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CORPORATE MENS REA:
A LEGAL CONSTRUCT
IN SEARCH OF A RATIONALE

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Abstract

The imposition of liability, whether civil or criminal, on corporations evokes heated debate and continuing controversy. One of the more theoretically perplexing and practically challenging areas of corporate liability are the provisions in the law that require a corporation to possess a state of mind, such as intent, before it is made liable. The apparent incongruity of requiring a corporation to have a state of mind, when it has no mind per se, should encourage us to ask why we have laws that require corporations to possess mens rea -- why not simply make corporations liable on a strict liability or negligence standard. There appears to be no deterrence-based answer to this question to date. This Article undertakes to fill this gap.

The Article compares the various corporate mens rea standards against strict liability and negligence to ascertain when, if ever, corporate mens rea is socially preferable to its alternatives. The analysis suggests that corporate mens rea is indeed problematic and that, unlike mens rea requirements for individuals, corporate mens rea rarely proves to be preferable to its alternatives. Furthermore, even in those rare instances where corporate mens rea is the preferred alternative it is better to make corporate mens rea a matter only relevant to increasing the sanction, not a matter determinative of a corporation's liability. Consequently, it is socially desirable to replace corporate mens rea standards with strict liability or negligence that allows for mens rea to be made a matter influencing the magnitude of the sanction when appropriate. Current developments in the law seem to be moving in this direction and the analysis in this paper adds further support for them.

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I INTRODUCTION

Considerable debate and controversy surround the use of corporate mens rea standards as corporate liability standards.¹ Corporate mens rea refers to the various provisions in the civil and criminal laws that impose liability on the corporation for engaging in an act with a certain state of mind, such as intent.² However, requiring a

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¹ See, e.g., PETER FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 31 - 47 (1984) (discussing how corporate liability for mens rea wrongs may be premised on corporate internal processes); RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING §§ 3.4.2, at 198 - 203, 4.1 - .2, at 263 - 84 (1994) (discussing imputation of mens rea from agent(s) to the corporate principal); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1197 - 1201 (1983) (arguing that corporate mens rea may be satisfied by inquiring into the "reactive strategies" of corporations); Pamela Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1121 - 48 (1991) (discussing the "corporate ethos" standard of liability as representing corporate mens rea); Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287 *passim* (1990) (arguing that most methods of determining corporate intent are deficient and considering possible alternatives); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647 *passim* (1994) [hereinafter *Corporate Bodies*] (discussing and criticizing various methods of ascertaining corporate mens rea and then proposing a new method of ascertaining corporate mens rea); William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1059 - 77 (1992) [hereinafter *Sentencing of Corporations*] (discussing federal and state mens rea requirements); *Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1243 (1979) [hereinafter *Developments*] (discussing a liability standard premised on corporate "procedures and practices [that] unreasonably fail to prevent corporate criminal violations").

² See, e.g., Laufer, *Sentencing of Corporations*, *supra* note 1, at 1059 - 77 (discussing mens rea requirements at the federal and state level), 1092 - 94 (listing some examples of mens rea requirements).

corporation to possess a state of mind seems immediately paradoxical. Corporations have no "minds", as humans do, so how can they possess a state of mind? This glaring paradox should encourage us to ask why do we require corporations to possess mens rea before we impose liability on them -- why not simply make corporations liable on a strict liability or negligence standard.

Remarkably, there appears to be no deterrence-based answer to this question, in fact almost no one ever asks it.³ The absence of a clear rational for corporate mens rea standards is undoubtedly an important factor contributing to the confusion that surrounds this area of law.⁴ In light of this and the dramatic growth in corporate liability,⁵ the need for an answer to why we require corporations to possess mens rea before imposing liability on them becomes especially pressing. It is the object of this Article to answer

³ I have not found any articles or treatises that provide a deterrence rational for corporate mens rea standards, although a few articles discuss mens rea requirements for individuals from a deterrence perspective. See, e.g., Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 *passim* (1993); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1221 - 23 (1985); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1247 - 49 (1985).

⁴ See, e.g., Laufer, *Sentencing of Corporations*, *supra* note 1, at 1064 - 65 (discussing the "Brown" Commission findings). For examples of the varying types of corporate mens rea standards, see KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* §§ 4.01, at 129 - 31, 4.04, at 138 - 40, 4.05, at 140 - 45 (2d ed., 1992) and GRUNER, *supra* note 1, §§ 3.4.2, at 198 - 203, 4.1 - .2 at 263 - 84.

⁵ See, e.g., GRUNER, *supra* note 1, §1.9.2, at 52 - 55 (noting the relatively large increases in corporate prosecutions and in criminal sanctions against corporations); CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* 121 - 22 (1993) (discussing growth of corporate criminal liability in Europe); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L.REV. 193, 215 - 17 (noting that the growth of liability has led to "over 300,000 federal regulatory offenses" alone); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L. J. 1559, 1563 (noting that "[i]n the last three decades, corporate civil and criminal liability has expanded well beyond its traditional boundaries").

this question by determining when using corporate mens rea, as opposed to using strict liability or negligence, is socially desirable.⁶

Part II begins by examining the historical development of corporate mens rea requirements and setting out some reasons for why courts held corporations liable for wrongs requiring mens rea. I also suggest that these reasons have lost much of their force today. Part III defines the contours of corporate mens rea today by dividing the many forms of mens rea into three broad categories: intent, knowledge, and recklessness. Part III also asks what do we mean by saying that a corporation possesses knowledge or intent? In fact, there appear to be three things we might mean, which correspond to three liability standards under the heading of corporate mens rea. The first corporate mens rea standard imposes liability on the corporation under respondeat superior when *one agent* acts while possessing the required mens rea (the single actor mens rea standard).⁷ The second imposes liability on the corporation under respondeat superior when the aggregated information possessed by *all agents* is sufficient to meet the mens rea requirement (the collective mens rea standard).⁸ The third imposes liability when the corporation's internal procedures and policies are essentially negligent.⁹ This Article does

⁶ Generally, whenever the net benefits of using corporate mens rea are greater than the net benefits of using the other standards then corporate mens rea is the socially desirable liability standard. Cf. Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Control*, 93 YALE L.J. 857, 857 - 58 (1984) (utilizing similar reasoning when comparing enterprise liability with personal managerial liability).

⁷ See *infra* Part III.B.1.

⁸ See *infra* Part III.B.2.

⁹ See *infra* Part III.B.3.

not inquire into the third standard in any great detail because it represents forms of negligence mislabeled as corporate mens rea.

Part IV compares the single actor mens rea standard with strict liability and some forms of negligence in order to determine when, if ever, the single actor mens rea standard is socially desirable. Section A argues that all liability standards influence incentives to gather information about product risk, share that information within the corporation, and exercise the optimal level of care. The analysis suggests that the single actor standard provides inferior incentives on all three grounds as compared to strict liability and some of the negligence rules.¹⁰ It is then necessary to consider whether the single actor standard provides any advantages over the other standards to weigh against these disadvantages. Section B considers whether one advantage of mens rea in the individual context, its role as a proxy for factors, such as expected harm, that influence the level of the optimal sanction,¹¹ applies in the corporate context. The analysis suggests that this proxy role is much weaker in the corporate context than in the individual context. Section C examines other deterrence arguments supporting inquiry into mens rea for individuals and concludes that they are inapplicable in the corporate context.¹² Section D then compares the administrative cost effects of the various standards and concludes that they do not appear to favor one liability standard over the other. I thus

¹⁰ See *infra* Part IV.A. See also Steven Shavell, *Liability and the Incentive to Obtain Information About Risk*, 21 J. LEGAL STUD. 259 *passim* (1992) (discussing incentive effects of strict liability and some negligence rules).

¹¹ See Shavell, *supra* note 3, at 1247 - 49.

¹² See Parker, *supra* note 3.

conclude that the single actor standard is rarely socially desirable because its advantage, its weak proxy role, rarely outweighs its disadvantages.

Section E then considers those rare cases where inquiry into acting agent's mens rea may prove socially desirable and asks whether that inquiry should be made at the liability stage or should it be made at the sanctioning stage only. Inquiry at the sanctioning stage exclusively would entail, for example, a strict liability standard that made the acting agent's mens rea an aggravating factor that could increase the sanction. The analysis suggests that when inquiry into acting agent mens rea is desirable, strict liability plus mens rea at sanctioning is always preferable to the single actor standard. Therefore, the single actor standard should be replaced by strict liability or negligence plus occasional inquiry into acting agent's mens rea at sanctioning, when such inquiry is desirable. The analysis in sections A through D of this Part suggest that inquiry into acting agent's mens rea is, however, rarely desirable.

Part V then moves on to examine the collective mens rea standard. The analysis suggests that, although this standard encourages more information sharing than the single actor standard, the collective standard also provides disincentives to acquire information,¹³ sometimes stronger than those provided by the single actor standard. Thus, the collective standard has undesirable effects on incentives to exercise optimal care as well. Furthermore, the analysis shows that the proxy advantages associated with

¹³ See generally GRUNER, *supra* note 1, §4.3.1, at 285.

the single actor standard are not present under the collective mens rea standard. Thus, the collective mens rea standard is undesirable and should simply be replaced with either strict liability or negligence.

In light of this analysis I conclude that, even though mens rea standards for individuals may be desirable for many reasons,¹⁴ corporate mens rea standards are generally undesirable. My primary recommendation is that we replace corporate mens rea standards in all forms of corporate liability with either strict liability or negligence. Furthermore, we may consider placing inquiry into the acting agent's mens rea at the sanctioning stage of proceedings. Although these recommendations may appear dramatic they are being put into effect as we speak. For example, the growth in strict liability offenses for corporations (criminal and civil) is considerable, indicating a drift away from corporate mens rea standards, and there is a greater focus on the sanctioning stage evidenced by both the Federal Sentencing Guidelines and the writings of commentators.¹⁵ These developments are supported by my analysis and Part VI concludes by encouraging continued growth along these lines.

¹⁴ See, e.g., Parker, *supra* note 3, at 754 - 62, 774 - 82; Shavell, *supra* note 3, at 1248.

¹⁵ See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 242 & n.1 (2d ed., 1986) (citing Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 84 - 88 (1933) and MODEL PENAL CODE 141 - 145 (Tent. Draft No. 4, 1955) for the proposition that "[crimes]-without-fault" have increased); Parker, *supra* note 3, at 786 - 88 (discussing "overt" growth in strict liability offenses); Pitt & Groskaufmanis, *supra* note 5, at 1570, 1573 (noting that strict liability is becoming more common in corporate liability for environmental law violations). For discussions on the Federal Sentencing Guidelines, see, e.g., U.S. SENTENCING GUIDELINES § 8 (1995) [hereinafter GUIDELINES] (discussing organizational sanctions); Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L.REV 395, 395 - 97 (1991) (same); Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U.L.REV 247, 249 - 50 (1991)(same).

II HISTORICAL DEVELOPMENT OF CORPORATE MENS REA

The apparent incongruity of requiring corporations to possess a state of mind when corporations have no minds may cause one to wonder why did we start with corporate mens rea in the first place. Studying in skeletal form the historical development of corporate mens rea provides us with some insight into why courts might have imposed liability on corporations for wrongs requiring mens rea and whether that rationale still persists.

One of the earliest cases subjecting corporations to liability for a tort requiring mens rea was *Goodspeed v. The East Haddam Bank*.¹⁶ In this case the East Haddam Bank had originally brought suit alleging that Goodspeed "had made certain false, deceitful and fraudulent representations, with the intention of defrauding [the bank of \$5,000]." ¹⁷ The court found for Goodspeed and awarded costs as well.¹⁸ Goodspeed then brought a tort action against the bank for bringing a "vexatious suit."¹⁹ The trial court found for the bank, awarding a non-suit, which Goodspeed appealed.²⁰

¹⁶ 22 Conn. 530 (1853).

¹⁷ *Id.* at *531.

¹⁸ *See id.*

¹⁹ *See id.* at *535 (noting that the present case "is based upon the provisions of [a statute] and is subject to the same general principles as are actions . . . for malicious prosecution, at common law"). The acknowledged similarity between the present case and the tort action is the reason for my treating the analysis in the case as being applicable to tort law.

²⁰ *See id.* at *532.

The appellate court, however, decided that a corporation could be held liable for a tort, such as bringing a vexatious suit, which required malice.²¹ This court found that not permitting suit against a corporation because of its lack of actual mens rea would defeat enforcement of this tort.²² The court said, "to turn the plaintiff round, to pursue the proposed remedy, [against the directors] . . . would be equivalent to declaring him remediless . . .",²³ because many responsible directors might be judgment proof or difficult to identify.²⁴ Corporate liability would thus be needed to provide an effective remedy.²⁵ However, it appears that imposing liability on the corporation for bringing a vexatious suit was only available via the tort action which required malice.²⁶ Thus, to ensure that enforcement of the law and deterrence did not suffer the court held, over the protestations of the dissenters,²⁷ that a corporation could possess mens rea.²⁸ Examining

²¹ See *id.* at *530.

²² See *id.* at * 536 - 37.

²³ 22 Conn. 530, * 536.

²⁴ See *id.* This rationale squares well with the deterrence-based justifications for corporate liability. See, e.g., Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345, 1349, 1351 - 52, 1362 - 66 (1982)(discussing when enterprise liability proves valuable); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1244, 1246 - 52, 1254 - 55 (1984)(discussing the impact of judgment proof agents on the analysis of vicarious liability). Cf. Reinier H. Kraakman, *supra* note 6, at 864 - 67 (1984) (discussing possible risk sharing benefits from corporate liability).

²⁵ See Kornhauser, *supra* note 24; Sykes, *supra* note 24.

²⁶ I infer this from the fact that no other cause of action was suggested as an alternative to the tort action. See *Goodspeed*, *supra* note 16, 22 Conn. 530, *536.

²⁷ See *id.* at * 544 - 47 for dissenting opinion.

²⁸ See *id.* at *536, *542 - 44.

other early civil cases for a variety of different torts requiring intent suggests that there also the courts were willing to hold corporations liable for such torts.²⁹

In *Goodspeed* and other decisions the courts overcame any analytical difficulty of finding fictional beings to have mens rea by essentially noting that if an agent's conduct can be imputed to the corporation, which has no body with which to act, for reasons of law enforcement and public policy then the intention of an agent may be imputed to the corporation, which has no mind with which to intend, for very similar reasons.³⁰ It then appears that an enforcement-related rationale is present.

Around the same time, corporate mens rea began to appear in the criminal sphere as well.³¹ Before delving into the cases it may prove helpful to set out how subjecting corporations to criminal liability under a mens rea standard might be linked to a

²⁹ See, e.g., *Garret Brokaw v. The New Jersey Railroad and Transportation Company and William Campbell*, 32 N.J.L. 328 (1867) (holding that a corporation can be liable for the tort of assault and battery), *Samuel G. Reed v. Home Savings Bank*, 130 Mass. 443 (1881) (holding that corporations, including savings banks, could be liable for the tort of malicious prosecution).

³⁰ See *Goodspeed*, *supra* note 16, 22 Conn. 530, *542 (1853) (noting that "[i]f the act done is a corporate one, so must the motive and intention be. In the present case, to say, that the vexatious suit . . . was instituted, prosecuted, and subsequently sanctioned, by the bank, in the usual modes of its action; and still to claim, that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined . . . for practical application"). Similar reasoning is found in *United States v. Alaska Packers' Ass'n*, 1 Alaska 217 (1901) where the court said, "[i]f, for example, the invisible, intangible essence of air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can also intend to do these acts, and can act therein as well viciously as virtuously." *Id.* at 220.

³¹ See Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and An Observation*, 60 WASH.U.L.Q. 393, 415 (discussing numerous other cases of corporate criminal liability which required intent, such as "contempt of court, willfully or knowingly obstructing a road, conspiracy to violate federal and state antitrust laws, knowingly mailing obscene materials . . . and even manslaughter." (footnotes omitted)).

deterrence or enforcement related motive. My analysis proceeds in two steps: first, because corporate mens rea is primarily a creature found in corporate criminal liability,³² the development of corporate mens rea may be related to the development of corporate criminal liability. Setting out why the development of corporate criminal liability may be motivated by enforcement concerns is thus important. Second, I argue that viewing corporations as capable of possessing criminal mens rea may also be motivated by enforcement rationales.

As to the first step it has been argued elsewhere that corporate criminal liability may have developed to cover situations where public enforcement and corporate liability were necessary.³³ Public civil enforcement is a rather recent innovation and prior to its development the main form of public enforcement was criminal proceedings.³⁴ Thus, corporate criminal liability may have been the only means of combining public enforcement and corporate liability.³⁵ Cases where this would prove valuable were when

³² I make this assumption because normally mens rea seems to be considered more essential in crimes than in civil wrongs. See, e.g., LAFAVE & SCOTT, *supra* note 15, at 212.

³³ See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1485 - 86 (1996); Brickey, *supra* note 31, at 421 - 23 (discussing the public enforcement rational for corporate criminal liability); Nathaniel Lindley, *On the Principles Which Govern the Criminal and Civil Responsibilities of Corporations* (March 30, 1857), in 2 PAPERS READ BEFORE THE JURIDICAL SOCIETY 31, 34 - 35 (London, William Maxwell 1863)(noting that public enforcement was one of the purposes behind corporate criminal liability).

³⁴ See, e.g., Graham Hughes, *Administrative Subpeonas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 587 n.37 (1994); Mann, *infra* note 37, at 1849 - 52 (discussing the "growth of the administrative state").

³⁵ See Khanna, *supra* note 33, at 1486.

the harms caused were public ones and where responsible agents would be hard to identify or were judgment proof.³⁶

However, one of the more important principles of criminal liability is *actus non facit reum, nisi mens sit rea*.³⁷ Indeed, few offenses were based on strict liability or negligence, whereas many required mens rea.³⁸ Thus, mens rea requirements were crucial parts of the criminal law and for corporations to be subjected to the criminal law courts had to find ways of cabining corporations within offenses which required mens rea. If this was not done many public harms requiring corporate liability would go without remedy and deterrence would be compromised because corporations did not have mens rea.³⁹ In order to avoid this, courts may have decided to develop the notion of corporate mens rea in criminal cases.⁴⁰ Indeed, one could read that from the decisions in some cases.

³⁶ See Brickey, *supra* note 31, at 421 - 22 (noting the public harm factor); James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 82 - 84 (1976) (discussing the identifiability problem); Sykes, *supra* note 24 (discussing the judgment proof concerns).

