CORPORATE CRIMINAL ACCOUNTABILITY: A BRIEF HISTORY AND AN OBSERVATION

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I. INTRODUCTION

The pervasive influence enjoyed by large, publicly held corporations has inspired a body of scholarship that considers at length the need for effective mechanisms to regulate institutional behavior.[1] Enforcement of penal statutes applicable to corporations[2] is, of course, included among existing options, and renewed interest in criminally prosecuting

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1. For but a small sampling, see M. ANSHEN, CORPORATE STRATEGIES FOR SOCIAL PERFORMANCE (1980); A. COHEN & R. LEOB, CORPORATE GOVERNANCE (1979); D. DEMOTT, CORPORATIONS AT THE CROSSROADS: GOVERNANCE AND REFORM (1980); W. GROENING, THE MODERN CORPORATE MANAGER: RESPONSIBILITY AND REGULATION (1981); N. JACOBY, P. NEHEMKIS & R. EELLS, BRIBERY AND EXTORTION IN WORLD BUSINESS: A STUDY OF CORPORATE POLITICAL PAYMENTS ABROAD (1977); Y. KUGEL & N. COHEN, GOVERNMENT REGULATION OF BUSINESS ETHICS: U.S. LEGISLATION OF INTERNATIONAL PAYOFFS (1978); C. STONE, WHERE THE LAW ENDS—THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975); Goldberg, *A Defense of the Bureaucracy in Corporate Regulation and Some Personal Suggestions for Corporate Reform,* 48 GEO. WASH. L. REV. 514 (1980); Knauss, *Corporate Governance—A Moving Target,* 79 MICH. L. REV. 478 (1981); Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct,* 90 YALE L.J. 1 (1980); *The Role of Professionals in Corporate Governance,* 56 NOTRE DAME LAW. 751 (1981).

2. Some federal regulatory statutes containing penal provisions specifically include corporations in the definition of the term "person," *see, e.g.,* Sherman Act, 15 U.S.C. § 7 (1976); Securities Act of 1933, 15 U.S.C. § 77b(2) (1976); Securities Exchange Act of 1934, 15 U.S.C. § 78c(a) (1), (9) (1976); Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(e) (1976); Anti-Kickback Act, 41 U.S.C. § 52 (1976), while others indicate that corporations are within the reach of the criminal prohibition by including them in the penalty clause, *see, e.g.,* National Housing Act of 1933, 12 U.S.C. § 378 (1976); Federal Trade Commission Act, 15 U.S.C. § 714m(f) (1976); Wholesome Meat Act, 21 U.S.C. §§ 602, 610, 611 (1976); Meat Inspection Act, 21 U.S.C. §§ 88, 90 (1976); Navigable Waterways Act, 33 U.S.C. §§ 1, 3, 406, 411, 419, 449, 502 (1976); Oil Pollution Act, 33 U.S.C. § 1001(f) (1976). Still others include the term corporation in both such provisions. *See, e.g.,* Tobacco Statistics Act, 7 U.S.C. §§ 503-504 (1976); Export Standards Acts, 7 U.S.C. §§ 586, 589, 596, 599 (1976); Interstate Commerce Act, 49 U.S.C. §§ 1(3) (a), 10(3)-(4) (1976). In addition, some statutes contain provisions specifying that the acts and omissions of corporate agents occurring within the scope of employment shall be deemed the acts and omissions of the corporation. *See, e.g.,* Commodity Exchange Act, 7 U.S.C. § 4 (1976); Cotton Statistics and Estimates Act, 7 U.S.C. § 473c-3 (1976); Communications Act, 47 U.S.C. § 217 (1976); Elkins Act, 49 U.S.C. § 41(1)-(2) (1976). For a more extensive listing of examples, see 1 NAT'L COMM. ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, STAFF MEMORANDA ON RESPONSIBILITY FOR

corporations during the last decade[3] has brought to the fore the true breadth of corporate exposure to criminal liability.[4]

While it has long been settled that corporations constitutionally may be held accountable for criminal misdeeds of their agents,[5] one detects a current sense of uneasiness regarding the appropriate role and scope of corporate criminal liability.[6] Have we, for instance, strayed too far from the *mens rea* model of criminality when dealing with institutional misbehavior?[7] A vast array of penal statutes applicable to the corporate entity dispenses with any requirement of moral blameworthiness.[8] Is it time, perhaps, to re-examine such offenses in light of traditional notions of culpability so that we may arrive at a "consensus"[9] about what constitutes "truly culpable"[10] corporate wrongdoing and eliminate criminal penalties for "trivial conduct?"[11]

Beyond concerns regarding the philosophical implications of corporate criminal liability, one detects a sentiment that we are due an accounting regarding the utility of corporate criminal sanctions. Such

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CRIMES INVOLVING CORPORATIONS AND OTHER ARTIFICIAL ENTITIES: SECTION 402-406, App. A (1970).

3. The interest has not been limited to academic and political circles. There is objective data supporting the widespread belief that the number of federal criminal prosecutions to remedy violations of regulatory statutes is on the increase. *See* Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship,* 17 AM. CRIM. L. REV. 501, 501-02 n.4 (1980); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions,* 92 HARV. L. REV. 1227, 1227 n.5 (1979).

4. *See* note 2 *supra*. In addition to the regulatory statutes under which corporations may be criminally punished, there is a host of statutes within the federal criminal code that may be readily applied within the corporate setting. *See, e.g.,* 18 U.S.C. § 201 (1976) (bribery); *id.* § 371 (conspiracy); *id.* § 1001 (false statements); *id.* § 1341 (mail fraud); *id.* § 1343 (wire fraud).

5. New York Cent. R.R. v. United States, 212 U.S. 481 (1909). This decision is discussed in text accompanying notes 108-15 *infra*.

6. *See, e.g.,* Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on* Dotterweich *and* Park, 28 U.C.L.A. L. REV. 463 (1981); Elkins, *Corporations and the Criminal Law: An Uneasy Alliance,* 65 KY. L.J. 73 (1977); Fisse, *The Social Policy of Corporate Criminal Responsibility,* 6 ADEL. L. REV. 361 (1978); Friedman, *Some Reflections on the Corporation as Criminal Defendant,* 55 NOTRE DAME LAW. 173 (1979); Miller, *Corporate Criminal Liability: A Principle Extended to Its Limits,* 38 FED. B.J. 49 (1979); Orland, *supra* note 3; Spurgeon & Fagan, *Criminal Liability for Life-Endangering Corporate Conduct,* 72 J. CRIM. L. & CRIMINOLOGY 400 (1981).

7. *See* Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations,* 30 U. CHI. L. REV. 423, 440-49 (1963); Spurgeon & Fagan, *supra* note 6, at 420-23.

8. *See* Mueller, *Mens Rea and the Corporation,* 19 U. PITT. L. REV. 21, 38-40 (1957); Spurgeon & Fagan, *supra* note 6, at 410-20.

9. Orland, *supra* note 3, at 511.

10. *Id.*

11. *Id.*

sentiment occasionally surfaces in the form of contentious law review articles that indulge in niggling over constituent elements of a model penal sanction for which some coherent rationale may be offered in support.[12]

Both forms of disquietude share a common source, for the theories with which the theoreticians currently are working initially developed within the context of regulating individual, rather than institutional, behavior. The theories are extant in an institutional setting only because the genius of the common law ultimately accorded corporations anthropomorphic treatment and thus recognized them as persons under the law.[13] That in turn inspired the idea that a body of doctrines pertaining to natural persons might be applied with equal force to the juristic persons into which corporations had been transformed. The

12. *See, e.g.*, Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980); Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); McAdams, *The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative*, 46 U. CIN. L. REV. 989 (1978); Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980).

Some of the polemic calls to mind Oscar Wilde's characterization of the "English country gentleman galloping after a fox—the unspeakable in full pursuit of the uneatable." Wilde, *A Woman of No Importance*, Act i.

13. Anthropomorphization of the corporation, which breathed "life" into the corporate body, inevitably prompted an inquiry into the question whether dissolution of a corporation signaled corporate "death" for purposes of holding it legally accountable for crimes committed during its lifetime by human agents. Under the common-law rule, the answer was affirmative. Dissolution of a corporation effectively caused the corporate entity to cease to exist for all purposes. Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631, 634 (1949); Chicago Title & Trust Co. v. Forty-One-Thirty-Six Wilcox Bldg. Corp., 302 U.S. 120, 125 (1937); Oklahoma Natural Gas Co. v. Oklahoma, 273 U.S. 257, 259 (1927). A dissolved corporation could be neither sued civilly nor prosecuted criminally.

As corporations became more numerous, however, state legislatures found it necessary to enact winding-up statutes that prolonged corporate existence for a sufficient period of time to allow orderly resolution of the affairs of the corporation. United States v. Maryland & Va. Milk Producers, 145 F. Supp. 374, 375 (D.D.C. 1956) (most states' corporation laws provide for partial existence of corporation, after corporation's life terminates, to enforce liabilities that had previously accrued); United States v. Cigarette Merchandisers Ass'n, Inc., 136 F. Supp. 214, 215 (S.D.N.Y. 1955) ("[t]he purpose of course in keeping the corporation 'alive' is to ameliorate the unjust and harsh results to creditors and stockholders alike if the strict common law doctrine of corporate death and abatement were applied"). *See generally* W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, §§ 8147-8156 (rev. perm. ed. 1979).

It may be worth observing that the issue may not always be resolved in the clear cut terms of a life and death matter. *Cf.* United States v. Consolidated Laundries Corp., 291 F.2d 563, 571 n.11 (2d Cir. 1961) (corporation whose charter has been forfeited "not dead" but merely "in a state of coma").

simplicity of such notions, however, lay only in their inspiration, not in their execution.

