

9-6-2009

A Response to the Critics of Corporate Criminal Liability

Sara Sun Beale

Duke University School of Law

Follow this and additional works at: http://lsr.nellco.org/duke_fs

 Part of the [Corporation and Enterprise Law Commons](#), [Criminal Law Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Beale, Sara Sun, "A Response to the Critics of Corporate Criminal Liability" (2009). *Duke Law School Faculty Scholarship Series*. Paper 186.

http://lsr.nellco.org/duke_fs/186

This Article is brought to you for free and open access by the Duke Law School at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Duke Law School Faculty Scholarship Series by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

**A RESPONSE TO THE CRITICS OF CORPORATE CRIMINAL LIABILITY
FORTHCOMING, AMERICAN CRIMINAL LAW REVIEW**

ALL RIGHTS RESERVED – DO NOT CITE OR QUOTE WITHOUT PERMISSION

Sara Sun Beale*

For more than 50 years, most criminal law and corporate scholars in the United States have been opposed to corporate criminal liability, arguing that it should be eliminated or at least strictly limited.¹ In this symposium issue, for example, Albert Alschuler argues that “corporate criminal punishment is a mistake.”² He likens corporate criminal liability to the ancient—and discredited—practices of deodand and frankpledge, and concludes that “viewing it as frankpledge is less ridiculous than viewing it as deodand.”³ Many law and economics scholars have argued that corporate liability is inefficient and should be scrapped in favor of civil liability for the entity and/or criminal liability for individual corporate officers and agents.⁴ Others, such as Pamela Bucy,⁵ endorse the notion of corporate criminal liability but argue that it must be restricted.⁶

*Charles L.B. Lowndes Professor, Duke Law School. I am grateful to Georgetown Law School for sponsoring the conference that led to this symposium issue, and the U.S. Chamber of Commerce and Special Counsel Cheryl Evans for inviting me to participate in the Task Force on Corporate Criminal Liability. Additionally, I thank Abby Faulkner, Christopher Moriarty, Matt Tynan, and Chris Vieira for their assistance with the research, and Bill Brown, Eric Colvin, Michael Elston, Thomas Hanusik, Joanne Klineberg, Adam Safwat, and John Thornton for sharing their expertise. Any errors, of course, are my own.

¹I have described these critiques in previous work. *See generally* Sara Sun Beale, *Is Corporate Criminal Liability Unique*, 44 AM. CRIM. L. REV. 1503 (2007), hereinafter *Is Corporate Criminal Liability Unique*, and Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89 (2004).

²Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, ___ AM. CRIM. L. REV. ___, ___ (2009).

³*Id.* at ___.

⁴*See* Beale & Safwat, *supra* note 1, at ___. It should be noted that Jennifer Arlen is an important exception; she argues that in certain situations criminal sanctions for corporations can create important incentives for compliance with the law. *See, e.g.*, Jennifer Arlen, [insert cite to symposium piece].

⁵Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?* ___ AM. CRIM. L. REV. ___, ___ (2009). In a seminal article, Professor Bucy argued in favor of the corporate ethos standard. *See* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991).

The purpose of my essay is to respond to claims that corporate liability is an embarrassing historical vestige or at least a uniquely troubling feature of U.S. criminal law, and that the elimination or limitation of such liability should be a top priority for law reform. Although I acknowledge there are problems with corporate criminal liability in the U.S., these problems are far from unique, and it would be a serious mistake to view corporate criminal liability in isolation. Indeed a comparative view of corporate criminal liability suggests if there is to be reform, that the agenda should be broader, and reformers should consider whether to make it easier—rather than harder—to prosecute corporations, at least in certain contexts.

My essay will discuss four points. First, imposing criminal liability on corporations makes sense, because corporations are not, fundamentally, fictional entities. Rather, they are very real—and enormously powerful—actors whose conduct often causes very significant harms both to individuals and to society as a whole. Second, many of the problems with corporate liability are endemic to U.S. criminal law, rather than unique. The problems of corporations are not special, and they are not the most serious problems facing the criminal justice system. Third, a comparative review reveals something that may come as a surprise: in other countries, the focus in the past several decades has been on the creation of corporate criminal liability in jurisdictions in which it did not exist, and where such liability already existed the modern reforms included modifications intended to make it easier, rather than harder, to prosecute corporations criminally. In particular, there have been notable changes in both English and Canadian law in the last decade aimed at making it easier to prosecute corporations for homicide and for workplace injuries. Accordingly, if the reform of corporate criminal liability is to be made a priority, we should be asking not only about the need for restrictions, but also whether there is a need to expand liability or enforce existing offenses more vigorously. Finally, I want to address the possible collateral consequences of a corporation’s criminal conviction, such as debarment from government contracting. The key point is that these consequences are not intrinsically tied to criminal liability, nor are they limited to corporations. Accordingly, they should be considered by prosecutors on a case by case basis, but should not affect the policy questions addressed here.

I. Corporations are real

A good deal of scholarship begins from the premise that corporations are fictional entities, which have no existence apart from the various individuals who act on behalf of the fictitious entity. This premise can lead quickly to the conclusion that corporate liability is unjust because it effectively punishes innocent third parties (shareholders, employees, and so forth) for the acts of the individuals commit offenses while in the employ of these fictional entities.⁷ What this account misses is the reality that corporations are not fictions. Rather, they are enormously powerful—and very real—actors whose conduct often causes very significant harms both to

⁶See, e.g., Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007).

⁷See, e.g., Alschuler, *supra* note __, at __.

individuals and to society as a whole. In a variety of contexts the law recognizes this reality, by allowing corporations to own property, make contracts, commit torts, and to sue and be sued.⁸ Indeed, the Supreme Court has held that corporations have many constitutional rights under the U.S. constitution.⁹

Moreover, the power now wielded by corporations is both enormous and unprecedented in human history. It misses a lot to compare corporations like Exxon Mobil, Microsoft, or AIG to a horse or a cart that was treated as a deodand under ancient English law.¹⁰ The wealth of the top Fortune 500 corporations is one measure of corporate power. In 2008 annual revenues from the top ten revenue-producing corporations in the U.S. were more than \$2.1 trillion; the profits from the ten most profitable U.S. corporations were more than \$176 billion.¹¹ Exxon Mobil topped both lists, recording almost \$445 billion in revenue and over \$45 billion in profit.¹² Corporations also wield power more directly via their lobbying efforts. Since 1998 Exxon Mobil has spent over \$120 million on lobbying, including \$29 million in 2009.¹³ The U.S. Chamber of Commerce has spent over \$477 million since 1998, more than twice the amount of any other corporation or industry group.¹⁴ Other industry groups, like the Pharmaceutical Research and Manufacturers of America, spent hundreds of millions of dollars in the last ten years to lobby on behalf of multiple corporations.¹⁵

⁸See generally 1 JAMES. D. COX & THOMAS LEE HAZEN, COX AND HAZEN ON CORPORATIONS INCLUDING UNINCORPORATED FORMS OF DOING BUSINESS § 7.01 (2d ed. 2003).

⁹Although corporations do not possess the Fifth Amendment privilege against self incrimination, the Supreme Court has recognized that they do have rights under the First Amendment, the Fourth Amendment, the Equal Protection Clause, and the Double Jeopardy clause of the Fifth Amendment. See Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L.R. 793 (1996) (describing and critiquing the Supreme Court's decisions on the constitutional rights of corporations).

¹⁰See Alschuler, supra note __, at __.

¹¹See http://money.cnn.com/magazines/fortune/fortune500/2009/full_list/;
<http://money.cnn.com/magazines/fortune/fortune500/2009/performers/companies/profits/>

¹²*Id.*

¹³<http://www.opensecrets.org/lobby/top.php?indexType=s> (top lobbying spenders since 1998); <http://www.opensecrets.org/lobby/top.php?showYear=2008&indexType=s> (top lobbying spenders in 2008).

¹⁴See <http://www.opensecrets.org/lobby/top.php?indexType=s> (top lobbying spenders since 1998).

