Kentucky has enacted further the MPC definitions of “agent” and “high managerial agent.” Ky. Rev. Stat. Ann. § 502.050(1), (2).

LOUISIANA

Louisiana has not specifically addressed corporate criminal liability. However, the Louisiana Penal Code provides that “person” includes a body of persons, whether incorporated or not. La. Rev. Stat. Ann. § 14.2(7) (2003).

MAINE

Maine imposes criminal liability when an “organization” fails to discharge a “specific duty” imposed on it by law, when such an “omission is prohibited by this code or by a statute defining a criminal offense outside of this code;... .” Me. Rev. Stat. Ann. tit. 17-A § 60(1)(A). Maine also imposes criminal liability when the conduct specified in the definition of the crime is committed by an agent acting in the scope of his authority. Me. Rev. Stat. Ann. tit. 17-A § 60(1)(B). Maine has declined to provide the “organization” a defense when the individual whose acts give rise to the offense has not been prosecuted or convicted. Me. Rev. Stat. Ann. tit. 17-A § 60(2).

MARYLAND

Nothing in Maryland’s statutes or judicial opinions touches explicitly on corporate criminal liability. However, Maryland’s criminal code defines “person” to include corporations and other business entities. Md. Code Ann. § 1-101(h).

MASSACHUSETTS

The laws of Massachusetts do not address corporate criminal liability.

MICHIGAN

Although Michigan does not explicitly address general corporate criminal liability by statute, its judicial opinions define the scope of corporate criminal liability. The Court of Appeals of Michigan, in *People v. General Dynamics Land Systems, Inc.*, reversed a lower court decision, which refused to charge a corporation with manslaughter. *People v. Gen. Dynamics Land Sys., Inc.*, 175 Mich. App. 701 (Mich. Ct. App. 1989). The court reasoned as follows:

[the] penal code defines “person,” “accused,” and similar words to include public and private corporations, unless a contrary intention appears. MCL 750.10; MSA 28.200. After examining the common-law definitions of manslaughter, we are unpersuaded that a contrary intention appears. Consequently, we cannot agree with the dissenting opinion in this respect and reach an opposite conclusion; that a corporation is sufficiently a “person” to be the perpetrator of a manslaughter.

Id. at 703.

In *People v. American Medical Centers, Ltd.*, the Court of Appeals also addressed corporate criminal liability. *People v. Am. Med. Ctr., Ltd.*, 118 Mich. App. 135 (Mich. Ct. App. 1982). The appellate court affirmed a corporation’s fraud conviction, reasoning that “‘person,’ as defined

by MCL 400.602(e); MSA 16.614(2)(e), includes a corporation. It is well settled that a corporation is liable for the fraudulent conduct of its president where the conduct was within the scope of his authority.” *Id.* at 155.

In addition, Michigan defines “person” to include business associations, including public and private corporations. MCL § 761.1(a).

MINNESOTA

Minnesota does not expressly impose corporate criminal liability by statute. However, case law has defined the circumstances in which a corporation will be held criminally liable. In *State v. Christy Pontiac-GMC, Inc.*, the Supreme Court of Minnesota reasoned that “[i]f a corporation can be liable in civil tort for both actual and punitive damages for libel, assault and battery, or fraud, it would seem if may also be criminally liable for conduct requiring specific intent.” *State v. Christy Pontiac-GMC, Inc.*, 354 N.W.2d 17, 19 (Minn. 1984); *see also State v. Compassionate Home Care, Inc.*, 639 N.W.2d 393, 397 (Minn. Ct. App. 2002).

The court also narrowed potential liability, stating: “[i]f a corporation is to be criminally liable, it is clear that the crime must not be a personal aberration of an employee acting on his own; the criminal activity must, in some sense, reflect corporate policy so that it is fair to say that the activity was the activity of the corporation. There must be, as Judge Learned Hand put it, a ‘kinship of the act to the powers of the officials, who commit it.’” *Id.* at 19-20 (citing *United States v. Nearing*, 252F. 223, 231 (S.D.N.Y. 1918)).

MISSISSIPPI

Mississippi has not explicitly addressed corporate criminal liability in its statutes or judicial opinions.

MISSOURI

Missouri has enacted, without significant change, MPC § 2.07(1), (3) and (4). Missouri’s changes to these sections include the omission of the model subsection providing for a presumption of corporate liability where criminal statutes impose absolute liability. Mo. Rev. Stat. § 562.056. Further, Missouri did not enact the MPC’s definition of “corporation,” defining only “agent” and “high managerial agent.” Mo. Rev. Stat. § 562.056(3).

MONTANA

The Montana Criminal Code expressly defines the extent of corporate criminal liability. Mont. Code Ann. § 45-2-311 (2003). It has enacted MPC § 2.07(1) with the exception of subsection (b), which would have provided for corporate liability upon a corporation’s failure to discharge a specific legal duty. Montana has also enacted the defense to liability described in MPC § 2.07(5), and the MPC definitions of “agent” and “high managerial agent.” Mont. Code Ann. § 45-2-311(2), (3).

A corporation may be held criminally liable if the offense committed is a misdemeanor, or “is defined by another statute that clearly indicates a legislative purpose to impose liability on a corporation and an agent of the corporation performs the conduct that is an element of the offense while acting within the scope of the agent’s office or employment and in behalf of the corporation, except that any limitation in the defining statute concerning the corporation’s accountability for certain agents or under certain circumstances is applicable.” *Id.* A corporation can also be held liable for a criminal act requested or performed by the board of directors or a “high

managerial agent.” *Id.*

The statute also provides a defense to corporations. “A corporation’s proof that the high managerial agent having supervisory responsibility over the conduct that is the subject matter of the offense exercised due diligence to prevent the commission of the offense is a defense to a prosecution for any offense to which subsection (1)(a) refers, other than an offense for which absolute liability is imposed. This subsection is inapplicable if the legislative purpose of the statute defining the offense is inconsistent with the provisions of this subsection.” *Id.*

NEBRASKA

Nebraska’s statutes do not specifically address corporate criminal liability. However, both the Nebraska Supreme Court and the Nebraska Court of Appeals have discussed the issue. In *Mueller v. Union P. R.R.*, 220 Neb. 742 (1985), an employment lawsuit, the Nebraska Supreme Court stated in dicta: “While a corporation may be convicted of certain types of criminal acts committed by its agents, even if the acts have been forbidden by the corporation, in order to impose such criminal liability against the corporation, the agent must have been acting within the scope of his or her authority.” *Mueller*, 220 Neb. 742 (citing *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962)); *United States v. Thompson-Powell Drilling Co.*, 196 F. Supp. 571 (N.D. Tex. 1961); *Vulcan Last Co. v. State*, 194 Wis. 636, 217 N.W.412 (1928)).

