INDICTING CORPORATIONS REVISITED: LESSONS OF THE ARTHUR ANDERSEN PROSECUTION*

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I. Introduction

In June 2002, a federal jury in Houston, Texas convicted the major accounting firm of Arthur Andersen[1] of obstruction of justice in connection with its destruction of documents relating to its accounting work for Enron Corporation.[2] The firm agreed to stop auditing public companies by the end of August, in effect closing its business. The Andersen firm was subsequently sentenced to pay a fine of $500,000 and sentenced to five years probation. Approximately 28,000 people lost their jobs at the company in the United States alone.[3]

Enron was not Andersen's only crisis; the summer of 2001 brought problems to Andersen on other fronts. In July 2001, just months before the Enron scandal heated up, Andersen settled a dispute with the Securities and Exchange Commission regarding its accounting and auditing work of Waste Management Corporation, paying some $7 million and suffering censure under SEC Rule 102(e). Also in July 2001, the SEC sued five officers of Sunbeam Corporation and the lead Andersen partners on its audit. Meanwhile, events at Enron began to accelerate. By the middle of August, Enron warned Andersen about the possibility of an accounting scandal; within a month Andersen formed a "crisis-response" group.[4] On October 8, Andersen attorney Nancy Temple noted that an SEC investigation was "highly probable."[5] Two days later, on October 10, Michael Odom, a Houston-based Andersen partner, urged Andersen personnel to comply with the document retention policy, noting "if it's destroyed in the course of normal policy and litigation is filed the next day, that's great. . .we've followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable."[6] On October 26, a senior partner at Andersen circulated a New York Times article discussing the SEC's response to Enron, and commented that "the

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

2. United States v. Arthur Andersen, No. 02-121 (S.D. Tex. June 15, 2002).

3. In May, the United States Supreme Court overturned the conviction of Arthur Andersen, LLP and remanded for further proceedings. United States v. Arthur Andersen, 125 S. Ct. 2129 (2005). The Court's decision was based on error in the jury instructions defining the requisite criminal intent and is discussed further in Section VII. The decision has no bearing on the analysis provided in this paper.

4. U.S. v. Arthur Andersen, 374 F.3d 281, 285 (5th Cir. 2004).

5. *Id*. at 286.

6. *Id.*

problems are just beginning and we will be in the cross-hairs."[7] Throughout this period Andersen's Houston office shredded documents. Almost two tons of paper were shipped to Andersen's main office in Houston for shredding. This shredding continued until the SEC served its subpoena for records on November 8. Enron filed for bankruptcy less than one month later. Andersen was indicted on March 14, 2002 for obstruction of justice on the grounds that it knowingly, intentionally and corruptly persuaded its employees to shred Enron-related documents. The only individual to be charged criminally in connection with these events was David Duncan, the Andersen partner who led the Enron "engagement team"; Duncan was charged separately from the indictment of the Andersen firm, and he pled guilty in April 2002.

By all accounts, then, many problems brought an end to what was once one of America's top accounting firms.[8] There was, however, a clear causal connection between the firm's felony conviction and its consequent inability to audit public companies, an inability that, for a public accounting firm, amounted to death.

The prosecution that thus directly contributed to the demise of Arthur Andersen did not suggest at trial that the firm's management as a whole or even in significant part was corrupt. It did not have to. The prosecution's *only* burden was to prove, beyond a reasonable doubt, that *any one* of Andersen's 28,000 U.S. employees "acted knowingly and with intent to cause or induce another person or persons to (a) withhold a record or document from an official proceeding, or (b) alter, destroy, mutilate or conceal an object with intent to impair the object's availability for use in an official proceeding."[9] In order to prove the necessary intent, the government was not even required to prove that the Andersen employee in question acted solely for an improper purpose, so long as the action was taken "at least in part, with [the] improper purpose" of impeding an official proceeding.[10]

And, as stated by the district judge, so long as this agent or employee "was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions, or against the partnership's policies [did] not relieve the partnership of responsibility for the agent's acts."[11] Furthermore, under the law, "the agent of a partnership who commits an act need not be a high-level or managerial agent in order for the act to be attributable to the

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7. *Id.*

8. *See* Melissa Klein, *Guilty Verdict Draws Mixed Reaction*, ACCT. TODAY, July 8, 2002, at 1 (arguing the indictment itself may have been all that was needed to destroy the company). The day after the indictment, the government suspended all new business dealings with Arthur Andersen.

9. Court's Instructions to the Jury at 10, United States v. Arthur Andersen, No. 02-121 (S.D. Tex. June 5, 2002).

10. *Id.*

11. *Id.* at 5. In accordance with most federal circuits' law, Judge Harmon instructed the jury that it could consider Andersen's policies and instructions as bearing on the issue whether the agent in question was acting within the scope of his or her employment. *Id.* Having also been told that the partnership might still be responsible for the agent's acts even if the acts in question were contrary to the partnership's instructions or against the partnership's policies, the jury is unlikely to have made much sense of this instruction.

firm. A partnership may be held responsible for the acts of agents who are subordinate or low-level employees."[12] Finally, in a more debatable decision, when asked by the jurors if each one of them had to find the same Andersen employee guilty, the trial judge responded that a guilty verdict could be rendered even though the jurors could not all agree on which employee had the intent to commit obstruction.[13]

On balance, the public benefits generated by prosecuting Andersen criminally were minimal or, if they existed at all, were exceedingly subtle. No one went to jail as a result of its conviction, nor could they have under the law. The criminal fine paid by Andersen was the maximum under the criminal law but was still vastly less than the fines and penalties that might have been, and had been, levied against the firm in civil enforcement actions taken by various government agencies. Yet, the indictment, the conviction, and the consequent prohibition against appearing before the Securities and Exchange Commission were sufficient to kill the company, a company made up not only of partners and managers, but also, of course, of lower-level employees and shareholders. In 2001, Andersen employed 85,000 people in approximately 390 offices in 85 countries. By the end of the following year, only 3000 people remained.[14]

Andersen employees have found other jobs. This was especially true of higher-level partners or auditors who worked with those partners. Some of those, however, who worked in other positions, including administrative staff, had a much harder time finding new employment.[15] Even in the case of the merger of Andersen's international subsidiaries, redundancy was inevitable, and many lost their jobs.[16] This was experienced in all of Andersen's offices, many located far from Houston – the locus of the activities that resulted in the conviction.[17]

The purpose of this paper is not to attack the particular exercise of prosecutorial discretion that led to the indictment of Arthur Andersen. We believe, however, that

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12. *Id*. Ironically, the guilty agent identified by the government in the trial of Arthur Andersen was David Duncan, one of the firm's Houston-based partners, and the culpable conduct was the widespread shredding of documents. According to contemporary newspaper accounts, the jury rejected the government's theory, but nevertheless convicted Andersen upon its finding that a different agent of the firm performed a different act of obstruction of justice within the course of her employment by Andersen. The jury focused on an e-mail drafted by Arthur Andersen attorney Nancy Temple asking that her name be removed from an internal draft memorandum in which Arthur Andersen warned its client Enron that Enron's earnings statements were misleading. As of the date of this paper, Nancy Temple has not been charged with any crime. *See* Charles Lane, *Justices Overturn Andersen Conviction*, WASH. POST, June 1, 2005, at A1.

13. *Arthur Andersen Is Found Guilty of Obstructing Justice*, THE ACCT., June 21, 2002, at 1.

14. Charles E. Ramirez, *Andersen Workers Settle Into New Careers*, DETROIT NEWS, Dec. 1, 2002, at 1D.

15. *See* Linda Tucci, *Andersen Clears Out Office But Leaves Some Ex-Staffers Behind*, ST. LOUIS POST-DISPATCH, Aug. 29, 2002, at B1.

16. Habhajan Singh, *150 Leave Andersen Malaysia*, BUS. TIMES (Malay.), July 22, 2002, at 5.

17. Before these events, the name Arthur Andersen on a resume was a feather in a job seeker's cap. Although most of the firm's employees had no relation to the matter that was at issue for prosecution, they are tainted by association with a company now branded criminal. *See* Editorial, *Death of the Firm*, ST. LOUIS POST-DISPATCH, June 18, 2002, at B6.

the Arthur Andersen prosecution was, in retrospect at least, misguided and that a thoughtful revisiting of the decision to prosecute generates at least four conclusions:

- Stringent civil sanctions can be imposed on renegade parts of business entities with far less collateral damage to innocent individuals than can criminal prosecutions of the business entity itself. Moreover, business entities, as legal fictions, cannot go to jail or feel shame, and these are the *only* sanctions that can be imposed exclusively through criminal prosecutions. For these reasons, criminal prosecution of business entities should be considered only when it is clear that no civil sanction or combination of civil sanctions will suffice to deter the corporate misconduct. A combination of civil sanctions would have been both more fair and more efficient than was criminal prosecution of the entire Andersen firm.
- Because it is far from clear that the federal statute under which Andersen was prosecuted was intended to apply to corporations or other business entities, and because the original judicial rationale for indicting corporations in the first place is outdated, the legal justification for charging Andersen criminally was and is dubious.
- Much of the collateral damage done by the Andersen prosecution was the result of the regulation linking criminal conviction with automatic debarment of the firm from practice before the Securities and Exchange Commission.[18] Laws that thus impose mandatory, automatic and drastic civil sanctions in the wake of criminal convictions are unnecessarily harsh and rigid. They also give federal prosecutors life and death power over business entities, particularly over entities that are not sole-source providers of important commodities.
- The instructions given to the Andersen jury permitted conviction of Andersen regardless of whether the agent in question was a low-level employee or a high-level officer and regardless of whether his conduct was condoned or prohibited by management. Although the Andersen instructions were typical of current pattern federal instructions, this federal standard, based on the civil notion of *respondeat superior*, is far looser, and therefore more dangerous, than the standard generally employed in the various American states and other Western countries.