Early English cases held that corporations were not indictable for any wrongful act.[14] Enduring reluctance to hold corporations criminally liable was partly attributable to a dictum uttered by Chief Justice Holt in an anonymous case: "A corporation is not indictable but the particular members of it are."[15] No facts accompanied the remark, nor was the context in which it was made apparent. These shortcomings, however, did not dissuade common-law judges from citing Holt's statement with approval.[16]

The cluster of troublesome theoretical considerations raised by the mere notion of corporate criminal liability also impeded doctrinal growth.[17] The corporation was recognized in law not as a natural person, but as an artificial entity. As an abstraction, it lacked physical, mental, and moral capacity to engage in wrongful conduct, or to suffer punishment. It could neither commit criminal acts, entertain criminal intent, nor suffer imprisonment. It had no soul, and so could not be blamed.[18]

The economic and social role of the corporation in its early developmental period further prolonged its exemption from criminal liability. Corporations were few in number, well regulated, and chartered to perform specific tasks. Their impact on the general populace was minimal then and additional mechanisms to regulate corporate behavior were

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14. At an early date, however, a distinction was drawn between wrongful *action* and wrongful *inaction*. *See* notes 50-55 *infra* and accompanying text.

15. Anonymous, 88 Eng. Rep. 1518 (K.B. 1701). There follows a verbatim report of the entire case.

> Case 935. ANONYMOUS
> Corporation is not indictable
> Note: per Holt, Chief Justice. A corporation is not indictable, but the particular members of it are.

16. Nor, for that fact, were treatise writers dissuaded from adopting it as the definitive statement on the subject. "A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may in their distinct individual capacities." 1 W. BLACKSTONE, COMMENTARIES *476.

17. *See generally* W. FLETCHER, *supra* note 13, §§ 4942-4959; H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS 352-56 (2d ed. 1970); L. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW 3-12 (1969); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 853-57 (2d ed. 1961); Welsh, *The Criminal Liability of Corporations,* 62 L.Q. REV. 345 (1946).

18. Corporations aggregate "cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney." Case of Sutton's Hospital, 77 Eng. Rep. 960, 973 (K.B. 1612).

deemed unnecessary.[19] As the corporate form became more common, however, this attitude changed dramatically. During the seventeenth and eighteenth centuries, it became evident that shareholders were unable or unwilling to supervise the management of corporations,[20] whose impact on the community was growing substantially.

It was against that backdrop that common-law judges devised a theory of corporate accountability for crime.[21] As perceived necessity was the mother of invention, it seems appropriate that the theoretical debate about the meaning, function, and utility of the doctrine be placed in historical perspective before we assess the inevitable criticisms, explanations, and recommendations. Hence, a few pages of history are offered to accompany the volumes of logic.[22]

II. HISTORICAL DEVELOPMENT OF ENGLISH DOCTRINE

A. *Evolution of the Corporate Form*

The English corporation, an organizational form well established by the fourteenth century, originally could be created only by a grant from the crown or by an act of Parliament.[23] The crown attempted to foster the idea that incorporation was a privilege, and it encouraged organizations to become legally authorized entities over which it would hold control.[24] The earliest medieval corporations were ecclesiastical bodies whose principal function was management of church property.[25] From

19. *See* Elkins, *supra* note 6, at 87.

20. L. LEIGH, *supra* note 17, at 19.

21. Imposition of criminal responsibility on corporations is almost exclusively a common-law tradition. Corporate criminal liability is generally unknown in civil-law countries. Mueller, *supra* note 8, at 28-38. Notwithstanding the common-law origin of corporate accountability for crime, however, English courts were among the slowest to adopt an express rule holding corporations generally criminally liable. In comparison with developing Canadian and American theory, English law remained in a relative "state of infancy." L. LEIGH, *supra* note 17, at 2. *See also* Leigh, *The Criminal Liability of Corporation and Other Groups,* 9 OTTAWA L. REV. 247 (1977).

22. The author unabashedly acknowledges the corruption of a finer line penned by Justice Holmes. *Cf.* New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) ("[u]pon this point a page of history is worth a volume of logic").

23. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 475-76 (1923); Chayes, *The Modern Corporation and the Rule of Law,* in THE CORPORATION IN MODERN SOCIETY 25, 33 (E. Mason ed. 1961). Until the Reformation, the Pope created ecclesiastical corporations. *Id.*

24. 3 W. HOLDSWORTH, *supra* note 23, at 478-79; Chayes, *supra* note 23, at 33.

25. 3 W. HOLDSWORTH, *supra* note 23, at 471-74. *See generally* Carr, *Early Forms of Corporateness,* in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 161 (1909).

those bodies evolved lay associations, chiefly municipalities,[26] and mercantile and craft guilds,[27] the precursors of the modern business corporation.

During the sixteenth and seventeenth centuries the importance of corporations grew as hospitals, universities, and other similar associations adapted to the corporate form.[28] Also of growing importance by the end of this period was the joint stock company.[29] This form of business association was most useful in the promotion of new industry and the mobilization of national credit,[30] and joint stock companies were formed to conduct such divers enterprises as "Insurance and Im-

26. Holdsworth notes that as early as the reign of Edward II the borough was referred to as "un corps." 3 W. HOLDSWORTH, *supra* note 23, at 474.

27. The first trades to incorporate were those that provided the community with basic necessities. The earliest to become organized were the weavers, who were granted a charter by Henry II. During the fourteenth and fifteenth centuries, the goldsmiths, mercers, haberdashers, fishmongers, vintners, and merchant tailors had been chartered. Williston, *History of the Law of Business Corporations Before 1800,* 2 HARV. L. REV. 105, 108-09 (1888). The charter of incorporation typically granted a monopoly to engage in a particular trade or to trade in particular parts of the realm, as well as the right to regulate the trade in which the corporation was engaged. Chayes, *supra* note 23, at 33-34; Williston, *supra*, at 109-11.

28. Holdsworth, *English Corporation Law in the 16th and 17th Centuries,* 31 YALE L.J. 382, 382 (1922).

29. The joint stock company operated as a single entity, with stock contributed and profits shared by its various members. 8 W. HOLDSWORTH, *supra* note 23, at 206. Typically, a joint stock company was formed for a single expedition, upon completion of which the finances were investigated and the venture was wound up, with all the stock (including profits) distributed among subscribers to that voyage. A new stock, with perhaps the same group of subscribers, would be formed for each successive expedition. Thus, there was only one company from a legal point of view, but from an economic standpoint there were many. It was the governing machinery of these early companies, rather than the stock, that was constant. 1 W. SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, at 462 (1912).

30. B. HUNT, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND 1800-1867, at 6 (1963).

By the middle of the sixteenth century a significant increase in foreign trade seemed imminent, and there was a growing need for venture capital to fund new expeditions. Because the corporation was viewed as a public agency charged with the governance of a particular trade, membership was restricted to the merchant class. Merchants therefore enjoyed a quasi-monopoly over available capital.

If the new trade were to be controlled by corporations, capital for its development would likely be restricted to those funds already controlled by the merchants. The joint stock system proved to be a vehicle for breaking down their quasi-monopoly and joint stock companies began to flourish, sporting a larger and conspicuously nonmercantile element. The companies' socially diverse membership provided both much needed capital and a more efficient managerial structure, combining "the specific and detailed knowledge of the trader with the broad outlook of the man of affairs, . . . [each of whom] in isolation was imperfect." 1 W. SCOTT, *supra* note 29, at 444.

provement of Children's Fortunes," and "Making Salt Water Fresh."[31] Most of these companies were unincorporated,[32] and many indulged in wildly extravagant speculation and contrived elaborate schemes to defraud. Having wielded great power without incurring liability for its misdeeds,[33] the joint stock company was blamed for the miseries of the country.[34]

The scandals generated by irresponsible promoters induced a "panic-stricken Parliament"[35] to adopt a resolution condemning their practices and to enact the Bubble Act,[36] a scathing indictment of those who "contrived dangerous and mischievous undertakings or projects under false pretence of the public good," drawing in "unwary persons to subscribe"; who acted "as if they were corporate bodies" and pretended "to make their shares transferable" without legal authority; and who engaged in "many other unwarrantable practices (too many to enumerate)," all contributing to "the common grievance, prejudice and inconvenience."[37] Parliament thus enjoined such undertakings and declared them punishable as public nuisances.[38] Only over the next century and

31. Williston, *supra* note 27, at 112. The capital of joint stock companies was largely used for ventures involving new trades, revived industries or those proposed to be conducted by new methods, or other endeavors involving a high degree of risk. 1 W. SCOTT, *supra* note 29, at 461. Of necessity, and consonant with their less restrictive membership requirements, shares in these companies were transferable without the consent of any other shareholders. In contrast, corporate shares were not freely transferable outside the merchant class.

Market quotations on shares or "actions" of many joint stock companies appeared alongside stock quotations of corporations in an English newspaper. F. MAITLAND, *Trust and Corporation,* in SELECTED ESSAYS 141, 208 (1936). *See* 1 W. SCOTT, *supra* note 29, at 351.

32. Although the primary legal distinction between the corporation and the joint stock company was the corporation's charter, several of the best known joint stock companies (including the South Sea Company and the East India Company) were also chartered by the Crown. Williston, *supra* note 27, at 109-11.

33. Joint stock companies, like corporations, enjoyed some measure of limited liability for their debts. As early as the fifteenth century it was established that individual shareholders were not personally liable for a corporation's debts. 8 W. HOLDSWORTH, *supra* note 23, at 203. The shareholders were required, however, to pay any sums assessed them by the corporation, thus creating the potential for creditors to satisfy corporate debts by inducing the corporation to levy against its shareholders. To prevent this manner of debt collection, corporations began contractually limiting the liability of shareholders to a maximum sum. Many unincorporated companies sought similar protection for their subscribers. *See* 1 W. SCOTT, *supra* note 29, at 228, 270.

34. B. HUNT, *supra* note 30, at 8.

35. F. MAITLAND, *supra* note 31, at 208.

36. 6 Geo. 1, c. 18 (1719).

