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THE CRIMINAL LIABILITY OF CORPORATIONS AND OTHER GROUPS: A COMPARATIVE VIEW

*L.H. Leigh**

In recent years, economic, or white-collar, crime has attracted widespread interest in both America and Europe. Increasingly, we are exhorted to turn our attention from the problems of street crime to those of corporate crime. Corporate crime involves vast sums; it can prejudice not only the financial interests of citizens, but also their lives and their property; it can thwart important state policies, such as controlling pollution, fostering competition, and protecting consumers. These pressures are felt throughout the industrialized world. It is not surprising, therefore, that corporate criminal liability has been discussed extensively by scholars who have addressed the problem of economic crime. Corporate criminal liability¹ is one method by which states seek to control business activities, a method that dates back, at least in the United States, to the passage of the Sherman Act of 1890.² It is currently being advocated in Europe as a means to control the excesses of economically powerful entities.³ Yet not all scholars agree that corporate criminal liability is the best means of achieving such control, and those who concede its value do not necessarily agree that all corporate wrongdoing should be penalized criminally.⁴

In this Article, I propose to survey the status of corporate and

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1. Although there is a substantial body of legal writing that proceeds on the assumption that there is such a thing as corporate crime, notorious ambiguities of usage need to be examined. What for instance is meant by "corporate" crime? In some usages it clearly does not connote that criminal liability may be ascribed to a corporation, but refers to such further matters as the conditions of ascription and how they relate to the realities of the corporate entity as some scholars see them. Corporate criminal liability as a method of control also calls into question fundamental values pertaining to the personal character of guilt and punishment, as well as functional questions of effectiveness.

2. Sherman Act, 15 U.S.C. §§ 1-7 (1976).

3. See, e.g., *La Responsabilit Penale Delle Persone Giuridiche* in DIRITTO COMUNITARIO 99-100 (University of Messina ed. 1981) [hereinafter cited as MESSINA SYMPOSIUM] (remarks by Faure); Delmas-Marty & Tiedemann, *La Criminalit, le droit penal et les multinationales*, 1979 *Juris-Classeur Priodique*, la semaine juridique, [J.C.P.] II No. 53, at I-2935.

4. See Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 *AM. CRIM. L. REV.* 501 (1979-1980).

group liability in Europe and in the common-law countries, and to examine the alternative methods of control devised in various legal systems. In most European countries, the rule is that *societas delinquere non potest*.⁵ Certain countries, for example, Italy and West Germany, have constitutional provisions that preclude corporate guilt.⁶ In other systems, the same arguments that originally impeded the development of corporate criminal liability in the common-law countries have simply had a more pervasive and lasting influence. These arguments may be summarized quickly: a corporation has no mind of its own and therefore cannot entertain guilt; it has no body and therefore cannot act *in propria persona*; punishing it would violate the fundamental principle that punishment must be imposed only on the actual offender; the regime of penalties does not contemplate possible corporate offenders; and, finally, procedures such as *instruction* (or rehabilitation) are not well adapted toward dealing with corporate entities.⁷ These difficulties have been overcome in common-law countries, but not always convincingly in European eyes.

Yet, fundamental as some of these objections appear to be, they have not inhibited the Netherlands from moving toward a full measure of corporate guilt, nor have they completely barred reform in other countries such as Finland, Poland, Norway, and France.⁸ Even in Spain, reforms of this sort have been envisaged.⁹ And while common-law and European systems start from first principles that are diametrically opposed, they often arrive in practice at a structure of liability that produces broadly similar answers to the problems of corporate crime. The coverage achieved by a system of administrative offenses, or by a system that permits corporations to be fined as a

5. I stress modern developments because most European systems recognized forms of corporate liability until the time of the French Revolution, examples being liability imposed on cities for rebellion and riot in European countries, and upon the hundred in English law for failure to maintain public works. But on the continent, this liability disappeared. To some continental jurists, corporate criminal liability, which we consider to be a response to problems thrown up by the modern industrialized state, appears medieval. See Huss, *La Responsabilité pénale des personnes morales*, in MESSINA SYMPOSIUM, *supra* note 3, at 351. For the history of the topic in Continental systems, see Barbero Santos, *Responsabilidad penal de las personas jurídicas*, in MESSINA SYMPOSIUM, *supra* note 3, at 454-58. For a history of corporate liability in the common law, see L. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* 1-2 (1969).

6. See MESSINA SYMPOSIUM, *supra* note 3, at 599 (remarks by Lupo); Screvens, *Les sanctions applicables aux personnes morales*, in MESSINA SYMPOSIUM, *supra* note 3, at 179-80.

7. See Huss, *supra* note 5.

8. See Delmas-Marty, *La Responsabilité Pénale de Groupements*, *REVUE INTERNATIONALE DE DROIT PENAL*, 50e année, Nouvelle Série, 1e et 2e Trimestre (1980).

9. See Barbero Santos, *supra* note 5; Yañez Roman, *Revista de Libros y de Revistas*, in 25 ANUARIO DE DERECHO PENAL Y CIENCIAS PENALES, (1972.)

secondary party or assessed damages as a civil consequence of a crime, or by one that contains provisions imposing corporate liability only for certain offenses, for example, may differ little from that achieved under a system of full corporate liability.¹⁰ But the theoretical objections noted above continue to affect profoundly the structure of proposed reforms.

Briefly, three positions concerning corporate liability may be identified. First, there are systems of full corporate criminal liability, such as those in England and the United States. Second, there are systems that recognize only partial corporate criminal liability, for example Denmark, Belgium, and France. Finally, some systems do not permit such liability at all, or permit it only under the guise of administrative offenses. Italy and West Germany afford examples of this restrictive view of corporate liability.

This Article will sketch each of these positions in some detail, beginning, in Part I, with those systems that authorize full liability. Part II discusses systems that presently fall within the second category noting some recent suggestions for broader liability. Part III deals with systems that provide for only administrative liability, outlining the sanctions developed under those systems. In Part IV, I briefly summarize the sanctions directed against individual corporate directors and officers in all of these systems.¹¹

I. SYSTEMS OF FULL CORPORATE LIABILITY

Full corporate criminal liability developed first in a modern form in the United States and Canada, then in England, and more recently in the Netherlands. In systems having full corporate criminal liability, the general rule is that all corporations are criminally liable without limitation as to type. In the Netherlands, for example, liability is expressly imposed on corporations by Article 51 of the Criminal Code.¹² So wide is the rule in most common-law jurisdictions that even state corporations may be convicted of offenses,¹³ although this extension has been vigorously criticized.¹⁴ Where jurisprudence

10. Belgium and France provide examples. See Screvens, *supra* note 6.

11. I do not ignore the need for socioeconomic analysis of contemporary problems that the method of corporate liability has been devised to meet, in part at least, but that must be the concern of further scholarship. In the confines of this paper, my concern must be primarily legal.