II. WHEN, IF EVER, IS CRIMINAL PROSECUTION OF A LEGAL FICTION WARRANTED?

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

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

18. 17 C.F.R § 201.102(e)(2) (2005).

shirked duties to the public, thereby creating a nuisance.[19] This principle was gradually applied to commercial corporations as well as quasi-public ones. As Professor Coffee has pointed out, these cases presented no great theoretical difficulty at the time; in the first place, "no individual agent of the corporation was responsible for the corporation's omission" and in the second, "there was no imputation of guilt from agent to principal" because "only the corporation was under a duty to perform the specific act in question."[20]

As time went on, American courts began to extend the principle to encompass instances of malfeasance as well as nonfeasance, so that, for instance, a corporation that had a duty to keep a public area clear could be charged criminally for its dumping in that area as well as for its failure to keep the area clear.[21]

The watershed was reached in 1909 when the United States Supreme Court held that Congress acted constitutionally in passing a criminal statute that regulated rebating by common carriers and that specifically provided that the acts of a common carrier's officers, agents and employees, if amounting to misdemeanors, were to be considered the acts of the carrier.[22] This was the first authoritative application to a corporation of a criminal statute requiring criminal intent.[23]

In the *New York Central* case, the Supreme Court seems to have been moved by the fact that, as of 1909 at least, there were few alternative sanctions available. If the Court refused to recognize *respondeat superior* liability in such cases, it said, "many offenses might go unpunished."[24] The Court also pointed to the logic of having a fine paid by the corporation that benefited from the criminal act in question, and observed that

> [T]he great majority of business transactions in modern times are conducted through [corporations], and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.[25]

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

20. John C. Coffee, Jr., *Corporate Criminal Responsibility*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 253, 253-54 (Sanford H. Kadish ed., 1983).

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

22. New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 496 (1909).

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

24. *Id.* at 495.

25. *Id*. at 495-96.

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

B. The Two Punishments Which Are Associated With the Criminal Law and Not with the Civil Law – Incarceration and Humiliation – Do Not Apply to Corporations; Hence, There Is No Reason To Pursue Corporations Criminally

It seems indisputable that, as legal fictions, corporations are incapable of having culpable states of mind, so they cannot, in the colloquial sense at least, be said to have acted "willfully," "corruptly" or "intentionally."[26] It is also obvious that corporations cannot be punished by incarceration.[27]

It has been argued, however, that the other purely-criminal sanction, public humiliation, justifies prosecution of corporations. In addition to the potential financial consequences of prosecution, these commentators point out, criminal sanctions usually carry with them a *stigma* which many corporations, for the sake of continued business relations, would seek to avoid.[28] These writers say that if only the individual responsible for the activity were held criminally liable, and not the corporation he worked for, the corporation might avoid all such stigma or reputational harm, other than a circumstantial identification with the crime.[29]

It is probably true that an indictment stigmatizes a corporation more than does even the stiffest regulatory proceeding, but it is difficult to assess the benefits, if any, of this stigmatizing to the public at large. Presumably, when the general public learned that federal authorities had obtained an indictment of the Andersen firm, people inferred that federal law enforcement was very angry with the firm, and the

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26. This frequently-cited rationale apparently underlies the refusal of a number of foreign countries to prosecute corporations at all. Among these are Austria, Germany, Greece, Ireland, Italy, Luxembourg, Spain, and Sweden.

27. This is not necessarily so in Belgium. *See* Gunter Heine, *New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience-Or Vice Versa?*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 173 (1998). The Belgian legislature has passed a law requiring each corporation to designate a responsible person to become criminally liable if criminal activity is committed on the part of the corporation. *Id.* at 177. In such a case, it is not necessary to prove criminality on the designated person's part. *Id.* at 177-78. To soften what may seem like a rather harsh responsibility, the designated person receives extra compensation for the risk involved, in part to provide reimbursement should fines be imposed after a determination of liability. *Id.* at 178.

28. Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1289-90 (1990).

29. *Id.* at 1290.

firm thereby sustained serious reputational harm. But this reputational harm may be too serious, as we have noted, and may taint the reputations of all officers and employees of the indicted corporations, the vast majority of whom were completely innocent.

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

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

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

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

As Professor, now District Judge, Gerard Lynch has succinctly put it, there are compelling reasons to look to the civil side of the law rather than the criminal in trying to deter, control and punish a corporation's misdeeds. "Corporate misconduct appears to be a particularly suitable area for the application of punitive civil sanctions for three reasons: monetary sanctions are appropriate, corporate plaintiffs are relatively abundant, and specialized agencies exist to facilitate public enforcement where that is necessary."[30]

Judge Lynch's first point is self-evident: monetary sanctions, the primary

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30. Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 31 (1997).

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

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

On the other hand, the legal landscape is now dotted with numerous causes of action on the civil side which were unheard-of in 1909 when the Supreme Court was first considering the issue of prosecuting organizations. Shareholders' derivative suits are now available to challenge corporate waste and greed. Similarly, there are now private attorneys-general bringing antitrust lawsuits, encouraged by treble damages, and as well as class action lawyers, encouraged by awards of attorneys' fees. Even more important in terms of fraudulent corporate behavior are whistleblower suits under the False Claims Act and other statutes.[31]

The rise of specialized agencies for public enforcement, Judge Lynch's third point, is also undeniable. In 1909 the New York Central, the criminal defendant in that seminal Supreme Court case, faced little or no federal regulation. Nowadays it would be dealing with the Federal Railroad Administration, the Department of Transportation, and numerous other federal agencies such as the Environmental

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31. Although the False Claims Act was on the books in 1909, it has only been since 1986, when the Act was broadened, that the Act has become a significant enforcement device. *The Top 100 False Claims Act Settlement*, CORP. CRIME REP., Dec. 30, 2003, at 1, *available at* http://www.corporatecrimereporter/fraudrep.pdf. In 2003, for instance, the government reaped more than $1.9 billion in whistleblower suits, whereas 15 years earlier, in 1988, its takings under the Act were a mere $355,000. *Id.*

Protection Agency and the Occupational Safety and Health Administration. And as Judge Lynch points out, the specialists at these agencies necessarily have a much more sophisticated sense of law enforcement priorities when it comes to their specialty areas than does the average prosecutor. Hence, an environmental agency specialist, for instance, can go after types of pollution that make a genuine difference to the environment rather than focusing solely on instances that make an appealing and intelligible case for a jury in a criminal trial.[32]

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

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

Despite the strength and flexibility of civil sanctions, however, corporate criminal prosecutions may occasionally be necessary, for instance, when the corporate system itself helps produce criminal behavior. If only the individual actor-agent is prosecuted, corporate management may view officers and employees as expendable and may institute policies that encourage illegal but profitable behavior. In such instances, conviction of individuals only, ignores the fact that pressures may be coming from within the organization itself.[33] Corporate criminal liability identifies the corporate organization itself as the responsible party and points to the need for reform at the corporate level.[34]

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

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32. *See* Lynch, *supra* note 30, at 33.
33. Foerschler, *supra* note 28, at 1289.
34. *Id.* at 1290.

warning that certain conduct carries criminal consequences and if, truly, "everybody's doing it" and has been doing it for years, it may be fairer to identify the corporate culture as the criminal actor.

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

III. LEGISLATIVE INTENT MATTERS

By now all, or virtually all, criminal violations in the United States have been codified in written statutes. These statutes encompass a wide spectrum of human activity, from rape to misuse of the Smokey Bear logo, and a range of intentionality, from "corruptly" to "negligently." Despite this plethora of legislation, nothing we have seen has raised the issue of whether the familiar maxims of statutory interpretation can be utilized to determine whether the legislature that enacted a particular criminal statute intended corporations to be among those prosecuted for its violation.[35]

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

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

The statute does not contain any definition of "whoever." By contrast, Congress has explicitly defined "person" and "whoever" to include corporations and other organizations in a handful of other statutes, *e.g.*, those dealing with chemical and biological warfare and weapons,[36] cyber terrorism,[37] international terrorism,[38]

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35. Some state laws governing imposition of corporate criminal liability explicitly direct judges and prosecutors to consider the legislature's intent on a crime-by-crime basis. *E.g.*, DEL. CODE ANN. tit. 11, § 281 (2004); N.Y. PENAL LAW § 20.20 (McKinney 2006).

36. 18 U.S.C. § 229F (2000).

37. 18 U.S.C. § 1030(e)(12) (2005).

38. 18 U.S.C. § 2331(3) (2005).

monetary transactions,[39] and weapons.[40] By accepted rules of statutory construction, it appears that Congress, wisely, may not have intended the more general criminal laws to be applied to corporations or other organizations.[41]

This conclusion – that Congress did not intend the traditional *malum in se*, common-law crimes to apply to corporations – is bolstered by the language of Section 1512(b), requiring proof that the defendant acted "knowingly" and "corruptly."[42] Because states of mind such as these can only be attributed to a corporation through the device of agency, the question arises: what agent?