Further, in *State v. Roche, Inc.*, 2 Neb. App. 445 (Neb. Ct. App. 1994), the Nebraska Court of Appeals affirmed the conviction of a corporation for theft by deception. The court noted: “At least since 1909, the U.S. Supreme Court has concluded that a corporation may be liable criminally for offenses where its agent acts within his or her authority and in which intent is an element.” *Id.* at 454.

In addition, a Nebraska statute provides “[f]or purposes of the Nebraska Criminal Code, unless the context otherwise requires” that “person” includes, “where relevant a corporation...” Neb. Rev. Stat. § 28-109(16).

NEVADA

Nevada’s statutes and case law do not expressly address the issue of corporate criminal liability and, therefore, the basis for corporate criminal liability in Nevada remains unclear. However, within the criminal code, § 193.160 addresses penalties for misdemeanors committed by corporations when those penalties are not fixed by statute. Nev. Rev. Stat. § 193.160 (2003). The statute reads: “In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable as for a misdemeanor, and there is no other punishment prescribed by law, the corporation is punishable by a fine not exceeding \$1,000.”

NEW HAMPSHIRE

Corporate criminal liability is addressed in the New Hampshire Criminal Code section titled “Classification of crimes.” N.H. Rev. Stat. Ann. § 625-9. The statute classifies crimes, including crimes committed by corporations. *Id.* For example, “[a] felony is murder or a crime so designated by statute within or outside this code or a crime defined by statute outside of this code where the maximum penalty provided is imprisonment in excess of one year; provided, however, that a crime defined by statute outside of this code is a felony when committed by a corporation or an unincorporated association if the maximum fine therein provided is more than \$200.” *Id.* Further, New Hampshire defines “person” to include “a corporation or an unincorporated association.” N.H. Rev. Stat. Ann. § 625:11.

NEW JERSEY

New Jersey has enacted the provisions of the MPC, excluding the subsection of the MPC presuming corporate criminal liability for strict liability offenses. N.J. Stat. Ann. § 2C:2-7 (West 2002); MPC § 2.07(2). New Jersey has elected to impose liability on corporations specifically, and not on unincorporated associations. *Id.*

NEW MEXICO

New Mexico does not expressly address corporate criminal liability by statute or in case law. However, New Mexico's Criminal Procedure Act defines "person" to include, "unless a contrary intention appears," any "individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity." N.M. Stat. Ann. § 31-1-2(E).

NEW YORK

New York has enacted MPC § 2.07(1) and the MPC definitions of "agent" and "high managerial agent." N.Y. Penal Law § 20.20 (McKinney 2002).

NORTH CAROLINA

The North Carolina Criminal Code does not deal explicitly with corporate criminal liability. However, the North Carolina Supreme Court addressed the issue in *State v. Salisbury Ice & Fuel Co.*, 166 N.C. 366 (1914), in which a corporation appealed a fraud indictment. The court stated: "[I]t is held that a corporation can be held criminally liable for conspiracy or any other crime requiring the proof of an intent. . . . It was long contended that even civil liability arising from evil intent could not be visited upon an artificial being. This fiction has vanished, and corporate liability on the criminal side permanently established, even for assault." *Id.* at 368. The court upheld the indictment. *Id.* at 370.

NORTH DAKOTA

The North Dakota Criminal Code expressly addresses corporate criminal liability, having enacted a narrow version of the MPC. N.D. Cent. Code § 12.1-03-02 (2003). It provides that a corporation will face criminal liability for an offense committed by an agent within the scope of his or her employment if the offense was "authorized, requested, or commanded" by those making the policy of the corporation, including the board of directors, executive officers, and others involved in policymaking. *Id.* A corporation may also be criminally liable for failure to perform a duty required by law. *Id.* Moreover, corporate criminal liability may be assigned to a corporation for a misdemeanor committed by an agent of the corporation within the scope of his or her employment. *Id.* Finally, a corporation may be held criminally liable for "[a]ny offense for which an individual may be convicted without proof of culpability, committed by an agent of the corporation or the limited liability company within the scope of the agent's employment." *Id.*

OHIO

The Ohio Criminal Code addresses corporate criminal liability, holding "organizations" criminally liable according to the principles expressed in the first two subsections of MPC § 2.07. Ohio Rev. Code Ann. § 2901.23 (2003). Under the statute, a corporation may be held criminally liable if an agent of the corporation, acting within the scope of his or her employment, commits a minor offense, "except that if the section defining the offense designates the officers,

agents, or employees for whose conduct the organization is accountable or the circumstances under which it is accountable, such provisions shall apply.” *Id.*

Criminal liability may also be imposed on a corporation if the statute defining the offense plainly demonstrates a purpose to impose corporate criminal liability. *Id.* Moreover, a corporation may be held criminally liable for failure to perform a duty mandated by law. *Id.* Finally, “[i]f, acting with the kind of culpability otherwise required for the commission of the offense, commission [of the offense] was authorized, requested, commanded, tolerated, or performed by the board of directors, trustees, partners, or by a high managerial officer, agent, or employee acting in behalf of the organization and within the scope of his office or employment.” *Id.* The statute also provides a defense from liability, modeled after that found in subsection 5 of MPC § 2.07, applicable when the high managerial agent, responsible for the subject matter of the offense, exercised due diligence to prevent its completion. *Id.*

OKLAHOMA

Oklahoma does not address general corporate criminal liability by statute. However, Chapter 64 of the Oklahoma Criminal Code addresses various frauds and offenses in the context of corporate affairs. Okla. Stat. tit. 21 §§ 1631-1645. The Chapter addresses such issues as fraud in stock subscriptions, failing to enter receipts, and refusing to permit inspection of corporate books. *Id.* In addition, Okla. Stat. tit. 21 § 110 provides that the term “‘person’ includes corporations, as well as natural persons.”

