

CORPORATE CRIMINAL LIABILITY:
WHAT PURPOSE DOES IT SERVE?

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ABSTRACT

The debate regarding the growth and effectiveness of corporate criminal liability, an institution of considerable historical antiquity, has been both voluminous and intense. In spite of this we still do not have a clear answer to one of the most fundamental questions about corporate criminal liability, which is what purpose does it serve given that other liability regimes, such as corporate civil liability, also exist. After all corporations can only be fined, not imprisoned, and fines are identical to the sanctions available in corporate civil liability. Given this similarity it is remarkable that few have ever asked why do we have corporate criminal liability instead of corporate civil liability. The need for an answer to this question is especially pressing in light of the phenomenal growth in corporate criminal liability and the recent calls to further increase criminal liability on corporations. Consequently, knowing when corporate criminal liability is preferable to corporate civil liability would be of the utmost importance to policy makers, practitioners, judges, academics and society as a whole.

This paper examines a number of possible rationales for preferring corporate criminal liability to corporate civil liability and concludes that most of them are rather weak and support only the most limited use of corporate criminal liability. In addition, corporate criminal liability has many disadvantages that corporate civil liability does not. In light of this it is better to focus our energies on using or adapting corporate civil liability to achieve societal goals rather than relying on corporate criminal liability.

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I INTRODUCTION

Corporate criminal liability is a fast growing area of legislation and legal activity. In the last decade or so we have witnessed, in the United States and overseas, a proliferation in criminal liability for corporations and their officers when their actions violate environmental laws, antitrust laws, securities laws and a whole host of other important areas of law.¹ Indeed, in the United States this issue has been the center of much heated debate with recent moves to develop and implement new Federal Sentencing Guidelines for corporations, which impose much tougher penalties for violations of the law. Corporate criminal liability is thus not only of critical importance to the enforcement of the law in areas in which the primary violators are corporations and their officers, but also it is a topic of current debate in and amongst the academe, the judiciary and the practitioners' bar.

Although the imposition of criminal liability on a corporation, as opposed to its managers or employees, generates considerable debate, commentators rarely ask *why* we have criminal liability for corporations.² This is rather puzzling as the sanction of

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¹ The analysis in this paper is applicable to all other areas of corporate crime such as RICO and government procurement fraud.

² For a sample of the discussion so far see, John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981); John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980); Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965); *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979); K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed., 1992); K. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME* (1990). R. GRUNER, *CORPORATE CRIME AND SENTENCING* (1994); J. T. Byam, *Comment: The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582 (1982); Note, *Increasing Community Control Over Corporate Crime: A Problem in the Law of Sanctions*, 71 YALE L.J. 289 (1971); R. A. POSNER, *Optimal Sentences for White Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980); R. A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed., 1992); S. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U.CHI. L. REV. 423 (1963); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); G. Hughes, *Administrative Subpoenas and the Grand Jury: - Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573 (1994); K. Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L.REV 193 (1991); J. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U.L.REV 315 (1991); B. Baysinger, *Organization Theory and the Criminal*

imprisonment has no meaning when applied to a corporation. Furthermore, the question of why we have this form of corporate liability becomes especially pressing in the context of the growing trend, both domestically and internationally, to increase criminal liability on corporations.³ To determine the purpose of corporate criminal liability we need to ascertain when is it the socially desirable liability strategy to use, as opposed to another liability strategy such as corporate civil liability, in influencing corporate behavior. Indeed, corporate criminal liability is, in reality, only one part of an intricate tapestry of corporate liability strategies that have been woven together to ensure compliance with the law. Thus, analysis of corporate criminal liability is not so much a compartmentalized inquiry into the costs and benefits of some form of law enforcement, but an inquiry into what mix of corporate liability strategies (e.g. corporate criminal or civil liability, managers' personal liability, third party liability, reputational consequences and regulation) best achieves societal goals. The point is that we must compare the costs and benefits of corporate criminal liability with other liability strategies to determine which is the optimal strategy or mix of strategies for society.⁴ It is within this conceptualization that this paper is framed.

The project of this paper develops in a number of stages beginning with Parts II and III which set the background for our primary discussion. Part II examines how the American institution of corporate criminal liability has developed and what commentators thought it was designed to achieve. This Part also notes that the possible historical

Liability of Organizations, 71 B.U.L.REV. 341 (1991); J.C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It?*, 101 YALE L.J. 1875 (1992); and K.G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1.

³ Domestically the growth of corporate crime is impressive with the growing regulations concerning areas such as environmental and financial institutions laws. For examples of this growth see the historical discussions of corporate criminal liability found in GRUNER, *supra* n 2 and K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed., 1992) chapter 2 in particular and works concerning particular areas of law such as L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* (1995); S.P. MARTIN, *CRIMINAL SECURITIES AND COMMODITIES FRAUD* (1993); Symposia, *Securities Fraud*, 31 AM. CRIM. L. REV. 827 (1994); J. VILLA, *BANKING CRIMES* (1987); P. AREEDA & L. KAPLOW, *ANTITRUST ANALYSIS* (4th ed., 1988); R. POSNER, *ANTITRUST* (1981); R. Darnell, *Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise*, 31 AM. CRIM. L. REV. 123 (1993); D. SAXE, *ENVIRONMENTAL OFFENSES, CORPORATE RESPONSIBILITY AND EXECUTIVE LIABILITY* (1990); P. MENELL & R.B. STEWART, *ENVIRONMENTAL LAW AND POLICY* (1994). In addition, corporate criminal liability is increasing in other countries such as Australia and New Zealand. See R. TOMASIC, *CORPORATE CRIME AND CORPORATIONS, LAW ENFORCEMENT STRATEGIES IN AUSTRALIA* (1993); STAINS ON A WHITE COLLAR (ed. P. Grabosky, 1989); B. FISSE & J. BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY* (1993) and Y.V. VAN ROY, *GUIDEBOOK TO NEW ZEALAND COMPETITION LAWS* (2d ed., 1992). Also in Europe corporate criminal liability appears to be more favorably looked upon than in the past. See *ECONOMIC CRIME IN EUROPE* (L. Leigh ed., 1980) and C. WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* 121-122 (1993)(citing Recommendation No. R(88)18 in which the Council of Europe recommends the adoption of corporate criminal liability along the lines discussed in Part III B of this paper and relying heavily on the approach taken in the Netherlands). Thus, corporate criminal liability in general has been increasing. See L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* (1969); J. SAVELSBURG & P. BRUHL, *CONSTRUCTING WHITE-COLLAR CRIME*, (1994) and K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed., 1992) for further discussion.

⁴ R.H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Control*, 93 YALE L.J. 857 (1984).

justifications for corporate criminal liability are no longer present. Part III inquires into the variety of corporate criminal liability systems in the US and Western Europe to highlight the unique nature of corporate criminal liability in the US. From this point I move into examining the primary question in this paper - what purpose does corporate criminal liability serve *now*?

Part IV provides a prelude to this discussion by setting out the analytical framework used in this paper. To determine when corporate criminal liability is socially desirable is to ask in what circumstances is corporate criminal liability preferable to all of the other liability regimes that may be utilized (e.g., corporate civil liability, individual criminal liability and so on). If another liability regime is preferable to corporate criminal liability then it should be used instead of corporate criminal liability. Under this framework the crucial factor is the comparison of liability regimes and my primary comparison is between corporate criminal liability and corporate civil liability.

However, these liability regimes are in reality only shorthand ways of describing certain combinations of characteristics or features. Corporate criminal liability is a corporate liability regime that combines strong procedural protections (e.g., beyond reasonable doubt standard of proof), strong enforcement features (e.g., grand jury investigation powers), arguably unique sanctions (e.g., stigma) and others, whereas corporate civil liability is a corporate liability regime that normally combines weaker procedural protections (e.g., preponderance of evidence standard), lesser enforcement powers, not so unique sanctions and others. However, there are many corporate liability regimes in between these two polar extremes. Some forms of corporate liability possess almost all the traits of corporate criminal liability (e.g., strong procedural protections and enforcement features) whereas others possess only some of these traits (e.g., not so strong protections, but strong enforcement features). In other words there are numerous corporate liability regimes along a continuum ranging from the traditional form of corporate civil liability to corporate criminal liability as described above. This means that if we desire strong enforcement devices, but not strong procedural protections we can obtain this by relying on one of the corporate liability regimes along this continuum that has strong enforcement devices, but not strong procedural protections. By doing this we obtain the desirable traits without the undesirable ones. This is clearly preferable to relying on corporate criminal liability which has both desirable and undesirable traits. In light of this corporate criminal liability would be the desirable liability strategy only when *substantially all of its traits* were socially desirable. When only some traits are desirable then it is

preferable to rely on a corporate liability regime along the continuum that has only desirable traits rather than corporate criminal liability.

In light of this, the analysis must identify the features of corporate criminal liability, when each feature is socially desirable and how these features are, or can be, replicated in other corporate liability regimes. The six features of corporate criminal liability which I have identified are (i) its aim, which is deterrence, (ii) who is liability imposed upon (i.e., the corporation rather than the individual), (iii) its sanctions, (iv) its procedural protections, (v) its enforcement devices, and (vi) any message sending effects. Parts V through VIII examine the last four features and Part IV B examines the first two features. The first two features help set the background for the comparison between corporate criminal liability and others forms of corporate liability. In Part IV B I begin by asking can corporate criminal liability have aims other than deterrence, like individual criminal liability may (e.g., retribution and so on). The answer is that the predominant goal of corporate criminal liability should be deterrence. Given that the primary goal is deterrence I then briefly set out why corporations are made liable, criminally or civilly. This is particularly important because the corporation has neither the body with which to commit the *actus reus* nor the mind with which to possess the *mens rea* for the offense and thus surely the corporation cannot be deterred. The corporation is made liable, for deterrence purposes, for the acts of its agents in both civil and criminal spheres and setting out when any type of corporate liability is socially desirable is a useful beginning to a discussion about when the criminal species of corporate liability is socially desirable. The analysis indicates that corporate liability is usually desirable when corporate agents are judgment proof and when the corporation can monitor its agents cheaply. The issue is then when do we prefer using the criminal variety of corporate liability. From here I examine the social desirability of the four main features of corporate criminal liability.

Part V examines the sanctioning characteristics of corporate criminal liability as compared to those of other liability regimes. The sanctions available in criminal proceedings against individuals (i.e., fines, imprisonment and stigma) are not all available in corporate criminal liability.⁵ Thus, the analysis in this Part examines the circumstances in which the sanctions that *are available* in corporate criminal liability, especially any stigma effect, are socially desirable. The socially desirable penalty structure would be that which uses the socially cheapest sanction, in terms of sanctioning costs, first and then

⁵ Although a corporation can be fined it cannot be imprisoned or otherwise physically harmed (it has no body) and the form of reputational loss it suffers is different than that an individual might suffer - see Part V B for further discussion.

relies on the more expensive sanctions, if needed, to obtain optimal deterrence. The more expensive sanctions should only be used if their incremental deterrence gains outweigh their incremental sanctioning costs. Relying on this analysis our first conclusion is that cash fines are the socially preferred sanction because they have the lowest sanctioning costs. However, if cash fines do not suffice for optimal deterrence then we need to examine the other more expensive sanctions which can be used to supplement cash fines (e.g., probation and loss of license). Using this analysis I conclude that reputational loss or stigma is an undesirable sanction in the context of criminal proceedings against a corporation because it is too costly compared to alternative sanctions. Therefore, it would be optimal to eliminate, as much as is possible, reliance upon reputational penalties as they are undesirable in the corporate context. All other sanctions available in corporate criminal liability can be replicated in other corporate liability regimes.

Following on from this, Part VI examines the procedural protections of corporate criminal liability such as the criminal standard of proof, jury trials, double jeopardy protection and the grand jury indictment process. Many of these procedural protections may be justified in the context of criminal prosecutions against individuals to reduce or prevent false convictions, but they are almost always undesirable in criminal prosecutions against corporations. The reason is that false convictions in the corporate context are not as problematic to society as false convictions in the context of criminal proceedings against individuals. In addition, other reasons for these protections, besides error prevention and reduction, are briefly discussed in this Part to highlight that they also do not apply in the corporate context. Further, relying on these protections, when they are not desired, would increase costs to society (i.e., more effort required to obtain convictions) and weaken deterrence (convictions are now harder to obtain). Consequently, reliance on these procedural protections when undesirable, which is almost always in the corporate context, would be both socially harmful and costly.

Part VII then discusses the enforcement characteristics of corporate criminal liability as compared to those of other liability regimes. The discussion focuses on criminal liability being a form of public enforcement, the greater information gathering powers this form of public enforcement sometimes possesses, and any possible benefits that may stem from bringing both criminal and civil proceedings against a corporation around the same time or the benefits of parallel liability regimes. Public enforcement is socially desirable when victims are unlikely to detect the wrong or be able to prosecute the wrongdoers. Sometimes, however, even public enforcement would not be enough to obtain optimal

deterrence because the wrongs are so difficult to detect and prosecute. In these circumstances we may prefer to rely on more expensive enforcement devices to obtain optimal deterrence. One such device would be to provide public enforcement agents with large information gathering powers to seek out such wrongs and then prosecute them. Another device would be to allow public enforcement agents to bring two suits against the corporation (i.e., parallel liability) in order to obtain optimal deterrence. These devices normally cost more to society than simple public enforcement because they require people to go out and gather more information or because they require two suits to be brought rather than one. Consequently, we should first rely on public enforcement and if it does not suffice for optimal deterrence then we may examine the other more expensive enforcement devices.⁶ The analysis in Part VII details when each device may be preferable, but for now the important points to note are (i) that the enforcement features of corporate criminal liability, unlike its stigma sanction and procedural protections, will sometimes be socially desirable (e.g., public enforcement) and (ii) that these enforcement features are all already available in other corporate liability regimes. Therefore, by using other corporate liability regimes we can obtain these enforcement features, when desired, without having to take the undesirable sanctions and procedural protections.

However, corporate criminal liability may achieve cost savings that have yet to be replicated in other corporate liability regimes. Cost savings may arise from pursuing corporate criminal liability *along with managerial criminal liability* instead of pursuing another corporate liability regime with managerial criminal liability. This is because once a manager is found guilty in criminal proceedings the doctrine of *respondeat superior* will make the corporation liable, criminally or civilly, with about the same amount of prosecutorial effort and cost. However, when we pursue corporate criminal and managerial criminal liability only one government agency brings suit (the Justice Department), but with corporate civil liability and managerial criminal liability two agencies normally bring suits. Thus, corporate criminal liability results in enforcement cost savings since only one agency is bringing the suits. We have yet to achieve these enforcement economies through other corporate liability regimes, although the analysis indicates that it is desirable and rather easy to do so. Nonetheless, *at present* there is a benefit from corporate criminal liability, but it only arises when pursuing managerial criminal liability is desirable, which is rarely.

⁶ We may rely on these other enforcement devices only when the incremental deterrent gains from using them are greater than the incremental enforcement costs from doing so. This is analogous to the reasoning used in Part V for sanctions.

This leaves only one feature for consideration, the message sending effects of corporate criminal liability. Part VIII examines whether corporate criminal liability can be said to possess any message sending characteristics which indicate to society that a certain type of activity or activities are considered worse than others. The benefits attributable to the message sending trait are debated and critiqued in Part VIII along with some mention that there may be more precise and socially cheaper ways in which to send messages instead of imposing criminal liability on corporations. Finally, Part IX concludes by summarizing the arguments developed in this paper and making some policy recommendations.

Having traversed considerable ground in our debate I conclude that the circumstances in which *substantially all of the traits* of corporate criminal liability are socially desirable are nearly non-existent now. The analysis indicates that the procedural protections and stigma sanction commonly associated with criminal proceedings are socially undesirable in the corporate context. In addition, most of the enforcement devices associated with corporate criminal liability, while sometimes desirable, are available in some other corporate liability regimes. In those cases where only some of the traits of corporate criminal liability are socially desirable (e.g., enforcement devices) it is preferable to rely on a corporate liability regime that has these desirable traits rather than on corporate criminal liability with both undesirable and desirable traits. Relying on corporate criminal liability when some of its features are undesirable would increase costs to society and weaken deterrence. If these were the only factors to consider then I would recommend that we drastically curtail or simply abolish corporate criminal liability and replace it with another corporate liability strategy. However, other factors do exist. In particular when pursuing managerial criminal liability is optimal it is desirable to also pursue corporate criminal liability rather than another corporate liability regime because it is cheaper for the prosecution. These cost savings are not available in another corporate liability regime yet, but my analysis indicates that it would be desirable and probably quite simple to make them available. If this happens then we should seriously consider abolishing corporate criminal liability and replacing it with other corporate liability regimes. Thus, although there may have been some justification in the past for using corporate criminal liability when our enforcement techniques were not as well developed there is very little, from a deterrence perspective, that now justifies the continued imposition of criminal liability on corporations as opposed to civil liability.⁷ Indeed, the answer to the question the title poses "corporate criminal liability: what purpose does it serve?" is that its purpose, if any, should

⁷ Therefore, we may, instead of having *corporate criminal liability*, prefer to have *corporate civil liability*.

not be to obtain greater sanctions or more powerful and expensive enforcement tools but, surprisingly, to take advantage of a prosecutorial convenience.

II HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY

To better understand the present purpose of corporate criminal liability it is useful to ask how and why corporate criminal liability first began and what commentators, judges and practitioners thought it was designed to achieve. This part examines the historical development of corporate criminal liability in England and in the US, and sets out the views of early commentators on corporate criminal liability.

Corporate criminal liability has had a chequered past beginning with being thoroughly denounced and then later accepted piecemeal until it grew to its present level. Its growth has been tied to the development of the corporate form of business and that is where I begin our historical journey. English historians generally place the first corporations around the end of the 14th Century, but they did not have a significant influence on everyday life until the late 1700s.⁸ This was when they began to assume a role more important than individual enterprise in the growth of commerce.⁹ In the US commercial corporations also grew quite slowly.¹⁰ However, by the mid 19th century the

⁸ A commentator has noted that the corporation had its beginning in the Roman Empire - see Campbell, *Limited Liability for Corporate Shareholders: Myth or Matter-of-fact*, 63 KY. L. J. 23 (1975) (citing W. BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 498 (Chitty ed. 1832)). Initially, corporations could only be created by charter from the crown or by an act of Parliament although the Pope created ecclesiastical corporations until the reformation. However, the medieval English corporations (primarily ecclesiastical bodies whose main purpose was the management of church property) bear little resemblance to the modern commercial corporation. See 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 470, 471-76 (3rd ed., 1923) and generally Carr, *Early Forms of Corporateness*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 161 (1909). See also J. R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L. J. 73, 85-89 (1976). The importance of corporations grew as universities, hospitals and other similar associations adapted to the corporate form and the mercantile and craft guilds emerged in the 16th and 17th centuries. In the next 150 years or so the business corporation and joint stock company began to appear more frequently and gained legal and commercial recognition and acceptance. See Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382 (1922); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 470, 474 (3rd ed., 1923); S. Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 108-109 (1888). See also 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 206 (3rd ed., 1923); B. Hunt, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND 1800-1867 at 6 (1963). K.F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L. Q. 393, 397 (1981); Chayes, *The Modern Corporation and the Rule of Law*, in THE CORPORATION IN MODERN SOCIETY 25, at 25-45 especially 33 and 37 (E. Mason ed. 1961).

⁹ See Elkins, *supra* n 8, at 86. After some initial doubts about the joint stock corporation it began to take on considerably more importance. See K.F. Brickey, *supra* n 8, at 398-400 discussing early responses to the problems with joint stock corporations like the Bubble Act 6 Geo. 1, c. 18 (1719).

¹⁰ For example, there were only 250 charters granted prior to 1800 and only a little under a third of them were for those who planned to engage in commercial purposes. See generally Baldwin, *Private Corporations 1701-1901*, in TWO CENTURIES' GROWTH OF AMERICAN LAW 1701-1901, at 261 and 269-311 (1901). The more common charter was quasi-public in character and was established to improve public transportation facilities. Brickey, *supra* n 8, at 405. The slow development of commercial corporations could be attributed both to the suspicion of business corporations inherited

corporate form grew dramatically and as in England it became the primary source of commerce.¹¹

As corporations became more prevalent both in the US and in England the issue of attributing liability to corporations began to find its way into the courts. Initially, however, corporate criminal liability received a frigid welcome.¹² The general belief was that corporations were not held criminally liable in the early 16th and 17th centuries.¹³ This is not surprising because in the early 1700s corporate criminal liability would have faced at least four obstacles plus some indifference since corporations were not significant influences on society at the time.¹⁴ The first obstacle was attributing acts to a juristic fiction, the corporation. Since corporations cannot in themselves act then someone else's acts need to be imputed to the corporation to make it liable for most offenses. However, imputing acts to a corporation was conceptually rather difficult in earlier times, since the doctrine of *respondeat superior* was not firmly established until the 19th century.¹⁵ The second obstacle was that many crimes required intent or moral blameworthiness and neither is likely with a corporate defendant.¹⁶ Indeed suggesting that a corporation has the wherewithal to feel and intend would have been considered absurd. In addition, imputing

from England and to Parliament's extension of the Bubble Act in 1741 to prohibit additional American grants of corporate charters for commercial purposes. The corporate charter, a grant from the king to the royal governors, was the foundation of most forms of political organization in the American colonies. When the colonies became states, the power to create corporations was then invested in the legislatures. See generally, Rogers, *Municipal Corporations 1701-1901*, in *TWO CENTURIES' GROWTH OF AMERICAN LAW 1701-1901*, at 218 (1901).

¹¹ Chayes, *supra* n 8, at 31 and Elkins, *supra* n 8, at 86.

¹² L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* 16 (1969) and E. DODD, *AMERICAN BUSINESS CORPORATION UNTIL 1800* 10-13 (1954).

¹³ *Id.* For example, Lord Holt reportedly said in 1701 that "[a] corporation is not indictable, but the particular members of it are." *Anonymous Case* (No. 935), 88 Eng. Rep. 1518 (K.B. 1701). Most commentators cite this case to support the contention that corporations cannot be criminally liable. See e.g., 1 J. BISHOP, *CRIMINAL LAW*, § 307 (1st ed., 1856). Blackstone, relying on Lord Holt, says that "[a] corporation cannot commit treason, or felony, or other crime, in its corporate capacity; though its members may in their distinct individual capacities." 1 W. BLACKSTONE, *COMMENTARIES*, *476 (1765). Holdsworth stated that corporations "could commit neither sin or crime; and some said no tort-truly suitable representatives for saints and churches." See 3 HOLDSWORTH, *supra* n 8, at 471-474. Nonetheless, the reasons behind this decision are not clear since the case Lord Holt's quote comes from is anonymous, without facts and without context. In fact the entire case consists of this quote, yet it was often relied upon to conclude that corporations could not be criminally liable. Lord Holt was later reported as saying that the reporters at this time were remarkably inaccurate and could have made history think ill of his and his brethren's understanding of the law. See Brickey, *supra* n 8, at 397-405 and F. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 4 (1928). See also *State v. Morris & Essex Railroad*, 23 N.L.J. 360, 364 (1852). Note Blackstone also does not provide reasons.

¹⁴ J.C. Coffee, *Corporate Criminal Responsibility*, in *ENCYCLOPAEDIA OF CRIME AND JUSTICE* (ed. S.H. Kadish, 1983) at 253.

¹⁵ *Id.* and see L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* at 4-8 (1969). In addition, for further discussion please see Dewey, *The Historical Background to Corporate Legal Personality*, 25 YALE L.J. 655 (1926) and G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* (2d ed., 1961) at 856.

¹⁶ LEIGH, *supra* n 15, at 5-8.

an agent's intentions to the corporation would have violated one purpose of the criminal law which was punishment of those who were blameworthy.¹⁷ The fact that we *impute intention* to the corporation indicates that it is not truly blameworthy. Finally, even if this hurdle could be overcome the *respondeat superior* doctrine had not yet developed to allow for the imputation of any kind of mental state. The third obstacle was the *ultra vires* doctrine which, at least in contract law, would not bind the corporation to acts that were outside the scope of activity for which it was formed and criminal activity was outside of any corporation's scope of activity.¹⁸ Finally, the fourth obstacle was that there were elements of a corporate prosecution that would not sit well with normal criminal proceedings. For example, there was a requirement in criminal proceedings that the defendant be personally brought before the court for arraignment.¹⁹ The corporation could, however, only appear through its agents (e.g., its lawyer) - a concept English law did not favor as it smacked of prosecution in absentia.

Therefore, for corporate criminal liability to grow into its present form would require both overcoming these four obstacles and an expansion of the activities in which corporations engaged to overcome societal indifference. Both of these are reflected in the historical development of corporate criminal liability in England and the US which is chronicled in the following four sections. Throughout the discussion the views of commentators are interspersed with the cases and legislation. However, since the first two obstacles, imputing acts and later criminal intentions, were the most problematic to overcome they are emphasized in my discussion.²⁰

¹⁷ Id. This point has been repeated in many later writings too such as G. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 19 (1957). Note English Law has traditionally disfavored vicarious criminal liability, see e.g., *Rex v. Huggins*, (1730) 2 Ld. Raym 1574.

¹⁸ LEIGH, supra n 15, at 8-9 and Coffee, supra n 14. See also Note, *Criminal Liability of Corporations*, 14 COLUM. L. REV. 242 (1914) and BRICE, *ULTRA VIRES* (3d ed., 1893) at 435.

¹⁹ See G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* (2d ed., 1961) at 854-857; LEIGH, supra n 15, at 9-12; Welsh, *The Criminal Liability of Corporations*, 62 LAW Q. REV. 345 (1946); 4 W. BLACKSTONE, *COMMENTARIES*, at 318 and 320 and SHORT & MELLOR, *CROWN OFFICE PRACTICE* (2d ed., 1908) at 20.

²⁰ The latter two obstacles were remedied rather easily as the doctrine of *ultra vires* began to hold less and less sway in the courts especially in tort and crimes cases. See F. POLLOCK, *THE LAW OF TORT* (7th ed., 1904) at 58-59; F. Maitland, *Introduction*, GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (1900) at xxxix; LEIGH, supra n 15, at 9-12 and also *Hauker v. Britannic Assurance Co. Ltd* [1928] 1 KB 766. The courts developed ways around the procedural problems of prosecuting corporations (e.g., allowing an attorney to represent the client for purposes of having the defendant before the court). See *Rex v. H. Sherman Ltd* [1949] 2 All ER 207; Coffee, supra n 14, at 253-255; LEIGH, supra n 15, at 9-12; Elkins, supra n 8, at 83; Administration of Justice (Miscellaneous Provisions) Act 1933 and see also *Citizens Life Assurance Co., v. Brown* [1904] AC 423.

A PUBLIC NUISANCE CASES

In the first cases of corporate criminal liability in England, which date back to the early 17th century, municipalities or towns were held criminally liable for their nonfeasances (i.e., failures to perform a public duty imposed by the state) that resulted in public nuisance.²¹ In decisions imposing liability on such entities, the courts often observed that the public convenience in question (usually a bridge or road) had been built before the present inhabitants had taken on the responsibilities of the town or county; that it had been maintained by former inhabitants; and the present inhabitants were bound to do the same.²² Thus, the duty to maintain and repair followed the corporation not its members. Similarly, in the US the courts upheld criminal indictments and convictions of towns and municipalities for nuisance arising out of the neglect of statutory duties.²³ Corporate criminal liability then initially arose in both England and the US in cases involving (i) quasi-public corporations (i.e., towns and so on) for their (ii) nonfeasances that resulted in (iii) public nuisances. However, corporate criminal liability was not restricted to *quasi-public corporations* for long.

²¹ See LEIGH, *supra* n 15, at 16. See e.g., *Case of Langforth Bridge*, 79 Eng. Rep. 919 (K.B. 1635). Here the inhabitants of a governmental unit were charged in a criminal proceeding for failure to repair a public convenience. The object of the majority of proceedings was to force the abatement of the nuisance. Note that an indictment could not result in an abatement being compulsory, but could result in a fine. To compel abatement required applying for a writ of mandamus. *The King v. Severn & Wye Ry.*, 106 Eng. Rep. 501 (K.B. 1819). My understanding is that abatement could only occur in proceedings for the common law crime of public nuisance. See Brickey, *supra* n 8, at 401-402.

²² See *The King v. Mayor of Stratford-upon-Avon*, 104 Eng. Rep. 636 (K.B. 1811). There were a string of other cases dealing with similar facts such as *The King v. Inhabitants of Clifton*, 101 Eng. Rep. 280 (K.B. 1794) (quashing indictment because the road ran through two counties); *Rex v. Inhabitants of Great Broughton*, 98 Eng. Rep. 418 (1771) and *The King v. Mayor of Liverpool*, 102 Eng. Rep. (K.B. 1802). During this time *respondeat superior* was also developing - or a theory of corporate acting. See *The King v. City of London*, 8 St. Tr. 1039 (K.B. 1682) (The mayor of London and some other officials were charged with usurping the powers entrusted to them as directors of a body corporate when they taxed the citizens and then took the money. The court found the officials liable and ordered the city to forfeit its charter and declared acts of the agents to be the acts of the corporation). See Brickey, *supra* n 8, at 402-403.

²³ One of the first was against the City of Albany which was indicted for "failing to cleanse the basin of the Hudson River which had become foul, filled, and choked up with mud, rubbish, and dead carcasses of animals". *People v. Corporation of Albany*, 11 Wend. 539, 543 (N.Y. Sup. Ct 1834). The New York Supreme Court of Judicature held:

It is well settled that when... [corporations or individuals] are bound to repair a public highway or navigable river, they are liable to indictment for the neglect of their duty. An indictment and an information [sic] are the only remedies to which the public can resort for a redress of their grievances in this respect. If an individual has suffered a particular injury, he may recover his loss by an action on the case.

Id. The court reasoned that since the corporation had the power to stop the nuisance, there was no question that it had a duty to exercise that power. The argument that there may have been no demonstrable private injury was considered irrelevant. The court's language is notable in two ways. First, it indicates that the principle that corporations may be held criminally liable for nonfeasance resulting in public nuisance was considered well settled as early as 1834. Second, the statement focuses attention on the public character of the harm and the need for an effective procedure to remedy it. See Brickey, *supra* n 8, at 406. Note that common nuisance was defined as "an offense against the public, either by doing a thing which tends to the annoyance of all the king's subjects or by neglecting to do a thing which the common good requires". *People v. Corporation of Albany*, 11 Wend. 539, 543 (N.Y. Sup. Ct 1834).

In the 1820s and 1830s the first commercial corporations became involved in the construction and operation of turnpikes, canals, and bridges.²⁴ The activities of these early commercial corporations were close to those of municipalities in earlier times and the resultant analogy for purposes of corporate criminal liability was straightforward.²⁵ Therefore, corporate criminal liability for public nuisances resulting from nonfeasances by either quasi-public or private corporations was established by the 1840s.

These cases of corporate criminal liability apparently did not raise problems with the first two obstacles. Since an offense premised on nonfeasance requires no intent, imputation of intent was not an issue. In addition, the case of nonfeasances (i.e., omissions) was considered different to imputing agents' positive acts since no individual agent of the corporation was considered responsible for the corporation's omission.²⁶ It was only the corporation that was under a duty to perform the specific act and not an agent so the question of imputation of conduct did not arise.²⁷

B THE EXTENSION OF CORPORATE CRIMINAL LIABILITY TO ALL CRIMES NOT REQUIRING CRIMINAL INTENT

As the presence and importance of corporations grew and as *respondeat superior* became more established it was clear that corporate criminal liability was not going to be shackled to cases of public nuisances arising from nonfeasance.²⁸ In fact the first development was the extension of corporate criminal liability from nonfeasances to misfeasances. Following this it was extended from public nuisance to all offenses that did not require criminal intent.

²⁴ See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 166-167 and 446 (1973) and Elkins, *supra* n 8, at 91-92.

²⁵ See A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 10 (rev. ed. 1967). As early as 1836 a private turnpike road company was indicted for common law nuisance for the improper maintenance of a road. See *Susquehannah & Bath Turnpike Co. v. People*, 15 Wend. 267, 268 (N.Y. 1836). See for some early doubts *McKim v. Odom*, 3 Bland. 407, 421 (Md. 1828)(dicta) and Elkins, *supra* n 8, at 92 (n. 68). The criminal liability of such private corporations came about not only by judicial decision, but also by legislative action. In 1804 Massachusetts specifically made turnpike corporations "liable for damages.... and also liable to presentment by a grand jury, for not keeping the same in good repair". The General Turnpike Act, Mass. St. 1804, Ch. 125, cited in *Commonwealth v. Free Bridge Corp.*, 68 Mass. 58, 68 (1854).

²⁶ Coffee, *supra* n 14, at 253-254.

²⁷ Therefore, the absence of an established *respondeat superior* doctrine was not dispositive in these early cases as imputation was considered unnecessary. Elkins, *supra* n 8, at 87-88. In addition, the early common law view could be justified upon consideration of the societal and economic role of corporations at the time. The use of the corporation was still in its infancy and there was little need, therefore, to impose criminal sanctions to control organizations which had so little impact on society.

²⁸ See Hall, *The Substantive Law of Crimes 1887-1936*, 50 HARV. L. REV. 616 (1937).

Before 1842 it was questionable whether corporations could be held criminally liable for both misfeasances (positive acts) and nonfeasances (omissions to act),²⁹ but in that year the English courts abandoned any distinction between nonfeasance and misfeasance for the purposes of imposing criminal liability on a corporation. In *The Queen v. Great North of England Railway* the corporation was indicted for a nuisance in obstructing a highway by a railway line - an affirmative act (i.e., misfeasance).³⁰ Lord Denman held that corporate misfeasance was legally indistinguishable from nonfeasance.³¹ The distinction is often semantic since maintaining an improper bridge (misfeasance) is the same as not maintaining a proper bridge (nonfeasance).³²

The nonfeasance/misfeasance distinction that appeared deeply embedded in English common law jurisprudence was short lived in America.³³ In two cases, *State v. Morris & Essex Railroad*³⁴ and *Commonwealth v. Proprietors of New Bedford Bridge*³⁵, the courts indicted corporations for affirmative acts (i.e., misfeasances) that resulted in public nuisance. The reasons given were often similar to those of Lord Denman.³⁶ In *State v. Morris* the court held that once one accepts the notion that corporations are indictable for nonfeasance then "all preliminary and formal objections' to finding criminal liability - such as the corporation's intangibility and consequent incapacity to be arrested, to appear in court, or to be subjected to imprisonment, as well as considerations of fairness to innocent

²⁹ See e.g., *Queen v. Birmingham & Gloucester Railway Co.*, 114 Eng. Rep. 492 (Q.B. 1842).

³⁰ 115 Eng. Rep. 1294 (Q.B. 1842). The company was indicted for cutting through an existing highway and then strewing it with debris. Both acts contravened the powers conferred upon the enterprise when it was incorporated.

³¹ Lord Denman, delivering the judgment of the court, characterized the exemption of corporations from liability for wrongful acts but not from wrongful omissions to act as a "startling incongruity". See *supra* n 30 at 1298.

³² See *supra* n 30 at 1298.

³³ See Brickey, *supra* n 8, at 407. In *State v. Great Works Milling & Manufacturing Co.*, 20 Me. 41, at 43 (1841) the court overturned the conviction of a corporation charged with a nuisance in the erection of a dam across the Penobscot River, on grounds that a corporation "can neither commit a crime or misdemeanor, by any positive act or affirmative act, or incite others to do so, as a corporation". See also *State v. Ohio & Miss. R.R.*, 23 Ind. 362, 365 (1864). Some commentators have suggested that this judgment was not so much one against corporate criminal liability for misfeasances, but simply against making minority shareholders liable for things they may not have approved or may have even resisted but to no avail against a determined albeit criminally inclined majority. See F. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 5 (1928).

³⁴ 23 N.L.J. 360 (1852). The corporation was indicted for nuisance for having constructed a building upon a public highway and for further obstructing the road.

³⁵ Here the proprietors were indicted for building a bridge across a river in a manner that caused a public nuisance. The court held that even assuming that the notion had ever been sound (i.e., that misfeasance should be treated differently than nonfeasance), it had arisen during a time when corporations were few in number and had limited influence on society. "Experience has shown the necessity of essentially modifying it....". 68 Mass. (2 Gray) 339 at 345 (1854).