Here again, familiar techniques of statutory construction can be used, once corporate criminal liability has been inferred, to determine the appropriate rules of attribution, *i.e.*, whose conduct or state of mind can be attributed to the corporation so as to justify criminal sanctions being visited on the entire corporation.[43]

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

By contrast, normally, no single person or group handles all corporate responses to all government investigations, the subject matter of Section 1512(b) – after all, anyone can shred documents, and the rule of attribution is therefore obscure. Whose shredding, and whose state of mind, should be attributed to the entire Andersen firm? The statute is too general to point us to an answer to that question and should therefore not be applied to corporations.[44]

IV. THE FALL-OUT OF THE ANDERSEN PROSECUTION WAS GROSSLY DISPROPORTIONATE TO THE OFFENSE AND ILLUSTRATES THE FOLLY OF LINKING CONVICTION WITH AUTOMATIC CIVIL SANCTIONS

The ramifications of the current state of our laws, where prosecutors have the

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39. 31 U.S.C. § 5312(a)(5) (2005).

40. 18 U.S.C. § 921(a)(1) (2005).

41. The counter-argument is that in Title 1, Chapter 1, Section 1, of the United States Code, Congress said that "*unless the context indicates otherwise* . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2005) (emphasis added). It seems, however, that "the context indicates otherwise," *id*., in Title 18, the Criminal Code. Since the Criminal Code still revolves primarily around criminal intent, something that corporations are incapable of having, and since the Criminal Code includes a few statutory provisions that explicitly encompass corporations and other organizations (as noted above), we do not believe that 1 U.S.C. § 1 generally applies to the Criminal Code, Title 18.

42. 18 U.S.C. § 1512(b) (2005).

43. *See infra* Section V. The phrase "rule of attribution" and the importance of the concept in this context are derived from Lord Hoffmann's thoughtful opinion in *Meridian Global Funds Management Asia Ltd. v. Securities Comm.*, [1995] 2 A.C. 500, 506-12 (P.C. 1995) (appeal taken from N.Z.).

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

weapons of criminal prosecution and also of consequent or alternative civil sanctions in their arsenal against corporate misconduct, are deeply troubling to many observers, including current and former prosecutors.[45]

This regime gives government, and especially the federal government, vast and irrationally shaped areas of power. False Claims Act[46] cases, which often feature both criminal charges and civil claims, are classic examples. Defendant corporations, which more or less by definition in False Claims cases do a lot of business with the federal government, often feel forced to pay exceedingly large settlements on the civil side, and to plead guilty to a carefully-orchestrated charge on the criminal side, simply to avoid "betting the company" in a criminal trial, the outcome of which might mean automatic exclusion from a federal program that provides a significant portion of the company's livelihood.

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

The wild card in the above scenarios, the factor that so significantly increases the prosecution's bargaining power, is Congress' and administrative agencies' coupling, in certain areas, of automatic and sweeping civil sanctions that follow criminal convictions for certain offenses.[47] This coupling is most frequently found in the government contracts arena, where Congress has in general decreed that those who are convicted of defrauding the government will automatically be debarred from contracts with the government. This may appear to be a rational decree at first blush, but as shown above, in practice it leads to vast dislocations of power as between the Department of Justice and businesses that deal with the government, particularly in the healthcare and defense industries.

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45. The Federal Criminal Procedure Committee of the American College of Trial Lawyers, which is responsible for this paper, includes current and former federal prosecutors within its ranks.

46. 31 U.S.C. 3729 (2005).

47. *See, e.g.*, 42 U.S.C. § 1320a–7(a)(1) ("The Secretary [of Health and Human Services] *shall exclude* . . from participation in any Federal healthcare program . . . [a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under [the federal Medicare program] or under any State health care program." (emphasis added)).

Putting all this power in the hands of prosecutors conflicts with of one of the first precepts of legal education: that we are a nation ruled by laws rather than by individuals. While prosecutorial discretion is a time-honored and necessary fact of law-enforcement life, this discretion has historically been limited to issues on which prosecutors presumably have become experts. How serious was this individual's crime? Should the mitigating factors in this case cause the prosecutor to decline prosecution altogether, or should they rather affect only the seriousness of the charges or the recommended sentence? There is nothing, however, in a federal prosecutor's training that prepares him or her either to make decisions about an economic entity's claim to exist, or to balance the personal and financial dislocation inflicted on innocent employees and shareholders against the possible incremental deterrence value of indicting the corporation as well as its officers.[48]

We cannot know if the Andersen firm would have survived its conviction on criminal charges in the absence of the regulation requiring that, upon any felony conviction, it be debarred from practicing before the Securities and Exchange Commission.[49] But the mandatory nature of that debarment made the firm's death inevitable.

V. THE FEDERAL COURTS SHOULD REVISIT THE ISSUE OF PROSECUTING BUSINESS ORGANIZATIONS AND SHOULD DEVELOP UNIFORM JURY INSTRUCTIONS LIMITING THE CIRCUMSTANCES UNDER WHICH CONVICTIONS MAY BE HAD

To the extent that Congress does now and may continue in the future to impose criminal sanctions on corporations and other organizations, we respectfully suggest that the Judicial Conference of the United States, through its Advisory Committee On Criminal Rules, consider adopting a jury instruction, see Appendix A, based on The American Law Institute's Model Penal Code.[50] Such an action would bring the federal government into line with the majority of states that have legislated on this issue and more nearly in line with Western European jurisprudence.

As stated above, the law in the Fifth Circuit, where the Andersen firm was prosecuted, basically incorporates the rules of *respondeat superior* from civil cases into criminal cases without any significant modification. Thus, Judge Melinda Harmon instructed the jury that (1) Andersen was legally bound by the acts and statements of its agents made within the scope of their employment; (2) although the agent in question must be acting with the intent, at least in part, to benefit the partnership, it was not necessary that the agent's primary motive was to benefit the

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48. A jury trial, of course raises an even greater question: is there anything in the training of the average juror that prepares him or her to make that decision? The seriousness of this consideration is demonstrated where, as in the Andersen trial, the jury convicts on a theory that is different from that of the prosecution.

49. 17 CFR § 201.102(e)(2) (2005) (stating that "any person who has been convicted of a felony . . . shall be forthwith suspended from appearing or practicing before the Commission").

50. MODEL PENAL CODE § 2.07 (1962).

partnership; (3) although the agent's criminal act must have related directly to the performance of the agent's general duties for the partnership, it was not necessary for the particular act itself to have been authorized by the partnership; (4) indeed, a partnership may be held responsible for its agents' acts performed within the scope of their employment even though the agents' conduct is contrary to the partnership's actual instructions or stated policies; and (5) the agent in question need not be a high level or managerial agent in order for his or her act to be attributable to the firm.[51] This is the law, but in this respect, to quote Dickens' Mr. Bumble, the law is an ass.

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

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

The American Law Institute recognized this some decades ago in drafting and adopting Model Penal Code, Section 2.07, governing the liability of corporations, unincorporated associations and persons acting, or under a duty to act, on their behalf.[52] Broadly speaking, Section 2.07 permits convictions of corporations (a) if the offense is minor, or (b) if the offense consists of an omission to discharge a specific duty, or (c) if the commission of the offense was "authorized, requested, commanded, performed or recklessly tolerated by the Board of Directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment."[53] Under Section 2.07(5), "it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."[54]

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

Section 2.07(1) of the Model Penal Code provision covers in detail the three categories of circumstances, described above, in which corporations may be

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51. Court's Instructions to the Jury at 4-5, United States v. Arthur Andersen, No. 02-121 (S.D. Tex. June 5, 2002).

52. MODEL PENAL CODE § 2.07 (1962); see footnote 1 of Appendix B hereto for full text.

53. MODEL PENAL CODE § 2.07(1) (1962).

54. *Id.* at § 2.07(5).

convicted of crimes performed by their agents.[55]

The first category consists of cases where:

> the offense is a violation or the offense is defined by a statute other than the [criminal] Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply . . . .[56]

This category encompasses minor offenses ("violations"), such as "petty offenses,"[57] as well as those felonies and misdemeanors which can loosely be described as "regulatory," where the regulatory offense is such that the legislature can be clearly seen to have intended to impose criminal liability on corporations. For these petty offenses and regulatory crimes, the Model Penal Code provides for conviction upon a showing merely that "the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment", *i.e.*, the familiar *respondeat superior* standard.[58]

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

The second category under Section 2.07(1) encompasses those offenses that consist of "an omission to discharge a specific duty of affirmative performance imposed on corporations by law."[59] In this category, as we read it, it is unnecessary for the prosecution to specify any individual whose conduct will be attributed to the corporation for criminal purposes, and a sort of strict liability is thus imposed.

Non-regulatory crimes, the traditional common law felonies and misdemeanors, constitute the third category.[60] Here the rule of attribution is that the corporation may only be convicted if "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."[61] The phrase "high managerial agent" is defined in Section 2.07(4)(c): "an officer of a corporation or an unincorporated association,

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55. *Id.* at § 2.07(1).

56. *Id.* at § 2.07 (1)(a).