OREGON

The Oregon Criminal Code describes the circumstances in which a corporation may be held criminally liable. Ore. Rev. Stat. § 161.170 (2001). Oregon has enacted a statute substantially the same as MPC § 2.07(1) and the MPC definitions of “agent” and “high managerial agent.” The statute assigns criminal liability under the following situations:

- (a) The conduct constituting the offense is engaged by an agent of the corporation while acting within the scope of employment and in behalf of the corporation and the offense is a misdemeanor or a violation, or the offense is one defined by a statute that clearly indicates a legislative intent to impose criminal liability on a corporation; or
- (b) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
- (c) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of employment and in behalf of the corporation.

Id.

PENNSYLVANIA

Pennsylvania expressly addresses corporation criminal liability, having enacted each material provision of MPC § 2.07 without substantial change. 18 Pa. Cons. Stat. Ann § 307 (2002).

PUERTO RICO

The laws of Puerto Rico do not address corporate criminal liability.

RHODE ISLAND

Rhode Island does not impose general corporate criminal liability. However, case law indicates that corporations can be held criminally liable for conspiracy. *State v. Eastern Coal Co.*, 2 R.I. 254 (1908). The court stated: “If corporations have the capacity to engage in actionable conspiracy they have the power to criminally conspire.” *Id.* at 268.

SOUTH CAROLINA

The South Carolina Criminal Code does not explicitly define the general criminal liability of corporations. However, it does extend the crime of barratry to corporations and unincorporated associations. S.C. Code Ann. § 16-17-30 (2002). South Carolina case law does not address corporate criminal liability.

SOUTH DAKOTA

The South Dakota Criminal Code does not contain a general statute addressing corporate criminal liability. However, South Dakota defines “person” to include a “limited liability company, corporation, firm, organization, partnership or society.” S.D. Codified Laws § 22-1-2.

In addition, the Supreme Court of South Dakota has expressly ruled that corporations can be held criminally liable. *State ex rel. Botsford Lumber Co. v. Taylor*, 34 S.D. 13 (1914). In a case where a corporation was charged with unfair discrimination, the court noted: “It is perfectly clear that corporations may be guilty of a crime, under the laws of this state. It is likewise clear, that the courts are given jurisdiction over such crimes, and that a corporation may be charged therewith, either by indictment or information.” *Id.* at 16, 19.

TENNESSEE

The Tennessee Criminal Code includes a subsection, very similar to MPC § 2.07(1), that provides for general corporate criminal liability. Tenn. Code Ann. § 39-11-404 (2003). The subsection extends criminal liability to a corporation when it intentionally fails to perform a duty imposed by criminal law. *Id.* Criminal liability also arises when the board of directors of the corporation engages in or authorizes an illegal act. *Id.* A corporation will also be held liable if an agent of the corporation engages in illegal conduct while acting within the scope of his or her employment, if the offense is a misdemeanor or the offense is defined “by statute which indicates a legislative intent to impose such criminal liability on a corporation.” *Id.* In addition, Tennessee has enacted the MPC definitions of “agent” and “high managerial agent.”

TEXAS

Texas has enacted a limited version of the MPC. Texas holds corporations and associations criminally liable when an agent, acting on behalf of the corporation or association within the scope of his or her employment, commits an offense for which corporations or associations are explicitly made liable, where a legislative intent to hold the entity liable appears, and for strict liability offenses. Tex. Penal Code Ann. § 7.22(a). Texas will hold a corporation criminally liable for a felony only where the offense was “authorized, requested, commanded, performed or recklessly tolerated” by the governing board or a high managerial agent. Tex. Penal Code Ann. § 7.22(b).

UTAH

Utah has enacted a limited version of the MPC. Specifically, Utah has enacted MPC §§ 2.07(1)(b) and (1)(c). A subsection of the Utah Criminal Code describes when a corporation will be held criminally liable. Utah Code Ann. § 76-2-204 (2003). The statute declares that a corporation may be held criminally liable when a corporation fails to perform a duty that is mandated by law, or the board of directors authorizes or undertakes the offense. *Id.*

VERMONT

Vermont does not expressly address corporate criminal liability within its statutes or case law.

VIRGIN ISLANDS

Virgin Islands does not expressly address corporate criminal liability within its statutes or case law.

VIRGINIA

Virginia does not expressly address corporate criminal liability within its statutes or case law.

WASHINGTON

The Washington Criminal Code expressly defines when a corporation may be held criminally liable. Wash. Rev. Code § 9A.08.030 (2003). Washington has enacted MPC § 2.07(1), and the MPC definitions of “agent,” “corporation,” and “high managerial agent.” Wash. Rev. Code § 9A.08.030(1), (2). The statute states that a corporation may be found guilty of a crime if it fails to fulfill a duty proscribed by law, or if an agent, acting within the scope of his or her employment, engages in criminal conduct that is either a misdemeanor or is defined by a statute which “clearly indicates a legislative intent to impose such criminal liability on a corporation.” Wash. Rev. Code § 9A.08.030. In addition, Washington law provides that a corporation held criminally liable for an act forfeits its right to do business in the state. Wash. Rev. Code § 9A.08.030(5).