12. See Fasseur, *The Criminal Liability of Legal Persons in Netherlands Law*, in MESSINA SYMPOSIUM, *supra* note 3, at 309.

13. *E.g.*, Rex v. Yorkshire Elec. Board, *The Times* (London), Nov. 17, 1951 at 3, col. 3.

14. Professor Glanville Williams suggests that the net effect is simply to penalize the public at large. G. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* 864 (2d ed. 1961). M. Huss, relying on a jurisprudential view long since rejected in England, considers that as such corpo-

of an antique sort still has its day is seen in respect of the question whether bodies that the law has not endowed with corporate status may be treated as legal persons for the purpose of prosecution. In some systems the problem has been resolved by legislation that specifies which unincorporated bodies may be so treated. This is true in England for some offenses involving trade unions.¹⁵ And a recent attempt to recodify the federal criminal law in the United States would permit almost any organization to be held criminally liable.¹⁶ In general, however, one must look to the details of particular state and federal laws to determine whether an entity that does not enjoy corporate status is a legal entity.

In determining whether a corporation may be criminally liable, one must also consider the problem of *ultra vires* acts by corporate employees. It is generally accepted in England and in the United States that a company founded for lawful purposes may nonetheless commit crimes. The solution in English law, where the *ultra vires* rule is strict, is that the crime may be imputed to the company where its activity falls within the class of activities permitted by its objects clause.¹⁷ In Europe, the general rule is the same, but commentators have difficulty visualizing how a company that was formed for commercial purposes could be held liable for offenses foreign to the corporate purpose.¹⁸ This in turn is reflected in the view, fairly widely held, that only commercial and industrial corporations should be held criminally liable and then only for economic offenses.¹⁹

Under a system of full corporate criminal liability, however, there is no reason why criminal prosecution of corporations should be limited to economic offenses. Provided that will and act can be

rations are not the creature of a number of persons coming together, that they could not themselves have a collective will capable of entertaining guilt. Huss, *supra* note 5, at 371. Neither criticism is persuasive, though both are suggestive. In those countries that accord independence of activities to state corporations, it would not be sufficient simply to admonish officers of such corporations through governmental channels; the fact of a criminal conviction may cause such corporations to take remedial action in the same way as a privately owned corporation would. As to the second criticism, in England at least, it is now accepted that there is no theory of corporate personality; the law recognizes as a corporation an entity that the legislature endows with the attributes of corporate status. Hart, *Definition and Theory in Jurisprudence*, 70 L.Q. REV. 37 (1954). A corporation without members has, nonetheless, directors who think and act for it, and whose intention may be treated as criminal and imputable to the corporation.

15. See Trade Unions Act, 1871, 34 Vict. ch. 3 §§ 15-16.

16. Criminal Code Reform Act of 1979, S. 1722, 96th Cong., 2d Sess. § 111, 125 CONG. REC. 12,203 (1979). See S. REP. NO. 553, 96th Cong., 2d Sess. 82 (1980).

17. See L. LEIGH, *supra* note 5, at 46-51.

18. See Delmas-Marty, *supra* note 8.

19. See, e.g., Delatte, *La Responsabilité Pénale des Personnes Morales*, in MESSINA SYMPOSIUM, *supra* note 3, at 306.

attributed to a corporation, there is nothing, in theory, to prevent a corporation from being held liable for an offense of violence such as murder. It is clear that the general rule permits liability for manslaughter, especially where death is attributable to an omission rather than to an unlawful act.²⁰ While the Ford Motor Company was acquitted of manslaughter charges arising out of defects in the design and positioning of the Pinto's gasoline tank, the acquittal was on the merits and was not based on any view that the corporation could not be convicted of manslaughter as a matter of law.²¹ Perhaps the spectral mind seems less incongruous than the spectral hand. Even for the narrow class of offenses in which attribution of an act to the corporation is theoretically impossible — *e.g.*, rape, bigamy, and the self-administration of a noxious drug to procure an abortion — a corporation might still be charged as an accessory to the crime.²²

What is not clear, however, is whether courts in any of those systems that permit corporate criminal liability would enunciate exemptions from liability based on views of public policy, or the incongruity of convicting corporations for certain crimes, or both. The incongruity, if any, in convicting a corporation for an act of violence reflects an inarticulable premise that conditions of policy, especially deterrence, require the prosecution of natural persons. It also undoubtedly reflects a common sense reaction to the problem of attributing a physical act to the corporation. Yet the accepted theory as readily permits attribution of act as of mind.

Of course, theory is one thing, practice another. In systems that permit corporate criminal liability, corporations are seldom convicted of traditional crimes of violence. In general, corporations are held liable for crimes that are closely related to their business activities.²³ In the United States, conspiracy in restraint of trade is a par-

20. *Rex v. East Crest Oil Co.*, [1944] 3 D.L.R. 535 (Alta. Sup. Ct., App. Div.), *revd. on other grounds*, *East Crest Oil Co. v. The King*, [1945] 2 D.L.R. 353 (Sup. Ct. Can.); *Union Colliery Co. v. The Queen*, 31 S.C.R. 81 (Sup. Ct. Can. 1900). For the United States, see *People v. Ebasco Servs., Inc.*, 77 Misc.2d 789, 354 N.Y.S.2d 807 (Sup. Ct. 1974) (although corporation cannot be the victim of a homicide, it may commit that offense and be held to answer therefor).

21. See V. Swigert & R. Farrell, *Corporate Homicide: Definitional Processes in the Control of Deviance*, 15 LAW & SOC. REV. 161 (1980-1981).

22. See The Law Commission (England), Published Working Paper No. 44, ¶ 37 (June 30, 1972). Related to these cases where attribution is impossible is a heterogeneous collection of offenses couched in terms that are apt to impose liability only on natural persons. Among these are homicide offenses where the statute defines the homicide as the killing of one human being by another. *The Queen v. Murray Wright Ltd.*, [1970] N.Z.L.R. 476 (C.A.); *People v. Rochester Ry. & Light Co.*, 195 N.Y. 102 (1909).