³⁷ See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 204 (6th ed., 1995) (discussing this phrase for individuals); WAYNE LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 212 (2d ed., 1986) (same); GLANVILLE WILLIAMS, *TEXTBOOK ON CRIMINAL LAW* 70 (1983); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1805 (1992) (noting that "[i]n paradigmatic criminal law, commission of a wrongful act must be accompanied by a mental element of wrongdoing"). Cf. CHRISTOPHER D. STONE, *WHERE THE LAW ENDS* 1 - 2 (1975) (noting that the law developed to deal with individuals and corporations were later fitted into such laws); Daniel Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 337 (1996) (noting that "criminal statutes [were] drafted with individuals in mind . . .").

³⁸ The common law appeared very reluctant to allow for crimes without mens rea. See, e.g., KADISH & SCHULHOFER, *supra* note 37, at 235 - 43; LAFAVE & SCOTT, *supra* note 37, at 212; WILLIAMS, *supra* note 37, at 70.

³⁹ This reasoning is analogous to that used in *Goodspeed*, *supra* note 16, at *536, *542 - 44.

⁴⁰ See, e.g., *New York Central*, *infra* note 41, at 495 (noting a concern with "offenses [going] unpunished").

In *New York Central & Hudson River Railroad Co. v. United States*,⁴¹ an employee of the defendant railroad company gave rebates, prohibited under the Elkins Act,⁴² to certain customers "upon shipments of sugar from the city of New York to the city of Detroit, Michigan."⁴³ Consequently, both the employee and the defendant corporation were convicted and the corporation brought this appeal to the Supreme Court.⁴⁴ The appeal centered on part of §1 of the Elkins Act which allowed for vicarious criminal liability to be imposed on the corporation for the acts and intentions of its agents.⁴⁵

Defense counsel argued that this was unconstitutional because "[punishing] the corporation is in reality [punishing] the innocent stockholders [and depriving] them of their property without opportunity to be heard, consequently without due process of law [and that this provision] deprive[s] the corporation of the presumption of innocence . . . which is part of due process" ⁴⁶ Simply put, "[i]t amounts to punishing the innocent for the guilty." ⁴⁷

⁴¹ 212 U.S. 481 (1909).

⁴² Act of Feb. 19, 1903, ch. 708, 32 Stat. 847 (repealed 1978).

⁴³ *New York Central*, *supra* note 41, at 489.

⁴⁴ *See New York Central*, *supra* note 41, at 490, 491.

⁴⁵ *See id.* at 491 - 92.

⁴⁶ *Id.* at 492.

⁴⁷ *Id.* at 482.

The Supreme Court held that this provision was not unconstitutional and thus rejected this argument.⁴⁸ In so doing the Court said that it saw

[N]o valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by a fine because of the knowledge and intent of its agents to whom it has intrusted authority to act

....

[Further, giving corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.⁴⁹

In other words, denying corporate criminal liability here would eviscerate the Elkins Act and result in its enforcement being hampered⁵⁰ -- a result the Court would not tolerate.⁵¹ This enforcement related rationale is indeed similar to that in *Goodspeed*.⁵²

In 1909, the same year as the *New York Central* decision, another court, in *People v. Rochester Railway & Light Co.*,⁵³ held that corporations could, in theory, be liable for the crime of manslaughter.⁵⁴ In this case the defendant corporation was alleged to have

⁴⁸ See *id.* at 494 - 96.

⁴⁹ *Id.* at 495 - 96.

⁵⁰ Some commentators argue that this decision may be motivated by a desire to ensure adequate enforcement of the law. See, e.g., Brickey, *supra* note 31, at 414; James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY.L.J. 73, 96 (1976).

⁵¹ See *New York Central*, *supra* note 41, at 495. See also *id.* at 494 (noting that this decision only extends a principle from civil liability for purposes of public policy).

⁵² In fact, in the *New York Central* decision the Court agreed with Bishop's reasoning that "[s]ince a corporation acts by its officers and agents their purposes, motives, and intent are just as much as those of the corporation as are the things done." *Id.* at 492 - 93 (quoting Bishop's NEW CRIMINAL LAW, § 417). This is similar to the argument noted by the court in *Goodspeed*, see *supra* note 30.

⁵³ 88 Northeast Reporter 22 (1909).

⁵⁴ See *id.*

committed manslaughter "because . . . it installed certain apparatus in a residence in Rochester in such a grossly improper, unskillful, and negligent manner that gases escaped and caused the death of an inmate."⁵⁵ The court held that a corporation could be found liable for this crime, relying in part on the enforcement related reasoning in *New York Central*.⁵⁶ The court also supported the notion that the intent required for the crime could be imputed from agents in much the same way that it is imputed in the civil context.⁵⁷ In this particular case the wording of the statute precluded finding non-human entities liable for manslaughter, but there was no reason why corporations, under differently worded statutes, could not be held liable.⁵⁸ Both *New York Central* and *Rochester* helped open the proverbial "door" for corporations to be held criminally liable for all kinds of acts of natural persons except a few such as rape, murder, and bigamy.⁵⁹ Both cases also suggest that corporate mens rea may indeed have had an enforcement rationale.

However, at present, there is a lesser enforcement need for relying on mens rea wrongs. First, the traditional reluctance to allow for strict liability and negligence based

⁵⁵ 88 Northeast Reporter 22 (1909).

⁵⁶ *See id.* at 23 - 24.

⁵⁷ *See id.* at 23 (citing, approvingly, cases making this holding).

⁵⁸ *See id.* at 24. The statute read "'the killing of one human being . . . by another' - is manslaughter." *Id.* at 24 (quoting section 193 Penal Code). The court held that the word "another" could only be read to mean another human being thereby excluding corporations from liability. *See id.* at 24.

⁵⁹ *See* Brickey, *supra* note 31, at 410, 413 - 15. *See also* Khanna, *supra* note 33, at 1484 n.37 (citing GRUNER, *supra* note 1, at §3.2.3, at 175 - 78 and discussing this issue in greater detail). Even in *New York Central* the Court accepted that "there are some crimes, which in their nature cannot be committed by corporations." *New York Central*, *supra* note 41, at 494.

crimes has dwindled, especially in the corporate context.⁶⁰ Second, corporate criminal liability is no longer the primary means of obtaining public enforcement and corporate liability because corporate civil liability enforced by government agencies is available and tends to rely less on mens rea notions than corporate criminal liability did.⁶¹ The presence of these non-mens rea alternatives makes reliance on mens rea based criminal and civil wrongs less pressing than in the past. The presence of alternatives raises the basic question: why do we have corporate mens rea now given that alternatives are available? This Article answers this question by first defining what corporate mens rea means today.

III WHAT IS CORPORATE MENS REA TODAY?

In this Part I examine a number of definitional issues relating to corporate mens rea. Section A defines corporate mens rea to mean corporate intent, knowledge, and

⁶⁰ See LAFAVE & SCOTT, *supra* note 37, at 242 & n.1 (citing Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 84 - 88 (1933) and MODEL PENAL CODE 141 - 145 (Tent. Draft No. 4, 1955) for the proposition that strict liability crimes have increased); Fischel & Sykes, *supra* note 37, at 341 (noting that "Many environmental crimes are strict liability or negligence offenses; criminal statutes prohibiting making false statements to the government have been interpreted by courts as not requiring any intent to defraud the government." (citations omitted)). See also LAFAVE & SCOTT, *supra*, at 233 - 37 (discussing negligence in the criminal context); Laufer, *Corporate Bodies*, *supra* note 1, at 670 n.91 (discussing federal sentencing guidelines); Pitt & Groskaufmanis, *supra* note 5, at 1563, 1573 (discussing growth in corporate strict liability offenses).

⁶¹ On the presence of corporate civil liability enforced by government agencies, see, for example, Graham Hughes, *Administrative Subpeonas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 587 n.37 (1994); Mann, *supra* note 37, at 1849 - 52 (discussing the "growth of the administrative state"). Often mens rea seems a more essential element in crimes than in civil wrongs. See LAFAVE & SCOTT, *supra* note 37, at 212. In the civil sphere negligence liability has also grown, (see Mann, *supra* note 37, at 1847) thereby lessening the need to rely on mens rea as well.

recklessness. Section B further refines these definitions by setting out how to determine if a corporation possesses mens rea.⁶²

A *The Variety of Corporate Mens Rea Requirements*

Corporate mens rea requirements impose liability, civil or criminal, on corporations for engaging in an act with the required mens rea.⁶³ However, when we refer to corporate mens rea do we mean corporate intent, willfulness, or something else (and what do these terms themselves mean?). This, as some commentators have noted, is one of the most perplexing and complex questions to answer.⁶⁴ One reason for this is that there are so many different types of mens rea requirements; for instance, Federal legislation, as Laufer notes, provides for more than 100 types of mens rea, including over 20 formulations of "willfulness" itself.⁶⁵

⁶² In European jurisdictions corporate mens rea is not as common a liability standard as in the United States which is not too surprising given that the area where corporate mens rea is most common, corporate criminal liability, (see LAFAVE & SCOTT, *supra* note 15, at 212) is not available to the same extent in jurisdictions outside the United States. See, e.g., John C. Coffee, Jr., *Emerging Issues in Corporate Criminal Policy*, Foreword to GRUNER, *supra* note 1, at xix - xxi (discussing recent development in corporate criminal liability in Europe where its acceptance is increasing); L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508 *passim* (1982) (discussing the same but in the late 1970s and early 1980s); Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 19, 29 (1957) (discussing French corporate criminal law around World War II).

⁶³ Cf. Laufer, *Sentencing of Corporations*, *supra* note 1, at 1059 - 77, 1092 - 94 (noting examples of corporate mens rea).

⁶⁴ See, e.g., KADISH & SCHULHOFER, *supra* note 37, at 210; Laufer, *Sentencing of Corporations*, *supra* note 1, at 1064 (citing SENATE COMM. OF THE JUDICIARY. 96TH CONG., 2D SESS., REPORT OF CRIMINAL CODE REFORM ACT OF 1979, 59 (1980)); Laufer, *Corporate Bodies*, *supra* note 1, at 656 - 57.

⁶⁵ See *id.* at 1064 - 66.

Commentators and legal reformers, however, tend to categorize these different types of mens rea along a continuum beginning with intent and concluding with negligence.⁶⁶ Along this continuum four main points have been identified.⁶⁷ Intent is an extreme point on this continuum and a person acts intentionally "with respect to the nature or result of the actor's conduct [when] it was his conscious object to perform an action of that nature or to cause such a result."⁶⁸ Thus, murder, for example, is defined as stabbing someone with the object of seeing that person dead. Knowledge is the next point on the continuum and is when an actor is "aware that his conduct is of [a particular] nature"⁶⁹ or when "he is aware that it is practically certain that his conduct will cause [a particular] result."⁷⁰ An example would be burning sulfur dioxide into the atmosphere knowing that this is very likely to damage or impair property and harm people living nearby. Next is recklessness which is defined as "consciously [disregarding] a substantial

⁶⁶ See MODEL PENAL CODE, §§ 2.07 (4)(c), (1)(a), (1)(c), (2), (5), (1)(b) and § 217C and § 2.07, comment at 151 (Tent. Draft No. 4, 1955); KADISH & SCHULHOFER, *supra* note 37, at 211 - 13; LAFAVE & SCOTT, *supra* note 37, at 213; Laufer, *Corporate Bodies*, *supra* note 1, at 716 - 24 (discussing his preferred standard for ascertaining corporate mens rea).

⁶⁷ See, e.g., MODEL PENAL CODE, §§ 2.07 (4)(c), (1)(a), (1)(c), (2), (5), (1)(b) and § 217C and § 2.07, comment at 151 (Tent. Draft No. 4, 1955).

⁶⁸ KADISH & SCHULHOFER, *supra* note 37, at 211 (summarizing the MODEL PENAL CODE, § 2.02(2)(a)(i)). There are other definitions of intent that are analytically very similar to the definition in the text. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.5.1, at 440 - 42 (1978) (discussing the definition of intent in the U.S. (including the Model Penal Code), Germany, and the then Soviet Union, which are similar in many respects); LAFAVE & SCOTT, *supra* note 37, at 218 (quoting MODEL PENAL CODE § 2.02(2)(a)(i)); GLANVILLE WILLIAMS, *THE MENTAL ELEMENT IN CRIME* 10 (1965) ("A consequence is intended when it is desired to follow as the result of the actor's conduct."); Shavell, *supra* note 3, at 1247 (defining intent as when "[a party] 'desires' the result and . . . acts in a way that he believes will raise the probability of the result.") Shavell further defines desire to mean that the result "either directly or indirectly [raises the actor's] utility." *Id.* This definition includes transferred intent cases and cases where the actor "intended [a] harmful result . . . directly or indirectly. . . ." *Id.*

⁶⁹ LAFAVE & SCOTT, *supra* note 37, at 218 (quoting § 2.02(2)(b)(i) of the MODEL PENAL CODE).

⁷⁰ *Id.* at 218 (quoting the MODEL PENAL CODE § 2.02(2)(b)(ii)). For similar definitions in the corporate context see also GRUNER, *supra* note 1, at 201 - 02; Laufer, *Corporate Bodies*, *supra* note 1, at 719 - 21.

and unjustifiable risk."⁷¹ This involves an element of subjective awareness of the likely harm from acting.⁷² For example, driving at 110 miles per hour in a 20 mile per hour school zone just because you felt like it and thereby causing injury. Finally, there is negligence which involves not meeting the due care standard while acting.⁷³ An example might be when a party fails to take precautions to prevent her beer cans from exploding when the cost of the precaution is less than the expected harm.

In this Article corporate mens rea refers only to offenses which require intent, knowledge, or recklessness. I do not bring negligence under this label because much of the literature treats negligence and mens rea requirements separately and to maintain consistency with the prior literature I also adopt this labeling technique.⁷⁴ We then have

⁷¹ KADISH & SCHULHOFER, *supra* note 37, at 216 (quoting the MODEL PENAL CODE, § 2.02(2)(c)). Others have defined recklessness in a similar manner. See WILLIAMS, *supra* note 37, at 96 ("[Recklessness] normally involves conscious and unreasonable risk-taking, either as to the possibility that a particular undesirable circumstance exists or as to the possibility that some evil will come to pass. The reckless person deliberately 'takes a chance'."). For definitions in the corporate context, consult GRUNER, *supra* note 1, §§ 3.4.2, at 201 - 02, 4.2.2(c), at 276 - 81; Laufer, *Corporate Bodies*, *supra* note 1, at 721 - 22.

⁷² See KADISH & SCHULHOFER, *supra* note 37, at 216.

⁷³ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.1 at 163 - 67 (4th ed., 1992); Laufer, *Corporate Bodies*, *supra* note 1, at 722 - 24; Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2 (1980). There are even more definitions, but they are essentially captured by the definition in the text. See, e.g., KADISH & SCHULHOFER, *supra* note 37, at 212 ("A person acts negligently . . . when he inadvertently creates a substantial and unjustifiable risk of which he ought to be aware."). Throughout I will assume that acting includes omitting to act.

⁷⁴ See, e.g., GRUNER, *supra* note 1, at §3.4.2, at 198 - 203; POSNER, *supra* note 73, §§ 7.4 - .5, at 236 - 41. In addition, mens rea is normally interpreted as referring to a subjective state of mind rather than an objective one, which is associated with negligence. See, e.g., KADISH & SCHULHOFER, *supra* note 37, at 212 ("[Negligence] is distinguished from purposeful, knowing or reckless action in that it does not involve a state of awareness."); LAFAYE & SCOTT, *supra* note 37, at 233 (noting that "all [negligence] definitions [require] an expression of the required degree of risk which the defendant's conduct must create, and . . . [that the] conduct . . . be judged by an objective (reasonable man) standard."). Thus, one could justify different labels for intent, knowledge and recklessness (mens rea) and negligence on this basis.

three types of corporate liability standards: strict liability, negligence, and corporate mens rea (i.e., corporate intent, knowledge, and recklessness).

Under strict liability the corporation must have engaged in the harmful activity to be liable.⁷⁵ A strict liability rule imposes liability, for instance, when it is illegal to dispose of hazardous material in a public area. There is no requirement for the actor to know the material is hazardous and the actor's due care while acting will not excuse him from liability either. Under a negligence standard a party who acted with noble motives may still be liable if they did not exercise due care when acting. Further, liability under negligence will only attach if the actor fails to exercise due care not just because harm has occurred. Finally, for an offense requiring mens rea the corporation must have engaged in the harmful activity and possessed the required mens rea. This implies that if the corporation had no mens rea, but was negligent it would not be held liable. Further, if the corporation exercised due care, yet an agent caused harm while acting with mens rea the corporation would still be liable.⁷⁶

B. How to Determine if a Corporation Possessed the Required Mens Rea?

Even having identified the broad contours of the types of violations that fall under the heading of corporate mens rea we need to identify how to determine if a corporation

⁷⁵ See Shavell, *supra* note 73, at 2 - 3.

⁷⁶ See *infra* text accompanying notes 82 - 91.

possesses mens rea. This section examines this issue and concludes that corporate mens rea is simply an umbrella label used to describe three types of liability standards.⁷⁷

1. *The Single Actor Mens Rea Standard*

Under the first corporate mens rea standard, which I refer to as the single actor mens rea standard (SAMR), the federal courts use respondeat superior to impute *one agent's* acts and mens rea to the corporation.⁷⁸ Respondeat superior attaches liability to the corporation when an employee acts "with [at least a partial] intent to benefit the corporation"⁷⁹ and "within the scope of [his] employment."⁸⁰ The status of the corporate employee is not relevant.⁸¹ I consider a few examples of SAMR to provide a flavor of how it operates.

⁷⁷ Cf. GRUNER, *supra* note 1, at §§ 3.4.2, at 198 - 203, 4.1 - .2, at 263 - 84 (discussing different methods of ascertaining corporate mens rea); Laufer, *Corporate Bodies*, *supra* note 1, at 651 - 58.

⁷⁸ See GRUNER, *supra* note 1, at § 3.4.2, at 198 - 99 (discussing cases such as *U.S. v. Hilton Hotel Corp.*, 467 F. 2d 1000 (9th Cir. 1972), *U.S. v. Bank of New England*, 821 F. 2d 844 (1st Cir. 1987), *U.S. v. Twentieth Century Fox Film Corp.*, 882 F. 2d 656 (2d Cir. 1989)); Laufer, *Corporate Bodies*, *supra* note 1, at 653.