57. 18 U.S.C. § 19 (2005) (defining 'petty offenses' as committed by individuals and organizations, respectively).

58. An exception is provided for those instances in which the rule of attribution is spelled out in the statute. *Id.* at § 2.07(3)(a).

59. *Id.* at § 2.07(1)(b).

60. *Id.* at § 2.07(1)(c).

61. *Id.*

or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association."[62]

This is the section that would most nearly apply to the Arthur Andersen prosecution.[63] If the Andersen firm had been prosecuted under this standard, it might still have been convicted since both David Duncan and Nancy Temple might have been considered by the jury to be high managerial agents of the firm. We believe, however, that this standard would have focused the jury's attention, more appropriately, on the *level* of responsibility of the agent in question (in Duncan's case, his partnership status) or the *type* of responsibility *vis-à-vis* the offense conduct (in Nancy Temple's case, her role as an attorney supervising, in part at least, the firm's response to the Enron investigation).

VI. CONCLUSION

Congress would be well advised, we believe, to consider enacting some version of the Model Penal Code, or the thoughtful solution recently enacted by the Canadian Parliament to govern the prosecution of corporations,[64] but we do not believe that this is necessary in order to achieve some significant reform. Instead, we believe that the Judicial Conference of the United States could, in its general supervisory role, draft and adopt a suggested model jury instruction on this subject. (See example at Appendix A.)[65] The jury instruction given by Judge Harmon to the

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62. *Id.* at § 2.07(4)(c).

63. Interestingly enough, a partnership such as Arthur Andersen would technically fall under subsection (3) of the Model Penal Code provision, which states that there is no liability whatsoever for non-regulatory felonies, such as 18 U.S.C. § 1512, which the Andersen firm was prosecuted for violating. *See* MODEL PENAL CODE § 2.07(3). Most of the states that have followed the Model Penal Code, however, have omitted this section and have treated unincorporated associations in the same manner as corporations or have made no provision whatsoever for prosecuting associations. *See, e.g.*, N.J. STAT. ANN. § 2C: 2-7 (2005); 720 ILL. COMP. STAT. 5/5-4 (2005).

64. In late 2003, Canada enacted important new legislation on the subject of corporate criminal liability. Significantly, definitions in the Criminal Code were amended with the consequence that all criminal statutes are potentially applicable to organizations. *See* Section 2, Criminal Code, R.S.C., ch. C 46 (1985), as amended. The new provisions contain, however, important limitations on such prosecutions, in that there are explicit and restrictive rules of attribution, one set relating to statutes in which negligence is the focus and another set regarding statutes that involve "fault . . . other than negligence." Sections 22.1 and 22.2, *Criminal Code*, R.S.C. 1985, c. C-46, as amended.

65. The model jury instruction we put forward in Appendix A of this paper is based generally on the Model Penal Code, with some modifications. The Model Penal Code, Section 2.07, contemplates a standard for unincorporated associations that is different from the standard for corporations; we see no reason why the standard should be different and our proposal would permit unincorporated associations to be convicted on the same basis as corporations.

In addition, our proposed jury instruction does not cover the circumstance encompassed by Section 2.07(1)(b), in which "the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law . . . ." MODEL PENAL CODE § 2.07(1)(b). These circumstances arise largely not within the context of the Federal Criminal Code, but rather, for example, the Internal Revenue Code. The applicable jury instruction in such circumstances seems to us to be straight forward. For instance, if the Internal Revenue Code

Andersen jury was derived from the federal common law, not from any statute. We see no reason why the federal judiciary, having allowed the *respondeat superior* doctrine to metastasize from the civil side onto the criminal side, could not take steps to reverse this growth and to rationalize and improve the jury instruction used in this area. If and when the Judicial Conference initiates such a review, we hope that the foregoing analysis proves helpful.

VII. EPILOGUE

In June of 2004, the conviction of Arthur Andersen, LLP was affirmed by the Fifth Circuit.[66] However, in May 2005, a unanimous United States Supreme Court reversed and remanded the conviction, finding fatal flaws in the jury instructions on which the conviction was based.[67] Andersen had been charged under 18 U.S.C. §§ 1512(b)(2)(A) and (B), which provided that it was a crime to "knowingly use intimidation or physical force, threaten, or corruptly persuade another person- . . .with intent to. . .cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding."[68] The Supreme Court held that the jury instructions failed to convey properly the elements of a "corrupt persuasion" required for a conviction under § 1512(b).

As this article goes to press, the government has moved to dismiss its indictment against Andersen rather than re-try the case.[69] In another twist, the only person to have pleaded guilty in the Andersen matter, former Andersen partner David Duncan, moved the same day to withdraw his guilty plea.

APPENDIX A

PROPOSED JURY INSTRUCTION FOR PROSECUTIONS OF CORPORATIONS AND UNINCORPORATED ASSOCIATION

The defendant in this case is a [corporation] [partnership] [trade union] [etc.] rather than an individual. Under the law such entities are sometimes considered persons and may in some instances be liable for violating the criminal laws. However, as an entity, the defendant can only act through its agents, such as its

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provides that a corporation shall file tax returns and pay its taxes, with criminal penalties if it fails to do so, then the legislative intent to impose criminal responsibility on the corporation regardless of which of its agents is responsible seems fairly clear.

Likewise, we have not drafted a proposed jury instruction to cover Section 2.07(1)(a), covering minor offenses or regulatory offenses other than those described in the previous paragraph, because such prosecutions are, in our experience, extremely rare; moreover, if such a prosecution were to be brought, we believe the rule of attribution is adequately spelled out in the Model Penal Code itself and an appropriate jury instruction could be crafted to suit the particular case.

66. United States v. Arthur Andersen LLP, 374 F.3d 281, 302 (5th Cir. 2004).

67. Arthur Andersen LLP v. United States, 125 S. Ct. 2129, 2137 (2005).

68. 18 U.S.C. 1512(b) (2005).

69. Carrie Johnson, *US Ends Prosecution of Arthur Andersen*, WASH. POST, Nov. 23, 2005, at D1.

officers, partners, and employees. Here [where the defendant is charged with a felony under the criminal code], the defendant may only be convicted if you find beyond a reasonable doubt that the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

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

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

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

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

APPENDIX B

STATE POLICIES ON CORPORATE CRIMINAL LIABILITY

This appendix discusses the law regarding corporate criminal liability in each of the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. Some states have clearly defined the scope of corporate criminal liability in general, many modeling their statutes after the MODEL PENAL CODE §2.07 (Official Revised Draft 1962)(hereinafter "MPC").[1] Other states have enacted statutes

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1. (1) A corporation may be convicted of the commission of an offense if:
(a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense

that impose criminal liability on corporations through individual statutes addressing specific actions, or that define "person" to include corporations and other business entities. Of those states that have not addressed corporate criminal liability by statute, some have addressed the issue in case law, while others have yet to develop this area of law.

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designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

(2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.

(3) An unincorporated association may be convicted of the commission of an offense if:

(a) the offense is defined by a statute other than the Code that expressly provides for the liability of such an association and the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the association is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.

(4) As used in this Section:

(a) 'corporation' does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) 'agent' means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) 'high managerial agent' means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

(5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1)(a) or Subsection (3)(a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

(6)(a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

ALABAMA

Alabama does not expressly address general corporate criminal liability within its statutes or case law. However, the state does address liability issues in individual statutes. Also, Alabama has adopted MPC § 2.07(6)(a) without substantial change, in a statute entitled, "Corporate conduct." ALA. CODE § 13A-2-26 (2003). As in the MPC, this statute holds an individual liable for any actions he commits or causes to be committed in the name of a corporation. *Id.*

In addition, the Code of Alabama defines "person" to include "a human being, and where appropriate a public or private corporation, an unincorporated association, a partnership, a government, or a governmental instrumentality." ALA. CODE § 13A-1-2(11) (LexisNexis 2005). This definition has been interpreted by The Court of Criminal Appeals of Alabama, in 2002. State v. St. Paul Fire and Marine Ins. Co., 835 So. 2d 230 (Ala. Crim. App. 2000) (addressing the question of whether an insurance company could be found criminally liable for perjury). Even though the court held that the corporation could not be indicted for perjury, the court did establish a framework for determining when a corporation can be held criminally liable. *Id.* at 234. The court noted that while the definition of "person" in the criminal code (ALA. CODE § 13A-1-2(11)) includes corporations, its applicability is limited by the words "where appropriate." *St. Paul Fire*, 835 So. 2d at 233. Since the Legislature has expressly provided for corporate criminal liability for individual crimes by expressly including corporations in the definition of "person" for individual criminal statutes,[2] the court held criminal liability of corporations is limited to those sections where the Legislature has expressly provided for corporate criminal liability. *Id*. at 233-34.

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

ALASKA

The Alaska criminal code expressly defines the extent of corporate criminal liability in a section entitled "Legal accountability of organizations." ALASKA STAT. § 11-16-130 (2004). This section is modeled after MPC § 2.07(1) and (3) with some changes. The Alaska criminal code defines "organizations" to include, "a corporation, company, association." ALASKA STAT. § 11-81-900(b)(43). Further, Alaska has enacted the MPC's definition of "agent" without substantial change. ALASKA STAT. §11-16-130(2)(b).

In addition, the Alaska criminal code defines "person" as "a natural person and, when appropriate, an organization, government, or governmental instrumentality."