³⁶ The court considered the distinction between misfeasance and nonfeasance to be absurd for much the same reasons as did Lord Denman in England. Elkins, *supra* n 8, at 94-95.

stockholders - must be dispensed with because they apply equally to indictments for nonfeasance and misfeasance." ³⁷

Once the principle that corporations could be convicted of misfeasance for creating a nuisance was established, there was no theoretical impediment to imposing liability for other acts of misfeasance unrelated to nuisance (i.e., all crimes without intent requirements). ³⁸ Thus, corporations were held liable for such crimes as Sabbath breaking, ³⁹ permitting gaming on a fair ground, ⁴⁰ charging usurious interest rates ⁴¹ and the unauthorized practice of medicine. ⁴²

The growth of corporate criminal liability outside the arena of public nuisances for nonfeasances may appear troubling as holding corporations liable for misfeasances requires imputation of agent conduct. However, by the mid 1800s, the time of the first misfeasance cases, the doctrine of *respondeat superior* was firmly established. This tort law doctrine allowed the imputation of agent conduct to the principal when the conduct was within the scope of employment and done with some intent to benefit the principal. ⁴³ As the doctrine became established there was a conceptual basis for attributing liability to the corporation. The appearance of *respondeat superior* coincided with the growth in number and importance of corporations in society and with the apparent demand for regulation of business activity by society.⁴⁴ As imputation of conduct became easier and corporations more prevalent corporate criminal liability grew to include all offenses not requiring criminal intent.

³⁷ Id., at 366 and Brickey, supra n 8, at 408. The argument that corporations could not be held criminally liable because criminal acts were outside their objects or charters (i.e., the *ultra vires* doctrine) was rejected. The court stated that this concern would also have barred much civil liability and this would be both unjust and contrary to settled legal principles. In addition, if the conviction were to bind the corporation - in this case the judgment required destruction of a valuable building - clearly the corporation should have the opportunity to appear and defend rather than have its rights determined at trial of an irresponsible employee who may have acted out of a motive to harm the company. In any event, there existed no procedures to enforce a judgment against a corporation that had not been made a party to the proceeding.

³⁸ Brickey, supra n 8, at 410.

³⁹ *State v. Baltimore & O.R.R.*, 15 W. Va. 362 (1879).

⁴⁰ *Commonwealth v. Pulaski County Agricultural & Mechanical Ass'n*, 92 Ky. 197, 17 S.W. 442 (1891).

⁴¹ *State v. First Nat'l Bank*, 2 S.D. 568, 51 N.W. 587 (1892).

⁴² *People v. John H. Woodbury Dermatological Inst.*, 192 N.Y. 454, 85 N.E. 697 (1908).

⁴³ See *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247-1248 (1979) and RESTATEMENT (SECOND) ON AGENCY § 219 (1958).

⁴⁴ See Hall, *The Substantive Law of Crimes 1887-1936*, 50 HARV. L. REV. 616 (1937); Ohlin, *The Effect of Social Change on Crime and Law Enforcement*, 43 NOTRE DAME LAW. 834 (1968) and Coffee, supra n 14, at 253-255.

In contrast to the rapid development and acceptance of a theory of corporate criminal liability for crimes without an intent requirement, its extension to crimes requiring intent lagged behind.⁴⁵ In fact, the courts recognized that a corporation could not be indicted for offenses requiring evil intent.⁴⁶ Treason, felony, perjury and violent crimes against the person could be committed only by natural persons.⁴⁷ It was not until 1909 that corporations were clearly made liable for crimes of intent in the US.⁴⁸

C CRIMES OF INTENT

Courts and commentators struggled with the problem of corporate criminal liability for crimes of intent,⁴⁹ however, during the period between 1875 to 1910 many federal and state courts began imposing criminal liability on corporations for crimes requiring criminal intent.⁵⁰ This reached its climax in the 1909 decision of the US Supreme Court in *New York Central & Hudson River Railroad v. United States*.⁵¹ New York Central had been charged and convicted of granting rebates to sugar refineries in violation of the Elkins Act.

⁴⁵ Elkins, *supra* n 8, at 95.

⁴⁶ See *State v. Morris & Essex Railroad*, 23 N.J.L. 360, 364 (1852) and *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. 339, 345 (1854). In England, Lord Denman in *The Queen v. Great North of England Railway*, 115 Eng. Rep. 1294, 1298 (Q.B. 1842) limited the scope of his decision by making clear that "acts of immorality" (e.g., perjury and offenses against the person) were beyond the capacity of corporations.

⁴⁷ *Id.*

⁴⁸ The liability of English corporations for crimes requiring criminal intent was judicially sanctioned only in the early years of the 20th century. See *Mousell Brothers, Ltd. v. London & North-Western Ry.*, [1917] 2 K.B. 836. Greater acceptance of this doctrine came after World War II. See L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* 29-36 (1969).

⁴⁹ One reason for this reluctance was that traditionally intent was not a required element in the cases affirming corporate criminal liability and thus it raised a new issue. All the cases of corporate criminal liability until the 1850s concerned either public nuisance or regulatory offenses which were concerned with public harm primarily and which did not require criminal intent. The rationale for applying criminal sanctions to corporations in the case of public nuisance was simply to abate the nuisance. See *State v. Morris & Essex R.R.*, 23 N.J.L. at 370 (1852). In the case of regulatory violations the purpose was to prevent public harm without regard to the actor's intent in committing the violation. See Elkins, *supra* n 8, at 96. In addition, many jurists were uncomfortable with the idea of holding a corporation criminally liable for crimes of intent as that required imputing the criminal intent of an agent to the corporation (i.e., obstacle two). If punishment is a critical purpose of the criminal law it requires that the person convicted be morally blameworthy and be capable of feeling punishment. Coffee, *supra* n 14, at 254-255 and LEIGH, *supra* n 15, at 5-8. Neither of these is met with corporations as by imputing an agent's intentions we are conceding that the corporation itself did not possess the requisite intent and corporations simply cannot feel. Please see for further discussion *infra* n 73 to 75. Furthermore, allowing corporate criminal liability for crimes of intent may have indicated a willingness to accept vicarious criminal liability, which if applied to individuals (assuming both agent and principal are individuals) would have been considered unacceptable as a person should be punished only for their actions. Note that any difficulty in conceiving of an artificial entity as having intent should not be a problem since *respondeat superior* was used to impute both *acts and intentions* to the corporation in tort law. Brickey, *supra* n 8, at 410.

⁵⁰ See for example, *United States v. Union Supply Co.*, 215 U.S. 51 (1909) and *United States v. John Kelso Co.*, 86 F. 304 (N.D. Cal 1898).

⁵¹ 212 U.S. 481 (1909).

⁵² On appeal, counsel asserted that section 1 of the Act, which specifically declared the acts of officers, agents, and employees of a common carrier to be the acts of the carrier, was unconstitutional. To fine the corporation for the acts of its employees amounted to taking money from and punishing innocent stockholders without due process of law.⁵³

Justice Day, writing for an unanimous court, found that there was no basis in law or public policy for holding that Congress could not impose such responsibility on common carriers. ⁵⁴ The Court held that, "[i]t would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act." ⁵⁵ Enforcement of such statutes would be effective only if the corporation, which received the benefits of the wrongful act(s), were the target of the prosecution. ⁵⁶ If this were not the case Congress would lose its only effective method of controlling corporate misconduct and correcting abuses the statute was supposed to reach. The Court thus considered the case before it to be unique in the sense that Congress had clearly indicated an intention to make the corporation criminally liable and enforcement of the law would be compromised if the corporation could not be held liable. These reasons were probably enough to overcome the second obstacle (imputation of intent).⁵⁷ In addition, the context of the decision, coming only a few years after the passing of the Antitrust laws and during a general anti-big-business sentiment, would have made the decision easier to swallow.

Nonetheless, *New York Central* could have been narrowly restricted to cases of crimes where Congress had indicated an intention to make the corporation criminally liable

⁵² 49 U.S.C. §§ 41-43 (1976).

⁵³ Moreover statutory imputation of criminal responsibility was contrary to the presumption of innocence accorded individuals accused of criminal wrongdoing and was thereby precluded. *Supra* n 51, at 494.

⁵⁴ *Supra* n 51, at 499. Justice Moody did not participate in the case.

⁵⁵ *Supra* n 51, at 496. Although the Court believed that some classes of crimes could not be committed by corporations (without indicating why this may be so or what classes of crimes these are), it found that the instant offense belonged to a larger class of offenses consisting merely of purposely doing something prohibited by statute. *Id.* at 494. In cases involving this class of crimes, logic and policy dictated imposition of corporate liability for wrongs committed by agents acting within the scope of their authority. Brickey, *supra* n 8, at 413.

⁵⁶ Brickey, *supra* n 8, at 414. Recognizing that the rights of corporations should be respected the Court nonetheless stated that the law "cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands." *Supra* n 51, at 495.

⁵⁷ The fact that it was important to the overall enforcement of regulatory policy helped. Coffee, *supra* n 14, at 255.

and where enforcement would be impeded if the corporation could not be indicted.⁵⁸ However, this was not to be the case.⁵⁹ Beginning in the late 19th and continuing into the early 20th century, courts found corporations criminally liable for offenses such as contempt of court,⁶⁰ willfully or knowingly obstructing a road,⁶¹ conspiracy to violate federal and state antitrust laws,⁶² violation of the espionage act,⁶³ and even manslaughter.⁶⁴ In many of these cases one could argue that enforcement would be hindered if corporate criminal liability was not permitted, but the other matters in the Supreme Court's decision had less sway (e.g., Congressional intent and language).⁶⁵ In addition, some courts later held that corporate criminal and civil liability serve essentially the same purpose of deterrence and thus if *respondeat superior* could be used to impute agents' intentions to a corporation in civil law it could do so in criminal law as well.⁶⁶ Thus, it is not surprising

⁵⁸ Supra n 51, at 496. Courts initially drew distinctions between crimes of general intent and those of specific intent. "The ordinary crimes, wherein only general evil, or the mere purpose to do the forbidden thing, suffices for the intent, are plainly within this doctrine." Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEG. STUD. 403 (1974) and *People v. Clark*, 14 N.Y.S. 642 (1891). Thus, if a crime were completed merely by the purposeful doing of a prohibited act the corporation was indictable. See Brickey, supra n 8, at 411. However, as courts gave express recognition to the capacity of corporations to commit crimes requiring general intent the question whether there remained a sound reason for drawing a distinction between imputing general and specific intent to corporations arose. After all, corporations had been held vicariously liable for such intentional torts as assault and battery, libel, and malicious prosecution. Because it would be no more difficult theoretically to impute specific intent for a crime than a tort, the only point remaining in dispute was whether the corporation lacked capacity to form evil intention. The answer was "The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not ... bear discussion." See *U.S. v. MacAndrews & Forbes Co.*, 149 F. 823, 836 (C.C.S.D.N.Y. 1906) and *State v. Rowland Lumber Co.*, 153 N.C. 610, 612, 69 S.E. 58 (1910).

⁵⁹ Later courts used this decision to extend corporate criminal liability to cases where Congress had not explicitly decided to make the corporation criminally liable. In addition, courts also extended the holding in this case to affirm convictions of corporations for crimes requiring specific intent. See the cases discussed in infra n 60 to 64.

⁶⁰ See e.g., *Telegram Newspaper Co., v. Commonwealth*, 172 Mass. 294, 52 N.E. 445 (1899).

⁶¹ See e.g., *State v. White*, 96 Mo. App. 34, 69 S.W. 684 (1902).

⁶² See e.g., *United States v. MacAndrews & Forbes Co.*, 149 F. 823 (C.C.S.D.N.Y. 1906).

⁶³ *United States v. American Socialist Soc'y*, 260 F. 885 (S.D.N.Y. 1919).

⁶⁴ See for example, *United States v. Van Schaick*, 134 F. 592 (C.C.S.D.N.Y. 1904) and *People v. Rochester Ry. & Light Co.*, 195 N.Y. 102, 88 N.E. 22 (1909). See also *United States v. New York Herald Co.*, 159 F. 296 (C.C.S.D.N.Y. 1907) for knowingly mailing obscene materials. It is worth noting that there was the parallel development of vicarious criminal liability (i.e., human principal and human actor whereas corporate criminal liability is human actor and corporate principal). An early example of this is *Regina v. Saunders*, 75 Eng. Rep. 706 (K.B. 1575). Saunders wanted to kill his wife in order to marry another. He consulted his friend Archer and Archer recommended poison as the best method of homicide. Saunders attempted to give his wife a poisoned apple, but his wife gave it to their daughter. The daughter ate it while Saunders watched passively. Saunders was charged for his daughter's murder and Archer as an accessory. Both were convicted. On appeal Archer's conviction was overturned as he only aided Saunders to poison the wife not the daughter. As this doctrine later developed it was only a matter of time before it became joined in judicial reasoning with corporate liability (see Brickey, supra n 8, at 415-421).

⁶⁵ Coffee, supra n 14, at 255.

⁶⁶ See *United States v. Nearing*, 252 F. 223 (S.D.N.Y. 1918) at 231 where Judge Learned Hand says that no distinction should be drawn between corporate criminal and corporate civil liability since both were "merely an imputation to the corporation of the mental condition of its agents". See Coffee, supra n 14, at 285. For further discussion of the alter ego doctrine please see LEIGH, supra n 15, at 91-112.

that, as of 1909, corporations could be criminally liable for almost all types of wrongs except a few such as treason, rape, bigamy and murder.⁶⁷

The English courts, on the other hand, were more reluctant to hold corporations liable for crimes of intent.⁶⁸ In addition, once corporations were held liable for crimes of intent the English courts restricted the group of corporate agents whose intentions could be imputed to the corporation. For crimes of intent the alter ego doctrine would only impute criminal intent from agents who were high enough in the corporate hierarchy to be considered its alter ego (under *respondeat superior* any agent's intent may be imputed).⁶⁹

The decisions extending corporate criminal liability beyond the public nuisance arena created a furor amongst commentators.⁷⁰ Most of the commentary during the periods when corporate criminal liability related only to crimes not requiring intent tended to focus on the issue of whether vicarious liability or corporate liability was a useful construct.⁷¹

⁶⁷ See generally, 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 464-511 (2d ed., reissued 1968). Often the justification given is the pithy statement that corporations cannot commit these acts. This is not entirely convincing as corporations cannot actually commit any act, they have no body. Once we are willing to accept vicarious liability and imputing agents' acts to the corporation there is no reason why in theory the corporation cannot then "commit" these acts. It would appear the reason that the corporation cannot be held *liable* for these acts is because the rules regarding imputation of agent behavior to the principal would probably bar it. Normal agency rules require the behavior to be within the scope of employment of the agent and these acts are unlikely to fall within the agent's employment duties. Also it would appear that prosecutors prefer to charge individuals for crimes that entail some form of violence as well - it perhaps appears more appropriate. See Brickey, *supra* n 8, at 414-416.

⁶⁸ L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* 29-36 (1969) and *Mousell Brothers Ltd. v. London & North-Western Rly.*, [1917] 2 K.B. 836

⁶⁹ See the discussion in Part III B. One could view this as a means to attach some moral turpitude to the corporation as when the "alter ego" of the corporation has the requisite criminal intent perhaps the corporation itself could be said to possess the requisite intent. See Coffee, *supra* n 14, at 255 and L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508, 1514-1518 (1982). From all this one could hold that the US courts allowed a greater relaxation of substantive limits on criminal law to ensure important regulatory policies, where English courts followed the anthropomorphic analogy to the logical end to hold only the intent of the "mind" (i.e., alter ego) of the corporation as imputable to the corporation.

⁷⁰ See generally 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 464-511 (2d ed., reissued 1968); 1 J. BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* § 506 (3d ed., 1865); L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 448 (1973); Adams, *A Chapter of Erie*, in *HIGH FINANCE IN THE SIXTIES* 115-116 (F. Hicks ed., 1929); F.B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 691 (1930); H.W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1936); F. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1 (1928); W. FLETCHER, *CYCLOPAEDIA OF THE LAW OF PRIVATE CORPORATIONS*, §§ 8147-8156 (rev. perm. ed. 1979); L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* (1969); Welsh, *The Criminal Liability of Corporations*, 62 LAW Q. REV. 345 (1946); N. Lindley, *On the Principles Which Govern the Criminal and Civil Responsibilities of Corporations*, in 2 JUR. SOC'Y PAPERS 31 (1857); F. Pollock, *Has the Common Law Received the Fiction Theory of Corporations?*, 27 L. Q. REV. 219 (1911); H. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); Note, *Criminal Liability of Corporations*, 14 COLUM. L. REV. 414 (1914); Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285 (1909); Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921) and Canfield, *Corporate Responsibility for Crime*, 14 COLUM. L. REV. 479 (1914).

⁷¹ See generally, T. BATY, *VICARIOUS LIABILITY* (1916); Hackett, *Why is a Master Liable for Tort of His Servant?*, 7 HARV. L. REV. 107 (1893); O.W. Holmes, *Agency (pts. 1 & 2)*, 4 HARV. L. REV. 345 (1891), 5 HARV. L. REV. 1 (1891); Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916); Steffen, *Independent Contractor and the Good Life*, 2

Although some commentators favored vicarious liability many commentators came down against this idea for a number of reasons such as dissipating the concept of individual responsibility, the unfairness of punishing innocent shareholders and such matters.⁷² Nonetheless, these commentators were concerned with *all types of corporate liability* and not corporate criminal liability in particular. The second group of commentary picks up in the period when corporations began being held liable for crimes of intent. The commentary here is overwhelmingly negative and perceives that holding corporations criminally liable in these circumstances runs contrary to the punishment and retributory aims of the criminal law (i.e., punishment of the morally blameworthy).⁷³ This is because it relies upon vicarious liability or guilt based on something besides personal fault.⁷⁴

U. CHI. L. REV. 501 (1935); Wigmore, *Responsibility for Tortious Acts: Its History* (pts. 1 & 2), 7 HARV. L. REV. 315 (1894) and O.W. HOLMES, *THE COMMON LAW* 16-17 (M. Howe ed. 1963); F. Pollock, *Has the Common Law Received the Fiction Theory of Corporations?*, 27 LAW Q. REV. 219 (1911); Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); Note, *Criminal Liability of Corporations*, 14 COLUM. L. REV. 414 (1914); Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285 (1909); Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921); Canfield, *Corporate Responsibility for Crime*, 14 COLUM. L. REV. 479 (1914). F.B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 691 (1930); H.W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1936); F. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1 (1928). More recently also see W. FLETCHER, *CYCLOPAEDIA OF THE LAW OF PRIVATE CORPORATIONS*, §§ 8147-8156 (rev. perm. ed. 1979); L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* (1969); Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); J.C. Coffee Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Response*, 63 VA. L. REV. 1099 (1977); C. STONE, *WHERE THE LAW ENDS* (1975); A. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980) and R.H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

⁷² See G. Mueller, *Criminal Liability and Administration*, 34 N.Y.U.L. REV. 83, 93-94 (1959); Lee, *supra* n 70, at 4-5 and most of the cites in *supra* n 71 discussing the early reluctance to imposing liability of any nature on the corporation plus N. Lindley, *supra* n 70, at 34-35 and also J.C. Coffee Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980).

⁷³ The majority of these commentators however did not seem concerned by the imputation of criminal liability to the corporation for the acts of agents resulting in crimes that did not require intent. Many of the commentators did not view this latter category of offenses as "true crimes" and presumably thought such offenses did not have a retributory aim, but were designed to achieve public prosecution for offenses. See e.g., Nathaniel Lindley, *On the Principles Which Govern the Criminal and Civil Responsibilities of Corporations*, 2 JUR. SOC'Y PAPERS 31 (1857) at 34-35. See references in *supra* n 70 and later G. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 19 (1957).

⁷⁴ Indeed this matter continues to plague modern commentators who discuss ways in which they can construct blame for the corporation rather than why we may want to impose liability on corporations based on some conception of blame. There has been significant commentary trying to create a corporate intent (as opposed to imputing it from the agents) so that a corporation could be considered morally blameworthy itself and thus override one fundamental objection to corporate criminal liability for crimes of intent. This development although interesting again ignores the more basic question of why do we want to make up intent for corporations? See GRUNER, *supra* n 2, §§ 2.3.1 and 2.3.5 (pages 139-144) and W. S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L. J. 647-730 (1994). Also see *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1241-1243 (1979) discussing Proactive Corporate Fault or fault because the corporation's procedures and practices are inadequate to prevent the commission of the offense (i.e., fault prior to the act occurring); B. Fisse & J. Braithwaite, *Restructuring Corporate Criminal Law*, 56 S. CAL. L. REV. 1141, 1200 (1983) discussing reactive corporate fault or fault because the corporation did not react appropriately after the act had occurred; P. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) discussing the corporate ethos standard or the conception of fault that the personality of the corporation literally encourages corporate agents to commit a criminal act. This was one of the proposed standards for the AUSTRALIAN MODEL CRIMINAL CODE (§ 501.3 Discussion Draft 1992); Finally P. A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984) discussing Corporate Policy or attributing fault when the corporation's internal decision structures can be said to cause the wrongs to occur. For

Thus, the majority of the early commentary either challenged corporate liability of all types or only one species of corporate criminal liability (that associated with crimes of intent).⁷⁵ None appear to have asked why do we have corporate criminal liability at all, especially as corporate civil liability existed at this time.⁷⁶ Undoubtedly the growth in the scope and number of corporations and the need to regulate them would have provided the impetus for the growth in corporate liability, but why should it be of the criminal species.⁷⁷ This is especially perplexing as most of the doctrines used in corporate criminal liability were borrowed from corporate civil liability (e.g., *respondeat superior*).⁷⁸

Most of the early commentators and court decisions state that if the corporation was not made criminally liable deterrence would not be served because often agents were judgment proof or had absconded or were otherwise difficult to isolate and sanction effectively.⁷⁹ This reason, by itself, does not provide a convincing answer to our query as corporate civil liability would have presumably maintained deterrence as well as corporate criminal liability given that the same sanctions are available.⁸⁰ However, I suggest that when this factor is considered in the context of the types of wrongs for which corporate

opposing views on the plausibility of corporate criminal responsibility on matters such as criminal intent and so on please see D. Cressey, *The Poverty of Theory in Corporate Criminal Responsibility*, in 1 *ADVANCES IN CRIMINOLOGICAL THEORY* 31 (W.S. Laufer & F. Adler eds., 1989) and B. Fisse & J. Braithwaite, *On the Plausibility of Corporate Criminal Theory*, in 2 *ADVANCES IN CRIMINOLOGICAL THEORY* 15 (W. S. Laufer & F. Adler eds., 1990).

⁷⁵ There was a group of commentators who did not view corporate criminal liability in terms of imposing liability on a corporation, but rather on its shareholders and preferred to debate the policy issues with regard to this framework. Thus, they would ask whether it made sense from a policy perspective to make shareholders liable in those circumstances. Of course this particular approach would require asking not how can a corporation be blamed, but why make shareholders liable upon showing of some conception of corporate fault or blame instead of just simply making them liable for the acts of corporate agents. Although these commentators were framing the question in this manner they appeared more concerned with trying to highlight the problems with the anthropomorphization of the corporation. In any event they did not ask nor answer the question of why have corporate criminal liability given that alternative liability regimes exist. See Lee, *supra* n 70, at 4-6 and 14.

⁷⁶ The growth in principles concerning corporate civil liability undoubtedly influenced the development of corporate criminal liability as indicated by the *New York Central* case's reliance on tort law principles to allow corporate criminal liability for crimes requiring intent. See Elkins, *supra* n 8, at 97-100.

⁷⁷ See for example Adams, *A Chapter of Erie*, in *HIGH FINANCE IN THE SIXTIES* 115-116 (F. Hicks ed. 1929).

⁷⁸ Furthermore, it would appear that many of the reasons given for permitting corporate criminal liability could on the face of it have been achieved by making the corporation civilly liable. See text accompanying notes 79 and 82.

⁷⁹ See Canfield, *supra* n 70 and Lee, *supra* n 70 plus Lindley, *supra* n 70, at 31-35 and more recently much of the deterrent based arguments in support of this seem to move along such lines - see Sykes, *infra* n 179; GRUNER, *supra* n 2, §§ 2.3.2 and 2.3.3; B. Fisse & J. Braithwaite, *Restructuring Corporate Criminal Law*, 56 S. CAL. L. REV. 1141, 1200 (1983) and B. Fisse, *The Social Policy of Corporate Criminal Responsibility*, 6 ADEL. L. REV. 361 (1978).

⁸⁰ Another explanation for the earlier cases was that abatement may have only been available in proceedings for the common law crime of public nuisance and thus we needed corporations to be criminally liable to obtain this sanction. However, this does not justify later developments where abatement is not sought.

criminal liability developed an answer to why we started with corporate criminal liability can be hypothesized.⁸¹

Most of the early instances of corporate criminal liability are public harms - nuisance, regulatory violations and so on. Given this one would suspect that private enforcement may be unlikely since most private parties would not have the incentive to sue for the small amount of harm suffered by them and the likely benefit back to them for that harm if they were successful in court.⁸² One would then expect that public enforcement would be required to ensure that the corporation and the actors properly internalized the cost of their activities to society and that optimal deterrence was obtained. However, public enforcement in the late 1600s through the early 1900s was conducted by the government in predominantly criminal proceedings.⁸³ The growth of public enforcement using civil proceedings is a phenomena of the relatively recent past dating back to the early 1900s and growing dramatically around the New Deal.⁸⁴ However, corporate criminal liability had reached its present level of applicability by 1909,⁸⁵ which was before the growth of the administrative state and public civil enforcement in the US.

Thus, for activities causing public harm we needed public enforcement which was typified in the 16th through 19th centuries by criminal enforcement. However, the individual who committed the harm could be judgment proof or may not be easily identifiable within the corporate hierarchy. Maintaining optimal deterrence in these

⁸¹ Note that the standards to determine if a corporation is going to be liable are the same in both types of proceedings. See K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* §§ 3.09 (pages 115-118) (2d ed., 1992). There appears to be little discussion of the possible stigma effects of a corporate conviction on the corporation and thus it is unlikely that stigma arguments were the basis for developing the doctrine of corporate criminal liability. Perhaps since most of the early cases of corporate criminal liability are considered not "true crimes" (i.e., not crimes of intent) the stigma would not really attach.

⁸² I have assumed damages in civil cases were compensatory only and that parties had to pay their own legal fees. The harm suffered by each may be quite small, but when aggregated could be considerably larger. See the references cited in Part VI A for greater detail. Also see A.M. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (2d ed., 1989), chapter 10 (pages 75-86), A.M. Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEG. STUD. 105 (1980) and W.Landes & R.Posner, *The Private Enforcement of Law*, 4 J. LEG. STUD. 1 (1975).

⁸³ Before the New Deal there was almost no scope for public civil proceedings. Indeed the earliest commentators and courts seemed to be think that the crimes that were not true crimes were cases of when we would desire public prosecution, see Lindley, *supra* n 70, at 34-35 and *People v. Corporation of Albany*, 11 Wend. 539, 543 (N.Y. Sup. Ct. 1834) and quote in *supra* n 28.

⁸⁴ M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992) at 213-246 and G. Hughes, *Administrative Subpoenas and the Grand Jury: - Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, at 587-589 (n. 37) (1994) noting that the first agency to develop some investigative powers was the Interstate Commerce Commission in the Interstate Commerce Act 1887 of Feb. 4, 1887 ch. 104, 24 Stat. 379 (1887) codified at 49 U.S.C. ss 10101-11901 (1988).

⁸⁵ By 1909 corporate criminal liability applied to crimes of intent, which at the time were also cases of public harm predominantly, such as antitrust violations.

circumstances would require also making the corporation liable as normally the corporation's and the agent's assets combined would be enough to meet most sanctions.⁸⁶ Given these two constraints corporate criminal liability seems a sensible option with the enforcement techniques available at the time.⁸⁷ Therefore, the growth of corporate criminal liability until 1909 may indeed have served a purpose.

However, corporate criminal liability continued to grow even after 1909. The next developments in the doctrine were in how far would it extend (to what types of activities), when would it attach (i.e., when would agent behavior and intention be attributed to the corporation), and how effective could it be made.⁸⁸ Each of these are examined in the following section.

⁸⁶ If this is the case then the optimal sanction may not be imposed and deterrence would thereby be compromised. The arguments for why corporate liability is useful when agents are judgment proof is discussed in Part IV B.

⁸⁷ It would appear appropriate to make the corporation criminally liable since we need to sanction the corporation to maintain some deterrence and we need public enforcement - the only form of which was criminal proceedings. We could query why not simply make individuals criminally liable and corporations civilly liable after an individual conviction. There are a few problems with this approach. First, we need to find an individual to convict, however this is not always easy. Second, even if an individual could be convicted (but was judgment proof thus necessitating corporate liability) we cannot be sure that private parties would bring follow on civil suits. Private parties may not be aware of the fact that an individual was convicted for which they could recover or court costs may have still been prohibitive (the compensatory damages are less than court costs for the private party). In addition, if 5000 private parties brought suit that may have been quite a burden on the court system for small amounts and since the class action suit is also recent innovation the method to aggregate claims would have been public enforcement. Also, the amount the corporation pays to private parties and the amount the individual is sanctioned may sum more than the total fine which would be optimal for deterrence purposes. Therefore, there are considerable problems with trying to obtain the benefits of public enforcement without using corporate criminal liability in the early days of the doctrine.

⁸⁸ White collar crime prosecutions rose from 8 percent in 1970 to 24 percent in 1983 and since the Justice Department's Environmental Crimes Unit started up in 1982 there has been a 200 percent increase in prosecutions (see K. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME*, xxv (1990)). See also MODEL PENAL CODE, § 2.07. For examples of the vast increases in legislation in the area of corporate crime see: Mail Fraud (18 U.S.C. § 1341), Wire Fraud (18 U.S.C. § 1343), Fraud on the United States (18 U.S.C. § 371), Copyright Act (17 U.S.C. § 506 (a) for example), Securities Fraud (The Securities Act 1933 and the Securities and Exchange Act 1934 see 15 U.S.C. § 78j(b) - Insider Trading or section 10b), Perjury (18 U.S.C. § 1621), False Declarations (18 U.S.C. § 1623), Obstruction of Justice (see e.g., 18 U.S.C. § 1503), Bribery (18 U.S.C. §§ 203-205, 207-209 for example), RICO (The Racketeer Influenced and Corrupt Organizations Act enacted as Title IX of the Omnibus Crime Control Act of 1970 and examples such as 18 U.S.C. §§ 1961 and 1962), Tax and Currency Reporting Crimes (26 U.S.C. § 6012 and the Bank Secrecy Act see 12 U.S.C. § 1829b(a) (1) and 1951 for example), Environmental Laws (Clean Air Amendments of 1970, 84 Stat. 1676; The Clean Water Act, 33 U.S.C. § 1251-1376; The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987; The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 and the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629) and Occupational Health and Safety (OSHA, 29 U.S.C. § 651(b)).

For a sampling of works in this area please see K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed., 1992) preface at ix - x and ch. 3-5; R. GRUNER, *supra* n 2, ch. 3-16; Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1306-1311 (1990); B. Fisse & J. Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism, and Accountability*, 11 SYD. L. REV. 468, 504-507 (1988); B. Fisse, *Restructuring Corporate Criminal Law*, 56 CAL. L. REV. 1141, 1183-92 (1983); W. S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1059-1085 (1992); O.W. HOLMES, *THE COMMON LAW* 10-20 (M. Howe ed., 1963); J.C. Coffee Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1276 (1977); S. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U.CHI. L. REV. 423 (1963); P. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 MINN. L. REV. 1095, 1121-1164 (1991); H.W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1927); Lederman, *Criminal Law, Perpetrator and Corporation*:

D CORPORATE CRIMINAL LIABILITY AFTER 1909

One question which generated much debate was for which agents' wrongs would a corporation be held criminally liable. Attributing criminal liability to the corporation took the form of the *respondeat superior* doctrine at common law, which allowed *any agent's* acts and intentions to be imputed to the corporation.⁸⁹ An alternative was the imputation standard used in England which focused on the intent of a corporate agent high up in the corporate hierarchy.⁹⁰ However, the most well known alternative and one adopted by many states is that found in the Model Penal Code. This had parts of both *respondeat superior* and the English rule plus some of its own additions (e.g., the due diligence defense at times).⁹¹ However, even though *respondeat superior* has been criticized for its breadth and lack of defenses it remains the predominant imputation standard at the federal level.⁹²

Another major development since 1909 was the actual growth of legislation authorizing the imposition of liability, criminal or otherwise, on corporations. Beginning around the New Deal and continuing into the early to late 1970s the growth in things for

Rethinking a Complex Triangle, 76 J. CRIM. L. & CRIMINOLOGY 285 (1985); Miller, *Corporate Criminal Liability: A Principle Extended to Its Limits*, 33 FED. B. J. 49 (1979); K. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753 (1987); Casenote, 51 GEO. L. J. 386 (1963); Note, *Corporate Criminal Liability*, 68 N.W.U. L. REV. 870 (1973); Hauptly & Rider, *The Proposed Federal Criminal Code and White-Collar Crime*, 47 GEO. WASH. L. REV. 523 (1979); Note, *Development in the Law- Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959); Goldsmith, *RICO and Enterprise Criminality*, 88 COLUM. L. REV. 774 (1988) and Blakey, Coffee, Coffey and Crovitz, *What's Next? The Future of RICO*, 65 NOTRE DAME L. REV. 1073 (1990).

⁸⁹ *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247-1248 (1979) and RESTATEMENT (SECOND) ON AGENCY, § 219 (1958). Generally the acts and intentions of all corporate employees that are undertaken within the scope of their employment and with some intent to benefit the corporation will be attributed to the corporation. See *U.S. v. Armour & Co.*, 168 F. 2d 342 (3d Cir. 1948). Early on some courts held that there needed to be a link between the acts and intentions of lower level employees and some level of management for liability to be attributed to the corporation. See e.g., *State v. Baltimore & Ohio R.R.*, 15 W. Va 362 (1879) and *People v. Canadian Fur Trappers Corp.*, 161 N.E. 455 (N.Y. 1928). However, the "link" requirement was quickly done away with. See e.g., *St. Johnsbury Trucking Co., v. United States* 220 F. 2d 393, 398 (1st Cir. 1955) and Elkins, *supra* n 8, at 110-115 and see e.g., *Standard Oil Co. of Texas v. United States*, 307 F. 2d 120 (5th Cir. 1962).

⁹⁰ See Elkins, *supra* n 8, at 100-102 and *U.S. v. Carter*, 311 F. 2d at 934 (6th Cir. 1963).

⁹¹ This was often alleged to be an improvement over *respondeat superior* because it provided corporations, which appeared to have tried not to violate the law (or tried to prevent their agents from violating the law), with some benefit for so doing. Although debate over imputation standards is indeed interesting and important it is concerned with what type of imputation standard do we want rather than what form of liability strategy do we desire and thus it does not occupy much room in our present debate. See *supra* n 88 for works considering this issue.

⁹² See *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 and 1253-1259 (1979) plus Elkins, *supra* n 8, at 116-124. See K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed., 1992), ch. 3.

which corporations could be made liable increased at an almost exponential rate.⁹³ The marked growth in corporate liability and the heightened awareness of corporate crime often made the debate surrounding corporate crime reach feverish levels.⁹⁴

Thus, corporate criminal liability has continued to grow since 1909. This is somewhat surprising because between 1909 and the present public civil enforcement had become rather common. Given that corporate criminal liability may have been a method in which to utilize public enforcement against corporate entities one would expect that the advent of public civil enforcement would have impeded the development of corporate criminal liability, yet it did not.⁹⁵ There may be at least two reasons behind this. The first is that corporate criminal liability had already been accepted, at least judicially, by the time of the New Deal and thus the existence of corporate criminal liability was not really a matter of debate. Indeed the debate shifted to imputation standards and so on. Second, although public civil enforcement existed it did not possess all the powers of criminal enforcement, such as the grand jury's information gathering powers, and hence criminal enforcement may have been a useful tool in some cases. However, recently, the discrepancies between the enforcement powers in public criminal and public civil cases have greatly diminished and this requires us to ask why do we *now* wish to continue with corporate criminal liability.⁹⁶ In fact, this is precisely what this paper asks.

Nonetheless, even though the presence of public civil enforcement did not appear to abate the growth of corporate criminal liability it may have had an impact on the commentary of the times. There were some murmurings in the early to mid 1960s and

⁹³ See supra n 88 and J. C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981). In the early 1930s there was a proliferation of statutes making corporations liable, both criminally and civilly, for a whole host of things such as securities violations, investment fraud and general business related crimes. This trend only continued to grow over the next few decades and then in the 1960s and 1970s there was another spurt of legislation creating more corporate liability. In particular corporate crime legislation grew as the Watergate scandal and the associated revelations of many instances of corporate crime and nefarious activities conducted in the corporate context hit the headlines. Elkins, supra n 8, at 73. There was a large growth in banking and electoral funding regulations and money laundering provisions along with regulation of the financial markets. See supra n 88 and J. VILLA, *BANKING CRIMES* (1987). In addition to this there is the growth of the environmental laws and workplace and occupational safety laws. See supra n 88.