37. *Id.*

38. *Id.* In addition to the normal fines and penalties for public nuisances, anyone convicted was subject to the penalties provided in an ancient praemunire statute, 16 Rich. 2, c. 5 (1392) (including forfeiture of the offender's lands, tenements, goods and chattels, and loss of the king's

a half did the business corporation and the joint stock company gain legal and commercial recognition and acceptance and begin to assume a role more important than individual enterprise in the growth of commerce.[39]

B. *The Corporate Personality*

As the corporate form of governance was becoming established, three principles essential to the recognition of corporations as persons evolved.[40] First, a corporation was recognized as an entity distinct from its members.[41] Second, corporate property was considered distinct from the property of its members.[42] Third, a judgment against a corporation could be executed only against the property of the corporation, not that of its members.[43] Extension of the mortmain laws to the lay corporation invested it with immortality, from which logically followed the notion that a corporation could not be outlawed or excommunicated, assaulted or imprisoned; nor could it commit treason or felony.[44] In the view of some canonists, the corporation could commit neither sin nor delict.[45]

Having imputed these attributes to the corporation, however, common-law lawyers confronted the troublesome question, "how far, if at all, matters affecting individual members of the corporate body affected

protection), and was made liable for treble damages in a private civil suit. In the only Bubble Act prosecution reputed to have been brought in the eighteenth century, the punishment meted out to the offending promoter was hardly draconian. The court considered the imposition of additional penalties purely discretionary and fined the defendant five pounds and sentenced him to imprisonment at the king's pleasure. The King v. Cawood, 92 Eng. Rep. 386 (K.B. 1724). *See* B. HUNT, *supra* note 30, at 7 n.11. By the time the Bubble Act was repealed in 1825, "most of its teeth had been drawn" by judicial interpretation. F. MAITLAND, *supra* note 31, at 209.

39. *See* B. HUNT, *supra* note 30, at 13. *See also* A. DUBOIS, THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT: 1720-1800 (1938).

40. For a critical view of the anthropomorphization of the corporation, see Friedman, *supra* note 6. *See also* Lindley, *On the Principles Which Govern the Criminal and Civil Responsibilities of Corporations,* in 2 JURIDICAL SOC'Y PAPERS 31 (1857); Pollock, *Has the Common Law Received the Fiction Theory of Corporations?,* 27 L.Q. REV. 219 (1911).

41. 3 W. HOLDSWORTH, *supra* note 23, at 482. The distinction between the corporation and its members was considered essential to canon-law theory, and it was applied to ecclesiastical corporations by the early part of the fourteenth century. *Id.* at 483.

42. *Id.* at 482. This was one of the characteristics that distinguished incorporated from unincorporated bodies. *Id.* at 484.

43. *Id.* at 482. Conversely, the property of the corporation could not be reached upon a judgment against its members. *Id.*

44. *Id.* at 484-85.

45. *Id.* at 485.

the validity of corporate acts."[46] If, for example, members of the corporation acted under duress, would the duress avoid the act as a corporate act? No, it was held, the corporation was not menaced—only its individual members had been threatened.[47] If, on the other hand, the head of the corporation was under some disability at the time of a purported corporate act (as, for example, a vacancy in the office or outlawry of the office holder), that might well have been a good defense in the event that his successor brought a suit based upon the act.[48] The distinction between natural and juristic persons, it seems, was difficult to apply logically and consistently to concrete fact patterns.

C. *Development of Corporate Liability*

From an early age it was established that corporations possessed many of the same capacities with which natural persons were endowed. A corporation could own property, enter into contracts, sue, and be sued.[49] Development of a coherent theory of corporate liabilities, on the other hand, proved more problematical. The corporation as a distinct entity was an abstraction. It had no mind and so it could not form criminal intent. Until the development of a theory of vicarious liability, the corporation lacked corporeal members and could not act physically: "A man shall not have a writ of trespass against an abbot and convent because the convent cannot commit trespass; . . . [nor] shall a man have a writ of trespass against a mayor or commonalty . . . ."[50]

As early as 1635, however, a corporation was held liable on a presentment for nonfeasance.[51] There, as in a variety of cases arising during the eighteenth and nineteenth centuries,[52] the inhabitants of a

46. *Id.*

47. Two cases involving this question arose in the late fifteenth century. In the first, an action of debt was brought against an abbot and a convent. That the abbot's predecessor had compelled the monks to execute the deed under duress was held to be no plea. Y.B. Mich. 15 Edw. 4, pl. 2, *cited in* 3 W. HOLDSWORTH, *supra* note 23, at 485. *See also* Abbot J. Hulme's Case, Y.B. Mich. 21 Edw. 4, pl. 53 (p. 70), *quoted in* 3 W. HOLDSWORTH, *supra* note 23, at 485-86.

48. 3 W. HOLDSWORTH, *supra* note 23, at 486-87.

49. *Id.* at 488.

50. *Id.* (quoting Y.B. Mich. 15 Edw. 4, pl. 2).

51. Case of Langforth Bridge, 79 Eng. Rep. 919 (K.B. 1635).

52. *See, e.g.,* The King v. Inhabitants of Clifton, 101 Eng. Rep. 280 (K.B. 1794) (quashing the indictment because the road ran through two counties); Rex v. Inhabitants of Great Broughton, 98 Eng. Rep. 418 (K.B. 1771) (holding that the inhabitants of one division of a parish were not liable to repair a common highway running through the division when the common law bound the parish at large to repair highways). *See also* The King v. Mayor of Stratford upon Avon, 104 Eng. Rep. 636 (K.B. 1811); The King v. Mayor of Liverpool, 102 Eng. Rep. 529 (K.B. 1802); The King

governmental unit were charged in a criminal proceeding for failure to repair a public convenience.[53] In decisions imposing liability on such public entities, the courts ordinarily observed that the public convenience in question (usually a bridge or road) had been erected before the present inhabitants had taken on the responsibilities of the town, parish, or county; that it had been maintained by former inhabitants; and that present inhabitants were bound to do the same. The corporation was responsible for making the needed repairs before the present mayor, aldermen, and burgesses became its directors, and the duty to repair followed the corporation, not its former members.[54] By mid-nineteenth century, it was fairly well established that a corporation was indictable for a breach of duty consisting of inaction, though not for felonies or for crimes involving personal violence.[55]

A theory of corporate acting also was developing over this period. A 1682 decision held that a corporation *qua* corporation could be held liable for the misdeeds of its agents.[56] In that case the mayor of London and several other officials were charged with usurping the powers entrusted to them as directors of a body politic and corporate when they taxed the citizens and then pocketed the money. The court found the officials liable and ordered forfeiture of the city charter, declaring the acts of the agents to be the acts of the corporation.

Later borrowing the theory of vicarious liability from tort law,[57]

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v. Inhabitants of the West Riding of Yorkshire, 96 Eng. Rep. 401 (K.B. 1770); Regina v. Inhabitants Com. Wilts, 91 Eng. Rep. 313 (K.B. 1705); The Queen v. Saintiff, 87 Eng. Rep. 1002 (K.B. 1705); The Queen v. Inhabitants of Cluworth, 87 Eng. Rep. 920 (K.B. 1705).

53. Though such prosecutions were not uncommon, they were perceived not as true criminal prosecutions but rather as a means to enforce the performance of a public duty. L. LEIGH, *supra* note 17, at 16. Even so, the only sanction that could be imposed upon conviction was a fine. A corporation could not be compelled by indictment to abate a nuisance. That result could be achieved only by applying for a writ of mandamus. The King v. Severn & Wye Ry., 106 Eng. Rep. 501 (K.B. 1819).

54. The King v. Mayor of Stratford upon Avon, 104 Eng. Rep. 636 (K.B. 1811).

55. The leading English case on this point was The Queen v. Birmingham & Gloucester Ry., 114 Eng. Rep. 492 (Q.B. 1842) (corporation indictable for disobeying a statute directing it to construct certain arches across a railway). In that case the court noted the procedural obstacles to criminal prosecution of a corporation. At assizes, the accused had to appear personally. Since the corporation could appear only by attorney, it could not be tried at assizes. Indictments could, however, be removed by writ of certiorari to King's Bench Division, where the corporation could appear and plead by attorney. That this was a cumbersome and circuitous route for the prosecutor did not alter the criminal liability of the corporation. *Id.* at 496. *See also* L. LEIGH, *supra* note 17, at 9-10. This procedural obstacle was removed by the Criminal Justice Act, 1925.

56. The King v. City of London, 8 St. Tr. 1039 (K.B. 1682).

57. The Queen v. Stephens, 1 L.R. 702 (Q.B. 1866) (owner of slate quarry liable for nuisance

courts imposed corporate criminal liability for misconduct of employees acting within the scope of their employment. In *The Queen v. Great North of England Railway*[58] the company was indicted for cutting through an existing highway and then strewing it with debris. Both acts contravened the powers conferred upon the enterprise when it was incorporated. Noting the development of corporate liability in tort actions such as trespass, assumpsit, and wrongful distraint, and also observing that an action on the case would lie under these facts, counsel for the prosecution argued that further relaxation of the general rule against corporate liability was warranted. The rule was "established in a state of society very different from the present, at a time when corporations were comparatively few in number,"[59] and it had been necessary to engraft exceptions upon the rule from an early date. Whenever application of the rule would cause great inconvenience or tend to defeat the purpose for which the corporation was chartered, the court noted, the exception should prevail.[60]

Lord Denman, delivering the judgment of the court, characterized the exemption of corporations from liability for wrongful acts but not from wrongful omissions to act as a "startling incongruity."[61] While holding that acts of employees were imputable to the corporation, which therefore could be indicted for misfeasance, he limited the scope of the decision by making clear that "acts of immorality"—such as perjury and offenses against the person—were beyond the capacity of the body corporate.

> These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, can-

when employees threw slate stone into the Tivy River); Rex v. Medley, 172 Eng. Rep. 1246 (N.P. 1834) (owners of electric plant liable for nuisance when employees discharged waste from the plant into the Thames). On the development of the doctrine of vicarious liability, see generally T. BATY, VICARIOUS LIABILITY (1916). *See also* 8 W. HOLDSWORTH, *supra* note 23, at 472-79; Lindley, *supra* note 40, at 31; Wigmore, *Responsibility for Tortious Acts: Its History* (pts. 1 & 2), 7 HARV. L. REV. 315, 383 (1894). For additional authority, see note 133 *infra*.

58. 115 Eng. Rep. 1294 (Q.B. 1846).

59. *Id.* at 1296 (quoting Beverly v. Lincoln Gas Light & Coke Co., 112 Eng. Rep. 318 (K.B. 1837)).