⁷⁹ *Developments*, *supra* note 1, at 1247.

⁸⁰ *Id.*

⁸¹ See BRICKEY, *supra* note 4, § 4.01, at 130; GRUNER, *supra* note 1, § 3.4.2, at 199 - 200; *Developments*, *supra* note 1, at 1248 - 50. Some other standards use an imputation approach similar to respondeat superior except that they only impute the intent of a corporate agent high up in the corporate hierarchy. See, e.g., MODEL PENAL CODE, § 2.07(1)(c) (1962). These other standards are not examined because they would not change the primary conclusions of this Article.

In *United States v. Twentieth Century Fox Film Corporation*⁸² the corporation and its employee were convicted of criminal contempt for willfully not following the provisions of an antitrust consent decree entered into by the government and the corporate defendant in 1951.⁸³ The present case arose in 1988 as a result of charges that Goldstein, an employee of Fox, had engaged in block-booking, a practice Fox had promised not to engage in as part of the consent decree.⁸⁴ Fox appealed its conviction because, amongst other reasons, it argued that "the Government had to establish not only that Goldstein willfully violated the decree but also that Fox was not 'reasonably diligent' in securing compliance with the decree by its employees [which Fox argued the government had not done]."⁸⁵ The Second Circuit rejected this argument and held that as long as an employee of Fox willfully violated the consent decree then respondeat superior would hold Fox liable,⁸⁶ even if Fox had been "reasonably diligent" in devising compliance programs.⁸⁷ Thus, liability for employee acts and intentions is swift under respondeat superior for SAMR and does not depend on the reasonableness of the corporation's actions.⁸⁸ Similar principles apply for other types of corporate mens rea, such as corporate knowledge.⁸⁹

⁸² 882 F.2d 656 (2d Cir. 1989).

⁸³ *See id.* at 656 - 57, 659.

⁸⁴ *See id.* at 658. Block-booking is "conditioning the licensing of one film or group of films upon the licensing of one or more additional films." *Id.*

⁸⁵ *Twentieth Century Fox Film Corporation*, *supra* note 82, at 659.

⁸⁶ *See id.* at 661.

⁸⁷ *See id.*

⁸⁸ *See also Developments*, *supra* note 1, at 1246, 1248.

⁸⁹ *See GRUNER*, *supra* note 1, § 3.4.2, at 198 - 202 (discussing willful conduct in the corporate context).

However, not every act and intention of an employee is imputed to the corporation. In particular, if the employee acts outside the scope of employment or without even a partial intent to benefit the corporation then respondeat superior would not impose liability.⁹⁰ Obvious examples of such cases would be murder, rape, and treason.⁹¹ SAMR, however, is not the only liability standard under the label "corporate mens rea".

2. *The Collective Mens Rea Standard*

Under the collective mens rea standard (COMR) liability attaches "when the knowledge and conduct of multiple employees is attributed to a corporate principal and

⁹⁰ See BRICKEY, *supra* note 4, § 4.02, at 131 - 37 (discussing the "intent-to-benefit" requirement); GRUNER, *supra* note 1, §§ 3.4.2, at 202 - 03, 3.5, at 203 - 06, 3.6.1, at 229; *Developments*, *supra* note 1, at 1247 - 49. In *Standard Oil Company of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962), a case involving employees violating the Hot Oil laws for their own (and some third parties') gain rather than to benefit the corporation (*see id.* at 120 - 22, 129) the Fifth Circuit held that "the corporation does not acquire that knowledge or possess the requisite 'state of mind essential for responsibility', through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer." *Standard Oil Co. of Texas*, *supra*, at 129 (citing *United States v. Chicago Express, Inc.*, 235 F.2d 785, 786 (7th Cir. 1956)).

Similar principles apply for offenses requiring knowledge. See GRUNER, *supra* note 1, § 3.4.2, at 202. Gruner notes

knowledge obtained by an employee working against corporate interests may still be attributed to a firm:

- (a) if the failure of the employee to act on the information he has gained results in a violation of a duty of his corporate employer,
- (b) if the employee gains the knowledge while acting within the apparent scope of his powers, or
- (c) if the corporate principal knowingly retained a benefit gained through the acts of the employee.

GRUNER, *supra* note 1, § 3.4.2, at 202 (discussing RESTATEMENT (SECOND) OF AGENCY, § 282 (2)).

⁹¹ See *New York Central*, *supra* note 41, at 494. See also Brickey, *supra* note 31, at 413 - 15 (discussing cases where corporate liability for such crimes was disavowed, such as *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)).

the . . . liability of the corporation is evaluated as if the collective knowledge and actions were held and undertaken by a single party."⁹² This type of liability standard provides the firm and its managers with an incentive to share information amongst themselves thereby enhancing deterrence and law compliance.⁹³ I define the contours of collective mens rea by providing examples of when courts have held corporations liable for mens rea offenses when no one particular agent engaged in an act with the required mens rea.⁹⁴

In *United States v. Bank of New England*,⁹⁵ the bank appealed its convictions for willfully not filing a certain Currency Transaction Report, a report that was required to be filed if a transaction in excess of \$10,000 had occurred.⁹⁶ In this case a bank customer "withdrew . . . more than \$10,000 in cash by using multiple checks -- each one individually under \$10,000 -- presented simultaneously to a single bank teller."⁹⁷ It was argued that the fact that more than one check was used differentiated this case from that

⁹² GRUNER, *supra* note 1, § 4.1.1, at 263. In practice the knowledge and information that is imputed includes the "factual information supplemented by the obvious inferences raised by [the] information." *Id.* at 267. This broadens the scope of information, but what qualifies as an "obvious inference" is not yet certain. *See id.* at 271 (noting that sometimes "if a corporation had the means to reach a conclusion, it will be deemed to know that conclusion." and other times courts may require a "due diligence limitation"). The general limitations of respondeat superior still apply. *See id.* at 272 - 84.

⁹³ *See id.* at 266.

⁹⁴ We could, of course, examine cases of collective intent, collective knowledge, and so forth, but that inquiry would be fruitless because the lines between these concepts are very blurred. *See id.* at 267. As Gruner has commented, "a more accurate description [of collective mens rea] would be the knowledge and actions by groups of corporate employees which, when considered in the aggregate, raise similar implications for criminal analyses as the culpable knowledge, willfulness and specific intent of offenders." GRUNER, *supra* note 1, § 4.2, at 267.

⁹⁵ 821 F.2d 844 (1st Cir. 1987), *cert. denied* 484 US 943 (1987).

⁹⁶ *See id.* at 847 (discussing 31 C.F.R. § 103.22 (1986)).

⁹⁷ *Id.* at 847.

where only one check was used and hence the bank was not required to file a report.⁹⁸ The court rejected this argument and held that the bank must file a report.⁹⁹ For our purposes the important issue is how the First Circuit interpreted and applied the willfulness requirement. The court held that "[a] finding of willfulness under the Reporting Act must be supported by 'proof of the defendant's knowledge of the reporting requirements and his specific intent to commit the crime.'"¹⁰⁰ The court held that both elements of willfulness -- knowledge of requirements and specific intent to violate them - - might be shown by either relying on SAMR or COMR.¹⁰¹ In this case there was clear evidence that some corporate employees were aware of these reporting obligations because there were memos, prepared by corporate officers, and discussions with auditors, that made clear that such transactions were of concern to the corporation and that reports were needed.¹⁰² Thus, even if the particular teller dealing with the customer was unaware of the reporting obligation the knowledge of another employee (evidenced by the memos for example) could be added to the failure of the tellers in filing a report to hold the corporation liable for willfully failing to file a report.¹⁰³

⁹⁸ See *id.* at 847.

⁹⁹ See *id.* at 849 - 51. "This case falls squarely within the Act's reporting requirements because it involves the physical transfer of more than \$10,000 in currency from one bank in one day to a single customer during a single visit." *Id.* at 850.

¹⁰⁰ *Bank of New England*, *supra* note 95, at 854 (citing *United States v. Hernando Ospina*, 798 F.2d 1570, 1580 (11th Cir. 1986) and *United States v. Einstein*, 731 F.2d 1540, 1543 (11th Cir. 1984)).

¹⁰¹ See *id.* at 855 - 56.

¹⁰² See *id.* at 857.

¹⁰³ See *id.* at 857. Gruner notes that some courts are reluctant to allow for collective specific intent (as opposed to collective knowledge or recklessness). See GRUNER, *supra* note 1, § 4.2.3, at 283 - 84 (discussing *US v. LBS Bank-NY*, 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990) and *Kern Oil v. Tenneco Oil*, 792 F.2d 1380, 1387 (9th Cir. 1986) *cert. denied* 480 U.S. 906 (1987)).

The collective standard also covers situations where no individual agent had the complete mens rea, but where bits of information, which when combined are sufficient for the mens rea requirement, are held by different agents in the corporation.¹⁰⁴ Consider the case of *United States v. T.I.M.E. - D.C.*¹⁰⁵

In this case T.I.M.E. - D.C. was found guilty of knowingly and willfully contravening a federal regulation,¹⁰⁶ which required that

No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.¹⁰⁷

The defendant had devised a new system to reduce rampant absenteeism whereby a driver who was feeling unwell would call the dispatcher and be informed that "[the

¹⁰⁴ *Bank of New England* also supports this conclusion when approving the following statement from the lower level court in that case. "[I]f [e]mployee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all." *Bank of New England, supra* note 95, at 855 (citing Rya W. Zobel, J. in the lower level case this was appealed from).

Gruner also notes that collective mens rea may "[extend] beyond the duration of employment of the individual who gained the knowledge." GRUNER, *supra* note 1, § 3.4.2, at 201.

¹⁰⁵ 381 F.Supp. 730 (1974).

¹⁰⁶ *See id.* at 739 (noting that the case concerned "a violation of section 322(a) of the Interstate Commerce Act.").

¹⁰⁷ 49 C.F.R. 392.3. The court noted that "Section 332 (a) of the Interstate Commerce Act imposes criminal penalties for the knowing and willful violation of any of the regulations imposed by the Highway Administration." *T.I.M.E. - D.C., supra* note 105, at 733.

driver's] absence would be considered unexcused unless he submitted a doctor's slip or similar verification of his illness."¹⁰⁸ It appears that the defendant did not make clear what the consequence of such a letter was or how easily it could be cured.¹⁰⁹ In light of this situation the wife of a driver, Brown, called in to a dispatcher, Giles, to tell him that her husband was ill and would not report to work that day.¹¹⁰ Giles apparently told Brown's wife of the letter policy.¹¹¹ Later that very day Brown called and spoke to another dispatcher, Zimmerman, and asked to be "placed back in the lineup."¹¹²

The defendant could argue that no one individual employee both knew that Brown was ill and that he was going to work that day -- Giles knew of the illness and Zimmerman of Brown's intending to work -- and thus that the corporation could not be held liable for a knowing and willful violation.¹¹³ The court flatly rejected this argument and held that

[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.¹¹⁴

¹⁰⁸ *T.I.M.E. - D.C.*, *supra* note 105, at 733.

¹⁰⁹ This appears to be the impression the drivers had, *see id.* at 734 - 36. *See also id.* at 739.

¹¹⁰ *See id.* at 735.

¹¹¹ *See id.*

¹¹² *Id.* at 736 n. 7.

¹¹³ *See id.* at 735 - 36 n. 7, 738.

¹¹⁴ *Id.* at 738.

This then represents a case of the second type of COMR -- where no agent has mens rea, but collectively the agents possess sufficient information to have mens rea.¹¹⁵

These examples of SAMR and COMR highlight that both focus on the information *already possessed* by corporate agents when illegal conduct is undertaken. There is no duty at present to "gather reasonably available information."¹¹⁶ It then follows that if no one possesses information, and hence mens rea, the corporation is not liable under either of these mens rea standards, even if it was negligent not to have the information or to have acted.¹¹⁷ Conversely, the corporation cannot avoid liability for harm caused by its agents' acts once information of a sufficient amount to meet the mens rea requirement is held within the corporation, even if the corporation takes due care in obtaining and sharing information.¹¹⁸ This stands in contrast to the third corporate mens rea standard which in essence represents different forms of the negligence rule.¹¹⁹

¹¹⁵ Other cases come to similar conclusions. See, e.g., *Bank of New England*, *supra* note 95, at 855 (citing Rya W. Zobel, J. in the lower level case this was appealed from); *Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951). Gruner also notes that the court in *T.I.M.E. --D.C.* would find the defendant liable because "[the corporation failed] to analyze obvious symptoms of defects in its methods for gathering information on driver fitness." GRUNER, *supra* note 1, § 4.2.1, at 271. This is especially so when there was already "a union grievance complaining of the unfairness of the company's policies" *Id.*

¹¹⁶ GRUNER, *supra* note 1, § 4.3.1, at 285. The implications of having a strict liability wrong and mens rea simultaneously for the same conduct is considered *infra* Part IV.E.

¹¹⁷ See *id.* at 285.

¹¹⁸ See *Twentieth Century Fox Film Corporation*, *supra* note 82, at 660 - 61. See also GRUNER, *supra* note 1, § 4.2.1, at 269 (noting that liability is strict once a sufficient amount of information is held within the corporation).

¹¹⁹ The crucial difference between the commentators' approaches, discussed in Part III.B.3, and COMR is that with the commentators' approaches if correct procedures were in place liability would be avoided, whereas under COMR even if correct procedures were in operation, liability would not be avoided if the

3. *The Third Corporate Mens Rea Standard -- Liability for Negligent Procedures and Policies.*

The third standard, articulated by commentators not courts, imposes liability when the corporation's internal procedures and policies are negligent in some way.¹²⁰ This standard is simply a form of negligence and it is somewhat mystifying that it is called "corporate mens rea". It may be easier to simply drop the facade of corporate mens rea and call this negligence. If this is what we do then the comparison between this liability standard and the others collapses to a comparison between negligence and strict liability.

corporation acted and were held to have information sufficient for mens rea. See GRUNER, *supra* note 1, § 4.2.2, at 276.

¹²⁰ There are many versions of this third standard and I will begin with the proactive fault and reactive fault standards. See, e.g., *Developments*, *supra* note 1, at 1243 (noting that proactive corporate fault (PCF) imposes liability where "a corporation's procedures and practices . . . unreasonably fail to prevent corporate criminal violations."); Laufer, *Corporate Bodies*, *supra* note 1, at 665 - 66 (discussing both PCF and Reactive Corporate Fault (RCF), which "shifts the focus of liability from fault prior to the time of the actus reus [as in PCF], to fault in reaction to the actus reus."). Let us assume that a corporation is told by its customers that the seals on its bottles of tablets can be removed and placed back easily thereby increasing the chances of tampering going unnoticed then the corporation should, under an RCF standard, do something to make tampering more difficult to conceal. If the corporation does nothing then a RCF standard might hold them liable for harm.

Other commentators suggest asking whether "a corporate practice or policy violates the law" or whether "it was reasonably foreseeable that a corporate practice or policy would result in a corporate agent's violation of the law." Laufer, *Corporate Bodies*, *supra* note 1, at 668. Yet others ask variations on these questions. See, e.g., Bucy, *supra* note 1, at 1121 - 48 (discussing the "corporate ethos" standard); Laufer, *Corporate Bodies*, *supra* note 1, at 668 (discussing "corporate policy"); Laufer, *Corporate Bodies*, *supra* note 1, at 715 - 25 (discussing Laufer's own standard - "constructive corporate culpability"). Consider the following as an example of what may suffice for liability under the standards described in this paragraph. Suppose a corporation produces a drug for use in treating sinus colds and has many testing procedures to determine the effectiveness of the drug. However, the corporation has no procedure for examining whether the drug has side effects. In fact, the drug does have side effects that include increasing chances for heart disease. Assuming that it is straightforward and inexpensive to ascertain side effects then the corporation's lack of information gathering on this issue could be sufficient for liability under these standards. See Laufer, *Corporate Bodies*, *supra* note 1, at 722 - 23. Cf. GRUNER, *supra* note 1, § 4.3.1, at 284 - 85; Foerschler, *supra* note 1, at 1308 - 11.

The literature already provides ample grounds for dealing with this comparison and analysis should be conducted within that framework.¹²¹ For this reason the third standard is not analyzed in this Article.

Looking at the picture just painted we have numerous types of corporate mens rea and numerous liability standards under the aegis of corporate mens rea. To know (i) which corporate mens rea liability standard (SAMR or COMR) is desirable and (ii) which type of mens rea requirement (intent, knowledge or recklessness) is desirable we need to know *why* we require corporations to possess mens rea before we attach liability on them. It appears that no one has even attempted to provide a deterrence-based answer to this question.¹²² In light of this, it is the object of this Article to both ask and answer this question.

¹²¹ See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 367 - 70 (1988); POSNER, *supra* note 73, at 175 - 80; Shavell, *supra* note 73, *passim*.

¹²² I have not found any deterrence-based treatments of corporate mens rea, although there are some articles examining deterrence-based arguments for individual mens rea requirements. See, e.g., Parker, *supra* note 3, *passim*; Shavell, *supra* note 3, at 1247 - 49. I consider deterrence, not retribution, to be the main aim of any form of corporate liability. See *Developments*, *supra* note 1, at 1235 & n.16 (citing sources suggesting deterrence is the "primary rationale" for imposing criminal liability on corporations); Kraakman, *supra* note 6, at 865 - 68 (analyzing corporate and individual liability through a deterrence lens); GRUNER, *supra* note 1, at § 2.3.6, at 144 n.121 ("Federal law identifies offender reform and the specific deterrence of offenders as primary goals of criminal sentences for offenders including corporations"); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 356 (1968) (arguing that the purposes of corporate criminal liability do not include retribution). But see *Developments*, *supra* note 1, at 1237 - 38 (arguing that retribution might be a purpose of corporate criminal liability). See also Guangwei Ouyang & Roger A. Shiner, *Organizations and Agency*, 1 LEGAL THEORY 283 *passim* (1995) (discussing the moral status of corporations and concluding that corporations do not have the same moral status as individuals in the metaphysical sense).

IV THE SINGLE ACTOR MENS REA STANDARD

In this Part I compare SAMR with strict liability and negligence in order to ascertain the circumstances in which SAMR may prove preferable to these alternative standards. My analysis suggests that SAMR is not a desirable liability standard. Indeed, it would be preferable to rely on strict liability or negligence as the liability standard with occasional inquiry into the acting agent's mens rea at sanctioning when such inquiry is considered desirable. My analysis also indicates that such an inquiry is rarely desirable.