⁹⁴ ROSS, *How Lawless are Big Companies?*, FORTUNE, Dec. 1, 1980, at 56, 57; R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATION* (1976); J.C. Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) and L. Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 501 n.4 (1980).

⁹⁵ Note that the concept of corporate liability came much later in Europe than in the US. Indeed it was originally rejected - see Leigh, supra n 69, at 1509, n. 5. Prior to the French revolution most European countries had forms of corporate liability, but they then disappeared as they were viewed as medieval in character. They have of course returned.

⁹⁶ See Part VII B on Information Gathering Benefits.

again at the end of the 1970s questioning why do we have corporate criminal liability given that corporate civil liability (including of the public variety) also exists.⁹⁷ However, the early articles do little more than briefly examine this issue and conclude perfunctorily that no good reason for corporate criminal liability exists or that corporate criminal liability is useful because it possesses a special stigma without examining if a stigma sanction is desirable in the corporate context.⁹⁸ These claims will be examined in greater depth later in this paper.

In light of the marked increase in corporate criminal liability and the ease of attributing liability to the corporation for the acts of agents it would seem natural that the next avenue of debate would revolve around how well was corporate criminal liability working.⁹⁹ Indeed, from the early 1980s until the present the debate focused on how severe and effective the criminal sanctions on corporations were and what other sanctions could we utilize to improve deterrence.¹⁰⁰ This manifests itself in the considerable

⁹⁷ This is coincidentally the same time that public civil enforcement started gaining enforcement powers similar to those in criminal enforcement. See Coffee, *supra* n 14, 253; Coffee, *supra* n 94, at 447-448; B. Fisse, *Restructuring Corporate Criminal Law*, 56 CAL. L. REV. 1141 (1983); J.T. Byam, *Comment: The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582 (1982); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed., 1992) at 421-423; M. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L.REV 395 (1991) at pp 410-418 and K. Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992). These all mention the issue that we do have the alternative of corporate civil liability, but their analysis rarely examines corporate criminal liability against corporate civil liability in a sustained manner. Byam and Block perhaps come the closest and their analyses are indeed insightful but they do not cover all the issues examined here or in the same detail. Many other commentators also were concerned by the presence of corporate criminal liability and came down against it for a number of reasons. Please see G. Mueller, *Mens rea and the Corporation*, 19 U. PITT. L. REV. 21, 23 (1957) and H. Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME LAW. 173, at 180 and 184 (1979) on the mismatch of corporate criminal liability since criminals generally are required to have intent; Friedman, at 188-191 and *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1276-1289 (1979) on the dubious application of constitutional protections to the corporation (although not the same perspective in this paper); *Developments in the Law*, at 1236-1237, 1262 and 1303-1306 on the inability of corporate criminal liability to meet both consequentialist and retributive justifications for corporate criminal liability; H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* at 361 (1968), Breit & Elzinga, *Antitrust Penalties and Attitudes Towards Risk: An Economic Analysis*, 86 HARV. L. REV. 693, 697 (1973) and S. Kadish, *Some Observations on the Use of Criminal Sanction in Enforcing Economic Regulations* 30 U.CHI. L. REV. 423, 434 (1963) on the ineffectiveness of the criminal stigma as a deterrent and others discussed in Byam, at 603. None of these commentaries take the approach taken in this paper and they do not really ask the same question being asked in this paper in a sustained manner.

⁹⁸ On papers suggesting there is no significant stigma effect see H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* at 361 (1968), Breit & Elzinga, *Antitrust Penalties and Attitudes Towards Risk: An Economic Analysis*, 86 HARV. L. REV. 693, 697 (1973) and S. Kadish, *Some Observations on the Use of Criminal Sanction in Enforcing Economic Regulations* 30 U.CHI. L. REV. 423, 434 (1963). For those suggesting there is some impact please see Coffee, *supra* n 94, at 447, M. CLINARD & P. YEAGER, *CORPORATE CRIME* 29-31, 318.322 (1980) and B. Fisse, *The Use of Publicity as a Criminal Sanctions Against Business Corporations*, MELB. U. L. REV. 107 (1971).

⁹⁹ The effectiveness of criminal sanctions in most spheres and a desire for some consistency provided the impetus to the government in the early 1980s to set up the US Sentencing Commission to inquire into areas of sentencing concerning federal crimes - one important area of which is corporate criminal liability. See references in *infra* n 100.

¹⁰⁰ See M. A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U.L.REV 247 (1991); M. K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L.REV 395 (1991); J. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71

literature surrounding the federal sentencing guidelines as they apply to organizations.¹⁰¹ Many commentators favor more severe sanctions and others think that more severe sanctions are unnecessary and may result in overdeterrence.¹⁰²

The recent focus on sanctions has brought the question of why we have corporate criminal liability to the fore again since the sanctions it provides are essentially the same as those in civil proceedings.¹⁰³ However, commentators have not taken this point any further than to note their bewilderment with the present state of affairs. Thus, there is really no clear and comprehensive answer as to why do we have corporate criminal liability when corporate civil liability and other alternative liability regimes exist.

It is thus the object of this paper to query *when is corporate criminal liability socially desirable given that corporate civil liability and other liability alternatives exist*. The historical survey of the literature and case law indicates that this question has rarely been asked and answered even more rarely, yet the fundamental nature of this sort of inquiry beseeches us to ask and then provide a comprehensive answer to it. This is what I propose to do in this paper. I have already hypothesized that corporate criminal liability began in order to take advantage of public enforcement techniques available in the early 1700s and 1800s, however, in the 20th century criminal enforcement is not the only form of public enforcement. Public civil enforcement is also present and has more recently obtained powers remarkably similar to those possessed by criminal proceedings, but in a more flexible environment. In light of this we must ask ourselves what purpose corporate criminal liability serves *now* given that we have our present form(s) of corporate liability as alternatives. This issue takes up the remainder of the paper after a brief discussion of

B.U.L.REV 315 (1991); B. Baysinger, *Organization Theory and the Criminal Liability of Organizations*, 71 B.U.L.REV 341 (1991); S. Saltzburg, *The Control of Criminal Conduct in Organizations*, 71 B.U.L.REV 421 (1991); H. Pitt & K. Groskaufmanis, *Mischief Afoot: The Need for Incentives to Control Corporate Criminal Conduct*, 71 B.U.L.REV 447 (1991); D.J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); K. Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); D. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755 (1992); R. Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1 (1988); U.S. SENTENCING COMMISSION, SENTENCING GUIDELINES MANUAL 393-433 (1993); S. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); Swensen & Clark, *The New Federal Guidelines: Three Keys to Understanding the Credit for Compliance Programs*, CORP. CONDUCT Q., Winter 1991, at 1, 3 and Cohen & Scheffman, *The Antitrust Sentencing Guidelines: Is the Punishment Worth the Costs?*, 27 AM. CRIM. L. REV. 331, 343-347 (1989). It is worth noting that debate has continued over the anthropomorphic elements of corporate criminal liability with papers discussing ways in which to establish corporate intent and imputation standards. See *supra* n 74.

¹⁰¹ See *supra* n 100.

¹⁰² *Supra* n 100.

¹⁰³ M. K. Block, *supra* n 100.

corporate criminal liability in other jurisdictions to highlight the unique nature of the American institution of corporate criminal liability.

III CORPORATE CRIMINAL LIABILITY IN THE US AND WESTERN EUROPE

In this Part I examine the systems of corporate criminal liability in the US and Western Europe and inquire into (i) the acts for which corporations can be made criminally liable (the scope of corporate criminal liability) and (ii) the standards used to attribute liability to the corporation for the acts of its agents. Section A covers corporate criminal liability in the US. Section B examines those European countries labeled as "full corporate criminal liability". Section C examines European countries labeled as "partial corporate criminal liability" and section D examines European countries labeled as "no corporate criminal liability".

A CORPORATE CRIMINAL LIABILITY IN THE US

Corporations in the US can be made criminally liable for almost all the things that natural persons can be made criminally liable for except acts such as rape, murder, bigamy and so on.¹⁰⁴ The scope of corporate criminal liability in the US is thus very broad. Similarly, the standards used to attribute liability to the corporation are also quite broad. Corporate liability is based on the imputation of agents' conduct to the corporation,¹⁰⁵ which, in the US, arises primarily through the application of the doctrine of *respondeat superior*.¹⁰⁶ Under the doctrine a corporation is held liable for the acts of its agents only if any of its agents (i) commit a crime (or other wrongful act) (ii) within the scope of

¹⁰⁴ See *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481, 494 (1909). See also K. Brickey, *Corporate Criminal Accountability: A Brief History and An Observation*, 60 WASH. U. L. Q. 393 (1982) at 413.

¹⁰⁵ For further discussion on the history of this doctrine please see K. Brickey, *Corporate Criminal Accountability: A Brief History and An Observation*, 60 WASH. U. L. Q. 393 (1982); R.S. GRUNER, *supra* n 2, at 76-84 and J.R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L. J. 73 (1976).

¹⁰⁶ The doctrine of *respondeat superior* is the most prevalent legal technique of attributing liability to the corporation in the federal courts and most state courts. Nonetheless, corporations can be found criminally liable for the acts of their employees and agents under a number of different methods that often vary depending on the authority for criminality and the actual type of offense. Corporations can be held criminally liable in the U.S.A. under both Federal Law and State Law. The primary focus of this paper is on Federal Law. See *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1979); K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed., 1992) §§ 3.01 to 3.09; RESTATEMENT (SECOND) OF AGENCY, §§ 212-213, 215, 217B, and 219 (1958); *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481, 494-495 (1909); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 70, at 460-467 (4th ed., 1971); U.S. NATIONAL COMMISSION ON THE REFORM OF THE FEDERAL CRIMINAL LAWS, *WORKING PAPERS* 168 (1970). See also text accompanying *infra* notes 120 to 125 and R. GRUNER, *supra* n 2, chapters 3 through 7.

employment and with (iii) an intent to benefit the corporation.¹⁰⁷ All three matters must be proved in order to impose liability on the corporation.

The first issue is whether a crime was committed by an agent of the corporation. This means that the agent must have committed an illegal act (the actus reus) with the specific intent required by the law (the mens rea). Specific intent may be proven in two ways to make the corporation liable. The first is by finding that a particular agent of the corporation had the specific intent so that it may be imputed to the corporation.¹⁰⁸ The second is when courts find the requirement of corporate criminal intent is satisfied on the basis of the collective knowledge of the employees as a group, even though no single employee has enough information to know that the crime was being committed.¹⁰⁹ The second issue is whether the illegal act was committed within the agent's scope of employment.¹¹⁰ However, the scope of employment requirement translates, in practice, to any act that occurred while the agent was carrying out a job-related activity.¹¹¹ Thus, courts have found conduct to fall within the scope of employment even if it was forbidden by the corporation's policy or by a superior and yet occurred in spite of good faith efforts to prevent the crime by the corporation and its officers.¹¹² Finally, the prosecution must prove that the agent committed the crime with some intent to benefit the corporation. The corporation may be criminally liable even if it received no actual benefit -as long as the

¹⁰⁷ See *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1979).

¹⁰⁸ Note that a corporation can be conceived of as an aggregation of its agents and then it is not necessary to prove that a specific person acted illegally only that some agent of the corporation committed the crime. This makes it substantially easier to find the corporation liable. See *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1248-1249 (1979).

¹⁰⁹ GRUNER, *supra* n 2, at 263-267 provides an explanation of this rule as being designed to foster greater information sharing within the corporation in order to prevent/deter corporate wrongs from occurring. See also K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed., 1992) at § 4.05.

¹¹⁰ *Developments in the Law*, *supra* n 108, at 1249 and RESTATEMENT (SECOND) OF AGENCY, § 219 (1958). Agency doctrine limits scope of employment to "conduct that is authorized, explicitly or implicitly, by the principal or that is similar or incidental to authorized conduct." For an economic analysis of the efficiency of the scope of employment rule please see A.O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988).

¹¹¹ The general standard for the scope of their employment is whether the activity of the employee is sufficiently related to their assigned activities that corporate managers bear some responsibility for overseeing (i.e., monitoring and preventing) misconduct when it occurs within the authorized time, space and limits for performance and falls within the scope of employment. There are a number of legal doctrines governing when the agent has the authority necessary to act on behalf of the corporation including express, implicit, apparent and inherent authority. Essentially, almost all acts of the employee/agent that are somehow connected with their assigned tasks fall within the scope of their employment. This is justified because if we limit the scope of employment then the corporation could easily evade liability by saying we do not want you to do anything illegal and thus put the illegal activities out of the scope of employment. But we need more than lip service. See Sykes, *supra* n 110 and GRUNER, *supra* n 2, at 203-229.

¹¹² *Developments in Law*, *supra* n 108, at 1249-1250.

agent can be said to have acted with at least a partial intent to benefit the corporation the corporation is liable.¹¹³ This is then a very broad imputation standard.¹¹⁴

Given the breadth of *respondeat superior* it is not surprising that alternatives developed. One alternative, the American Law Institute's Model Penal Code (MPC), sets out three distinct systems of corporate criminal liability. The first applies to crimes of intent where no legislative purpose to impose liability on corporations appears (e.g., larceny and manslaughter). Under this system the corporation is only liable for its agents' acts if the offense was "performed, authorized, or recklessly tolerated by the board of directors or a high managerial official",¹¹⁵ when that higher up is acting on behalf of the corporation and within the scope of their employment.¹¹⁶ The distinction between this and *respondeat superior* is in whose intent is imputed to the corporation, under the MPC it would be a high managerial official's intent, whereas under *respondeat superior* it would be any agent's intent.¹¹⁷ The second system deals with crimes of intent for which the legislature has clearly intended to impose liability on the corporation. The standard here is the same as under *respondeat superior*, but the MPC allows for a defense of due diligence if the defendant can prove this on the preponderance of evidence.¹¹⁸ The third system applies to strict liability crimes only and as such a showing of intent to benefit is not required nor is specific intent required (strict liability offenses require no mens rea).¹¹⁹

¹¹³ This standard is not restrictive as only a partial intent to benefit the corporation is enough (i.e., not exclusively to benefit the employee). The existence or absence of benefit is relevant as evidence of an intent to benefit. See K. BRICKEY, CORPORATE CRIMINAL LIABILITY (2d ed., 1992) at § 4.02 (pages 131-137); GRUNER, *supra* n 2, at 229-248 and *Developments in the Law*, *supra* n 108, at 1250-1251. The intent to benefit test can be seen as a means of placing liability on the person most likely to be able to influence the agent's incentives. If the agent is intending to benefit the corporation then that means they have some conception of what will benefit the corporation or what the corporation may desire (or its shareholders/top management would desire). In light of this the corporation can send signals (i.e., adjust compensation) to influence the agent's behavior. If the agent had no intent to benefit the corporation the corporation would have difficulty in directly influencing agent behavior. See R.H. Kraakman, *Gatekeepers: The Anatomy of a Third Party Enforcement Strategy*, 2 J. L. ECON. & ORG'N 53 (1986) at 55-56 (n. 6).

¹¹⁴ Furthermore, the requirements of scope of employment and intent to benefit can also be met through ratification. In this situation the corporation is liable for "approving" the criminal act rather than "committing" it. *Developments in the Law*, *supra* n 108, at 1251.

¹¹⁵ A high managerial official is an officer or other agent of the corporation having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation. MODEL PENAL CODE, § 2.07 (4)(c) (1962).

¹¹⁶ MODEL PENAL CODE § 2.07(1)(a), (c) (1962).

¹¹⁷ MODEL PENAL CODE § 2.07, comment at 151 (Tent. Draft No. 4, 1955); RESTATEMENT (SECOND) OF AGENCY § 217C (1958) and *Developments in Law*, *supra* n 108, at 1251-1252.

¹¹⁸ MODEL PENAL CODE, §§ 2.07 (1)(a) and 2.07 (5) (1962). See also *Developments in Law*, *supra* n 108, at 1252 (n. 48).

¹¹⁹ MODEL PENAL CODE, § 2.07 (2) (1962). Note that for this system no due diligence defense would apply as liability is imposed on a strict liability basis (see MODEL PENAL CODE, § 2.07 (5) (1962)).

Otherwise the principles of *respondeat superior* apply.¹²⁰ The MPC has been adopted by many states, but at the federal level *respondeat superior* reigns supreme.

As harms committed in the corporate context have attracted greater attention in the US they have similarly drawn the ire of European legislatures. However, the general European response has not been to draft or interpret laws to make the corporation criminally liable.¹²¹ Each of the European systems is briefly described in order to highlight that corporate criminal liability is certainly not a given in most jurisdictions, indeed, it is the exception.¹²²

B FULL CORPORATE CRIMINAL LIABILITY

The Netherlands and most common law legal systems such as the UK have systems of full corporate criminal liability.¹²³ The general rule in these countries is that all corporations are criminally liable without limitation as to type.¹²⁴ Thus, the scope of corporate criminal liability in these countries is very similar to that in the US,¹²⁵ but the standards used to impute agents' acts and intentions to the corporation are different.¹²⁶

¹²⁰ See *Developments in the Law*, supra n 108, at 1251-1253. There are also some instances when the corporation may be found criminally liable under specific standards set out in statutes. See MODEL PENAL CODE, § 2.07 (1)(b) (1962). For further discussion of these standards please see K. BRICKEY, supra n 113, §§ 3.01 to 3.09 and GRUNER supra n 2, at 292-321.

¹²¹ Most countries in Europe prefer to impose liability on natural persons. See Delatte, *La Responsabilite Penale des Personnes Morales*, in DIRITTO COMUNITARIO at 283-284 and, L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508, 1524-1525 (1982). Although corporate criminal liability is not as common in Europe as in the US, there have been many suggestions to broaden the scope of corporate criminal liability in Europe. Please see *La Responsabilita Penale Delle Persone Giuridiche* in DIRITTO COMUNITARIO (University of Messina ed. 1981), plus the Council of Europe Recommendation in 1988 discussed in C. WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY, 121-122 (1993)(citing Recommendation No. R(88)18) and G. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957) (opposing corporate criminal liability anywhere for crimes of intent). See generally, L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508 (1982).

¹²² See Leigh, supra n 121, at 1510.

¹²³ For discussions concerning the history of corporate criminal liability in these countries see: L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* (1969); Huss, *La Responsabilite penale des personnes morales*, in DIRITTO COMUNITARIO at 351; Barbero Santos, *Responsabilidad penal de las personas juridicas*, in DIRITTO COMUNITARIO at 454-458; and more recently, S. Field & N. Jorg, *Corporate Liability and Manslaughter: Should We Be Going Dutch?*, CRIM. L. REV. 156 (1991)(discussing Article 51, Criminal Code, Netherlands, 1976) and WELLS, supra n 121.

¹²⁴ In the Netherlands Article 51 of the Criminal Code expressly imposes liability on the corporation. See Fasseur, *The Criminal Liability of Legal Persons in Netherlands Law*, in DIRITTO COMUNITARIO, at 309, Field & Jorg, supra n 123, at 158 and Leigh, supra n 121, at 1510.

¹²⁵ In the UK it is generally accepted that a corporation formed for lawful purposes can commit crimes, however, the *ultra vires* doctrine has resulted in restricting the scope of activities to which the corporation can be held liable to those that fall within the class of activities permitted by its objects clause. L. LEIGH, supra n 123, at pp 46-51. However, this is given a rather broad interpretation and even acts which would probably not fall within the objects are sometimes the basis for making the corporation liable (e.g., manslaughter). See e.g., *Rex v. East Crest Oil Co.*, [1944] 3 D.L.R. 535

In the US the federal courts rely on the doctrine of *respondeat superior* to impose criminal liability on a corporation for the acts and intentions of *any of its agents* regardless of their position within the corporate hierarchy.¹²⁷ English courts, on the other hand, have tended to be more restrictive. For crimes that require criminal intent the English courts rely on the alter ego doctrine which makes the corporation liable if the individual actor (i.e., agent) has been invested by proper authority with managerial power and responsibility over a significant aspect of the company's business.¹²⁸ This is similar to the MPC's high managerial agent standard. An intermediate imputation standard also exists. In the Netherlands appellate decisions framed a two-pronged test for corporate criminal liability: (i) did the defendant corporation have the power to determine whether the employee did or did not do the act in question and (ii) did the corporation "accept" such acts?¹²⁹ In 1987 a Dutch hospital was convicted under this test of negligent homicide for using old, outdated and poorly maintained anaesthetic equipment during an operation

(Alta. Sup. Ct., App. Div.), *rev'd on other grounds, East Crest Oil Co. v. The King*, [1945] 2 D.L.R. 353 (Sup. Ct. Can.) and V. Swigert & R. Farrell, *Corporate Homicide: Definitional Processes in the Control of Deviance*, 15 LAW & SOC'Y REV. 161 (1980-1981). In Europe the general rule is the same, but commentators have difficulty with attributing liability to a corporation for activities that are foreign to the corporate purpose. See Delmas-Marty, *La Responsabilite Penale de Groupements*, REVUE INTERNATIONALE DE DROIT PENAL, 50e annee, Nouvelle Serie, 1e et 2e Trimestre (1980). This has resulted in the general view that only commercial and industrial corporations should be held criminally liable and then only for economic type offenses. See e.g., Delatte, *La Responsabilite Penale des Personnes Morales*, in Diritto Comunitario at 306. There is, however, nothing in these systems that would prevent the corporation from being held liable for activities outside this range of behavior. In the US the *ultra vires* doctrine has long since been buried and the general view is that corporations cannot be convicted of certain crimes such as rape, murder, and bigamy. However, as a general matter prosecutorial discretion and choice in cases to bring often provides a similar result. Where dealing with violent offenses normally only natural persons are charged and corporations are normally charged with offenses related to their business activities. See K. Brickey, *Corporate Criminal Accountability: A Brief History and An Observation*, 60 WASH. U. L. Q. 393 (1982) at 414-416; LEIGH, *supra* n 123, at 51-52; Leigh, *supra* n 121, at 1513; *United States v. Lanier*, 578 F.2d 1246 (8th Cir. 1978); *United States v. Griffin*, 401 F. Supp. 1222 (S.D. Ind. 1975) and *United States v. Hilton Hotel Corp.*, 467 F.2d 1000 (9th Cir.) *cert. denied*, 409 U.S. 1125 (1973). Corporations are generally considered exempt from the criminal law of rape, bigamy, and the self-administration of a noxious drug to procure an abortion in the other jurisdictions as well. See The Law Commission (England), Published Working Paper No. 44 para 37 (June 30, 1972).

¹²⁶ There are some questions that are raised when the entity is not a corporation but is some other social/business group. See L. Leigh, *The Criminal Liability of Corporations and Other Groups*, 9 OTTAWA L. REV. 246 (1977). Generally, one must look to the details of particular state and federal laws to determine whether a non-corporate entity can be made criminally liable. See Leigh, *supra* n 121, at 1511.

¹²⁷ In the US some states follow the Model Penal Code formulation of a high managerial agent. Also note that just because a corporation cannot be imprisoned does not mean that it can not be found criminally liable - a corporation is made liable so far as it can be made so. See J.R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY L.J. 73 (1976); MODEL PENAL CODE § 207 (Proposed Official Draft 1962); *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 275 N.E. 2d 33, 71 (1971); Senate Bill S.1630, § 402.

¹²⁸ LEIGH, *supra* n 123, at ch. 3; *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705, 713 (H.L.) and *Tesco Supermarkets, Ltd. v. Nattrass*, [1972] A.C. 153, 170 (H.L. 1971). The agent need not be designated as a governing organ of the corporation, but if they function independent of superior authority in respect of general management decisions in the sphere of activity in which they function they meet the test.

¹²⁹ S. Field & N. Jorg, *Corporate Liability and Manslaughter: Should We Be Going Dutch?*, CRIM. L. REV. 156 (1991).

resulting in the death of a patient.¹³⁰ This sort of intermediate standard appears to be gaining support on the Continent. The Council of Europe in 1988 accepted the recommendation of a select committee that member states examine revising their criminal codes to recognize corporate criminal liability along similar lines.¹³¹ This recommendation is by its very nature not mandatory, but it indicates a willingness in Europe to adopt corporate criminal liability and to relax the imputation standards for corporate criminal liability, although not to the extent of *respondeat superior*.¹³²

In short then common law countries and the Netherlands recognize corporate criminal liability for essentially the entire panoply of offenses as in the US, but there are important differences in the rules concerning attribution of liability. These differences may reflect the different compromises made in each jurisdiction concerning the need to enforce socio-economic legislation and the dictates of legal principle.¹³³

C PARTIAL CORPORATE CRIMINAL LIABILITY

Having inquired into systems of full corporate criminal liability we can then move on to consider systems of partial corporate criminal liability. A number of European jurisdictions, such as France and Denmark,¹³⁴ recognize various forms of corporate criminal liability.¹³⁵ In these jurisdictions special legislation makes corporations criminally liable for a wide range of public welfare or quasi-criminal offenses, but not for crimes of intent generally. Such liability is often considered less than truly criminal

¹³⁰ Id., at 158.

¹³¹ The Council's recommendation was for member states to revise their criminal codes to reflect the following principles: (i) corporations should be able to be made liable for offenses committed in the exercise of their activities, even when the offense is foreign to the purposes of the corporations, (ii) liability should attach regardless of whether a natural person can be prosecuted (iii) the corporation should not be liable when its management is not implicated in the offense and has taken all necessary steps to avoid the offense (iv) and enterprise liability should be additional to any individual liability. CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* 121-122 (1993) and J.C. Coffee Jr., *Emerging Issues in Corporate Criminal Policy*, Forward to GRUNER, *supra* n 2, at xix to xxvii.

¹³² Another related area where this is some difference is that the collective knowledge doctrine prevalent in the US is generally not found elsewhere. This may be a remnant of the search in most jurisdictions for a high managerial agent in the corporation when intent needs to be imputed from an agent to the corporation, (i.e., liability requires finding a specific agent whose intent can be imputed so the issue of collective knowledge does not arise) but nonetheless it is a difference that is worth noting. See Leigh, *supra* n 121, at 1518.

¹³³ Leigh, *supra* n 121, at 1518.

¹³⁴ Levasseur & Bouloc, *La Responsabilite Penale Des Personnes Morales d'Apres Le Droit Positif Francais Actuel*, in *DIRITTO COMUNITARIO* at 197, 209 and Leigh, *supra* n 121, at 1518-1522 plus Garde, *The Penal Responsibility of Judicial Persons in Danish Law*, in *DIRITTO COMUNITARIO* at 321.

¹³⁵ See G. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957).

because the offenses to which it relates are found outside the Criminal Code.¹³⁶ For example, in Denmark cases involve licensees of public houses, restaurants and hotels, and safety in the workplace at times.¹³⁷ However, for serious offenses, such as smuggling, personal guilt is required and then the corporation is not liable.¹³⁸ In France some special provisions permit the imposition of criminal liability on corporations for public welfare offenses¹³⁹ (e.g., tax fraud, foreign exchange offenses, and price-fixing).¹⁴⁰ Recently, however, French law has allowed for administrative sanctions (fines imposed by the Department of Economic Affairs) that would essentially overtake and replace criminal sanctions.¹⁴¹ This development was not met with praise¹⁴² and reforms are underway in France to impose criminal liability on corporations.¹⁴³

Thus, the partial liability systems will sometimes impose corporate criminal liability by statute, but certainly nowhere near the extent in the US and generally not for crimes of intent.¹⁴⁴ In addition, the standards used to impute liability to the corporation more closely resemble those used in England rather than *respondeat superior*.¹⁴⁵ Partial systems are then more restrictive than full liability systems.¹⁴⁶

¹³⁶ See Leigh, *supra* n 121, at 1519.

¹³⁷ See Garde, *The Penal Responsibility of Judicial Persons in Danish Law*, in DIRITTO COMUNITARIO at 321.

¹³⁸ *Id.*

¹³⁹ Levasseur & Boulloc, *supra* n 134, at 217.

¹⁴⁰ With regard to safety at work the corporation can be convicted where fault cannot be imputed to a natural person. Cartels can also be sanctioned using corporate criminal liability. Levasseur & Boulloc, *supra* n 134, at 217 and see also Leigh, *supra* n 121, at 1520.

¹⁴¹ Levasseur & Boulloc, *supra* n 134, at 220.

¹⁴² See Commission de Revision du Code Penal, Avant-Projet Definitif de Code Penal, Livre I (La Documentations Francaise 1978), Arts. 38 & 39 and Leigh, *supra* n 121, at 1521.

¹⁴³ Indeed in 1991 France amended its Penal Code to remove the general principle that criminal liability could not attach to non-human entities. Thus, it would appear that France may soon move into the full corporate criminal liability systems assuming the criminal law is now extended by the courts and legislatures to corporations. W. JEANDIDIER, DROIT PENAL GENERAL 341 (1991) and Coffee, *supra* n 131, at xx.

¹⁴⁴ In Belgium corporations cannot be criminally convicted at all. However, a criminal sanction against a director or manager or other employee may affect the corporation as the fine paid by the employee may be then reimbursed to them by the corporation. Note that a corporation may be sanctioned by closure of business or seizure of assets and although these sanctions are often considered penal/punitive they are not imposed on the corporation in criminal proceedings in Belgium. For example, Belgian price-fixing legislation provides that if an organ or agent of the corporation is responsible for the violation as principal or accessory, its (the corporation's) business may be closed. See Delatte, *La Responsabilite Penale des Personnes Morales*, in DIRITTO COMUNITARIO at 292-293 and 306.

¹⁴⁵ It would further appear that the standard for imputation will be close to the English standard or the Council of Europe's recommendation. See Coffee, *supra* n 131, at xx-xxi. There have been projects to reform French law to allow for corporate criminal liability and to set up a system of corporate responsibility. See e.g., Commission de Revision du Code Penal, Avant-Projet Definitif de Code Penal, Livre I (La Documentations Francaise 1978), Arts. 38 & 39. In the recent past there has been some convergence on when significant penalties attach to a corporation. In Europe the standard is generally that *liability attaches* when a "higher up" is involved. In the US liability attaches when any agent commits the act, but now significant penalties are imposed only when a "higher up" is involved (see U.S. SENTENCING

D NO CORPORATE CRIMINAL LIABILITY

Having examined partial liability systems I finally examine those systems that do not allow for corporate criminal liability at all. Italy and Germany provide *only* for administrative sanctions and no corporate criminal liability in any form.¹⁴⁷ Administrative sanctions are sanctions imposed by administrative agencies not by a court nor with the protections of criminal proceedings.¹⁴⁸

In Germany, it is believed that the purpose of corporate criminal liability - to reclaim corporate profits through crime - can be achieved through other ways than imposing criminal liability on a corporation.¹⁴⁹ Civil liability can be used to achieve this. In addition, administrative sanctions may be levied against corporations for public welfare or administrative offenses (*Ordnungswidrigkeiten*).¹⁵⁰ "[A] fine may be imposed against a corporation whenever a representative organ of the corporation or a member of such an organ, commits an offense through which the obligations of the corporation have been improperly performed, or the corporation has been unjustly enriched."¹⁵¹

There has been some debate in Germany about whether these administrative sanctions are just simply a semantic trick to get around prohibitions against corporate criminal liability,¹⁵² but German scholars generally believe there is a difference.¹⁵³ Administrative offenses are (i) thought to be morally neutral, and (ii) cannot result in imprisonment even for natural persons.¹⁵⁴ These two factors often help to distinguish

GUIDELINES MANUAL (1991), ch. 8, § 8A1.2 and Applicate Note 3(c) and § 8C2.5). In the US, "insignificant" penalties would presumably still apply even if no "higher up" was involved.

¹⁴⁶ Nonetheless, even in these partial liability systems there is civil liability on the corporation so it does not escape sanction altogether. See DIRITTO COMUNITARIO, supra n 123, at 604-605 (remarks by Cosson) and see Leigh, supra n 121, at 1522.

¹⁴⁷ G. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957) and Leigh, supra n 121, at 1522.

¹⁴⁸ A number of European countries, such as Belgium, EEC, and Luxembourg, provide administrative sanctions along with some partial forms of corporate criminal liability for corporate wrongs. See Leigh, supra n 121, at 1522-1524.

¹⁴⁹ H. JESCHECK, *LEHRBUCH DES STRAFRECHTS, ALLGEMEINER TEIL* and Leigh, supra n 121, at 1522.

¹⁵⁰ JESCHECK, supra n 149.

¹⁵¹ JESCHECK, supra n 149 and Leigh, supra n 121, at 1522-1523. A fine can also be imposed on the corporation if no identified person can be convicted of the offense, or it is decided not to proceed against individuals. *Id.*

¹⁵² Leigh, supra n 121, at 1523.

¹⁵³ Professor Jescheck is uncomfortable with administrative offenses as he feels they do carry a notion of moral guilt. See JESCHECK, supra n 149.

¹⁵⁴ JESCHECK, supra n 149.

criminal and administrative sanctions. In any event, the severity of administrative sanctions is high and is often believed to be sufficient to control the activities of corporations.¹⁵⁵ Jurisdictions in this category have administrative sanctions for many areas where partial systems have criminal sanctions. Further, the imputation standards used for administrative liability are similar to the rest of Europe when attributing criminal liability.¹⁵⁶

In summary Europe presents three categories of corporate criminal liability systems. The full liability systems are very similar to the US system although the standards used for imputation are more restrictive. The partial liability systems do not permit for criminal liability for the same range of activities in the US and use more restrictive imputation standards. Finally, systems that do not permit corporate criminal liability but do provide for administrative sanctions have imputation standards similar to those of partial systems and cover a similar range of activities, but impose administrative not criminal liability. Thus, the European response to corporate crime has been considerably more diverse than the American response and more restrictive.¹⁵⁷ This suggests that the American institution of corporate criminal liability is indeed different and it compels us to ask what purpose does this institution serve. We begin our discussion of this question by setting out the framework for analysis used in this paper.

IV THE FRAMEWORK FOR ANALYSIS

The discussion in this part is divided into two sections which both serve as preludes to the primary discussion in this paper concerning the purpose of corporate criminal liability. Section A sets out the analytical framework used in this paper to determine when corporate criminal liability is socially desirable. Section B discusses a few preliminary matters such as why do we have any type of corporate liability, civil or criminal, before

¹⁵⁵ Oehler, *La Responsabilit  Penale Delle Persone Giuridiche Nella Comunit  Economica Europea*, in DIRITTO COMUNITARIO at 1523 and National Reports cited in DIRITTO COMUNITARIO. See also Tiedemann, *Antitrust Law and Criminal Policy in Western Europe*, in ECONOMIC CRIME IN EUROPE, (L. Leigh ed. 1980).

¹⁵⁶ See JESCHECK, supra n 149 and the quote accompanying supra note 151.

¹⁵⁷ Furthermore, corporate criminal liability has only recently been gaining limited support on the continent. C. WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 121-122 (1993)(citing Recommendation No. R(88)18. Nonetheless, the German and Italian systems still do not allow for any form of corporate criminal liability. See SAVELSBURG & BRUHL, supra n 3, at 48. Discussions with practitioners in Europe reveal that even now many countries do not provide for corporate criminal liability. However, in those that do many believe the purpose of corporate criminal liability is to sanction the corporation without having to prove damages (as we would in a private civil action) by imposing a fine on it. In the US this can be achieved through public civil enforcement. Also note that countries with administrative sanctions (which do not require damage calculations) are more reluctant to consider corporate criminal liability.

launching into Part V and a full blown analysis of the social desirability of corporate criminal liability.

A ANALYTICAL FRAMEWORK

The question of why we have corporate criminal liability is in essence a question about when is it socially desirable to have corporate criminal liability as opposed to alternative liability regimes. Imposing criminal liability on a corporation is in reality only one way in which to regulate behavior in and around a corporation. There are many other ways to regulate corporate behavior such as imposing civil liability on a corporation, imposing civil liability on a manager, imposing criminal liability on a manager or imposing criminal or civil liability on some third party. Thus, to determine when the imposition of criminal liability on a corporation is optimal one must compare it to other liability options and ask when are the net benefits from corporate criminal liability higher than those of alternative liability strategies. The circumstances in which the net benefits of corporate criminal liability are higher than the net benefits of all the other liability regimes are when corporate criminal liability is socially optimal.

The critical factor is then the comparison between liability regimes. Given these alternatives we have a number of possible comparisons that could be made. I could compare (i) corporate criminal liability to corporate civil liability, (ii) corporate criminal liability to individual criminal liability, (iii) corporate criminal liability to individual civil liability and (iv) corporate criminal liability to combinations of the other liability strategies. In effect I will make all these comparisons (as this is the only way to know whether corporate criminal liability has any place in an optimal liability mix), but my approach is sequential. I begin by asking when and in what circumstances is imposing criminal liability on a corporation rather than imposing civil liability on a corporation desirable. If corporate civil liability is always preferable (i.e., has higher net benefits) to corporate criminal liability then we can always replace corporate criminal liability with corporate civil liability and society would be made better off. On the other hand, if there are situations in which corporate criminal liability could be preferred to corporate civil liability then the issue arises of whether corporate criminal liability is also preferable to the individual liability regimes and so on.