23. Although offenses by corporations are linked to the business activities of the corporation, it is not possible to categorize them formally in any other way. In the Netherlands, liability originally was imposed for economic offenses as listed, rather than defined, by statute. This was found to be undesirable because it was not inclusive enough. Although most instances of

adigm case.²⁴ Other recent examples include fraud,²⁵ filing erroneous reports with government,²⁶ bribery and corruption,²⁷ and extortion by a collection agency.²⁸ In Britain, convictions are registered for fraud and for conspiracies to offend against regulatory legislation.²⁹ Canada presents a picture similar to the United States.³⁰ Where acts of violence are involved, prosecutors tend to charge natural persons alone unless there is clear evidence that such violence was inflicted pursuant to corporate business policy. One reason underlying such prosecutorial charging decisions is that to prosecute a corporation successfully the state must attribute to the corporation the will and acts of its agents. Here common-law systems have made a distinct contribution, overcoming the problem that corporations can neither think nor act by themselves. They have done so in different ways, depending on the extent to which courts are required to search for some attribute of corporateness in attributing responsibility. This, in turn, leads to the secondary problem of distinguishing between a corporation's own liability and its vicarious liability for the acts of agents or employees acting in the course of their employment. If a wide test of attribution is chosen, it may be difficult to rebut the accusation that an enterprise is in effect being subjected to vicarious liability. But vicarious liability for serious crime is at vari-

corporate crime concern what is loosely referred to as socioeconomic legislation, there are cases that fall outside its ambit that, as Dr. Fasseur remarks, cannot be excluded in principle: "It is conceivable that a legal person may be accused of culpable homicide, e.g. a pharmaceutical company which markets a product that is harmful to health or a transport undertaking which uses defective vehicles and causes an accident as a result." Fasseur, *supra* note 12, at 314. As it was impracticable to list those offenses for which a corporation might be liable, the Netherlands Criminal Code now contains a general principle of liability. Parenthetically, it may be remarked that the notion of economic crime, which is certainly fashionable in Europe at present, lacks cohesion. It is a catch-phrase only. The example given by Dr. Fasseur is of a crime that certainly does not lack economic impact or significance.

24. There are many recent cases; for a prominent example, see *United States v. Hilton Hotel Corp.*, 467 F.2d 1000 (9th Cir.), *cert. denied*, 409 U.S. 1125 (1973); see generally *Reasons & Goff, Corporate Crime, A Cross-National Analysis* in *WHITE COLLAR CRIME, THEORY AND RESEARCH* (G. Geis & E. Stotland eds. 1980).

25. *United States v. Lanier*, 578 F.2d 1246 (8th Cir. 1978).

26. *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6 (E.D. Ark. 1978); note that the accused bodies were legal entities.

27. *United States v. Griffin*, 401 F. Supp. 1222 (S.D. Ind. 1975).

28. *State v. Adjustment Dept. Credit Bureau, Inc.*, 483 P.2d 687 (Idaho 1971).

29. See L. LEIGH, *supra* note 5, at 51-52 (1969).

30. *Id.*; Leigh, *The Criminal Liability of Corporations and Other Groups*, 9 OTTAWA L. REV. 246 (1977). In 1969, I concluded:

In practice liability generally relates to certain types of commercial frauds or violations of regulatory legislation. Those traditional areas of the law in which corporations have appeared as the accused, such as fraud or obscene libel, involved offences closely related to the business activities of the corporation.

L. LEIGH, *supra* note 5, at 52. Nothing in the intervening years suggests that that summary was wrong.

ance with fundamental values embedded in both common-law and civil systems.³¹ Hence continental objections to corporate personal liability.

English courts have adopted a formula that is intended to distinguish personal from vicarious liability. This is the doctrine of identification that, by a process of inversion, was treated as establishing that a corporation could have a mind capable of entertaining a criminal intent. Viewed as a doctrine of ascription, the identification doctrine is consistent with all theories of corporate personality and with the accepted view that no such theory exists. As Viscount Haldane explained this doctrine in 1915:

My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of shareholders in general meeting, that person may be the board of directors itself, or it may be, and in some companies it is so, that the person has an authority co-ordinate with the board of directors given to him under the articles of association.³²

This formulation, the alter ego doctrine, underlies the English rule concerning the attribution of mental state to the corporation as a mental state personal to it. In the process, English courts treat the alter ego notion almost as if it asserted that a corporation has a mind and can will, whereas it originally served only as the basis on which a state of mind could be imputed to a corporation for the purposes of limiting civil liability.

The alter ego notion has not been restricted to officers enjoying power by virtue of a corporate charter or by a delegation from the primary managerial organ. Rather courts have adapted the doctrine to take account of the realities of power in large, decentralized corporations. The question is, had the individual actor been invested by proper authority with managerial power and responsibility over a significant aspect of the company's business? In other words, is he functionally independent of superior authority in respect of general management decisions in that sphere of activity in which he functions?³³ This formula clearly leaves a good deal of latitude to the

31. *See, e.g.*, *Rex v. Huggins* 92 Eng. Rep. 518 (1730). On English Law, *see* J. SMITH & B. HOGAN, *CRIMINAL LAW* 140-54 (4th ed. 1978).

32. *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705, 713 (H.L.). *See* L. LEIGH, *supra* note 5, at ch. 3, for an account of the doctrine in practice, and *id.* at ch. 6, for a discussion of the relationship between corporate and vicarious liability.

33. *Tesco Supermarkets, Ltd. v. Nattrass*, [1972] A.C. 153, 170 (H.L. 1971); *see Regina v.*

court or jury. Once the rule abandons the safety of insisting that the officer be designated as a governing organ of the corporation in its constituent documents, the line between vicarious and personal liability may be blurred.³⁴ But English courts have also had to recognize that if the magic circle is drawn too narrowly, the test for liability will not meet the realities of large-scale corporate organizations in which much primary authority will be bestowed on branch, area, and division managers.³⁵

In the United States the distinction between personal and vicarious liability for corporations is more obscure.³⁶ Most states appear to follow the high managerial agent formulation contained in the Model Penal Code.³⁷ Under this standard, a corporation should not be held criminally liable "unless such conduct was performed, authorized, ratified, adopted or tolerated by the corporation's directors,

Andrews-Weatherfield Ltd., [1972] 1 W.L.R. 118 (C.A. 1971); *Regina v. Sporle*, [1971] CRIM. L. REV. 706; the Canadian rule is virtually the same: *Regina v. St. Lawrence Corp.*, 5 D.L.R. 3d 263 (Ont. C.A. 1969).