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2. *See e.g*. ALA. CODE § 13A-9-70(3) (2005) (defines person as "any individual, organization, group, association, partnership, corporation").

ALASKA STAT. § 11-81-900(b)(45).

ARIZONA

The Arizona criminal code expressly defines the extent of corporate criminal liability in a section entitled "Criminal liability of enterprises; definitions." ARIZ. REV. STAT. ANN. § 13-305 (2001). This section is modeled after MPC § 2.07(1) and (3) with slight modification. Arizona defines "enterprise" as any "corporation, association, labor union or other legal entity." ARIZ. REV. STAT. ANN. § 13-105(15).

In addition, Arizona does define "person" to include individuals, corporations, and associations. ARIZ. REV. STAT. ANN. § 42-5001(8) (2005). The Arizona Court of Appeals implied in dicta that a corporation could be held criminally liable for failure to file tax returns using this statute. State v. Angelo*,* 800 P.2d 11 (Ariz. Ct. App. 1990). The court noted that "under the present and former code, the 'person' who does not file a transaction privilege return is the party subject to criminal liability. A 'person' can be either an individual or a corporation." *Id.* at 26.

ARKANSAS

The Arkansas criminal code expressly defines the extent of criminal liability in three general statutes. The first is entitled "Liability of organizations." ARK. CODE ANN. §5-2-502 (1997). This section is modeled after subsections MPC § 2.07(1) and (3) with slight changes. Arkansas defines "organizations," to include, *inter alia*, corporations, associations, "or any other group of persons organized for any purpose." ARK CODE ANN. §5-2-501 (1) (1997). The second is entitled "Liability of agents." ARK CODE ANN. §5-2-503 (1997). This section is modeled after subsection MPC § 2.07(6) with slight changes, such as not imposing the same sentences upon these individuals as would be imposed by statute if the organization itself was liable. ARK CODE ANN. §5-2-503*;* ARK CODE ANN. §5-4-201(e) (1997) (establishing guidelines for organizations convicted of criminal offenses). Finally, Arkansas has enacted the MPC's definition of "agent" and "high managerial agent" without substantial change. ARK CODE ANN. §5-2-501 (1997). Arkansas has not adopted subsections MPC § 2.07(2), and (5).

CALIFORNIA

California does not expressly address general corporate criminal liability within its statutes or case law. The Court of Appeal for California addressed the issue of corporate criminal liability in *Sea Horse Ranch, Inc. v. People*, and found that a corporation could be held liable for manslaughter because of the president's acts and omissions. 30 Cal. Rptr. 2d. 681, 687 (Cal. Ct. App. 1994). The court noted that "a corporation may be criminally liable for the conduct of its officers or agents or employees." *Id*. at 687. (citing Granite Construction Co. v. Superior Court, 149 Cal. App.3d (Cal. Ct. App. 1983)). The court found since the corporate president acted on the corporation's behalf, his negligence could be imputed to the corpora-

tions. *Id.* at 689.

COLORADO

The Colorado Criminal Code expressly defines the extent of corporate criminal liability in two general statutes. The first is entitled "Criminal liability of business entities." COLO. REV. STAT. § 18-1-606 (2003). This section is modeled after MPC § 2.07 (1) and (3) with some changes. Subsections (1)(a) and (1)(b) are modeled after MPC §2.07(1)(b), (3)(b), (1)(c) and (3)(c) without substantial change. Colorado defines "business entities" to include, *inter alia*, corporations "or other association or group of individuals doing business in the state." COLO. REV. STAT. § 18-1-606(2)(b). Colorado also has enacted the MPC's definitions of "agent" and "high managerial agent" without substantial change. *Id.* § 18-1-606(2)(a). Pursuant to Section 18-1-606(2)(b) of the Colorado Criminal Code, Colorado appears to have limited the scope of those organizations subject to the statute to organizations doing business in the state. In addition, in a section entitled, "Criminal liability of an individual for corporate conduct" COLO. REV. STAT. § 18-1-607 (2003), Colorado adopts MPC § 2.07 (6)(a) without substantial change. Further, Colorado imposes fines upon business entities for criminal violations. COLO. REV. STAT. § 18-1-606(3).

CONNECTICUT

Connecticut does not expressly address general corporate liability within its statutes or case law. However, the Connecticut Penal Code defines "person" to include, "where appropriate, a public or private corporation, a limited liability company, an unincorporated association . . . ." CONN. GEN. STAT. § 53a-3(1) (2003). Additionally, Section 53-303c of the criminal code imposes criminal penalties on corporations that violate particular provisions of the criminal code, mainly the restriction on operating certain businesses on Sundays. CONN. GEN. STAT. § 53-303c (2003). Moreover, the code lays out specific punishment for corporations that engage in money laundering. CONN. GEN. STAT. § 53a-281 (2003).

Further, in a section entitled, "Criminal liability of an individual for conduct in name or behalf of corporation or limited liability" CONN. GEN. STAT. § 53a-11 (2001), Connecticut adopts MPC § 2.07 (6)(a) without substantial change.

DELAWARE

The Delaware criminal code expressly defines the extent of corporate criminal liability in a section entitled, "Criminal liability of corporation." DEL. CODE ANN. tit.11, § 281 (2004). In this section, Delaware has adopted MPC § 2.07(1) and (3) without substantial change. Delaware defines "organization" to include "public or private corporation, a trust, a firm . . . an unincorporated association." DEL. CODE ANN. tit.11, § 284 (2004) (referencing Delaware's definition of "person," DEL.

CODE ANN. Tit. 11, § 222(21) (2004)). In addition, in a section entitled, "Criminal liability of an individual for corporate conduct." DEL. CODE ANN. tit. 11, § 282 (2004), Delaware adopts MPC § 2.07 (6)(a) without substantial change. Delaware also has enacted the MPC's definition of "agent" and "high managerial agent" without substantial change. DEL. CODE ANN. Tit.11, § 284 (2004).

DISTRICT OF COLUMBIA

The District of Columbia does not expressly address general corporate criminal liability within its statutes or case law. However, specific District of Columbia statutes impose criminal liability on business entities. For example, the District of Columbia's criminal code, entitled "Fraudulent advertising" imposes criminal liability on "any person, firm, association, corporation, or advertising agency" for fraudulent advertising. D.C. CODE §22-1511 (2001).

FLORIDA

Florida does not expressly address corporate general criminal liability within its statutes. However, the District Court of Appeal for Florida addressed the issue in *West Valley Estates, Inc. v. State*, and found that a corporation can be criminally liable "for the acts of an agent who has been vested with the authority to act on behalf of the corporation in the sphere of corporate business in which he commits the criminal act." 286 So.2d. 208, 209 (Fla. Dist. Ct. App. 1973). Here the court convicted a corporation for dredging beyond the limits of the permits after the vice-president of the corporation followed orders from the president. *Id*. at 208.

GEORGIA

The Georgia criminal code expressly defines the extent of corporate criminal liability in a section entitled, "Criminal responsibility of corporations." GA. CODE ANN. §16-2-22 (2003). This section is modeled after MPC §2.07(1) with the exception that Georgia did not adopt subsection MPC §2.07(1)(b). Further, Georgia has enacted the MPC's definition of "agent" and "managerial official" with minor changes. GA. CODE ANN. § 16-2-22(b).

In addition, the Court of Appeals of Georgia addressed the issue of criminal liability of an individual for corporate conduct in *Parish v. State*, and found that a corporate officer can be held criminally liable for criminal acts made in the form of corporate acts. 342 S.E.2d. 361(Ga. Ct. App. 1986).

GUAM

The Guam criminal code expressly defines the extent of general corporate criminal liability in a section entitled, "Criminal Liability of Corporations." GUAM CODE ANN. tit. 9, § 4.80 (a), (b) (1996). This section is modeled after MPC § 2.07(1) with some changes. In addition, Guam has enacted the MPC's definition of "agent." GUAM CODE ANN. tit. 9, § 4.80(c) (1996).

HAWAII

The Hawaii criminal code expressly defines the extent of general corporate criminal liability in two general statutes. The first is entitled, "Penal liability of corporations and unincorporated associations." HAW. REV. STAT. § 702-227 (1993). This section has adopted MPC §2.07(1) and (3) without substantial change. The second statute is entitled "Liability of persons acting or under a duty to act, in behalf of corporations or unincorporated associations." HAW. REV. STAT. § 702-228 (1993). This section is modeled after MPC §2.07(6) with the exception that Hawaii did not adopt subsection MPC §2.07(6)(c).

IDAHO

Idaho does not expressly address corporate criminal liability within its statutes. However, the Supreme Court of Idaho has addressed the issue. In *State v. Adjustment Dep't Credit Bureau*, the court describes the situations in which a corporation may be held liable. 483 P.2d 687 (Idaho 1971). The court laid out the following test to determine corporate criminal liability.

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

Id. at 691. The test established by the court is modeled after MPC §2.07(1), (2) with the exception that the Court did not adopt subsection MPC §2.07(1)(a).

In addition the Idaho penal code defines "person" to include a public or private corporation. IDAHO CODE ANN. § 18-101(7) (2004).