WEST VIRGINIA

The West Virginia Criminal Code does not expressly address general corporate criminal liability. However, the Supreme Court of West Virginia implied in dicta that a corporation can be held criminally liable for the acts and omissions of its employees. *Mandolidis v. Elkins Indus.*, 161 W. Va. 695 (1978). The case involved a tort action brought by employees of the corporation. As part of its discussion of intent, the court noted: “It is almost universally conceded that a corporation may be criminally liable for actions or omissions of its agents in its behalf.” *Id.* at 704 n.8 (citing W. LaFave and A. Scott, Handbook on Criminal Law 229 (1972)).

WISCONSIN

Wisconsin has not enacted a general statute addressing corporate criminal liability. However, the Supreme Court of Wisconsin has addressed the issue in *State v. Dried Milk Products Co-op.*, 16 Wis. 2d 357 (Wis. 1962), and *Vulcan Last Co. v. State*, 194 Wis. 636 (1928). In *Dried Milk Products Co-op.*, the Supreme Court of Wisconsin upheld a trial court’s criminal conviction of a corporation. *Dried Milk Products Co-op.*, 16 Wis. 2d 357. The court noted: “[A] corporation acts of necessity through its agents whose acts within the scope of the agent’s authority are the acts of the

corporation, both for the imposition of civil and criminal liability.” *Id.* at 361 (citing *Vulcan Last Co.*, 194 Wis. 636).

In *Vulcan Last Co.*, the Supreme Court of Wisconsin upheld the criminal conviction of a corporation for attempting to influence votes in a referendum election. *Vulcan Last Co.*, 194 Wis. 636. The court quoted a United States Supreme Court case:

It is true that there are some crimes which in their nature cannot be committed by corporations. 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. . . . If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy.

Id. at 642-43 (citing *New York Cent. & H.R.R. Co. v. U.S.*, 212 U.S. 481, 494-95 (1909)).

WYOMING

Wyoming does not expressly address corporate criminal liability in its statutes or case law. However, Wyoming defines “person” to include corporations. Wyo. Stat. Ann. § 6-1-104(a)(vii).

APPENDIX F

SELECTED NATIONS' PRACTICES REGARDING WHETHER AND WHEN TO PROSECUTE CORPORATIONS

The state of the law in the various member states of the European Union varies widely with respect to corporate criminal liability. If there is a trend, it has been toward increased corporate liability, but there are still a number of countries that do not hold corporations criminally liable at all. Austria, Germany, Greece, Ireland, Italy, Luxembourg, Spain and Sweden are in the latter camp. These countries hold that corporations may not be found criminally liable, only individuals. On the other side of the issue are Belgium, Denmark, Finland, France, the Netherlands, and Portugal, all of which have expanded their law to include some form of corporate criminal liability. The United Kingdom also holds corporations criminally liable in many instances. Outside of Europe, other countries, including Australia, Canada, and China, have adopted some degree of corporate criminal liability as well.

International bodies have also increasingly begun to address the problem of corporate criminal liability. For example, the Council of Europe passed the Convention on the Protection of the Environment through Criminal Law in 1998, and the Committee of Ministers of the Council of Europe passed a Recommendation in 1990 concerning Liability of Enterprises Having Legal Personality for Offenses Committed in the Exercise of their Activities.

The following is a brief description of the systems in each of the countries and bodies listed above.

Australia

In passing the *Criminal Code Act*, 1995, Australia adopted a theory of corporate criminal liability based on the *corporate culture* model. Corporate culture is defined in the Australian *Criminal Code Act*, 1995 (paragraph 12.3(6)) as “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place”. This model serves to impute a real intent, in the criminal law sense, to the corporate entity. Section 12.1(1) of the *Criminal Code* states that, “This code applies to bodies corporate in the same way as it applies to individuals”. While a company may not have a “mind”, its intentions are to be drawn from its organization and actions. Accordingly, the corporate culture model does not require finding an individual responsible for an offense in order to find liability on the part of the corporation.

For *mens rea* crimes, the fault requirement of the criminal law is deemed satisfied if the corporation “expressly, tacitly or impliedly authorised or permitted the commission of the offence.” (Criminal Code Act, paragraph 12.3(1)). Authorization or permission can be shown by any of the following means (Criminal Code Act 1995, paragraph 12.3(2)):

- a. the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- b. a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

- c. a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- d. the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

However, and with regard to the latter, a defense of due diligence exists, if “the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission” of the high managerial agent (paragraph 12.3(3)). This defense could exonerate the corporation where a director acts illegally and contrary to the explicit orders of the board of directors.

Moreover, according to the *Criminal Code Act*, Section 5.5(a) and (b), a corporation, as well as a natural person, may be found liable for criminal negligence if it engages in conduct that constitutes “such a great falling short of the standard of care that a reasonable person would exercise in the circumstances” and “such a high risk that the physical element exists or will exist” that the conduct “merits criminal punishment.” The statute does not clarify whether a company could still be found criminally negligent as a result of the negligence of an individual employee other than a high managerial agent.

Australia’s standard thus follows that of the Model Penal Code in many ways.

Austria

Austria is among the countries that follow the motto *societas delinquere non potest* (corporations cannot commit crimes). *A Study on Systems of Civil Liability of Statutory Auditors in the Context of a Single Market For Auditing Services in the European Union*, at 93 (carried out on behalf of the European Commission Jan. 17, 2002), available at <http://www.europa.eu.int/comm/intemalmarket/en/company/audit/docs/auditliability.pdf> (last visited January 6, 2005). Consequently, only individuals may be held liable for corporate wrongdoing. Michael J. Faure and Gunter Heine, *Criminal Enforcement of Environmental Law in the European Union*, European Union Network for the Implementation and Enforcement of Environmental Law (2000) at 104, available at <http://www.europa.eu.int/comm/environment/impel/pdf/criminal.pdf> (last visited January 6, 2005).