60. 115 Eng. Rep. at 1296 (quoting Church v. Imperial Gas Light & Coke Co., 112 Eng. Rep. 324 (K.B. 1838)).

61. 115 Eng. Rep. at 1298. The court further observed that it was "as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission." *Id.*

not be guilty in these cases: but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large.[62]

III. HISTORICAL DEVELOPMENT OF AMERICAN DOCTRINE

A. *The Colonial Corporation*

The corporate charter, a grant from the king to the royal governors, was the foundation of most forms of political organization in the American colonies.[63] When the colonies became states, the power to create corporations was then reposed in the legislatures, which perpetuated the corporate form of governance. In Massachusetts, for example, an early statute provided that "the inhabitants of every town within this government are hereby declared to be a body politic and corporate."[64] By 1900, the number of incorporated cities, towns, and villages exceeded 10,000.[65]

The private business corporation was absorbed into the mainstream of American life more slowly, however.[66] Of the 225 private corporate charters granted prior to 1800,[67] fewer than a third were issued to enterprises whose purpose was to engage in general commercial activity.[68]

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62. *Id.* Following this landmark decision, the pattern of corporate criminal prosecution remained one of targeting regulatory offenses that required no culpable mental state. Section 2 of the Interpretation Act, 1889, further eased the task of developing an appropriate theory of corporate criminal liability by providing that penal statutes using the term "person" shall be construed to include "a body corporate," unless a contrary intention appears. Nonetheless it was not until after the turn of the century that the theory of corporate liability extended to reach *mens rea* offenses. *See* Chuter v. Freeth & Pocock, Ltd., [1911] 2 K.B. 832 (violation of Sale of Food and Drugs Act); Director of Pub. Prosecution v. Kent & Sussex Contractors, Ltd., 1 K.B. 146 (1944) (violation of motor fuel rationing order); Rex v. I.C.R. Haulage Co., 30 Crim. App. 31 (1944) (conspiracy to defraud).

63. Rogers, *Municipal Corporations 1701-1901,* in TWO CENTURIES' GROWTH OF AMERICAN LAW 1701-1901, at 218 (1901). The first municipal corporation created by grant was a borough in Maine that was incorporated in 1624. *Id.* at 209.

64. *Id.* at 219 (citing St. 1785, c. 75, § 8).

65. *Id.* at 224.

66. *See generally* Baldwin, *Private Corporations 1701-1901,* in TWO CENTURIES' GROWTH OF AMERICAN LAW 1701-1901, at 261 (1901). The relatively slow development of the American business corporation is attributable both to the inherited suspicion with which colonial legislators viewed it and to Parliament's extension of the Bubble Act, in 1741, to prohibit additional American grants of corporate charters for business purposes. *Id.* at 267-68.

67. For a list of these colonial charters, see *id.* at 269-311. "By this time, however, the number of public and municipal corporations, religious societies, academies, library companies, and public quasi-corporations, such as drain companies, had become very large, and probably approached two thousand." *Id.* at 276.

68. The more numerous categories included banks (28), insurance companies (25), and manufacturing concerns (12). *Id.* at 312. Not until well after the turn of the century was the business of the country conducted by incorporated associations. *Id.* at 275.

The more typical colonial corporation was quasi-public in character and was established to improve public transportation facilities. Because its activity centered around improving navigable waterways[69] and building roads and bridges,[70] the early corporation was the type of entity which "carried or might properly have carried the right of eminent domain."[71] It is not surprising, then, that it was to the more prevalent public and quasi-public corporations that criminal liability first attached.

B. *Evolving Theory*

1. *Nuisance*

The law of nuisance provided the earliest weapon in the arsenal of theories that would support a corporate criminal prosecution.[72] Although common nuisance was defined as "an offense against the public, *either by doing* a thing which tends to the annoyance of all the king's subjects, *or by neglecting to do* a thing which the common good requires,"[73] as had been true in English law the "neglect" prong of the definition first was applied to American corporations.

Polluted river basins,[74] deteriorated roads,[75] decaying bridges,[76] and malodorous slaughterhouses[77] constituted the types of nuisances that were targets of the earliest corporate criminal prosecutions. In one of

69. Forty-seven corporations were engaged in the business of improving rivers, harbors, and canals. *Id.* at 312.

70. Seventy-four were established for that purpose. *Id.*

71. *Id.* at 276.

72. *See, e.g.,* Commonwealth v. Hancock Free Bridge Corp., 68 Mass. 58 (1854); State v. Morris Canal & Banking Co., 22 N.J.L. 537 (1850); President of Susquehannah & Bath Turnpike Rd. Co. v. People, 15 Wend. 267 (N.Y. Sup. Ct. 1836); People v. Corporation of Albany, 11 Wend. 539 (N.Y. Sup. Ct. 1834); State v. Corporation of Shelbyville, 36 Tenn. 176 (1856). In one notable exception, State v. Dover, 9 N.H. 468 (1838), it seems that the town of Dover was indicted for refusing to build a road in derogation of a duty to do so. There is no indication that this neglect of duty created a nuisance. Rather, the prosecution appears to be based purely on official misconduct under an independent theory of criminal nonfeasance. *See generally* R. PERKINS, CRIMINAL LAW 488-90 (2d ed. 1969). *See also* Pittsburgh, V. & C. Ry. v. Commonwealth, 101 Pa. 192 (1882) (railway company indictable for failure to reconstruct road as required by statute, but not for nuisance under the facts).

73. People v. Corporation of Albany, 11 Wend. 539, 543 (N.Y. Sup. Ct. 1834) (emphasis added). The court cited Hawkins and Blackstone in support of its definition.

74. People v. Corporation of Albany, 11 Wend. 539 (N.Y. Sup. Ct. 1834).

75. Commonwealth v. Hancock Free Bridge Corp., 68 Mass. 58 (1854); President of Susquehannah & Bath Turnpike Rd. Co. v. People, 15 Wend. 267 (N.Y. Sup. Ct. 1836).

76. State v. Morris Canal & Banking Co., 22 N.J.L. 537 (1850).

77. State v. Corporation of Shelbyville, 36 Tenn. 176 (1856).

the first, the City of Albany was indicted for failing to cleanse the basin of the Hudson River, which had become "foul, filled and choked up with mud, rubbish, and dead carcasses of animals."[78] In consequence the basin emitted noxious fumes, the water became unpotable, and the conditions posed a menace to public health.

Counsel for the corporation argued that the indictment against the city in its corporate capacity could not be sustained. If the corporation indeed had a legal obligation to cleanse the basin (a contested allegation), the individual officers who were obligated to act to abate the nuisance should have been prosecuted rather than the corporation.

Reviewing the corporation's conviction, the New York Supreme Court of Judicature answered the argument by stating:

> It is well settled that when . . . [corporations or individuals] are bound to repair a public highway or navigable river, they are liable to indictment for the neglect of their duty. An indictment and an informortion [sic] are the only remedies to which the *public* can resort for a redress of their grievances in this respect. If an *individual* has suffered a particular injury, he may recover his loss by an action on the case.[79]

The court's language is notable in two respects. First, it indicates that the principle that corporations may be held criminally liable for nonfeasance was considered well settled as early as 1834. Second, the statement focuses attention on the public character of the harm and the need for an effective procedure to remedy it.[80]

Considering the question whether the city neglected to perform an obligation imposed by law, the court noted that the city was empowered by statute to abate nuisances in streets and wharves, to prevent obstructions in the river, and to require excavation, deepening, and cleansing of the basin. The court reasoned that since the corporation had the power to abate the nuisance, there could be no question that it had a duty to exercise that power. The power to abate "constitutes a part of the mass of corporate powers which they have sought for the promotion of the public good; the execution of which is not at their option. They are bound to execute them when demanded by the public

78. People v. Corporation of Albany, 11 Wend. 539, 539 (N.Y. Sup. Ct. 1834).

79. *Id.* at 543.

80. A judgment of conviction of nuisance frequently carried with it an order compelling abatement. *See, e.g.,* State v. Ohio Oil Co., 150 Ind. 21, 49 N.E. 809 (1898); State v. Paggett, 8 Wash. 579, 36 P. 487 (1894). Indeed abatement was the primary object of a nuisance prosecution. State v. Morris & Essex R.R., 23 N.J.L. 360, 370 (1852).

interest."[81] That there may have been no demonstrable private injury was considered irrelevant.[82]

2. *Nonfeasance Versus Misfeasance*

The nonfeasance/misfeasance distinction, so deeply embedded in English common law, was short lived in American jurisprudence. It appeared only briefly, and mostly in dicta.[83] By mid-nineteenth century, two well-reasoned and influential opinions seem to have settled the question whether corporations were indictable for affirmative acts as well as omissions to act. In the first, *State v. Morris & Essex Railroad*,[84] the company was indicted for nuisance for having constructed a building upon a public highway and for further obstructing the road with railroad cars. Company counsel conceded that a corporation could be liable for nonfeasance, but appealed the corporation's conviction on the sole issue of the propriety of charging the corporation for an affirmative act.

The Chief Justice of the New Jersey Supreme Court began his analysis of the issue by questioning the statement, attributed to Chief Justice Holt, that "[a] corporation is not indictable, but the particular members of it are."[85] The court doubted that Holt would have stated such a broad proposition and noted that Holt himself had complained of his reporters "that the stuff which they published would make posterity think ill of his understanding, and that of his brethren on the bench."[86]

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81. People v. Corporation of Albany, 11 Wend. 539, 543 (N.Y. Sup. Ct. 1834). In this case the trial judge erred by instructing the jury that the corporation was bound to abate even though abatement would require it to exercise powers not conferred by its charter (removal of a bulkhead), rather than those specifically conferred by law (to order and direct cleansing operations).

82. It would indeed be very remarkable, if a law should be so framed, that a public duty could not be enforced, unless some person had actually sustained a private injury, and become entitled to a private action for redress, by reason of a neglect to perform it; in other words, that a public road, which a corporation is bound by law to repair, may become ruinous, obviously dangerous and nearly impassable, and yet the public have no remedy to compel its repair, unless some private person, liable to pay toll, shall venture upon it, and sustain injury. They are distinct remedies for distinct injuries.