A. *Incentive Effects of Alternative Liability Standards*

I begin by considering the effects of SAMR and its alternatives on incentives to exercise care, to gather information about the risks associated with corporate products, and to share that information within the corporation. In order to do this a few notions must be defined more carefully. Optimal care is defined as "the level of care that is socially best *given* optimal acquisition of information about risk."¹²³ Further, the optimal amount of information sharing is the amount of sharing necessary to ensure that optimal care is taken. I begin the analysis by focusing on information gathering because that to a great extent influences the other matters.

¹²³ Shavell, *supra* note 10, at 260. Optimal information gathering is when "the social value of information exceeds the costs of information." *Id.*

Under SAMR liability attaches when one agent of the corporation both engages in an act *and* possesses the required mens rea while acting. Mens rea may be viewed as a label placed on the amount of information an actor possesses about his own conduct.¹²⁴ Thus, intent suggests a certain amount of information, knowledge suggests another amount, and so forth. SAMR is then similar to strict liability premised upon a certain amount of information possessed by the acting agent. The issue is then what effect might this standard have on incentives to gather information.

Corporate agents, under SAMR, are likely to gather less information than is optimal. This is because there is no sanction for failing to gather the optimal amount of information and no general duty to "gather reasonably available information",¹²⁵ yet liability under SAMR is based on the amount of information held. The corporation is then faced with the following choice. If the agent does not gather information then the costs to the corporation and the agent are only that the agent may not perform as well as if they had information (there is no liability for failing to gather information). If, however,

¹²⁴ Mens rea is simply "a requirement that the person charged possessed . . . subjective awareness of the . . . 'true' nature of his or her own conduct and any surrounding factual circumstances made relevant by the legal definition of the offense . . . [or more simply did the actor possess] 'self-characterizing' information." Parker, *supra* note 3, at 744 - 45.

¹²⁵ GRUNER, *supra* note 1, § 4.3.1., at 285. Note that a close relative of the duty to gather information is the willful blindness mental state, which LaFave and Scott, quoting the Model Penal Code, define as follows:

"[K]nowledge of the existence of a particular fact . . . is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist." . . . The . . . requirement of awareness of a high probability of the existence of the fact serves to ensure that the purpose to avoid learning truth is culpable. As to the Model Penal Code exception where the defendant actually believes the fact does not exist, it assures that the defendant is not convicted [on a negligence type objective theory].

LAFAVE & SCOTT, *supra* note 37, at 219 - 220 (footnotes omitted)(quoting MODEL PENAL CODE § 2.02(7)).

the agent gathers information then the costs to the corporation and the agent include the likely costs of future liability for harm caused, the costs of taking precautions to reduce the number of times harm occurs, and the costs of acquiring further information which may be needed to reduce or avoid harm.¹²⁶ Often the costs of gathering information may exceed the costs of not gathering information for the corporation and information may not be acquired even when it is socially desirable to do so.¹²⁷ Perhaps this is what is meant when people in a corporation seem averse to receiving certain types of information -- they may not want to place themselves in a position to have to do something about it.¹²⁸ As less information is gathered the level of care exercised and the level of information sharing will, by definition, be suboptimal.

A reduction in information gathering can have drastic consequences. Consider Mokhiber's discussion of the DES children.¹²⁹ DES was a drug that was claimed to prevent or reduce the likelihood of miscarriages.¹³⁰ However, not only did DES not appear to reduce the chance of miscarriage, but also it increased the chances for the DES

¹²⁶ Liability attaches because if the agent has mens rea and acts within respondeat superior the corporation is liable even if it was not negligent. *See supra text accompanying notes 82 - 90.*

¹²⁷ *Cf.* Shavell, *supra* note 10, at 266 - 67 (discussing a similar result in the context of certain negligence rules). *Cf. also id.* at 268 n.11 (discussing the possibility that too much information may be gathered if the "private value of information [exceeds] the social."); GRUNER, *supra* note 1, §4.3.1, at 284 - 85 (noting a similar result under COMR).

¹²⁸ *Cf.* STONE, *supra* note 37, at 62 (noting that "the organization banks on the unwritten hope that 'what he [the manager] doesn't know cannot hurt him.'").

¹²⁹ The following discussion is based on Mokhiber's account of the DES case. *See* RUSSELL MOKHIBER, CORPORATE CRIME AND VIOLENCE 172 - 80 (1988).

¹³⁰ *See id.* at 173.

children (the children of the mothers who took DES) to suffer from cervical cancer or have other side effects.¹³¹ It appears the company manufacturing DES "failed to test the drug adequately [for example] DES has never been tested on pregnant animals before being given to pregnant women."¹³² This was especially troubling as one expert noted at the civil trial because:

Prior to the marketing of DES there existed numerous separate factors which taken as a whole, could have and should have alerted a reasonably prudent pharmaceutical company to the need for animal testing [DES before marketing it to pregnant women].¹³³

In this case the lack of information gathering contributed to causing harm that was avoidable.¹³⁴ As Joyce Bichler, a DES daughter and later civil litigant, said "[t]hey hadn't bothered to do a simple and necessary test that would have prevented all the pain and suffering."¹³⁵

¹³¹ See *id.* at 175, 179.

¹³² *Id.* at 176.

¹³³ *Id.* at 176.

¹³⁴ See *id.* at 179.

¹³⁵ *Id.* at 176. Stone appears to support the argument that the law may induce a reduction in information gathering when he suggests that if punitive damages "hinge upon whether or not some top-level officer . . . knew about the wrongful acts" (STONE, *supra* note 37, at 62) then we would probably see lower level employees preventing information from reaching corporate higher-ups and corporate higher-ups avoiding receipt of important information in order to avoid liability. See *id.* at 62. The ignorance of corporate higher-ups is very troubling if it might result in products being marketed that are quite dangerous. This point can then be generalized to note that the disincentive to gather and receive information would exist even if liability were not based on the mens rea of a high corporate agent, but of any corporate agent because then every agent would have some incentive to avoid gathering information.

In addition, the problems with SAMR may be even worse than a disincentive to gather information because this standard can impede the sharing of information within the corporation. Employees could deliberately conceal information from higher-ups as Stone suggests they might,¹³⁶ but information sharing may also be hampered without employees deliberately concealing information. For example, a corporation may structure its internal processes and agent employment duties in such a way that it would be difficult for *one agent* to end up having the information needed for him to both possess mens rea and commit the undesirable act to be liable under SAMR.¹³⁷ Suppose the law states that knowingly dumping hazardous material in a river is illegal. Then a corporation may separate its agents into two groups: those who engage in dumping material and those who know about the hazardousness of the material being dumped. If these two people are rarely required to have contact (or such contact is not facilitated or encouraged) then one agent in the corporation is unlikely to both act and possess the required mens rea thereby avoiding corporate liability under SAMR. Because SAMR allows corporations to avoid liability by partitioning information it encourages them to do so, resulting in suboptimal information sharing and a suboptimal level of care. Thus, with SAMR the optimal level of care, information gathering, and information sharing are highly unlikely.

¹³⁶ See STONE, *supra* note 37, at 61 - 62.

¹³⁷ Cf. *id.* at 52 (noting that "information and acts are [often] distributed among many different employees."). I have assumed that an individual may not acquire some information in order to avoid becoming liable, however, there is presumably a limit to how much information may be avoided given the agent's job responsibilities. However, the corporation can structure the responsibilities in such a way that this may not prove to be an important consideration under SAMR.

This can be contrasted with the results under alternative liability rules. Shavell argues that the use of strict liability, assuming the imposition of the correct sanction for optimal deterrence, results in optimal information gathering and optimal care.¹³⁸ Shavell notes that "[b]ecause a party bears the losses he causes and he incurs the costs of obtaining information and of exercising care, his problem becomes the social problem, and he makes socially desirable decisions."¹³⁹ Furthermore, for parties to exercise optimal care the information they possess must be shared optimally with other members of the corporation.

The results under negligence depend on which of the myriad of negligence rules is used. One negligence rule, termed the "complete negligence rule" by Shavell, attaches liability if the actor "either failed to exercise optimal care or failed to obtain information when he should have done so (even if he exercised optimal care)."¹⁴⁰ Shavell shows that this rule results in optimal information gathering.¹⁴¹ Furthermore, optimal care is taken because "the threat of negligence induces optimal care."¹⁴² Finally, in order to exercise optimal care the information gathered must be shared optimally. Thus, all three incentive effects are optimal under strict liability as well as the "complete negligence" rule.¹⁴³ The

¹³⁸ See Shavell, *supra* note 10, at 260, 263.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 260.

¹⁴¹ See *id.* at 261, 263 - 64.

¹⁴² Shavell, *supra* note 10, at 261.

¹⁴³ But see Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEG. STUD. 833 *passim* (1994) (noting that if a corporation is made strictly liable then it may take measures to reduce the number of times it engages in harmful activity, but its actions may increase its chances for

issue is then whether SAMR has any advantages over the other standards that outweigh its disadvantages.

B. Proxy Advantages of The Single Actor Mens Rea Standard

In this Part I examine the proxy rationales for mens rea requirements for individuals and ask whether and to what extent they apply to corporations under SAMR. The analysis suggests that the proxy argument is rather weak in the corporate context.

1. Mens rea as a proxy for relevant factors for individuals

A rationale given in the literature for mens rea requirements for individuals is that they are proxies for certain matters, such as expected harm, expected private benefit, and the probability of sanction, that help to determine the optimal actual sanction.¹⁴⁴ Raising sanctions when intent is present may be justified because expected harm increases with

conviction in those cases in which it still engages in the activity and thus we are providing a lesser incentive for it to engage in these enforcement efforts -- one of which could be the corporation's incentives to gather information). However, because corporate mens rea is defined as strict liability plus inquiry into acting agent's mens rea one would expect that the negative incentive to gather information would only be compounded compared to pure strict liability. Furthermore, even if the effects on information gathering were the same there is some chance of rectifying that using strict liability by providing what Arlen terms "corporate use privilege". *See id.* at 865 - 66. This protection is not available if we rely on corporate mens rea because by privileging information on intent we have essentially made it impossible to prove intent and to hold the corporation liable.

¹⁴⁴ *See* Posner, *supra* note 3, at 1222 - 23 (discussing criminal intent and the probability of sanction); Shavell, *supra* note 3, at 1247 - 49 (1985) (discussing expected harm, expected private benefit and the probability of sanction). *See also* Shavell, *supra*, at 1248 n.58 (noting that Oliver W. Holmes, Jr., was the first to link intent and the probability of harm). *See also* Parker, *supra* note 3, at 763 - 64. For analogous reasoning in the context of punitive damages, see David Friedman, *An Economic Explanation of Punitive Damages*, 40 ALA. L. REV. 1125 (1989).

intent.¹⁴⁵ Expected harm increases because, as Shavell notes, both the probability of harm and the magnitude of harm increase with intent.¹⁴⁶ As expected harm rises there would be a need to increase actual sanctions to maintain the expected sanction at the level prior to the rise in expected harm and thereby maintain optimal deterrence.¹⁴⁷

Although this indicates that intent may reveal some useful information about expected harm it does not, by itself, suggest why we need an intent *proxy* for expected harm. Generally, relying on proxies, or indirect inquiry, proves socially desirable when the net benefits of indirect inquiry, via the mens rea element, are greater than the net benefits of directly inquiry. For instance, indirect inquiry is preferable when we cannot obtain as much information about these factors by directly inquiring into them as we might by indirectly inquiring into them (assuming all else is equal) or when direct inquiry is considerably more expensive than indirect inquiry (assuming all else is equal).¹⁴⁸

¹⁴⁵ See Shavell, *supra* note 3, at 1248.

¹⁴⁶ Shavell notes that "by definition, where a party intends to do harm, his act raises the probability of harm." Shavell, *supra* note 3, at 1248. Further, "intent may be correlated with the likely magnitude of harm because a party [who intends harm] is prone to do greater harm than one who does not." *Id.*

¹⁴⁷ See *id.* at 1248. I have assumed that the expected sanction that existed prior to the change in expected harm was optimal for deterrence purposes. I also conjecture that we could also spend resources on increasing enforcement effort to increase the probability of sanction, but this is presumably more costly than increasing sanctions, which may be socially costless or if sanctions are socially costly they may still result in lower total costs than increasing enforcement expenditures.

¹⁴⁸ See Shavell, *supra* note 3, at 1247 - 49 (making the first limb of this argument). The first limb of the argument is that if the costs of direct and indirect inquiry are nearly the same then our choice should be that one which provides more information. The second limb of the argument is that if the amount of information is the same with both types of inquiries then our choice depends on which is cheaper. There will of course be a vast middleground where we may make tradeoffs between increased information and increased cost. The preferred result is the one where the value of the extra information obtained outweighs the extra costs of gathering that information.

In the context of expected harm information on expected harm, as Shavell argues, can be ascertained from a much simpler and more direct source, the harm itself.¹⁴⁹ If the offense is a harm-based violation (i.e., a sanction is imposed once harm occurs) then an increase in expected harm will "result in greater or more frequent sanctions [and hence a higher expected sanction]."¹⁵⁰ Thus, there may be little need to inquire into intent when dealing with a harm-based violation, assuming of course that the harm could be readily estimated or measured.¹⁵¹ This argument, Shavell notes, would not apply to act-based sanctions (i.e., where a sanction is imposed for engaging in an illegal act rather than for harm being imposed) because we do not know the harm yet and thus using direct measures of it may be difficult for act-based violations.¹⁵²

Second, we can examine intent and its connection to expected private benefits. Simply put, "the utility of parties who intend harm is raised by the occurrence of harm ... [t]hus, parties who intend to do harm should be more difficult to deter."¹⁵³ Given the added difficulty of deterrence higher sanctions may be warranted when the expected private benefits include socially unrecognized benefits, such as deriving pleasure from

¹⁴⁹ See STEVEN SHAVELL, ECONOMIC ANALYSIS OF LAW CLASS NOTES (1994) § 22.4.8, at 20 - 21.

¹⁵⁰ *Id.*

¹⁵¹ See SHAVELL, *supra* note 149. If harm is very difficult to measure (e.g., dispersed through a number of different victims so that any one person's suit may not reflect the total social loss) then we might need proxies to estimate increases in harm. See also Parker, *supra* note 3, at 763 n.63 (noting other possible uses of intent for attempts and others matters).

¹⁵² See SHAVELL, *supra* note 149, at 20.

¹⁵³ Shavell, *supra* note 3, at 1248.

seeing another suffer.¹⁵⁴ Further, intent may be one of the best measures we have for the presence of socially illicit gains.¹⁵⁵ This use of intent applies for both harm-based and act-based offenses.

One qualification is that intent justifies higher sanctions only when some of the expected private benefits are socially unrecognized. If intent is correlated with an increase in expected private benefits that are all socially recognized then there is no need to increase the sanction due to intent because now the activity has a higher social benefit than it previously did, which is not a reason to increase the sanction.¹⁵⁶

¹⁵⁴ See *id.*

¹⁵⁵ We could of course ask why not directly inquire into the expected private benefits people are likely to receive rather than try to estimate it through an intent proxy. The problem is that if private benefits are not social benefits (i.e., Y receives pleasure in watching X suffer) then it is difficult to know when this is so without asking about mental states. One could try, instead of relying on intent, to use measures of expected harm to identify situations where expected private benefits involve benefits that are not social benefits. However, I do not think there is necessarily a clear link between expected private benefits that are socially unrecognized and expected harm. Cheating in a game of low monetary stakes poker may have a small expected harm but vast private benefits to a gambler -- some of which may be counted by society as pleasure to him and some which may not (such as pleasure derived from seeing his opponent lose). One can imagine other examples involving delusional characters and so on, but the point is that expected harm is probably not as good a proxy as intent because it may not identify the situations where there are private benefits that include benefits not counted by society.

¹⁵⁶ To analyze this part of the argument in greater detail we need to consider two cases: (i) where some private benefits are not counted as expected social benefits and (ii) where all private benefits are counted as social benefits. Throughout I assume that sanctions are socially costless.

Let us consider the first case. Suppose that the expected social harm from an act is 100 and the expected private and social benefit is 99 for those who do not intend to cause harm. This act is socially undesirable and should not be engaged in. If we assume that the probability of sanction is 1 then the expected (and actual) sanction to deter this activity would be 100. However, if there are some parties who derive pleasure from seeing others suffer then for them the expected private benefit may be 110. Such people will not be deterred by anything less than a sanction of 110. Here the sanction needs to be increased from 100 to 110. This is essentially the argument in Shavell, *supra* note 3, at 1248.

Let us then consider the second case (where all private benefits are counted as social benefits). Suppose an act has expected social harm of 100 and expected private and social benefit of 105 for those who intend it and 99 for those who do not intend it. Here simply imposing an expected sanction of 100 would produce the socially desired result. Those with expected private and social benefits are 99 would be deterred (a desirable outcome) and those with expected private and social benefits of 105 would still go ahead with the act (a desirable outcome). In this case imposing a sanction higher than 105 on those intending to act would deter socially desirable activities and should not be encouraged. Thus, intent is

Finally we can examine the probability of sanction. It has been argued that a person who intends harm is likely to plan out their harmful activity and cover up later to avoid getting caught.¹⁵⁷ Thus, one who acts with intent is more difficult to catch and sanction than someone who does not.¹⁵⁸ As the probability of sanction drops the expected sanction drops and we need to increase the actual sanction to maintain the same expected sanction as existed prior to the drop in the probability of sanction.¹⁵⁹

The question here is whether we need a proxy for the probability of sanction because there may be other objective facts to rely upon. For example, in a murder case if the murder weapon has been wiped clean of fingerprints then we can infer a cover up or careful planning and increase the sanction on the convicted offender. Thus, we may be able to obtain direct evidence, such as a murder weapon wiped clean of prints, on the probability of sanction. Of course, if we need to rely on a proxy intent may be one of the best ones because other possible proxies, such as expected harm and so on, are not necessarily correlated with the probability of sanction.¹⁶⁰

useful to increase sanctions if we believe that the person intending harm derives pleasure from another's disutility.

¹⁵⁷ See Shavell, *supra* note 3, at 1248; Posner, *supra* note 3, at 1222 - 23.