ILLINOIS

The Illinois criminal code expressly defines the extent of general corporate liability in a section entitled, "Responsibility of corporation." 720 ILL. COMP. STAT. ANN. 5/5-4 (a) (West 2002). This section is modeled after MPC § 2.07(1) with the exception that Illinois did not adopt subsection (b). Further, Illinois has enacted MPC § 2.07(5), which provides corporations a defense to criminal liability when the high managerial agent responsible for the subject matter of the offense exercised due diligence to prevent its completion. 720 ILL. COMP. STAT. ANN. 5/5-4 (b). Illinois has also enacted the MPC's definition of "agent" and "high managerial agent" without substantial change. *Id.* 5/5-4(c). In addition, in a section entitled, "Accountability for Conduct of Corporation" 720 ILL. COMP. STAT. ANN. 5/5-5

(West 2002), Illinois adopts MPC § 2.07 (6)(a) and (c) without substantial change.

INDIANA

The Indiana criminal code expressly defines the extent of general corporate criminal liability in a section entitled "Liability of corporation, partnership, or unincorporated association." IND. CODE ANN. § 35-41-2-3 (a) (LexisNexis 2004). This section is modeled after MPC § 2.07(1)(a) and (3)(a) with some changes. This section allows a corporation, limited liability company, partnership, or unincorporated association to be convicted of any offense, "only if it is proved that the offense was committed by its agent acting within the scope of his authority." IND. CODE ANN. § 35-41-2-3 (a).

In addition the Supreme Court of Indiana addressed the issue of criminal liability of an individual for corporate conduct in *Commissioner v. RLG, Inc.*, and found that a corporate officer can be held criminally liable for criminal acts made in the form of corporate acts. 755 N.E.2d 556, 560 (Ind. 2001) (citing Doyle v. State, 468 N.E.2d 528, 542 (Ind. Ct. App. 1984)). Here the court found Roseman, the sole corporate officer of RLG, could be held personally liable under the responsible corporate officer doctrine for violations of the Indiana Environmental Management Act. *Id.* at 561.

IOWA

The Iowa criminal code expressly defines the extent of corporate general criminal liability in a section entitled, "Liability of Corporation, partnership, and voluntary associations." IOWA CODE § 703.5 (2001). This section is modeled after MPC § 2.07(1) and (3) with minor changes and with the exception that Iowa did not adopt subsection MPC § 2.07(1)(a) or (3)(a). In addition, Iowa has enacted the MPC's definition of "high managerial agent" with minor changes. IOWA CODE § 703.5 (2001).

KANSAS

The Kansas criminal code expressly defines the extent of general corporate liability in a section entitled, "Corporations; criminal responsibility." Kan. Stat. Ann. § 21-3206 (1995). Kansas holds corporations criminally liable for "acts committed by its agents within the scope of their authority." KAN. STAT. ANN. § 21-3206 (1995). Kansas has adopted the MPC's definition of "agent" with minor changes. KAN. STAT. ANN. § 21-3206 (2) (1995). In addition, in a section entitled, "Individual liability for corporate crime" KAN. STAT. ANN. § 21-3207 (1995), Kansas adopts MPC § 2.07 (6)(a) and (c) without substantial change.

KENTUCKY

The Kentucky criminal code expressly defines the extent of general corporate criminal liability in three statutes. The first section is entitled, "Corporate liability."

KY. REV. STAT. ANN. § 502.50(1) (2003). In this section Kentucky has adopted MPC § 2.07(1) without substantial change. The second is entitled, "Individual liability for corporate conduct." KY. REV. STAT. ANN. § 502.60 (2003). In this section Kentucky has adopted MPC § 2.07 (6)(a) without substantial change. Finally, Kentucky has enacted the MPC's definition of "agent" and "high managerial agent" without substantial change. KY. REV. STAT. ANN. § 502.50(2) (2003).

LOUISIANA

Louisiana does not expressly address general corporate criminal liability within its statutes. However, the Louisiana Penal Code provides that "person" includes a body of persons, whether incorporated or not. LA. REV. STAT. ANN. § 14:2(7) (2006).

In addition, the Court of Appeal of Louisiana addressed the issue of criminal liability of an individual for corporate conduct in *Ridgway v. Marks*, and found that a corporate officer can be held criminally liable for criminal acts made in the form of corporate acts. 146 So. 2d 61, 63 (La. Ct. App. 1962).

MAINE

The Maine criminal code expressly defines the extent of general corporate criminal liability in a section entitled, "Criminal liability of an organization." ME. REV. STAT. ANN. tit. 17-A, § 60(1) (1964). This section is modeled after MPC § 2.07(1) and (3) with some changes and with the exception that Maine has not adopted subsection MPC § 2.07(1)(c) or 3(c). Maine defines an "organization" as a "corporation, partnership, or unincorporated association." ME. REV. STAT. ANN. tit. 17-A, § 2(19) (1964). Maine has declined to provide the "organization" a defense when the individual whose acts give rise to the offense has not been prosecuted or convicted. ME. REV. STAT. ANN. tit. 17-A, § 60(2) (1964). In addition, in a section entitled, "Individual liability for conduct on behalf of organization," ME. REV. STAT. ANN. tit. 17-A, § 61 (1964), Maine adopts MPC § 2.07 (6)(a) and (b) without substantial change.

MARYLAND

Maryland does not expressly address general corporate criminal liability within its statutes. However, the Maryland criminal code defines "person" to include corporations and other business entities. MD. CODE ANN., CRIM. LAW § 1-101(h) (West 2002).

MASSACHUSETTS

Massachusetts does not expressly address corporate general criminal liability within its statutes. However, the Appeals Court of Massachusetts addressed the issue in *Commonwealth v. Angelo Todesco*, laying out a test in order to establish corporate criminal liability. 818 N.E.2d 608 (Mass. App. Ct. 2004). The court

established the following test where the following three elements must be proved beyond a reasonable doubt:

> (1) that an individual committed a criminal offense; (2) that at the time of committing the offense the individual "was engaged in some particular corporate business or project"; (3) that the individual had been vested by the corporation with the authority to act for it, and on its behalf, in carrying out that particular corporate business or project when the offense occurred.

Id. at 613.

MICHIGAN

Michigan does not expressly address general corporate criminal liability within its statutes or case law. However, the Michigan criminal code defines "person to include a corporation unless a contrary intention appears." MICH. COMP. LAWS § 761.1(a) (2000). This definition has been interpreted in case law. The Court of Appeals of Michigan, in *People v. General Dynamics Land Systems, Inc.*, reversed a lower court decision, which refused to charge a corporation with manslaughter. 438 N.W.2d. 359 (Mich. Ct. App. 1989). The court reasoned as follows:

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

Id. at 361.

In *People v. American Medical Centers, Ltd.*, the Court of Appeals also addressed corporate criminal liability. 324 N.W.2d 782 (Mich. Ct. App. 1982). The appellate court affirmed a corporation's fraud conviction, reasoning that "'person,' as defined by MICH. COMP. LAWS § 400.602(h) (1997) includes a corporation. It is well settled that a corporation is liable for the fraudulent conduct of its president where the conduct was within the scope of his authority." *American Medical Centers*, 324 N.W.2d at 793.

MINNESOTA

Minnesota does not expressly address corporate general criminal liability within its statutes. However, the Supreme Court of Minnesota addressed the issue in *State v. Christy Pontiac-GMC, Inc.*, and found "[i]f a corporation can be liable in civil tort for both actual and punitive damages for libel, assault and battery, or fraud, it would seem it may also be criminally liable for conduct requiring specific intent." 354 N.W.2d 17, 19 (Minn. 1984); *see also* State v. Compassionate Home Care, Inc., 639 N.W.2d 393, 397 (Minn. Ct. App. 2002).

The court also narrowed potential liability, stating:

> [i]f a corporation is to be criminally liable, it is clear that the crime must not be a personal aberration of an employee acting on his own; the criminal activity must, in some sense, reflect corporate policy so that it is fair to say that the activity was the activity of the corporation. There must be, as Judge Learned Hand put it, a 'kinship of the act to the powers of the officials, who commit it.'

354 N.W.2d at 19-20 (citing United States v. Nearing, 252 F. 223, 231 (S.D.N.Y. 1918)).

MISSISSIPPI

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

MISSOURI

Missouri expressly defines the extent of corporate criminal liability in a section entitled, "Liability of corporations and unincorporated associations." MO. REV. STAT. §562.056 (West 1999). In this section, Missouri has adopted MPC § 2.07(1) and (3), without substantial change. In addition, Missouri has enacted the MPC's definition of "agent" and "high managerial agent," without substantial change. MO. REV. STAT. §562.056(3). Further, in a section entitled, "Liability of individual for conduct of corporation or unincorporated association" MO. REV. STAT. §562.061 (West 1999), Missouri adopts MPC § 2.07 (6)(a) without substantial change.

MONTANA

The Montana Criminal Code expressly defines the extent of corporate criminal liability in a section entitled "Criminal Responsibility of Corporations." MONT. CODE ANN. § 45-2-311 (2005). This section is modeled after MPC §2.07(1) with the exception that Montana did not enact subsection (b). Montana has also enacted MPC § 2.07(5), which provides corporations a defense to criminal liability when the high managerial agent responsible for the subject matter of the offense exercised due diligence to prevent its completion. MONT. CODE ANN. §45-2-311(2). In addition, Montana has enacted the MPC's definition of "agent" and "high managerial agent" without substantial change. *Id*. §45-2-311(3). Further, in a section entitled, "Accountability for conduct of corporation" MONT. CODE ANN. § 45-2-312 (2005), Montana adopts MPC § 2.07 (6)(a) and (c) without substantial change.