Commonwealth v. Hancock Free Bridge Corp., 68 Mass. 58, 67 (1854).

83. The leading case in point is State v. Great Works Milling & Mfg. Co., 20 Me. 41 (1841) (quashing an indictment for erecting a nuisance). *See* State v. President & Directors of Ohio & Miss. R.R., 23 Ind. 362 (1864) (citing *Great Works Milling* with approval). *See also* McKim v. Odom, 3 Bland. 403 (Md. Ch. 1828); Orr v. Bank of the United States, 1 Ohio 37 (1822); Commonwealth v. President of Swift Run Gap Turnpike, 4 Va. (2 Va. Cas.) 362 (1823).

84. 23 N.J.L. 360 (1852).

85. *Id.* at 364 (quoting 12 Mod. 559 [Anonymous, 88 Eng. Rep. 1518 (K.B. 1701)]).

86. 23 N.J.L. at 364.

The court then turned its attention to the development of corporate criminal liability. The court's first premise was that once one accepts the notion that corporations are indictable for nonfeasance, "all preliminary and formal objections"[87] to finding criminal liability—such as the corporation's intangibility and consequent incapacity to be arrested, to appear in court, or to be subjected to imprisonment, as well as considerations of fairness to innocent stockholders—must be dispensed with because they apply equally to indictments for nonfeasance and misfeasance. The distinction lay, if at all, in the argument that while a corporation can neglect to act, it cannot act with force and therefore cannot commit acts of trespass or positive wrong.

The court noted that while the early rule was to the contrary, it since had become well settled that a corporation could be held liable for torts committed by its agents.[88] Corporations had been held accountable for trover, negligence, trespass, ejectment, disseisin, assault, and false imprisonment.[89] If a corporation could be held civilly liable as a natural person for such tortious acts of its agents, there could be no sound reason for denying its capacity to be made accountable for the same acts in a criminal prosecution.

A further objection raised by counsel was that a corporation cannot commit a criminal act because its charter does not confer the power to do so. The court quickly rejected this ultra vires argument. The logical extension of such an argument would be that a corporation is not accountable for civil wrongs, which clearly would be unjust as well as contrary to settled legal principles.[90]

The final argument made by counsel for the railroad was that because the individuals who personally participate in the decision to cause a wrong to be committed and those who personally commit the wrong are individually responsible, there exists no strong policy favor-

87. *Id.* at 366.

88. "[I]f a corporation has itself no hands with which to strike, it may employ the hands of others." *Id.* at 367.

89. *Id.* at 367-68.

90. According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their corporate powers, they had no right by law to do it: it was not one of the objects for which they were incorporated, and therefore is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice.

Id. at 369 (quoting Binney's argument in Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & Rawl. 6, 12 (Pa. 1818)).

ing holding the corporation aggregate also responsible. This, too, the court found unpersuasive. The corporation both instigated and benefitted from the wrong. The individuals who performed the work would be, in all probability, difficult to identify and financially irresponsible. Moreover, it was in the best interest of the corporation to be made a party to the prosecution. As the principal purpose of a prosecution for nuisance was to compel abatement, an order to abate frequently was part of the judgment of conviction. If the conviction were to bind the corporation—in this case the judgment required destruction of a valuable building—clearly the corporation should have had the opportunity to appear and defend rather than have its rights determined at the trial of an irresponsible employee who may have acted out of a motive to harm the company. In any event, there existed no procedures to enforce a judgment against a corporation that had not been made a party to the proceeding. For those reasons, the indictment was held proper and the judgment was affirmed.

Two years later a second important case was decided. In *Commonwealth v. Proprietors of New Bedford Bridge*[91] the proprietors were indicted for building a bridge across a river in a manner that obstructed navigation, thereby causing a public nuisance. Responding to the defendants' objection to the indictment of a corporation for misfeasance, the court noted that authority for their position could be found in stray dicta that text writers had incorporated into their works, but that few courts had actually ruled on the point. Assuming *arguendo* that the notion ever had been sound, it had originated during a time when corporations were few in number and had more limited powers and purposes. "Experience has shown the necessity of essentially modifying it . . . ."[92]

The court also pointed out that the distinction between nonfeasance and misfeasance often is absurd. In this case, for example, it would have been possible to characterize the wrong as either failure to construct a proper bridge (nonfeasance) or construction of an improper bridge (misfeasance). In either event the nuisance—obstruction of the waterway—arose from the presence of a bridge that otherwise would not have impeded navigation had not the corporation exercised its

91. 68 Mass. 339 (1854). *See also* Stacey v. Vermont Cent. R.R., 27 Vt. 35 (1854).

92. 68 Mass. at 345.

power to cause the bridge to be built there.[93] In short, no sound reason for perpetuating a frequently meaningless distinction could be found.

Once the principle that corporations could be convicted of misfeasance for creating a nuisance was established, there was no theoretical impediment to imposing liability for other acts of misfeasance unrelated to nuisance. Courts accordingly held corporations amenable to conviction of such crimes as Sabbath breaking,[94] permitting gaming on a fair ground,[95] charging usurious interest rates,[96] furnishing liquor to minors,[97] and the unauthorized practice of medicine.[98]

3. *Crimes Requiring Intent*

In contrast with the rather rapid development and acceptance of a theory of corporate criminal liability, its extension to crimes requiring intent lagged behind. The two courts that settled the debate over the nonfeasance/misfeasance distinction conceded, in their landmark decisions, that a corporation could not be indicted for offenses requiring evil intent. Treason, felony, perjury, and violent crimes against the person could be committed only by natural persons.[99]

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93. *Id.* at 346. *See also* State v. Morris & Essex R.R., 23 N.J.L. 360, 371-72 (1852) (Nevius, J., concurring):

> It requires no great ingenuity to show that a company, as such, may be guilty of a public nuisance. A canal company, acting within the scope of its chartered rights, constructs a canal across a public highway or road, but neglects to erect a bridge for the accommodation of the public travel; such canal becomes a nuisance, as well by the act, as by the neglect of the company.

Id.

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

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

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

97. Southern Express Co. v. State, 1 Ga. App. 700, 58 S.E. 67 (1907).

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

99. Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. 339, 345 (1854); State v. Morris & Essex R.R., 23 N.J.L. 360, 364 (1852). *See also* 1 W. BLACKSTONE, *supra* note 16, at *476. One troublesome obstacle to imposing corporate liability for felonies was the nature of the authorized punishment. The early felonies—murder, wounding, mayhem, false imprisonment, rape, robbery, burglary, arson, and larceny—all were punishable by death or dismemberment, sanctions quite incapable of literal application to the corporate entity. *See generally* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 464-511 (2d ed. reissued 1968). As more categories of wrongful conduct came to be defined as felonies and other sanctions authorized, the early rule exempting corporations from felony prosecution became the object of criticism. "[A] corporation cannot be hung: yet there is no reason why it may not be fined, or suffer the loss of its franchise, for the same act which would subject an individual to the gallows." 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 506 (3d ed. 1865). The latter view ultimately prevailed.

Arguments against imposing corporate liability for such crimes generally followed two familiar themes. First, just as earlier arguments relied on the fictive character of the corporation to oppose a theory of corporate acting (it has no hands with which to strike), some opposing liability for intent crimes also relied on the nature of the corporate entity. Since a corporation "has no soul," it cannot have "actual wicked intent."[100] It cannot, therefore, be guilty of crimes requiring "*malus animus*."[101] The second argument revived the ultra vires plea. Some acts are so far beyond the purposes of the corporation and the powers granted by its charter that the corporate entity is incapable of committing them.[102] To impose liability for such acts would be contrary to settled rules regarding a principal's liability for the acts of its agent.

Courts drew some distinctions, however, between crimes requiring specific intent and those for which general intent would suffice. In one sense the acts of the corporation are the acts of its officers, directors, and employees.[103] When they act on behalf of the corporation, their

100. State v. First Nat'l Bank, 2 S.D. 568, 571, 51 N.W. 587, 587 (1892) (dictum). The corruption and mismanagement of many corporations, including "[t]he pillaging of the Erie Railroad by the robber barons in the late 1860's," L. FRIEDMAN, A HISTORY OF AMERICAN LAW 448 (1973), so alarmed one essayist that he pointedly called corporations "a class of artificial beings" that established "despotisms" and threatened to become "the masters of their creator[s] . . . . Everywhere . . . they illustrate the truth of the old maxim of the common law, that corporations have no souls." Adams, *A Chapter of Erie,* in HIGH FINANCE IN THE SIXTIES 115-16 (F. Hicks ed. 1929).

101. State v. Morris & Essex R.R., 23 N.J.L. 360, 364 (1852).

102. United States v. Alaska Packers' Ass'n, 1 Alaska 217, 221 (1901); Commonwealth v. Punxsutawney Street Passenger Ry., 24 Pa. C. 25, 26 (1900). In other words, the ultra vires nature of the act was measured by degrees for purposes of determining whether a corporation could be held accountable for it.

> A corporation, especially as viewed from the standpoint of the criminal law, is an artificial creation of the law, consisting of one or several persons endowed with a part of the duties and capabilities of an unincorporated man. To determine what part and how much it covers, we look at its particular nature and objects, and the terms of the act of incorporation. Hence a corporation cannot, in its corporate capacity, commit a crime by an act in the fullest sense ultra vires and contrary to its nature. But within the sphere of its corporate capacity, and to an undefined extent beyond, whenever it assumes to act as a corporation, it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining to the thing the like relations.

United States v. Alaska Packers' Ass'n, 1 Alaska 217, 220 (1901) (quoting Bishop on Criminal Law).