¹⁵⁸ See Shavell, *supra* note 3, at 1248.

¹⁵⁹ See *id.*

¹⁶⁰ The presence of harm does not appear clearly correlated with a decrease in the probability of sanction and thus an increase in harm tells us little about the probability of sanction.

There are then basically three cases when it may prove desirable to rely on intent as a proxy (assuming direct inquiry is inferior): (i) when dealing with act-based offenses the presence of intent may suggest when expected harm is likely to increase and hence when sanctions need to increase; (ii) when dealing with act- or harm-based offenses the presence of intent may suggest that the actor derived socially disfavored benefits from the act and that might justify a higher sanction; (iii) when dealing with act- or harm-based offenses the presence of intent may provide information about the probability of sanction and hence justify a higher sanction.¹⁶¹

In addition, knowledge may reveal information about expected harm,¹⁶² expected private benefits of the socially illicit nature,¹⁶³ and the probability of sanction,¹⁶⁴ but to a

¹⁶¹ My research so far indicates that mens rea offenses appear to be both act-based and harm-based. For examples of harm-based offenses, see 18 U.S.C. §§ 33, 654, 1111, 1852. For examples of act-based offenses, see 18 U.S.C. §§ 46, 471, 1006, 1427.

¹⁶² In order to analyze the relationship between knowledge requirements and expected harm we need to clarify some definitional matters, in particular what is a knowing violation. First, knowledge may mean that an actor is "aware that it is practically certain that his conduct will cause [a particular] result." LAFAYE & SCOTT, *supra* note 37, at 218 (quoting the MODEL PENAL CODE § 2.02(2)(b)(ii)). Second, knowledge may mean awareness of the actual probability and magnitude of harm. Thus, knowledge that an act has a low probability of harm would count as knowledge. If the first interpretation is used then expected harm rises because knowledge implies a "high likelihood of harm". SHAVELL, *supra* note 149, at 20. If the second interpretation of knowledge is used then one cannot easily identify a correlation with expected harm. A party may know that his act has a small probability and small magnitude of harm and thus expected harm is not really influenced by this form of knowledge as it is by the earlier interpretation. Consequently, the role of knowledge in increasing sanctions because of a possible relationship with expected harm depends on the definition of knowledge one uses. Of course, as with our discussion of intent, the presence of knowledge is not particularly important in estimating increases in expected harm when dealing with harm-based offenses. See *supra* text accompanying notes 149 to 153.

¹⁶³ Knowledge, in either sense discussed in *supra* note 162, might provide useful information about when private benefits include socially illicit gains and thus when to increase sanctions. The issue is whether the probability of the actor being motivated by socially illicit gains when the actor has knowledge is higher than the probability when the actor has no knowledge. The answer depends on what assumption we make about the correlation of socially illicit benefits and mens rea forms. If socially illicit benefits can be present *only* if someone intends harm then any state of mind less than intent provides no clue as to the illicit nature of the benefits. Thus, sanctions should not be increased for this reason if only knowledge is present. However, if we assume that the probability of socially illicit benefits being present when someone has knowledge is

lesser degree than intent.¹⁶⁵ Finally, recklessness may also provide some useful information about expected harm, however recklessness is not really a "proxy" for expected harm but a loose description of direct inquiry into it.¹⁶⁶ This is because asking

greater than when someone has no knowledge, but less than when someone acts with intent then knowledge warrants a higher sanction than the no knowledge case. Further, the sanction in the knowledge case should be less than in the intent case. I treat the latter assumption as the more realistic one in order to have an argument in support of mens rea requirements (the proxy rationale) to weigh against their negative effects on information gathering.

¹⁶⁴ Let us consider the relationship between knowledge and the probability of sanction (i.e., are they negatively correlated). A person who knows her act is likely to cause harm may not desire to cause harm per se, but will certainly not want to get caught so the probability of sanction drops. See SHAVELL, *supra* note 149, at 20 (making this observation with regard to his second version of intent which is functionally the same as my first version of knowledge). Of course, as with intent, if there is direct evidence on the probability of sanction there is less need for a proxy, such as knowledge, to gather information on it. Furthermore, even if knowledge is defined as knowing the actual probability of harm, small or large, I suspect that the actor would take greater measures to avoid liability if he knew there was a chance of harm than if he was not aware of the chance of harm. These results can be ascertained from the comments relating to knowledge and the presence of socially illicit gains in *supra* note 163. If the probability of socially illicit gains being present is greater when the party acts with knowledge, in either sense, than when they act without knowledge then the knowledgeable actors would probably want to cover up in order to obtain the socially illicit benefits without being caught.

¹⁶⁵ I consider the knowledge sanction to generally be less than the intent sanction because the relevant factors may change by more if intent is present than if knowledge is, thus justifying a higher sanction.

¹⁶⁶ See *supra* Part III.A. (defining recklessness). What about recklessness providing us with information about when private benefits include socially illicit gains. The argument used in the context of knowledge requirements applies here -- recklessness has a greater probability of indicating socially illicit gains than the absence of recklessness, but less than the probability if knowledge is present. However, I expect that the probability of obtaining socially illicit gains when acting recklessly is so small that it may as well be the same probability as when the person acts without recklessness. Finally, what about recklessness and the probability of sanction. Our normal conception of a reckless person is someone who does not engage in much foresight into what they are doing so careful planning is unlikely and cover ups may be unlikely or more difficult to accomplish than when some initial planning was involved. Thus, it is unlikely that recklessness is negatively correlated with the probability of sanction. One possible situation where recklessness might be negatively correlated to the probability of sanction is when a reckless actor ends up destroying some of the evidence needed to find him liable. Here recklessness may make conviction more difficult (as opposed to detection, which is not influenced) and may justify a higher sanction, but this is certainly a narrower range of areas than either intent or knowledge. However, the opposite may also be the case -- when someone is reckless she may actually make it easier to convict her than if she were not reckless (evidence may actually be easier to find) and thus a lower sanction would be optimal. In the end the increase or decrease in the sanction is not dependent on recklessness per se, but on what that does to the evidence and since no *a priori* relationship can be established at this stage I will assume both effects average out.

if someone engaged in an act with a large and obvious risk of harm is very similar to asking whether the act had high expected harm.¹⁶⁷

2. *Mens rea requirements as proxies for relevant factors under the single actor mens rea standard*

I examine corporate intent and corporate knowledge under SAMR (corporate recklessness is ignored because it is not really a proxy for expected harm) to ascertain if the proxy advantages apply in the corporate context. Although an agent's intent or knowledge may justify increasing sanctions on the agent why should the agent's mens rea lead to an increase in the corporation's sanction as well? The reason is linked to the rationale for corporate liability. In the literature corporate liability is generally justified

¹⁶⁷ Throughout the analysis I have assumed that actors know the nature of their acts (i.e., they know if the act is act X or Y) or if they are uncertain they "accurately perceive the likelihood that their acts are illegal." Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information About Whether Acts are Subject to Sanctions*, 6 J. L. ECON. & ORGANIZATION 93, 94 - 95 (1990). Kaplow has argued that under certain assumptions the sanction on those who know the nature of their act (the informed) and on those who do not know the nature of their act (the uninformed) should be the same. *See id.* at 94, 99 - 100. The proof of this proposition is contained in Kaplow's analysis, but for our purposes the important thing to note is that "if the uninformed [incorrectly] perceive the likelihood that their acts are harmful, their optimal sanction will be higher or lower than that for the informed, depending on whether the uninformed underestimate or overestimate the likelihood that their acts are harmful." Kaplow, *supra*, at 95. The implications of this can be seen in the following example. Let us assume that there are people who act with intent (any mens rea formulation will do) and that these people know that their acts are illegal. In other words, some subset of the informed act with intent whereas the remaining members of the informed group act without intent. The analysis in this part suggests that the sanction on those acting with intent should be higher than the sanction on those acting without intent. Thus, the informed actors acting with intent receive a sanction of Π which is greater than the sanction the informed actors acting without intent are subjected to, which is called I . If the uninformed correctly estimate the likelihood of their liability then the sanction on them (U) is the same as I . *See Kaplow, supra*, at 95. Thus, $\Pi > I = U$. However, if the uninformed underestimate the likelihood of their liability then U should be greater than I . *See id.* In theory it is possible that the degree of underestimation may be so severe that U needs to be increased above Π as well, but this seems unlikely because it is difficult to conceive of a realistic situation where the underestimation is so severe that $U > \Pi > I$ is optimal. Thus, we are likely to see $\Pi > U > I$ in this case. If the uninformed overestimate the likelihood of liability then we should see $\Pi > I > U$.

because agents are judgment proof when it comes to paying for the harms they have caused while acting within the scope of their employment.¹⁶⁸ If an agent is judgment proof then agent's incentives to take precautionary activities are reduced and overproduction of the corporation's goods are likely because they are underpriced (i.e., some of the costs of the product are externalized because the agent is judgment proof; hence the product costs less to the corporation than to society).¹⁶⁹ Imposing liability on the corporation may reduce these problems because it more likely that a judgment will be met when both agent and corporate assets are available compared to when only agent assets are available.¹⁷⁰ This reasoning can be applied to the context of the acting agent's mens rea.

Let us assume that the optimal sanction when intent or knowledge is not present is \$800 and when intent or knowledge is present \$1000 because the probability of sanction drops with intent. Let us also assume, for now, that indirect inquiry is desirable. Further, the maximum monetary penalty that can be imposed on the agent is \$300. Then in the no-intent or no-knowledge case we need at least \$500 from the corporation and in the intent or knowledge case we need at least \$700 to ensure optimal deterrence. Thus, a

¹⁶⁸ See Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1244, 1246 - 47, 1247 - 52, 1254, 1255 (1984) (discussing the influence of judgment proof agents on an analysis of vicarious liability). See also Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability Accidents*, 70 CAL. L. REV. 1345, 1349, 1351 - 52, 1362 - 66 (1982); Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 *passim* (1980).

¹⁶⁹ See Sykes, *supra* note 168, at 1244, 1246 - 52, 1254 - 55.

¹⁷⁰ See *id.*

higher sanction on the corporation is needed in the intent case. Similarly, when intent is related to an increase in expected harm for act-based offenses it may justify a higher corporate sanction (assuming direct inquiry is inferior).¹⁷¹ Thus, there are reasons to increase corporate sanctions because of agent mens rea for both act-based and harm-based offenses.

Let us then consider the situation where the agent's intent or knowledge is positively correlated with expected private benefits. If these private benefits are counted as social benefits then there is little reason to increase sanctions on anyone. On the other hand, if the private benefits include items which would not be counted as social benefits then that might be a reason to increase sanctions on the agent, but courts have normally refused to increase the *corporation's* sanction, in fact, they have normally refused to impose *any sanction* on the corporation.¹⁷² Examples of such cases are where corporate agents commit murder, rape, or treason.¹⁷³

Courts would consider these activities to be outside the scope of the agent's employment and hence not within respondeat superior.¹⁷⁴ In such situations imposing any sanction on the corporation may prove pointless and simply be socially costly. This is

¹⁷¹ See discussion *supra* Part IV.B.1.

¹⁷² See BRICKEY, *supra* note 4, § 4.02, at 131 - 38; GRUNER, *supra* note 1, §§ 3.2.3, at 175 - 78, 3.5, at 203 - 06, 3.6.1, at 229; Brickey, *supra* note 31, at 410, 413 - 15.

¹⁷³ See, e.g., GRUNER, *supra* note 1, § 3.2.3, at 175 - 78; Brickey, *supra* note 31, at 410, 413 - 15.

¹⁷⁴ See GRUNER, *supra* note 1, § 3.2.3 (b), at 176.

because in all likelihood there is nothing the corporation can do to stop this event (i.e., it cannot easily police its agents for such behavior and hence would probably not be an effective gatekeeper)¹⁷⁵ and almost nothing it can do to provide incentives to avoid engaging in these activities (at least no more so than the government).¹⁷⁶

Thus, acting agent's mens rea may provide some legally useful information only about expected harm and the probability of sanction. However, corporations produce more documentary evidence than individuals,¹⁷⁷ and this may provide us with direct evidence about the probability of sanction and expected harm so that the need to rely on proxies, such as mens rea, is considerably less in the corporate context as compared to the individual context.

Let us consider the possibility of direct evidence on the probability of sanction versus reliance on a mens rea proxy for this information. Suppose a corporation which makes automobiles has a division that does safety checks. Let us assume that the law states that if a corporation knowingly produces a dangerous car it is liable and possibly subject to greater than compensatory damages. Suppose a supervising engineer discovers

¹⁷⁵ The term "gatekeeper" is borrowed from Reinier Kraakman. See Reinier H. Kraakman, *Gatekeepers: An Anatomy of a Third part Liability Strategy*, 2 J.L. ECON. & ORGANIZATION 55 *passim* (1986).

¹⁷⁶ See, e.g., Alan 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, 563 (1988). See also GRUNER, *supra* note 1, § 3.2.3, at 175 - 78. In fact, if the corporation were to say "do not murder people" to its agents and were to try to enforce this prohibition it is doubtful if it would be any more effective than the government and indeed it may be less effective because it cannot threaten imprisonment. See A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239, 239 - 40 (1993).

¹⁷⁷ See *Developments*, *supra* note 1, at 1276.

that a particular car model is likely to explode if it goes faster than 70 m.p.h. Let us assume this amount of knowledge satisfies the "knowingly produced a dangerous car" standard in the law and that no other cause for the explosion can be identified. The engineer may later decide that he would prefer to go ahead with the automobile as is and take his chances. In order to avoid questioning by superiors, colleagues, and subordinates as well as to avoid increased corporate sanctions the engineer destroys the safety report or fabricates a new one. Once harm occurs we are faced with the choice using a two-step (indirect) or one-step (direct) inquiry. We could inquire into the corporation's (under SAMR, the engineer's) mens rea, as evidenced by the destroyed or fabricated report and other matters, and then inquire into the effect of this on the probability of sanction or we could directly inquire into the probability of sanction by noting that the report has been destroyed or fabricated, which would make it more difficult to convict the corporation. The one step approach may be simpler.

Thus, direct inquiry may provide at least as much information as indirect inquiry, but direct inquiry may often prove more accurate and useful than indirect inquiry. Let us slightly adapt the example just given by assuming that the engineer makes no change to the report, but still goes ahead with the automobile. Let us also assume that we are dealing with a harm-based sanction and that expected private benefits are not influenced so that the only factor that might be influenced by the engineer's knowledge is the probability of sanction.¹⁷⁸ However, if harm occurs conviction is nearly certain under the

¹⁷⁸ See *supra* text accompanying notes 149 - 153.

knowing violation standard because the report proves the engineer and hence the corporation "knew" of the danger. In this case increasing the sanction because the agent had knowledge would result in an excessively high sanction because the probability of sanction is not lowered -- it is nearly certain. Indeed, a similar argument can and has been made in the context of punitive damages in the Exxon Valdez case.¹⁷⁹ On the other hand, reliance on direct inquiry into the probability of sanction would show that there is little need to increase the corporation's sanction due to the presence of agent mens rea and would, thus, be the better result. Similar arguments can be made about direct and indirect evidence on expected harm.¹⁸⁰

In light of this analysis SAMR provides valuable information less frequently than individual mens rea (i.e., agent mens rea is not important when discussing corporate sanctions if mens rea is used to identify expected private benefits that are socially unrecognized) and the need for a proxy, instead of direct inquiry, for the remaining relevant factors is much less in the corporate context than in the individual context. We thus need to consider other types of possible deterrence advantages from mens rea requirements and ask if they apply to SAMR.

¹⁷⁹ See, e.g., Fischel & Sykes, *supra* note 37, at 342 - 43 (noting that "[t]he probability that a large oil spill will be detected is one. The imposition of . . . punitive damage awards, will overdeter . . .").

¹⁸⁰ Let us then consider the possibility of direct evidence on expected harm versus reliance on mens rea proxies for this information. Let us assume we are dealing with an act based offense. Taking the example just considered if the engineer did not touch the report, but went ahead with the automobile anyway then once harm occurred the government or private plaintiff already has some evidence of expected harm -- the report -- and there is little need to inquire into mens rea. Indeed, one wonders where an employee would obtain knowledge about harm if not from corporate records or operations.

C. *Mens Rea Requirements as Checks on Private Investment in Information for Individuals*

Parker argues that another deterrence rationale is that individual mens rea requirements work to allow authorities to impose higher-than-optimal penalties on offenders who act with mens rea without imposing high costs on those who act without mens rea.¹⁸¹ Thus, mens rea allows for targeting of high sanctions. This section considers whether this argument has any applicability in the corporate context under SAMR and concludes that it does not.

Parker argues that in the criminal process sanctions are "upwardly biased" or higher-than-optimal.¹⁸² Such sanctions are normally justified by the observation that the socially desirable amount of "criminal" conduct is zero (e.g., we are not worried about overdetering murder).¹⁸³ We can then avoid spending time and effort in calculating precise penalties for such offenses by imposing large sanctions to deter this activity because overdeterrence is not a big problem.¹⁸⁴

¹⁸¹ See Parker, *supra* note 3, at 746 - 47. This argument is somewhat different to Kaplow's, discussed above in note 167, (where the analysis assumes sanctions are to be set at the optimal level) because Parker considers the situation when sanctions are set at a greater than optimal amount. See Parker, *supra*, at 754 - 62.

¹⁸² See *id.* at 754.

¹⁸³ See *id.* at 759 - 60 (discussing authors who accept that large penalties may be imposed in the criminal process for this reason).

¹⁸⁴ See *id.* at 754, 759 - 62. The costs of setting precise sanctions is high because, as Parker notes: [T]he simplest form of [optimal enforcement] theory requires at least the determination of external harm and the probability of detection and punishment, and those factors alone create formidable problems. More complex forms of the theory, which consider risk averse actors and the social costs of punishment would require determinations of

In contrast, in the civil law, where the optimal amount of the behavior in issue is rarely zero,¹⁸⁵ we observe more effort to determine a closer estimate to the optimal expected sanction (i.e., detailed procedures to set the sanction more precisely than in the criminal law).¹⁸⁶ In other words the private parties and enforcement authorities decide to

elasticities of response to punishment, risk-bearing and dead weight losses. Additional complications result from the disparate effects of nominally equivalent penalties on differently situated offenders, particularly with respect to wealth and reputational effects.