¹⁵*Id.*

Modern corporations not only wield virtually unprecedented power, but they have done so in a fashion that has often caused serious harms to both individuals and to society as a whole. In some recent cases, corporate misconduct and malfeasance destabilized the stock market and led to the loss of billions in shareholder equity and the loss of tens (or perhaps even hundreds) of thousands of jobs. Enron was the seventh most valuable company in the U.S., until the revelation of its use of deceptive accounting devices to shift debt off its books and hide corporate losses led to losses of more than \$100 billion in shareholder equity before it filed for bankruptcy.¹⁶ But Enron was not alone in the use of fraudulent accounting practices. The revelation of similar misconduct by other corporations (including Dynergy, Adelphia Communications, WordCom, and Global Crossing) also led to massive losses.¹⁷ Federal prosecutors have also uncovered widespread wrongdoing in other industries, though the nature of the violations has varied over time. In the past decade virtually every major pharmaceutical company has pled guilty to or settled charges arising out of serious misconduct.¹⁸ In the previous decade, the 1990s, the most prominent cases concerned antitrust violations. The largest single fine imposed was \$500 million for a worldwide scheme to fix the price of vitamins, and fines from the nine most serious antitrust cases of the decade totaled \$1.2 billion.¹⁹

Because of their size, complexity, and control of vast resources, corporations have the ability to engage in misconduct that dwarfs that which could be accomplished by individuals. For example, Siemens, the German engineering giant, paid more than \$1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East, and Latin America, using its slush funds to secure public works contracts around the world.²⁰ There is nothing wrong with recognizing that it was Siemens, not simply some of its officers or employees, who should be held legally accountable. U.S. investigators found that the use of bribes and kickbacks were not anomalies, but the corporation's standard operating procedures and part of its business strategy.²¹

¹⁶Beale & Safwat, *supra* note ____, at 91 (describing losses as well as resulting criminal charges against Enron officials).

¹⁷*Id.* at 93-94 (describing losses for each corporation, including an estimated \$100 million loss resulting from Dynergy's fraudulent accounting).

¹⁸*Id.* at 94-95 (describing resolution of charges against Pfizer, AstraZenexa, Beyer, GlaxoSmithKline, and Abbott Laboratories).

¹⁹*Id.* at 91 n.4 (citing fine imposed on F. Hoffmann-LaRoche Ltd. in 1999 and other cases compiled by Russell Mokhiber in the Corporate Crime Reporter).

²⁰*See Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, U.S. Dept. of Justice Press Release, Dec. 15, 2008, available at <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html>, and Eric Lichtblau & Carter Daugherty, *Siemens to Pay \$1.34 Billion in Fines*, N.Y. TIMES, Dec. 16, 2008, at B8.

In my view, Siemens was properly prosecuted and convicted.²²

Professor Alschuler, echoing other classic critiques, argues that the corporation is a mere fiction that cannot be punished, and that it is innocent shareholders who are forced—wrongly—to bear the direct burden of criminal sanctions, and innocent employees, creditors, customers, and communities who must bear the indirect burdens.²³ This argument misses the mark in several respects. First, the entire point of the corporate form is to create a legal entity that is separate from its shareholders (as well as its employees, creditors, and others). Each corporation has its own assets, as well as its own liabilities. The shareholders of Siemens benefitted from its success when it used bribery and kickbacks to obtain contracts that generated billions of dollars of profit. They would have benefitted if the corporation had brought suit to enforce its contractual rights. On the other hand, if Siemens had breached its contracts or committed torts, no one questions that the corporation would have been liable, though the innocent shareholders would have lost equity. Note, however, that the point of the corporate form is that those losses would have affected the shareholders' equity in the corporation, but not their personal assets, even if the corporation's liabilities exceeded its obligations. Why, then, is it surprising that the corporation should be held liable for fines arising from criminal conduct, even though the fines might have affected the value of the shareholder's equity in Siemens? (Or the interests of Siemens' employees or its creditors?)

Moreover, the argument that it is improper to impose criminal fines that effectively “punish” the “innocent” shareholders, employees, creditors, and others, proves far too much. These arguments apply equally to punitive damages, and indeed to any money judgment against a corporation, since such a judgment also reduces the shareholders' equity (as well as its ability to pay its employees and creditors). Is it conceivable that the need to protect “innocent” shareholders means they may benefit from the corporation's successes, but never suffer the detriment of any error in judgment, misconduct, or malfeasance that might result in a breach of contract, a tort, or a regulatory violation? Note that the civil damages resulting from the most serious misconduct by employees, such as the oil spill caused by the Exxon Valdez²⁴ and the explosion that left thousands dead at Bhopal, India,²⁵ may be hundreds of millions of dollars, or

²¹*Id.* (quoting Joseph Persichini, Jr., the head of the Washington office of the F.B.I.).

²²See Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, ___ AM. CRIM. L. REV. ___, ___ (2009).

²³Alschuler, *supra* note ___, at ___.

²⁴*See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (upholding punitive damage award equal to compensatory award equal to the compensatory damage of \$507.5 million for damages caused by release of millions of gallons of crude oil as a result of reckless action of captain which were not acquiesced in by corporation).

²⁵*See* Edward Broughton, *The Bhopal disaster and its aftermath: a review*, 4 ENVIRON. HEALTH 6 (2005) (describing the worst industrial accident in history—the release of 40 tons of methyl isocyanate gas from a pesticide plant in 1984—which immediately killed at least 3,800

more. These damages, of course, can effectively punish shareholders and other third parties. Do criminal penalties really differ in some fundamental way from other damages that are properly imposed upon corporations?

In my view, it is not possible to distinguish in a meaningful way the “innocent” third parties in corporate cases (the shareholders, employees, creditors, and so forth) from the innocent third parties who are typically affected by the prosecution of individual defendants. Indeed, the innocents typically suffer more, not less, when individuals are prosecuted. As noted above, the corporation is a distinct legal entity, with its own assets that are distinct from the personal assets of the shareholders. The corporation pays its fines, like any other judgment, from those assets. The punishment falls on the entity, though the effect is felt by the shareholders and others. Similarly, when individual defendants are ordered to pay criminal fines, or imprisoned and unable to earn income, the purpose is to punish the defendant, though the effect is to punish those who are dependent, directly or indirectly, upon the defendant. This includes family members who may be part of an economic unit with the defendant, sharing income and owning property jointly or by the entirety, as well as creditors and in some cases employees.²⁶ Note that the innocent parties harmed by the punishment of individual defendants are often less able to protect their assets than the shareholders, who have no liability beyond their investment in the shares of the corporation.

II. Does corporate criminal liability raise unique problems?

The short answer is no.²⁷ The critics of corporate criminal liability argue that it is (1) unnecessary, because civil liability is sufficient and more efficient, (2) so broad that it encompasses conduct that is not blameworthy, and (3) punished excessively. By themselves, these critiques are powerful, but critics add that the current regime gives prosecutors far too much leverage: in essence, the stakes are so high under the current regime and the playing field so slanted in the government’s favor that corporations have no choice but to make whatever

people and caused significant morbidity and premature death for many thousands more, and the company’s efforts to dissociate itself from legal responsibility), *available at* <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1142333> .

²⁶Spouses typically own real property jointly or by the entirety and depend upon each other’s income for the support of the household, including any minor children. *See* U.S. Census Bureau, *2009 Statistical Abstract of the United States*, Tables 578 and 950, *available at* <http://www.census.gov/compendia/statab/> (76.2% of married women with children between 6 and 17 years old participate in the labor force; 83.8% of married-couple families own their homes). And, of course, individuals may employ others who suffer when their employers lose their jobs or their income. *See* Julie Scelfo, *Trickledown Downsizing*, N.Y. TIMES, Dec. 11, 2008, at D1, *available at* <http://www.nytimes.com/2008/12/11/garden/11domestics.html> (describing difficulties of childcare providers and housekeepers in New York City after financial sector layoffs).

²⁷*See generally* Beale, *supra* note __ , for a longer version of the answer “no.”

concessions the government demands whenever it raises the specter of criminal charges. There is some truth to these criticisms, but they are endemic to U.S. criminal law, rather than unique to corporate criminal liability.

A. Criminal prosecutions as a substitute for civil liability or regulation

There is no question that American law imposes criminal sanctions on conduct that might more efficiently (and more humanely) be dealt with in a civil regulatory regime. Indeed, our reliance on harsh criminal sanctions is a central feature of U.S. law that divides us from many other developed western nations. That said, corporate criminal liability is not the most egregious example of our excessive reliance on criminal sanctions. If we are going to have a debate about cutting back on the use of criminal sanctions when we could use civil or regulatory mechanisms, we have to talk about our approach to drugs. By all critical measures—such as government expenditures for investigations and prosecutions, number of prosecutions, or overall societal impact—the need to rethink our approach to corporate crime pales in comparison to the need to rethink our reliance on a criminal justice approach to drug enforcement.²⁸

Federal prosecutors bring criminal charges against no more than a few hundred corporations each year, and a few dozen more avoid prosecution by entering into deferred prosecution or no prosecution agreements.²⁹ In contrast, in the five year period from 2004 to 2008, approximately 25,000 people were convicted and sentenced for federal drug offenses each year,³⁰ and more than 95% of those defendants were sentenced to terms of imprisonment.³¹

The cost of our current approach to drugs is truly staggering. While federal drug cases dwarf the number of federal corporate prosecutions, both are insignificant when compared with

²⁸Portugal could provide a model. In 2001, Portugal decriminalized all drugs, including heroin and cocaine, providing that possession for personal use subject only to administrative sanctions. A recent evaluation concludes that this experiment has been highly successful: drug usage rates have remained the same or decreased slightly and drug-related pathologies such as deaths and sexually transmitted diseases have decreased dramatically. *See generally* GLEN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES (2009) (describing the Portuguese system and comparing its experience since 2001 with other nations within the European Union as well as other selected nations).