34. It is not clear whether identification may be resisted on the ground that the officer in question intended to benefit himself rather than the corporation. There is early, but unsatisfactory authority that even where the company is the officer's victim, it may still be liable for any offense that he causes it to commit in the process. In *Moore v. I. Bresler Ltd.*, [1944] 2 All E.R. 515, the company was thus held liable for a fraud committed on the revenue, even though the revenue fraud was a consequence of a fraud perpetrated on the company by its comptroller. This is hardly satisfactory. Civilly, a company would not be considered to be a party to a fraud on a third party where it arose from a fraud committed by its director on it. See *Belmont Fin. Corp. v. Williams Furniture Ltd. (No. 1)* [1979] Ch. 250 (C.A. 1977). The American rule by which a corporation is not held liable where its employee or officer acted with intent to defraud it seems preferable and may yet commend itself to an English court. Certainly Canadian courts would not identify the officer's act with the corporation in such circumstances. *Regina v. Howard Smith Paper Mills, Ltd.*, [1954] Ont. R. 543. In the United States, see *United States v. Harry L. Young, Inc.*, 464 F.2d 1295 (10th Cir. 1972); notes 46-48 *infra* and accompanying text.

35. Dr. Glanville Williams concludes that in respect of crimes of *mens rea* it does not much matter whether the notion of the "inner circle" is restricted since the purposes of deterrence are generally best served by prosecuting the natural persons responsible. G. WILLIAMS, *TEXT-BOOK OF CRIMINAL LAW* 949 (1978). In an English context this is persuasive enough since antitrust is not punishable criminally, and, in respect of most other offenses, it does not seem unduly difficult to pinpoint the directing author of the wrong. Indeed, it is difficult to see why the company is prosecuted as well. On the other hand, he argues, the formulation restricts the liability of a corporation for crimes of negligence since negligence by, for example a branch manager of a shop, should be imputable to the company as its negligence. *Id.* This, with respect, misconceives the legislation in issue in the negligence cases, for its purpose was to give defense to a company that would have been liable vicariously had it not used all due diligence to prevent infractions by its employees. The real question in the case of *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153 (H.L. 1971), was whether the company was conclusively fixed with the negligence of its manager as its alter ego, or whether it was *prima facie* vicariously liable, subject to a showing that it had instituted a proper system of control. The latter was held to be the case.

36. See generally Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976).

37. MODEL PENAL CODE § 207 (Proposed Official Draft 1962). Of course a corporation can be strictly or vicariously liable for the fault of its agents or menial employees.

officers or other 'high managerial agents' who are sufficiently high in the corporate hierarchy to warrant the assumption that their acts in some substantial sense reflect corporate policy."³⁸ Not surprisingly, the president of a corporation is a high managerial agent for the purposes of this rule.³⁹ It is apparently not necessary that the president or board of directors knew of the offense; it is enough that an agent, invested with authority over the relevant aspect of the corporation's activities, authorized or acquiesced in the offense.⁴⁰

In general, corporate criminal liability for federal offenses does not follow the "high managerial agent" formulation used by most states. The rule for most offenses is that a corporation can be liable for the act of any employee where that employee was acting in the course of his employment. This is the formulation advanced in section 402 of Senate Bill S. 1630, which is intended to codify existing law.⁴¹ Under this proposed codification, a corporation would be held criminally liable for the acts of its agents in three situations: where liability is strict, where the criminal acts are those of an agent acting within the scope of his employment, and where the agent's acts fall within the scope of his authority.⁴²

The basic theory underlying the federal standard appears to be that the corporation owes a general duty to the public to ensure due enforcement of federal regulations, especially those pertaining to trade and commerce.⁴³ The Brown Commission originally intended a high managerial agent formula to apply federally. Presumably,

38. *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 275 N.E.2d 33, 71 (1971).

39. *See, e.g., People v. Aquarian Age 2000 Inc.*, 380 N.Y.S.2d 545 (1976).

40. *Commonwealth v. Moraiti*, 34 Pa. Commw. 27, 382 A.2d 997 (1978); *West Valley Estates, Inc. v. State*, 286 So. 2d 208 (Fla. 1973); *State v. Adjustment Dept. Credit Bureau, Inc.*, 483 P.2d 687 (Idaho 1971).

41. § 402 Liability of an Organization for Conduct of an Agent

Except as otherwise expressly provided, an organization is criminally liable for an offense if the conduct constituting the offense — (a) is conduct of its agent, and such conduct — (1) occurs in the performance of matters within the scope of the agent's employment or authority and is intended by the agent to benefit the organization; or (2) is thereafter ratified or adopted by the organization; or (b) involves a failure by the organization or its agent to discharge a specific duty of conduct imposed on the organization by law.

S. 1630, 97th Cong., 1st Sess., § 402 (1981) (Criminal Code Reform Act of 1981).

42. S. REP. NO. 553, *supra* note 16, at 81.

Recently, some federal courts appear to have doubted this formulation. It is still the accepted doctrine, but in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir.), *cert. denied*, 409 U.S. 1125 (1973), the court doubted whether the knowledge of a menial employee would be sufficient to impose liability on the corporation, and similar doubts are expressed in at least one other federal case. *United States v. Hangar One, Inc.*, 406 F. Supp. 60 (N.D. Ala. 1975). *See Elkins, supra* note 36. It does seem clear that few, if any, cases in fact impose liability in respect of the state of mind of menial employees.

43. S. REP. NO. 553, *supra* note 16, at 80-81.

this was rejected because of the exigencies of enforcement. The proposed formula and the present law are consistent in their emphasis on enforcement of the law within an organization by the organization itself. The organization is thus required to supervise the application and enforcement of regulatory legislation internally.⁴⁴

American law does, however, limit liability where the human actor was not acting within the scope of his employment or authority and did not intend to benefit the corporation. Indeed, some courts run the two concepts together, concluding that an agent who did not intend to benefit the corporation was not acting within the scope of his employment or authority.⁴⁵ What matters is whether the acts were intended to benefit the corporation, not whether they benefited the corporation in fact. If the acts were done with that intent, the corporation may be held liable, even though the acts were done in defiance of express corporate policy.⁴⁶ Underlying this rule is the notion that the corporation must itself ensure that its employees and agents adhere to the law, coupled with the assumption that management is usually aware of violations.⁴⁷