Parker, *supra*, at 754 - 55 (footnotes omitted). These additional complications are explained by Parker by example: "imprisonment of an especially productive individual imposes a greater cost on both the individual and society than the imprisonment of a less productive individual. Similarly, the stigma effect of criminal conviction would appear to rest more heavily on those with the more valuable pre-offense reputation." Parker, *supra*, at 755 n.38.

Optimally, imprisonment and other non-monetary sanctions should only be used once fines have been exhausted. See A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984). See generally Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, *passim* (1984); John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of An Individual's Reputation*, 21 J. LEG. STUD. 159, 159 (1992); John R. Lott, Jr., *Should the Wealthy Be Able to "Buy Justice"?*, 95 J. POL. ECON. 1307, 1309 - 10 (1987); A. Mitchell Polinsky & Steven Shavell, *A Note on Optimal Fines When Wealth Varies Among Individuals*, 81 AM. ECO. REV. 618, *passim* (1991).

¹⁸⁵ See Parker, *supra* note 3, at 759 - 60 (treating the criminal law as being unusual because the "optimal level of [criminal conduct] is zero." Thus, the norm must be that the optimal amount of activity is more than zero.).

¹⁸⁶ See *id.* at 756 - 57. Parker argues that

[C]ivil procedure embodies elaborate and fairly rigorous fact-finding procedures to determine the amount of damages to compensate a plaintiff, whereas criminal sentencing decisions are more rough-hewn and avowedly punitive. Even the relatively straightforward optimal penalty factor of the social harm of an offense -- the closest analog to civil damages -- is rarely addressed with precision at criminal sentencing. Explicit considerations of the other parameters of optimal enforcement -- such as detectability or responsiveness -- are rarer still, and almost never quantified. Further, criminal sentencing law tends to be formally neutral to considerations of wealth and reputation and devotes remarkably little effort to coordinating criminal sentences with civil remedies or other collateral consequences of conviction.

Parker, *supra* note 3, at 756 - 57 (footnotes omitted). This suggests that "the criminal process was designed to produce only a roughly determined penalty level, for otherwise the more precise civil procedures presumably would have been adopted in the criminal process as well." Parker, *supra* note 3, at 757. See also Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L.REV. 395 (1991) at 415-417 (discussing potential effects on optimum enforcement).

expend efforts to set relatively precise sanctions for wrongs normally subject to civil sanctions because the optimal amount of the activity is not zero and hence overdeterrence is a consideration, but in the criminal context, when the optimal amount of the activity is zero, there is less need to spend resources on determining exact penalty levels.¹⁸⁷

However, the savings in penalty calculations from upwardly biased penalties come at a cost because they provide the actor with an incentive to expend greater than the optimal amount on what Parker terms "self-characterizing information."¹⁸⁸ The costs of obtaining self-characterizing information are the costs actors incur in characterizing their behavior as being legal or not.¹⁸⁹ Because the penalty in the civil setting is near optimal so is expenditure on self-characterizing information.¹⁹⁰ However, in the criminal setting the incentive to spend on self-characterizing information is greater because the actor now wants to be more certain that the act is legal than before to avoid the imposition of higher-than-optimal penalties.¹⁹¹ Parker thus argues that the greater-than-optimal

¹⁸⁷ Cf. Parker, *supra* note 3, at 756 - 58 (discussing efforts to set sanctions in the civil and criminal spheres).

¹⁸⁸ See *id.* at 761, 774 - 77.

¹⁸⁹ See Parker, *supra* note 3, at 744 - 45.

¹⁹⁰ See *id.* at 774 - 75.

¹⁹¹ See *id.* at 774 - 77. Parker argues that:

If we now introduce a variable I, representing the actor's self-characterizing information costs as a function of the expected penalty pF, and hold the other factors constant, then the optimal penalty level would not be affected. However, the private decision at the social optimum is now modified by the consideration of information costs, such that a violation still will occur whenever:

$$(5) G + I > H \text{ (where } H = pF^* \text{)}.$$

investment in self-characterizing information may lead actors to avoid engaging in certain activities.¹⁹² This decrease in activity does not concern us if the activity is X, whose optimal level in society is zero. However, act X (undesirable always) may look to the actor very similar to act Y (sometimes or normally desirable) and Y may be overdeterred.¹⁹³ As Parker notes

If the expected penalty for umbrella theft is upwardly biased from the external harm [then] you would expend too many resources in determining which umbrella you were taking, because a mistake could prove costly. If penalties were high enough, you might chain you own umbrella to your wrist, you might not use an umbrella, you might not eat in restaurants on rainy days ...¹⁹⁴

Parker suggests that mens rea requirements may mitigate the degree of excessive investment in self-characterizing information.¹⁹⁵ Parker notes that

In other words, the actor's investment in self-characterizing information ... should not exceed the difference between H and G [private gains], or simply H if one wishes to ignore the potential gain from a violation.

Parker, *supra* note 3, at 774 - 75 (footnotes omitted). In Parker's analysis 'p' refers to the probability of conviction, 'F' to the fine, 'F*' to the optimal fine, 'G' to private gains, and 'H' to external harm. *See id.*

¹⁹² *See id.* at 775.

¹⁹³ *See id.* at 760 - 62, 776 - 77, 781 - 82.

¹⁹⁴ Parker, *supra* note 3, at 782. *Cf. also* Posner, *supra* note 3, at 1221 - 22. Examples of similar cases abound, such as the antitrust treatment of research and development joint ventures (determining when a joint venture is legal may be difficult for the parties), which may, arguably, induce some people not to form such ventures (which would produce undesirable results -- less innovation and so forth). *See, e.g.,* 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); Teece & Jorde, *Innovation, Cooperation and Antitrust: Striking the Right Balance*, 4 HIGH TECH. L.J. 1 (1989).

¹⁹⁵ *See* Parker, *supra* note 3, at 775 - 77.

A close examination of the criminal law doctrine reveals that "intent" -- in the ordinary sense of purpose or objective -- is not the general case of criminal culpability. Rather the general case of mens rea is a requirement that the person charged possessed, at the time of the offense, subjective awareness of the "true" or objective nature of his or her own conduct and any surrounding factual circumstances made relevant by the legal definition of the offense . . . [D]id the actor know what he or she was doing? For instance, if the crime is larceny did the actor know that the property taken belonged to another.¹⁹⁶

If we look at mens rea in this light then, as Parker suggests, it restricts criminal sanctions (traditionally) to those who possessed mens rea or to those people for whom gathering information about what they were doing had zero costs.¹⁹⁷ For example, a person with knowledge already knows what they are doing and hence there is little incentive on their part to become overinformed or to be chilled from desirable behavior.¹⁹⁸ Thus, mens rea in combination with higher-than-optimal penalties is near optimal because it minimizes costs of penalty calculation for the authorities for offenses where overdeterrence is not a large concern and "[minimizes] actors' investment in self-characterization information."¹⁹⁹

This argument is indeed persuasive and important because mens rea is valued not due to its correlation with other factors, but because mens rea is useful in and of itself.

¹⁹⁶ *Id.* at 744 - 45 (footnotes omitted).

¹⁹⁷ *See id.* at 778 - 80.

¹⁹⁸ *See id.* Indeed, Parker argues that even for those who act with gross negligence the extra cost for them to determine the nature of what they are doing is going to be minimal and hence such an expenditure may indeed be justified given that it may reduce the occurrence of a large harm. *See id.*

¹⁹⁹ *Id.* at 745- 46.

Thus, mens rea is valuable per se, not as a proxy. The question is then whether this argument applies in the corporate context.

This argument is premised on the application of upwardly biased penalties which result because of little effort being placed into determining the optimal sanction. On both counts it is highly questionable whether this argument applies to corporations. First, it is not clear that corporate criminal sanctions are very severe. The constant calls to increase corporate sanctions seem to indicate, if anything, that corporate sanctions may not be severe enough.²⁰⁰

Second, the contention that penalties are imprecisely set in the criminal process as it applies to corporations is highly suspect. The procedures for assessing corporate sanctions, civil or criminal, are rather detailed. One need only look at the grids in the Federal Sentencing Guidelines as they relate to organizations to witness how much effort is being made to try to calculate rather precise penalties.²⁰¹ Furthermore, in the context of corporate civil proceedings there are already detailed procedures for sanction setting and there have been moves to coordinate sanctions presumably to impose a total sanction that

²⁰⁰ For debate on antitrust law and research and development joint ventures, consult R. Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969) and Note, *Research Joint Ventures*, 21 HARV. J. LEGIS. 405 (1984). For debate on the guidelines and on increasing sanctions, see, for example, Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U.L. REV. 247 *passim* (1991).

²⁰¹ See GUIDELINES, *supra* note 15, § 8. This is not to suggest that the guidelines are perfect, only that they show efforts to calculate penalties. For discussion of concerns with the guidelines for corporations, see Fischel & Sykes, *supra* note 37, at 343 - 46.

is near optimal.²⁰² This suggests efforts being made to precisely calculate penalties. Given that such efforts are being made then sanctions are likely to be close to optimal and hence so is expenditure on self-characterizing information.²⁰³

Even if we take the opposing view -- that the Federal Sentencing Guidelines are not particularly precise or helpful -- that may only lead us, as Fischel and Sykes suggest, to prefer corporate civil liability over corporate criminal liability.²⁰⁴ Given that most of the corporate mens rea standards appear in the criminal law such a change would also reduce reliance on the corporate mens rea standards.²⁰⁵ Consequently, on either view, reliance on corporate mens rea standards would decrease.

²⁰² See GUIDELINES, *supra* note 15, § 8C2.8(a)(3) (noting that the court can take into account collateral consequences when determining the final fine figure); Parker, *supra* note 3, at 756 - 57 (discussing civil procedures); WHITE COLLAR CRIME COMMITTEE OF THE A.B.A. SECTION OF THE CRIMINAL JUSTICE, COLLATERAL CONSEQUENCES OF CONVICTIONS OF ORGANIZATIONS 31 (1991) (discussing coordination of sanctions). A qualification to this is the presence of punitive damages, but if these are calculated and imposed to obtain the optimal expected sanction then they too fall within the comments here.

²⁰³ Note that evidence of chilling of behavior does not necessarily prove that self-characterization costs are high and need to be reduced. If sanctions are set relatively precisely we need not expect higher than optimal investment in self-characterizing information. If chilling still persists it probably has more to do with courts inaccurately deciding if the conduct in question is legal or not and this uncertainty resulting in chilling of desirable behavior. Cf. Kaplow, *infra* note 206, at 356 - 58. The remedy for this involves improving the accuracy of the court decision or reducing one type of error (say wrongful convictions) by increasing the standard of proof. Cf. *id.*

Another point worth noting is that the likely social (and private) costs from an actor's wrongful self-characterization of his action are less for corporations than individuals because the social (and private) costs of imprisonment cannot be imposed on corporations in any event. Cf. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 194 (1968) (discussing social costs of wrongful punishment in the context of individuals and jail).

²⁰⁴ See Fischel & Sykes, *supra* note 37, at 343 - 46.

²⁰⁵ See *supra* text accompanying note 32.

One clarification worth mentioning is that Parker's argument is that mens rea requirements help reduce a certain type of error -- that of chilling easily mistakable yet desirable behavior or overinvestment in self-characterizing information. This type of error correction is different to the error correction involved in using appeals or imposing a high standard of proof. Imposition of a higher standard of proof or use of the appeals system are, as some commentators suggest, aimed at rectifying errors *that courts make* in determining if an act is legal or not.²⁰⁶ Mens rea requirements, on the other hand, relate to the *actor's error* in characterizing his own behavior. Thus, the error correction devices are aimed at different types of errors.²⁰⁷

This, of course, does not mean that mens rea is not relevant to the court in determining if an act is legal or not -- that is, mens rea could be relevant to reducing court error. When the other evidence is equivocal some courts have relied on an actor's mens rea in determining the legality of an act.²⁰⁸ LaFave and Scott note that

²⁰⁶ For further discussion of the standard of proof as an error correction device, consult Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEG. STUD. 307, 356 - 62 (1994), Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399, 410 - 15 (1973). On chilling of desirable behavior due to court error, consult John E. Calfee & Richard S. Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 *passim* (1984). For further discussion on appeals, see Steven Shavell, *The Appeals Process As A Means of Error Correction*, 24 J. LEGAL STUD. 379 *passim* (1995).

²⁰⁷ If we wanted to compare mens rea with another error correcting device we would need to compare it to ex ante vetting regimes found in some areas of the law (such as pre-merger notification in antitrust). See PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* 819 - 820, 832 - 34, 871 - 77 (4th ed., 1988) (discussing pre-merger notification in Antitrust and some guidelines associated with it). Note also that Parker also uses his analysis to explain many different facets of mens rea, see Parker, *supra* note 3, at 778 - 807.

²⁰⁸ See LAFAVE & SCOTT, *supra* note 37, at 231 (discussing the use of motive in criminal procedure and citing cases including *Commonwealth v. De Petro*, 350 Pa. 567, 39 A.2d 838 (1944) and *State v. Miller*, 186 Conn. 654, 443 A.2d 906 (1982)). LaFave and Scott discuss the use of motive, which is defined somewhat differently and more narrowly than intent, but seems similar enough to warrant discussion. See *id.*

the fact that the defendant had some motive, good or bad, for committing the crime is one of the circumstances which, together with other circumstances, may lead the fact finder to conclude that he did in fact commit the crime; whereas lack of any discernible motive is a circumstance pointing in the direction of his innocence.²⁰⁹

Thus, mens rea may help correct some court error as well.²¹⁰ However, the fact that mens rea may be a *relevant* factor in determining legality does not imply that mens rea should be a matter *required* for liability.²¹¹ The usage of mens rea as a relevant factor is not the same thing as a mens rea requirement for liability. Even if we abolish mens rea from the definition of an offense we can still use proof of mens rea as a factor relevant in determining liability. Furthermore, to the extent that mens rea is relevant because it tells us something about expected harm or the other relevant factors we are back in the proxy argument, which has already been canvassed.

In light of this analysis SAMR essentially serves as a proxy for other relevant factors (e.g., probability of sanction) that increase the sanction on the corporation. However, given that the need for a proxy, rather than direct inquiry, and the information it provides are less in the corporate context than the individual context and that the

²⁰⁹ LAFAVE & SCOTT, *supra* note 37, at 231.

²¹⁰ This argument is subject to some qualifications, such as it is not certain how strong this argument is for forms of mens rea besides intent and its use in dubious when evidence on mens rea is unclear.

²¹¹ In fact, LaFave and Scott do not appear to argue that the relevance of mens rea is a reason justifying the existence of mens rea *requirements*, just that mens rea may be relevant. See LAFAVE & SCOTT, *supra* note 37, at 231.

disincentives to gather and share information are often present,²¹² I am doubtful whether SAMR would be preferable to the alternative liability standards. Indeed, the greater the information gathering disincentive the less likely we are to find mens rea and hence the less likely to have any possible proxy advantage. Therefore, it would probably be rare to have a situation where the proxy advantage outweighed the disadvantages from information gathering which suggests that strict liability or negligence are preferable to SAMR.

However, even if we assume that sometimes the proxy advantages outweigh the disadvantages in terms of information gathering disincentives that does not mean we want SAMR as a *liability standard*. Even though the analysis so far identifies broadly when inquiry into the acting agent's mens rea is desirable it does not tell us at what point in the proceedings we should make this inquiry. Should the agent's mens rea be a matter for liability or for sanctioning or for both. I examine this issue in section E after briefly discussing administrative costs of alternative liability standards in section D.

D. Administrative Costs

Administrative cost effects may be divided into two steps. The first is the per case cost under alternative liability standards and the second is the effect of administrative costs on the frequency of suits (i.e., number of suits) being brought. In this paper the

²¹² See *supra* Parts IV.A. and IV.B.2.

combined effects of these two steps provide the total administrative costs effects of the alternative liability standards.

On a per case basis SAMR is often more costly than strict liability.²¹³ This is because to determine liability under strict liability we need to prove fewer things (mens rea need not be shown).²¹⁴ In contrast, SAMR should be cheaper on a per case basis than the negligence rules. The literature normally treats strict liability as being cheaper than negligence on a per case basis.²¹⁵ I treat SAMR as simply strict liability plus inquiry into acting agent's mens rea. Thus, for SAMR to be more expensive on a per-case basis than the negligence rules the costs of inquiry into acting agent's mens rea must exceed the cost differential between strict liability and negligence. However, the negligence rule considered in section A inquires into the acting agent's mens rea (the actual amount of information the agent held) plus other matters.²¹⁶ For these negligence rules, SAMR is almost certainly cheaper on a per case basis. We then need to inquire into the frequency effects.

²¹³ I say often rather than always because sometimes if there is no mens rea then there is no liability and no need to inquire into damages. Under strict liability, as defined in this paper the absence of mens rea does not allow the corporation to escape liability so the parties and the court will make inquiries into damages (which has its own costs). However, one expects that prior to adjudication, that is before we know if there is mens rea or not, parties would make some expenditures on determining likely damages even under SAMR. Nevertheless, *courts* would not make this inquiry as often under mens rea standards.

²¹⁴ For an analogous argument in the context of negligence and strict liability, see Shavell, *supra* note 10, at 269.

²¹⁵ See, e.g., COOTER & ULEN, *supra* note 121, at 367 - 68; A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 50 -51 (2d ed., 1989); POSNER, *supra* note 73, at 179; Shavell, *supra* note 10, at 269.

²¹⁶ See Shavell, *supra* note 10, at 269 (discussing administrative costs of the negligence rules he examines).

The higher costs of SAMR is one factor that might result in less cases being brought than under strict liability.²¹⁷ Similarly, if negligence costs more on a per case basis than SAMR we would expect fewer cases under negligence than under SAMR.²¹⁸ Thus, the frequency effect often works in the opposite direction to the per case cost effect. On the basis of the information we have at present, it is not clear whether the frequency or per-case-cost effect would dominate, but inquiry into this would be important to our final conclusion. For now it may prove advantageous to treat the administrative costs effects as netting each other out since we have no *a priori* reason to prefer one effect over the other. Thus, our analytical position remains as it was after the analysis in section C (SAMR is rarely desirable) and we can ask at what point in the proceedings, liability or sanctioning, should we inquire into agent mens rea, assuming that we have a rare case where it is desirable to do so.