²⁹In fiscal 2008, the federal courts sentenced 198 corporations. U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 51, *available at* <http://www.ussc.gov/ANNRPT/2008/Table51.pdf> .

³⁰*Id.* at Figure B, *available at* <http://www.ussc.gov/ANNRPT/2008/FigB.pdf> .

³¹*Id.* at Table 12 (combining rates for trafficking, communication, and simple possession), *available at* <http://www.ussc.gov/ANNRPT/2008/Table12.pdf> .

state and local law drug enforcement. In 2007, non-federal agencies made approximately 1.8 million arrests on charges of drug sales, manufacturing, and possession.³² The cost of enforcing our country's drug laws is an enormous drag on the economy. Incarceration of approximately half a million drug offenders alone costs taxpayers nearly \$20 billion each year, in addition to billions of dollars in lost productivity.³³ The federal government budgeted another \$14.1 billion for fiscal year 2009 for use in drug crime prevention.³⁴ And an accounting of these enormous financial burdens fail to capture the social costs of racial disparities in arrests and sentencing, the lost opportunity to spend funds on education or health and safety, and the disgrace of having the highest incarceration rate in the world.³⁵

The financial and social concerns raised by drug law enforcement illustrate that the criminal system's flaws are larger and go far beyond those perceived by corporate interests. If we are to take seriously the idea of restricting the use of criminal sanctions to the kinds of cases when regulatory or civil sanctions cannot be effective, it would be inconceivable to limit the discussion to corporate criminal liability. There are many reasons to put this issue on the agenda for Congress and state legislatures, and the current economic crisis might even open a window of opportunity given the crushing costs of the current penal system. But we can't, in good conscience, see this as an issue of corporate liability alone.

B. Liability without true fault

Many critics argue that corporate criminal liability, especially in the federal system, imposes liability when there has been no true fault on the part of the corporation. The paradigm case is the misconduct of a single rogue employee, which can be attributed to the corporation by the doctrine of respondeat superior.³⁶ There is general agreement that the corporation should be held civilly liable for a tort under these circumstances, if the harm was caused by an employee acting in the scope of his employment.³⁷ The question, then, is whether in sufficiently serious

³²U.S. Dep't of Justice, Fed. Bureau of Investigation, *Crime in the United States 2007* (Sept. 2008), <http://www.fbi.gov/ucr/cius2007/arrests/index.html>.

³³Office of Nat'l Drug Control Policy, *The Economic Costs of Drug Abuse in the United States 1992-2002*, at III-22 (Dec. 2004).

³⁴Office of Nat'l Drug Control Pol'y, *National Drug Control Strategy, FY2009 Budget Summary 1* (2008).

³⁵For a discussion of the U.S. incarceration rates, see *infra* text accompanying notes ___ to ___.

³⁶ See Podgor, *supra* note ___, at 1541, and Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud*, 51 ALA. L. REV. 239, 287 (1999).

³⁷ See RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

cases where the conduct also breaches a criminal law, the corporation should be held to answer for the criminal offense. Note that in either the civil or the criminal setting, the typical punishment is a judgment of corporate fault and an order to pay a fine. Thus the argument that a corporation has “no soul to damn” and no body to imprison³⁸ cuts both ways. Critics use it to argue that there is no reason to prosecute a corporation. Supporters of corporate criminal liability might turn the argument around and ask what’s the big deal, since the corporation can’t go to jail (or hell)?

But both supporters and opponents of corporate criminal liability assume that there are differences between civil and criminal liability, and there are good arguments that the current federal approach can impose criminal liability when there is not, by some measures, corporate blameworthiness. This is an important issue, but the difficulty of confining criminal punishments to moral blameworthiness is endemic to the definition of crimes and defenses.³⁹ I will give three examples. The first is the scope of the insanity defense. Even if both the government and defense experts agree that a defendant suffers from schizophrenia and that his condition made it impossible for him to control the conduct that constituted the offense, he has no defense under current federal law.⁴⁰ (The situation is as bad or worse in most states; indeed, five states have eliminated the defense completely, and most of the remainder also have a fairly narrow version of the *M Naughten* test.⁴¹ It’s highly debatable, of course, whether a defendant with severe mental illness can be said to be blameworthy and held criminally responsible.

³⁸ Cf. John C. Coffee, Jr., “No Soul To Damn, No Body To Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1981).

³⁹ For a more detailed treatment of some of these arguments, see Beale, *supra* note ____, [unique], at 1513-18.

⁴⁰ In adopting the Insanity Defense Reform Act, codified as 18 U.S.C. § 17, Congress cut back on the insanity defense, eliminated the volitional prong which previously allowed a defense when the defendant was unable to conform his conduct to the requirements of the law because of a mental disease or defect. See SARAH N. WELLING, ET AL., FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT, AND RICO § 26.3 at 427-28 (1998).

⁴¹ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.04[A] (4th ed. 2006) (stating that the acquittal of John Hinkley caused a national reassessment of the insanity defense, reversing the trend in favor of the American Law Institute’s broadened definition of insanity, and prompting a return to *M Naughten*), and *id.* § 25.06[B] (noting that after the Hinkley acquittal four state legislatures have eliminated the insanity defense, and the courts have reached a similar result in one additional state).

My second example concerns accomplice liability. In the federal courts and many states, a defendant may be convicted as an accomplice to conduct—including homicide—that he did not intend to aid, and did not actually aid, if he was an accomplice to other related conduct.⁴² This principal is part of the felony murder rule, and the extension of accomplice liability through the *Pinkerton* doctrine in conspiracy cases and the more general doctrine of natural and probable consequences.⁴³

And, finally, an individual's moral culpability is irrelevant to many of the weapons and immigration offenses that make up the most rapidly growing part of the federal criminal docket. Jeffrey Meyer provides the following examples:

- An immigrant alien may be criminally convicted for unlawfully reentering the United States even if she believed that she had proper government approval to return;
- A defendant charged with felon-in-possession-of-a-firearm may be convicted even if mistaken about his felony history (e.g., he had been previously assured by a court that he did not have a felony history or he believed that his prior conviction had never been formally entered or had been expunged);
- A defendant charged with criminal possession of an unregistered firearm may be convicted even if he mistakenly thought the firearm was registered as required;
- A defendant charged with illegal disposal of toxic waste may be convicted even if she is ignorant of the waste's toxic qualities or even if she thought that her employer had a proper permit to allow disposal.⁴⁴

I do not mean to endorse the imposition of criminal sanctions in all of these settings. Rather, I want to make a more limited point: criminal liability in the federal system (and in the U.S. more generally) does not match up closely with many people's definition of blameworthiness or moral guilt. These are critical issues, and they should be reexamined. But if we have to triage,

⁴² See Beale, *supra* note ____, at 1514-15.

⁴³ *Id.* (noting the persistence of both felony murder and the doctrine of natural and probable consequences, despite widespread scholarly criticism). For a general description of these doctrines in the federal system, see Welling et al., *supra* note ____, § 4.2 C (iv) (describing natural and probable consequences and felony murder), and *id.* § 4.5 (describing *Pinkerton* doctrine).

⁴⁴ Jeffrey A. Meyer, *Authentically Innocent: Juries and Regulatory Crimes*, 59 HASTINGS L. J. 137, 137-38 (2007) (footnotes omitted).

and give priority to only a few of these issues, neither the number of cases nor the severity of the sanctions would place corporate criminal liability at the top of my list for reform.

C. Excessive punishment

In the past three decades, the U.S. has set international (and historic) records for the use of imprisonment, whether measured by the percentage of the population that is incarcerated or the length of the terms of incarceration.⁴⁵ The short answer to any complaints that corporate (or white collar) punishments are excessive is that all of our punishment policies must be reevaluated, and that this should be a top priority.

For example, Senator Jim Webb has listed the following reasons why a comprehensive overhaul of the criminal justice system is urgently needed:

- The United States has by far the world's highest incarceration rate. With five percent of the world's population, our country now houses twenty-five percent of the world's reported prisoners. More than 2.38 million Americans are now in prison, and another 5 million remain on probation or parole.
- Our prison population has skyrocketed over the past two decades as we have incarcerated more people for non-violent crimes and acts driven by mental illness or drug dependence.
- The costs to our federal, state, and local governments of keeping repeat offenders in the criminal justice system continue to grow during a time of increasingly tight budgets.