If the state can attribute the acts and will of employees or agents to a corporation, the corporation will rarely be exculpated on the ground that the penalty for the offense cannot be imposed on it. In England, murder and treason apart, all crimes may be punished with a fine. In other common-law jurisdictions and in the United States, violators can be fined for most offenses, and American corporations

44. It may well be that the fact that the federal government is not the primary criminal lawmaking authority in the United States (with obvious exceptions) influenced federal courts, interpreting legislation founded on the commerce clause for example, to lay down a broad rule of responsibility that is permeated with concepts of vicarious liability. The vicissitudes of *mens rea* in federal courts would certainly be consistent with this theory. Thus, in *United States v. Hilton Hotel Corp.*, 467 F.2d 1000 (9th Cir.), *cert. denied*, 409 U.S. 1125 (1973), the court held that the Sherman Act is directed at results, not intent. *See generally* S. REP. NO. 553, *supra* note 16, at 59-69. Uniquely, perhaps, American law holds that elements of knowledge possessed by different employees and agents of the same corporation may be combined to achieve a guilty mind. *Inland Freightlines v. United States*, 191 F.2d 313 (10th Cir. 1951); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974); *cf.* Law Commission Working Paper, *supra* note 22 at ¶ 39(d). The doctrine may be limited to awareness of circumstances rather than to purpose since that seems to be the context in which the matter has arisen. It is more consistent with liability for failure to supervise, than with *mens rea* liability for traditional crimes.

45. *United States v. Beusch*, 596 F.2d 871 (9th Cir. 1969).

46. *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir. 1978); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1941); *United States v. Beusch*, 596 F.2d at 878; *Belcher v. Birmingham Trust Natl. Bank*, 348 F. Supp. 61 (N.D. Ala.), *stay denied*, 395 F.2d 685 (5th Cir. 1978).

In some cases, however, it may be possible to infer an intention not to benefit the corporation from the actor's disregard of corporate policy. *Beusch*, 596 F.2d at 878.

47. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir.), *cert. denied*, 409 U.S. 1125 (1973).

may be placed on probation.⁴⁸ Apart from this, a wide spectrum of possible sanctions exists, injunction, *quo warranto*, dissolution, divestiture, closure of premises, and disqualification orders against directors who are responsible for the commission of criminal offenses through the medium of the corporation.⁴⁹ The general rule, where a fine as well as imprisonment is available, is that the legislature intends that the corporation shall be liable so far as it can be.⁵⁰

In short, common-law countries recognize a wide measure of corporate criminal liability even though there are important differences in the rules concerning attribution of fault. These differences reflect the various compromises reached in each country between the dictates of venerable legal principles and the need to enforce much modern socioeconomic legislation. The general principle of corporate liability is well-established, however, as is the rule that corporate guilt in no way eliminates the personal guilt of the natural person to whom the offense may be attributed; he remains liable throughout.⁵¹ There may, of course, be cases where corporate guilt does not depend on identification of the guilty offender, not only those involving strict liability, but offenses of omission as well. If the offense requires *mens rea*, however, it would be difficult to convict, in England at least, if it could not be shown that a high managerial officer ought to have known of the circumstances triggering the duty to act and culpably failed to do so. With all this in mind, we may now turn to those systems that permit only a measure of corporate criminal liability.

II. SYSTEMS OF PARTIAL CRIMINAL LIABILITY

A number of European systems recognize various forms of corporate criminal liability, either directly or indirectly. In all of these systems, however, the natural person is primarily responsible. In Belgium, for example, the natural person is liable, and, in the case of omissions, liability rests on those persons who were responsible for preventing the infraction. Here, of course, the laws deal largely with

48. *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972); *United States v. J.C. Ehrlich Co.*, 372 F. Supp. 768 (D. Md. 1974). See Coffee, "No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 448-57 (1981).

49. See Coffee, *supra* note 48; Leigh, *supra* note 30 at 294-98.

50. See *People v. Charter Thrift & Loan*, 30 Cal. App. 3d 412, 106 Cal. Rptr. 364 (1973), and cases cited therein.

51. See *United States v. Wise*, 370 U.S. 405 (1962) (dealing with criminal antitrust liability); *Regina v. Sheridan*, [1972] 9 C.C.C. 2d 545 (Ont. Dist. Ct.); *Dellow v. Busby*, [1942] 2 All E.R. 439 (K.B.).

fiscal and social security matters. It is thus necessary to ask who performs what tasks on behalf of the company. As Professor Delatte has observed, the principle of imputability of the corporate fault to the individual requires a factual inquiry into who was really at fault, and that person need not be an organ of the company.⁵² The rule of personal responsibility also applies in France, particularly for acts that tend to harm the corporation itself. In the absence of any special provision in the law, the directors or presidents are personally liable for public welfare offenses imputable to their corporations.⁵³ The directors, under this doctrine, must prevent infractions from occurring. In respect, however, of the serious offense of *abus de biens sociaux* — in effect the diversion of corporate assets — directors are held liable only where they were aware of the facts.⁵⁴ Where the object of the legislation is to protect third parties or the interests of society at large, Professors Levasseur and Boulloc believe that corporate responsibility would be a just solution, but there, too, the general rule of corporate nonresponsibility remains in force.

In a number of European countries, special legislation makes corporations (and sometimes any other employer) liable criminally for a wide range of public welfare or quasi-criminal offenses. Such liability is often considered to be less than truly criminal because the offenses to which it relates are found outside the Criminal Code. This is true in Denmark, for example, where the common cases include licensees of public houses, restaurants and hotels, and offenses under motor vehicles legislation. There is also a tradition of holding owners of businesses liable for offenses concerning fiscal matters like filing false income tax returns. Smuggling, however, is regarded as a particularly serious offense requiring personal guilt. Similarly, owners, including corporate owners of workplaces, can be held strictly liable for offenses concerning the safety of the workplace. But employers' liability applies only to the most serious offenses; when the offense is less serious, workmen of superior status, such as foremen, may be charged. As to the types of entities liable, companies having legal persons, including some public corporations, can be convicted of such offenses, but partnerships generally can not.⁵⁵

In Belgian law, corporations may not be criminally convicted,

52. Delatte, *supra* note 19, at 283.

53. See Levasseur & Boulloc, *La Responsabilité Pénale Des Personnes Morales d'Après Le Droit Positif Français Actuel*, in MESSINA SYMPOSIUM, *supra* note 3, at 197, 209.

54. *Id.* at 210 n.33. The directors appear to be personally liable even in some of these cases — for example, where the entity passes a bad check.