E. Should Inquiry Into Agent Mens Rea Occur at the Liability or Sanctioning Stage?

Given that the primary benefit of SAMR is its proxy role in increasing sanctions then we must ask why not simply inquire into acting agent's mens rea at the sanctioning stage only rather than at the liability and sanctioning stages as is the case at present.²¹⁹

²¹⁷ For an analogous discussion in the strict liability and negligence context, see POSNER, *supra* note 73, 179.

²¹⁸ If there are a lot of cases near the margin under a strict liability standard then a slight increase in costs may greatly reduce the number of cases brought which may outweigh the increase in cost per case. Thus, if each case costs about 10 under strict liability and going to corporate intent requires expending 11 we might not bring say 10 cases out of the 100 we would bring under strict liability. The costs are then 990 (i.e., 90 times 11) whereas costs would be 1000 under strict liability. Corporate intent then decreases cost by 10.

²¹⁹ See *supra* Part IV.A and B.

Mens rea could be made a sanctioning issue by using strict liability as our liability standard and imposing a base fine, which might be increased at the sanctioning stage if aggravating factors, such as the acting agent having mens rea, were present. Such a system is likely to improve upon the deterrent effect of SAMR with lower total sanctions and lower sanctioning costs. Let us develop this further in the following hypothetical.

Before beginning I make a number of assumptions. First, the probability of sanction when a person acts with intent is lower than when someone acts without intent.²²⁰ Second, no other relevant factor is affected.²²¹ Third, I assume that courts make perfect decisions regarding whether the defendant had mens rea or not. Fourth, let us assume that we have the option of using a strict liability standard (liability is imposed for causing harm regardless of intent), the single actor mens rea standard, or a strict liability standard that makes acting agent's mens rea a sanctioning matter after imposing a base fine (SL+MR).

Now, let us make some numerical assumptions. The probability of detection under strict liability is 40% for those who do not intend harm. Because strict liability imposes liability almost automatically upon detection I assume the probability of detection is also

²²⁰ This in itself provides us with a reason to impose higher sanctions on those acting with intent than on those acting without intent. See Shavell, *supra* note 3, at 1248. Also, I assume that actors know if their acts are legal or if they are uncertain they "accurately perceive the likelihood that their acts are illegal." Kaplow, *supra* note 167, at 94.

²²¹ This assumption is made for analytical simplicity. Allowing other factors to enter the analysis simply adds more matters to consider, but does not change the general thrust of this analysis.

the probability of having a sanction imposed (i.e., the probability of sanction). For those who intend harm the probability of sanction and detection under strict liability is 25%.²²² Under the single actor mens rea standard those who do not intend harm face a 0% probability of sanction, because intent is a required element of liability. Those who intend harm face a probability of detection of 25%, but the probability of sanction is less than 25% because conviction is not automatic upon detection as it is under strict liability. Under SAMR the prosecution/plaintiff must prove that the corporate agent acted with intent and this may not always be proven. Thus, I assume that the corporation is found liable at the intent level sanction 80% of time that it is detected (implying the probability of a sanction for those who intend harm of 20% under SAMR). Finally, let us assume that the expected harm is 100 and that the optimal expected sanction is 100. Let us then consider the results of using strict liability and SAMR.

First, under strict liability the actual sanction is assumed to be set at the rate needed to deter those who act without intent (I relax this assumption in a moment). Thus, we need an expected sanction of 100 when the probability of sanction is 40% -- this leads to an actual sanction of 250.²²³ Those who act without intent are optimally deterred because they face an expected sanction equal to expected harm (\$100).²²⁴ Those who act

²²² The 15% drop in the probability of sanction arises because the offender may cover up or carefully plan the activity. See Shavell, *supra* note 3, at 1248.

²²³ This is an application of the Becker proposition. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 *passim* (1968).

²²⁴ Those who act without intent face an expected sanction of 100 (i.e., 60% (0) + 40%(250) = 100) and they will only engage in the act if their expected private benefits exceed 100. I assume that the private benefits are socially recognized.

with intent are sanctioned only 25% of the time and face an actual sanction of 250 or an expected sanction of 62.50 and hence are underdeterred.

Now, let us assume that the actual sanction is set at the rate to deter those with intent. Because those with intent are sanctioned 25% of the time the actual sanction needs to be 400 to result in an expected sanction of 100. If this is the case then those with intent are optimally deterred. However, those who act without intent face an expected sanction of 160 and are overdeterred.²²⁵ Therefore, regardless of how the sanction is set under strict liability we are likely to overdeter one group and/or underdeter another.

Let us then consider SAMR and assume that the sanction is set at the rate to deter those with intent (this must be the case because those without intent face no sanction at all). The probability of sanction under SAMR is 20% and thus the actual sanction must be 500 to result in an expected sanction of 100. Those who act with intent are then optimally deterred. However, those who act without intent face an expected sanction of zero because when they are not detected they face no sanction and when detected they still face no sanction because they do not have intent. Thus, under SAMR those acting without intent are underdeterred.

From this analysis it is clear that both liability rules if left by themselves are suboptimal. Let us then consider SL+MR. I will assume the base fine is set at the

²²⁵ The expected sanction is \$160 because \$400 is imposed 40% of the time and the remaining time (60%) no sanction is imposed.

amount necessary to deter those acting without intent if the liability standard is strict liability (i.e., 250). Under this system those who act without intent are optimally deterred because they are detected 40% of time and the actual sanction on them is 250 resulting in an expected sanction of 100.

On the other hand, those acting with intent are detected and receive *some* sanction 25% of the time. Of these times they are proven to have intent 80% of the time.²²⁶ Thus, they receive the intent level sanction 20% of the time (25% x 80%), the strict liability sanction 5% of the time (25% x 20%), and no sanction, because they are not detected, 75% of the time. Those acting with intent thus face the following sanctioning structure: $75\% (0) + 5\%(250) + 20\% (X) = 100$. Solving for X we find that the optimal actual sanction to impose on those found to have acted with intent is \$437.50 and this group is then optimally deterred.

The strict liability plus mens rea at sanctioning system (SL+MR) has a number of advantages over either strict liability or SAMR by themselves. First, deterrence is enhanced under SL+MR because both those acting with intent and those acting without intent are optimally deterred, whereas under either strict liability or SAMR one group or both groups are not optimally deterred.

²²⁶ I am assuming that the difficulty of proving mens rea is the same whether mens rea is a sanctioning or liability factor. Thus, the probability of those acting with intent receiving the intent level sanction is the same under SAMR or SL+MR -- 20%.

Second, the actual sanction under SL+MR on those acting with intent is lower than that under SAMR. This may prove advantageous if the corporation cannot pay \$500, but can pay \$437.50, as this avoids judgment proof problems.²²⁷

Third, SL+MR may have lower sanctioning costs than SAMR for those who act with intent depending on what assumption we make about how sanctioning costs increase.²²⁸ If sanctioning costs increase at a constant rate as the amount of the sanction increases (i.e., \$0.10 per dollar) then total expected sanctioning costs under SAMR and SL+MR are the same.²²⁹ However, if sanctioning costs rise at an increasing rate as the sanction magnitude rises (i.e., \$0.10 per dollar for the first \$250 sanction and then \$0.15 per dollar for the next \$200 sanction increment) then the total expected sanctioning costs under SL+MR are lower than under SAMR.²³⁰ The increasing rate of sanctioning costs

²²⁷ The higher the probability of conviction the lesser the sanction needs to be to maintain the same expected sanction as compared to the sanction when there is a lower probability of conviction. Cf. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 *passim* (1968). Thus, as long as it can be shown that the probability of conviction under strict liability when someone acts with intent is higher than the probability of conviction under SAMR when someone acts with intent SL+MR is likely to require a lower sanction than SAMR and hence tend to avoid judgment proof problems better than SAMR.

²²⁸ I have assumed that only cash fines are used as sanctions. Also note that my comparison is limited to those acting with intent under SAMR and SL+MR. I do not discuss the sanctioning costs effects on those acting without intent because under SAMR there are zero sanctioning costs for this group (no liability is imposed), but this group is also underdeterred. I assume that the costs of underdeterrence outweigh the sanctioning cost savings under SAMR for those acting without intent.

²²⁹ Let us assume that the sanctioning costs are \$0.10 per dollar under either standard. Then, under SAMR if a sanction is imposed the sanctioning costs are \$50 (i.e., \$500 x \$0.10). The \$500 sanction is imposed 20% of the time so the total expected sanctioning costs under SAMR are \$10 (\$50 x 20%). Under SL+MR the sanctioning costs are as follows. The sanction on those acting with intent is \$437.50 (sanctioning cost of \$43.75) 20% of the time and \$250 (sanctioning cost of \$25) 5% of the time. This results in total expected sanctioning costs on those acting with intent of \$10, which is the same as under SAMR. The calculation is $\$43.75 (20\%) + \$25 (5\%) = 8.75 + 1.25 = 10$.

²³⁰ Let us assume that from \$0 to \$250 sanctioning costs are \$0.10 per dollar, from \$250 to \$450 sanctioning costs are \$0.15 per dollar, and from \$450 to \$650 sanctioning costs are \$0.20 per dollar. The \$500 sanction is treated as \$250 at a rate of \$0.10 per dollar, then \$200 at a rate of \$0.15 per dollar and

seems the more realistic assumption because as sanction levels increase one would expect opposition to the sanction being imposed (in terms of stronger legal defense and so forth) to increase and thereby increasing sanctioning costs.²³¹ These three arguments make a compelling case for the SL+MR system.

However, there are systems at present that are analytically similar to a SL+MR. First, there is the lesser included charge system in the criminal process wherein any charge regarded as a lesser charge than that made by the prosecution is included in the prosecution's case.²³² Thus, a charge of murder implies a charge for manslaughter. If we treat strict liability as a lesser included offense in a mens rea offense then the benefits of SL+MR may still accrue because if the defendant is charged under SAMR and the prosecution fails to show mens rea then they may still convict under the lesser included strict liability charge. Thus, those with intent are detected 25% of the time and 80% of these times they are found to have intent. The remaining times they are caught but

finally \$50 at a rate of \$0.20 per dollar. Thus, $\$250(0.10) + \$200(0.15) + \$50(0.20) = \65 . This is imposed 20% of the time: $\$65 (20\%) = \13 . Under SL+MR the \$437.50 sanction has sanctioning costs of \$53.13 which are imposed 20% of the time and the \$250 sanction has sanctioning costs of \$25 imposed 5% of the time. The \$53.13 figure is calculated by treating the \$437.50 sanction as \$250 at a rate of \$0.10 per dollar and \$187.50 at a rate of \$0.15 per dollar. Thus, $\$250(0.10) + \$187.50(0.15) = \$53.125$ (or \$53.13 rounded to two decimal points). This results in total expected sanctioning costs of \$11.88, which is less than under SAMR for those acting with intent. The \$11.88 results from adding $\$53.13 (20\%) + \$25(5\%) = 10.625 + 1.25 = 11.875$ (\$11.88 rounded to two decimal points).

²³¹ See Louis Kaplow, *A Note on the Optimal Use of Nonmonetary Sanctions*, 42 J. PUB. ECON. 245 *passim* (1990). I am assuming that sanctioning costs do not increase at a decreasing rate as sanction levels increase. Thus, \$0.10 per dollar for the first \$250 and then \$0.08 per dollar for the next \$200 sanction increment is considered implausible.

²³² See FED. R. CRIM. PROC. Rule 31(c) which states that "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." This rule is based on the doctrine at common law, see for further discussion *Schmuck v. United States*, 489 U.S. 705, 717 n.9, 719 (1989).

convicted only of the lesser included strict liability offense. Those with intent then face the following sanctioning structure: $75\%(0) + 5\%(250) + 20\%(X) = 100$. Solving for X we obtain \$437.50 as with SL+MR. Thus, in effect the lesser included charge system appears to replicate the advantages of SL+MR.

A similar effect can be achieved in civil cases if courts are willing to allow for multiple claims in the same suit or allow for a later amendment of the suit to permit more than one cause of action.²³³ For example, alleging a mens rea civil wrong along with a related strict liability wrong, if any, in the same suit. Furthermore, the presence of overlapping civil and criminal regulation also provides a situation similar to SL+MR because a civil strict liability action may be a background action when a criminal charge involving mens rea is brought. However, the civil and criminal suits in the overlapping system may need to be pursued in different trials and this would increase the administrative costs of this system in comparison to the single civil suit with multiple causes of action system, the lesser included charge system, and SL+MR. Nevertheless, the lesser included charge system and the single civil suit with multiple causes of action system appear to replicate the effects of SL+MR.

However, there are reasons why we may still prefer SL+MR. First, making mens rea a sanctioning factor leaves considerable discretion to the sanctioning judge in

²³³ I am not certain how difficult it is to add claims later in the civil context. Furthermore, in civil cases where only one claim is brought (or where more than one claim is brought, but only one can possibly attach liability to the defendant) then, as I understand, the fact finder does not have the power to award damages on a different cause of action (even a lesser one) from that alleged.

determining the sanction, whereas if we simply have lesser included charges or multiple claims then the judges are limited to the legislative pigeonholes for crimes or the wrongs listed in front of them for civil suits.²³⁴ The added flexibility of SL+MR may be desirable in some cases. Second, to the extent that civil suits cannot be combined in one action the SL+MR system is an improvement over the civil system with two trials because it involves only one trial and hence less cost.²³⁵ Third, explicit sanction enhancement via SL+MR may focus attention more squarely on the use of mens rea as a sanctioning tool only rather than as a liability factor and hence clarify and simplify analysis. Overall, SL+MR may be an easier and simpler method of sanction enhancement for corporations than the lesser included charge system or the multiple claims civil suit system. However, note that moving mens rea to the sanctioning stage does not remove the problems with incentives to gather information about risk, all it does is improve upon SAMR whenever inquiry into acting agent mens rea is deemed desirable.

Before moving on I think it is important to note that the SL+MR analysis is based on a number of assumptions. In particular, it assumes our only concern is with the sanction that is imposed and also that our primary goal is deterrence. Thus, I would be

²³⁴ Thus, if the legislature decrees six gradations of killing or homicide we are limited to these six categories, but at the sanctioning stage judges can make even finer gradations. This may prove a valuable advantage in many cases.

Another possible problem with relying on multiple claims at the liability stage arises when the corporation had negligent procedures and an agent acted with mens rea. In this case the corporation may be found liable under both negligence and mens rea wrongs. If the SL+MR system is used the judge can set the sanction to reflect both wrongs, but I am not certain how easily this can be done when the corporation is found liable of two separate offenses. Further information is needed to come to a definitive conclusion.

²³⁵ I am assuming that sometimes courts may not allow two suits to be joined in one trial.

cautious about extending this analysis to the case of individual criminal liability which appears premised on goals besides deterrence, such as retribution, and may not permit such a change.²³⁶ Indeed there may be many good reasons to inquire into mens rea for individuals.²³⁷ However, in areas of corporate liability deterrence is the primary goal and we may consider examining how this analysis may be applied to other liability standards such as negligence in the corporate context.²³⁸ Although this may indeed be very fruitful I reserve comment on it for further discussion in another paper.

²³⁶ See, e.g., LAFAVE & SCOTT, *supra* note 37, § 1.5, at 22 - 27 (discussing such purposes for individuals); *Developments*, *supra* note 1, at 1235, 1237 - 38 (discussing retribution for corporations). Cf. WILLIAMS, *supra* note 37, at 71 (noting his discomfort with making "fault" a sanctioning issue only).

²³⁷ See, e.g., Parker, *supra* note 3, at 754 - 62, 774 - 82; Shavell, *supra* note 3, at 1248.

²³⁸ See *supra* text accompanying note 122 (noting that deterrence is the primary goal of corporate liability). Negligence can be converted into strict liability plus inquiry into due care at sanctioning. In the following example I show the same benefits may be obtained as with turning mens rea into a sanctioning issue only, but with negligence other constraints narrow the savings we may obtain compared to shifting mens rea for corporations into the sanctioning stage. Let us assume that there are two levels of care - no care and optimal care (interpreted as due care). The costs of optimal care are 65 and no care 0. The probability of an accident if no care is taken is 50% and if care is taken is 20%. The losses if an accident occurs are 1000. Thus, the social costs if no care is taken are 500 and if care is taken are 265. Let us also assume that the probability of sanction under strict liability is 40% and 20% under negligence. The difference is not because negligent acts are more difficult to detect - in fact I assume they are detected with the same probability as strict liability offenses - but because the plaintiff needs to prove more under negligence than strict liability and this reduces the probability of conviction. Under a negligence rule we need an expected sanction of more than 65 to induce the actor to take care - say 66. If the probability of an accident if no care is taken is 50% and the probability of conviction under negligence is 20% then to achieve an expected sanction of 66 we need an actual sanction of 660 (i.e., $660 \times 50\% \times 20\% = 66$). The expected sanction under strict liability needs to be greater than 265 - say 266. This leads to a sanction of 1830 (i.e., $1830 \times 50\% \times 40\% = 266$). Now we can make negligence a sanctioning factor and make the liability standard strict liability.

Under this approach a corporation is liable for an offense on a strict liability basis and the sanction can be increased upon proof of negligence - we will require plaintiffs to try to make a serious and good faith effort prove negligence (i.e., they cannot just allege strict liability - they must allege and support a claim for negligence - if they fail to show negligence after a serious effort to do so, but do prove the act occurred then they receive the strict liability base fine). The question is what should this base fine be? This is a difficult question and I will highlight why this is so in the following continuation of the example.

We want the expected sanction under strict liability plus due care at sanctioning to be 66. This sanction may be imposed in two parts -- upon proof of the act (strict liability) and then upon proof of negligence at sanctioning. Let us say that the strict liability base fine is 100. If no care is taken and the corporation is found to have committed the act then the expected sanction becomes 20 ($100 \times 50\% \times 40\%$) because the accident probability is 50% and the probability of conviction under strict liability is 40%. Thus, upon proof of negligence we need an additional expected sanction of 46. This translates into an additional sanction of 460 (i.e., $460 \times 50\% \times 20\% = 46$). The total sanction if the corporation is negligent is

V THE COLLECTIVE MENS REA STANDARD

The collective mens rea standard attaches liability to the corporation, using respondeat superior, if the total information possessed by corporate agents when aggregated is enough to meet the mens rea requirement imposed by law.²³⁹ In this Part I compare this liability standard to other liability standards. Section A examines the proxy role of COMR and concludes that this is not generally an advantage of COMR. Section B examines the possible disadvantages, in terms of incentives to gather information, of COMR and concludes that the incentives to gather information and to exercise care are worse under COMR than under strict liability and some of the negligence rules. Therefore, COMR should be replaced by strict liability or negligence.

then 560 which is less than the 660 under negligence as a liability standard. Thus, the benefits discussed in the text would accrue. However, this situation is not optimal for the following reasons.