⁴⁵Between 1987 and 2007, the U.S. prison population nearly tripled, and for the first time, more than 1 in every 100 adults is now confined in a jail or prison. *See generally* PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 at 5 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf. The U.S. rate of imprisonment far exceeds that of any other nation, and is roughly four times the international average. Christopher Hartney, Fact Sheet: US Rates of Incarceration: A Global Perspective 1-3, *available at* http://www.nccd-crc.org/nccd/pubs/2006nov_factsheet_incarceration.pdf (finding U.S. rates of incarceration to be roughly four times the world average, 4 to 7 times that of other western nations, 4 times that of sentenced prisoners in China, and exceeded only by the historic estimates of the rates of incarceration in the Soviet GULAG of the 1950s). As the report notes, the U.S. rates are not simply the result of higher crime rates in the U.S., as shown by the fact that U.S. sentences are longer than those imposed by other countries for the same offense. *See id.* at _____. *See also* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, ___-___ (2006) (discussing the relationship between the crime rates and sentencing policies in the U.S. and other nations).

- Existing practices too often incarcerate people who do not belong in prison and distract from locking up the more serious, violent offenders who are a threat to our communities.
- Mass incarceration of illegal drug users has not curtailed drug usage. The multi-billion dollar illegal drugs industry remains intact, with more dangerous drugs continuing to reach our streets.
- Incarceration for drug crimes has had a disproportionate impact on minority communities, despite virtually identical levels of drug use across racial and ethnic lines.
- Post-incarceration re-entry programs are haphazard and often nonexistent, undermining public safety and making it extremely difficult for ex-offenders to become full, contributing members of society.⁴⁶

Revising the approach to sentencing policy in corporate cases can appropriately be a part of this agenda, though not its centerpiece. In the case of corporate sentences, as well as sentences for other offenses and offenders, our sentencing law should be revised in light of the best empirical research. Examples of research topics which should be surveyed as part of that effort include: the tradeoff between the certainty of punishment (which increases as more resources are provided for investigation) and the severity of punishment,⁴⁷ the consequences of allocating funds for prevention and treatment in lieu of investigation and punishment of offenses; and the effect that different sentencing policies will have on corporate behavior.⁴⁸

D. Excessive prosecutorial power

In the past few years, prosecutorial power has become one of the focal points for critics of corporate criminal liability. Critics express shock that corporations are unable to contest any charges prosecutors choose to bring against them, and must therefore not only concede liability but also become the prosecutor's agents in the investigation and prosecution of corporate officers and employees.⁴⁹ This imbalance is said to arise from the excessively broad definition of

⁴⁶SEN. WEBB'S NATIONAL CRIMINAL JUSTICE COMMISSION ACT OF 2009, March 2009, available at <http://webb.senate.gov/email/incardocs/FactSheeti.pdf> . Additional information about hearings sponsored by Senator Webb, and his efforts to create a commission to evaluate the criminal justice system can be found at <http://webb.senate.gov/email/criminaljusticereform.html> .

⁴⁷ See e.g., Johannes Andenaes, *Deterrence*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE at 507, 510 (2nd ed. 2002) (noting that it is generally accepted that the certainty of punishment is more important than the severity in deterring crime).

⁴⁸ See, for example, Jennifer Arlen, [cite article in this issue]

⁴⁹ See generally Beale, *supra* note ____, at 1523-26 (describing critique and reasons

corporate liability under the federal doctrine of respondeat superior, the risk averse behavior of corporate boards of directors, and other doctrines that strip corporations of their rights and reward their heavily coerced cooperation.⁵⁰ Indeed, Professor Alschuler has suggested that the real function of corporate liability is similar to the ancient system of frankpledge, which held a group of individuals responsible for the wrongdoing of their neighbor unless they helped the authorities to apprehend the wrongdoer.⁵¹

There is, however, very little new or distinctive about this description of the tremendous leverage possessed by federal prosecutors and the coercive power they can exert to compel cooperation from those who may be charged with a crime. The necessity to cooperate in order to get concessions is a fact of life in the federal system (and in the states as well).⁵² There is a culture of waiver in the federal courts, but it extends to all defendants, not just corporate defendants. More than 95 percent of federal defendants plead guilty, conceding their guilt and waiving all of their procedural rights.⁵³ If the defendant agrees to plead guilty, prosecutors have the authority to drop charges and to make plea recommendations or agreements under the Federal Rules of Criminal Procedure,⁵⁴ and the federal sentencing guidelines create powerful incentives for guilty pleas through the provisions for downward departures for acceptance of responsibility.⁵⁵ The prosecutor's leverage is greatest in prosecutions for the many federal offenses that carry long mandatory minimum sentences. By statute, the sentencing judge is required to impose the mandatory minimum sentence unless the federal prosecutor moves for a sentence below the minimum on the ground that the defendant has provided a sufficient degree of assistance in the investigation and prosecution of another person.⁵⁶ This system creates enormous pressures to

corporations feel pressure to waive rights and cooperate).

⁵⁰ See generally Beale, *supra* note ___, at 1523-29.

⁵¹ Alschuler, *supra* note ___, at ____.

⁵² Beale, *supra* note ___, at 1525-29.

⁵³ In fiscal 2008, 96.3 percent of federal convictions resulted from guilty pleas. See U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Fig. C, available at <http://www.ussc.gov/ANNRPT/2008/FigC.pdf> and Table 10, available at <http://www.ussc.gov/ANNRPT/2008/Table10.pdf>.

⁵⁴ See Fed. R. Crim. P. 11(c)(1) (allowing attorneys for government and for defendant to reach a plea agreement that may involve the prosecutor's agreement (1) not to bring, or to move to dismiss some charges, (2) to recommend or agree not to oppose a particular sentence, or (3) to agree that a particular sentence or range is appropriate).

⁵⁵ See U.S.S.G. 3E1.1.

⁵⁶ See 18 U.S.C. § 3553(e) (providing that "[u]pon motion of the government" the court has the authority to impose a sentence below the mandatory minimum if the defendant has

cooperate in the case of defendants facing many decades of mandatory imprisonment for drugs or weapons offenses in a system that makes no provision for parole.⁵⁷

Do federal prosecutors have too much leverage in the current system? Perhaps so, but the issue is one that cannot, in good conscience, be limited to corporate defendants.

III. A comparative perspective yields some surprising conclusions

A comparative analysis provides no support for the claim that corporate criminal liability is so outmoded or anomalous that it should be eliminated. To the contrary, a review of the experience of other western industrial countries reveals five developments. First, instead of eliminating corporate criminal liability, several European jurisdictions that previously made no provision for corporate criminal liability have created such liability, and others have expanded existing bases of corporate liability for crimes. Second, several European nations now authorize more than one basis for holding a corporation criminally liable, providing for both respondeat superior liability and liability for overall organizational fault. Third, there is some precedent for alternatives, such as those proposed in the U.S., that focus corporate liability more narrowly than respondeat superior. Fourth, there are also new measures in both Canada and the U.K. that are intended to make it easier, not harder, to prosecute corporations for certain kinds of crimes. These reforms were responses serious corporate malfeasance that could not be successfully prosecuted under existing laws, which were deemed insufficient to protect the public interest. Finally, in Australia recent legislation has broadened the scope of liability—though only in some jurisdictions and for some classes of cases—using standards ranging from respondeat superior to new forms of liability that focus on inadequate management or defects in corporate culture.

A. Western European countries are creating and expanding corporate criminal liability

Beginning in the 1970s, nations throughout western European began creating or expanding corporate criminal liability, rather than contracting or eliminating it.⁵⁸ Some of the legislation affected small nations. For example, legislation in the Netherlands and Denmark

provided substantial assistance in the investigation or prosecution of another person who has committed an offense. In *Wade v. United States*, 504 U.S. 181, 185 (1992), the Supreme Court held that this provision operates as a limitation on the court's authority, but does not create a duty to file such a motion, a decision which is committed to the prosecutor's discretion.

⁵⁷ For an argument that this pressure is excessive across the board, see Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563 (1999) (arguing that the guidelines have created an overheated market for cooperation).