Belgium

The Belgian Supreme Court, the Cour de Cassation, has advocated the principle of *societas delinquere non potest*: “The Corporation being a legal fiction, it could fulfill neither the actus reus nor the mens rea requirement.” Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 Int’l & Comp. L.Q., 493, 495, n. 22 (1994). Belgian law does, however, provide for corporate criminal liability under certain conditions. A corporation may be held liable for offenses that are closely linked to accomplishing its stated purpose or the defense of its interests or for activities that may be shown to have been undertaken for the benefit of the company. *Statutory Auditors’ Study* at 94. The Belgian legislature has also passed a law requiring each corporation to designate a responsible person to become criminally liable if criminal activity is committed on the part of the corporation. In such a case, it is not necessary in to prove criminality on the designated person’s part. To soften what may seem like a rather harsh responsibility, the designated person receives extra compensation for the risk involved, in part to provide reimbursement should fines be imposed after a determination of liability. Gunter Heine, *New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience-Or Vice Versa?*, 1998 St. Louis-Warsaw Transatlantic L.J. 173, 177 -78 (citations omitted).

In Belgium, corporations may not be held criminally liable for environmental offenses. The environmental offense must be personalized so that an individual is subject to the criminal sentence. Sentences include fines, prison sentences (usually suspended), publication of judgments against corporations, and seizure of waste matter and packaging. For lesser offenses, administrative sanctions are imposed. *Faure* at 108-114.

Canada

In late 2003, Canada enacted important new legislation on the subject of corporate criminal liability.

The definition of “everyone”, “person” and “owner” is expanded, in the Criminal Code itself, to include organizations. All criminal statutes in Canada are thus potentially applicable to organizations; and “organization” is defined expansively, to include public bodies, corporations, partnerships, trade unions, municipalities, and even any “association of persons that . . . is created for a common purpose, . . . has an operational structure, and . . . holds itself out to the public as an association of persons.” Section 2, *Criminal Code*, R.S.C. 1985, c. C-46, as amended.

There are explicit rules of attribution, one set relating to statutes in which negligence is the focus and another set regarding statutes that involve “fault . . . other than negligence.” With respect to statutes in which negligence is the standard, the rule of attribution is as follows:

An organization is a party to the offense if

- (a) acting within the scope of their authority
 - (i) one of its representatives is a party to the offence, or
 - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (b) the senior officer who is responsible for the aspect of the organization’s activities that is relevant to the offense departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

Section 22.1, *Criminal Code*, R.S.C. 1985, c. C-46, as amended.

“Representatives” includes any employee or agent as well as directors and partners and the like. “Senior officer” is defined as a representative “who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.” Section 2, *Criminal Code*, R.S.C. 1985, c. C-46, as amended.

On the negligence side of things, then, the Canadian law is very broad, encompassing not only normal *respondeat superior* attribution, but also composite attribution combining acts or omissions of multiple representatives. The sole limiting factor is that the prosecution must prove that the senior officer or officers departed markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent the representative from engaging in the negligent conduct.

Things are more complicated on the non-negligence side of things. The rule of

attribution extends only to the corporation's "senior officers", and applies only when an act is done "with the intent at least in part to benefit the organization." Prosecution of the organization itself, then, is permissible if under those circumstances a senior officer is an actual "party to the offense", or with the necessary criminal state of mind directs others in the organization to perform the actual criminal act or to make the criminal omission, or, knowing that an employee or agent of the organization is a party to the offense or is about to be a party, fails to take all reasonable measures to prevent this from happening. Section 22.2, *Criminal Code*, R.S.C. 1985, c. C-46, as amended.

One of the ways in which this is different from the Model Penal Code is that it omits the affirmative defense available to a corporate defendant where evidence can be produced that "the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission." (Model Penal Code, Section 2.07(d)).

The November 2003 amendments to the criminal code also include a new section, Section 718.21, relating to the sentencing of organizations. Among the ten factors that a court is now required to take into consideration in imposing a sentence on an organization are "any advantage realized by the organization as a result of the offence", "the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees", whether the organization had a record of being sanctioned by a regulatory body for similar conduct, and "any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence." Section 718.21, *Criminal Code*, R.S.C. 1985, c. C-46, as amended by ch. 21, 2003 A.S.C. (Bill C-45).

China

Corporate criminal liability in China was provided in 1997 by an amendment of the *Criminal Code*. The first criminal law was promulgated in 1979 and defined the criminal responsibility of a natural person but did not cover "unit crime", units being companies, enterprises, institutions, state organs or organizations. In 1987, the Customs Law of the People's Republic of China stipulated for the first time that "enterprises, institutions, state organs or organizations" could commit a crime. Under that system, in certain cases, only the unit could be deemed criminally responsible, whereas in other cases, only persons who were responsible in the unit could be held criminally liable. In 1997, the Criminal Law was amended to apply the system of unit crime. There are 129 infractions that can lead to prosecution as a unit crime. Most unit crimes belong to the category of economic crimes, and the majority of the economic crimes can be committed by a unit.

Article 30 of the *Criminal Code* stipulates that "[A] company, enterprise, institution, organization or group which commits an act endangering society, that is considered a crime under the law shall bear criminal responsibility". According to this provision, it must be shown that a company purported to obtain an "illicit benefit for its own"; that the illicit benefit was a benefit prohibited by national law, administrative law and regulations, as well as other related stipulations; that the crime was committed as a result of a decision made by the company collectively or by a person in a position of responsibility, and reflects the will of the company; and that the crime is clearly stipulated by the law. In China, a unit crime generally requires criminal intent before a unit may be held to be criminally responsible. However, in some situations, it is possible to hold the unit responsible for its negligent acts.

According to the *Criminal Code*, the "dual-punishment system" is the general

principle for punishing the unit criminally; the “single-punishment system” is the exception. Article 31 of the law provides in part, “A unit responsible for a criminal act shall be fined. The person in charge and other personnel who are directly responsible shall also bear criminal responsibility.”