In order to effectively compare liability regimes we need to develop a more refined conception of what is meant by the terms "corporate criminal liability" and "corporate civil

liability". Corporate criminal liability and corporate civil liability are both simply labels used to describe certain combinations of traits or characteristics. Thus, asking when is it preferable to have corporate criminal liability rather than corporate civil liability is in reality asking when is it preferable to have the combination of traits known as corporate criminal liability rather than the combination of traits known as corporate civil liability.

What then are the traits of corporate criminal liability and corporate civil liability. From the literature there are, arguably, six traits: ¹⁵⁸

Corporate Criminal Liability

1. Liability is imposed on the corporation
2. The Aim is Deterrence.
3. Some sanctions appear unique and quite severe (e.g., reputational loss/stigma).
4. Enforcement Devices Are Considered Powerful.
5. High Procedural Protections.
6. Message Sending Role.

Corporate Civil Liability

1. Liability is imposed on the corporation.
2. The Aim is Deterrence.
3. Sanctions are perceived not to be as severe.
4. Enforcement Devices Considered Less Powerful.
5. Low Procedural Protections.
6. Lesser Message Sending Role.

Undoubtedly these two paradigms are oversimplistic. There are numerous corporate liability strategies in between these two polar extremes. Some corporate liability strategies have most of the traits of corporate criminal liability (e.g., strong procedural protections and powerful enforcement devices). ¹⁵⁹ There are yet other corporate liability strategies that are much closer to the model of corporate civil liability described above.¹⁶⁰ Thus, in reality there exists a continuum of corporate liability strategies that have traits ranging from the simple form of corporate civil liability described above to the traits associated with corporate criminal liability. This means that if we desire strong enforcement devices, but not strong procedural protections we can obtain this by relying on

¹⁵⁸ These characteristics are based on the analysis provided by earlier commentators and my analysis as well. Please see *Developments in Law*, supra n 108, at 1276-1311 and 1340-1365; K. Mann, *Punitive Civil Sanctions: A Middleground Jurisprudence*, 101 YALE L.J. 1795 (1991) and J.C. Coffee Jr., *Does Unlawful Mean Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L.REV 193 (1991).

¹⁵⁹ Mann, supra n 158, at 1813.

¹⁶⁰ The reason I can take this approach is that my general assumption is that the traits of corporate criminal liability can be made available in corporate civil liability as well. Although this point is made clearer and supported in later parts of the paper, for now I would note that generally most of the traits of corporate criminal liability can be made available in corporate civil liability. Indeed, the plethora of forms of corporate civil liability are a testament to this fact.

one of the corporate liability strategies along the continuum that has strong enforcement devices, but not strong procedural protections. This is clearly preferable to relying on corporate criminal liability because we have obtained the desirable traits without the undesirable ones. In light of this corporate criminal liability, as defined above, would be the desirable liability strategy only when *substantially all of its traits* were socially desirable.¹⁶¹ When only some traits are desirable then it is preferable to rely on a liability strategy along the continuum that has only the desirable traits rather than corporate criminal liability with desirable and undesirable traits.

We may then ask what label to place on the corporate liability strategies along the continuum between corporate criminal and corporate civil liability. However, the label placed on them is unimportant because what matters is the traits they possess. Thus, we could label these corporate liability strategies as enhanced corporate civil liability, mixed trait corporate liability, reduced corporate criminal liability or something else and it would not affect my analysis in any significant manner.¹⁶² However, the majority of the liability strategies on this continuum are normally labeled as forms of corporate civil liability and to maintain consistency with prior literature I also tend to refer to them as corporate civil liability regimes.¹⁶³ Regardless, the important matter is when are the traits socially desirable and that will be the focus of this paper.

Given the framework used in this paper two questions must be asked whenever a particular characteristic of corporate criminal liability is examined. We want to know when, if ever, the trait is socially desirable and also how this trait is, or can be made, available in another corporate liability strategy. This tells us a number of things. First, at the completion of the analysis we will know when substantially all of the traits of corporate criminal liability are socially desirable. In these circumstances it is socially optimal to rely on corporate criminal liability. Second, we will know the circumstances in which only some of the traits of corporate criminal liability are socially desirable. In these circumstances it is optimal not to have all the traits of corporate criminal liability, but to

¹⁶¹ I take as the social goal the minimization of the total social costs of offenses which in the context of corporate offenses are the cost of reducing the number of offenses to a certain level and the cost of enduring the offenses at that level.

¹⁶² Enhanced corporate civil liability could refer to a liability strategy with traits 1, 2, and a strong 4. Mixed trait corporate liability could refer to a liability strategy with traits 1, 2, and strong 4 and 5. Reduced corporate criminal liability could refer to a liability strategy with traits 1, 2, and strong 3, 4 and 5.

¹⁶³ One could quibble with this approach and ask why is it that we are willing to add traits to corporate civil liability and still label it corporate civil liability yet we are reluctant to subtract traits from corporate criminal liability and still refer to it as corporate criminal liability. I am not certain why these systems have been labeled as they have, but it is relatively unimportant to the analysis.

rely on a corporate liability strategy that possesses the desirable traits and not the undesirable ones. Knowing how these traits are, or can be, replicated in another corporate liability strategy would prove very helpful to our analysis.¹⁶⁴

The main discussion in this paper begins in Part V with the sanctioning traits of corporate criminal liability, however, before moving onto that analysis two preliminary matters are discussed in section B. These are the first two characteristics of corporate criminal and corporate civil liability, which are the same - liability being imposed on the corporation and that the aim of imposing liability is deterrence.

B. PRELIMINARY CHARACTERISTICS

This section first argues that deterrence is the aim, or at the least the overwhelmingly predominant aim, of corporate criminal liability. Second, given that this is the goal of both corporate criminal and corporate civil liability we need to ask why impose liability on the corporation since it is the agents (i.e., humans) who act and who need to be deterred not the corporation.

Much debate has surrounded the aim of imposing liability on a corporation.¹⁶⁵ In the civil sphere most commentators now agree that the aim is deterrence.¹⁶⁶ Undoubtedly deterrence is a key concern for corporate criminal liability,¹⁶⁷ but criminal liability in general has other purposes besides deterrence (i.e., retribution, rehabilitation, incapacitation (restraint) and education).¹⁶⁸ We must then ask whether these other purposes apply in the case of corporate criminal liability.

¹⁶⁴ I refer to the basic model of corporate civil liability plus some traits as a form of corporate civil liability, but when the traits that are added make the liability regime identical to corporate criminal liability then I will refer to it as corporate criminal liability.

¹⁶⁵ See references from Part II C.

¹⁶⁶ *Id.*, and see also J.T. Byam, *Comment: The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582 at 583-586 (1982); Kraakman, *supra* n 71; Stone, *supra* n 71 and references in *infra* notes 173 to 178.

¹⁶⁷ See GRUNER, *supra* n 2, at 76-148 plus *Developments in Law*, *supra* n 108, at 1231-1241 and B. Fisse, *The Social Policy of Corporate Criminal Responsibility*, 6 ADEL. L. REV. 361 (1978).

¹⁶⁸ Criminal law jurisprudence has put forward at least five rationales to justify criminal sanctions: rehabilitation, restraint, deterrence, education and retribution. See, e.g., MODEL PENAL CODE @ 1.02 (proposed Official Draft, 1962); W. LAFAVE & A. SCOTT, CRIMINAL LAW (1972) at 5; H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35-61 (1968); *Developments in Law*, *supra* n 108, at 1231-1241 and B. Fisse, *supra* n 167. See also *supra* n 66 and Judge Learned Hand's comments.

The retributive theory treats punishment as the proper response to an offender's acts of blameworthiness.¹⁶⁹ Moral culpability, the crucial prerequisite of the retributive theory, requires actors to have knowledge of their past actions or some form of mens rea. A corporation cannot possess knowledge and intent as it has no mind.¹⁷⁰ Without these traits corporations cannot be morally culpable and thus there is no retributive justification for punishing them.¹⁷¹ In light of this almost all commentators accept that retribution is not an important aim of corporate criminal liability.¹⁷² Many of the other rationales for criminal sanctions, such as restraint, education and rehabilitation of corporations that violate the

¹⁶⁹ See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 101-07 (Bobbs-Merrill ed. 1965); W. LAFAVE & A. SCOTT, *CRIMINAL LAW* (1972) at 21-25; H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* at 10-16 (1968); See also *Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1231-33 (1979) and at 1237 ("even when the activity proscribed by law is not in itself morally wrong, the knowing violation of the law may be morally blameworthy"). Of course corporations cannot knowingly violate any law.

¹⁷⁰ The law has dealt with this by treating corporations as if they were persons. Nevertheless, corporations are "persons" in legal fiction only, not in reality. See J.R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 93-95 (1976) and H. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109. See also *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339, 445 (1854) ("Corporations cannot be indicted for offenses which derive their criminality from evil intention"). However, as corporations developed into the predominant players in the United States' economy, courts and legislatures attempted to inject elements of retributive theory into the laws governing corporations. See, e.g., *New York Central & H.R.R.R. v. United States*, 212 U.S. 481, 495 (1909). See also H. Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME LAW. 173, 178-79 (1979); Comment, *Corporate Criminal Liability*, 68 NW. U.L. REV. 870, 71 (1973). See also *United States v. U.S. Gypsum*, 438 U.S. 422 (1978) (Sherman Act requires intentional misconduct before a violation can be found). See generally Mathews & Sullivan, *Criminal Liability for Violations of the Federal Securities Laws: The National Commission's Proposed Federal Crime Code, S. 1, and S. 1400*, 11 AM. CRIM. L. REV. 883 (1973).

¹⁷¹ But see P. French, *Types of Collectivities and Blame*, 56 PERSONALIST 160, 166 (1975) (corporations "can be justifiably held blameworthy . . ."); *Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1243 (1979) ("corporate moral fault may be said to depend on [the corporation's] internal processes"). Certainly one can critique a corporation's internal processes, but the corporation itself did not create these processes the people within the corporation did and if anyone is at fault they are. In any event, corporations cannot be punished as individuals can. See also Byam, *supra* n 166, at 585 (n.21). See also GRUNER, *supra* n 2, §§ 2.3.1 and 2.3.5; References in *supra* n 74 and SHAME, RESPONSIBILITY AND THE CORPORATION (H. Cutler ed., 1986). Occasionally judicial reasoning enters the fray too. See e.g., *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 661 (2d Cir. 1989) where the court suggested that criminal contempt sanctions based on the actions of corporate employees serve to punish corporations and vindicate the authority of the court implementing the judicial order that was violated. One wonders why not sanction the employee - would this not reaffirm the authority of the court?

¹⁷² *Developments in Law*, *supra* n 171, at 1234-1238; Byam, *supra* n 166, at 583-585 and Coffee, *supra* n 14, 255. Occasionally, some commentators suggest that a retributive justification may be present as corporate criminal liability provides society with an avenue in which to direct their anger and displeasure. This draws some analogy from medieval practices of blaming the instrument of wrongdoing, such as a sword or a cart's wheel, for the harm that has occurred and thereby helping participants feel avenged. See GRUNER, *supra* n 2, at 139-144. See also A. W. Alschuler, *Ancient Law and the Punishment of the Corporation: Of Frankpledge and Deodand*, 71 B.U.L.REV 307 (1991). The idea that there is a retributive need in society so great that it requires punishing non-human entities and labeling them criminal seems in need of empirical support. Also to desire this we need to have a situation where we want to use the criminal label for retribution purposes, but cannot find anyone to attach the label to. Thus, in order to "quell" society's thirst for revenge we impose the criminal label on the corporation to prevent something undesirable from happening (what exactly is not clear). This also seems to suggest that people would not notice that the "person" being blamed does not exist or may be they do not care. I am not sure this is likely. In any event, corporate criminal liability is probably more costly than blaming a sword, since it involves trial, imposition of sanctions and legal fees none of which are present when blaming a sword (the owner of the sword may not care about criminal liability, but the owners of the corporation do care).

law, are as one commentator puts it "unnecessary, impractical, or nonsensical".¹⁷³ It is then clear that the predominant, if not exclusive, purpose of corporate criminal liability is deterrence.¹⁷⁴

Given that deterrence is the predominant aim of imposing liability, whether criminal or civil, on a corporation we need to inquire into how is deterrence served by imposing liability on the corporation.¹⁷⁵ Corporate liability appears a little odd from a deterrence perspective since it requires the imposition of liability on an entity which has no body with which to act nor mind with which to think and hence cannot and need not be deterred.¹⁷⁶ In reality, the corporation is being held liable for the acts or omissions of its agents and it is the agent's behavior we are trying to influence. Furthermore, it is much more common for the corporation to be made liable in practice rather than its managers and employees, even though it is the managers or employees who act and who need to be deterred. It then becomes important to examine the rationale for this situation.¹⁷⁷

Corporate liability is only one type of liability strategy that society can adopt to regulate behavior in and around a corporation. Other options include direct managerial or individual liability, third party liability strategies and others. Why then do we have corporate liability given the alternatives that are available? Answering this question requires a cost-benefit comparison of corporate liability to other liability strategies.¹⁷⁸ For corporate liability to be of some value in deterrence terms we need to show first that corporate liability can deter the managers or employees as does individual (or direct) liability and second that corporate liability has some advantage over direct managerial liability that would explain the tendency to rely on corporate liability more frequently than

¹⁷³ See J.T. Byam, *Comment: The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582 (1982) at 583-586. See generally K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 2-6 (1976); M. GREEN, *THE CLOSED ENTERPRISE SYSTEM* 162 (1972) and H. PACKER, *supra* n 168, at 356. One may note that restraint of the corporation can be achieved in criminal proceedings through the use of probation and in civil proceedings through injunctions as discussed in Part V A.

¹⁷⁴ Federal Law has identified "offender reform and specific deterrence of offenders as primary goals of criminal sentences for offenders including corporations." GRUNER, *supra* n 2, at 144. See also 18 U.S.C. § 3553(a); S. Rep. No. 225, 98th Cong., 2d Sess. 76, 96 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182. See also Coffee, *supra* n 14, at 285.

¹⁷⁵ See GRUNER, *supra* n 2, ch.3 to 7; *Developments in Law*, *supra* n 171, at 1247-1248. Corporations can be held criminally liable in the US under both Federal and State Law. The focus of this paper is on Federal Law.

¹⁷⁶ The American Law Institute's Model Penal Code offers a different approach to attributing liability. See the discussion in Part II A and *Developments in the Law*, *supra* n 171, at 1251-1253; MODEL PENAL CODE §§ 2.07(1)(a), (c), 2.07 (4), and 2.07(5) (1962) and R. S. GRUNER, *CORPORATE CRIME AND SENTENCING* (1994) pp 292-321.

¹⁷⁷ For a much more in depth and thorough discussion of when corporations are liable and why please see R.H. Kraakman, *supra* n 71 and R.H. Kraakman, *Gatekeepers: The Anatomy of the Third Party Enforcement Strategy*, 2 J. L. ECON. & ORG'N 53 (1986).

¹⁷⁸ See Kraakman, *supra* n 71, at 857-862.

direct liability. The arguments that suggest under what circumstances corporate liability is socially optimal are quite well known and are briefly described below.¹⁷⁹

Both direct liability and corporate liability influence the incentives of managers and employees. Direct liability, as the name indicates, directly influences the managers' or employee's behavior by imposing a penalty on them for committing certain undesirable acts. Corporate liability works somewhat more indirectly. Since corporations are profit maximizers, fines for offenses can effectively deter socially undesirable corporate activity.¹⁸⁰ By imposing sanctions on the corporation for the acts of managers or employees the corporation's value would presumably be decreased. The shareholders bear the brunt of this decrease and would therefore have an incentive to encourage managers not to commit these undesirable acts (assuming that the benefit from the acts does not outweigh the costs to the shareholders in lost value). Shareholders can do this by tinkering with the incentives of managers and employees in their contracts to induce them not to engage in certain types of activities.¹⁸¹ The shareholders can also sell their shares and this could result, if a large enough portion is sold, in replacement of the managers through takeover or proxy contest. Consequently, shareholders can influence managers' or employees' incentives in a manner similar to direct liability so that deterrence could be achieved through imposing liability on the corporation and conscripting it to influence the incentives of wrongdoers.¹⁸²

¹⁷⁹ Please see A.O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1245-1256 (1984), C. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980), L. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability Accidents*, 70 CAL. L. REV. 1345 (1982) and R.H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Control*, 93 YALE L.J. 857, pp 858-867 (1984) for an excellent and thorough discussion of this issue.

¹⁸⁰ Byam, *supra* n 166, at 586-588. Please see also *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1365 (1979) and Riley, *Taming G.M. . . . and Ford, Union Carbide, U.S. Steel, Dow Chemical . . .*, in *WITH JUSTICE FOR SOME* (B. Wasserstein & M. Green eds. 1970) at 207.

¹⁸¹ This also forces the corporation to internalize the costs of production and therefore results in a production level that reflects the true cost of the product.

¹⁸² If profits decline or are otherwise unsatisfactory then there would normally be undesirable consequences for managers, as described in the text. Thus, corporations run by rational profit maximizers will decide to commit an offense if the difference between the expected benefits of the offense to the corporation and the expected costs of the offense is positive. The expected cost to a corporation of committing an offense is the probability that the government will impose a sanction times the severity of the sanction. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed., 1992) at 163-167. Occasionally, managers will still commit wrongs. "The temptation may be said to be strong, when the pleasure or advantage to be got from the crime is such as in the eyes of the offender must appear great in comparison of the trouble and danger that appear to him to accompany the enterprise . . ." J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in *THE WORKS OF JEREMY BENTHAM* 67 (ch. XI, @ XL) (Bowring ed. 1843). For a study indicating criminal activity often is the result of rational calculations, see Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* (G. Becker & W. Landes eds. 1974) 68.

The ability of shareholders to set up effective incentives is tempered by their ability to monitor and observe the activities of the corporation's managers and employees.¹⁸³ If they can cheaply observe employee behavior then corporate liability can work as effectively as direct civil liability.¹⁸⁴ However, if observing managers is prohibitively costly or managers' activities are imperfectly observable then the incentives are less effective.¹⁸⁵ Given this we often need some other reason(s) to explain the predominant reliance on corporate liability.

Two common reasons for relying on corporate liability over direct liability are that agents are often judgment proof and shareholders are better risk bearers than managers or employees. The first and primary reason is that corporate liability may overcome some of the complications that arise when agents are judgment proof.¹⁸⁶ For example, if we rely exclusively on direct liability and agents are judgment proof then agents are likely to invest inefficiently little in loss avoidance. Assuming that damages are set optimally then the agent's expected loss is less than the amount of expected damages and thus the agent has a lesser incentive to prevent loss than they would if they were to pay the full amount of expected damages.¹⁸⁷ In addition, when agents are judgment proof, then the perceived costs for the corporation's products are less than the true economic cost and that may increase the level of production in that area of activity beyond what would be optimal. Corporate liability may overcome these problems when the combined assets of the corporation and the agent are sufficient to meet expected damages.¹⁸⁸ The corporation is then forced to internalize the costs of harm and it has the incentive to provide incentives for its managers to avoid harm (assuming agents can be cheaply monitored). Further, since the

¹⁸³ Sykes, *supra* n 179, pp 1236-1239 and pp 1245-46.

¹⁸⁴ The actual comparison requires detailing who is monitoring who in each liability strategy. In direct liability the government or private party is monitoring the manager. In the case of corporate liability we have the government or private party monitoring the corporation (and coincidentally managers) which then monitors the manager. If the latter approach is cheaper than the former then clearly the latter would be preferable to direct liability.

¹⁸⁵ Sykes, *supra* n 179, pp 1247-1256.

¹⁸⁶ The discussion here relies on Sykes, *supra* n 179, pp 1244-1257.

¹⁸⁷ For example, let us assume that the expected benefit from a certain act to the actor is \$20 and the probability of conviction is 50% and the optimal fine is \$40. This should result in optimal deterrence. If the actor's assets are only \$30 then the expected sanction for them is \$15 (assuming the probability of conviction cannot or should not be changed), which is less than the \$20 they can expect to benefit and thus they would go ahead with the activity.

¹⁸⁸ See Sykes, *supra* n 179, pp 1244-1255. There are other alternatives to corporate liability to overcome the problem of judgment proof agents - such as individual criminal liability for the agent. See Kraakman, *supra* n 71, at 867-876 and 876-888 and A.M. Polinsky & S. Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239 (1993) (discussing when imprisonment may be socially desirable and what costs it may entail). Generally, unless even corporate liability is unable to deter its agents or both the corporation and the agent are judgment proof corporate liability is probably a cheaper alternative to individual criminal liability. Please see *infra* n 193-195 for a more thorough discussion.

cost of harm is internalized the cost of production reflects true economic cost and the level of production would be closer to the optimal level. If, however, agents cannot be cheaply monitored, for any reason, this efficiency enhancing aspect of corporate liability is reduced, but not eliminated. In these cases it is debatable whether corporate liability is preferable to direct liability.¹⁸⁹

However, the possible advantages of corporate liability do not end with overcoming the problems with judgment proof agents. A secondary benefit of corporate liability is that it may provide more efficient risk sharing between principal and agent. The normal assumption in the agency literature is that managers are risk averse and shareholders as a group are normally risk neutral.¹⁹⁰ Therefore, managers bear risk less efficiently than shareholders. From this one can move on to say that managers also bear legal risk rather inefficiently. Thus, if one wanted a manager to bear legal risk we would have to compensate them upfront for this in the form of a risk premium. The risk premium is, by hypothesis, going to be higher than what shareholders will be offered to bear the risk instead, as they are better risk bearers. Thus, corporate liability by reallocating the risk of loss results in a social gain which normally does not sacrifice deterrence gains either.¹⁹¹ This benefit may be obtained by relying on managerial insurance in some cases without corporate liability, but corporate liability certainly does provide this benefit.

It is these concerns that usually make the most compelling case for corporate liability and explain why it is the predominant form of liability when it comes to regulating activities within or related to a corporation. However, direct liability still exists either by itself or as a complement to corporate liability. The primary reason for this is that corporate liability may not be able to achieve the optimal result by itself. Indeed considerable scholarship has examined when corporate liability may fail and what is the most effective

¹⁸⁹ For a more thorough discussion of the complications of expensive or imperfect observability please see Sykes, *supra* n 179, pp 1247-1256.

¹⁹⁰ Managers are risk averse because all of their human capital is invested in one thing - the corporation- and thus a downward turn for them can result in large financial loss that could leave them with almost nothing. In other words a manager's work and effort for a corporation are undiversified. Shareholders on the other hand, presuming the existence of a smoothly functioning securities market, are better able to diversify their risk by holding a diversified portfolio of investments. This results in them being more or less risk neutral. See, for example, Kraakman, *supra* n 71, at pp 864-867 for most of the discussion in the following paragraph.

¹⁹¹ The corporation and the manager may be able to negotiate the optimal risk sharing agreement, but this assumes that there are no barriers to negotiation and that it is not too costly. For further discussion please see Sykes, *supra* n 179, at 1245 and Sykes, *supra* n 110. Managers could also simply purchase insurance for this, but my suspicion is that they would then require the corporation to pay for this insurance and if insurance rates are set at an actuarially fair rate then the amount the corporation pays to the insurance company would equal the amount its pays implicitly by insuring the manager through corporate liability. The difference would be who could monitor the manager better the corporation or the insurance company.

response to it.¹⁹² Corporate liability may fail for a number of reasons which can be usefully categorized under the three headings of asset insufficiency,¹⁹³ sanction insufficiency¹⁹⁴ and enforcement insufficiency and in these circumstances reliance solely on corporate liability is not optimal.¹⁹⁵ Nonetheless, corporate liability for the acts of its agents is generally the preferred form of liability to achieve optimal deterrence. Having set out why a corporation is made liable we can then proceed to discuss when the optimal form of liability would be criminal. The rest of the paper is devoted to this issue.

V SANCTIONING CHARACTERISTICS

In this Part the discussion concerns the types of sanctions that are available in corporate criminal liability and when they may be socially desirable. The arguably unique sanction of corporate criminal liability is its possible stigma effect. Stigma may be a useful sanction at times when employed against an individual, but it is another matter when we use it against a corporation. The question is then when is it desirable to rely on stigma as a

¹⁹² See Kraakman, *supra* n 71, at pp 867-896.

¹⁹³ Asset insufficiency occurs when the corporation does not have enough assets to pay for the harm caused by the manager or employee immediately (i.e., the optimal fine is \$100 and the corporation has \$90 in cash now). In these circumstances the corporation externalizes some of the cost of production and this results in a reduced incentive to take optimal precautions. A solution to this is to impose liability on the manager or employee to make up for this. However, by imposing liability on managers we make them bear risk, which we know they do inefficiently. In order to reduce risk bearing costs we would like to find someone who was better able to bear risk than the manager and still not lose the deterrence benefits. The most common approach is for the corporation to purchase directors and officers insurance for its top managers and directors. Insurance companies are likely to be better risk bearers (pool risks, diversify) than managers and insuring the manager results in a better sharing of risks and is thus preferred. Consequently, the response to asset insufficiency is to impose shiftable liability on the manager. *In this manner the corporation pays for the harm, but not immediately.* Further, if the manager's activity can be cheaply monitored by the corporation or the insurance company then the manager's incentives to take optimal care to avoid loss are maintained. However, if monitoring is difficult or costly then there may be some reduction in incentives for loss avoidance. It is here that there is a trade off between risk sharing and loss avoidance incentives. See Kraakman, *supra* n 71, pp 869-871.

¹⁹⁴ Sanction insufficiency is when the legal system cannot charge a price high enough to deter firm wrongs for any reason, including asset insufficiency. Thus, the harm caused may be \$1,000 and the corporation has \$90 now and its total net present value discounted back to today is \$900. Here we have both asset insufficiency and sanction insufficiency, but if the total net present value was \$1,100 we would have only asset insufficiency. The response to sanction insufficiency is to impose direct liability on managers that cannot be shifted by insurance or is impossible to shift (e.g., criminal liability). In these circumstances we have absolute liability on the manager. Here the net benefits of absolute liability plus corporate liability outweigh the net benefits of shiftable liability plus corporate liability. See Kraakman, *supra* n 71, pp 867-888.

¹⁹⁵ There may be cases where even imposing liability on the corporation and the manager is not enough and a third party may need to be called in. This arises due to enforcement insufficiency which is when the legal system cannot even detect or prosecute a significant proportion of offenses. The response to this is normally to enlist the support of some third party to help enforce the law. Often these may be gatekeepers or at times whistleblowers. The point is that third parties may even be brought into the broil to achieve the optimal level of deterrence. In essence the lawmakers impose liability not because they believe the corporation can influence directly the incentives of the employee but because the corporation could prevent misconduct either by withholding its support which is necessary for the fruition of the offense or by telling the enforcement authorities when a wrong is about to occur or has already occurred. See Kraakman, *supra* n 71, at 888-896.

sanction in the corporate context as compared to other sanctions we could employ. This Part examines when the different types of sanctions available in the corporate context are desirable and where the stigma sanction factors in. The sanctions considered are (i) sanctions imposed by law (section A) including fines, probation, debarment and loss of license, tax and bankruptcy consequences, and other related concerns and (ii) sanctions imposed by society or reputational penalties (section B). Throughout the analysis mention is made of how these sanctioning characteristics may be replicated in other corporate liability regimes.

A SANCTIONS IMPOSED BY LAW

Legislatures permit judges and administrative agencies to impose many sanctions in criminal proceedings including cash fines, probation,¹⁹⁶ debarment,¹⁹⁷ loss of license,¹⁹⁸ tax and bankruptcy consequences¹⁹⁹ and other related penalties.²⁰⁰ The non-monetary penalties such as imprisonment are not applicable in the corporate context.²⁰¹ Thus, the discussion concerns sanctions that impose some kind of monetary loss on the corporation.

In determining which types of sanctions to impose the primary consideration is that the socially optimal sanction (or mix of sanctions) is that which obtains optimal deterrence

¹⁹⁶ See R. Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1 (1988) and J.C. Coffee, Jr., R.S. Gruner, & C. Stone, *Standards for Organizational Probation: A Proposal to the United States Sentencing Commission*, 10 WHITTIER L. REV. 77 (1988). See also US SENTENCING COMMISSION, SENTENCING GUIDELINES MANUAL 393 (1993), chapter 8.

¹⁹⁷ Debarment is an extended exclusion preventing the affected party from serving as a government contractor for a lengthy period of time specified in the debarment order (normally less than three years). A suspension is a shorter bar from government contracting and normally lasts 18 months. GRUNER, *supra* n 2, §§ 13.2 to 13.3 (pages 748-790).

¹⁹⁸ GRUNER, *supra* n 2, at § 13.2.3 and page 759. Illegal conduct may result in a firm being disqualified from receiving government licenses to conduct regulated activities. Revocation is also a possibility. See for example, 10 C.F.R. §§ 50.34 and 50.57.

¹⁹⁹ See GRUNER, *supra* n 2, § 1.9.2 discussing the denial of tax deductibility for criminal fines and §§ 5.6.1. to 5.6.4 discussing the possible nondischargeability of criminal fines in bankruptcy for corporations.

²⁰⁰ See K. BRICKEY, CORPORATE CRIMINAL LIABILITY (2d ed., 1992) §§ 1.06 to 1.19; GRUNER, *supra* n 2, at 756-759.

²⁰¹ Let us assume that the highest fine that can be imposed on anyone, individual or corporation, is the amount of wealth they/it has. Thus, the highest sanction is limited, de facto, by the wealth constraint. However, there may be some cases where the harm caused by the activity is greater than the person's/corporation's wealth and where insurance is either inappropriate or unavailable. In this case the monetary sanction provides inadequate deterrence. If the added benefit in deterrence obtained from the non-monetary sanction exceeds the costs of imposing that sanction (e.g., staffing prisons, etc...) then opting for that sanction appears optimal. See for more, A.M. Polinsky & S. Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984); S. Shavell, *Criminal Law and the Optimal Use of Non-Monetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985) and A.M. Polinsky & S. Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239 (1993). Occasionally penalties such as imprisonment can be made available in the civil sphere but this is rare, see Mann, *supra* n 158, at 1809-1810.

at the lowest sanctioning costs for society.²⁰² The following section sets out why normally this results in reliance on cash fines as the primary sanction. It also describes when sanctions such as debarment and probation may prove optimal *in addition* to a cash fine.

Cash fines are generally the most preferred sanction as they are the socially cheapest method in which to obtain optimal deterrence.²⁰³ For example, let us assume that the optimal expected sanction to deter a certain undesirable activity is \$20. Further, the probability of detection and conviction is 50% and is assumed to be fixed for now. In light of this the optimal sanction would be \$40 (i.e., an expected sanction of \$20). We have the choice of using cash fines of \$40 or using a debarment or loss of license remedy that would have the effect of a \$40 loss to the corporation today. If both types of sanctions are available our preference should be for that sanction which achieves optimal deterrence at the lowest sanctioning costs.

The costs of imposing a cash fine are the costs incurred in determining what the optimal sanction should be and the costs of effecting the transfer of that cash fine immediately upon judgment. The debarment remedy requires that we bar the corporation from engaging in a certain type of activity, by forcing it to lose its license to practice the activity or suspending it from practicing for some time, and thus its costs would be different to those for cash fines. First we must determine what the optimal debarment sanction should be - this involves determining the optimal sanction as with cash fines *plus* determining whether barring a corporation from engaging in some activity will cost the corporation exactly \$40 (the amount of the optimal sanction). To ascertain the effect of debarment on the corporation would require estimating the corporation's profits for future years, hypothesizing how much is lost by the imposition of the penalty each year and how much this would be worth in present day dollars (\$40 lost 5 years from now is not the same

²⁰² See A.M. Polinsky & S. Shavell, *The Optimal use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984) discussing why fines are generally preferred to imprisonment and further why when we may use imprisonment we should first exhaust deterrence opportunities through the imposition of fines and then supplement it with imprisonment rather than relying exclusively on imprisonment (at p 95 and 98). Although this concerns sanctions available only for individuals it highlights that the optimal sanction is the one that achieves deterrence at the lowest sanctioning costs to society. This point is what the reasoning in this section is essentially built upon. For more discussion of similar and related issues please see for example R. A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980); R.A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed., 1992) at 163-167 and 223-231 and K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* (1976) at 112-138 plus G. S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) for a more general discussion of how to set the optimal fine (that which minimizes enforcement costs yet maintains optimal deterrence - if at present the probability of conviction is 50% and the optimal expected sanction is 100 then the optimal fine is 200, however if we can reduce the probability of conviction to 25% and raise the optimal fine to 400 we still have an expected sanction of 100 but we may spend less in catching and convicting defendants than when we had a 50% probability of conviction).

²⁰³ Polinsky & Shavell, *supra* n 202.

as \$40 lost today) plus any adverse consequences from the denial of future profitable opportunities that such a sanction may result in.²⁰⁴ These costs are not incurred when we use cash fines.²⁰⁵ Thus, the costs associated with a loss of license/debarment sanction are higher than those for cash fines and we should prefer to use cash fines as they are the cheapest method in which to achieve optimal deterrence.²⁰⁶

However, if the defendant corporation cannot pay the entire amount of the optimal cash fine at the time of judgment then the fine will not be enough to obtain optimal deterrence.²⁰⁷ For example, if the corporation has only \$30 of assets available to pay a cash fine then it would not be optimally deterred (we need \$40 in cash fines for that). Given that the judgment proof corporation is not adequately deterred we need to consider other sanctions that may improve deterrence. A loss of license for three years may result in a present value loss today of \$40 (e.g., \$16 this year, \$16 next year and \$16 in year three), but it does not place an *immediate* drain on the corporation's cash assets and could be imposed on a corporation even if it was judgment proof with respect to the optimal cash fine.²⁰⁸ This provides a method in which to obtain optimal deterrence and should be used when the added deterrent benefits from using this sanction are greater than the increase in sanctioning costs attributable to the use of this sanction (a condition relevant to all sanctions).²⁰⁹ However, the fact that the loss of license sanction is useful in this situation does not result in exclusive reliance on it. The optimal penalty structure in this example is to impose a cash fine of \$30 and then a loss of license penalty with a present day value of \$10 as this has the same deterrent effect as a \$40 loss of license penalty, but would be socially cheaper to impose.²¹⁰

²⁰⁴ Note that a preferable option to even the loss of license and similar remedies may be to simply allow for the payment by installment of cash fines each year as this avoids any longer term consequences from being denied opportunities to profit.

²⁰⁵ See R.A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed., 1992) at 421-423. In addition to these costs a loss of license sanction also incurs all the costs associated with the imposition of fines (except transferring funds, but these are trivial).

²⁰⁶ This is reasoning analogous to that in Polinsky & Shavell, *supra* n 202.

²⁰⁷ This argument is analogous to the argument about judgment proof managers in Part IV B. See *supra* n 187.

²⁰⁸ I have assumed that suffering \$16 loss for three years is something that the corporation has the capacity to meet over those three years, but the corporation does not have \$30 in liquid cash assets right now. This also has limits, we cannot impose a sanction greater than the corporation's net present value today however we calculate it. If we need still greater sanctions for deterrence we may consider imposing sanctions on managers or third parties, see Kraakman, *supra* n 71 and n 194.

²⁰⁹ For now I will assume that the marginal increase in deterrence is greater than the marginal increase in sanctioning costs.

²¹⁰ Assuming that a loss of license penalty costs 80 cents for \$40 and a cash fine 40 cents for \$40 then a \$10 loss of license penalty would result in 20 cents in sanctioning costs and the \$30 in cash fines would have a sanctioning cost of 30 cents or total sanctioning costs of 50 cents, which are lower than the 80 cents incurred if we relied exclusively on the

In light of this when the corporation is judgment proof it may be desirable, in order to obtain optimal deterrence, to supplement a cash fine with a sanction such as a loss of license sanction. The type of sanction we may prefer to rely on (e.g., loss of license, probation or debarment) may depend on the specifics of the corporation and on how severe we want the penalty to be. Debarment (i.e., denial of government contracts for some time), for example, would have its greatest effect in cases where the primary customer or supplier to the firm was the government.²¹¹ When the government is not the primary supplier or customer of the corporation and we still desire a large penalty we may use loss of license as that would deny the corporation from dealing with all of its customers (non-governmental ones and governmental ones) in the market for which they had the license. Probation may be desirable when we want to impose penalties on the corporation in many different spheres of its activity or when we simply want to rearrange or improve some of its internal procedures.