⁵⁸ For a more in depth discussion of these trends, see Beale & Safwat, *supra* note __, at 110-26. See also Thomas Weigend, *Soecietas delinquere no potest? A German Perspective*, 6 *J. INT'L CRIM. JUST.* 927, 928 (2008) (noting quick spread of corporate criminal liability to the Netherlands, Switzerland, Austria, and Italy).

provided that corporations are, in general, liable for all offenses within each nation's general criminal code.⁵⁹ In 1995, Finland imposed a new form of negligence-based criminal liability on corporations,⁶⁰ and in 2003 Switzerland for the first time imposed criminal liability on corporations.⁶¹ But perhaps the most significant legislation was adopted 1992 when France enacted a revised penal code that provided, for the first time, for corporate criminal liability.⁶² More recently, a 2000 amendment effectively expanded the scope of corporate liability under French law.⁶³ Additionally, transnational European organizations have recommended that their member states provide for criminal or quasi-criminal liability on organizations for specific types of offenses.⁶⁴

It should be noted, however, that not all European nations have followed this trend. The most significant exception is Germany, which has not overcome its traditional resistance to the imposition of criminal liability on artificial entities.⁶⁵

B. The contours of European corporate criminal liability

Not surprisingly, the scope of corporate liability varies from country to country within Europe. Although a detailed treatment is beyond the scope of this essay,⁶⁶ some general conclusions can be drawn.

⁵⁹Beale & Safwat, *supra* note __, at 110-112.

⁶⁰ *Id.* at 113.

⁶¹ *Id.* at 113-15.

⁶² *Id.* at 115-122.

⁶³ *Id.* at 119.

⁶⁴ *Id.* at 126-36 (discussing proposals of the Council of Europe and the European Union).

⁶⁵ *Id.* at 122-26. It is unclear whether the Siemens case, discussed *supra* at __, might spur a change in the German approach. At the time of Siemens' guilty plea in the United States, the U.S. press reported that German prosecutors had already announced a deal with Siemens that would cost the corporation the equivalent of \$540 million, plus earlier payments of \$290 million. Lichtblau & Dougherty, *supra* note __, at B8 (referring to the "[p]rosecutors in Munich" whose work first revealed the outlines of the bribery scheme, and describing the various payments to be made by Siemens in Germany).

⁶⁶ For a more detailed discussion, see generally *id.* (passim). ?? **Eds: Is there a better way to cite the article generally?**

First, the legislative developments in Europe serve as a rebuke to arguments that corporate criminal liability is an outdated historical vestige that serves no proper function in the contemporary world. These developments reflect an increasing recognition in Europe of the economic power wielded by corporations, the distinctive threats posed by that power, and the need for corporate criminal liability as one response to these concerns. The European scholarly commentary, moreover, reflects a view that corporations represent a distinct set of interests, have their own personalities, and are proper subjects of moral condemnation and stigma.⁶⁷

Second, the trend among these European nations adopting comprehensive liability schemes is to integrate respondeat superior and corporate organizational fault. Although France has not followed this approach, other European nations have imposed both forms of liability on corporations.⁶⁸ Why are two alternative theories of liability useful? If the prosecution can tie the offense to the conduct of an individual corporate employee, liability may be imposed under respondeat superior. But in some cases it may be difficult to find a single individual who is at fault, and in such cases the prosecution can establish its case by demonstrating an organizational failure. Switzerland imposes criminal liability on the basis of respondeat superior principles but qualifies it with the requirement that the prosecution also show that the corporation has not taken reasonable steps to prevent the offense.⁶⁹

C. Reforms that limit or refocus corporate criminal liability

While Western Europe has been creating and expanding corporate criminal liability, Australia and Canada—countries that share the U.S. common law heritage—have recently adopted legislation that restricts or at least reframes corporate criminal liability. But in the case of Canada, as noted below, this revision was combined with legislation that makes it easier to prosecute corporations for certain offenses involving the negligent creation of risks to public health and safety.

D. Reforms to make it easier to prosecute corporations

Since 2000 both the United Kingdom and Canada have adopted legislation intended to make it easier to prosecute corporations for homicide, though the Canadian legislation also imposes limitation on other types of corporate prosecutions.

In adopting the Corporate Manslaughter and Homicide Act of 2007,⁷⁰ the United Kingdom

⁶⁷*Id.* at 139-42

⁶⁸*Id.* at 155-58.

⁶⁹*Id.* at 113-15, and 157. The various approaches are also summarized graphically, *id.* at 163.

⁷⁰2007, c. 19.

Parliament broke dramatically with past judicial decisions narrowly circumscribing corporate criminal liability. With the exception of certain regulatory offenses, the House of Lords' decision in *Tesco Supermarkets v. Natrass*,⁷¹ rejected corporate criminal liability on the basis of respondeat superior. An English corporation was responsible only for the actions and state of mind "of those of its directors and managers who represent its 'directing mind and will.'"⁷² In practice, the restrictive "identification principle" meant that companies were liable only when one of the most senior officers acted with the requisite fault.⁷³ Accordingly, corporations could not be held liable even when a corporation's gross negligence was responsible for harm to many people, or even the loss of many lives. The crash at Ladbroke Grove Junction (also called the Paddington train crash) left 31 people dead and more than 500 injured in 1999, and a public enquiry led by Lord Cullen exposed many factors that led to the accident, including inadequate driver training, and improper maintenance of the track and signals.⁷⁴ The Railway Inspectorate and the Railtrack signaling staff were also criticized.⁷⁵ Although fines were imposed and a variety of reforms were undertaken to prevent similar occurrences, there was also a public perception that the legal system should be strengthened to allow the prosecution of the responsible entity in similar cases. Additionally, prior to the 2007 legislation there was no way to prosecute government departments or other Crown bodies, because of the doctrine of Crown immunity, and the fact that many Crown

⁷¹[1972] A.C. 153

⁷²ARCHBOLD, CRIMINAL PLEADING, EVIDENCE, AND PRACTICE § 17-30 (2007).

⁷³As Professor Celia Wells explained:

The relatively narrow doctrine developed via . . . *Tesco v. Natrass* had as its governing principle that only those who control or manage the affairs of a company are regarded as embodying the company itself. The underlying theory is that company employees can be divided into those who act as the 'hands' and those who represent the 'brains' of the company, the so-called anthropomorphic approach. The identification principle essentially meant that a company would be liable for a serious criminal offence (only) where one of its most senior officers had acted with the requisite fault.

CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 99–100 & 101 (2d ed. 2001).

⁷⁴For links to all the relevant reports, see <http://www.rail-reg.gov.uk/server/show/nav.1204> .

⁷⁵Id.

bodies had no separate legal identity for the purposes of a prosecution.⁷⁶

The new legislation provides:

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

. . . .

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).⁷⁷

As the explanatory notes prepared by the Ministry of Justice explain:

. . . [R]ather than being contingent on the guilt of one or more individuals, liability for the new offence depends on a finding of gross negligence in the way in which the activities of the organisation are run. In summary, the offence is committed where, in particular circumstances, an organisation owes a duty to take reasonable care for a person's safety and the way in which activities of the organisation have been managed or organised amounts to a gross breach of that duty and causes the person's death. How the activities were managed or organised by senior management must be a substantial element of the gross breach.⁷⁸

The new offence also applies to certain government departments and police forces, as well as partnerships and as trade unions acting as employers.⁷⁹

Although it is too soon to say whether this provision will be effective, it was certainly

⁷⁶See Corporate Manslaughter and Corporate Homicide Act of 2007, Explanatory Notes at 3, available at http://www.opsi.gov.uk/acts/acts2007/en/ukpgaen_20070019_en_1.htm [hereinafter Explanatory Notes].

⁷⁷Corporate Manslaughter and Homicide Act 2007, c. 19, §§ 1, 3.

⁷⁸Explanatory Notes, *supra* note __, at 3.

⁷⁹Corporate Manslaughter and Homicide Act 2007, c. 19, § 2.

intended to make it possible to prosecute cases which could not have been brought successfully under the prior law.

The developments in Canadian law were also a response to perception that it was too difficult to obtain corporate convictions. A government explanation of Bill C-45 refers to it as the “Westray Bill,” and identifies it as a response to a 1992 explosion in the Westray coal mine that left 26 miners dead.⁸⁰ After an unsuccessful attempt to prosecute either the company or three of its employees, a Royal Commission was established to make recommendations, including the recommendation that led to the enactment of Bill C-45.⁸¹

Bill C-45 creates a legal duty on the part of all persons “directing the work of others” to take reasonable steps to ensure the safety of both the workers and the public.⁸² It also sets forth general standards for holding organizations liable for the acts of their representatives, distinguishing between the standards applicable to negligence offenses and those requiring a higher mental state.⁸³

In the case of negligence offenses, the new Canadian statute includes several features designed to make it easier to prosecute corporations. First, the statute provides that a corporation is responsible for the acts or omissions of its “representatives” acting in the scope of his or her authority, and defines “representative” to include any “employee,” “agent or contractor of the organization” as well as more senior officials.⁸⁴ It also attributes to the corporation the acts or omissions of multiple “representatives” taken together.⁸⁵ Note, however, that in either case the prosecution must also show a failure to prevent the negligent act or omission that breached a reasonable standard of care,⁸⁶ but the negligent failure to supervise may be the failure of an identified senior officer or the failure, collectively to put in place an effective supervisory system

⁸⁰Canadian Centre for Occupational Health and Safety, Bill C-45 – Overview, available at <http://www.ccohs.ca/oshanswers/legisl/billc45.html>.