103. That corporate employees could be held personally accountable for crimes committed on behalf of a corporation was a point on which there was "no doubt." Regina v. Great North of England Ry., 115 Eng. Rep. 1294, 1298 (Q.B. 1846). *See also* Cowley v. People, 83 N.Y. 464, 469 (1881) ([i]t has . . . for years been the law of this State that the officers of a corporation might be indicted for the neglect of a duty resting upon it"). By 1890, a growing body of case law acknowledged this proposition. *See, e.g.,* Elsberry v. State, 52 Ala. 8, 10 (1875); State v. Great Works Milling & Mfg. Co., 20 Me. 41, 44 (1849); Moore v. State, 49 Miss. 147 (1873), *writ dismissed,* 88

motives and intentions, as well as the acts themselves, are imputable to the corporation.[104]

> If, for example, the invisible, intangible essence of air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can also intend to do these acts, and can act therein as well viciously as virtuously. The ordinary crimes, wherein only general evil, or the mere purpose to do the forbidden thing, suffices for the intent, are plainly within this doctrine.[105]

Thus if a crime were completed merely by the purposeful doing of a prohibited act, such as taking salmon from a river[106] or working one's

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U.S. 636 (1875); State v. Morris & Essex R.R., 23 N.J.L. 360 (1852); State v. Patton, 26 N.C. 16 (1843); *Ex parte* Schmidt, 2 Tex. App. 196 (1877). Between 1890 and 1914 alone there were 40 cases in which corporate officers were indicted for Sherman Act violations. United States v. Wise, 370 U.S. 405, 497 n.1 (1962).

It was during this same period, however, that the notion of corporate accountability for crime was becoming more generally accepted, owing to development of the theory of corporate acting. Once that acceptance occurred, it was inevitable that individual members of the corporation would argue that their official acts were acts of the corporation for which they should not be personally accountable. *See, e.g.,* United States v. Lanier, 578 F.2d 1246 (8th Cir.), *cert. denied,* 439 U.S. 856 (1978); Kelly v. United States, 258 F. 392 (6th Cir.), *cert. denied,* 249 U.S. 616 (1919); United States v. Pinkston-Hollar, Inc., 4 O.S.H. Cas. (BNA) 1697 (D. Kan. 1976); State v. Cooley, 141 Tenn. 33, 206 S.W. 182 (1918); Milbrath v. State, 138 Wis. 354, 120 N.W. 252 (1909). *See also* Wood v. United States, 204 F. 55 (4th Cir.), *cert. denied,* 229 U.S. 617 (1913); United States v. Winslow, 195 F. 578 (D. Mass. 1912), *aff'd,* 227 U.S. 202 (1913); United States v. MacAndrews & Forbes Co., 149 F. 823 (C.C.S.D.N.Y. 1906).

The argument was not entirely illogical, for one of the underpinnings of the rule holding the corporate entity liable was the traditional sound policy of looking "to the principal rather than the mere agent," State v. Morris & Essex R.R., 23 N.J.L. 360, 369 (1852), in the context of other agency problems. Notwithstanding that official acts of corporate officers and employees might be charged as acts of the corporation, however, courts found this argument wholly unpersuasive.

No doctrine of agency law would permit corporate agents to immunize themselves from criminal responsibility for their own acts by the simple expedient of incorporating. State v. Cooley, 141 Tenn. 33, 206 S.W. 182 (1918). Adoption of articles of incorporation subjects the resulting corporate entity to the laws governing corporate bodies, but the incorporators do not thereby extinguish existing personal duties and liabilities. Milbrath v. State, 138 Wis. 354, 361, 120 N.W. 252, 254 (1909). They may not avail themselves of the advantages derived from conducting business through the corporate form and then claim that the corporation and its officers have distinct legal existence. Wood v. United States, 204 F. 55 (4th Cir.), *cert. denied,* 229 U.S. 617 (1913). If they commit crimes in the conduct of corporate business, they merely use the corporation as an instrumentality through which they carry out their own unlawful acts. Kopald-Quinn & Co. v. United States, 101 F.2d 628, 632 (5th Cir.), *cert. denied,* 307 U.S. 628 (1939); State v. McBride, 215 Minn. 123, 131, 9 N.W.2d 416, 420 (1943); Milbrath v. State, 138 Wis. 354, 361, 120 N.W. 252, 254 (1909).

104. United States v. John Kelso Co., 86 F. 304, 305-06 (N.D. Cal. 1898); United States v. Alaska Packers' Ass'n, 1 Alaska 217, 220 (1901).

105. United States v. Alaska Packers' Ass'n, 1 Alaska 217, 220 (1901).

106. *Id.* at 218-19, 224.

employees more than eight hours per day,[107] the corporation was indictable.

This principle soon gained the express approval of the United States Supreme Court in *New York Central & Hudson River Railroad v. United States*.[108] New York Central had been charged and convicted of granting rebates to sugar refineries in violation of the Elkins Act.[109] On appeal, counsel asserted that section 1 of the Act, which specifically declared the acts of officers, agents, and employees of a common carrier to be the acts of the carrier, was unconstitutional. To fine the corporation for the acts of its employees, counsel argued, amounted to taking money from and punishing innocent stockholders without due process of law. Moreover, the argument ran, statutory imputation of criminal responsibility was contrary to the presumption of innocence accorded individuals accused of criminal wrongdoing and was thereby precluded.

Justice Day, writing for a unanimous court,[110] found no basis in law or public policy for holding that Congress could not impose such responsibility on common carriers. Since Congress is empowered to regulate interstate commerce to eliminate favoritism and discrimination in the use of the commercial channels of the nation, "[i]t would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act."[111]

Although the Court believed that some classes of crimes could not be committed by corporations,[112] it found that the instant offense belonged to a larger class of offenses consisting merely of purposely doing something prohibited by statute.[113] In cases involving this class of crimes, logic and policy dictated imposition of corporate liability for wrongs committed by agents acting within the scope of their authority.

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107. United States v. John Kelso Co., 86 F. 304 (N.D. Cal. 1898).

108. 212 U.S. 481 (1909). Professor Orland has characterized the holding in *New York Central* as the typical "prosecution-oriented interpretation" that the Court has historically accorded regulatory statutes applicable to corporations. Orland, *supra* note 3, at 502.

109. 49 U.S.C. §§ 41-43 (1976).

110. Justice Moody did not participate in the case. 212 U.S. at 499.

111. *Id.* at 496.

112. *Id.* at 494. The Court did not indicate the reasoning behind this statement, nor did it further enumerate those crimes it thought corporations were incapable of committing.

113. *Id.*

Enforcement of statutes prohibiting the practice of rebating would be effective only if the corporation, which derived the benefit from the unlawful practice, were the target of the prosecution. Recognizing that the rights of corporations should be respected, as are the rights of natural persons, the Court nonetheless stated that the law "cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands."[114] If corporations were immunized from criminal punishment because of the early notion that a corporation is incapable of committing a crime, Congress would lose its only effective method of controlling corporate misconduct and correcting the abuses the statute was designed to reach.[115]

As courts gave express recognition to the capacity of corporations to commit crimes requiring general intent, open hostility to retention of a "fanciful [theory] . . . in process of abandonment"[116] surfaced and brought to the forefront consideration of the question whether there remained a sound reason for drawing a distinction between imputing general and specific intent to corporations. After all, corporations had been held vicariously liable for such intentional torts as assault and battery,[117] libel,[118] and malicious prosecution.[119] Because it would be no more difficult theoretically to impute specific intent for a crime than a tort,[120] the only point remaining in dispute was whether the corporation lacked capacity to form evil intention. The suggestion that it did was met with little patience. "The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not . . . bear discussion."[121] The proposition was simply untenable.[122]

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114. *Id.* at 495.

115. *Id.* at 496.

116. United States v. MacAndrews & Forbes Co., 149 F. 823, 835 (C.C.S.D.N.Y. 1906).

117. *See, e.g.,* Evansville & C.R.R. v. Baum, 26 Ind. 70 (1866); Brokaw v. New Jersey R.R. & Transp. Co., 32 N.J.L. 328 (1867).

118. *See, e.g.,* Philadelphia, W. & B.R.R. v. Quigley, 62 U.S. (21 How.) 202 (1858); Fogg v. Boston & L.R.R., 148 Mass. 513, 20 N.E. 109 (1889).

119. *See, e.g.,* Goodspeed v. East Haddam Bank, 22 Conn. 530 (1853); Reed v. Home Sav. Bank, 130 Mass. 443 (1879).

120. United States v. Nearing, 252 F. 223, 231 (S.D.N.Y. 1918); Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 296-97, 52 N.E. 445, 446 (1899).

121. United States v. MacAndrews & Forbes Co., 149 F. 823, 836 (C.C.S.D.N.Y. 1906).

122. State v. Rowland Lumber Co., 153 N.C. 610, 612, 69 S.E. 58, 58 (1910).

Beginning in the late nineteenth and continuing into the early twentieth century, courts wrestling with this issue began breaking down the last barrier to imposing on corporations the full range of liabilities to which natural persons were subject. During this period courts found corporations properly subject to criminal prosecution for such offenses as contempt of court,[123] willfully or knowingly obstructing a road,[124] conspiracy to violate federal and state antitrust laws,[125] knowingly mailing obscene materials,[126] conspiracy to conceal a bankrupt's assets,[127] willful breach of duties imposed on oleomargarine dealers,[128] willfully tearing down a stable and fence,[129] conspiracy to transport liquor into Indian territory,[130] violation of the espionage act,[131] and even manslaughter.[132]

IV. A Related Historical Development: Vicarious Criminal Liability

Development of the doctrine of corporate liability for crime, itself a species of vicarious liability since corporations act only through human agents, paralleled that of a doctrine of vicarious criminal liability. The theory by which the criminal conduct of a direct participant might be imputed to another human being who did not participate in the crime had its roots in the agency law doctrine of *respondeat superior*.[133]

123. Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N.E. 445 (1899).

124. State v. White, 96 Mo. App. 34, 69 S.W. 684 (1902).

125. United States v. MacAndrews & Forbes Co., 149 F. 823 (C.C.S.D.N.Y. 1906); Chicago, Wilmington & Vermilion Coal Co. v. People, 214 Ill. 421, 73 N.E. 770 (1905); State v. Eastern Coal Co., 29 R.I. 254, 70 A. 1 (1908).

126. United States v. New York Herald Co., 159 F. 296 (C.C.S.D.N.Y. 1907).

127. United States v. Young & Holland Co., 170 F. 110 (C.C.R.I. 1909).

128. United States v. Union Supply Co., 215 U.S. 50 (1909).

129. State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910).

130. Joplin Mercantile Co. v. United States, 213 F. 926 (8th Cir. 1914), *aff'd,* 236 U.S. 531 (1915).

131. United States v. American Socialist Soc'y, 260 F. 885 (S.D.N.Y. 1919), *aff'd,* 266 F. 212 (2d Cir.), *cert. denied,* 254 U.S. 637 (1920); United States v. Nearing, 252 F. 223 (S.D.N.Y. 1918).