Denmark

Denmark passed laws providing for corporate criminal liability in 1996. Gunter Heine, *supra* at 175. In the case of environmental offenses as well, companies may be held criminally liable, along with their directors. It need not be proven that a specific employee engaged in wrongdoing, as long as it can be established that the company as such must be responsible for the incident. Sanctions are contained in section 110 of the Danish Environmental Protection Act. *Faure* at 115-125. Denmark also has a system of corporate fines called “bodesansvar.” Hans de Doelder and Klaus Tiedemann, *La Criminalisation du Comportement Collectif: XIV e Congrès International de Droit Compare* 19 (1994).

Finland

Finnish law also provides for corporate criminal liability. *Statutory Auditors’ Study* at 94. A corporation may only be held criminally liable, however, for offenses specified by statute. Corporations exercising public authority may not be held criminally liable.

In order for liability to attach, either someone at the managerial level must be adjudged guilty, or a lack of due diligence to prevent the crime on the part of the corporation must be proven. Thus, the corporation may still be subject to criminal liability, even if a specific employee is not found guilty. Whether or not an employee is sufficiently senior to trigger corporate criminal liability depends on whether he or she is someone “with decision-making power.” *DeDoelder* at 29.

Sanctions include so-called “day-fines” in which a fine is imposed for a certain number of days, based on the monthly income and assets of the offender. Imprisonment is not used as often as a sanction. *Faure* at 126-130.

The provisions for corporate criminal liability, which took effect in 1995, are found in the Finnish Penal Code, Chapter 9, Sections 1-9 and Chapter 48, Section 9. Byung-Sun Cho, *Emergence of an International Environmental Criminal Law?* 19 U.C.L.A. J. Env’tl. L. & Pol’y 11, 30 (2000/2001).

France

France had not recognized corporate criminal liability since the French Revolution and its emphasis on individualism. Leonard Orland and Charles Cachera, *Essay and Translation: Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) Under the New French Criminal Code (Nouveau Code Penal)*, 11 Conn. J. Int’l L. 111, 115 (1995). However, in the face of mounting criticism, in 1982 the Conseil Constitutionnel made it clear that there were no constitutional impediments to imposing fines on corporations. This was the first step in a series of developments that culminated in the passage of the Nouvel Code Penal.

Under the Nouveau Code Penal, in effect since 1994, corporations may be held criminally liable in France. As in Finland, they may be held liable, however, only for offenses specifically enumerated by law. The French Penal Code provides that “legal entities are criminally responsible ... for the offences which provide for such a liability.” *Statutory Auditors’ Study* at 94.

When the Nouveau Code Penal was put before Parliament in 1992, opponents argued that fines could already be imposed on corporations (*personnes morales*), and that expanded criminal liability would harm small shareholders, employees, and creditors. *Orland and Cachera* at 122. The Nouveau Code Penal in section 121-2 provided for criminal liability of corporations, based on the directing mind concept (See discussion in United Kingdom section, *infra*). Corporate criminal responsibility extended to all legal entities: corporations, nonprofit organizations, and even some governmental or state controlled organizations. Foreign corporations with establishments in France could be criminally responsible as well. The *personne morale* could be liable either as a principal or an accomplice, and a natural person could be liable as an accomplice to an entity. The Code Penal and the Circular (the equivalent of Advisory Committee Comments under U.S. law) suggest that a natural person may not use corporate liability as a shield against personal liability, however. Conversely, personal liability of the corporate officer is not a precondition to corporate liability. *Orland and Cachera* at 123-124.

Violation of supervisory duties was deemed to be sufficient to trigger corporate criminal liability. Markus Wagner, *Corporate Criminal Liability National and International Responses*, Int. Soc. For the Reform of Criminal Law 13th Int. Conference Commercial and Financial Fraud: A Comparative Perspective, Malta, 8-12 July 1999, at 5, *available at* <http://www.icclr.law.ubc.ca/publications/Reports/corporatecriminal.pdf> (last visited July 26, 2002). Although conduct of a corporate officer or corporate organ generally is a prerequisite to corporate liability, entity liability can occur in limited circumstances even without an officer's or organ's conduct. The unlawful conduct must occur in furtherance of corporate goals and objectives. Renegade conduct of an individual does not trigger corporate liability.

The Nouveau Code Penal also provides for sanctions in Articles 131 and 132. *Orland and Cachera* at 124-25. Monetary sanctions for corporate entities are five times as high as for individuals and up to ten times as high in aggravated circumstances. Other sanctions include prohibition against performing professional or social activities; placement of the corporation under judicial supervision; preclusion from public bids or markets; prohibition of public offerings; prohibition against making payments by check; confiscation of criminal objects; and publication of sentencing of the corporation in the news media. In extreme situations, corporate dissolution is a remedy.

The list of offenses triggering corporate criminal liability is long. *Orland and Cachera* at 163-67. It includes crimes against humanity, homicide, drug trafficking and money laundering, exposure to risk of death, discrimination, pimping, violation of privacy, misrepresentation, "defamatory denunciation", theft, extortion, embezzlement, fraudulent insolvency, receiving stolen goods, terrorism, "violation of the nation's fundamental interests," copyright infringement, price fixing, air pollution, and infringement of waste elimination regulations. The areas of labor law and commercial law still await legislation. Environmental offenses are enumerated not only in the Nouveau Code Penal, but in other major French environmental laws. Pierrick B. Le Goff, *The French Approach to Corporate Liability for Damage to the Environment*, 12 Tul. Eur. & Civ. L.F. 39, 62 (1997). France has no specific law concerning auditor liability, but the general provisions for theft and embezzlement might be applicable.