⁸¹*Id.*

⁸²Canadian Crim. Code C-46, 217.1.

⁸³Compare Canadian Crim. Code C-46 § 22.1 (defining standard for offenses requiring negligence), and § 22.2 (defining standard for offenses requiring proof of “fault”).

⁸⁴*Id.* at § 22.1(a)(i) and 2..

⁸⁵*Id.* at § 22.1(a)(ii).

⁸⁶*Id.* at § 22.1(b)

or authority.⁸⁷

In contrast, when a higher mental state is required, a corporation is liable only when one of its senior officers has both the higher mens rea level and more direct involvement in the conduct constituting the offense.⁸⁸ Two features of the law were designed to expand liability for these offenses. First, the law expanded the definition of the persons who count as “senior officers” beyond those who would be deemed the directing mind, encompassing any employee or agent “who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities.”⁸⁹ Second, the law allows the imposition of liability for what might be deemed merely letting the crime happen, i.e., a senior officer’s failure to take reasonable steps to prevent the offense knowing that a representative of the corporation was about to commit the offense.⁹⁰

E. Australia: a mixed system with some movement to expand liability

Corporate criminal liability also exists in all jurisdictions within Australia’s federal system, and there have been significant efforts to redefine and broaden its scope in the last 20 years. Although Australia has some decisions adopting vicarious criminal liability for corporations,⁹¹ for serious offenses the Australian courts have generally followed the House of Lords’ decision in *Tesco*, which limits liability to cases involving senior officers who can be characterized as the corporation’s directing mind.⁹² This narrow standard continues to be

⁸⁷*Id.*

⁸⁸*Id.* at § 22.2 (imposing liability for fault offenses only if one or more of the senior officers (1) committed the offense while acting within the scope of their authority, or (2) acting with the kind of mens rea required by the offense directed another representative of the corporation to perform the conduct constituting the offense, or (3) failed to take reasonable steps to prevent the offense knowing that a representative of the corporation is about to commit the offense).

⁸⁹*Id.* at § 2.

⁹⁰*Id.* at 22.2(c).

⁹¹BERNADETTE MCSHERRY & BRONWYN NAYLOR, AUSTRALIAN CRIMINAL LAWS 35 (2004).

⁹²McSherry & Naylor, *supra* note __, at 35; BRENT FISSE, HOWARD’S CRIMINAL LAW at 599-600 (5th ed. 1990); Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM. L. F. 1, 10 (1995). The High Court of Australia approved of the *Tesco* approach in *Hamilton v. Whitehead*, (1988) 166 CLR 121. *See also* John Thornton, *Criminal Liability of Organisations* at 2 (2008), available at <http://isrcl.org/> (conference papers).

applicable in most cases, but several legislative initiatives have imposed broader standards.

One form of legislative action has focused on particular offenses. The judicial acceptance of *Tesco* provoked what one author characterized as “a counter-reaction under statute,” leading to the enactment of numerous provisions imposing respondeat superior corporate liability for particular offenses.⁹³

More fundamental change has also been proposed, though it has been enacted only in legislation affecting federal and territorial offenses. A national commission was established to provide discussion papers and a draft model criminal code, and this process led to the adoption of a new federal criminal code in 1995.⁹⁴ The code commission regarded the treatment of corporate liability as inadequate, especially for large corporations, citing major disasters such as Bhopal and the Exxon Valdez in support of its argument for reform.⁹⁵ Additionally, the commission “considered the focus on identifying a culpable employee as too narrow in light of the greater delegation to junior officers in modern organizations, and changing corporate structures.”⁹⁶ Accordingly, the commission recommended a major revision of corporate criminal liability, which was adopted as part of the new federal criminal code.⁹⁷

Australia’s federal code creates multiple bases for corporate criminal liability.⁹⁸

⁹³Fisse, *supra* note __, at 600. **Error! Main Document Only.**The most recent example is trade practices legislation adopted in 2009. The Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Aust.) creates two new corporate cartel offenses, §§ 44ZZRF (making a contract containing a cartel provision) and 44ZZRG (giving effect to a cartel provision), and Item 18 of the Act states that the exception in § 6AA(2) of the consolidated Trade Practices Act 1974 excludes Part 2.5 (the general corporate liability provisions) of the Criminal Code. The Act is available <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/frame1odgmentattachments/52E05F242044340FCA2575EC0017F493> . I am indebted to John Thornton, First Deputy Director, Office of Commonwealth Director of Public Prosecutions, for drawing this to my attention and explaining the interaction of the provisions in question.

⁹⁴For a discussion of the process leading to the new code, see McSherry & Naylor, *supra* note __, at 30.

⁹⁵Thornton, *supra* note __, at 5-6 (quoting Model Criminal Code Officers Comm., Final Report, Dec. 1992, at 105-07).

⁹⁶McSherry & Naylor, *supra* note __, at 148.

⁹⁷The Commonwealth Criminal Code is appended as a schedule to the Criminal Code Act of 1995. It came into force on January 1, 1997. See McSherry & Naylor, *supra* note __, at 30.

⁹⁸The explanatory memorandum accompanying the new legislation also made it clear that the provision was not intended to be the exclusive basis for prosecution, even in the

Collectively, these broaden its reach considerably for cases that fall under federal jurisdiction. The code draws several distinctions. First, it uses respondeat superior principles to attribute conduct: a corporation is responsible for the conduct of any of its officers, agents, or employees acting within the actual or apparent scope of their authority.⁹⁹ Second, the code bifurcates the attribution of mens rea, distinguishing between offenses that require only negligence and those that require higher mental states.¹⁰⁰ When negligence suffices, if no individual officer, employee, or agent was negligent, a corporation may nonetheless be held criminally liable if “the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).”¹⁰¹ Additionally, corporate negligence may be shown by inadequate management or failure to provide adequate systems to ensure that information goes to the relevant persons within a corporation.¹⁰² In the case of offenses requiring a higher mens rea level, the code provides multiple bases for corporate liability. A corporation is liable when either its board or a high managerial agent carries out, authorizes, or permits the offense with intention, knowledge or recklessness.¹⁰³ But a corporation is also criminally liable if it had a defective corporate culture that “directed, encouraged, tolerated, or led to non-compliance” or that did not require compliance.¹⁰⁴ It is not clear whether this latter provision allows for a demonstration of culpability based on corporate culture alone, without evidence that a particular

Commonwealth courts. *See* Thornton, *supra* note ___, at 12 (noting that the explanatory memorandum stated it was open to the legislature to employ other legal mechanisms, such as strict liability or a shift in the burden of proof, to impose liability on corporations for particular offenses).

⁹⁹Criminal Code § 12.2 provides:

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

¹⁰⁰*See id.* at §§ 12.3 (specifying when a corporation may be held responsible for fault element of offenses requiring “intention, knowledge, or recklessness”), and 12.4 (specifying when corporation may be held responsible for fault element of offenses requiring negligence).

¹⁰¹*Id.* § 12.4(2).

¹⁰²*Id.* § 12.4(3).

¹⁰³*Id.* § 12.3(2)(a) & (b). In the case of conduct that is authorized or permitted by a high managerial agent, the code recognizes a defense if the corporation proves that it “exercised due diligence to prevent the conduct, or the authorisation or permission.” *Id.* at 12.3(3).

¹⁰⁴*Id.* § 12.3(2)(c) & (d).

agent of the corporation actually acted with the requisite mens rea.¹⁰⁵

The drafters of the federal code hoped its provisions would serve as a model and be adopted in the other eight Australian jurisdictions (six states and two territories),¹⁰⁶ but so far only the Australian Capital Territory and the Northern Territory have adopted reforms based upon the federal provisions.¹⁰⁷

IV. Collateral consequences should be collateral to the discussion

Despite their critical real world importance, the collateral consequences of conviction should not play a central role in debates concerning the proper scope of corporate criminal liability. It is quite true that the conviction of a corporation often triggers collateral consequences that have a far greater impact than any criminal penalties that may be imposed. Indeed, the risk of such collateral consequences may drive corporations to settle a case through a deferred prosecution agreement even when they may have a good defense. At the end of the day, however, these consequences have no necessary relationship to question of the corporation's criminal liability. A variety of serious collateral consequences will also occur if a corporation is not itself charged with a crime, but it is charged in a civil lawsuit or regulatory proceeding, or criminal charges are filed against a representative of the company for actions taken in the course of their

¹⁰⁵ See IAN LEADER-ELLIOTT, *THE COMMONWEALTH CRIMINAL CODE: A GUIDE FOR PRACTITIONERS* 309, 311 (2002), available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_CriminalCodePractitionerGuidelines-March2002. (The Commonwealth Attorney-General's Department issued guidance questioning the suggestion by Professor Eric Colvin that "[t]he fault element...can be located in the culture of the corporation even though it is not present in any individual." Instead, the guidance argued that, practically at least, "[t]he better view is that intention, knowledge and recklessness cannot be attributed to a corporation unless an agent acted with intention, knowledge or recklessness.")