Having set out when such sanctions may be socially desirable it is also worth noting that all of these sanctions are available in other corporate liability regimes. Fines are the criminal law equivalent of civil law damages and the other sanctions can also be achieved in corporate civil liability. For example, if price fixing is a criminal offense and debarment is based on being convicted for a criminal offense then a criminal conviction for price fixing could result in debarment. This could also be achieved by redrafting the debarment laws to say that civil sanctions for price fixing result in debarment or can result in debarment at the discretion of the court/government agency bringing the case.²¹² Similar arguments can also be made for loss of license, denial of tax deductibility,²¹³

loss of license penalty. For analogous reasoning see Polinsky & Shavell, *supra* n 202, at 95 and 98. I have assumed that the sanctioning costs are linear (i.e., they do not have diminishing marginal returns), however, this assumption does not significantly affect the analysis.

²¹¹ See GRUNER, *supra* n 2, §§ 13.2 to 13.3 (pages 748-790).

²¹² Such a system may increase one-time drafting costs slightly, but would reduce the recurring costs of prosecution as we are using cheaper civil proceedings (they do not require strong procedural protections) to enforce the law.

²¹³ The non-deductibility of criminal fines means that the impact of a criminal fine of \$30 is greater than the impact of a civil sanction of \$30 since the civil sanction can be used as a deduction when paying taxes. The question is when might denying tax deductibility be a useful feature of a sanctioning system. We could achieve a net impact of \$30 through a civil fine (even if tax deductible) by imposing a cash fine of \$45. However, if the most a corporation can pay as a cash fine is \$30 then clearly imposing a \$45 cash fine is not plausible and imposing a \$30 cash fine would result in less than optimal deterrence because the net impact is less than \$30 since they gain some tax advantages and for optimal deterrence we need the impact to be \$30. In such a situation we can deny tax deductibility and impose a cash fine of \$30 and its net impact will be \$30 or that needed for optimal deterrence. Note that denying tax deductibility costs less than loss of license as it would not involve calculating future profit streams and so on. In fact, denying tax deductibility would have about the same social costs as imposing cash fines. Thus, we should rely on fines first and then denying tax deductibility and then loss of license and so on. It is worth noting that just because denying tax deductibility increases the sanction without increasing sanctioning costs above those for fines is not a reason to suggest abolishing tax

probation (the criminal law equivalent of injunctions)²¹⁴ and exclusion from government programs and benefits.²¹⁵ Indeed, some of these sanctions are already available if a corporation is found liable in a civil case.²¹⁶ Having discussed when these sanctions are desirable and how they can be replicated in other corporate liability regimes we can move onto to our next area of inquiry.

B SOCIETALLY IMPOSED SANCTIONS - REPUTATIONAL PENALTIES AND STIGMA

It is not only the courts and Congress that impose sanctions on corporations, but society as well in the form of lost reputation or stigma. Thus, as the final sanctioning characteristic of corporate criminal liability the discussion focuses on reputational loss. A discussion about reputational loss involves a number of questions. First, in section 1, I examine what we mean by reputation in the corporate context. I isolate two types of reputational effects of corporate criminal liability - one on the corporation and the other on

deductibility. Undoubtedly tax deductibility for some civil sanctions is designed to foster some purposes and as such denying such deductibility may be upsetting some other societal goals and should only be attempted once we have exhausted our opportunities for deterrence using cash fines and the added deterrent gains are greater than the effects on tax policy. See GRUNER, *supra* n 2, § 1.9.2 on the denial of tax deductibility for criminal fines and §§ 5.6.1. to 5.6.4 on the possible nondischargeability of criminal fines in bankruptcy.

²¹⁴ In the case of individual offenders probation is a method in which to restrict the activities in which the offender can engage and presumably to reduce their opportunities for causing harm in the future. See R. Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1 (1988) and J.C. Coffee, Jr., R.S. Gruner, & C. Stone, *Standards for Organizational Probation: A Proposal to the United States Sentencing Commission*, 10 WHITTIER L. REV. 77 (1988). See also US SENTENCING COMMISSION, SENTENCING GUIDELINES MANUAL 393 (1993), chapter 8. This is useful if we find that there is a limit on how much we can fine a defendant, in effect a wealth constraint, and we yet need more sanctions to achieve the desired level of deterrence. See A.M. Polinsky & S. Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984). See Gruner at 11-26. By restraining activity we can achieve this, but this has costs in itself and should only be used when the net benefit is greater than the net benefit of other options, such as monetary sanctions. A corporation can be put on probation and have its activities restricted. See US Sentencing Commission, chapter 8 § 8D and § 8E. However, this sanction is not unique to corporate criminal liability. In effect, this sanction is the criminal law equivalent of a civil injunction for a corporation. In fact, when considering proposals for corporate probation as a penalty within the Federal Sentencing Guidelines considerable reference was made to the use of injunctions against the corporation in civil contexts. See Coffee et al. There may be some distinction between probations and injunctions in that they may be enforced differently, but this strikes me as a minor point since the maximum enforcement for breach of probation may be imprisonment - something unavailable for corporations. Perhaps the speed of enforcement may be greater for probation violations, however, this is not very convincing since breaches of injunctions are rather quickly enforced in many areas - for example intellectual property and interim injunctions. See A. R. MILLER & M. H. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL* (2d ed., 1990).

²¹⁵ GRUNER, *supra* n 2, § 13.2.3 (pages 756-759); M. Cohen, *Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts, 1984-1987*, 26 AM. CRIM. L. REV. 605, 615 (1989) and WHITE COLLAR CRIME COMMITTEE OF THE A.B.A. SECTION OF THE CRIMINAL JUSTICE, *COLLATERAL CONSEQUENCES OF CONVICTIONS OF ORGANIZATIONS* 31 (1991). I am providing a list of examples of where each of these remedies may be found: Exclusion from government programs (42 U.S.C. §§ 1320a-7(a), (b); Debarment and suspension (48 C.F.R. § 9.403 for example) and for loss of licenses (for example 10 C.F.R. §§ 50.34 and 50.57). For tax consequences see GRUNER, *supra* n 2, § 1.9.2 and for dischargeability of debts see GRUNER, *supra* n 2, § 5.6.

²¹⁶ *Id.*

its top management. Section 2 examines the first of these effects and asks when is imposing reputational loss on a corporation a socially desirable sanction. Having discussed when reputational loss may be a desirable sanction section 3 examines whether corporate civil liability can offer a reputational penalty similar to that of corporate criminal liability. Finally, in section 4, I examine when is imposing a reputational loss on top management through their corporation's conviction a socially desirable sanction. The analysis in this section indicates that reputational loss in any form is rarely a socially desirable sanction in the corporate context.

1. *What is reputational loss in the corporate context ?*

We begin with the first question, which is what is reputation. The term "reputation" is used in many contexts and carries with it more than one meaning. For individuals reputational loss can mean both an increased reluctance of other people to engage in future trading or dealing with the individual and a sense of shame the individual may feel.²¹⁷ However, for corporations reputational loss refers *only* to the reluctance of others, such as customers and workers, to deal with the corporation in the future. Reputational loss for corporations cannot mean a feeling of shame since a corporation has no soul or mind with which to feel shame or anything else.²¹⁸ Thus, for our purposes reputation, as applied to corporations, is the supracompetitive price that a firm with a good reputation can charge customers for their goods (i.e., like a quasi rent) or the lower wages a "good employer" needs to pay to attract workers.²¹⁹ Although there are many types of corporate reputation I will restrict my attention to the corporation's reputation with its customers. The reasoning developed here is analogous for other areas of corporate reputation.²²⁰ Thus, if the corporation provides lower quality than promised and customers become aware of this the corporation then suffers a loss in its reputation (i.e., customers decide to trade less with the corporations and the corporation cannot charge its supracompetitive price).

²¹⁷ For example, please see D. Charny, *Non-Legal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990). The social desirability of such a sanction on top management is discussed in section 4.

²¹⁸ The now famous quote of Edward, First Baron Thurlow, "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?" cited in J. C. Coffee Jr., "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) indicates this.

²¹⁹ J.M. Karpoff & J. Lott, *Reputational Penalty Firms Bear From Committing Criminal Fraud*, 36 J. L. & ECON. 757 (1993).

²²⁰ Similarly, corporations with reputations for being good employers could attract workers with less monetary compensation than firms with bad reputations as employers and so on.

However, some caveats must be mentioned when corporate reputation is defined in this manner. The first thing to note is that if reputation is something used to charge customers supracompetitive prices then an activity that harms third parties only or primarily is unlikely to show up as a reputational loss for the firm.²²¹ Second, only corporations that have reputations can really suffer a reputational loss and some firms (e.g., fly-by-night operations) are unlikely to be caught by this type of sanction.²²² Consequently, reputation as a sanction is not as complete as cash fines because it misses a number of different situations (little or no reputation firms and harms caused to third parties). This may represent a large proportion of corporate wrongs and brings into question when might reputational loss be a desirable sanction in the corporate context?

2. *When is using reputational loss socially optimal, if ever?*

The issue is then what are the advantages of using reputational penalties/stigma, when they may exist, as opposed to other monetary penalties such as cash fines to obtain higher sanctions if needed for deterrence purposes. For example, if the reputational loss/stigma effect of a conviction is \$1 Million why not increase the cash fine by \$1 Million instead of using reputational penalties/stigma. Arguably, using reputational losses as opposed to cash fines has at least two advantages: (i) reputational losses are socially cheaper than cash fines and (ii) when the corporation is judgment proof with regard to the optimal cash fine a reputational penalty may provide the needed extra deterrence.²²³

Before examining these advantages it is worth noting that my analysis assumes, as does most of the literature, that cash fines and reputational loss are substitutable to some degree. This is so even though cash fines and reputational penalties are imposed by different parties (one by the government and the other by society). However, both cash

²²¹ It may occasionally be possible that a customer, unaffected by the wrong, would not buy the corporation's product due to their acts in another sphere. For example, I may not buy X's toys because the toys are made of petroleum waste that X's transport recently dumped into a river 5000 miles from where I live. I am offended by this and decide not to buy X's products. There may be the rare occasion on which an event that harms primarily third parties (like an oil spill) could result in a boycott of that corporation's goods, but this is considered the exception rather than the rule. Please see Karpoff & Lott, *supra* n 220, at 798-797. Also this strikes me as being something tied to the quality of the act, not the criminal label. In other words if this act occurred and was called civil the reaction would be the same as if it were called criminal.

²²² *Id.*, at 757-760.

²²³ J.C. Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into The Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981) at pp 400-405 and J. Byam, *supra* n 166, at 599-603. This problem is not significant if we view restructuring and receivership as being very effective and quick, however, since this does not appear realistic as a general matter the statement in the text forms our beginning point. We could also consider other methods of dealing with judgment proof problems (sanctioning third parties and so on).

finances and reputation can work as quality assurance devices.²²⁴ If the firm does not provide the promised level of quality then it may be subjected to cash fines or suffer a loss in its reputation and in the prices it can charge. If cash fines are sufficient to obtain the level of quality desired then customers have no need to rely on reputational losses to ensure quality.²²⁵ Therefore, as cash fines increase towards the level needed to obtain the quality desired, reliance on reputational penalties should decrease. Similarly, as cash fines decrease reputational penalties should increase. In some sense then the government, by setting cash fines at a particular level, can influence whether reputational penalties increase or decrease, but perhaps not the exact amount by which they do so. Thus, there is some substitutability between reputational penalties and cash fines. Furthermore, even though the substitutability of these sanctions is not always perfect I will assume that for the vast majority of cases we confront substitutability is nearly perfect.²²⁶ We can then begin our comparison of cash fines and reputational penalties.

First if we can sanction a corporation by using cash fines or reputational penalties (i.e., the corporation is not judgment proof with regard to optimal cash fines) then we must ask why use one sanction rather than the other. Once again the resolution of this issue is based upon which sanction is cheaper in terms of sanctioning costs.²²⁷ Both reputational penalties and cash fines have sanctioning costs. Cash fines have administrative and enforcement costs, such as determining the optimal sanction and then effecting the transfer of funds.²²⁸ In addition, fines often result in customers of non-offending firms paying higher prices because higher fines increase non-offending firms' returns from protecting themselves against false charges.²²⁹

²²⁴ See Karpoff & Lott, *supra* n 220, at 762-766 (n.7 in particular discussing B. Klein & K. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981)).

²²⁵ Presumably, firms will only provide reputational investments if their customers desire it.

²²⁶ See Karpoff & Lott, *supra* n 220, at 762-766 (n.7 in particular discussing B. Klein & K. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981)). Fines and reputational penalties are not perfect substitutes because there are some matters relating to quality that fines may have difficulty in penalizing. For example, if a pizza does not taste as good as it normally does it we will probably have difficulty in setting cash fines to rectify this, but reputational penalties probably work better. Similarly, reputational penalties do not work as well as cash fines for third party harms. Therefore, the two sanctions are not perfectly substitutable, but over a large range of things and sanction levels they are. Note that this does not mean that a large cash fine will not produce a large reputational penalty. If the large cash fine is sufficient for the quality level desired then reputational penalties should be small, but if the large cash fine still does not assure the desired level of quality reputational penalties may persist.

²²⁷ See Karpoff & Lott, *supra* n 220, at 762-766 (n.7 in particular discussing B. Klein & K. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981)).

²²⁸ Karpoff & Lott, *supra* n 220, at 761.

²²⁹ Karpoff & Lott, *supra* n 220, at 761. This cost attaches to any sanction imposed by the law.

However, reputational penalties are also costly. These penalties are costly since they arise from the quasi rents firms obtain when customers pay high prices for the assurance of high quality.²³⁰ Since reputational penalties effectively reduce these quasi rents they result in the destruction of assets and hence are costly. In other words no one receives the reputation the corporation has lost, whereas with cash fines someone does receive the cash fine (the government or a private party).²³¹ In addition, in order to impose the optimal sanction on the defendant (i.e., one that maximized efficiency and was not too high or too low), the government would have to expend resources to determine the monetary penalty a criminal stigma would impose on a corporation.²³² However, corporate sales and profits fluctuate in response to innumerable variables, and this would require the government to wade through sales and income data to determine, *ex ante*, the profit effect of a corporation's criminal conviction.²³³ This could impose an enormous cost on the criminal system, especially as reputational penalties may be subject to considerable "noise" and hence uncertainty.²³⁴ Therefore, reliance on reputational penalties would require the government to expend effort in determining the optimal sanction, the amount of likely reputational loss, and the costs in terms of destruction of assets.²³⁵ Reliance on fines, on the other hand, basically involves the determination of the optimal sanction and possibly slightly higher prices. Therefore, the sanctioning costs associated with reputational penalties should never be less than those associated with criminal or civil fines

²³⁰ Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981).

²³¹ Reputational penalties result in the destruction of assets and in the passing of information to customers. Cash fines result in the passing of the fine from the corporation to the government or private party. If both techniques can be used to achieve optimal deterrence and the desired quality level then it is clear that cash fines are cheaper since there is no asset loss involved but deterrence and quality are maintained. Simply put reputational loss is analogous to someone offering to burn their house everytime they provide inferior quality. No one gets the house once it is burnt.

²³² See Byam, *supra* n 166.

²³³ See Byam, *supra* n 166.

²³⁴ Of course, if the errors in assessing the impact of reputational penalties are evenly distributed between overestimating and underestimating the actual effect we may still achieve the optimal sanction by relying on an average figure, but my suspicion is that reputational errors may be biased in one direction (underestimation) so that even this would be difficult. In addition, there is some chance that reputational loss could be imposed even if there is no finding of liability - a sort of innuendo loss perhaps. Assuming that this sort of innuendo loss is not later corrected (or not completely corrected) then reputation appears to be an even more unreliable sanction.

²³⁵ See H. PACKER, *supra* n 168, at p 361 and *Developments in the Law*, *supra* n 171, at 1366. Coffee highlights six potential problems inherent in a strategy of deterring corporate conduct through adverse publicity: "the government is a poor propagandist; government publicity may be 'drowned out' by the current flood of criticisms of corporations; corporations can mitigate bad press with 'counter-publicity'; the effect of adverse publicity from a regulatory violation is dubious; adverse publicity is a 'loose-canon,' the effect of which is 'wholly unpredictable'; and several civil liberties issues surround the use of adverse publicity as a sanction." J.C. Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) at pp 425-429.

on corporations.²³⁶ Thus, cash fines should be preferred over reputational penalties as they are socially cheaper.

On the other hand, if the defendant corporation cannot pay the entire amount of the optimal cash fine at the time of judgment then the fine will not be as effective in terms of deterrence.²³⁷ However, a reputational penalty may still obtain optimal deterrence even when the corporation is judgment proof with respect to the optimal cash fine. This is because reputational penalties, rather than placing an immediate drain on available corporate assets, reduce corporate value through the share market (i.e., reduce the share price of corporate stock) and thereby provide investors with incentives to adapt behavior.

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This use of reputation is still subject to the same problems as before - inaccuracy and affecting only firms with good reputations and others, but in addition, reputational penalties are not the only way to obtain optimal deterrence when cash fines are not sufficient.²³⁹ Why not consider other ways to fine the shareholders that might overcome the judgment proof problem.²⁴⁰ Some alternative remedies have already been suggested in this paper (e.g., loss of license) and in the literature, such as equity fines²⁴¹ and making

²³⁶ However, we can assume, for the sake of argument, that the administrative and enforcement costs of criminal/civil sanctions are occasionally greater than those that need to be spent to determine the profit effect of the excess reputational loss in criminal cases (or criminal stigma) as applied to corporations and those exhausted through destroying quasi rents through reputational penalties. Even if this were true the criminal stigma would have decreasing marginal benefits. As courts find corporations guilty of criminal offenses, the criminal label would have essentially decreasing and at some point no impact on future corporate profits. As criminal sanctions became more common and their profit effect decreased, the courts would have to increase sanctions to maintain the optimal level of expected costs. When the criminal label's profit effect was zero the criminal sanction would equal the civil sanction for a given offense since the primary rationale for imposing a lower sanction, the criminal label's profit effect, would no longer exist. Thus, under this reasoning, criminal sanctions are no more nor no less efficient than civil ones. This does not present a convincing rationale for using reputational loss as a sanction. See J.T. Byam, *supra* n 166, at 601.

²³⁷ In addition, if a judgment proof corporation is required to pay the optimal cash fine it may be forced into bankruptcy. This may not be a desirable consequence and we may prefer reputational penalties because they reduce. J.C. Coffee, *supra* n 235, at 400-405.

²³⁸ A reputational penalty could reduce share value from \$1 per share to \$0.85 per share and this loss has not directly reduced the corporation's cash assets. It is worth noting that the reliance on reputational penalties or any other penalty is only justifiable when the marginal increase in deterrence from using the reputational penalty is greater than the marginal increase in sanctioning costs as is the case with all sanctions.

²³⁹ I have assumed that we do not wish to have stakeholders made liable such as workers. See Coffee for further discussion, *supra* n 235, at 400-405.

²⁴⁰ There are other alternatives that could be considered such as imprisoning managers in addition to corporate penalties as well. This raises the comparison of corporate criminal liability and individual criminal/civil liability.

²⁴¹ See Coffee, *supra* n 235, at 413-424 for equity fines.

the shareholders personally liable on a pro rata basis.²⁴² For example, an equity fine could require a corporation convicted of a criminal offense to issue (and authorize if necessary) a number of shares to the state's victim compensation reserve that would have an expected market value equal to the cash fine needed to deter the activity.²⁴³ Thus, an equity fine by diluting share market value would have an effect similar to that of reputational penalty. In addition, equity fines are likely to be socially cheaper to impose. Since equity fines are more precise than reputational penalties their impact is less costly to determine as compared to the impact of a reputational penalty.²⁴⁴ Further, equity fines do not result in the destruction of assets as reputational penalties do.²⁴⁵ Thus, sanctions such as equity fines and debarment should be given preference to reputational loss when deciding on the sanction to supplement cash fines with when the corporation cannot pay the optimal cash fine.²⁴⁶ Reputational penalties are then simply not desirable as sanctioning alternatives to cash or equity fines as they are too costly.

However, we have not exhausted all possible ways in which reputational penalties could prove to be socially desirable. Let us assume that reputational penalties are incurred at a point in time earlier than the imposition of cash fines (criminal or civil). Fines can only be imposed on a corporation once it has been convicted or found liable, whereas reputational penalties can be imposed once the share market becomes aware that the corporation has legal troubles. The share market is usually aware of the corporation's legal troubles before a conviction occurs. In addition, empirical studies of reputational penalties

²⁴² See H. Hansmann & R.H. Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991). Personal shareholder liability, when reputational losses and equity fines prove too little, may carry with it some costs such as obtaining the fines from all the different shareholders all over the US or the world.

²⁴³ The fund should be able to liquidate securities in any manner that maximizes its return. For further discussion of how such equity fines may be calculated please see Coffee, *supra* n 235, at 415-418.

²⁴⁴ Equity fines are imposed knowing what impact they will have. This cannot be said *ex ante* of reputational penalties.

²⁴⁵ Equity fines may also have a number of other advantages. See J.C. Coffee, *supra* n 235, at pp 413-414. Aside from avoiding the deterrence trap (Coffee, at 389-393), spill over - bankruptcy concerns (Coffee, at 400-405) and nullification problem (Coffee, at 405-407) the equity fine has other benefits. The manager's interest is better aligned with that of the corporation because the per-share decline in the corporation's common stock that follows such a penalty will reduce the value of stock options and other incentive compensation available to the manager. The manager would also fear the creation of a large block of securities which makes the corporation an enticing target for takeovers. Finally, "the typical shareholder's apparent focus on short-term profit-maximization will now have to take into account the risks of illegal behavior; accordingly, the stock value of legally "risky" companies will predictably decline, and stockholders will begin to demand increased internal controls within corporations to reduce such legal exposure." (Coffee, at 413-414). There are qualifications to these points, but they provide a list of the benefits of the equity fine. Furthermore, equity fines are primarily distributional whereas reputational penalties reduce asset value.

²⁴⁶ In addition, these other alternatives could also inform the debate on the first alleged benefit of reputational loss - that it is cheaper to impose than fines. Even if reputation losses are cheaper than fines we need to know if they are cheaper than other sanctions (e.g., equity fines). Note that equity fines can be made available in both criminal and civil proceedings.

find that the largest part of the reputational loss a corporation suffers occurs at the initial news report of legal troubles (which is earlier than conviction).²⁴⁷ If we then assume that the entire reputational loss is incurred at an early point in the proceedings (say before trial) then perhaps a reputational penalty may provide a higher expected sanction than using cash fines and equity fines or any other combination of penalties that are imposed after conviction.²⁴⁸

Let us assume that the probability of detection and conviction (i.e., the probability of the imposition of a fine) is 10% and the probability of detection and it being reported to the market is 35% (i.e., the probability of imposing a reputational penalty). Let us also assume that the probabilities cannot be increased any further without incurring incredibly high costs for society. In addition, I assume that the maximum cash fine that can be imposed on a corporation is \$1 Million and that the optimal expected sanction is \$800,000. Further, the maximum reputational penalty is \$2 Million all of which is imposed before trial. The expected sanction to the corporation in criminal proceedings is then \$800,000 ($\$2,000,000 \times 35\% + \$1,000,000 \times 10\%$). If instead we relied on a \$1 Million cash fine and \$2 Million in equity fines (also the maximum that can be imposed) then the expected sanction is \$300,000 ($\$3,000,000 \times 10\%$).²⁴⁹ In this situation the cash fine cannot be increased any further and thus the greater reliance on reputational penalties would result in a higher sanction which may be preferable in some cases for deterrence.

However, there may be other ways in which to increase the expected sanction rather than relying on reputational penalties. We could authorize the imposition of a cash fine on a corporation as soon as it is charged (i.e., the same time as reputational loss). This system, however, imposes a sanction without proof of violation of any law and may be

²⁴⁷ Karpoff & Lott, *supra* n 220, at 781-785.

²⁴⁸ Let us further assume that the reputational loss does not vary with the later finding of guilt or innocence so that an overestimation of liability is rarely corrected.

²⁴⁹ I am assuming that imposing an equity fine of \$2 Million would eradicate any reputational penalty. This assumes perfect substitutability of sanctions which may not always be the case, see *supra* n 224 to 226. The reason this benefit exists relates to the probability of imposition for reputational penalties and the difficulty of raising other sanctions beyond a certain limit given the probability of their imposition. Here there is a need for a greater expected sanction and the reputational penalty could provide it. Once again this approach is desirable only when the marginal increase in deterrence is greater than the marginal increase in sanctioning costs and no other alternative is better. Note that we could try hybrid strategies as well. For example, \$1 Million in cash fines, \$1 Million in equity fines and \$1 Million in reputational penalties and the expected sanction is then \$550,000 and not enough for optimal deterrence. Note that this suggests that one of our earlier conclusions may be suspect. Earlier it was suggested that the optimal penalty structure exhausts the cheapest sanctions first and then moves on to the more costly sanctions. However, equity fines are cheaper than reputational penalties yet we have not exhausted the total potential for equity fines (which is \$2 Million). The conclusion in the paper regarding optimal penalty structure assumed that the probability of imposition of each type of sanction was the same. Here we have relaxed that assumption and have reached a different result. This is not surprising - it only indicates that analysis is both clarified by and restricted to its assumptions.

unrealistic and probably unconstitutional. Instead we could increase sanctions by increasing the costs of defending some types of suits (e.g., increase the number of forms to be filled up) or increase sanctions on others (e.g., managers).²⁵⁰ Both would probably pass constitutional muster. These options are better than reputational penalties because they may be cheaper in terms of sanctioning costs and are more precise to measure.²⁵¹ However, an important concern with these alternative sanctions is that many do not exist yet. Undoubtedly developing them may prove helpful, but until then reputational loss may be desirable in a narrow range of cases.

In addition to increasing expected sanctions the early imposition of a reputational penalty may encourage early settlement and allow the enforcement agency to informally sanction the corporation and thereby avoid a costly trial. If the optimal sanction can be imposed using either cash fines (go through trial) or reputational losses (avoid trial) then when the enforcement costs avoided by not going for a trial are greater than the extra sanctioning costs of reputational penalties compared to cash fines we will prefer to rely on reputational penalties.²⁵² This is clearly better than relying on cash fines because it is socially cheaper. However, we should note that trials can often be avoided by relying on

²⁵⁰ If we could increase the costs for the corporate defendant only and not the plaintiff/prosecution this may be even better. We could also increase costs for the defendant early on and for the prosecution later on, such that imposition of the costs on the defendant are more certain than the costs on the prosecution. Note that I have assumed that the government brings the suit so that malicious suits are assumed to be fewer than if private parties had brought the suit. I have also assumed that if a false suit is brought against a corporation the reputational loss inflicted early on is not fully compensated if a conviction is not entered (some may still doubt if the corporation was truly innocent or was able to "avoid" liability somehow).

²⁵¹ Another approach may be not to rely on reputational penalties on the corporation, but to rely on imposing sanctions on other parties (such as managers or third parties) to obtain the optimal amount of deterrence. To determine which is more appropriate we would need to balance the extra costs of using reputational loss (i.e., sanctioning costs) against, say, the risk aversion costs of imposing managerial liability or the costs of using other liability options and their respective deterrence benefits. If we were considering increasing defense fees we need to examine the costs of this (e.g., deterring some from defending against suits which they should not be found liable for - thereby weakening deterrence).

²⁵² For example, let us assume that the probability of detecting a wrong is 40% and of convicting a corporation for it is 5%. Further, the enforcement costs to detect the harm are \$500,000 and to obtain a successful conviction are \$3 Million. The optimal expected penalty is \$1 Million and hence the optimal cash sanction is \$20 Million and the optimal reputational loss is \$2.5 Million. The corporation has assets of \$40 Million to pay cash fines. Let us also assume that the sanctioning costs of using a reputational penalty are \$1 in sanctioning cost for every dollar in reputational loss and for cash fines 5 cents for every dollar in cash fines. Under these assumptions imposing the optimal cash fine has total costs of \$4.5 Million (i.e., \$3.5 Million enforcement costs plus \$1 Million sanctioning costs) and imposing the optimal reputational loss of \$2.5 Million has total costs of \$3.5 Million (i.e., \$500,000 enforcement costs (detection only) plus \$2.5 Million sanctioning costs). Assuming substitutability between reputation and cash fines it is clear that relying on reputational loss is socially cheaper than relying on cash fines (i.e., to obtain \$2.5 Million in reputational loss means we have a very relatively low cash fine - no where near \$20 Million). If this is so then we may wonder why not avoid the law and simply let customers police wrongdoing by imposing reputational losses. This may be desirable in some cases, but I will assume that the probability of detection without government resources is about 1% and then the desirability of reputational loss evaporates. Note that given the difficulty of obtaining conviction one might wonder why not make the corporation strictly liable for the offense or increase information gathering powers or some other change to improve the probability of obtaining conviction. In fact, these alternatives should be considered.

any sanction that is imposed early on, such as charging sanctions or increasing the costs of suit. These sanctions would be better than reputational loss since they can obtain the enforcement savings without the higher sanctioning costs. However, these other sanctions have yet to be utilized, and until they are relying on reputational penalties provides costs savings when the costs of going to trial are greater than the difference in sanctioning costs between reputational penalties and cash fines.

At this point a summary may prove useful to highlight that reliance on reputational penalties is almost always undesirable in the corporate context. Reputational penalties are socially desirable in circumstances where (i) customers are harmed and the firm has a reputation *and* (ii) the sanctioning costs of reputational penalties are less than those of cash fines or other sanctions - essentially never *or* (iii) in some cases the early imposition of the reputational penalty will result in possibly higher expected sanctions whose deterrent effect outweighs their higher sanctioning costs as compared to the deterrent effect and costs of other sanctions - a highly unlikely occurrence *or* (iv) the early imposition of a reputational penalty results in enforcement cost savings outweighing its sanctioning costs- again rather unlikely. It would then appear that use of reputational penalties on corporations is rarely, if ever, desirable.²⁵³ The two arguments premised on the early imposition of reputational penalties indicate narrow areas in which reputational penalties may be desirable. However, we have the choice of imposing reputational loss through civil or criminal proceedings against the corporation. For criminal proceedings to be the preferred course we need to show that the reputational penalty of corporate criminal liability is greater than that of corporate civil liability and that the greater reputational penalty is sometimes desirable.

3. *Is there a difference in the reputational loss suffered in criminal and civil proceedings against a corporation?*

Most of the literature has examined whether there are *any* reputational losses from criminal convictions or findings of liability and the result has been that there are from both.

²⁵³ Whether and when reputational penalties are desirable sanctions in the individual context is a separate matter and one on which this paper makes no comment. Note also that the literature refers to the fact that reputational penalties may be useful when customers can easily assemble and assess information about corporate wrongdoing and when they can detect that the wrong has occurred. In addition, drafting and enforcement costs of legal rules may be rather high. Other factors also exist but the fact that we use criminal liability normally indicates that public enforcement is desirable and as such the likelihood of the victim detecting the harm or the wrongdoer may not be high and, see Part VII A, and the drafting and other costs of legal rules are presumably not high (otherwise public enforcement is problematic). Thus, it is doubtful if reputational penalties will be much help here, they clearly work better in a contractual type of relationship if they work at all (i.e., the victims are more likely to be repeat players than in tort where they may be unknown to the corporation). See *supra* n 230.

²⁵⁴ However, an important question to ask is not whether a criminal conviction has reputational consequences, but whether the reputational consequences, whatever they are, of a criminal conviction *are significantly different (i.e., greater)* than those from a finding of liability in civil proceedings. Although I am not aware of a thorough study on this issue, I suspect that the difference is likely to be very very small. ²⁵⁵ This is because the reputational penalty only imposes a monetary loss on the corporation and it is not clear why this would be greater if the proceedings were criminal rather than civil (i.e., a corporation does not feel shame, or anything else, if convicted). Indeed, the magnitude of the reputational loss in the corporate context probably arises from the activity causing the harm not the label placed on it. ²⁵⁶ For example, if Exxon is convicted of a criminal offense for violating the environmental laws and fined \$1 Billion and Shell is found liable for violating the same environmental laws in the civil sphere and pays \$1 Billion in damages for the same act, would we perceive any significant difference in reputational losses? It seems doubtful.²⁵⁷

However, my discussions with members of government agencies that recommend or prosecute such cases and with practitioners in the field indicate that there may be some difference in reputational losses for cases that do not demand the sort of sensational appeal

²⁵⁴ For example, please see Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981) and J.M. Karpoff & J. Lott, *supra* n 220.

²⁵⁵ I know of only one study which even mentions this issue as part of a related thesis and then notes that his limited findings suggest no difference in reputational impact between criminal and civil fines for corporations. See M.K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L.REV 395 (1991) at 410-418. Block also mentions that sentencing in criminal cases may result in greater inaccuracy than damage setting in civil cases as the process of setting criminal fines even under the recent guidelines can be quite problematic.

²⁵⁶ See R. POSNER, *ECONOMICS ANALYSIS OF LAW* (4th ed., 1992) at 422. Some have attempted to prove the stigma effect of corporate criminal liability by drawing inferences from a corporation's activities. "For example, two commentators cite the following example: '[S]eeking to avoid conviction for reckless homicide for the Pinto deaths of three girls, Ford Motor Company spent in litigation expenses an estimated one million dollars to escape a possible \$30,000 penalty.' According to these commentators, this example proves that, '[a]s with individuals, the social opprobrium attached to a criminal conviction acts as a deterrent for corporations.' Ford officials, on the other hand, justified the expense in this way: '[C]onviction . . . would doubtless facilitate any civil actions brought against Ford by the victims' relatives;' and, according to a criminal investigator for the prosecutor in the Pinto case, a conviction in the Pinto case would lead to the 'next logical step . . . to go after individual executives.' Thus, it is at least arguable that additional litigation costs that a criminal conviction would produce, and not a stigma from conviction, justified Ford's litigation cost." See J.T. Byam, *supra* n 166, at 600-601 and *INDUSTRY WEEK*, Feb. 19, 1979, at 24. One cannot use Ford's behavior to prove that criminal conviction has greater stigma effect than civil findings of liability, only that criminal conviction has some reputational effect.

²⁵⁷ Clearly, reputational loss is normally greater in criminal cases for individuals than in civil cases and is reflected in the shame the individual may feel. The issue is then can a corporation feel shame. The simple answer is no, since a corporation is devoid of a mind it cannot feel at all. Thus, all that can be done to a corporation is to reduce its profits, and my suspicion is that the magnitude of the monetary penalty imposed by reputational loss will be the same in criminal or civil cases against corporations. H. PACKER, *supra* n 168, at 361.

of the Exxon Valdez.²⁵⁸ The excess reputational loss attaches to both corporations and to top management as a sort of reputational rub-off, but our focus here is on corporate reputation. It is then possible that corporate criminal liability has a higher reputational penalty than corporate civil liability and this may well be something corporate civil liability could not mimic. Thus, if we desired a very severe expected sanction (i.e., for a large corporate wrong) that could not be obtained with other sanctions imposed by the law or by the reputational loss penalty in civil cases then we may prefer the reputational loss in corporate criminal liability. However, this type of grandiose corporate wrong would probably fall into the category of 'sensational' cases where the reputational penalties are the same in both liability regimes. Further, if we wish to save enforcement resources by imposing early penalties then corporate criminal liability is desirable when the reputational penalty of corporate civil liability is not large enough for optimal deterrence.²⁵⁹ Otherwise we could simply rely on corporate civil liability's reputational penalty to avoid trial costs and obtain deterrence. Consequently, when corporate civil liability's reputational penalty is insufficient for deterrence and trial costs are very high the reputational penalty from corporate criminal liability appears desirable.²⁶⁰ Nonetheless, this argument is rather peculiar since we normally justify the high costs of criminal trials because the sanctions are so severe, yet here we use the high sanctions to avoid going through a criminal trial. This seems a rather perverse and unpalatable manner in which to use the criminal process. An alternative to this is to develop sanctions in civil proceedings that can be imposed early on (e.g., increase costs of defending the suit). By relying on this alternative we avoid (i)

²⁵⁸ Discussions with Mr. Peter Kenyon, Regional Counsel's Office, Environmental Protection Agency (EPA) Boston, MA; Professor Heymann, Harvard Law School and others indicating in their experience that a higher reputational loss arose from criminal conviction than from a finding of liability in a civil case against corporations. Note that reputational effect also varies with whom the product is being sold to. If the product is sold to end users then higher reputational losses (if they exist) may apply. Yet to avoid this the corporation could sell under a different name or brand name (this may entail lack of use of goodwill). Also if the product is sold to an intermediate seller it appears less likely that reputational loss in criminal as opposed to civil proceedings would matter all that much. My suspicion is that another corporation may not make much distinction, when dealing with a supplier who was found guilty for a criminal or civil sanction, as the informational content in either sanction would presumably be the same.