NEBRASKA

Nebraska does not expressly address corporate criminal liability within its statutes. However, both the Nebraska Supreme Court and the Nebraska Court of

Appeals have addressed the issue. In *Mueller v. Union P. R.R.*, 220 Neb. 742 (1985), an employment lawsuit, the Nebraska Supreme Court stated in dicta: "While a corporation may be convicted of certain types of criminal acts committed by its agents, even if the acts have been forbidden by the corporation, in order to impose such criminal liability against the corporation, the agent must have been acting within the scope of his or her authority." *Id*. at 751 (citing Standard Oil Co. of Tex. v. United States, 307 F.2d 120 (5th Cir. 1962)); United States v. Thompson-Powell Drilling Co., 196 F. Supp. 571 (N.D. Tex. 1961), *rev'd* Standard Oil Co. of Tex. v. United States, 307 F.2d 120 (5th Cir. 1962); Vulcan Last Co. v. State, 194 Wis. 636 (1928).

Further, in *State v. Roche, Inc*., 2 Neb. App. 445 (Neb. Ct. App. 1994), *rev'd on other grounds*, 246 Neb. 568 (1994), the Nebraska Court of Appeals affirmed the conviction of a corporation for theft by deception. The court noted: "At least since 1909, the U.S. Supreme Court has concluded that a corporation may be liable criminally for offenses where its agent acts within his or her authority and in which intent is an element." *Id.* at 454.

In addition, a Nebraska statute provides "[f]or purposes of the Nebraska Criminal Code, unless the context otherwise requires" that "person" includes "where relevant a corporation . . . ." NEB. REV. STAT. §28-109(16) (LexisNexis 2003).

NEVADA

Nevada does not expressly address corporate criminal liability within its statutes or case law. However, within the criminal code, §193.160 provides for the imposition of a fine not exceeding $1,000 where a corporation is convicted of a misdemeanor, the punishment for which is not fixed by statute. NEV. REV. STAT. §193.160 (2003). In addition, within the criminal code, §205.105 Nevada addressed the issue of criminal liability of an individual for corporate conduct, making the employee criminally liable for acts made on behalf of a corporation with respect to forgery. NEV. REV. STAT. §205.105 (2003).

NEW HAMPSHIRE

The New Hampshire Criminal Code classifies crimes, including crimes committed by corporations, in a section entitled "Classification of Crimes." N.H. REV. STAT. ANN. §625:9 (1996 & Supp. 2005). The statute provides that "a crime defined by statute outside of this code is a felony when committed by a corporation or an unincorporated association if the maximum fine therein provided is more than $200"; misdemeanors committed by a corporation are unclassified; and in the case of a corporation, "offenses defined outside of this code are violations if the amount of any such fine provided does not exceed $50." *Id.* § 625:9(III-V). In addition, the New Hampshire Criminal Code defines "person" to include "a corporation or an unincorporated association." N.H. REV. STAT. ANN. §625:

11(II) (1996).

NEW JERSEY

The New Jersey Code of Criminal Justice expressly defines the extent of corporate criminal liability in a section entitled, "Liability of corporations and persons acting, or under a duty to act, in their behalf." N.J. STAT. ANN. §2C:2-7 (West 2005). This section is modeled after MPC §§ 2.07(1) and (5). Subsection (5) provides corporations a defense to criminal liability when the high managerial agent responsible for the subject matter of the offense exercised due diligence to prevent its completion. N.J. STAT. ANN. § 2C:2-7(c). In addition, New Jersey has enacted the MPC's definition of "corporation," "agent" and "high managerial agent" without substantial change. *Id.* § 2C:2-7(b). Further, New Jersey does not negate the possibility of individual criminal liability when acting as a corporate agent. *Id.* § 2C:2-7(d).

NEW MEXICO

New Mexico does not expressly address corporate criminal liability within its statutes or case law. However, the New Mexico Criminal Procedure Act defines "person" to include, "unless a contrary intention appears," any "individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity." N.M. STAT. §31-1-2(E) (2000).

NEW YORK

New York expressly defines the extent of corporate criminal liability in a section entitled "Criminal liability of corporations." N.Y. PENAL LAW § 20.20 (McKinney 2004). This section is modeled after MPC § 2.07(1), without substantial change. In addition, New York has enacted the MPC's definition of "agent" and "high managerial agent," without substantial change. N.Y. PENAL LAW § 20.20(1). Further, in a section entitled, "Criminal liability of an individual for corporate conduct" N.Y. PENAL LAW § 20.25 (McKinney 2003), New York adopts MPC § 2.07 (6)(a) without substantial change.

NORTH CAROLINA

The North Carolina Criminal Code does not expressly address corporate criminal liability. However, the North Carolina Supreme Court last addressed the issue in *State v. Salisbury Ice & Fuel Co.*, 166 N.C. 366 (1914), in which a corporation appealed a fraud conviction. The court stated:

> [I]t is held that a corporation can be held criminally liable for conspiracy or any other crime requiring the proof of an intent . . . . It was long contended that even civil liability arising from evil intent could not be visited upon an artificial

> being. This fiction has vanished, and corporate liability on the criminal side permanently established, even for assault.

Id. at 367. The court upheld the indictment. *Id.* at 370.

In addition the Court of Appeals of North Carolina addressed the issue of criminal liability of an individual for corporate conduct in *State v. Seufert*, and found that a corporate officer can be held criminally liable for criminal acts made in the form of corporate acts. 271 S.E.2d 756, 759 (N.C. Ct. App. 1980). The court found there was a lack of evidence to convict an employee of a corporation of embezzlement. *Id.* at 760.

NORTH DAKOTA

The North Dakota Criminal Code expressly defines the extent of corporate criminal liability in a section entitled "Corporate and limited liability company criminal responsibility." N.D. CENT. CODE § 12.1-03-02 (1997). This section incorporates elements of MPC § 2.07(1). It provides that a corporation will face criminal liability for an offense committed by an agent within the scope of his or her employment if the offense was "authorized, requested, or commanded" by any person involved in the formulation of corporate policy, including the board of directors, executive officers, and executive managers. N.D. CENT. CODE § 12.1-03-02(1)(a). A corporation may also be criminally liable for failure to perform a duty required by law. *Id.* § 12.1-03-02(1)(b). Moreover, corporate criminal liability may be assigned to a corporation for a misdemeanor committed by an agent of the corporation within the scope of his or her employment. *Id.* § 12.1-03-02(1)(c). A corporation may also be held criminally liable for "[a]ny offense for which an individual may be convicted without proof of culpability, committed by an agent of the corporation or the limited liability company within the scope of the agent's employment." *Id.* § 12.1-03-02(1)(d). Furthermore, a corporation may not offer as its defense that "an individual upon whose conduct liability of the corporation . . . is based has been acquitted" or was not subject to prosecution for that offense. *Id.* § 12.1-03-02(2).

Additionally, in a section entitled, "Individual accountability for conduct on behalf of organizations," N.D. CENT. CODE § 12.1-03-03 (1997), North Dakota adopts MPC § 2.07 (6) without substantial change.

OHIO

The Ohio Criminal Code expressly defines the extent of corporate criminal liability in a section entitled "Organizational criminal liability." OHIO REV. CODE ANN. § 2901.23 (West 1997). This section is modeled after MPC § 2.07(1), (2) and (3). Ohio defines "organization" as a "corporation for profit or not for profit, partnership, limited partnership, joint venture, unincorporated association, estate, trust, or other commercial or legal entity," excluding an entity organized as or by the government. OHIO REV. CODE ANN. § 2901.23(D). Ohio has also enacted MPC

§ 2.07(5), which provides corporations a defense to criminal liability when the high managerial agent responsible for the subject matter of the offense exercised due diligence to prevent its completion. OHIO REV. CODE ANN. § 2901.23(C). Further, in a section entitled, "Personal accountability for organizational conduct" OHIO REV. CODE ANN. § 2901.24 (West 1997), Ohio adopts MPC § 2.07 (6) without substantial change.

OKLAHOMA

Oklahoma does not expressly address general corporate criminal liability within its statutes or case law. However, Chapter 64 of the Oklahoma Criminal Code addresses various frauds and offenses in the context of corporate affairs. OKLA. STAT. ANN. tit. 21, §§1631-1645 (West 2002). The Chapter addresses the following issues: fraud in stock subscriptions, fraud in organizing a stock company, unauthorized use of names, failing to enter a receipt, destroying or falsifying books, refusing to make or falsifying reports, refusing to permit inspection of corporate books, fraudulent insolvencies, and violating a duty by an officer. *Id.* Further, in the criminal code, Oklahoma allows a magistrate to issue a summons upon a corporation to answer to criminal charges. OKLA. STAT. ANN. tit. 22, § 1301 (West 2003). In addition, Oklahoma penal code defines "person" to include "corporations" OKLA. STAT. ANN. tit. 22, § 105 (West 2002).

OREGON

The Oregon Penal Code expressly defines the extent of corporate criminal liability in a section entitled "Criminal liability of corporations." OR. REV. STAT. §161.170 (2003). This section is modeled after MPC § 2.07(1). OR. REV. STAT. § 161.170(1)(a). In addition, Oregon has enacted the MPC's definition of "agent" and "high managerial agent" without substantial change. *Id.* § 161.170(2).