¹⁰⁶ McSherry & Naylor state that although the new Code applies only to Commonwealth offenses, "it was hoped that it would serve as a model to be adopted in due course by the other eight Australian jurisdictions." As of their 2004 book, only step in that direction had been taken by the Australian Capital Territory. McSherry & Naylor, *supra* note __, at 30.

¹⁰⁷ The Australian Criminal Code of 2002 for the Australian Capital Territory, which is based upon the federal model, became effective June 2, 2009. Part 2.5, which defines corporate criminal liability, is modeled on, but not identical to, the relevant provisions of the federal code. See Stanley Yeo, *Manslaughter Versus Special Homicide Offenses: An Australian Perspective*, in C. M. V. CLARKSON & SALLY CUNNINGHAM, *CRIMINAL LIABILITY FOR NON-AGGRESSIVE DEATH* 202 & nn. 18-19 (2008) (describing action in the territories following the federal approach). See *also id.* at 202-06 (discussing territorial approach to corporate liability for manslaughter).

employment.¹⁰⁸ And similarly draconian collateral consequences may result when individuals are convicted, but these are not regarded as a reason to eliminate individual liability for criminal offenses. Prosecutors do, however, appropriately take account of the collateral consequences that an individual will suffer if he or she is convicted. The same should be true in the cases of corporate criminal liability.

It is beyond dispute that a variety of serious collateral consequences occur when a corporation is convicted of a serious offense, though the consequences vary considerably depending upon factors such as the nature of the offense and the business in which the corporation is engaged. Some regulatory schemes disqualify or debar corporations that have been convicted of certain offenses. For example, under ERISA a corporation may not serve as a qualified professional asset manager (QPAM) if it has been convicted of certain felonies involving fraud or deception within the past 10 years.¹⁰⁹ Indeed the disqualification carries even further, since an otherwise qualified corporation cannot serve as a QPAM if it receives services from a corporation that has had such a conviction.¹¹⁰ More generally, the Federal Acquisition Regulations (FARs) debar for a three year period corporations that have been convicted of fraud or a criminal offense related to obtaining or performing a government contract.¹¹¹ Being debarred from government contracting or disqualified as a QPAM may wipe out much or all of a

¹⁰⁸ For example, the Securities and Exchange Commission (SEC) requires most publicly held corporations to file annual and quarterly disclosure of material pending civil litigation involving claims for damages that are greater than 10 percent of the corporation's assets. 17 C.F.R. § 229.103 & Instruction 2 to Item 103. In addition, the same corporations must annually report any criminal convictions (within the prior five years) or pending criminal proceedings involving a director, a person nominated to become a director, or an executive officer, if such proceedings are "material to an evaluation of the ability or integrity" of those individuals. 17 C.F.R. § 229.401. "Smaller Reporting Companies" as defined in 17 C.F.R. § 229.10 are exempt from these reporting requirements.

¹⁰⁹ See Stanley L. Iezman & Scott W. Darling, Pension Fund Real Estate Investments: The Role of the Qualified Professional Asset Manager (QPAM): A Primer for Trustees, *available at* <http://www.qpam.com/articles/TrusteePrimer.htm> . [add or substitute citation to QPAM regulation itself.]

¹¹⁰ *Id.*

¹¹¹ See Federal Acquisition Regulation (FAR) § 52.209-5; Common Rule Appendix.

corporation's business. Other statutory or regulatory provisions, such as the Securities Exchange Act of 1934, require that a corporation give public notice of a criminal indictment or conviction.¹¹² The negative publicity created by such a notification may wreck havoc on both the corporation's stock price and its business opportunities.

There are other sources of collateral consequences. Many state agencies that regulate particular industries (such as insurance) and foreign regulators may treat a criminal conviction—or even an indictment—as the trigger for some official action, ranging from the requirement of giving notice to automatic debarment or disqualification. Other collateral consequences are the result of private agreements, which may require notification if a party to the agreement has been indicted or convicted, and may treat such an event as a breach.

Recognizing the existence and importance of such collateral consequences does not, however, mean that corporate criminal liability should be eliminated or restricted. These collateral consequences have no intrinsic connection with criminal liability. Indeed, in some cases, civil liability already has the same collateral consequences. Thus a government contractor is debarred not only if it has been convicted of certain offenses, but also if it has had a civil judgment rendered against it for fraud.¹¹³ And civil or regulatory actions, like criminal actions,

¹¹² It appears that the SEC requires disclosure of any significant criminal indictment, and probably any pending criminal investigation of which the corporation is aware, in both quarterly and annual reports filed by publicly held companies. The regulation that governs the disclosures on SEC Forms 10-Q and 10-K, requests a description of “any material pending legal proceedings . . . to which the registrant [corporation with registered securities] or any of its subsidiaries is a party or of which any of their property is the subject. The regulation also instructs the corporation to “[i]nclude similar information as to any such proceedings known to be contemplated by governmental authorities.” 17 C.F.R. §229.103. Although almost all criminal proceedings are likely to be considered “material” by both the corporation and shareholders, the lack of a “bright-line definition” for materiality may create debate about borderline cases. See THOMAS LEE HAZEN, 2 TREATISE ON THE LAW OF SECURITIES REGULATION §§ 9.3, 9.4[5][C] (2009). Note that publicly held corporations that qualify as “Smaller Reporting Companies” are not subject to these disclosure requirements; the SEC defines such corporations as those that “(1) have a common equity public float of less than \$75 million or (2) are unable to calculate their public float and have annual revenue of \$50 million or less, upon entering the system.” See <http://www.sec.gov/info/smallbus/secg/smrepcosysguid.pdf>.

More immediate disclosure of a criminal indictment using Form 8-K, a “current report” filed when certain triggering events occur, may also be appropriate. 17 C.F.R. § 249.308. However, such disclosure does not appear to be mandatory, because instigation of criminal proceedings is not an event specified by the form. Rather, the final provision in the form, Item 8.01, specifies that “[t]he registrant may, at its option, disclose . . . any events, with respect to which information is not otherwise called for by this form, that the registrant deems of importance to security holders.”

¹¹³ See Federal Acquisition Regulation (FAR) § 52.209-5; Common Rule Appendix.

must also be disclosed under some statutes or regulations. The parties to an agreement may also bind themselves to disclose, and even treat as a breach, many other events, including adverse civil judgments against the corporation, or the conviction of a corporate officer or employee. State or foreign regulators may do the same.

There may be some disqualification, debarment, or notice provisions that are currently triggered only by a criminal conviction. But there is no reason to assume that would still be true if criminal liability for corporations were eliminated. If criminal liability were eliminated, provisions governing disbarment, disqualification, or notice could (and probably should) be amended to apply to cases of a civil or regulatory determination of wrongdoing. In other words, if corporations were no longer subject to the criminal law, a mechanism would still be necessary to bar those that had engaged in fraudulent activity from managing ERISA funds and serving as government contractors.

It is also important to note that the collateral harms flowing from criminal convictions are not limited to entities. An individual (as well as a corporation) may be disqualified from serving as a QPAM, or from contracting with the government, if he or she is convicted of a crime. Similarly, an individual may be found to be in default of a valuable contract if he or she is convicted. Indeed, the collateral consequences of an individual's conviction (particularly deportation) may be the most serious consequence of his or her conviction.

For all of these reasons, the prospect of collateral consequences is one that must be addressed by prosecutors on a case by case basis whenever they consider whether to file criminal charges against either an individual or a corporation, but these concerns should not drive the questions whether and under what circumstances corporations should be subject to criminal sanctions.