Germany

German law does not provide for corporate criminal liability. This policy has its origins in Roman law, as expressed, for example, by Friedrich Carl von Savigny:

Criminal law has to do with natural persons as thinking and feeling persons exercising their free will. A legal person however is not such a person, but merely a property owning being, . . . with its reality based on the representative will of certain individual persons, which, by way of fiction, is attributed to its own will. Such a representation . . . can be acknowledged everywhere in civil law, but never in criminal law. Everything which is considered as a legal person's crime is always only the crime of its members or organs, this means of single human beings or natural persons. . . . If a legal person were to be punished for a crime, the basic principle of criminal law, the identity of the offender and of the sentenced person, would be violated.

Wagner, *supra* at 1, n. 1.

Germany does have a system of administrative fines imposed on corporations, governed by section 30 of the Ordnungswidrigkeitengesetz. These fines do not grow out of criminal liability, however. The fines are called by a different name, "Geldbusse," rather than "Geldstrafe," to distinguish their non-criminal character. *Faure* at 134. They have been criticized for being reactive rather than proactive, or preventive. In some cases, low fines seem to have been ineffective in changing corporate behavior. *Wagner* at 8.

There has been much debate in Germany recently over the imposition of corporate criminal liability. Reasons given for not imposing such liability are the lack of capacity to act due to an absence of will; lack of capacity for culpability; and the inability to undergo punishment. The argument for a corporation's lack of capacity for culpability is based on a Bundesgerichtshof (Federal Supreme Court) decision in 1952 that defined guilt as occurring when a human being decides freely following responsibility and self-determination to act against the law. *DeDoelder* at 31 (citing to BGHSt. (GrS) 2, 194,200)). Jeschek in his treatise Allgemeiner Teil p. 204 argues that punishment expresses socio-ethical reprobation of society and is applicable only to individuals. *DeDoelder* at 31 (citing Schonkel/Schroder Vor §25, n.113; BVerfGE 20,323,336; Verhandlungen des 40. Deutschen Juristentages t. I (Gutachten) (1953)). Another argument against corporate criminal liability is that of Karl Engisch: that it is unjust to make a whole corporation liable for the actions of an individual, because the other members of the corporation suffer not because of their actions, but according to their financial participation in the enterprise. Finally, it has been argued that an individual would be subject to double condemnation: both as an individual and as member of a corporation. *Id.* at 32.

In 1998, the German Bundestag instituted a working group to look into the matter, perhaps under pressure of the latest GECD and ED directives. *Wagner* at 5-6. In addition, in recent German cases such as the Erdal-Leatherspray Case, the Wood Preservative Case and the G.D.R. Politbureau Case, German courts have begun to expand the criminal liability of high level management officials. *Heine* at 177 (citations omitted).

Greece

Greek law does not provide for corporate criminal liability. *Statutory Auditors' Study* at 93. Administrative law governs corporations in Greece. Hans de Doelder and Klaus Tiedemann, *La Criminalisation du Comportement Collectif: XIV e Congres International de Droit Compare* 19 (1994).

Ireland

Irish law does not generally provide for corporate criminal liability. *Statutory Auditors' Study* at 93.

Italy

Italian law does not provide for corporate criminal liability. *Statutory Auditors' Study* at 93. Non-liability of corporate entities in Italy is rooted in Article 27(1) of the Italian Constitution, which reads: "La responsabilita penale e personale." (Criminal responsibility is personal.) Cost. art. 27, available in English at http://www.oefre.unibe.ch/law/icl/it00000_.html. Owners, governing directors, general managers, and all legal representatives may always be held liable. Other persons are liable only if they have a specific responsibility for a certain duty. The legal representative of the corporation has the burden of proof to show that he or she has acted with necessary care to avoid wrongdoing, for example, an offense against the environment. In the case of a subordinate, the governing principle in determining the individual's criminal liability is one of delegation. For liability to attach, the delegation must be explicit and voluntarily accepted by the subordinate who possesses both the technical skill and "real decision-making autonomy." *Faure* at 139.

The Italian Constitution has been interpreted, however, as not impeding "quasi-penal" responsibility of corporations in the areas of competition and of radio and television communications. Hans de Doelder and Klaus Tiedemann, *La Criminalisation du Comportement Collectif: XIV e Congres International de Droit Compare* 13 (1994).

Luxembourg

Luxembourg does not provide for corporate criminal liability. *Statutory Auditors' Study* at 93.

Netherlands

Criminal liability has been imposed in the Netherlands since 1976. Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 *Buffalo Crim. L. Rev.* 641, 645 (2000). In the case of a corporate auditor found guilty of wrongdoing, for example, the auditing firm may be found liable if:

- (i) the responsible person or persons within the firm had knowledge of the way in which a statutory auditor acted, (ii) instructions were given to the concerned statutory auditor by persons with authority to do so, and (iii) the supervisor involved approved the conduct of the statutory auditor or failed to prevent the statutory auditor from acting.

Statutory Auditors' Study at 94.

Under Dutch law, it is not necessary to prove the guilt of an individual employee to find the company criminally liable. It is sufficient to show that the company could decide whether or not the wrongdoing would take place and that the criminal conduct of the employee is of a kind that the company normally accepts. The rank of an employee necessary to trigger corporate liability is an employee with “some influence.” DeDoelder at 29.

Sanctions include shutting down the company, imposition of fines, abrogation of certain corporate rights, imprisonment, confiscation of property, publication of judgment against the company, victim compensation, and injunctions ordering completion of certain obligations such as compliance with environmental laws. At present, administrative bodies do not impose sanctions as they do in Germany. *Faure* at 152-53.

Portugal

Portugal imposes corporate criminal liability for certain offenses enumerated in Portuguese criminal law. *Statutory Auditors’ Study* at 94. Corporate criminal liability is founded on Articles 11 and 12 of the new Penal Code (Decree Law No. 48/95), passed in 1995. In the case of environmental crimes, the Penal Code provides for protection of nature (Article 278) and protection against pollution (Article 279). Sanctions consist of criminal fines and “custodial sentences” commutable to fines. Some commentators feel that the administrative sanctions also possible under Portuguese law are more effective than criminal sanctions. *Faure* at 156-57. Portuguese law also incorporates a system of corporate fines called “coima.” *DeDoelder* at 19.