55. See Garde, *The Penal Responsibility of Judicial Persons in Danish Law*, in MESSINA SYMPOSIUM, *supra* note 3, at 321.

but they may be affected indirectly by fines against the persons in charge who may then be indemnified by the company.⁵⁶ A corporation may also be declared civilly liable for the acts of such persons, and while the common penalty imposed is a fine, the sanction may comprehend seizure of the assets of the corporation. (Under Belgian law, moreover, certain penal sanctions can be imposed on corporate bodies; the country's price-fixing legislation, for example, provides that if an organ or agent of the corporation is responsible for the infraction as principal or accessory, its business may be closed.⁵⁷) And, as with most European countries, the prosecution can obtain orders disqualifying the natural persons responsible for certain offenses from managing a particular type of business or from managing any business whatever.

French law contains a number of exceptional provisions, generally pertaining to the field of public welfare offenses, that permit the imposition of criminal liability on corporations. Examples include laws concerning tax fraud, foreign exchange offenses, and price-fixing. In respect of safety-at-work legislation, the corporation may be convicted where fault cannot be imputed to a natural person.⁵⁸ Similar provisions are contained in the Labor Code. Most striking are the provisions in cartel legislation that clearly provide for corporate criminal responsibility. Recently, the French Parliament, influenced by the example of the European Economic Community, whose rules are enforced under pecuniary sanctions, instituted a regime under which enterprises that operate as cartels or abuse a dominant position may be fined pursuant to a reasoned decision by the Department of Economic Affairs.⁵⁹ Yet this sanction, though heavy, is administrative in character. Professors Levasseur and Bouloc, noting that offenses concerning cartels are criminal in character, regret that the government, to secure the responsibility of corporate bodies, limited itself to administrative sanctions.⁶⁰ They concluded that although government is aware of the need to respond adequately to economic abuses of this nature by large corporations, they hesitate to cross the Rubicon and impose full corporate criminal liability.⁶¹ The scattered provisions in French law providing for corporate liability

56. See Delatte, *supra* note 19.

57. See *id.* at 292-93.

58. See Levasseur & Bouloc, *supra* note 53, at 217.

59. See *id.* at 219.

60. *Id.* at 220.

61. *Id.*

have not developed into a general doctrine of responsibility. There is, however, a project to reform the law in this respect.

The proposed French reform would use a rigorous doctrine of identification to impose corporate criminal liability. It would permit identification only where the infraction was committed (1) by the deliberate decision of one of the corporate organs, (2) in its name, and (3) in the collective interest. This, in terms of French law, poses vexing questions concerning the notion of collective interest of the group wider than the group's personal interest.⁶² Although the specification of the responsible organ is appropriate to eliminate arguments about whether a particular individual may be identified with the corporation, it does so at the price of a restrictive rule of liability, especially when it is necessary to prove that the directors not only made a deliberate decision, but also that they made it in the collective interest. American experience, particularly with antitrust offenses, indicates that offenses are often the work of middle range officials responding to business pressures, in a way that the head office forbade.⁶³ And while there is bound to be doubt concerning what the ultimate controller's policy really was, there must be some cases where local managers operated in defiance of central policy. Considerations of this sort clearly influenced the decision of the Netherlands not to insist on so rigid a formula. Professor Fasseur argues: "Particularly in the case of large organizations, top executives are not always fully informed and cannot reasonably be expected to be so."⁶⁴ He therefore considers it proper to prosecute the actual offenders as well. Whether a state of mind is to be imputed to a company, moreover, apparently depends on such familiar factors as the internal organization of the body and the tasks and responsibilities assigned to the natural persons employed by it.

The French formulation was seemingly influenced by realist notions of the corporation.⁶⁵ Certainly, it does not represent simply an attempt to distinguish between acts personal to the corporation and acts for which it may be held vicariously liable in a way that satisfies

62. See Commission de Révision du Code Pénal, Avant-Projet Définitif de Code Pénal, Livre I (La Documentation Française 1978), Arts. 38 & 39; Delmas-Marty, *supra* note 8. Curiously, this seems redolent of debates concerning *locus standi* in public interest legislation in the United States. However that may be, it is also doubtful in French law whether the collective interest would only include the interests of shareholders. Account may also be taken of the interests of creditors and workers. The emphasis on collective interest appears to be intended to protect employees and small shareholders. *Id.*, commentary at 42; Delmas-Marty, *supra* note 8.

63. See Coffee, *supra* note 48, at 397.

64. Fasseur, *supra* note 12, at 315.

65. See Barbero Santos, *supra* note 5.

the internal necessities of the legal system. The French reform proposals do, however, speak of a corporation as having a mind and will of its own.⁶⁶

The absence of a general principle of corporate responsibility does not mean that the corporation cannot be reached by a variety of other penal sanctions. For example, corporations are not likely to escape at least some liability when natural persons, either employed by or directing the corporation, are convicted of a "corporate" wrong. In these cases, the usual range of disqualifications, forfeitures, and confiscations will likely apply since the corporation can be held civilly liable for the infraction of the director or employee and may be made liable for all the civil consequences thereof, including tax fines or customs fines.⁶⁷ Corporations are thus subjected to a wide measure of liability for offenses committed in their name.

III. SYSTEMS OF ADMINISTRATIVE LIABILITY

A number of European countries, including Belgium, Luxembourg, and the European Economic Communities (EEC), provide for a wide measure of administrative liability. In Italy and Germany, administrative liability alone is possible. Of Germany, Professor Jescheck has concluded that the principal purpose of corporate criminal liability, which he identifies as reclaiming from corporations the profits that have accrued to them from crime, can be attained in other ways than through punishment. There are, however, administrative penalties against corporations. For public welfare or administrative offenses (*Ordnungswidrigkeiten*), a fine may be

66. See *Avant-Projet Définitif de Code Penal*, *supra* note 62, at 41. The proposed reform would limit liability to industrial, financial, or commercial groups, but would include noncorporate bodies whose "reality" justifies criminal responsibility. Both these points are considered valid by Barbero Santos, who, profoundly influenced by the realist theory, believes that there should not be liability on the part of a corporation except for crimes that are appropriate to it (*i.e.*, commercial or economic offenses in the case of a trading corporation), and that it should apply to all entities having real corporate personality. See Barbero Santos, *supra* note 5, at 478.