Let us examine the effects on the incentives of the corporation. If the corporation exercises no care it is sanctioned 66 in expected sanction terms under strict liability and negligence. What if the corporation exercises care - well it pays out 65 for the costs of care, but that is not all. The corporation also may have to pay over a strict liability fine. If care is exercised the probability of an accident is 20% and the probability of conviction is 40% under strict liability. This means even when exercising care the corporation will receive an expected sanction of 8 (i.e., $100 \times 20\% \times 40\% = 8$). This makes the expected costs of taking care $65 + 8 = 73$. Because this is now greater than the costs of not taking care the corporation would not take care. Thus, we cannot simply use any sanction as the base fine. In fact, given the numbers used here the strict liability base fine should not be more than \$12.5. For example, if the strict liability base fine is 10 then that provides an expected sanction of 2 for not taking care. We then need 64 from the negligence factors at sanctioning. The actual sanction needed to achieve this expected sanction is 640 (i.e., $640 \times 50\% \times 20\% = 64$). Thus, the total sanction is 650 which is less than the 660 and provides us with some benefits as described in the text. The effects on incentives are as follows: For taking no care the expected sanction is 66 and for taking care the expected costs are 65.8 and thus incentives to take care are maintained and this is achieved at a lower cost to society than using negligence as a liability standard. 65.8 is the result of the following calculation: $65 + (10 \times 40\% \times 20\% = 0.8) = 65.8$. The 40% represents the probability of conviction under strict liability and the 20% the probability of an accident if care is taken.

²³⁹ See *supra* Part III.B.2.

A. *Possible Proxy Advantages of the Collective Mens Rea Standard*

An important question to answer is whether COMR, like SAMR, serves as a proxy for the relevant factors, such as the probability of sanction. I will use the following example as the quintessential case of COMR. If agent Y dumps material into a river without knowledge of its hazardousness, but agent X does know of its hazardousness yet does not engage in dumping then the corporation is still liable under COMR for knowingly dumping hazardous material into a river.

In this case it is not clear to me how X's possession of mens rea and Y's acting without mens rea are likely to increase expected harm compared to when Y acts when X does not know the material is hazardous. X's possession of intent or knowledge is irrelevant to expected harm if X keeps his intentions and knowledge to himself, because Y would act in any event. Simply put, Y's acting is not influenced by X's mens rea if X and Y do not communicate. To show that expected harm would increase we need to show that the probability of harm increases *when X has mens rea compared to when he does not, if Y, not X, is the actor and the agents do not communicate*. I do not see why this should be so. Further, expected harm may increase if the magnitude of harm is greater when X has mens rea compared to when X does not, if Y, not X, is the actor and the agents do not communicate. Again I see no reason why this should be so. Thus, the possession by one agent or even a group of agents of information sufficient to satisfy the mens rea requirement does not increase expected harm if another agent engages in the

prohibited act. Similar arguments can be made for mens rea providing useful information on the likelihood of socially illicit gains and on the probability of sanction.²⁴⁰

Thus, collective mens rea does not serve a proxy purpose as SAMR occasionally might. So then what possible advantage might such a standard have? First, COMR may simply be a way to hold the corporation liable when we believe that an agent did act with the required mens rea, but we cannot prove it. If this is the case then COMR is simply SAMR in camouflage and the analysis in Part IV would apply to COMR.

However, the main benefit most commentators identify is that COMR provides corporations with incentives to encourage information sharing between agents in order to reduce the number of times a harmful act occurs.²⁴¹ Under COMR if X and Y do not communicate and Y acts then the corporation is held liable for harm, but if X and Y communicate then it is likely that Y will not dump material that he now knows to be hazardous (assuming Y does not desire to cause harm) and hence corporate liability

²⁴⁰ Even if COMR did provide information on socially illicit gains, I suspect the corporation is unlikely to be held liable as then the agent's mens rea probably falls outside the imputation rules of respondeat superior. See *supra* Part IV.B.2. Further, COMR does not appear negatively correlated with the probability of sanction. If X has knowledge yet Y acts without consulting X it is doubtful if anyone would make efforts to cover up or engage in careful planning. It appears unlikely that X would try to cover up Y's dumping because X has no incentive to do so except to protect the corporation from suit. If this is the case, X may find it easier to dump the garbage himself and then cover up rather than let Y dump (over whom X may have little control) and then try to cover up afterwards. Of course if X does the dumping himself then this is a case of SAMR.

Nonetheless, the dispersion of information in the corporation and the lack of sharing of information may make it more difficult for the corporation to engage in self policing, by reducing the probability of internal detection (not external detection though), and, thus, hurt deterrence.

²⁴¹ See BRICKEY, *supra* note 4, § 4.05, at 145; GRUNER, *supra* note 1, § 4.1.2, at 266.

would be avoided.²⁴² If the corporation's sanction is set optimally then the corporation will have an incentive (avoidance of liability) to encourage X and Y to communicate. Thus, by inducing information sharing, via COMR, we reduce the number of times a harmful act occurs and this is a benefit to society.

In general I agree that by sharing information we can reduce the number of harmful acts compared to if we did not share the information. However, my question is about whether COMR is the best method of achieving this goal.

B. Possible Disadvantages of the Collective Mens Rea Standard

Although COMR may provide agents with incentives to share information *already possessed* it may also provide agents with an incentive to reduce the amount of information they actually have in their possession.²⁴³ The less information they have the less effective information sharing will be (there is less to share). The reasons behind the agents' desires to avoid gathering information are identical to those in Part IV.A when considering SAMR. Simply put, because there is no sanction, under COMR, for failing to gather information the corporation will only gather the amount of information that is privately optimal rather than the socially optimal amount thereby resulting in suboptimal information gathering.

²⁴² See GRUNER, *supra* note 1, § 4.1.2, at 266.

²⁴³ Cf. *id.* at 285.

Indeed, the worsening in information gathering may be more severe than under SAMR because under SAMR the corporation can avoid liability by gathering information and partitioning it in a manner so that the acting agent does not have the information. However, under COMR such partitioning does not avoid liability so the corporation has a stronger incentive not to gather information in the first place because that is the only way it can avoid liability (besides not acting) under COMR.

Thus, COMR may improve on information sharing over SAMR, but at the cost of providing stronger disincentives to gather information than SAMR and unlike SAMR, provides no proxy advantages. On the other hand, the alternative liability standards, such as strict liability and some negligence rules, are *always* definite improvements over COMR because they provide optimal incentives to gather and share information and exercise care as well.²⁴⁴

At this point a quick summary of the analysis in Parts IV and V may prove helpful. First, SAMR should be replaced by strict liability or negligence as the liability standard with occasional inquiry at sanctioning into acting agent's mens rea when

²⁴⁴ We could ask if COMR is administratively cheaper than strict liability or the negligence rules. Because we cannot be sure whether the per case cost effect or the frequency effect dominates a conclusion on the total impact on administrative costs is difficult to ascertain in any greater detail than that in Part IV.D. I would only add that COMR has the same costs per case as does SAMR except that COMR might be slightly cheaper if proving *one* agent acted and possessed mens rea (SAMR) is more difficult than proving information existed somewhere in the corporation (COMR). Note that if we believe that the only time COMR proves of use is when it is used in lieu of SAMR then the analysis in Part IV indicates that it should only be a sanctioning matter not a liability matter.

desirable. The analysis in Part IV suggests that inquiry into acting agent's mens rea is rarely desirable. Second, COMR is not a desirable liability standard and should be replaced by strict liability or some negligence rules. Finally, the third corporate mens rea standard may indeed be desirable at times,²⁴⁵ but when it is it should be referred to as negligence not corporate mens rea as discussed in Part III.B.3. This indicates that corporate mens rea standards should be replaced by strict liability or negligence.

Although this conclusion may seem dramatic it is important to note that the law appears to be moving in this direction. Recently, there has been an increase in the number of strict liability offenses (criminal and civil) imposed on corporations and the matters suggested by the courts and commentators for consideration under the three corporate mens rea standards are often considered at the sanctioning stage of proceedings under the Federal Sentencing Guidelines (Organizational Sentencing Guidelines(OSG)).

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²⁴⁵ See, e.g., Shavell, *supra* note 73, at 10 - 17, 24 (noting that strict liability is preferable when injurer rather than victim behavior is more important to regulate); R. COOTER & T. ULEN, *supra* note 121, at 367 - 70 (same); POSNER, *supra* note 73, § 6.5, at 175 - 80 (same). Shavell notes that in the cases of unilateral accidents (ones where the victim can do little to influence the accident) clearly injurer behavior is more important. See Shavell, *supra*, at 10 - 17, 24. In cases of bilateral accidents we need to examine the situations on a case-by-case basis. See *id.* at 6 - 16, 17 - 22. Further, the administrative costs of the rules vary. See *supra* Part IV.D. Finally, the possible information gathering incentives of the negligence rules, as discussed in Part IV.A, need to be taken into account. Under complete negligence the information gathering incentives for the parties are the same as under strict liability. See Shavell, *supra* note 3, at 260. Most areas where corporate mens rea standards exist are cases of public harms imposed on society by the corporation (e.g., pollution, price fixing, financial fraud). See BRICKEY, *supra* note 4, §§ 6 - 13. Such cases tend to reflect a greater concern for injurer behavior probably because they tend to reflect instances of unilateral harms and thus make a prima facie case for strict liability. See Fischel & Sykes, *supra* note 37, at 330 (noting, implicitly, that many crimes in the corporate arena are cases of unilateral harm because victims can do little to influence the accident's occurrence). However, there may be cases of corporate wrongs where injurer behavior is not so important or where the information costs favor the negligence rule. Here we should then rely on negligence, but refer to it as *negligence* not corporate mens rea.

²⁴⁶ See Pitt & Groskaufmanis, *supra* note 5, at 1563, 1573 (discussing growth in corporate strict liability offenses); Laufer, *Corporate Bodies*, *supra* note 1, at 670 n.91 (discussing federal sentencing guidelines).

The OSGs would increase the corporation's sanction if "an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or . . . tolerance of the offense by substantial authority personnel was pervasive."²⁴⁷ This places inquiry into agent mens rea at the sanctioning stage. Although this provision does not increase sanctions due to the mens rea of *any* agent who acts (only the mens rea of higher ups), it is still illustrative of how agent mens rea may be made a sanctioning factor. The factors under the third corporate mens rea standard also make their way into the OSGs. A corporation's sanction may be reduced if it has "an effective program to prevent and detect violations of law",²⁴⁸ which is similar to some negligence standards.²⁴⁹ Consider also the provision, which appears to reflect direct inquiry into the probability of sanction, that allows courts to increase sanctions if the "organization willfully obstructed or impeded ... justice".²⁵⁰

See also GUIDELINES, *supra* note 15, §§ 8C2.5, 2.8 (1995); JED S. RAKOFF ET AL., CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION §§ 3 - 4 (1994) (discussing §§8C2.5 and 8C2.8 of the Guidelines).

²⁴⁷ GUIDELINES, *supra* note 15, § 8C2.5(b)(1)(A). Similar factors are relevant for smaller corporations as well. *See id.* §§ 8C2.5(b)(2), (3), (4), (5).

²⁴⁸ GUIDELINES, *supra* note 15, § 8C2.5(f).

²⁴⁹ *See, e.g., Developments*, *supra* note 1, at 1243 (defining proactive corporate fault to mean that liability is imposed where "a corporation's procedures and practices . . . unreasonably fail to prevent corporate criminal violations.")

²⁵⁰ *Id.* § 8C2.5(e). As we move into this arena we find greater reliance not on conceptions of mens rea but on internal procedures and memos which provide hints about agent motive and so on -- in other words more direct measures of the relevant factors. *See* GUIDELINES, *supra* note 15, § 8. Of course, the guidelines only apply to areas of corporate criminal liability, however, these are the main areas where corporate mens rea may be required in any event. These results are indeed very positive and seem consistent with my analysis.

Thus, the general focus on the sanctioning stage is consistent with my analysis and should be encouraged as should the greater reliance on strict liability offenses which indicates a move away from mens rea standards for corporations.²⁵¹ Current legal trends, then, seem to be developing along the lines suggested in this paper. In fact, if this trend continues we may find that corporate mens rea becomes a notion of the past.

VI CONCLUSION

Corporate mens rea standards are a puzzle in the law of corporate liability. Although they are found in many different statutes and in many different forms we have little understanding of what purpose such requirements are designed to serve. Indeed, why do we have corporate mens rea requirements -- after all corporations do not literally have minds so how can they possess a state of mind? This paper sets out to provide us with greater insight into why we have corporate mens rea requirements and how does knowing that tell us how to choose between the various forms of corporate mens rea.

The analysis begins by examining the historical development of corporate mens rea and noting that it may indeed have been justified. However, the reasons for its development no longer persist thereby raising the question of why we have corporate

²⁵¹ The focus on the sanctioning stage also needs to be fine-tuned so that inquiry into mens rea only occurs when direct inquiry proves less desirable. Some structure for requiring this sort of hierarchy of inquiry is needed. I imagine courts could first examine what direct evidence there is and if that proves ineffective then consider mens rea. Also a requirement that mens rea not be used to identify socially illicit gains in the corporate context could prove of assistance.

mens rea requirements today. The Article then defines corporate mens rea today and concludes that the various forms of mens rea can be placed into three broad categories: intent, knowledge, and recklessness. Furthermore, courts and commentators have at least three broad ways in which to determine if a corporation has mens rea: the single actor mens rea standard, the collective mens rea standard, and the third corporate mens rea standard or negligence. In the midst of these numerous myriad options there is little to guide us in choosing which standard or form of mens rea to use and when. Indeed, many commentators, legal reformers, and courts find this situation to be the epitome of confusion. This is hardly surprising because there is no deterrence-based rationale for corporate mens rea requirements²⁵² -- a gap that this Article fills by asking when are corporate mens rea standards socially desirable.

My analysis began by noting that corporate mens rea is in reality one type of liability standard we may use for corporations. Thus, to determine when corporate mens rea is socially desirable we need to determine when it is preferable to the other standards, such as strict liability and negligence. When engaging in this comparison I treat deterrence as the primary, if not exclusive, goal of corporate liability.²⁵³

²⁵² Only a few articles discuss mens rea requirements for individuals, but they do not concern *corporate* mens rea requirements. See, e.g., Parker, *supra* note 3 *passim*; Posner, *supra* note 3, at 1221 - 23; Shavell, *supra* note 3, at 1247 - 49.

²⁵³ See *supra* note 122.

Part IV begins by examining the single actor mens rea standard which imposes liability under respondeat superior on the corporation when one agent both acts and possesses the required mens rea. The analysis suggests that the incentives to gather and share information under this standard are inferior to the incentives under strict liability and some negligence rules, which has a flow through effect to worsen incentives to exercise optimal care thereby hampering deterrence. The Article then asks whether the deterrence-based rationales for mens rea requirements for individuals apply to corporations. The first rationale is the possible proxy role mens rea plays in increasing sanctions. This advantage occurs infrequently in the corporate context, or at least less frequently than in the individual context, because direct evidence on the relevant factors is normally available in the corporate context and also because agent mens rea is not helpful in increasing corporate sanctions when an agent derives socially illicit gains. Second, other advantages of mens rea requirements for individuals lose their importance when brought over to the corporate sphere thereby resulting in only the proxy advantage that can be weighed against the information gathering disincentive. In balancing these two effects I conclude that the single actor mens rea standard is rarely desirable because the proxy advantages are so infrequent. Further analysis shows that in those rare cases when inquiry into acting agent's mens rea is desirable that inquiry should take place at the sanctioning stage not the liability stage. Thus, the single actor mens rea standard should be replaced by strict liability or negligence as the liability standard and occasional inquiry into acting agent's mens rea at sanctioning when desirable. The analysis in Part IV indicates that such inquiry is rarely desirable.

I then examine, in Part V, the collective mens rea standard which imposes liability on the corporation under respondeat superior when the aggregated information of all corporate agents suffices for the mens rea requirement. The analysis concludes that this corporate mens rea standard does not serve any real proxy function and its only beneficial function is obtained in a more efficient manner by relying on strict liability or some forms of negligence. Thus, once again this corporate mens rea standard is undesirable. Finally, the third corporate mens rea standard is simply negligence in camouflage and should be both referred to and analyzed as such, not as corporate mens rea.

Upon completion of this analysis I conclude that, although individual mens rea may be desirable for many reasons,²⁵⁴ corporate mens rea is not. Indeed, this conclusion appears to have garnered some support in the recent developments in this area of law. More recently we witness an increase in strict liability offenses for corporations thereby avoiding the need for inquiring into mens rea for corporations.²⁵⁵ Furthermore, we see a much greater emphasis on the sanctioning stage where many factors, which in the past

²⁵⁴ See, e.g., Parker, *supra* note 3, at 754 - 62, 774 - 82; Shavell, *supra* note 3, at 1248.

²⁵⁵ Actual replacement of corporate mens rea requirements with strict liability provisions is unlikely because that would be difficult to do. Many mens rea requirements that apply to corporation, stem from mens rea provisions aimed at individuals, such as manslaughter and contempt of court. See STONE, *supra* note 37, at 1 -2 (noting that the law developed to deal with individuals and then corporations were later fitted into such laws); Brickey, *supra* note 31, at 415. Consequently, to remove corporate mens rea would mean somehow removing the provision, which may be undesirable if mens rea is optimal for individuals. However, simply enacting strict liability offenses provides the prosecutor/plaintiff with the choice of using the relatively simple strict liability standard or opting for the more difficult corporate mens rea standard. One expects few to choose the mens rea approach. Further, even if they did choose the mens rea approach to, for example, secure higher sanctions it is still possible that the higher sanctions may be obtained through relying on strict liability combined with the approach used in the Federal Sentencing Guidelines (i.e., increasing the sanction if agent mens rea is present). See GUIDELINES, *supra* note 15, § 8.

may have been considered under the heading "mens rea", are now examined at the sanctioning stage. Both these developments are praiseworthy and consistent with my analysis. Indeed my primary recommendation is that we do not pass more corporate mens rea statutes, but use other liability standards and sometimes make agent mens rea a factor at sanctioning.