Conclusion

The power and the corresponding scale of the wrongs that can be committed by modern corporations are unprecedented. For that reason, it is important for society to have at its disposal the full range of legal tools, including both regulations intended to prevent harm as well as civil and criminal remedies. Corporate criminal liability is not a unique and anachronistic feature of U.S. law. To the contrary, corporate criminal liability is increasingly regarded as a necessary part of the law of developed western nations. Accordingly, U.S. corporations can be prosecuted not only at home, but also in other countries where they do business. Indeed, French prosecutors recently charged Continental Airlines with manslaughter in connection with the crash of the Concorde supersonic airliner near Paris, which killed all aboard, and the case is expected to go to trial in February 2010.¹¹⁴

¹¹⁴Valerie de Senneville, *Les précédents judiciaires du crash du mont Sainte-Odile et de l'accident du Concorde*, LES ECHOS, June 18, 2009 at 25 (reporting that involuntary manslaughter charges against Continental Airlines, one of its chief technicians, two people responsible for the Concorde program at a French aerospace manufacturer, and the ex-director of the aeronautic group for technical control of the French aviation authority are expected to go to trial in February

There are problems with corporate criminal liability in the United States. But any agenda for reform should take account of two key points. First, as discussed in part II of this essay,¹¹⁵ those problems are generally endemic to the criminal justice system (and especially the federal criminal justice system), rather than unique to corporations. Indeed, corporations might be seen as canaries in a coal mine. Their experience puts a spotlight on problems (such as the effects of the enormous leverage now wielded by federal prosecutors) that also affect countless less visible defendants whose cases remain in the shadows. The study and reform of the fundamental issues brought to light in the focus on corporate criminal liability should focus on the system as a whole, not merely the tiny percentage of cases in which corporations are or may be charged.

Second, the agenda for reform should include the question whether corporate criminal liability (and/or other mechanisms such as civil liability and regulatory oversight) needs to be strengthened or expanded. Reformers should focus both on cross cutting general issues and on corporate responsibility for particular kinds of offenses. Developments in other nations are instructive. Other nations are generally creating and broadening corporate criminal liability, not eliminating or restricting it. These developments include providing multiple bases of liability, including both liability based on the defective management of the entity or its culpable ethos and liability based on respondeat superior or vicarious liability for the actions of high managerial agents.¹¹⁶ Reform in other nations has also provided for the aggregation of the conduct of multiple employees.¹¹⁷ Second, the reform efforts have focused on particular kinds of offenses, including corporate liability for health and safety related offenses and public corruption.

In Canada and the United Kingdom, mass disasters such as the collapse of the Westray mine, the train crash at Paddington, and the capsizing of the ferry Herald of Free Enterprise in the English Channel were catalysts for reforms making it easier to impose criminal liability on corporations for physical injuries and/or deaths.¹¹⁸ In both countries, legislative changes were

2010), and Alan Cowell & Matthew L. Wald, *Criminal Charges Against Continental in Deadly Concorde Crash*, N.Y. TIMES, July 4, 2008, at C3 (describing the prosecution's theory that the crash occurred because the Concorde's tire was damaged during takeoff by a metal strip that fell off an improperly maintained Continental DC-10 airliner). Between 2000 and 2006 the average number of corporations charged criminally in France varied from 267 to 444. Weigend, *supra* note __, at 943 n.94 (citing statistics reported in F. DESPORTES & F. LE GUNHEC, DROIT PENAL GENERAL 1132 (13th ed. 2006)).

¹¹⁵See *supra* __ to __.

¹¹⁶See *supra* __ to __, and __ to __ (describing developments in western Europe and in Australia).

¹¹⁷See *supra* at __ (describing § 12.4(2) of Australian federal code).

¹¹⁸See *supra* __ to __ (describing official enquiry into the Westray Mine collapse, failed prosecution, and adoption of Bill C-45), and __ to __ (describing official enquiry and U.K.

adopted after prosecutors were unable to secure corporate convictions in these cases, despite the fact that official inquiries found that corporate fault caused the loss of many lives.¹¹⁹ In addition, the sense that regulatory oversight also failed in those cases led to the inclusion of provisions allowing governmental entities, such as police departments, to be convicted of manslaughter in the United Kingdom.¹²⁰ Does the U.S. need similar reforms? The collapse of the Crandall Canyon mine in 2007, which caused the death of six miners and three rescue workers,¹²¹ may be a test case.¹²² After finding that the mine operator's multiple violations directly contributed to the deaths and that the operator and its engineering consultants demonstrated a reckless disregard for safety, the Mine Safety Health Administration imposed the largest-ever fines against a mine operator and referred the case for a criminal investigation.¹²³

Parliament's response to the Paddington train crash).

¹¹⁹*Id.*, and *see also* McSherry & Naylor, *supra* note ___, at 149 (describing several unsuccessful efforts in England to prosecute corporations for manslaughter including the prosecution of P&O Ferries after the sinking of the Herald of Free Enterprise and the prosecution of Great Western Railways after the Paddington train crash).

¹²⁰*See supra* at ___.

¹²¹Ian Urbina, *Utah Mine Disaster was Preventable, Report Says*, N.Y. TIMES, May 9, 2008.

¹²²In May 2009 a Montana jury acquitted W.R. Grace & Co. (and three former executives) in one of the most significant criminal cases ever brought against a polluter, but too many factors affected the case to draw any general conclusions. An estimated 1,200 residents of a small town in Montana have died or developed cancer or lung disease, and the prosecution charged that Grace had knowingly exposed the town's residents to asbestos poisoning and conspired to hide the danger. From the first the prosecution's effort to prove the criminal case was hampered by statutes of limitation. As the case went to trial, the presiding judge accused the prosecution team of poor planning and incompetence, and said they had withheld key information that would have undermined the testimony of the government's main witness, a former Grace employee. Accordingly, he instructed the jury to view the witness's testimony with "great skepticism." For descriptions of the trial and verdict, see Kirk Johnson, *Asbestos Prosecution Results In Acquittals*, N.Y. TIMES, May 9, 2009, at A10, and Kim Murphy, *Jury Acquits Mine Company, Officials in Asbestos Case*, L.A. TIMES, May 9, 2009, at ___.

¹²³*See* Robert Gehrke and Mike Gorrell, *MSHA Cites Poor Design, Anemic Oversight in Crandall Canyon Disaster*, THE SALT LAKE TRIBUNE, July 24, 2008 (describing the operator's violations and the fines imposed); and News Release, Mine Safety & Health Administration, MSHA refers issues relating to Crandall Canyon Mine to U.S. attorney for District of Utah (Sept. 3, 2008) (announcing criminal referral to U.S. Attorney in Utah), *available at*

<http://www.msha.gov/MEDIA/PRESS/2008/NR080903.asp>.

European authorities have also focused on the need for criminal sanctions to respond to corruption, and have urged all European nations to adopt criminal anti-corruption laws.¹²⁴ The unprecedented scale and geographic reach of the bribery by German engineering company Siemens (which paid billions in bribes to government officials in Asia, Africa, Europe, the Middle East, and Latin America to secure public works contracts)¹²⁵ vividly demonstrate the degree to which corruption can become entrenched within a corporate culture, and the impact it can have on the public. Within Europe, Germany has been the most significant jurisdiction bucking the trend against the adoption and expansion of corporate criminal liability.¹²⁶ It will be interesting to see if the Siemens scandal leads German authorities to rethink their opposition to corporate criminal liability.¹²⁷ In contrast, the U.S. was able to successfully prosecute Siemens because we have both the tough anti-corruption provisions of the Foreign Corrupt Practices Act and a strong form of corporate criminal liability.¹²⁸

The bottom line is that we need to maintain corporate criminal liability, and any reforms

¹²⁴See Beale & Safwat, *supra* note __, at 129-30, 1335-35 (describing proposals by Council of Europe and European Union).

¹²⁵For a description of the conduct to which Siemens plead guilty, see *at* <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html> .

¹²⁶For an excellent description of the traditional German position, as well as the pressures for change, see Wiegend, *supra* note __, at 930-45). (arguing that introducing criminal liability would be at odds with fundamental assumptions of German criminal law which are not compatible with utilitarian view that underlies modern corporate criminal liability approaches in other countries). See also Beale & Safwat, *supra* note __, at 122-26 (describing traditional German opposition to corporate criminal liability and proposals for change by some scholars and prosecutors).

¹²⁷In late 2008, after a two-year investigation, Siemens agreed to pay a record €1 billion fine. *Siemens Anxious to Put Bribery Scandal in the Past*, IRISH TIMES, December 27, 2008, Finance at 16. Although Siemens is trying to put the scandal behind it, prosecutors may seek further indictments among the hundreds of people linked to the investigation. Carter Dougherty, *Ex-Manager Tells of Bribery at Siemens*, N.Y. TIMES, May 27, 2008, at C4. Prosecutors reportedly hope the Siemens case will convince German corporations to clean up their practices. Siemens has already begun this process by hiring Michael Hershman of the watchdog group Transparency International, to help design an anticorruption training system for Siemens employees. *Id.*

¹²⁸Siemens' plea to violations of the U.S. Foreign Corrupt Practice Act is discussed *supra* at __, and in Henning, *supra* note __, at __.

we undertake should enhance rather than reduce the protection of the public.