It would be misplaced zeal to enter into a discussion of the forms of business organization in France and elsewhere with a view to determining which entities might be held criminally liable. It is enough perhaps to note that even on realist theories, a difficult problem of characterization arises in determining which bodies are to be conceded corporate status for the purpose of liability. Furthermore, there is the problem of determining whether the entity, corporate or not, has a collective will, or whether it would appear to the outsider. A further difficulty, felt by the French reformers, relates to the status of multinationals and group liability. American and Canadian doctrine concurs in holding that any company may be liable provided that it has attributes of independence. Indeed, parent and subsidiary can conspire together on that theory. See, e.g., *Las Vegas Sun Inc. v. Summa Corp.*, 610 F.2d 614 (9th Cir. 1979). See also *United States v. Yellow Cab Co.*, 322 U.S. 221 (1947); *Regina v. Dominion Steel & Coal Corp.*, [1956] 116 C.C.C. 117 (Ont. High Ct.).

67. MESSINA SYMPOSIUM, *supra* note 3, at 604-05 (remarks by Cosson).

imposed against a corporation whenever a representative organ of the corporation or a member of such an organ, commits an offense through which the obligations of the corporation have been improperly performed, or the corporation has been unjustly enriched. A fine against the corporation or other legal person is also possible if no identified person can be convicted of the offense, or it is decided not to proceed against individuals.⁶⁸ Professor Jescheck criticized this solution because he believes that fines are tainted with notions of guilt that are inappropriate to a legal person. He would, apparently, prefer a purely civil compensatory remedy for cases in which a legal entity has been unjustly enriched as the result of the actions of its organs.

The existence of administrative liability might even suggest that the notion of administrative offenses is a purely semantic device, adopted to circumvent the prohibition against corporate guilt in the laws of Germany and Italy. Most German scholars, however, believe that there is a real distinction. First, administrative offenses are thought to be morally neutral. Second, they cannot be punished by imprisonment when the offender is a natural person. Nevertheless, I would agree with the position taken by Professor Jescheck that such offenses cannot be deemed to be devoid of moral content. That fault finds no place in the formal definition of the offense does not imply that a person who commits such an offense can be assumed to have acted without moral fault.

Administrative offenses or not, both the German laws and the competition rules of the European Economic Community provide for heavy penalties.⁶⁹ Under the domestic laws of some European countries, moreover, a wide measure of sanctions in rem can be applied against offending businesses.⁷⁰ Given the severity of such sanctions and their quasi-penal nature, certain European scholars believe that they offer a sufficient means to control the activities of corporations, especially in the economic sphere.⁷¹ Thus, dogma cedes to the practical exigencies of law enforcement.

68. See H. JESCHECK, *LEHRBUCH DES STRAFRECHTS, ALLGEMEINER TEIL*. I am grateful to Mary Jeffries, B.A., for translating assistance.

69. See Oehler, *La Responsabilit Penale Delle Persone Giuridiche Nella Comunit Economica Europea*, in MESSINA SYMPOSIUM, *supra* note 3 at 422-41; Tiedemann, *Antitrust Law and Criminal Policy in Western Europe*, in *ECONOMIC CRIME IN EUROPE*, (L. Leigh ed. 1980).

70. See National Reports cited in MESSINA SYMPOSIUM, *supra* note 3; Screvens, *supra* note 6, at 187-89.

71. See H. JESCHECK, *supra* note 68; Huss, *supra* note 5, at 373.

IV. SANCTIONS AGAINST INDIVIDUALS

In Europe, there is a strong tendency to favor imposing sanctions against natural persons rather than corporations. In several countries, directors and others may be held liable for offenses that they ought to have prevented by reason of their position and function in the company.⁷² In Britain, directors' liability clauses apply to much of the modern regulatory legislation. Under these clauses, directors or officers of a corporation may be held liable for offenses committed by the corporation, not only where the offense was committed with their consent or connivance, but also where it was attributable to their neglect. Liability also extends to a person who discharges this function in fact.⁷³ Sometimes, the onus of proof is reversed, so that the director must show that he exercised due diligence to prevent commission of the offense.⁷⁴ It is striking that little practical use has been made of such provisions,⁷⁵ given the difficulty of proving that some person, other than the person whose mens rea and actus reus have been imputed to the company, directed, authorized, acquiesced in, or participated in the commission of the offense. Perhaps this is explained by the fact that one would still have to demonstrate the officer's responsibilities in the corporation to make out a prima facie case sufficient for the onus provision. Under English law, for example, not every director or officer is regarded as having responsibility over any and all of the corporation's affairs. The United States Study Draft of the Proposed Federal Criminal Code sought to overcome these problems by imposing an additional duty on corporate officers to allocate responsibility for compliance as well as a duty to manage and supervise.⁷⁶ Nevertheless, it would be difficult to do this, either by statute or by regulations, unless rigid management structures were required by corporate law. The draconian alternative would be to hold all corporate officers liable for all defaults.

In addition to provisions such as these, European countries, including Britain, use extensive disqualification provisions against directors who commit offenses of fraud, or even of negligence, in the

72. See Delatte, *supra* note 19, at 283-84.

73. See, e.g., Employment Protection (Consolidation) Act, 1978, ch. 44, § 155; Consumer Safety Act, 1978, 38 § 7(4); Energy Act, 1976, ch. 76 § 18(4); Industry Act, 1975, ch. 68 § 34(6).

74. See, e.g., Defence Production Act, 1968-1969, CAN. REV. STAT., ch. 62 § 21(5) (1973).

75. In Britain there appear to be only two reported instances: *Rex v. Yorkshire Elec. Board*, *The Times* (London), Nov. 17, 1951 at 3, col. 3; *Edwards & Sons Ltd. v. M'Kinnon*, 1944 S.L.T. 120 (Justiciary).