Spain

Spanish law does not recognize corporate criminal liability. *Statutory Auditors’ Study* at 93. It does, however, impose administrative sanctions against corporations and provides for “subsidiary civil liability.” Company executives may be held individually criminally liable under Article 31 of the Criminal Code even if they do not “meet the conditions, qualities or relations that the corresponding figure of crime of offences requires for being an active subject of it.” The gist of the statement seems to be that the executive may be held personally criminally liable even if he or she does not personally possess the requisite criminal intent. In the case of offenses against the environment, executives may be subject to imprisonment of six months to four years, fines of eight to twenty-four months (presumably “day-fines” as discussed above in the section on Finnish law), and removal from office for a period of one to three years. *Faure* at 160-161 (citing Spanish Criminal Code, art. 325).

Sweden

Sweden does not recognize corporate criminal liability. *Statutory Auditors’ Study* at 93. It does have a system of corporate fines called “foretagsbot.” *DeDoelder* at 19.

United Kingdom

Until 1915, a corporation in the United Kingdom could be liable only for three common law crimes which did not require *mens rea*: public nuisance, criminal libel, and contempt of court. A corporation could also be held liable for statutory regulatory offenses under a strict liability theory. Then, in 1915, the House of Lords, in a civil liability case, *Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, enunciated the principle of the “directing mind”, which became the basis of identification theory, a theory that permeated British judicial opinion in this area for decades.

In 1957, Lord Denning expounded this theory in somewhat anthropomorphous terms:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

At p. 172.

This passage was quoted in the 1971 case of *Tesco Supermarkets Ltd. v. Natrass*, [1971] 2 All ER 127 [1972] A. C. 153, HL. Of the five opinions generated by that case, four at least paid lip service to identification theory, but most also discussed at length the language of the statute at issue there, which allowed for a defense based on evidence that “the commission of the offense was due to . . . the act or default of another person . . .” “Much of the discussion revolved around the question of whether a culpable supermarket manager, employed by a chain of 800 or so supermarkets, could be said to be “another person” so as to absolve the innocent management of the supermarket chain of criminal responsibility.

In the 1995 case of *Meridian Global Funds Management Asia Ltd. v. Securities Comm.*, 2 A. C. 500 (1995), the Privy Council rejected the approach of trying to determine whose actions embody “the mind of a corporation”, in favor of a more pragmatic approach grounded in the judicial determination of legislative intent. Lord Hoffmann’s opinion traced the history of identification theory and concluded that, although the language of the earlier cases was somewhat metaphysical, the underlying quest in all cases was properly to determine what rule of attribution made sense in the statutory framework, *i.e.*, given the apparent purpose of the statute at issue, whose state of mind should sensibly be examined in order to give effect to the apparent legislative purpose? The statute at issue in *Meridian* was a securities regulation under which every person who held a relevant interest in 5% or more of the voting shares of a public company was required to give notice of his interest to the company and to the stock exchange. *Meridian* had a relevant interest in more than 5% of the voting shares of a particular company, and it failed to give the statutory notice. The issue was whether the ignorance of the largely perfunctory board of directors should be attributed to *Meridian* or whether the knowledge of two senior investment managers could be attributed to the company instead. Lord Hoffmann posed the question, “What rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company?” He answered, “Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf, which made them substantial security holders but would not have to report them until the Board or someone else in senior management got to know about it. This would put a premium on the Board paying as little attention as possible to what its investment managers were doing.” Thus, without explicitly jettisoning the “identification theory”, the Privy Council has shifted the analytical focus in any given case from the particular corporate personalities to the intent of the legislature.

For the last several years, a bill has been considered in England to legislate a special corporate manslaughter offense, corporate killing, where death is caused by the failure of a corporate board to adopt necessary safety measures. Passage in some form and some time seems likely.

International Organizations

In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders suggested that not only the persons acting on behalf of an institution, but the institution, corporation or enterprise should be held criminally responsible. Wagner, *supra* at 7, (citing *Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order*, A/RES/40/32 (1985), available at <http://www.icclr.law.ubc.ca/publications/Reports/corporatecriminal.pdf> (last visited January 6, 2005)). In 1988, the Council of Europe passed Recommendation (88) 18 concerning the Liability of Enterprises Having Legal Personality for Offenses Committed in the Exercise of Their Activities. The Recommendation advocated, on the one hand, the “application of criminal liability and sanctions to enterprises, where the nature of the offense, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offenses so requires,” and administrative sanctions on the other hand. Wagner, *supra* at 7 (quoting *Committee of Ministers, Council of Europe, Recommendation on Liability of Enterprises Having Legal Personality for Offenses Committed in the Exercise of their Activities*, Recommendation No. (88)/18 (1988)). Most recently, in 1998, the Council of Europe passed the Convention on the Protection of the Environment through Criminal Law, whose Article 9 stipulated that both criminal and administrative sanctions could be taken to hold corporate entities liable for environmental violations. *Id.* at 7.

Not all efforts to extend criminal liability to corporate entities have been successful, however. The participants in the 1998 Rome Conference on an International Criminal Court, for example, could reach no consensus regarding criminal liability of corporations. France had proposed a draft to extend the jurisdiction of the International Criminal Court to legal persons. Although the delegates negotiated the issue for three weeks, the final Rome Statute of the International Criminal Court provided for jurisdiction only over natural persons. *Developments in the Law - International Criminal Law. V. Corporate Liability for Violations of International Human Rights Law*, 114 Harv. L. Rev. 2025, 2031-32 (2001).

Internationally, there is no unified legal standard for corporate criminal liability. The laws range from one extreme, for example in Italy, with no imputed corporate criminal liability, to Germany with a system of administrative fines, to Canada with an explicit statutory scheme containing explicit rules of attribution. Generally, if there is a trend, it seems to be toward imposition of corporate criminal liability, especially in the case of offenses that senior corporate officials commit.

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