²⁵⁹ Note that there is normally no greater saving in enforcement resources by using corporate criminal or corporate civil liability with reliance on reputational penalties. If both regimes have enough reputational punch for deterrence then the enforcement costs saved would be about the same, but since corporate criminal liability has higher reputational penalties it would have higher sanctioning costs (we could try to reduce them to the level of that in corporate civil liability by adjusting the amount of the cash fine, but even this has costs -estimating reputational loss and so on). However, where corporate civil liability does not provide enough reputational punch and enforcement costs are still very high (i.e., no point in relying on cash fines) we may opt for corporate criminal liability. Here corporate criminal liability is desirable if the increase in sanctioning costs due to its higher reputational penalties (as compared to corporate civil liability) is less than the increase in deterrence obtained from doing so.

²⁶⁰ Corporate civil liability could in the future possess charging sanctions or we could increase the costs of defending these suits. Note that corporate civil liability with the threat of managerial criminal liability may have a similar effect on enforcement costs as might corporate criminal liability.

expensive trials, (ii) the high sanctioning costs of reputational penalties and (iii) the unseemly use of the criminal process. Clearly, this is the preferable alternative.

4. *Reputational consequences for top managers of their corporation's conviction.*

This leaves for consideration one final version of the reputational loss argument and this is when corporate criminal liability has a reputational rub-off effect on top management (their reputations are tarnished), but corporate civil liability would not. It has been suggested that there would be a rub-off effect on top management if a corporation was convicted rather than found liable in civil proceedings.²⁶¹ The people who associate with top managers could believe that the managers had a hand in the wrong occurring and thus may impose a reputational penalty on top management. However, imposition of civil liability on the corporation would not engender such a reaction since civil cases are presumed to be a common occurrence (i.e., this trait cannot be replicated in corporate civil liability).²⁶² Assuming this happens, a highly questionable assumption,²⁶³ the issue is why would we want to use this type of sanction to achieve deterrence.

The use of a reputational rub-off penalty suggests that corporate liability is by itself insufficient for deterrence purposes, otherwise we would rely only on corporate penalties rather than imposing this type of penalty on top management. Second, use of this indirect penalty indicates a belief that finding and convicting a manager would be difficult or that those we could find would not really be the "masterminds" of the activity, but scapegoats only. Both of these factors, harm in excess of the corporation's available assets and the actual masterminds are difficult to identify and convict, are present in many types of corporate crime.²⁶⁴ In this situation imposing a reputational loss on top management may encourage them to supervise more carefully the activities of their subordinates and their colleagues and to dissuade them from masterminding corporate delicts.

²⁶¹ Discussions with Mr. Peter Kenyon, Regional Counsel's Office, EPA, Boston. Some commentators are skeptical of this rub-off effect, please see *Developments in the Law*, supra n 171, at 1366 n. 5 and 6. See also S. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U.CHI. L. REV. 423, 434 (1963)

²⁶² I assume that the factors that cause this reaction are the criminal label not just that the government is bringing the suit. If it were the government bringing suit then there would be no difference if public civil enforcement was utilized.

²⁶³ *Developments in the Law*, supra n 171, at 1366 (n. 5 and n. 6).

²⁶⁴ See J.T. Byam, *Comment: The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 595-599 (1982) (describing when strong enforcement features may be desirable and how it relates to the corporate context).

This may be true, but I will argue that using corporate civil liability plus individual civil liability results in the same sanctioning effect as a reputational rub-off, but is socially cheaper than relying on the reputational rub-off effect.²⁶⁵ If we want to impose a sanction on top management without trying to prove they did any wrong why not do that directly instead of indirectly through a reputational rub-off. We could set a monetary penalty on top management for certain types of corporate wrongs. The penalty could be on a strict liability standard so that if the corporation was found liable top management would have the monetary penalty imposed upon them more or less automatically. This would make it very similar to the reputational rub-off penalty. This method, if feasible and practical, would be preferable to the reputational rub-off for two reasons: (i) strict liability fines are cheaper in terms of sanctioning costs than reputational loss and (ii) it is more accurate than reputational loss - an important consideration given the normal assumption of risk aversion of managers and overdeterrence concerns.²⁶⁶

However, reputational rub-off penalties may be more desirable if the manager is judgment proof. For example, let us assume that the most we can fine a manager to avoid bankrupting them is \$500,000. If the harm they caused requires the equivalent of a \$700,000 fine then we are underdetering them. Perhaps reputational penalties, in addition to monetary penalties, could result in the equivalent of a loss of \$700,000 to the manager. This approach has a few problems. First, we need to find situations in which all of the manager's available assets are less than optimal damages but the manager's total available assets plus their total reputational losses that could be suffered exceeds or at least equals optimal damages. I am not sure how often this is the case. Second, we need to assume that managers cannot negotiate a higher salary to take account of this reputational rub-off penalty, something managers would like to do especially if the wrong occurred under another top management's tenure. The fact that the reputational penalty can attach to innocent managers because they happen to take over at the wrong time is also something of considerable concern given that manager's are generally risk averse. In any event, if they can engage in negotiation then the corporation is in effect paying for this and we may query why not opt for the strict liability fine and allow the corporation to insure top management instead. Third, if the managers cannot negotiate we need to ask whether

²⁶⁵ I have assumed that imprisoning top management because their corporation was convicted is impermissible.

²⁶⁶ An important inaccuracy of reputational rub-off is that managers and top management do not always stay with the same corporation. Thus, top management of corporation X may have been cavalier in 1987 and the corporation is sued in 1993, by which time all the members of top management have changed at least three times over. Clearly, imposing a reputational rub-off penalty on top management in 1993 is very inaccurate since it sanctions new managers not the old ones. However, a strict liability fine could be targeted to find the managers at the time of the wrong occurring which a reputational rub-off may not do effectively. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed., 1992) at 422.

imposing this type of absolute liability on top management is desirable instead of using insurable strict liability fines on top management. Thus, the preconditions for preferring a reputational rub-off penalty are (i) that it is optimal to have no managerial insurance whether by negotiation with corporation or insurance company and corporate liability is insufficient for deterrence, (ii) top management is judgment proof, (iii) top management would not be judgment proof if reputational loss was taken into account, (iv) we cannot find a true culprit on whom to impose a fine and (v) the benefits of the reputational rub-off penalty would be greater than its costs in terms of inaccuracy and sanctioning costs and that the net benefit is greater than that of any other sanctioning option such as direct cash fines and so on. I am not certain how often this situation is plausible, but it appears exceedingly rare.

In light of the preceding arguments it becomes clear that reputational loss, whether attaching to the corporation or to top management, is rarely socially desirable in the corporate context. Our analysis indicates that we should prefer using sanctions imposed by the law rather than reputational penalties as they are socially cheaper. Furthermore, even within the sanctions that are imposed by the law we should prefer to rely on cash fines and then later on other sanctions such as denial of tax deductibility or loss of license because cash fines are socially cheaper to impose. Consequently, we should rely on cash fines until their deterrent effect is exhausted and then use denial of tax deductibility, loss of license, and equity fines until their deterrent effects are exhausted. These sanctions should only be used if the incremental deterrence gains of using them are greater than the incremental sanctioning costs of doing so. If higher sanctions are needed for deterrence we could consider, in addition to imposing all these sanctions, sanctions on managers, third parties, or increasing the costs of proceedings and so on. Thus, reputational loss is rarely, if ever, a desirable sanction. However, sometimes reputational penalties, because they are imposed at an early point in the proceedings could prove desirable. Nonetheless, the analysis indicates that rarely will this result in a desire to opt for corporate criminal rather than corporate civil liability since nearly equivalent reputational penalties are available in corporate civil liability. Furthermore, in the future reputational loss may even lose this advantage once civil sanctions have developed that can be imposed early on in a case. We can then move on to the next characteristic of corporate criminal liability.

VI PROCEDURAL CHARACTERISTICS OF CORPORATE CRIMINAL LIABILITY

The procedural characteristics of corporate criminal liability are guided by the

norms that are attached to most criminal proceedings.²⁶⁷ The procedural protections examined in this paper are:²⁶⁸ (i) the higher standard of proof in criminal cases, (ii) double jeopardy protection, (iii) the right to a jury trial, and (iv) the presence of grand jury investigation and indictment.²⁶⁹ Given the constitutional nature of these protections it is assumed for now that they must attach whenever something is labeled criminal and we cannot attempt to avoid them for corporate criminal liability. In any event the primary purpose of these protections is the prevention or correction of error and then too only a specific type of error that of a false conviction not that of a false acquittal.²⁷⁰ There may be many good reasons to prefer this sort of bias in the criminal process when it is being applied to individuals, but when it is applied to corporations it is by no means certain that

²⁶⁷ See *Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1231-33 (1979) at 1276-1300. Indeed the typical corporate crime case goes through essentially the same process as any other criminal case, save for the vast amount of documentary evidence required for a conviction. See *Developments in the Law*, at 1276. The controlling procedures for a corporate crime case can be found in the Federal Rules of Criminal Procedure and Federal Rules of Evidence.

²⁶⁸ For our purposes the procedural protections of criminal proceedings against a corporation that are different from those of a traditional civil proceedings against a corporation are the important ones. This helps to narrow the analysis to those protections that we may be able to avoid if we decide to opt for corporate civil liability instead of corporate criminal liability rather than on those protections we would still have even if we opted for corporate civil liability. The following protections apply in criminal proceedings and would normally attach in public civil proceedings as well, see *Developments in the Law*, supra n 267, at 1277-1293. The Supreme Court has held that the Fifth amendment's privilege against self-incrimination does not apply to corporations. The amendment is primarily designed to prevent violent, psychological and emotional coercion towards individuals. Since corporations lack the susceptibility of individuals to these sorts of practices corporations have been deemed to be outside the scope of the privilege. See *United States v. White* 322 U.S. 694, 701 (1944). The result is that corporate representatives who are custodians of documents and the like (who are not targets of criminal prosecution) are unable to claim any corporate privilege against self-incrimination. Further, if the government offers immunity to an employee it may then be able to force that employee to give testimony for a corporate conviction.

There is also the fourth amendment protection against unreasonable seizures. The Fourth Amendment does apply to corporations, but to a different degree than for individuals. For individuals the amendment is designed to protect privacy interests, but for corporations it is designed to prevent numerous and frequent interruptions to the business of the corporation. The result has been that the reasonableness standard for corporations is considerably lower than that for individuals and the significance and scope of this protection is considerably less for corporations than for individuals.

The attorney-client privilege is perhaps the most effective protection for corporations since it is not limited as the fourth and fifth amendment. The privilege applies only to documents that "constitute or contain communications between lawyer and client relating to legal advice." *Developments in the Law*, supra n 267, at 1289-1290. See 8 J. WIGMORE, EVIDENCE § 2291 at p 554 (McNaughton rev. 1961). The development of the privilege as it applies to corporations displays an ongoing judicial struggle in "tailoring the ordinary rules to the particular cloth of this legal entity." *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 88 n. 12 (D. Del. 1962). See *Developments in the Law*, supra n 267, at 1289-1293 for further discussion. Note that some other constitutional protections also apply but are of smaller significance - such as cruel and unusual punishment and substantive due process and equal protection of the laws. Please see R.S. GRUNER, CORPORATE CRIME AND SENTENCING (1994), pp 322-333 and *Developments in the Law*, supra n 267, at 1276-1299.

²⁶⁹ See *Developments in the Law*, supra n 267, at 1302 (standard of proof and jury trial) and 1341-1350 (double jeopardy). See also R.S. GRUNER, CORPORATE CRIME AND SENTENCING (1994), pp 326-328 and at pp 323-324 discussing procedural due process.

²⁷⁰ See for example, F. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEG. STUD. 289 (1983); R. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed., 1992) at 550-553; Byam, supra n 264, at 601 and H. Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME LAW. 173 (1979).

these protections are desirable. The analysis in this part examines each of these protections in light of their general bias and asks when is it socially desirable, if ever, to have these protections when the defendant is a corporation. In addition, I also consider other possible goals of these protections and ask whether they apply in the corporate context. The conclusion is that these protections are rarely, if ever, desirable in the corporate context.

A STANDARD OF PROOF

In criminal proceedings the prosecution must prove their case beyond a reasonable doubt to obtain a conviction of the corporation.²⁷¹ This stands in contrast to the preponderance of evidence standard used in civil cases. As a general matter the civil standard is easier to satisfy than the criminal standard and thus more effort must be expended to obtain a conviction for a criminal offense than to obtain a finding of liability in a civil case. Therefore, because of the higher standard of proof, criminal cases will normally involve greater costs to society than civil cases.

However, it may be possible that the higher standard of proof could prove advantageous in some circumstances and perhaps advantageous enough to overcome its higher costs. The higher standard of proof may be helpful in at least two circumstances. The first is that the higher standard of proof in criminal proceedings against individuals is justified because the costs of a wrongful conviction outweigh the cost of an wrongful acquittal.²⁷² This is because both wrongful acquittals and wrongful convictions may slightly reduce the deterrent effect of the criminal law, but a wrongful conviction may result in wrongfully imposing on the defendant socially costly penalties (e.g., imprisonment) that do not show up elsewhere as social benefits.²⁷³ The wrongful imposition of such a penalty results in a pure social waste. Therefore, the chance of wrongful conviction needs to be less than that of a wrongful acquittal if we wish to minimize costs of error to society and hence we have the beyond reasonable doubt standard. However, for purely civil cases the costs of a wrongful finding of liability and the costs of a wrongful finding of no liability are about the same. The costs of a wrongful finding of liability do show up elsewhere as social benefits (e.g., loss to the defendant in the amount of the fine but gain to the federal treasury or private party in the amount of the cash fine). The costs that do not show up elsewhere as a social benefit may be the rather

²⁷¹ The standard of proof arises from the due process clause. See GRUNER, *supra* n 269, at 322-334.

²⁷² POSNER, *supra* n 270, at 421-423.

²⁷³ POSNER, *supra* n 270, at 550-553 and 421-423.

small transactions costs of effecting the transfer of money from the corporation to another party (the government or others).²⁷⁴ Therefore, the standard need only be slightly weighted in favor of wrongful findings of liability and this is met by the preponderance of evidence standard. In light of this the criminal standard of proof is justified to reduce the high costs of a wrongful conviction that do not show up elsewhere as social benefits.

The question is then whether this argument applies in cases of corporate criminal liability. The primary sanction that we can impose on a corporation is the fine. However, the loss to the risk neutral corporation shows up elsewhere as a social benefit (in the federal treasury).²⁷⁵ Thus, the lower civil standard appears optimal when dealing with cash fines.²⁷⁶ Somewhat similar arguments can be made in the context of other sanctions imposed by the law.²⁷⁷

However, it is possible that the monetary fine may have consequences outside of the simple transfer of funds involved. One such consequence may arise when we impose a very severe sanction on a corporation or when a severe sanction is imposed under an uncertain legal rule. In such a case the very threat of this sanction may chill what may otherwise be desirable behavior (a fear commonly associated with antitrust cases and treble damages).²⁷⁸ In this case the costs of a false conviction include the increase in chilling of desirable behavior (or the decrease in desirable behavior). It is assumed that chilling of

²⁷⁴ POSNER, *supra* n 270, at 421-423.

²⁷⁵ The assumption of risk neutrality for corporations is quite common, although risk aversion can affect the analysis of the standard of proof, especially for individuals. See POSNER, *supra* n 270, at 226.

²⁷⁶ We then need to consider the other sanction that may result from a corporate conviction - reputational loss. The first question to ask here is whether the harm caused to the corporation in the form of reputational loss shows up elsewhere as a social benefit. It would appear that it does in the form of information conveyed to customers and society at large about the corporation. See POSNER, *supra* n 270, at 225-226 and also Karpoff & Lott, *supra* n 220, at 760-762. In this light the reputational penalty does not result in any harm to the corporation that does not show up elsewhere as a social benefit. However, even if to some extent it did one must query if it matters since reputational penalties are rarely socially desirable. Thus, the lower civil standard appears more appropriate in the corporate context if we avoid using reputational penalties. Even if reputational penalties were desirable that would not necessarily result in reliance on the criminal standard of proof, we could instead use an intermediate standard, please see discussion *infra* n 286 to 290 and accompanying text. Also note that reputational penalties as applied to individuals result in a feeling of shame which probably does not show up elsewhere as a social benefit, but this sense of shame is non-existent in the corporate context.

²⁷⁷ Other sanctions such as debarment and loss of license have somewhat higher sanctioning costs than cash fines and such sanctions are occasionally desirable. Presumably the wrongful imposition of these sanctions may have certain costs that do not show up elsewhere as social benefits such as the costs associated with denying future profitable business opportunities and so on. However, these costs may not result in a change of the standard of proof, and if they did they would almost certainly not result in the criminal standard, but probably some intermediate standard, see *infra* n 286 to 290 and accompanying text.

²⁷⁸ See e.g., Teece & Jorde, *Innovation, Cooperation and Antitrust: Striking the Right Balance*, 4 HIGH TECH. L.J. 1, 49 (1989); J.E. Calfee & R. Craswell, *Deterrence and Uncertain Legal Standards*, 2 J. L. ECON. & ORG'N 279 (1986) and R. Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969).

desirable behavior does not show up elsewhere as a social benefit. In light of this we may desire a higher standard of proof to reduce costs to society when chilling of desirable behavior may occur due to severe sanctions.²⁷⁹

However, is chilling of desirable behavior likely given the sanctions or legal standards we use in the context of corporate wrongs. Remarkably, it is not clear if there is any chilling of desirable corporate behavior in the US.²⁸⁰ As a general matter the sanctions imposed on corporations for corporate wrongs (especially in the criminal context) are considered rather insignificant, at least historically, and certainly not enough to chill corporate behavior.²⁸¹ The recent increases in corporate sanctions in both civil and criminal spheres indicates a general belief that sanctions are still not high enough and generally runs contrary to the argument that chilling of desirable corporate behavior is likely. Consequently, the higher standard is rarely justified on this ground.²⁸²

Although on this reasoning we may not normally support a higher standard of proof for corporate cases there may be other grounds upon which it may be justified. Let us assume that the costs to society from a false conviction and a false acquittal are about the

²⁷⁹ As an example consider the following scenario. The number of false convictions is 15 each costing 2 (1 for a wrong decision's impact on deterrence and 1 for the chilling of desirable behavior). The number of false acquittals is 25 each costing society 1 (the impact on deterrence). The total cost to society is then 55 of this situation. If we impose a higher standard of proof then the number of false convictions drops to 10 (still costing 2) and the number of false acquittals rises to 33 (costing 1) and the cost to society is 53. This is better than before even though the actual number of erroneous decisions has increased from 40 to 43.

²⁸⁰ Even in the antitrust context this is by no means a clearly accepted proposition, see J.E. Calfee & R. Craswell, *Deterrence and Uncertain Legal Standards*, 2 J. L. ECON. & ORG'N 279 (1986); R. Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969); Note, *Research Joint Ventures*, 21 HARV. J. LEGIS. 405 (1984) and more generally F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMICS PERFORMANCE* (3d ed., 1990).

²⁸¹ One of the primary reasons behind going for the sentencing guidelines for organizations was a perception that corporate penalties were insignificant, see *supra* n 100.

²⁸² I am not aware of any studies suggesting that empirically there are fewer desirable activities due to severe sanctions on corporations. Severe sanctions on individuals are somewhat different since individuals are assumed to be risk averse rather than risk neutral. My suspicion is that chilling of corporate behavior occurs because although corporations are risk neutral their managers may not be and even though the sanction is imposed on the corporation if it is severe it could result in the manager losing their job

same.²⁸³ A higher standard may then be beneficial when its imposition would result in a greater reduction in the number of false convictions than it would increase the number of false acquittals. For example, let us assume that under the civil standard of proof we have 40 incorrect decisions, each costing 1 to society, of which 25 are false convictions and 15 are false acquittals. Thus, the error cost to society is 40. Further, let us assume that under a higher standard the number of false convictions falls to 18 and false acquittals rises to 20. The cost to society is then 38 and this is better than 40. The question is when would the imposition of the higher standard of proof result in a greater reduction in false convictions than increase in false acquittals.

The higher standard is more likely to have this effect when there are a lot of false convictions in society as compared to false acquittals. This simply provides more scope for reduction in false convictions as compared to false acquittals. The question is then which type of error is more common in the case of corporate wrongs. Most of the literature on corporate wrongs (civil or criminal) discusses difficulty of proof as being a major impediment to the enforcement of the law.²⁸⁴ Thus, one suspects that the number of corporate false convictions in society is generally very very low and the real problem is with false acquittals. Consequently, the criminal standard of proof is normally not desirable in the corporate context.²⁸⁵

However, even if we assume the contrary in some cases (i.e., a high number of false convictions compared to false acquittals or that the chilling of desirable behavior can result) that does not necessarily mean we should opt for a higher standard of proof. All it indicates is that we need something more than the civil standard. A higher standard of proof reduces the number of false convictions at the cost of increasing the number of false acquittals. There are other ways in which we can reduce the number of false convictions

²⁸³ L. Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEG. STUD. 307, 356-362 (1994). See also James Andreoni, *Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?*, 22 RAND J. ECON. 395 (1991) suggesting a model in which the cost of false convictions rises with the sanction but the benefit of correct convictions - as by increasing deterrence - is not increasing with the sanction. See generally on the burden of proof: J. Johnston, *Bayesian Fact-finding and Efficiency: Toward an Economic Theory of Liability under Uncertainty*, 61 CAL. L. REV. 137 (1987); R. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399, 402-410 (1973); D. L. Rubinfeld & D.E.M. Sappington, *Efficient Awards and Standards of Proof in Judicial Proceedings*, 18 RAND J. ECON. 308 (1987); and J. Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968). Also see L. Kaplow, *A Note on the Optimal Use of Non-Monetary Sanctions*, 42 J. PUB. ECON. 245 (1990) for discussion on optimal sanctions when the sanctions are socially costly.

²⁸⁴ Undoubtedly one reason why civil investigative demands, discussed *infra* Part VII B, are so attractive is that they improve the detection and conviction of corporate wrongs. The focus on false acquittals is further supported by the need for the strategic and error correction benefits discussed in Part VII C 1 and 2.

²⁸⁵ This analysis can apply to chilling as well.

that do not involve increasing the number of false acquittals.²⁸⁶ One way would be to allow for appeals against false convictions.²⁸⁷ Another would be to increase the information gathering powers available to government agencies. Improving information gathering powers would make decisions more accurate and this would reduce both false convictions and false acquittals. In addition to these techniques for reducing the number of errors we could reduce the severity of errors by sanctioning people besides the corporation. If we felt sanctions were so severe that they could chill behavior why not consider sanctioning managers or third parties where the threat of chilling was less or where the social costs were less yet the social benefits (e.g., deterrence) still exist. What all this analysis indicates is that even if there are a number of false convictions or chilling is likely in some cases we need to examine whether increasing the standard of proof is the best method in which to reduce the total cost to society, especially if increasing accuracy (e.g., increasing information gathering powers) is an option.²⁸⁸

One final point worth noting is that even if other methods of reducing errors are ineffective is there any particular reason to believe that the standard of proof should be raised to the level that prevails in criminal cases (beyond reasonable doubt) rather opting for some intermediate standard of proof such as the clear and convincing evidence standard.²⁸⁹ Perhaps the criminal standard is optimal in cases where imprisonment is a

²⁸⁶ See for a much fuller discussion L. Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEG. STUD. 307 (1994).

²⁸⁷ This may prove problematic if the defendant has to spend more money in legal fees to correct an error as this may only further accentuate any chilling effect of the sanction.

²⁸⁸ As an example assume that there are 40 incorrect decisions in society under a civil standard of proof with normal information gathering powers of which 25 are false convictions and 15 false acquittals each costing 1 to society. So the total cost to society is 40 (system A). Under a higher standard of proof the number of false convictions falls to 16 and false acquittals rises to 18 and the total cost to society is 34 (system B). Under a civil standard plus high information gathering powers the number of false convictions falls to 17 and false acquittals to 12 so the total cost to society is 29 (system C). Finally, under a higher standard of proof plus higher information gathering powers we have 15 false convictions and 15 false acquittals or a total cost to society of 30 (system D). Under these set of facts system C is better than system D which is better than system B which is better than system A. Here it is optimal to rely on the civil standard plus higher information gathering powers. Note that error costs are not the only costs to society. There are other costs such as enforcement costs which are greater with a higher standard of proof and with greater information gathering powers (more person hours to get all the data for example). Also this analysis also indicates that the higher standard of proof is not tied to higher information gathering powers - these two factors are essentially independent. In addition, I have assumed that the government would use these powers to achieve correct decisions rather than simply to get enough to convict (i.e., a minimal effort may convict but greater effort would reveal that conviction is not justified and the government would go this extra mile).

²⁸⁹ It should be noted this is not meant to suggest that we should first try increasing information gathering and then fiddle with the standard of proof, only that there are a multitude of options besides opting for a criminal standard of proof. These options need to be considered and analyzed to determine which is the most desirable in the corporate context. Examples of intermediate standards are some state law requirements that before punitive damages are imposed the plaintiff needs to satisfy the court on the clear and convincing evidence standard. See e.g., GA.CODE.ANN. § 51-12-5.1(b) (1993) and KAN.STAT.ANN. § 60-3701(c) (1993). The similarity between punitive damages and severe damages for corporations is striking and I suspect indicates that the intermediate standard (if appropriate for punitive damages) is also appropriate for severe corporate damages. See generally, Note, *Winship on Rough Waters: The Erosion of the*

sanction since its social costs are so high. However, in cases where all that is happening is the chilling of desirable behavior or possible corporate bankruptcy we may not want such a higher standard of proof, but we may also prefer a standard higher than the civil one. We could then opt for an intermediate standard. Indeed, *optimally, the standard of proof should be set at that level which equates the marginal costs of false convictions and false acquittals.*²⁹⁰ Undoubtedly it may be difficult to gather information on such matters for each type or category of offense, but I think it is reasonable to conclude that an intermediate standard is more appropriate when we are concerned with the social costs of wrongfully chilling behavior and the criminal standard is more appropriate for dealing with the social costs of wrongful imprisonment.

In light of this analysis the higher criminal standard of proof would be justifiable only in those cases where there was chilling of desirable corporate behavior due to severe sanctions and uncertain legal standards or more false convictions than false acquittals in society and where no other method of error cost reduction was socially preferable to the criminal standard of proof. Given what we know about corporate sanctions and the difficulty of proof in the corporate context my suspicion is that the higher criminal standard of proof would simply not be desirable.

Let us, however, assume that sometimes the criminal standard of proof is needed in the corporate context. Even here devising enforcement apparatus that would impose this protection when desirable could be difficult and perhaps not worth it. This is because it is difficult to identify *ex ante* the category of corporate wrongs that would need this higher standard. We may know that some subset of antitrust cases will *often* require the criminal standard of proof, but we do not know *ex ante* which cases in this group will need it. All we know is that we can tell if the higher standard is desired by looking at the facts of a particular case on a case-by-case basis. We may then leave the determination of whether the higher standard applies to prosecutors so that a case-by-case determination may be

Reasonable Doubt Standard, 106 HARV. L. REV. 1093, at 1099 and 1107-1108 (1993); Mann, *supra* n 163, at 1860; Markus Dirk Dubber, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 238 (1991).

²⁹⁰ This is actually the calculation we need. If the costs of both types of errors are the same then the test is just the marginal change in false convictions should equal the marginal change in false acquittals.

made.²⁹¹ In fact we do leave it up to the prosecuting agency to determine whether to pursue corporate criminal liability or some form of corporate civil liability.

Although this is an option it strikes me as odd in some ways because we are leaving it up to the prosecution to place a higher standard of proof upon itself. This does not appear to be a proposition most prosecutors would willingly accept. Thus, to cajole prosecutors to behave as desired we may have to provide criminal sanctions that are deliberately much more severe than civil sanctions,²⁹² or we may need to compel prosecutors to choose criminal proceedings when we have reason to believe that there are a lot of false convictions as compared to false acquittals. The first approach may work when we feel we need high sanctions for deterrence purposes. In these situations the higher sanction is desirable and likewise the higher standard of proof may be desirable. This may be possible, but it certainly does not reflect the current state of affairs where some may be willing to argue that actually the sanctions in corporate civil liability are considerably higher than those in corporate criminal liability. Further, even prosecutorial compulsion has its problems.²⁹³ Finally, prosecutorial discretion is also subject to error and could result in using these protections when undesirable or in not using them when desirable.

In summary then the criminal standard of proof is undesirable in the corporate context and where something greater than the civil standard is needed we have the option of relying on the clear and convincing evidence standard or increasing information gathering powers. Even if we wanted to impose the criminal standard it would have to be accompanied by other changes such as significantly more severe sanctions and

²⁹¹ Although we can set the guidelines for these cases such as requiring categories of wrongs where the sanction is severe and a chance of wrongful conviction is high we cannot always decide *ex ante* which cases will fall into this category and thus it may prove valuable to leave the decision of whether to pursue corporate criminal liability up to the prosecution.

²⁹² I am not sure if the reputational loss difference between criminal and civil proceedings against corporations could represent this sanctioning difference as one expects the idea of higher sanctions is that the prosecutor wants to impose them, not have society impose them. But the matter is not altogether clear.

²⁹³ The second part, compelling prosecutors to choose corporate criminal liability when choosing the higher standard will reduce false convictions by more than it would increase false acquittals of equal social effect, seems a little more difficult. One could question whether prosecutors would willingly impose greater work upon themselves without the incentive to impose higher sanctions on the corporations. In the end we may have to set up a list of factors, presumably legally binding ones, that would compel prosecutors to rely on the protections offered by the higher standard of proof when we thought there was a larger number of false convictions in society. On the other hand, if prosecutorial discretion appears too confusing or problematic one could simply try to isolate as narrowly as possible those areas in which the criminal standard may be desirable and allow only for the imposition of corporate criminal liability before bringing any other suit. This has costs in that the criminal standard is then imposed on cases where it is not needed. In this situation the higher standard should only be imposed if the cases in which it is desired outnumber the cases in which it is not desired (or the costs of not imposing it on the group that needs it outweigh the costs of imposing it on the wrong group). Thus, even if we desire the criminal standard in some cases it may be very difficult to design a system to target the cases we want and avoid imposing the higher standard where it is not needed.

prosecutorial compulsion. In the final analysis the criminal standard is best left only for criminal proceedings against individuals. The higher standard of proof, however, is not the only procedural protection that corporate criminal liability possesses. The others such as double jeopardy protection and the right to a jury trial are discussed below. However, it is worth mentioning that the effects of these other procedural protections are more muted than the effect of the higher standard of proof since they can be avoided by clever legislative drafting (e.g., double jeopardy protection) or are usually insignificant (e.g., jury trial) or ineffectual in the corporate context (e.g., grand jury indictment process).

B DOUBLE JEOPARDY

The constitutional protection against double jeopardy is just one of the doctrines that concern subsequent actions by the government against the same defendant. A corporate defendant (in a criminal case) is protected against subsequent government actions involving the same facts, claim, or issues by the doctrines of collateral estoppel,²⁹⁴ *res judicata*,²⁹⁵ and the protection against double jeopardy.²⁹⁶

The protection against double jeopardy is similar to the protections provided by the judicial doctrines of *res judicata* and collateral estoppel. The double jeopardy clause bars multiple prosecutions for a single offense as does *res judicata*.²⁹⁷ Further, double jeopardy protection is similar to collateral estoppel because the prosecution "may not attempt to

²⁹⁴ The general rule of collateral estoppel is that determination of issues actually litigated and essential to a valid judgment in a previous action are conclusive in subsequent actions, at least between the same parties. RESTATEMENT (SECOND) ON JUDGMENTS § 68 (Tent. Draft No. 4, 1977). The Restatement has exceptions to this general rule in the following cases: (i) where the party against whom collateral estoppel would be applied could not, as a matter of law, obtain review of the judgment; (ii) where the issue is a legal one and either the two suits are on substantially unrelated claims or an intervening change in the legal circumstances or other considerations would make it unfair not to proceed to a new determination; (iii) where differences in the jurisdictions or procedures of the two courts would justify a new determination; (iv) where either party would carry a significantly heavier burden of proof in the initial action than in the subsequent action; or (v) there is for any other reason a "clear and convincing need" for a new determination of the issue. RESTATEMENT, § 68.1. See *Developments in the Law*, supra n 267, at 1342 and H. Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME LAW. 173, at 192-201 (1979).

²⁹⁵ *Res judicata* prevents parties which have litigated a claim to a final judgment from litigating it again. See RESTATEMENT (SECOND) ON JUDGMENTS, topic 2, title D, Introductory Note at 138 (Tent. Draft No. 5, 1978). Thus, where the government prosecutes a defendant for a crime that is shown to have been tried previously, *res judicata* bars the second prosecution. See *United States v. American Honda Motor Co.*, 289 F. Supp. 277 (S.D. Ohio 1968). If the two claims are different in any way, however, the later action may not be disposed of on *res judicata* grounds. See generally 1 B. J. MOORE, FEDERAL PRACTICE para O.418[2], at 2753 (2d ed., Supp. 1978). See *Developments in the Law*, supra n 267, at 1342 and Friedman, supra n 294.

²⁹⁶ "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. See also *Developments in the Law*, supra n 267, at 1342.

²⁹⁷ See *Green v. United States*, 355 U.S. 184 (1957).

controvert a point necessarily determined in the defendant's favor in a prior trial." ²⁹⁸ However, there are some differences. Except in a few circumstances, once a defendant is "placed in jeopardy" the defendant may not be prosecuted again. ²⁹⁹ Double jeopardy also bars appeal by the government if the defendant was acquitted. ³⁰⁰ Finally, double jeopardy protection is only available for government suits brought with the object of punishment (a purpose attributed to criminal suits and some civil suits with "punitive sanctions"). ³⁰¹ The judicial doctrines apply only on a final decision, do not bar appeals, and apply in both civil and criminal cases regardless of whether the object was punishment. ³⁰²

As a general matter double jeopardy protection attempts to restrict the ability of government to use its resources and power to impose the costs and uncertainty of trial more than once on a defendant, with a few exceptions that prevent technical application of the doctrine from impeding legitimate governmental efforts. ³⁰³ One particular attribute of

²⁹⁸ See *Developments in the Law*, supra n 267, at 1342 ("A basic distinction between double jeopardy and the judicial doctrines is that the latter require a final decision on the merits, whereas the former does not").

²⁹⁹ Placing in jeopardy generally occurs once the jury has been sworn or when the court starts to hear evidence. See *Crist v. Bertz*, 437 U.S. 28 (1978). For exceptions see e.g., *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

³⁰⁰ See *United States v. Wilson*, 420 U.S. 332 (1975), discussing government appeals and whether they are permitted.

³⁰¹ Sometimes the courts will hold that civil sanctions that have "punitive" purposes can be considered in double jeopardy decisions. The test for determining when something labeled "civil" will earn the double jeopardy protection is not entirely clear. In *U.S. v. Halper*, 109 S.Ct. 1892 (1989); 490 U.S. 435 at 448 (1989) the Supreme Court set out the test as being that if the civil sanction "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes" then it would fall into double jeopardy protection. However, in *Department of Revenue v. Kurth Ranch*, 114 S.Ct. 1937 (1994) the Court extended the reach of this by adding an unusual features element along to the solely remedial test (if the civil case has unusual features it may be considered punitive even if its purpose may not clearly be so). This new test has been considered confusing and in need of clarification, see *The Supreme Court, 1993 Term- Leading Cases*, 108 HARV. L. REV. 171-181 (1994). See also *Rex Trailer Co., v. United States*, 350 U.S. 148 (1956) and *Helvering v. Mitchell*, 303 U.S. 391 (1938). Plus see Note, *Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision"*, 28 STAN. L. REV. 80 (1976).

³⁰² See 1 B.J. MOORE, FEDERAL PRACTICE para O.418[2] at 2751 (2d ed., Supp. 1978). Double jeopardy protection does not apply where the first action was criminal and the second is a civil suit (and the court does not view the second civil suits as being "punitive" - if it is seen as punitive then double jeopardy protection applies). Collateral estoppel may, however, conclusively determine issues in the second case. In a civil action brought by a governmental agency following a criminal conviction, the conviction is "conclusive as to issues established against the defendant because the government sustained a greater burden of proof in the criminal proceeding than it would in the civil proceeding." See *United States v. Frank*, 494 F. 2d 145, 158-161 (2d cir.), cert. denied, 419 U.S. 828 (1974). It is worth noting that if the exact matters determined by a prior criminal conviction are ambiguous or unclear because they are based on a guilty plea, nolo contendere or some kind of general verdict, the court in the latter case determines, by examining the record, which issues were litigated fully and finally determined. See *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569 (1951). A party acquitted in a criminal case obtains no protection from a later civil suit since the government might be able to prove in a civil case what it could not in a criminal case due to the lower standard of proof in the civil case. See *United States v. National Association of Real Estate Bds.*, 339 U.S. 485, 493 (1950). See *Developments in the Law*, supra n 267, at 1349-1350 and Friedman, supra n 294.