76. Staff Memoranda on Responsibility for Crimes Involving Corporations and Other Artificial Entities §§ 402-06 in 1 Working Papers of the National Commission on Reform of the Federal Criminal Laws, 163, 187, n.73 (1970).

management of their corporations. Indeed, both natural persons and corporate bodies can, in many continental jurisdictions, be prohibited from exercising a profession or engaging in certain aspects of professional practice.⁷⁷ In Britain, a person who was convicted of an indictable offense in connection with the promotion, formation, management, or liquidation of a company, or who has been persistently in default in relation to reporting requirements, or who has been guilty of fraudulent trading or of fraud in relation to the company or of any breach of duty as an officer, liquidator, receiver, or manager, may be disqualified from taking part, directly or indirectly, in the management of a company.⁷⁸ A person who is convicted of fraud or dishonesty may be disqualified for a period of fifteen years; otherwise the maximum period of disqualification is five years. In addition, an undischarged bankrupt cannot be a director of a company,⁷⁹ and a person who has been a director of two or more companies each of which became insolvent while he was a director may also be disqualified by the court from acting as a director for as long as fifteen years in some instances.⁸⁰ This strikes not only at incompetent directors, but also at those whose conduct is consistent with long-term frauds or other abstractions of corporate property. The Department of Trade, which is responsible for the enforcement of company legislation, indicates that when directors commit offenses of the sort noted above, the court is almost invariably asked to make a disqualification order, and does so.⁸¹

V. GENERAL CONCLUSIONS

In the common-law systems, corporate criminal liability is an accepted principle. In continental systems it is not, save for the Netherlands, although France has formulated proposals for reform to this end and Belgium is beginning to do so. The European Economic Community is also interested in developing an adequate system of sanctions to confront the problems posed by large corporations, particularly in antitrust. The Messina symposium,

77. See Bailly, in *LES INTERDICTIONS PROFESSIONELLES* (Cujas ed. 1969). See generally L. Leigh, *Procedures and Sanctions in Respect of Economic Offences*, Report to the 12th Conference of Directors of Criminological Institutes, Council of Europe, Strasbourg (1976).

78. The British law has been consolidated in the Companies Act of 1981. Companies Act, 1981, ch. 62, § 93.

79. Companies Act, 1948, ch. 38, § 187.

80. Insolvency Act, 1976, ch. 60, § 9 as amended by the Companies Act, 1981, ch. 62, § 93. For a criticism of similar suggestions in the United States, see Leibmann, *Economic Crimes — The Proposed New Federal Criminal Code*, 27 *BUS. LAW.* 177 (1971).

81. See 10 *PARL. DEB., H.C.* (6th ser.) 88 (1981).

held under EEC auspices, concluded that the penal responsibility of legal persons that violate community norms should be recognized in the laws of all member states. The accent is clearly on workability, however, for the conclusions stated, rather agnostically, that each member state should work out "a system of repression (in the broad sense) covering sanctions of a penal, administrative, or specific nature."⁸² As in the United States, the impetus for reform comes from fears concerning the inability of states to control the economic power wielded by large groups and by multinational corporations. Scholars who advocate reform in Europe wish to have the power not only to fine a corporation, but also to subject it to other measures, for example, closure of premises, disqualification from pursuing a professional activity, confiscation, and more original still, placing the corporation under judicial supervision.⁸³ Dissolution has also been envisaged.

Some of these sanctions can be imposed, indirectly if not directly, in European systems in which the rule of corporate irresponsibility exists, although corporate responsibility might make judicial supervision, divestiture, or the disgorging of profits easier. But corporate criminal responsibility is not necessarily the only way to cope with problems of economic power, or with the problem of proving offenses by omission. Whether the range of sanctions is seen as penal or administrative in nature, the important point is that the sanctions be available.

It is also important, whether full corporate criminal liability be admitted or not, that natural persons remain responsible. Liability should be cumulative, not substitutionary. There is, however, a considerable moral problem since serious conduct must be labeled non-criminal to reach the corporation. Under this arrangement, both the corporation and the natural person would have the solace of being convicted of what appears to be a morally neutral infraction. Perhaps the answer to this problem is overlap in the legal system so that the natural person could be convicted of a crime, while the corporation is held liable only for an administrative offense. It would not be startling, for example, to create an administrative offense in respect of factory safety and yet still to punish natural persons criminally in the event of a serious injury or death. That often happens now. But it would be wrong not to convict the natural person of the graver

82. MESSINA SYMPOSIUM, *supra* note 3, at 659-60.

83. *See id.* at 230, 694; Avant-Projet Définitif de Code Penal, *supra* note 62, at 154.

offense if he can be identified and the burdens of criminal prosecution can be overcome.

It is perhaps not surprising that European scholars look askance at common-law doctrines. If corporate criminal liability exists to force management to supervise the functioning of an enterprise, the purpose of such liability will differ little from that of vicarious liability. The rules of liability for federal offenses in the United States are formulated in rather the same way. Unfortunately, this creates an anomalous exception: Enterprises that are not legal entities are not subjected to the supervisory duties imposed by traditional criminal offenses. There is thus an unresolved conflict between the needs of enforcement and legal dialectic. No one has yet sought to avoid or to minimize the conflict by extending vicarious liability to offenses of theft and deception; most common-law lawyers would reject the notion *peremptorily*. It should occasion no surprise that scholars elsewhere do so. Nor should it occasion surprise that scholars elsewhere refuse to treat liability ascribed through the identification or high managerial agent formula as truly personal. To say that *mens rea* may be ascribed to a corporation is not to say that a corporation has a mind, and European colleagues, who distrust our summary way of dealing with inconvenient concepts, may well object to founding doctrine either on crude anthropomorphism or on views of the reality of a corporation that seem to them unpersuasive.⁸⁴ To many European scholars, though increasingly perhaps a minority among them, the common-law systems seem to have set the theoretical problems aside rather than to have solved them.

It is, in other words, difficult to reconcile legal dogmas with the exigencies of enforcement in such a way as to preserve the internal consistency of the body of legal rules. Nor is the rather secular view of sanctions in the common-law systems reconcilable with the moral thrust of the European doctrine that emphasizes the personal nature of punishment. We may be content to have solved our problems with a metaphor; others conclude that the search for "corporateness" is misconceived from the start. Those who, like the French reformers, seek a rule restricted to policy decisions at the highest level, may solve a formal problem in personal liability, but only at the cost of functional efficiency. The rule may be based, moreover, on a model too simple for the corporate structures of today, which are large and decentralized and leave major policy decisions to autonomous or nearly autonomous power centers. Although European scholars are

84. See, e.g., *H.L. Bolton Engr. Co. v. T.J. Graham & Sons*, [1957] 1 Q.B. 152, 172 (C.A. 1956).

aware of enforcement problems, they need more practical information to guide their decision-making in law reform.

We should not, however, conclude on a negative note. Economic crime is a subject of serious concern at governmental, industrial, and academic levels. In the process, European systems and common-law systems often throw up broadly similar rules, especially as regards sanctions against directors and officers, *in rem* procedures, and the like. It seems clear that there is a community of interest and a sufficient similarity among fundamental ideas for each system to learn from the other, and, from a European point of view, there is every reason to believe that we can achieve a useful measure of harmonization as well.