PENNSYLVANIA

The Pennsylvania Crimes Code expressly defines the extent of corporate criminal liability, in a section entitled "Liability of organizations and certain related persons." 18 PA. CONS. STAT. §307 (2002). In this section, Pennsylvania has adopted each provision of MPC § 2.07 without substantial change.

PUERTO RICO

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

RHODE ISLAND

Rhode Island does not expressly address general corporate criminal liability within its statutes or case law. However, almost a century ago, the Rhode Island

Supreme Court stated that corporations can be held criminally liable for conspiracy. State v. E. Coal Co., 29 R.I. 254 (1908). The court held: "[I]f corporations have the capacity to engage in actionable conspiracy they have the power to criminally conspire." *Id.* at 268.

SOUTH CAROLINA

The South Carolina Criminal Code expressly defines the extent of corporate criminal liability in a section entitled "Liability of corporations and unincorporated associations." S.C. CODE ANN. §16-17-30 (2003). The sole function of this section is to extend the crime of barratry to corporations and unincorporated associations. *Id*. However, the criminal code also discusses how the judgment and sentencing should be carried out in criminal cases against corporations indicating that they may be subject to other criminal liabilities. S.C. CODE ANN. §17-25-320 (2003).

SOUTH DAKOTA

South Dakota does not expressly address corporate criminal liability within its statutes. However in 1914, the South Dakota Supreme Court ruled that corporations can be held criminally liable. State ex rel. Botsford Lumber Co. v. Taylor, 34 S.D. 13 (1914). In a case where a corporation was charged with unfair discrimination, the court noted:

> It is perfectly clear that corporations may be guilty of a crime, under the laws of this state. It is likewise clear, that the courts are given jurisdiction over such crimes, and that a corporation may be charged therewith, either by indictment or information.

Id. at 19.

Further, the Supreme Court of South Dakota addressed the issue of criminal liability of an individual for corporate conduct in *Wyman v. Terry Schulte Chevrolet, Inc.*, and found that a corporate officer can be held criminally liable for criminal acts made in the form of corporate acts. 584 N.W.2d 103, 106 (S.D. 1998).

In addition, the South Dakota Criminal Code defines "person" to include a "limited liability company, corporation, firm, organization, partnership or society." S.D. CODIFIED LAWS §22-1-2(31) (1998).

TENNESSEE

The Tennessee Criminal Code expressly defines the extent of corporate criminal liability in a section entitled "Corporate liability." TENN. CODE ANN. § 39-11-404 (2003). This section is modeled after MPC § 2.07(1). In addition, Tennessee has enacted the MPC's definition of "agent" and "high managerial agent." TENN. CODE ANN. § 39-11-404(b). Further, in a section entitled, "Individual liability for corporate conduct," TENN. CODE ANN. § 39-11-405 (West 2003), Tennessee adopts MPC § 2.07 (6)(a) without substantial change.

TEXAS

The Texas Penal Code expressly defines the extent of corporate criminal liability in a section entitled "Criminal Responsibility of Corporation or Association." TEX. PENAL CODE ANN. § 7.22 (Vernon 2003). This section is modeled after MPC § 2.07(1), (2), and (3) with the exception that Texas did not adopt subsection (1)(b) and (3)(b). Texas adopted subsections (1)(a), (3)(a), and (2) without substantial change. TEX. PENAL CODE ANN. § 7.22(a). However, Texas's version of (1)(c) and (3)(c) will hold a corporation criminally liable for a felony only where the offense was "authorized, requested, commanded, performed or recklessly tolerated" by a majority of the governing board or a high managerial agent. *Id.* §7.22(b). In addition, in a section entitled, "Criminal Responsibility of Person for Conduct in Behalf of Corporation or Association," TEX. PENAL CODE ANN. § 7.23 (Vernon 2003), Texas adopts MPC § 2.07 (6) without substantial change.

UTAH

The Utah Criminal Code expressly defines the extent of corporate criminal liability in a section entitled, "Criminal responsibility of corporation or association." UTAH CODE ANN. § 76-2-204 (2003). This section is modeled after MPC § 2.07(1)(b), (1)(c), (3)(b), and (3)(c) without substantial change. In addition, in a section entitled, "Criminal responsibility of person for conduct in name of corporation or association," UTAH CODE ANN. § 76-2-205 (West 2003), Utah adopts MPC § 2.07 (6)(a) without substantial change.

VERMONT

Vermont does not expressly address corporate criminal liability within its statutes. However, the Supreme Court of Vermont addressed the issue in *State v. Vermont Central R.R. Co.*, and found that a corporation may be indicted for a misfeassance and for nonfeassance. 27 Vt. 103 (Vt. 1854). The court found a railroad company liable for the acts of its employees for obstructing a public highway and other crimes. *Id.* at 103.

VIRGIN ISLANDS

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

VIRGINIA

Virginia does not expressly address corporate criminal liability within its statutes. However, the Supreme Court of Appeals of Virginia has addressed the issue in *Postal Telegraph v. City of Charlottsville*, finding that a corporate can be liable for crimes. 101 S.E.. 357, 358 (Va. 1919). Here the court found that a corporation could be held liable for violation of certain license taxes. In *Common-*

wealth v. Orkin Exterminating Co., the court held that a corporation could not be held criminally liable for manslaughter but did not overrule *Postal Telegraph*, but distinguished from it. Nos. 87-12 and 87-13, 1987, Va. Cir, Ct, Westlaw 488649.

In addition the Supreme Court of Virginia addressed the issue of criminal liability of an individual for corporate conduct in *Andrews v. Ring*, and found that a corporate officer can be held criminally liable for criminal acts made in the form of corporate acts. 585 S.E.2d 780, 787 (Va. 2003). The court found that an employee of the school board could be found liable for violations of the Uniform Statewide Building Code for pouring concrete without a permit. *Id*. at 787.

WASHINGTON

The Washington Criminal Code expressly defines the extent of corporate criminal liability in a section entitled "Criminal liability of corporations and persons acting or under a duty to act in their behalf." WASH. REV. CODE ANN. §9A.08.030 (West 2000). This section is modeled after MPC §2.07(1) and (6), with the only significant change being that Washington limits the responsibility of corporations for the offenses of their agents to offenses qualifying as gross misdemeanors or misdemeanors or offenses defined by a statute clearly indicating a legislative intent to impose criminal liability on a corporation. Moreover, Washington law provides that a corporation held criminally liable for an act forfeits its right to do business in the state. WASH. REV. CODE ANN. §9A.08.030(5). In addition, Washington has enacted the MPC's definition of "agent," and "high managerial agent," without substantial change, and has defined "corporation" as including "a joint stock association." *Id.* §9A.08.030(1).

WEST VIRGINIA

The West Virginia Criminal Code does not expressly address general corporate criminal liability. However, the Supreme Court of West Virginia implied in dicta that a corporation can be held criminally liable for the acts and omissions of its employees. Mandolidis v. Elkins Indus., 161 W. Va. 695 (1978). The case consolidated three tort actions brought by employees of the corporation. As part of its discussion of intent, the court noted: "[I]t is almost universally conceded that a corporation may be criminally liable for actions or omissions of its agents in its behalf." *Id.* at 704 n.8 (citing WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 229 (1972)). The West Virginia Legislature subsequently amended its workers' compensation statute to modify the intent standard adopted in *Mandolidis*. W.VA. CODE ANN. § 23-4-2 (LexisNexis 2005); *see also* Handley v. Union Carbide Corp., 804 F.2d 265, 269-70 (4th Cir. 1986). The legislature's intent in amending the statute was to narrow the application of the immunity standard announced in *Mandolidis* and add "more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct." § 23-4-2 (d)(1).

WISCONSIN

Wisconsin does not expressly address corporate criminal liability within its statutes. However, in the criminal code, Wisconsin allows a magistrate to issue a default judgment if a corporation fails to appear after a summons within criminal cases. WIS. STAT. § 973.17 (2003).

In addition, the Supreme Court of Wisconsin has addressed the issue in *State v. Dried Milk Prods. Co-op*., 16 Wis. 2d 357 (1962), and *Vulcan Last Co. v. State*, 194 Wis. 636 (1928). In *Dried Milk Products Co-op.*, the court upheld a trial court's criminal conviction of a corporation, 16 Wis. 2d 357 (Wis 1962), noting, "a corporation acts of necessity through its agents whose acts within the scope of the agent's authority are the acts of the corporation, both for the imposition of civil and criminal liability." *Id.* at 361 (citing Vulcan Last Co., 194 Wis. 636).

In *Vulcan Last Co.*, the court upheld the criminal conviction of a corporation for attempting to influence votes in a referendum election. The court stated:

> It is true that there are some crimes which in their nature cannot be committed by corporations. But there is a large class of offenses, . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them . . . . If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy.

194 Wis. 636, 642-643 (Wis. 1928) (citing N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 494-95 (1909)).

WYOMING

Wyoming does not expressly address corporate criminal liability within its statutes or case law. However, Wyoming defines "person" to include a "partnership, corporation, joint stock company or any other association or entity, public or private." WYO. STAT. ANN. §6-1-104(a)(vii) (2005).