³⁰³ Please see GRUNER, supra n 268, at pp 332-333 for further detail. The courts have noted that a corporation can suffer from the harms of multiple trials as individuals, since exposure to reprosecution can deplete resources from economic activity and cause other related undesirable consequences. Extension of double jeopardy protection to corporations also furthers the institutional purposes of the clause - see *Developments in the Law*, supra n 267, at 1344 and Friedman, supra n 294. Concurrent or subsequent prosecutions of corporate employees, managers, directors and their firm do not raise

double jeopardy protection bars government appeals but not defendant appeals. False acquittals are then more likely to remain unremedied due to double jeopardy protection and this reduces deterrent effect and imposes costs on society. Thus, double jeopardy protection is more concerned with false convictions than false acquittals.³⁰⁴ However, these concerns are unwarranted in the corporate context as we discussed in the context of the higher standard of proof.³⁰⁵ In any event the costs imposed by double jeopardy are easily avoided by drafting legislation in a manner to overcome the formalities of the doctrine.³⁰⁶

C RIGHT TO A JURY TRIAL

Another protection of corporate criminal liability is the right to a jury trial guaranteed by the sixth amendment.³⁰⁷ Although the Supreme Court has reserved its opinion on the applicability of the sixth amendment for corporate defendants,³⁰⁸ a large number of lower federal courts have recognized the corporation's right to a jury trial under some circumstances.³⁰⁹ In any event the right to a jury trial is more likely to apply in

double jeopardy protection because the corporation and the manager are separate entities and each is subject to one prosecution. A parent and subsidiary are also treated as separate entities. State and federal prosecutions are treated as proceedings by two different sovereigns as well. See GRUNER, *supra* n 269, § 5.7.11 and at 331-333.

³⁰⁴ This is because it appears to favor trying to overturn false convictions and not false acquittals.

³⁰⁵ Furthermore, the concern with the power imbalance between defendants and the government may have appeal in the individual context, but loses much of its appeal when the defendant is a large corporation such as IBM. Friedman, *supra* n 294, at 195-201. Friedman, further argues that the jurisprudence in this area has generally ignored whether the same power distinctions cause the need for concern in the corporate context as they might in the individual context - indeed such a concern may be absent in the corporate context.

³⁰⁶ One of the problems of double jeopardy is determining when offenses are similar enough to be "the same". If they are the same then double jeopardy protection applies if not then it does not. The problem is that it is not clear what the standard is for determining when they are the same. Initially, the standard was the "same evidence" test as developed in *Blockburger v. United States* 284 U.S. 299, 304 (1932): "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." Thus, each offense must contain some element that the other does not if the second case is to survive double jeopardy protection. See *Developments in the Law*, *supra* n 267, at 1345. However, *Grady v. Corbin*, 495 U.S. 508 (1990) overruled *Blockburger* and in its place provided another test - if the offenses are covering what is really the same conduct then they are the "same" for double jeopardy purposes. However, in 1993, *U.S. v. Dixon*, 113 S.Ct. 2849 (1993) overruled *Grady* and held that *Blockburger* was still the test. Thus, in theory legislative drafting would be able to circumvent double jeopardy protection (i.e., by providing an element in each offense that is not present in the other). A caveat needs to be added to this because it is not clear how one is to apply *Blockburger* after *Dixon* since the majority in that case had different techniques for applying *Blockburger*.

³⁰⁷ See GRUNER, *supra* n 269, at 326; Friedman, *supra* n 294 and Y. KAMISAR, W. LAFAVE & J. H. ISRAEL, *MODERN CRIMINAL PROCEDURE* (7th ed., 1993) at ch. 23 (pages 1288-1332).

³⁰⁸ Please see *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975).

³⁰⁹ Assuming that jury trial protection does apply to corporate defendants, it is not every criminal prosecution against a defendant that results in a right to a jury trial. The Supreme Court has recognized that "petty offenses" may be tried without a jury. For individuals, pettiness is often determined by reference to the period of incarceration that may be applicable to the offense or other indicia of seriousness. For corporations, the measures are monetary in nature and reflect an approximation of seriousness. For example, some circuits have held that where the fine threatened by the prosecution is greater than \$100,000 or if below \$100,000 the maximum fine would have a significant financial impact on the corporation (e.g., fine of 15% of the corporation's net worth) then the right applies. See R.S. GRUNER, *supra* n 2,

criminal cases than in civil cases.³¹⁰ Furthermore, on the assumption that jury trials are more expensive than non-jury trials (e.g., jury selection, sequestering, rules of evidence and other costs) a criminal case would be more costly to prosecute than a civil case. However, if the jury trial was desirable then these extra costs may be justified. Thus, we must ask when is the right to a jury trial desirable in the corporate context.

If our concern is with error reduction then we have the same arguments used earlier in the higher standard of proof context. However, the literature has indicated other reasons for the right to a jury trial for an individual and we need to ask if they have any influence on the corporation's right to a jury trial. Many commentators describe the purposes of the right to a jury trial as: (i) given that the defendant faces very severe criminal sanctions they should have the right to be judged by their peers and not just by judges who may not fully appreciate the situation in which they live and (ii) the community should have the right to nullify the application of some laws or to ignore the facts where it appears to the community at large, as represented by the jury, that the act should not be considered subject to criminal sanctions. Both of these reasons strike me as rather unlikely to apply in the corporate context. The first point is premised on the application of very severe sanctions, such as imprisonment, which are not available against corporations. Even if severe sanctions could be devised it is questionable what value the jury has in corporate cases. If the object of the jury in individual cases is to provide the defendant with empathetic ears because the jurors are peers of the defendant then it has dubious application in the corporate context. Who are the corporation's peers that can lend it an empathetic ear? What is the point of providing empathy for something which cannot feel it anyway?³¹¹

The second point, the desire to allow the jury to nullify the law and the facts, seems a little confusing in the corporate context since the general perception is that juries have an anti-business slant anyway and thus nullification is rare in the corporate context.³¹² In any

at 326-327. Please also see *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 663 (2d Cir. 1989) *cert. denied*, 493 U.S. 1021 (1990) and *United States v. Troxler Hosiery Co.*, 681 F.2d 934 (4th Cir. 1982).

³¹⁰ *Developments in the Law*, supra n 267, at 1302 and Y. KAMISAR, W. LAFAVE & J. H. ISRAEL, *MODERN CRIMINAL PROCEDURE* (7th ed., 1993) at ch.26 (pages 1412-1465).

³¹¹ See Friedman, supra n 294 at 197-201. Perhaps the idea is to provide the shareholders with a jury of their peers. This may be so, but given that most shareholders rarely show up to the trial of the corporation they own shares in one is somewhat perplexed by such an arrangement.

³¹² Friedman, supra n 294, at 197-201. Indeed it is surprising that there are even cases on the right to a jury trial given the perception of the bias against big-business that juries are supposed to have. It is possible however that the corporation would still opt for a jury trial even if juries had an anti-big-business slant. One reason may be that corporate managers perceive they have a better chance of avoiding liability if they face the jury rather than facing the judge. The only evidence I have in support of this is that there are cases where the jury has acquitted all the managers of the

event, it may be that the desirability of a jury trial makes little practical difference since most of time corporations would not opt for a jury trial as most juries are perceived to be anti-big-business and many corporate crimes involve big business.

D GRAND JURY INDICTMENT

This brings us to the grand jury indictment process. The grand jury serves at least two functions.³¹³ The first is to work as a powerful method of obtaining evidence and information for trial (i.e., its information gathering powers) and this function is discussed in Part VII B. The second function is to screen out cases that are without merit and this is the gist of this section. This section examines if the costs of the grand jury are justifiable in the corporate context given its screening function.³¹⁴

The grand jury and the jury trial have similar costs except that there are generally more grand jurors than jurors. The question is then what are the benefits of the screening function.³¹⁵ If the object of screening is to weed out likely false convictions then I doubt this is a serious problem in the corporate context. In addition, empirical data should make us question how serious are the grand jury's screening powers. The vast majority of grand juries at the federal level indict and thus it is unlikely that they truly minimize the chance

corporation yet held the corporation liable. See K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed., 1992) § 3.09 and *United States v. General Motors Corporation*, 121 F.2d 376 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941) and *United States v. Austin-Bagley Corp.*, 31 F. 2d 229 (2d Cir. 1929), *cert. denied*, 279 U.S. 863 (1929). The judges reviewing these cases indicated their amazement at these decisions (indicating they would have reached different conclusions). If this is representative of how judges and juries decide then corporate managers may indeed have a preference for choosing juries and they make the decision on jury trials. However, if corporations are the only defendant then this rational is no longer applicable.

³¹³ Although a grand jury indictment is not required in a corporate crime case it is often used before the case proceeds to trial. At times an information is all that is needed against a corporation, but most of the time indictments will be used. See GRUNER, *supra* n 269, at 323 and § 5.7.3.

³¹⁴ The costs attendant to grand juries refer to the costs of the grand jury structure not to the information gathering powers and conditions placed on it. The latter apply in civil cases where civil investigative demands are utilized - see Part VII B.

³¹⁵ See G. Hughes, *Administrative Subpoenas and the Grand Jury: - Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573 (1994) at 587-589 and 629-635. Indeed we have to ask what is achieved by using the grand jury for corporations, especially as many jurisdictions do not even have grand juries much less grand juries for corporations. For example in England there are no grand juries, see Hughes at 581 (n. 24) and 582 (n.27). See also A.M. NITTLE & M.H. BELSKY, *GRAND JURY INDICTMENT AND INVESTIGATION: THE BRITISH EXPERIENCE* in Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the House Committee on the Judiciary, H.R. Rep. No. 94, 95th Cong., 1st Sess. 1575 (1977); M. E. FRANKEL & G.P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 119 (1977); J. H. Israel, *Grand Jury*, in *ENCYCLOPAEDIA ON CRIME AND JUSTICE* (ed., S. Kadish, 1983) 810, at 814-815 mentioning that often states do not use the grand jury although at the federal level the grand jury is normally used. Hughes at 600-601, suggests that "Perhaps the volume of crime, the high degree of mobility, and a greater reluctance by citizens to cooperate with the police make the use of compulsory process in the investigation of serious crimes a more urgent need in the United States than in England." See also KAMISAR et al, *supra* n 310, at ch. 10 and ch. 15 (pages 634-727 and 914-954).

of false conviction.³¹⁶ The screening function of the grand jury is then a rarely desirable trait in the corporate context given the rarity of actual screening and the rarity of the need for it. The information gathering powers of the grand jury that may often be desirable are, as we shall find out, obtainable without the screening function of the grand jury and indeed without the grand jurors. Thus, the presence of the grand jury's screening powers are not sufficient to justify reliance on the grand jury and its costs.

In light of the foregoing analysis it would appear that the procedural protections normally appurtenant to corporate criminal liability are rarely desirable in the corporate context. These protections would be desirable in those cases where sanctions are very severe and legal standards uncertain such that chilling of desirable behavior may occur or where the procedural protections would result in a reduction in the number of false convictions that would be greater than the increase in the number of false acquittals of equal social value (which is more likely when there are more false convictions in society than false acquittals) and where no other method of error cost reduction (e.g., higher information gathering powers, appeals, sanctioning other parties, intermediate standards and so on) works better than the criminal standard of proof or other protections. This is a very unlikely situation and finding a way to design a system that accurately reflects this is difficult as well. In general the reason that these protections are rarely needed here is that the concern with false convictions is much more muted in the corporate context than in the individual context.³¹⁷ Consequently, relying on these procedural protections would make obtaining conviction more difficult and more costly (i.e., greater effort is needed for a conviction) thereby weakening deterrence and increasing costs for society *without any countervailing benefits*. Indeed this is what makes the procedural protections almost always undesirable in the corporate context. We could try to achieve these traits in another corporate liability regime, but since they are undesirable why bother.

³¹⁶ Y. KAMISAR, W. LAFAYE & J. H. ISRAEL, *MODERN CRIMINAL PROCEDURE* (7th ed., 1993) at 917-919 and 920 quoting a study where in 1984 federal grand jurors returned 17, 419 indictments and 68 "no true bills" or a rejection rate of about 3 in every 1,000. Many federal cases involve corporate crimes. Perhaps the grand jury may reduce chances for unnecessary expenditure. Once again given the ease with which most grand juries indict one doubts this is a significant factor. For a rather pessimistic view of grand juries please see Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 COR. L. REV. 260 (1995).

³¹⁷ One could view these protections as then being costs of corporate criminal liability when they are not desired. Aside from higher costs criminal proceedings take limited federal enforcement funds away from other civil proceedings. Thus, this reduces the number of civil cases that can then be pursued by the government against corporations due to their limited budgets.

VII ENFORCEMENT CHARACTERISTICS

In this Part I examine the enforcement characteristics of corporate criminal liability to determine if they shed any more light on the social optimality of corporate criminal liability. Given that enforcement concerns may have been the historical impetus behind the growth in corporate criminal liability (even until more recent times) an examination of the enforcement characteristics may prove very insightful. Thus, in this part I examine the enforcement characteristics of corporate criminal liability to determine when they may be desirable and how they are, or can be, replicated in corporate civil liability. In particular four enforcement characteristics are examined (i) criminal liability requires the use of public enforcement agents- Section A, (ii) criminal liability has large information gathering powers at the pre-litigation stage- Section B, (iii) the presence of parallel liability (one criminal and one civil suit against the corporation) may provide possible strategic or error correction advantages - Section C and (iv) cost savings from bringing two suits of the same type (two criminal suits - one against the corporation and the other against an individual manager) rather than two different types of suits (one criminal suit against an individual and one civil suit against a corporation)- Section D.³¹⁸

A PUBLIC OR PRIVATE ENFORCEMENT

As a general matter there are two different methods of enforcing legal norms. These are public enforcement models (of which criminal law enforcement is one) and private enforcement models (of which private party civil enforcement is one).³¹⁹ Thus, criminal and civil proceedings are enforced differently and the question is when do we prefer one enforcement model over the other. Private enforcement maximizes efficiency when two criteria are present for a group of legal rules: (i) that corporate wrongs have identifiable victims, and (ii) that victims are aware of the violation and the offender's identity.³²⁰ Thus,

³¹⁸ Another enforcement characteristic attached with most criminal processes is that they have restrictive admissibility rules compared to normal civil processes. For individuals many constitutional protections will bar the admissibility of evidence (the fourth amendment and so on), however these constitutional protections have very little impact in cases of corporate criminal or civil liability. Thus, the difference in admissibility standards for corporate criminal and civil liability are understated. See Mann, *supra* n 158, at 1810-1812.

³¹⁹ These forms of enforcement share many of the same types of costs, but the magnitude may differ depending upon whether public or private enforcement is used. See J.T. Byam, *supra* n 264, at 595. Note that the structure of corporate criminal enforcement is that only the Justice Department can bring criminal prosecution either of its volition or on referral from a governmental agency such as the SEC.

³²⁰ The cost of detection differs depending upon whether we use private or public enforcement agents. When a corporation breaches an agreement with a victim, the victim detects the breach at a very low or at zero cost. When a defective product results in injury to the purchaser/victim, the victim is likely to detect this injury and to know the identity of the injurer. Therefore, the victim's detection costs will be very close to zero. If the government was the only detector of violations of the law or breaches of agreements, society would spend more resources by hiring agents or

"private enforcement of legal rules that have a probability close to unity that victims will detect violations, produces optimal efficiency and any public enforcement causes overdeterrence and inefficiency."³²¹

However, not all corporate violations of legal rules result in identifiable victims who know a violation occurred and know who the violator was.³²² Some victims of corporate offenses are people unaware of the harm or of the violator's identity. Public enforcement agents must police violations of these types of legal rules to ensure efficiency.³²³ An example of this is a firm emitting toxic waste into a nearby river. It is unlikely that individuals who reside near the river will know that the polluted river is harming them. Even if they do it is unlikely that an individual victim would or could spend the resources needed to single out the offending firm from other firms.³²⁴ Due to the high expense for an individual to investigate the violation, the likelihood of private detection is low.³²⁵ This analysis suggests that private enforcement of legal rules where the probability of detection is close to one and public enforcement of those rules where the probability of detection is significantly less than one maximizes efficiency and

paying informers, than it would cost victims to detect these offenses themselves. Thus, for some legal rules using victims as detection agents would improve the efficaciousness of enforcement. The victims should be the sole detection agents if the marginal cost of employing a public detection agent is greater than the marginal reduction in the social cost of corporate crime caused by the public agent. See notes 69-76 in Byam, *supra* n 264, at 598-599 and accompanying text. If the victims' litigation costs are the same as or lower than the government's, the victims also should have to bring private actions against corporate offenders. When victims bring suits themselves that reduces the transaction costs associated with obtaining and transferring evidence and information to third parties as well as transferring compensation. Private suits eliminate the costs incurred when the government acts as an intermediary. See R. POSNER, *supra* n 270, at 595-602.

³²¹ See POSNER, *supra* n 270, at 595-602 (§§ 22.1 and 22.2) and J.T. Byam, *supra* n 264, at 597.

³²² If corporations can escape liability by spreading the costs of their offenses across a large group of victims, thereby eliminating the economic incentive for any one victim to initiate suit, then corporations may impose significant costs. See Byam, *supra* n 264, at 596-597. Where the costs of litigation are greater than each victim's economic interest in bringing suit, the class action suit promotes economic efficiency. The class action suit, which aggregates victims' damages, is a mechanism for ensuring that the corporation pays for its damage, while providing victims with an incentive to obtain compensation. For discussion of some problems of such suits, see Rosenfield, *An Empirical Test of Class-Action Settlement*, 5 J. LEG. STUD. 113 (1976).

³²³ See Byam, *supra* n 264, at 597-599.

³²⁴ For some violations of legal rules it is prohibitively expensive for individuals to detect violations or violators compared to the low return from their detection. Rewarding private enforcers with fines may be a method to bridge the gap. However, the defects of this have been well researched and they suggest the need for public enforcement to maximize efficiency. See POSNER, *supra* n 270, at 596-602 and Byam, *supra* n 264, at 598-599 and notes 71-76 in Byam plus accompanying text. W. Landes & R. Posner, *The Private Enforcement of Law*, 4 J. LEG. STUD. 1, 30-33 (1975); G. Becker & G. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEG. STUD. 1 (1974). Note also Polinsky, *infra* n 326.

³²⁵ Due to the low probability that individual investigation will detect violations, efficient sanctions will exceed the total social damage from violations.

effectiveness. This provides a general basis for when we may prefer public enforcement over private enforcement.³²⁶

However, this does not necessarily mean that corporate criminal liability should be preferred over corporate civil liability. Although civil liability is traditionally enforced by private parties, in the sphere of corporate liability much enforcement brought by governmental administrative agencies uses civil proceedings. In other words the advantages of public enforcement can be achieved through using public civil proceedings instead of criminal proceedings.³²⁷ However, sometimes public enforcement may not be enough to obtain optimal deterrence due to the difficulty of detection and prosecution and we may need to consider other enforcement devices to help achieve optimal deterrence.

B. INFORMATION GATHERING POWERS

Aside from who enforces the law we need to consider what added investigatory or information gathering powers, if any, are obtained through the criminal process that are not possessed by traditional civil proceedings brought by the government. If greater information gathering powers exist then we need to determine when it is optimal to allow public enforcement agents to use them (section 1). After having determined when it may be optimal to allow for greater information gathering powers and whether the present scheme of regulation reflects this we need to determine if greater information gathering powers can be, or already are, built into public civil proceedings (section 2).

1. *Information Gathering Differences in Criminal and Traditional Civil Cases*

Information is the cornerstone of successful litigation and settlement, however, information can come at different stages such as the pre-litigation, discovery and actual

³²⁶ See A.M. Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEG. STUD. 105 (1980) where four points are made (i) "Regardless of relative enforcement costs, private (competitive or monopolistic) enforcement leads in a wide range of circumstances to less enforcement than public enforcement", (ii) "Public enforcement is socially preferable to private enforcement in many circumstances even when public enforcement is much costlier" (iii) "Depending on relative enforcement costs, monopolistic enforcement may result in more or less enforcement than competitive enforcement" and (iv) "Regulating private enforcers by paying them something different than the fine for each violator detected can achieve the socially most preferred outcome in the competitive case but not generally in the monopolistic case". *Id.*, at 107-108.

³²⁷ See Byam, *supra* n 264, at 599. There is actually one other distinction between public criminal and public civil enforcement. Under public criminal no private parties can bring or join suit in the criminal sphere - only the government can bring this type of case, whereas private parties and government can bring civil suits. Perhaps criminal enforcement may be preferred because it bars private suits. This is not convincing because (i) civil litigation can deny standing to certain people and that works as an effective bar and (ii) criminal suits do not bar private parties from bringing suit only from bringing a criminal suit - private parties can and often do sue in follow on civil suits.

trial stages. For our purposes information gathered during pre-litigation and discovery will be the focus of the discussion.³²⁸

Although recently both civil and criminal discovery were substantially broadened,³²⁹ civil discovery remains considerably wider than criminal discovery.³³⁰ However, the advantage civil proceedings has in terms of information gathering during discovery is to be balanced against the advantage of criminal proceedings at the pre-litigation stage.³³¹ In federal criminal cases the use of the grand jury provides a substantial information gathering advantage over traditional civil proceedings at the pre-litigation stage. Grand jury subpoenas do not need to be supported by probable cause and they can be utilized to compel testimony and the production of documents.³³² They are also a discrete method of obtaining documents from third parties. Consequently, the grand jury is a powerful and often "indispensable engine of information-gathering and case-building in complex criminal cases."³³³

³²⁸ Information obtained at the trial stage is assumed to be about the same in both civil and criminal trials. I am assuming that high information gathering powers are only available in a form of public enforcement and not in private enforcement.

³²⁹ See G. Hughes, *Administrative Subpoenas and the Grand Jury: - Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 574 (1994) and The Federal Rules of Civil Procedure Rule 26(b). Courts in the past thought that any significant expansion in criminal discovery must be rejected because the Fifth Amendment's self-incrimination clause would ban the exercise of compulsion against defendants, and the unilateral imposition of more extensive discovery duties on the government would change the adversarial equipoise. Recently, a narrower understanding of the protections of the Fifth Amendment has reduced the force of this argument. See W. R. LAFAVE & J. H. ISRAEL, 2 CRIMINAL PROCEDURE § 19.3-19.4 at 474-531 (2d ed., 1984). See also K. Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992) for a more general discussion that includes some mention of information gathering in criminal trials.

³³⁰ See *Williams v. Florida*, 399 U.S. 78 (1970) and Federal Rules of Criminal Procedure 16(b) plus Hughes, supra n 315, at 574. See 6 BNA Crim. Prac. Man. 801 (1992). Hughes defines discovery as follows: "Discovery is the acquisition of information by one party from another after an issue has been joined in litigation. Discovery rules govern the flow of information between parties formally defined as adversaries and represented by counsel." Hughes, supra n 315, at 575. See also K. MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985) at pp 14-18.

³³¹ At the pre-litigation stage in a criminal trial the government may follow two paths. The first, obtaining a search warrant, is restricted by the requirement of showing probable cause before a magistrate under the Fourth Amendment. A search warrant is therefore unjustifiable in cases of mere suspicion. Furthermore, a warrant is confined to the seizure of goods and other physical objects and cannot be used to compel testimony. In addition, a search warrant may seem an inappropriate and somewhat harsh means of obtaining information from third parties (not themselves targets of the case) who could be willing to surrender documents or objects on demand. These problems can be avoided by the use of a grand jury subpoena. See Hughes, supra n 315, at 575-576. See also *U.S. v. Robinson*, 414 U.S. 218, 235 (1973) discussing warrants and *U.S. v. Dionisio*, 410 U.S. 1 (1973) on grand juries.

³³² See *United States v. Dionisio*, 410 U.S. 1 (1973).

³³³ Hughes, supra n 315, at 576. The direction of compulsory process to the citizen who, "unassisted by counsel, faces a conviction for contempt if she does not answer questions under oath in an inquisitorial setting," (Hughes, supra n 315, at 576) is odd and the grand jury stands out as a unique institution of American criminal procedure. See *United States v. Mandujano*, 425 U.S. 564, 581 (1976). Perhaps the sensitivity about the inquisitorial aspect of the grand jury is reflected in ambivalence towards it.

In light of this before litigation begins, criminal investigators have available virtually untrammelled compulsory process in the grand jury, yet in civil matters, even those brought by the government, compulsory process for investigatory purposes did not exist at common law. However once litigation was joined, civil discovery was rather broad while criminal discovery was quite narrow. This suggests that one possible benefit of corporate criminal liability rests in its greater information gathering powers at the pre-litigation stage. However, this benefit comes at a cost - lesser information gathering powers at the discovery stage. It is when the benefits from greater information gathering powers at the pre-litigation stage outweigh both its extra enforcement costs and the disadvantages of lesser information gathering powers at discovery that corporate criminal liability's information gathering powers appear useful.³³⁴

Under this structure one suspects that high information gathering powers at pre-litigation may be desirable when information at the pre-litigation stage is essential compared to information at the discovery stage. At the discovery stage there would appear to be clear evidence of harm having occurred and the issue is often is the defendant the guilty party. At the pre-litigation stage it may be that we are not sure if an offense has even occurred. Thus, offenses for which detection is difficult or where determining when and if harm occurred is difficult even with public enforcement would be prime candidates for greater information gathering powers at the pre-litigation stage as compared to information gathering powers at the discovery stage. Corporate crimes appear to be ones where often, though not always, it is the detection of the offense that is problematic.³³⁵ Indeed one could make a strong argument that the present regulatory scheme does reflect some concern for acquiring information needed by law enforcement.³³⁶

³³⁴ Hughes, *supra* n 315, at 578. The correct trade off is that corporate criminal liability is desirable when the benefits from increased information gathering powers at the pre-litigation stage outweigh the costs of less information at the discovery stage (assuming there are any) and any added costs of criminal proceedings and of using resources to get high information gathering powers. Sometimes criminal discovery may be able to tap into the findings of civil discovery in another case and hence there may be little loss in discovery powers. See *Developments in the Law*, *supra* n 267, at 1312-1320. However, if it becomes clear to government enforcers during civil litigation that a criminal prosecution is likely to ensue then debate arises as to whether the civil process should be stopped and criminal proceedings take over. If this is so then civil discovery may not even come to fruition, however, if it does then using that material in the criminal case may be allowed unless there was some kind of duty on the civil enforcer to inform the defendant of the possibility of a criminal case being brought. If there was such a duty and it was not met then some of the material obtained after the breach of the duty may not be held admissible. For further discussion see Hughes, *supra* n 315, at 589-593 and 635-651.

³³⁵ This is partially reflected in the use of the grand jury which is much more common at the federal level (which is normally concerned with corporate/organized crime). See KAMISAR, et al., *supra* n 310, at 17-20.

³³⁶ The present system of regulation is a mixture of parallel civil and criminal liability for corporations plus civil suits by private parties. Could the present overlapping system be considered to reflect some interest in information gathering powers and reflect areas where detection or prosecution is difficult. Often corporate crimes are rather difficult to detect. One can easily think of some environmental type harms where detection may be rather difficult and ascertaining when something happened and how may require greater powers than traditional civil proceedings. However, even then there are many areas of environmental law that may not be difficult to detect (e.g., a gigantic oil spill by a corporation's tanker

However, even if information gathering was an important factor and helped shape the structure of present regulation that does not resolve the debate. This is because it may be possible to obtain greater information gathering powers at the pre-litigation stage in other corporate liability regimes. In fact, the advent of the Civil Investigative Demand provides an instance of greater information gathering powers in the civil sphere.³³⁷

2. *The Rise of the Civil Investigative Demand*

The right to issue a civil investigative demand (CID) exists only by statute, however, such powers are now becoming more common among government agencies.³³⁸ The law governing judicial scrutiny of CIDs has increasingly been patterned on principles normally used for the grand jury,³³⁹ and now judicial scrutiny of CIDs almost exactly

is unlikely to be hard to detect or prosecute). One can see this sort of trend in many areas of corporate crime - we can find some categories of wrongs (such as environmental laws, antitrust laws and others) where some in that category are difficult to detect and others are relatively easy to detect. Therefore, one may not be able to say *ex ante* that a particular type of harm or wrong is *always* going to be difficult to detect to the degree that greater information gathering powers are needed in *every case*.

Since we cannot be sure *ex ante* whether these extra powers and costs are necessary it may perhaps be a good idea to provide for civil liability in case the greater powers of criminal liability are not needed. In such a scenario parallel liability is not too surprising. Where parallel liability is present we may then leave it up to a government agency (such as the Justice Department) to determine when the greater powers of criminal proceedings are needed and worth their extra costs. Indeed we do leave it up to the Department of Justice, at the Federal level, to determine whether or not corporate criminal prosecution is desirable. Congress may have decided to leave it to the prosecutorial agency to determine which type of proceedings (or mix of them) was best suited to the enforcement of the law and the budget of the enforcement agency for a given case. If this is the case then we would expect that difficulty of detection or prosecution when using civil proceedings and federal enforcement budgets and priorities would be matters which influence the Justice Department in going for a criminal prosecution and in influencing an agency making a referral for criminal prosecution to the Justice Department. The Department of Justice's Manual for Criminal proceedings suggests that (i) the availability and adequacy of alternate (i.e., non-criminal) proceedings, (ii) whether a substantial federal interest is being served and (iii) whether the person is subject to effective prosecution in another jurisdiction are matters to be considered. The Department of Justice Manual, Criminal Division, 9-27.220 to 9-27.250. Within these broad categories federal enforcement priorities, the seriousness of the offense, sanctions available in alternate proceedings and their likelihood of imposition are matters of considerable concern. From these policy statements it is not clear that information gathering is the key factor in deciding whether to go for criminal prosecution or not, but it is not inconsistent with the stated policy objectives either. Discussions with members of government enforcement agencies suggested that the key factors determining whether or not to bring or recommend criminal prosecution were the seriousness of the offense, a stigma on corporations being a desired benefit, and sometimes sanctions in criminal cases are more severe than civil sanctions (although the reverse is also true). Some thought information gathering powers were a relevant concern, but that as CIDs were becoming more common the reliance on the grand jury was lessening. Thus the evidence is equivocal, but not inconsistent with an information gathering justification for corporate criminal liability.

³³⁷ See Hughes, *supra* n 315, at pp 587-589.

³³⁸ A number of varying examples can be given: regulation of veteran's benefits (38 U.S.C. s 5711), reporting of energy information (15 U.S.C. s 796(b) (1)) and the protection of endangered species (16 U.S.C. s 1540 (a) (2) (1988)) as examples. See Hughes, *supra* n 315, at 587 (n. 73).

³³⁹ See Hughes, *supra* n 315, at 589 and *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

matches the standards for challenging a grand jury subpoena.³⁴⁰ Further, although CID power is occasionally restricted to compelling the production of documents, it often includes the power to compel testimony under oath as would the grand jury.³⁴¹ In addition, the power to communicate the product of an administrative investigation to other government agencies, although attended by some confidentiality rules, is a good deal broader than with the results of a grand jury investigation.³⁴²

In fact there are no differences likely to be of much practical consequence in the standards employed to scrutinize the enforcement of CIDs and their powers as compared with grand jury subpoenas.³⁴³ CID powers can be found in the Antitrust division of the Justice Department,³⁴⁴ the SEC,³⁴⁵ and the inspectors general³⁴⁶ amongst others.³⁴⁷ The

³⁴⁰ By contrast, the early cases on CIDs displayed judicial reluctance to grant broad enforcement. See S.R. Johnson, *Note, Reasonable Relation Reassessed: The Examination of Private Documents by Federal Regulatory Agencies*, 56 N.Y.U.L. Rev. 742 (1981). In *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924), (condemning "fishing expeditions" by government agencies and departments and appeared to require something close to a showing of probable cause). *Endicott Johnson v. Perkins*, 317 U.S. 501 (1943) which has become the primary case for the modern approach, indicated a growing recognition of the necessity to provide agencies with broad access to information. The Court set out three conditions for the validity of an CID. The CID must be sought for a "lawfully authorized purpose," requested documents must somehow be "relevant to the inquiry," and the documents "must be adequately specified". *Endicott Johnson* stated that "this does not mean that [the] inquiry must be 'limited ... by forecasts of the probable result of the investigation.'" Later in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Court refused to scrutinize a CID under any strict standard of relevance. Rejecting earlier cases, the Court announced the propriety of "fishing expeditions" intended only to seek assurance that regulations were not being violated. See *Morton Salt* at pp 642-643. The Court affirmed this in *United States v. Powell*, 379 U.S. 48 (1964) and held that an agency does not need to show probable cause but only demonstrate that its purpose is legitimate under statute, the inquiry is somehow relevant to that purpose, and that the required administrative steps have been followed. This is like the grand jury. Note that as with grand jury subpoenas, an unreasonably broad or burdensome CID could be modified or quashed, but the party challenging it bears the burden of proof. See *FTC v. Texaco Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

³⁴¹ Hughes notes a few exceptions. One is that the subpoena power conferred on Inspectors General which does not extend to compelling testimony. In addition, the Right to Financial Privacy Act, contains a restriction, which provides that a government agency may have access to the financial records of a customer in the possession of a financial institution only if there is reason to believe that the records sought are relevant to a legitimate law enforcement concern. See Hughes, *supra* n 315, at 594 (n. 73 to 76).

³⁴² For example, see 18 U.S.C. s 1968(a) (1988). In the Small Business Administration context confidentiality orders can be made but the Administration can disclose this material if it is not contrary to the public interest (13 C.F.R. § 110.5 (1993)). It is generally perceived that the Administration will share the information when a suspected violation of the law is in issue (see Hughes, *supra* n 315, at 601(n.116)). KAMISAR, et al., *supra* n 310, at 639-640 mention that the secrecy surrounding the grand jury testimony may be useful in encouraging informants to come forward. Confidentiality orders may induce a similar effect.

³⁴³ However, one procedural advantage of substantial importance applies to a party's challenge to a CID but is not available when a grand jury subpoena is challenged. The denial of a motion to quash an CID may be appealed, (*Reisman v. Caplin*, 375 U.S. 440, 449 (1964)) whereas no appeal is available when a motion to quash a grand jury subpoena is rejected. See *United States v. Ryan*, 402 U.S. 530, 532 (1971).

³⁴⁴ The Antitrust Civil Process Act 15 U.S.C. ss 1312-1313 (1988) confers on the Attorney General and the Assistant Attorney General in charge of the Antitrust Division of the Justice Department the "power to compel the production of documents, to compel written answers to written interrogatories, and to compel oral testimony whenever they believe the person may have information relevant to a civil antitrust investigation." Hughes, *supra* n 315, at 595-597 and Hart-Scott-Rodino Antitrust Improvements Act of 1976, H.R. Rep. No. 94-1343. 94th Cong., 2d Sess. 2606 (1976). See 15 U.S.C. ss 1312(a), (b), (c)(1)(A) and (i)(7) (1988). Note that the statute recognizes the Fifth Amendment privilege against self-incrimination to refuse to answer questions. See 15 U.S.C. s 1312(i) (7). The material that is obtained generally should

growth of this investigative power (and the growth of investigative departments in agencies) is of crucial importance as the significance of the grand jury and formal prosecutorial agencies as investigatory engines is diminished since much of the investigation is done by the civil agencies.

Thus, in terms of information gathering at the pre-litigation stage public civil proceedings have virtually identical powers to public criminal proceedings, but may prove more advantageous due to (i) a lower standard of proof,³⁴⁸ (ii) easier sharing between agencies of the information obtained in the CID than sharing of grand jury materials,³⁴⁹

not be made available to third parties without the consent of the person from whom they were originally obtained. See 15 U.S.C. s 1313 (c)(3). However, this provision is subject to some important exceptions: "The material may be furnished to any attorney of the Department of Justice who has been designated to appear before any court, grand jury, or federal administrative or regulatory agency in any case or proceeding. Also, officials, employees, or agents of the Justice Department may use such material in connection with the taking of oral testimony under the statute. Further, such material may be delivered to the Federal Trade Commission in response to a written request in connection with an investigation under the Commission's jurisdiction." See 15 U.S.C. ss 1313 (d)(1), (c)(2) and (d)(2). These provisions allow substantially more disclosure than do the grand jury rules.