132. United States v. Van Schaick, 134 F. 592 (C.C.S.D.N.Y. 1904); State v. Lehigh Valley R.R., 90 N.J.L. 372, 103 A. 685 (1917). *See also* People v. Rochester Ry. & Light Co., 195 N.Y. 102, 88 N.E. 22 (1909) (corporation may be indicted for crimes requiring intent, including manslaughter, but wording of instant statute requires human actor).

133. The history and policy underlying the doctrine have been explored at length elsewhere. For varying accounts, see generally T. Baty, *supra* note 57; Hackett, *Why is a Master Liable for the Tort of His Servant?,* 7 Harv. L. Rev. 107 (1893); Holmes, *Agency* (pts. 1 & 2), 4 Harv. L. Rev. 345 (1891), 5 Harv. L. Rev. 1 (1891); Laski, *The Basis of Vicarious Liability,* 26 Yale L.J. 105 (1916); Steffen, *Independent Contractor and the Good Life,* 2 U. Chi. L. Rev. 501 (1935);

A. *Historical Origin of the Respondeat Superior Doctrine*

Prior to the eighteenth century, the general rule was that a master was not liable for the acts of his servant unless those acts were procured, counseled, or commanded by the principal.[134] In the late seventeenth century, however, Lord Holt decided several cases that seemed to represent a departure from strict application of this rule. In the first, *Boson v. Sandford*,[135] Holt held that shipowners were chargeable for damage to cargo resulting from the negligence of the ship's master. Several years later, Lord Holt held a master chargeable for damage caused by a fire his servant started.[136] Rejecting the argument that the master should not be held accountable because he had not commanded the servant to set the fire, Holt laid down the principle that "tho' I am not bound by the act of a stranger in any case, yet if my servant doth any thing prejudicial to another, it shall bind me, where it may be presumed that *he acts by my authority, being about my business*."[137]

By the turn of the century, this developing notion that the master should be liable if the servant was acting within the course of the master's business and within the scope of his employment had begun to displace the requirement that the employer must command or procure the wrongful act.[138] It should be noted, however, that the cases carefully limited application of the evolving doctrine to civil liability. The master was liable *civiliter*, though not *criminaliter*.[139]

B. *Historical Origin of the Doctrine of Parties to Crime*

Vicarious liability in criminal law evolved in a similar, if slower, fashion. Under the early rule one was not accountable for the criminal

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Wigmore, *supra* note 57. *See also* O. HOLMES, THE COMMON LAW 16-17 (M. Howe ed. 1963). For a more contemporary view, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 69-74 (4th ed. 1971). *See also* R. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW (2d ed. 1959).

134. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 691 (1930).

135. 90 Eng. Rep. 377, 638 (K.B. 1690). This was treated as a mixed action for tort and quasi-contract.

136. Turbervil v. Stamp, 90 Eng. Rep. 590, 846, 903 (K.B. 1697). *See also* Jones v. Hart, 91 Eng. Rep. 382 (K.B. 1698); Middleton v. Fowler, 91 Eng. Rep. 247 (K.B. 1698); Kingston v. Booth, 90 Eng. Rep. 105 (K.B. 1685); Michael v. Alestree, 83 Eng. Rep. 504 (K.B. 1676).

137. Turbervil v. Stamp, 90 Eng. Rep. 590, 590 (K.B. 1697) (emphasis added). Blackstone construed the law of the time to support the conclusion that the servant would bind his principal if he acted under either express or implied command or encouragement of the master. 1 W. BLACKSTONE, *supra* note 16, at *429-30.

138. Sayre, *supra* note 134, at 701.

139. Hern v. Nichols, 91 Eng. Rep. 256 (K.B. 1708) (action on the case for deceit).

actions of another unless he procured, commanded, or counseled them. Insofar as criminal liability was at issue, the developing doctrine of *respondeat superior* was rejected during the eighteenth century.[140] "It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases . . . ."[141] Rather, the liability of each must be determined by the degree of his participation. "All the authors"[142] who dealt with this question of criminal liability maintained that the act of the servant would not affect the master in the absence of a command that the servant engage in the wrongful conduct. That this was an exceedingly narrow ground for imposing criminal liability is illustrated by *Regina v. Saunders*.[143]

Saunders, desiring to kill his wife so he could marry another, consulted a friend named Archer. Archer recommended poisoning her, and he procured for Saunders arsenic and roseacre. Saunders subsequently laced some roasted apple with the deadly poisons and served the dish to his wife. Already feeling ill, she took a few bites and then gave the apple to their young daughter, who ate it in their presence. Saunders remained passive in order to conceal his complicity in the matter. The intended victim recovered, but the child died two days later. Upon her death, Saunders was charged as principal and Archer as accessory to her murder. Both were convicted.

The knotty legal issue was whether Archer's conviction could stand. Archer, alas, had aided his compatriot only to poison the wife, but "no other."[144] With obvious concern,[145] the judges concluded that his assent to the poisoning of the wife could not be implicitly extended to the poisoning of the daughter, "for the poisoning of the daughter is a distinct thing from that to which he was privy, and therefore he shall not be adjudged accessory to it."[146]

In a lengthy reporter's note to the case, Plowden approved the re-

140. *See* Sayre, *supra* note 134, at 701.

141. Rex v. Huggins, 93 Eng. Rep. 915, 917 (K.B. 1730).

142. *Id. See, e.g.*, E. COKE, THIRD INSTITUTE *51; 1 M. HALE, PLEAS OF THE CROWN *616-17.

143. 75 Eng. Rep. 706 (K.B. 1575).

144. *Id.* at 709.

145. "And although they were so agreed, yet, rather than make a precedent of it, they reprieved him from one session to another for divers sessions, to the intent that they might purchase his pardon, and by that means be set at liberty." *Id.*

146. *Id.*

sult[147] and summed up his view of the doctrine of accessory liability. A person might be held liable for the criminal acts of another: (1) when the crime actually committed is the very crime the nonparticipant has counseled or commanded the actor to commit,[148] and (2) when the crime actually committed is different from the crime the nonparticipant has counseled, but it is a natural consequence of the counseled crime.[149] When the crime committed does not fall within either of the above categories, the nonparticipant is liable civilly, but not criminally.[150] This view of the doctrine of accessory liability accurately reflected the state of the law not only during Plowden's time but even a century later.[151]

1. *Nuisance*

Having opened the door to imputation of crimes to the corporate entity and to imputation of crimes to human nonparticipants (on admittedly narrow grounds), courts inevitably would join the two issues in an inquiry into the legal posture of members of the corporate hierarchy who did not directly participate in the corporate conduct that constituted an offense. As was true when courts first ventured into a theory of corporate criminal liability, the early cases in which liability was imputed to corporate officers were nuisance prosecutions.[152]

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147. *Id.* at 711.

148. If, for example, the wife had died or Archer also had counseled poisoning the daughter, he would be an accessory to murder.

149. If, for example, Archer had counseled Saunders to use the poison to make the wife gravely ill (the crime of common-law battery), and she died from its effects, Archer would be an accessory to murder.

150. Plowden's note did not address the issue of civil liability. *See* Sayre, *supra* note 134, at 702-04.

151. *Id.* at 697-98.

152. In a separate line of cases, criminal libel prosecutions, courts early established that the publisher of a newspaper or proprietor of a bookshop could be held liable for the acts of a subordinate employee who either inserted libelous material in the publication or sold it. Though knowledge and consent of the publisher or proprietor was an element of the offense, proof of publication and sale established a prima facie case. *See* Rex v. Williams, 98 Eng. Rep. 905 (K.B. 1774); Rex v. Almon, 98 Eng. Rep. 411 (K.B. 1770). This evidentiary rule soon became akin to a substantive rule of law, for it seemed to take on the character of an irrebuttable presumption. Even though some courts reiterated the prima facie case rhetoric, proof that the proprietor was inactive in the business or was even incapable of participating in it was insufficient to rebut the presumption of knowledge and consent. *See* Rex v. Gutch, 173 Eng. Rep. 1214 (N.P. 1829); Rex v. Walter, 170 Eng. Rep. 524 (N.P. 1799). Parliament remedied the situation in § 7 of The Libel Act, 6 & 7 Vict. c. 96 (1843), which specifically provided that the presumption was rebuttable and that the defendant might prove that the publication occurred "without his authority, consent, or

In one of the earliest reported cases, *Rex v. Medley*,[153] the directors and numerous employees of the Equitable Gas Company were indicted for discharging waste from their plant into the river Thames. The effluent was described as "nasty stuff fit to poison a horse."[154] So deleterious was the substance that it "smelt ready to knock anybody down,"[155] and a reporter's footnote pointedly assures that the sample produced at trial "fully justified the witness's statement."[156] The directors raised in defense their ignorance of the situation. They rarely visited the site of the plant and never actively participated in its management. The decision to dump the sludge into the river was an expedient to which the workmen resorted only when machinery designed to dispose of the refuse by process of evaporation failed.[157] The act had never been approved by the directors, and installation of an adequate evaporation system had since abated the nuisance.

In his instructions to the jury, the judge stated that in his opinion the directors' unawareness of the condition made no difference, provided that they had conferred authority on the others to operate the plant. "[I]f persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants."[158] The jury apparently agreed, for it convicted the chairman, deputy chairman, superintendent, and engineer.

In a subsequent nuisance prosecution, *The Queen v. Stephens*,[159] the owner of a slate quarry near the Tivy River was indicted for obstructing navigation by throwing slate stone and debris into the river.

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knowledge, and that the said publication did not arise from want of due care or caution on his part." *Id.* The statute had a significant impact on subsequent libel prosecutions. *See, e.g.*, The Queen v. Holbrook, L.R. 4 Q.B.D. 42 (1878); The Queen v. Holbrook, L.R. 3 Q.B.D. 60 (1877).