³⁴⁵ The Securities and Exchange Commission (SEC) has wide ranging powers to investigate any possible violation or impending violation of securities laws. The Commission can require any person to file a statement under oath and may also subpoena people and require the production and handing over of books and documents. See 15 U.S.C. s 78u(a)(1) and (b) (1988). The Commission can transmit its findings to the Justice Department. 15 U.S.C. s 78u(a) and 78u(d). The Commission may share information in its files with other agencies, even if a violation of law does not appear. 17 C.F.R. s 202.5(b) (1993). Although information gathered is often protected by a presumption of confidentiality, the Commission may "authorize a disclosure if it finds that disclosure is not contrary to the public interest." 17 C.F.R. s 240.0-4. Finally, the Commission may transfer financial records that it has obtained to any state securities enforcement agency or to the Justice Department without notice under the Financial Privacy Act of 1978. 15 U.S.C. s 78u(h)(9)(B) (1988). See generally Hughes, *supra* n 315, at pp 597-599. Sharing of information is easier than with the grand jury.

³⁴⁶ An important development over the last fifty years has been the rise of the offices of Inspector General in major government departments to combat fraud, waste, and abuse. See 5 U.S.C. app. ss 2-3, 9 (1988). The subpoena powers of Inspectors General covers all documentary material but not the compulsion of testimony. See 5 U.S.C. app. s 6(a)(4). The Justice Department has encouraged use of the Inspector's office for investigating purposes, in part to avoid problems that may arise from grand jury secrecy rules. Once the propriety of the subpoena is established as falling within the Inspector General's statutory powers, a successful attack by the party subpoenaed is highly unlikely. See *United States v. Balanced Financial Mgmt., Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985) and *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164 (3d Cir. 1986). Hughes, *supra* n 315, at 599-600.

³⁴⁷ The criminal trial and investigation may in some circumstances provide evidence or other useful side benefits for later private civil cases and result in a subsidization of these later cases' enforcement efforts or in obtaining a finding of liability where one was simply not possible without the use of these broad powers. See *Developments in the Law*, *supra* n 267, at 1350. However, even corporate civil liability when the government brings suit achieves essentially the same things (i.e., subsidization and so on of private civil suits).

³⁴⁸ The analysis in Part VI A indicates that higher information gathering powers do not necessarily result in a higher standard of proof unless they increase chances for false conviction errors, but Part VI A indicates they do not. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed., 1992) at 550-553 (ss 21.2 and 21.3).

³⁴⁹ The materials obtained through the grand jury's subpoenas (whether documents or testimony) are not automatically open for inspection by government officers or agencies. "Both because they are records of the court and because the grand jury's proper function is narrowly perceived as the investigation of criminality, a presumption of secrecy applies. More problematic than the attempted use of the grand jury for purely civil ends is the disclosure to agencies of civilly relevant information obtained by a grand jury legitimately pursuing a criminal investigation. Agencies may seek access to grand jury materials in order to avoid duplication of investigative effort or to take advantage of less restrictive grand jury procedures. Access to grand jury information may be obtained through several different ways. However, there has been considerable judicial vacillation on when such access will be granted and under what conditions." See *United*

and (iii) greater information gathering at the discovery stage than criminal proceedings provide. Therefore, any benefits of criminal proceedings in terms of information gathering can be achieved through civil proceedings using CIDs.³⁵⁰ Thus, it would appear that the information gathering powers associated with CIDs are much more desirable than those associated with corporate criminal liability and the grand jury. The grand jury would only be preferable when the protections that accompany it (and that do not accompany CIDs) are desirable. My analysis in Part VI D indicates that we will rarely, if ever, desire these protections. In other words we rarely desire the information gathering powers of corporate criminal liability *and* the grand jury protections given that CIDs now exist.

C. STRATEGIC AND ERROR CORRECTION BENEFITS

We are then required to move on to the next category of enforcement characteristics, which are labeled strategic and error correction benefits from having two suits (one criminal and one civil against a corporation). Each possible benefit of parallel liability is examined in turn.

1. *Strategic benefits of parallel liability*

Pursuing criminal liability along with civil liability against a corporation can place the corporation in a strategically inferior position to that it would be in if such parallel liability did not exist. Both suits being brought around the same time could result in the

States v. Procter & Gamble Co., 356 U.S. 677, 684-685 (1958) (Whittaker, J., concurring) and Hughes, *supra* n 315, at 577. Inspection of grand jury materials by other government officers is usually conditioned and restricted and generally may be obtained only on application to the court under Rule 6(e) of the Federal Rules of Criminal Procedure. See Hughes, *supra* n 315, at 577-578 (n.16 discussing rule 6(e), *supra* n 1361). The second limitation is the grand jury's range of inquiry and powers of compulsion which are viewed as being justifiable only in a criminal investigation. It is not to be used as a pre-litigation discovery technique for civil matters. See *Procter & Gamble Co.* Note that typical statutory provisions for CIDs assert a presumption of confidentiality but provide large exceptions to make disclosure in the public interest and without a court order. See for example, 13 C.F.R. s 110.5 (1993) and Hughes, *supra* n 315, at 600-601 and then 635-650.

³⁵⁰ The other matters of difference between the grand jury and CIDs are usefully summarized in *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979) at 1312. "First, the enforcement process for summonses is less favorable to the government. In an enforcement hearing, courts look into agency motives closely, even allowing some discovery from the government despite the summary nature of such proceedings. Judicial scrutiny is less severe in the case of subpoenas, presumably because of a desire to preserve grand jury secrecy and autonomy. In addition, an order enforcing an agency summons is appealable, while enforcement of a grand jury subpoena cannot be appealed without first submitting to the penalty for civil contempt. Second, the grand jury witness enjoys fewer procedural protections while testifying. The agency witness has the right to have a lawyer present, and may at least inspect transcripts of his testimony afterwards, while the grand jury witness enjoys only a limited right to leave the room from time to time to confer with counsel, and can only obtain transcripts of his testimony if indicted. Finally, because agencies cannot grant immunity without approval of the Justice Department, it is somewhat more likely in the grand jury than in the agency context that testimony will be compelled by this means."

defense having to disclose some of its strategies in court early on or in losing issues in the civil case to increase their chances for victory in the criminal case (or to avoid the criminal case altogether). In either event the prosecution/plaintiff benefits from the imposition of parallel liability because it may provide the prosecution with extra leverage in settlement or plea bargaining or at trial.³⁵¹ Offenses where such strategic advantages may be needed is where it is difficult to obtain conviction even after relying on public enforcement with high information gathering powers. My reasoning for this conclusion is my assumption that relying on parallel liability is socially more costly than relying on public enforcement with high information gathering powers which is in turn more expensive than relying on public enforcement.³⁵² Of course we should rely on the socially cheaper enforcement device to obtain optimal deterrence first and if that is not sufficient to rely on the more expensive devices if the incremental deterrence gains from using them outweigh the incremental enforcement costs from doing so. Given my assumption about costs we should only use parallel liability when obtaining optimal deterrence with the other two enforcement traits has failed. This may be the case with some areas of corporate crime. However, we need to inquire into whether these advantages can be achieved through using two civil proceedings.

One strategic plus is that the corporation may lose an issue in a civil case to avoid loss in a criminal case (e.g., asking for the fifth amendment right against self-incrimination in the civil case and suffering any adverse consequences from that). Perhaps the threat of the later criminal proceedings would make the defendant fight less vigorously in the civil case and save or reduce litigation costs for the prosecution in civil cases.³⁵³ The key question is why would a corporation wish to lose the civil case rather than the criminal one.

³⁵¹ Some articles have noted this situation, but the articles focus on this as prejudicing the defendant (which it appears to do) and not on the strategic benefits one can take from it. Please see *Developments in Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979) at 1333-1337; Mathews, *Criminal Prosecutions Under the Federal Securities Laws and Related Statutes*, 39 GEO. WASH. L. REV. 901, 958-969 (1971); Note, *Stay of Discovery in Civil Courts to Protect Proceedings in Concurrent Criminal Actions - The Pattern of Remedies*, 66 MICH. L. REV. 738 (1968); C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2018 and 2286 (1970).

³⁵² My assumption here is that it is generally more expensive to bring two suits (where evidence may not be shared between agencies) rather than one suit with high information gathering powers. For example, the higher costs of using CIDs in one case are likely to be less than having another separate trial. It is possible that the reverse could occur, but I am treating this as the exception rather than the rule. In addition, using higher information gathering powers has so far been tied to the presence of public enforcement of some type. Thus, public enforcement would be socially cheaper than public enforcement with higher information gathering powers and this in turn is cheaper than using two suits. Clearly, then we should rely on public enforcement first to obtain optimal deterrence (as it is the socially cheaper method of enforcement) and then on higher information gathering powers if needed for deterrence (assuming the added benefits are greater than the added costs of doing so) and so on. If high information gathering powers can be obtained without public enforcement the calculus would obviously change.

³⁵³ *Developments in the Law*, supra n 351, at 1333-1335 and Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 476-477 (1957) plus WRIGHT, supra n 351. See also *Baxter v. Palmigiano*, 425 U.S. 308 (1976) and *United States v. White*, 589 F.2d 1283, 1285-1287 (5th Cir. 1979).

The most likely answer is that the sanctions in criminal cases may be more severe overall than in civil cases and by losing the civil one the criminal one may be avoided. However, as argued before, the possibly higher sanctions in criminal proceedings can be replicated in civil proceedings. Thus, the corporation has no incentive to lose the first civil case if its sanctions are equivalent to those in a second criminal case.³⁵⁴

Another possible benefit is gaining knowledge of defense strategy. Knowing this helps the prosecution in the later criminal trial. This benefits the prosecution because they may need to know defense strategy to have any chance of successfully prosecuting the corporation.³⁵⁵ This may indeed be a plausible benefit where successful prosecution would be improbable without such tricks, but why should the second case be criminal? It could be another related civil proceedings under another section or area of law.³⁵⁶ Since these benefits may be obtained by using two civil suits rather than one criminal and one civil this characteristic is not a reason to prefer corporate criminal to corporate civil liability.³⁵⁷

³⁵⁴ Indeed this option would be preferable for society as increasing sanctions in civil cases means that the prosecution can threaten higher sanctions in the same trial without having to ever go for another and probably more expensive second trial. Note that sometimes a corporate conviction may result in a higher reputational loss than a civil finding of liability, but since reputational penalties are generally undesirable we would prefer not to use them in this manner. We would prefer to increase sanctions through cash fines and so on, please see Part V A and B.

³⁵⁵ *Developments in the Law*, supra n 351, at 1336-1337 and Note, supra n 351, at 741. Trying to achieve this in one proceedings seems difficult and may require some reworking of the discovery rules.

³⁵⁶ *Developments in the Law*, supra n 351, at pp 1327-1328, provides a useful catalogue of the types of strategic problems corporations can face in parallel liability cases. Most of these are discussed in the text except circumventing criminal discovery limits by using civil discovery because this "benefit" could be achieved by simply broadening civil discovery.

³⁵⁷ One can examine the reverse situation to see if there is some strategic benefit in bringing the criminal case first and then the civil one second. An advantage of this is that if the prosecution loses the first case they can bring the second case and be unconcerned about the preclusion of issues. Coffee, supra n 235, at 447-448. This is because since the first case was a criminal one issues lost under it by the prosecution were lost under the higher standard of proof and that does not preclude trying them again at the civil level under a lower standard of proof. If both cases are civil then the standard of proof is the same and issue preclusion may indeed result. Thus, using the criminal case first can work as a practice case and not prevent the prosecution from trying again in a different sphere (civil proceedings). We must query however what exactly is gained in this process. The advantage arises if we think we can win the civil case, but only if we have had the criminal case first and lost that one. If all that were required were that we win the civil case then there is no need to bring the criminal one first - just bring the civil case first and avoid the costs of bringing two prosecutions. Thus, bringing the criminal case first must increase the chances of winning a civil suit brought after it even if the criminal case was lost. Why would we think bringing a criminal case first would improve chances of victory in a later civil case more than bringing a civil case first and then a second civil suit. One reason could be that bringing the criminal trial first could result in disclosure of defense strategy - this may be the case, but this would occur even if the first suit was brought using civil proceedings. Another reason could be to make use of the large information gathering powers of the criminal suit. However, the information gathering powers of the grand jury have been essentially replicated by the CIDs allowed in some public civil proceedings. Coffee, at 447 noted that criminal cases against corporations may proceed faster due to the Speedy Trial Act for crimes. I am not aware of any evidence indicating corporate crime cases move faster than corporate civil cases.

2. *Error correction benefits of parallel liability*

Disclosure of defense strategy may present us with a clue to another possible general benefit of the system of parallel liability and that is error correction. Disclosure of defense strategy is necessary when the first case is likely to result in an incorrect finding of no liability, but the second case would correct this if we had knowledge of defense strategy. Thus, one goal in allowing two suits against a corporation (or anyone) may be to provide an avenue for error correction in adjudication. There are, however, other alternatives to reduce or correct errors, such as appeals and improving trial court accuracy, and we need to ascertain when having two suits (i.e., one criminal and one civil) may be optimal compared to the other alternatives.

Clearly improving trial court accuracy could be costly as that involves extra expenditure on every case even if no error was made. Using any kind of later suit (i.e., one type of later suit is an appeal and another type is the second suit brought in a two suits regime) with its litigation and other costs has the advantage of encouraging separation so that only cases likely to contain errors are appealed or sued again and this results in fewer appeals or other suits. This could result in lower costs than improving overall trial accuracy. In circumstances when the net benefit from using any kind of later suit is greater than the net benefit of improving trial court accuracy then the former should be preferred.³⁵⁸ If this is the case we need to ascertain when an appeal is more socially desirable than relying on two suits. Two matters appear important at this stage. The first is that the second suit in a two suits system can only be brought by the plaintiff/prosecution whereas an appeal is normally available to both sides. This may suggest that second suits are designed to address false acquittals.³⁵⁹ The second is that appeals are restricted to errors relating to questions of law, whereas second suits could presumably deal with errors relating to questions of fact. This indicates that the errors second suits are designed to

³⁵⁸ This part of the analysis is discussed in greater detail in S. Shavell, *The Appeals Process as a Means of Error Correction*, Program in Law and Economics, Discussion Paper No. 144, Harvard Law School, August 1994.

³⁵⁹ I will assume that the criminal suit is the second one and the first is the civil case brought by government. Under a two suit system with only the plaintiff/prosecution side bringing the second case there are only four types of results in the first case: (i) not liable in reality and found not liable in the first case, (ii) liable in reality and found liable in the first case, (iii) not liable in reality and found liable in the first case and (iv) liable in reality and found not liable in the first case. In cases (i) and (ii) there is no error that needs to be corrected so the second suit is unnecessary. In case (iii) there is an error, but the second suit is not going to correct that error although an appeal may. Finally, case (iv) presents an error that could be corrected in a later second suit. Thus, second suits are useful to stop errors in case (iv) wrongful findings of no liability. One further point worth mentioning is that there may be some belief that case (ii) may involve an error if the sanction imposed on the defendant firm is not adequate to deter and therefore a second suit is needed to increase sanctions to the adequate level. To remedy this we can increase sanctions in the first case instead of using a second case as that simply increases litigation costs by duplicating proceedings.

correct are not only false acquittals, but errors which are predominantly factual in nature and hence not subject to appeal.³⁶⁰ Most areas of corporate criminal liability appear to be ones where there are likely to be many false acquittals due to errors associated with factual matters.³⁶¹ If this establishes when second suits are preferable to improving trial court accuracy and appeals then we need to inquire into whether the advantages from using one criminal and one civil suit can be achieved using two civil suits.

Let us assume that the only difference between corporate criminal and civil liability is the standard of proof and ask is there anything that justifies the higher standard of proof in the second case. Indeed it is somewhat perplexing that a second suit may be useful to correct errors since the standard of proof in the second suit is the higher criminal one which makes it harder to correct the error in the first case. However, sometimes under any later suit system (i.e., appeal or two suits) separation would not occur naturally as a result of litigation fees and thus the state may need to impose fees to encourage such separation and obtain the benefits of any later suit system.³⁶² Perhaps the higher standard of proof can be viewed as increasing the costs for the prosecution to bring the second case (like a fee) that will result in the prosecution being more selective in bringing cases and thereby increasing the likelihood of separation and the benefits of having a second suit.

Although this particular benefit has some appeal, discussions with government officials who enforce the law suggest this is unlikely in practice. Generally, it is uncommon for the government to bring a criminal case after having lost the civil one. The more common tendency is to bring the criminal one first.³⁶³ In any event, we could achieve the same thing through a second civil case by imposing a fee for bringing the second suit instead of increasing the standard of proof and labeling the suit criminal.³⁶⁴

³⁶⁰ I have assumed questions of fact are not appealable and this is normally the case. See Shavell, *supra* n 358. Another point worth mentioning is that second suits (i.e., not appeals) could also concern a matter of law if the second suit is based on a law that is nearly identical to that in the previous case. However, if it is double jeopardy may bar it - see Part VI B.

³⁶¹ For example, most courts agree that price fixing is illegal *per se* under the antitrust laws. A finding of no liability is more likely to result from difficulties in proving collusive behavior and agreement rather than debating over whether the *per se* rule applies.

³⁶² See for example, Shavell, *supra* n 358, at pp 3, 67, and 68 for more on appeal fees.

³⁶³ Discussions with Mr. Peter Kenyon, Regional Counsel's Office, EPA, Boston and Professor Heymann, Harvard Law School and others.

³⁶⁴ Perhaps this is because most of the use of fees has not been directly geared to result in separation, although I am not familiar with any reason why we could not do so. The arguments here assume that litigation fees are not enough to encourage government to bring or not bring a case and that government incentives are influenced by these concerns.

D. COST SAVINGS AND PROSECUTORIAL CONVENIENCE

Let us now consider some cost concern matters. In most cases of corporate criminal liability, individual managerial criminal liability is also sought.³⁶⁵ In these circumstances it may be cheaper to bring both criminal suits (one against the corporation and the other against the manager) rather than one criminal suit against the employee and the other a civil suit against the corporation. If an individual manager is found criminally liable then there would be very little difference between corporate criminal and civil liability because the doctrine of *respondeat superior* makes imputing any type of liability to the corporation rather easy once an agent is convicted. Given this we have little reason to prefer corporate civil over criminal liability - their costs are nearly identical if an agent is convicted.³⁶⁶ However, if both suits (against the individual and the corporation) are criminal then only one agency is bringing those suits, the Justice Department, and one judge is probably hearing both cases. If one suit is criminal and the other is civil then two agencies are bringing suits, the Justice Department and another government agency or division (e.g., the SEC), and two judges are hearing the cases.³⁶⁷ In light of this when it is optimal to pursue individual criminal liability it is generally better to also pursue corporate criminal liability rather than corporate civil liability because by doing so we save prosecutorial and judicial resources and still obtain the same deterrence. However, if we assume that reputational losses cannot be completely eliminated in any liability regime and that the reputational loss in corporate criminal liability is greater than that in corporate civil liability then corporate criminal liability may have higher sanctioning costs. Therefore, we have to trade off the enforcement cost savings with the losses in terms of sanctioning costs. The trade-off often favors enforcement costs savings if reliance on reputational penalties has been nearly eliminated.³⁶⁸ Thus, corporate criminal liability may be desirable when managerial

³⁶⁵ Discussions with enforcement officials indicates that they prefer to bring criminal proceedings against a corporation when they also bring criminal proceedings against an individual manager or employee. Thus, to some extent practice seems to reflect this conception of benefit. See *supra* n 363.

³⁶⁶ The reasoning behind this is as follows. Let us assume the procedural protections are desirable in the individual context. Thus, if we bring managerial criminal liability plus corporate criminal liability we incur the procedural protections in trying to show that the manager is liable. After that corporate criminal liability requires only proof that *respondeat superior* applies, which is easy to show even if we need to show it on the beyond reasonable doubt standard. If we pursued corporate civil liability instead we still only have to show that *respondeat superior* applies, but on a slightly lower standard of proof. However, since corporate liability of any sort is almost automatic upon conviction of an agent the difference in using corporate criminal or civil liability is minimal. Further, the sanctions in both corporate regimes are about the same.

³⁶⁷ It is worth noting that sometimes transferring a case from one agency to the other could result in a loss of specialization, but that could be avoided by allowing one or more members of one agency to help out the other agency. See Coffee, *supra* n 235, at 447.

³⁶⁸ I have assumed that we cannot completely rid ourselves of the reputational penalty and that once we label something criminal then the reputational loss will be greater, even if only slightly, than if the proceedings were labeled civil.

criminal liability is optimal. Prior analyses indicates managerial criminal liability is optimal when corporations are judgment proof with respect to the optimal sanction and when managerial civil liability would not achieve optimal deterrence.³⁶⁹ The irony of this argument is that corporate criminal liability, which normally makes prosecutorial success difficult due to the procedural protections, is beneficial here because it is cheaper and easier for the prosecution.

The issue is then can we replicate these enforcement economies in corporate civil liability. This would be preferable to corporate criminal liability since we would gain the enforcement economies without the higher sanctioning costs. It may be possible to adjust the civil process to allow the case against the corporation to be prosecuted and heard in a similar manner to corporate criminal liability (i.e., one judge and one agency), but our present structure of law enforcement does not present any clear examples of this. Trying to replicate these cost savings is desirable and if this happens it would provide no scope for corporate criminal liability.³⁷⁰ Until then corporate criminal liability provides a benefit in some cases, prosecutorial convenience.

At this point a summary may prove useful. The analysis indicates that most of the enforcement features of corporate criminal liability are sometimes desirable, but these features can be achieved using corporate civil liability. In fact, corporate civil liability may prove preferable in most cases since now it normally has better information gathering powers. The general structure of enforcement devices is that the cheapest enforcement device should be used to obtain optimal deterrence first and then we may rely on more expensive mechanisms if needed for added deterrence. Thus, we may desire the higher information gathering powers when public enforcement would not suffice for deterrence

³⁶⁹ This of course should only occur if the added deterrence gains from using criminal liability outweigh the extra enforcement and sanctioning costs of doing so.

³⁷⁰ Corporate civil liability could mimic these cost savings if we allowed the Justice Department to bring civil suits (in fact in the antitrust context we do) when it seeks managerial criminal liability (the files can be transferred from the civil enforcement agency to the Justice Department). The only cost savings of corporate criminal liability then arises from the fact that often only one judge hears both criminal cases. If proving respondeat superior is that easy however the extra effort in judicial resources may be little if we rely on corporate civil liability. In any event since the matters that need to be proved for corporate liability, of any type, once a manager is convicted are the same one wonders why the criminal suit judge just cannot go ahead and determine issues related to the corporation's civil liability or why we cannot allow the civil suit judge to simply quickly look at the case and decide. Even if some cost savings arise by relying on corporate criminal liability then we need to add a caveat to this discussion, which is that corporate criminal liability is justified on this ground when an individual agent has a good chance of being convicted. However, it would appear that when both individual and corporation are charged there is a good chance that the individual would be acquitted and the corporation found guilty, see *Developments in Law*, supra n 351, at 1249.

purposes.³⁷¹ If even this is not sufficient to obtain optimal deterrence we may begin to rely on the strategic benefits of parallel liability. All these traits should only be used if the incremental deterrence benefits are greater than the incremental costs of using these enforcement devices. However, since all these traits are available in other liability regimes we can obtain these traits without having to take the other parts of corporate criminal liability we do not desire. On the other hand, my analysis identifies one benefit of corporate criminal liability, cost savings when pursuing managerial criminal liability is optimal, that has yet to be replicated in another corporate liability regime. Although trying to replicate this in corporate civil liability may indeed be desirable, it has yet to occur. Thus, corporate criminal liability has some benefit in one area even if only temporarily.

VIII MESSAGE SENDING OR PREFERENCE SHAPING ROLES

It has been suggested that the imposition of criminal liability on corporations for corporate crime is desirable because one *unique* function of the criminal law is to educate, shape preferences, and convey society's condemnation for certain types of behavior (the message is directed to society whereas reputational penalties are aimed at the corporation/top management).³⁷² Thus, criminal liability may be warranted when no other advantages from imposing criminal liability exist because the corporation is used as a vehicle to communicate something to society and this has value.³⁷³ I would like to add a few caveats to the enthusiasm that might altogether too easily surround this.

First, sending messages is not as precise as one might imagine it to be. Labeling something as criminal may send a message to society that the activity is undesirable. However, attaching the criminal label to a juristic entity may devalue the effect of the label for other types of crimes if it is perceived that labeling such an entity as criminal is something of a farce since it cannot be imprisoned or have normal criminal procedures applied to it.³⁷⁴ Furthermore, it is not clear when messages need to be sent - by what

³⁷¹ The comparison is actually between the marginal increase in deterrence from using these enforcement traits and the marginal increase in the enforcement costs of using these more expensive techniques.

³⁷² Many articles refer to this social condemnation and the educative role of criminal liability. Please see, for example, J.C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It?*, 101 YALE L.J. 1875 (1992) and K.G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1.

³⁷³ This benefit may indeed be plausible and one could read the frequent references to the seriousness of the offense as justifying a criminal prosecution, see The Department of Justice Manual, Criminal Division, 9-27.220 to 9-27.250, as being a proxy to determine when a message needs to be sent.

³⁷⁴ Indeed it is not clear whether the message about our views on the behavior in question would be drowned out by the mirth at using the corporation as the vehicle to send this message. J. C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L.REV 193 (1991) and his pessimistic

standard do we determine when a message needs to be sent. If everyone already thinks the activity is undesirable is there any point in message sending as it has already been conveyed. However, if no amount of messages could convey a distaste for the activity then why bother (e.g., violation of a banking regulation that may require banks to disclose if anyone transacted more than \$10,000 in cash in one day). Presumably then it is only for activities that we do not have relatively fixed views on that message sending may be useful. However, even this is an incredibly broad category.³⁷⁵

Let us even further assume, *arguendo*, that in some cases sending messages may actually be socially desirable. This would not resolve our debate because we should then assess whether we think the message is more effectively sent by imposing the criminal label on the corporation or on a manager(s) or by using corporate civil liability.³⁷⁶ For example, if we were to conclude that a message needs to be sent by sanctioning the corporation we could send a well publicized letter condemning the corporation's activities and leave the corporation civilly liable only. Finally, assuming we would like to send a message, we should be clear that the sending of the message through criminal proceedings is costing society something and we should assess whether we think the trade off is desirable. The cost to society is the cost associated with the procedural protections and any reputational penalties of criminal proceedings in excess of those in civil proceedings when they are unwarranted. Since the desirability of message sending may not be co-extensive with cases in which the protections are desired (i.e., almost never) there may be times where by using the criminal process to send messages we are incurring undesirable costs.

Having canvassed considerable ground in our journey to discover the purpose of corporate criminal liability it is now time to collate all the analysis and try to point out when, if ever, corporate criminal liability will be socially optimal given that other liability alternatives already exist. Recall that the framework used in this paper will find corporate criminal liability to be socially optimal only in those circumstances where *substantially all of its traits* are socially desirable. The conclusions of this paper are summarized below.

view about halting the "trend" of overcriminalization see J.C. Coffee Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It*, 101 YALE L.J. 1875 (1992) especially at 1892-1893.

³⁷⁵ As there is no clear standard by which to determine when a message should be sent all I can posit is that message sending is only socially optimal if the benefits from sending the message outweigh the costs of sending the message. Perhaps message sending may prove useful when all our monetary sanctions on the corporation would not obtain optimal deterrence. This may indicate a small range of situations for which message sending may be desirable.

³⁷⁶ A message can also be sent by imposing criminal liability on the manager instead of the corporation. One could argue that it may be that managerial liability is generally preferred but that sometimes since a corporation is a complex organization it may be difficult to convict a particular manager of a crime. Thus, to maintain some deterrence *and* still send a message we may need criminal liability on a corporation. This is probably uncommon.

WHEN IS CORPORATE CRIMINAL LIABILITY SOCIALLY DESIRABLE ?

<i>Trait</i>	<i>When Desirable</i>
<i>Sanctions</i>	Fines are the desirable sanction in most cases as they are the socially cheapest way to obtain deterrence, but where the optimal cash fine is higher than corporate assets then we may rely on other sanctions to supplement cash fines that reduce the future value of the corporation such as probation, loss of license and so on. This is justified if the incremental increase in deterrence is greater than the incremental increase in sanctioning costs from using these sanctions. Reputational penalties on corporations and top management are almost never socially desirable and we should try to eliminate reliance, as much as is possible, on reputational penalties. All corporate sanctions, besides reputation, are available in corporate civil liability with equal force.
<i>Procedural Protections</i>	All the procedural protections are generally undesirable in the corporate context. The rare circumstances in which they may be desirable are when sanctions are very severe so that they may chill desirable behavior (not very likely) or when relying on the procedural protections would reduce more false convictions than it would increase false acquittals (this is more likely when there are more false convictions likely in society - not likely in the corporate context) and when no other method of error cost reduction (e.g., information gathering powers) is as effective. In any event, setting up an enforcement apparatus to reflect is difficult. Relying on these protections in the corporate context is undesirable and increases costs to society and weakens deterrence.
<i>Enforcement Devices</i>	Public enforcement is desirable when the probability of the victim detecting and prosecuting the offense is less than one. The high information gathering powers are desirable in cases where it is very difficult to prosecute offenses, public enforcement has not obtained optimal deterrence and the incremental deterrence benefits are greater than the incremental costs. The benefits of parallel liability are desirable when offenses are very difficult to prosecute even with high information gathering powers and the added benefits of using parallel liability are greater than the added costs of doing so. Cost savings from bringing corporate criminal and managerial criminal liability are desirable and they are not yet available in other corporate liability regimes. However, they may in the future.
<i>Message Sending</i>	This is desirable when all other forms of message sending appear to be inadequate and is thus a rare occurrence.

In light of this the only times that all the traits of corporate criminal liability would be socially desirable would be when corporate liability was optimal, detection and prosecution were difficult, and where sanctions on corporations needed to be extremely high to maintain deterrence (yet not so high that other parties should be sanctioned instead). Furthermore, these extremely high sanctions should chill behavior (and yet we do not want to sanction other parties) or there should be a large number of false convictions in society compared to false acquittals that cannot be efficiently remedied in ways besides the protections of criminal procedure. Finally, all these events should occur at the same time

that we want to send messages to society about activities by imposing sanctions on corporations. This isolates only the smallest range of offenses or activities and suggests that corporate criminal liability would only be socially optimal in the rarest of circumstances or, put more colloquially, about as frequently as Haley's Comet visits our solar system. If these were the only matters to consider then I would suggest that it is best to simply abolish corporate criminal liability and replace it with other corporate liability strategies. I say this because there may be considerable practical difficulties in designing a system of corporate criminal liability that would apply it only when it was socially desirable. However, these are not the only matters to be considered. Corporate criminal liability may provide enforcement cost savings when pursuing managerial criminal liability is optimal. Corporate civil liability has not yet achieved this, although it would be desirable to consider ways in which we could adapt it to do so. Until then the optimal scope of corporate criminal liability is rather narrow - only when it is optimal to pursue managerial criminal liability. If we pursued corporate criminal liability outside of this area it would be both socially harmful and costly and an example may help to highlight this.

Suppose that a financial institution is convicted for not reporting a transaction worth \$100,000. Further let us assume that the corporation is not judgment proof so cash fines are sufficient for deterrence (i.e., no need for stigma). Also few false convictions occur and they cost about the same as false acquittals so that criminal procedural protections are undesirable. In addition, message sending seems pointless. The enforcement traits may be desirable, but they can be obtained by relying on a corporate liability regime with these enforcement traits that avoids the traits we do not desire. If we did, however, rely on corporate criminal liability we would have a few harmful effects: (i) society would bear the higher sanctioning costs of stigma penalties without justification, (ii) it would be harder to convict the corporation and therefore deterrence is weakened and (iii) it costs more to convict as more effort is required to overcome the procedural protections. It is clearly preferable to opt for another corporate liability regime. The multitude of corporate crime cases that fall into similar examples is astonishingly large. In light of this it is surprising that few objections have been raised to the presence of corporate criminal liability instead of corporate civil liability. Although there may be many reasons for this, I suggest that there is no natural constituency with the incentive to replace corporate criminal liability with another corporate liability regime.³⁷⁷ Nonetheless, my

³⁷⁷ Managers have little reason to object to corporate criminal liability because it is often the case that if both managers and corporations are tried criminally only the corporation is convicted while all managers are acquitted. This benefit probably outweighs any social or psychic losses the managers may feel from working within a convicted corporation. Corporations and shareholders have little need to object to corporate criminal liability. Given that sanctions are nearly identical in corporate criminal and civil liability it does not really matter if corporations are criminally or civilly fined. In

analysis shows that it is desirable (regardless of natural constituencies) to restrict corporate criminal liability to cases where pursuing managerial criminal liability is optimal. However, it is desirable to try to adapt corporate civil liability to allow for these cost savings and thereby eliminate the desirability of corporate criminal liability altogether.³⁷⁸

IX CONCLUSION

Corporate criminal liability is an institution of considerable historical antiquity in the US. However, there is little understanding of what, if anything, this institution is designed to achieve. It has been the object of this paper to examine this issue in the hopes of finding some rationale(s) that would justify the present scope of criminal liability on corporations. The historical development of corporate criminal liability suggests that it may have begun in order to utilize the public enforcement that criminal liability provides and then later for the greater information gathering powers it possessed over corporate civil liability. However, as time progressed both of these things could be achieved in forms of corporate civil liability. Thus, the question that becomes of import is what purpose does corporate criminal liability serve *now*.

To determine the purpose of corporate criminal liability we must realize that corporate criminal liability is only one of a number of different liability strategies, such as corporate civil liability and individual civil liability, that can be used to regulate behavior in and around corporations. Therefore, to determine the purpose of corporate criminal liability we must compare it against other liability strategies and ask when is it the most preferred liability strategy to use. My primary comparison is between corporate criminal liability and the various other corporate liability regimes such as corporate civil liability. The analysis indicates that corporate criminal liability is the socially desirable liability strategy to use when *substantially all the traits* of corporate criminal liability are socially

addition, the procedural protections make imposing liability on the corporation in criminal cases harder than in civil cases - something corporations would not object to. There may be differences in reputational losses in the regimes, but I suspect they are outweighed by the benefits of the procedural protections. The procedural protections benefit corporations in all criminal cases whereas the higher reputational penalties only apply if the reputational loss could apply (i.e., not for third party harms and so on) and even then the difference in reputational loss may not be significant. Of course if corporate decisions to lobby for legal changes are made by management then there is little incentive to oppose corporate criminal liability. Prosecutors also have little incentive to oppose corporate criminal liability because if they do not like it they have the choice of pursuing corporate civil liability instead. Congress also incurs almost no cost in making the corporation criminally as well as civilly liable. Finally, the losses due to higher costs and weakened deterrence of corporate criminal liability impose costs on society which suffers from a considerable collective action problem. Thus, there is no natural constituency that possesses the incentive to try to call for the removal or serious reduction in corporate criminal liability.

³⁷⁸ This is then a transitory benefit only.

desirable. If only some traits were desirable we would prefer to use another corporate liability regime that possessed the desirable traits and not the undesirable ones. It is simply preferable to take desirable traits and not undesirable ones.

Having traversed considerable ground in our debate I conclude that the circumstances in which *substantially all of the traits* of corporate criminal liability are socially desirable are nearly non-existent now. The analysis indicates that the procedural protections and stigma sanction commonly associated with criminal proceedings are socially undesirable in the corporate context. In addition, the enforcement devices associated with corporate criminal liability, while sometimes desirable, are available in some forms of corporate civil liability. In those cases where only some of the traits of corporate criminal liability are socially desirable (e.g., enforcement devices) it is preferable to rely on a corporate liability regime with only desirable traits rather than on corporate criminal liability with both undesirable and desirable traits. Relying on corporate criminal liability when some of its features are undesirable would increase the costs to society of prosecuting cases (more evidence is needed to convict), weaken deterrence because conviction is difficult to obtain and increase sanctioning costs due to the use of any stigma penalty without any countervailing benefits. If these were all the factors to consider then my analysis suggests that the scope of corporate criminal liability would need to be drastically curtailed or it should be abolished altogether and replaced with other corporate liability regimes. However, other factors also enter the analysis and suggest that if pursuing managerial criminal liability is optimal it may prove convenient and less expensive to pursue corporate criminal rather than corporate civil liability. This is the strongest justification we can provide for corporate criminal liability at present and it only persists so long as these cost savings cannot be achieved in corporate civil liability. However, the analysis indicates that it is desirable and rather easy to achieve these cost savings in other corporate liability regimes. Thus, although there may have been some justification in the past for using corporate criminal liability when our enforcement techniques were not as well developed there is very little, from a deterrence perspective, that now justifies the continued imposition of criminal liability on corporations as opposed to civil liability. Indeed, from the analysis in this paper it would appear that the answer to the question the title poses "corporate criminal liability: what purpose does it serve?" may be almost none.