153. 172 Eng. Rep. 1246 (K.B. 1834).

154. *Id.* at 1248.

155. *Id.*

156. *Id.* at 1248 n.*(a)*[1].

157. The prosecution introduced evidence that the effluent had caused a substantial fish kill and made the water unfit to drink. Counsel for the defense argued that if the engineer had not devised this ingenious method of disposing of the plant's waste, the plant would have had to shut down and cease lighting the district for a time. He continued:

> In considering what is or is not a nuisance, a jury must take into consideration the whole of the circumstances and consequences. If it can be shewn that the comfort and security of society are much promoted by particular works, it would be absurd to say that the poisoning of a few fish was a thing not to be tolerated.

Id. at 1249. This line of argument has a remarkably contemporary ring.

158. *Id.* at 1250.

159. L.R. 1 Q.B. 702 (1866). *See also* People v. Detroit White Lead Works, 82 Mich. 471, 46 N.W. 735 (1890).

Because he was so old, the owner was unable to supervise personally the removal of quarried slate. He was prepared to show, however, that the employees had been warned by him, and by his sons as well, not to pollute the river. Demonstrating lack of sympathy for his position, the court held that the owner of a business is liable for public nuisance created by his workmen while working within the scope of their employment, even if the owner is ignorant of their activities and has given orders to the contrary.

The nuisance prosecution thus became an established exception to the general rule that the doctrine of *respondeat superior* has no place in the criminal law.[160] The import of the early cases was clear. Those

160. In contemporary times, the proliferation of public welfare offenses has provided impetus for considering anew the question whether a corporate officer who does not personally participate in conduct constituting an offense may be held responsible when a subordinate violates a penal statute. Public welfare offenses typically require neither intent nor guilty knowledge, and instead simply penalize proscribed conduct or results without regard to *mens rea*. Strict liability is imposed not because the offense might be considered *malum prohibitum*, but because the conduct constituting the violation exposes the public to an unacceptable risk of injury that is unaffected by the intent of the violator. Morissette v. United States, 342 U.S. 246, 256, 259 (1942).

The Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 301-392 (1976), fits the public welfare offense pattern, and prosecutions under § 303 of the Act, 21 U.S.C. § 333 (1976), have served as the principal vehicles for exploring the potential liability of a corporate officer for violations in which he played no direct role. Section 303 provides that any person who violates the prohibition against introducing adulterated or misbranded food, drugs, or cosmetics into commerce is subject to imprisonment and/or a fine.

In the first significant decision under the Act, a closely divided Supreme Court upheld the conviction of the president and general manager of the Buffalo Pharmacal Company. United States v. Dotterweich, 320 U.S. 277 (1943). Writing for the majority, Justice Frankfurter noted that the Act puts a seller of goods at risk to know the properties of the commodity he distributes through the channels of commerce. The regulatory scheme dispenses with "the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Id.* at 281.

Reaffirming the *Dotterweich* doctrine more than three decades later, the Court stated that managerial liability under the Act is predicated upon an omission or failure to discharge corporate responsibility. United States v. Park, 421 U.S. 658 (1975). The rationale underlying *Dotterweich* and its progeny is that the degree of public interest in preventing contamination of food and drugs is sufficiently great that it warrants imposing the highest standard of care on those in the chain of distribution "who execute the corporate mission." *Id.* at 664.

The *Park* Court identified two specific positive duties imposed by the Act: (1) "primarily, a duty to implement measures that will insure that violations will not occur," *id.* at 672; and (2) an affirmative duty to seek out and remedy violations that do occur. The Act imposes the highest duty of foresight and vigilance. *Id.* at 673.

In the contemporary dialogue about corporate criminal liability, commentators have characterized the Act and the cases decided thereunder as an "extraordinary expansion of the legal concept of corporate crime, both by Congress and by the federal courts." Orland, *supra* note 3, at 503. In

who owned, operated, or directed the operation of a company were obliged to exercise supervisory control over subordinate employees. Neglect of that duty would not be countenanced as a defense in a criminal nuisance prosecution predicated upon wrongful acts of the subordinates.

V. AN OBSERVATION

It seems appropriate to observe that the early doctrine through which corporations and their managers were held criminally liable developed with little or no heed to traditional notions of culpability. The underlying theory was forged in criminal prosecutions involving public nuisances. Institutional behavior that resulted in a "culpable" violation

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addition to the cases discussed in note 152 *supra* and in the text accompanying notes 153-58 *supra*, historical antecedents for this pattern of liability may be found in State v. Burnam, 71 Wash. 199, 202, 128 P. 218, 219 (1912) (vicarious liability should be extended to managing agents "when the offense consists in the violation of a police regulation when neither a guilty knowledge nor a criminal intent is made an element of the offense") (conviction reversed on other grounds), and People v. Detroit White Lead Works, 82 Mich. 471, 479, 46 N.W. 735, 737 (1890) (upholding nuisance convictions of president, vice president, treasurer, and manager who, as officers and directors of the corporation, "are the persons primarily responsible").

While most of the current body of case law recognizing liability for improper discharge of corporate responsibilities has been decided in the context of prosecutions under the Food, Drug, and Cosmetic Act, various components of the Court's analysis in *Dotterweich* and *Park* have been cited with approval in cases involving criminal violations of such statutes as (1) the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1273 (1976), *see* United States v. Klehman, 397 F.2d 406 (7th Cir. 1968) (but dismissing criminal information against individual defendant because prior testimony under subpoena conferred immunity); (2) the Filled Milk Act, 21 U.S.C. §§ 61-63 (1976), *see* Carolene Prods. Co. v. United States, 140 F.2d 61 (4th Cir. 1944) (upholding convictions of individual defendants responsible for promoting interstate business, without evidence of personal participation in or knowledge of offending shipments); (3) the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 135 (1976), and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-708 (1976), *see* United States v. Frezzo Bros. Inc., 602 F.2d 1123 (3rd Cir. 1979) (citing as authority for proposition that defendants' argument that they could not be held individually responsible when indictment charged them as corporate officers was meritless), *cert. denied,* 444 U.S. 1074 (1980); United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (using as authority for proposition that omission to perform duty may be basis of corporation's liability); (4) the Sherman Act, 15 U.S.C. §§ 1-7 (1976), *see* United States v. Wise, 370 U.S. 405 (1962) (*but cf.* United States v. Gypsum, 438 U.S. 422 (1978) (holding intent required)); *see also* United States v. Rachal, 473 F.2d 1338 (5th Cir.) (prosecution under Securities Act of 1933, quoting *Wise* extensively), *cert. denied,* 412 U.S. 927 (1973); (5) the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (1976), and the Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-756 (1976), *see* United States v. Gulf Oil Corp., 408 F. Supp. 450 (W.D. Pa. 1975) (applying in context of statutory requirement of willfulness); and (6) the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976), *see* United States v. Pinkston-Hollar, Inc., 4 O.S.H. Cas. (BNA) 1697 (D. Kan. 1976) (citing as authority supporting prosecution of corporate vice president as aider and abettor of corporation).

need not have constituted what we would deem "serious" wrongdoing. On the contrary, mere improper discharge of corporate responsibilities could provide a sufficient basis for institutional and individual convictions. Corporate criminal liability was, then, at the outset, strict liability. Only in the relatively recent past did we stray from the strict liability model of corporate criminality to a *mens rea* model.

Moreover, corporate criminal prosecutions in some respects served specific, well-defined objectives. In addition to exacting a financial penalty, prosecution of the corporation initially provided relief from public inconvenience or hazard through the mechanism of compelling corporate acts to abate nuisances.[161] Such proceedings were instituted as criminal prosecutions because the nuisance affected the public at large rather than a handful of individuals. Without proof of some special injury, a civil action could not have been successfully maintained by private citizens in their own names.[162] The abatement component of the prosecution made the corporation a particularly appropriate defendant, inasmuch as corporate property might be ordered removed or destroyed.

It cannot be said, however, that abatement was the sole purpose of the early nuisance prosecution. *Rex v. Medley*[163] provides a good illustration. There the individual defendants argued that the pollution of the Thames resulted from an emergency that had been resolved and that effluent from their plant would never again be discharged into the river. In short, this argument consisted of a plea of abatement accompanied by a promise to avoid creation of public nuisances in the future.

Before imposing judgment on the convicted defendants, Judge Littledale made the following observation:

> [W]e think, under all the circumstances, that this is not a matter to be passed over merely by the infliction of a nominal fine. At the same time, as no complaint has been made since this indictment was preferred, we do not think it necessary to visit the offence of these defendants with severe punishment.[164]

The clear implication is that had not the defendants abated the nui-

161. *See* notes 57 & 80 *supra*.

162. *See* Commonwealth v. Hancock Free Bridge Corp., 68 Mass. 58, 67-68 (1854); People v. Corporation of Albany, 11 Wend. 539, 544 (N.Y. Sup. Ct. 1834); The Queen v. Stephens, L.R. 1 Q.B. 702, 704 (1866).

163. 172 Eng. Rep. 1246 (K.B. 1834). For a discussion of this case, see text accompanying notes 153-58 *supra*.

164. 172 Eng. Rep. at 1250.

sance, severe punishment would have been in order. The abatement, however, only mitigated the penalty, which should not have been nominal in any event.

When institutional and managerial liability for regulatory offenses is placed in historical perspective, there seems less reason to fret over what has been cast as an "extraordinary expansion of the legal concept of corporate crime."[165] The traditional model of individual criminal liability necessitated conduct "that is particularly morally blameworthy"[166] in order to legitimate imposition of punishment.[167] The common-law model of corporate criminal liability, on the other hand, was wholly unconcerned with moral blame and only partly concerned with punishment.

That the early rule and its rationale were responses to particular needs that arose in the context of special facts and in simpler times is, of course, inconclusive. The historical facts compel neither continuing commitment to nor discrediting of the early doctrine in theory and practice. They suggest, however, that recognition of corporate criminal accountability constituted a more effective response to problems created by corporate business activities than did existing private remedies.

165. Orland, *supra* note 3, at 503. For the context in which the statement was made, see note 160 *supra*.

166. Spurgeon & Fagan, *supra* note 6, at 410.

167. *Id.* at 411.

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