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Limits on Individual Accountability for Corporate Crimes

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LIMITS ON INDIVIDUAL ACCOUNTABILITY FOR CORPORATE CRIMES

I. INTRODUCTION

Recently, a trend toward expanding personal accountability for acting or failing to act while serving in a position of authority has emerged.[1] In the past few years, public debate has focused on serious questions of personal accountability in such matters as Watergate,[2] the My Lai Massacre and covert CIA actions abroad.[3] In light of this trend, commentators have called for increased criminal accountability of individuals for corporate wrongdoing.[4] A new zeal has emerged for penetrating the multiple layers of hierarchy to hold not only the corporation,[5] but also high level corporate managers,[6] responsible for crimes committed on behalf of the corporation.

This comment will examine the recent trend toward imposing greater individual accountability for corporate crimes. It will examine the case law in the area, as well as the traditional requirements of Anglo-American jurisprudence. The first sections will define the scope and limitations of recent decisions. The last section will propose solutions to better serve the goal of deterrence.

II. THE SCOPE OF INDIVIDUAL ACCOUNTABILITY OF CORPORATE MANAGERS FOR CRIMINAL CONDUCT

A. General Rule: Proof of Specific Intent

An individual may not escape criminal liability merely by claiming that he acted on behalf of a corporation.[7] It is

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1. McAdams & Tower, *Personal Accountability in the Corporate Sector*, 16 AM. BUS. L.J. 67, 68 (1978).
2. *Id.*
3. *Id.*
4. *Id.* at 67.
5. *See infra* notes 186-217.
6. *See infra* notes 86-127.
7. It is clear that it is no defense to assert that the employee or agent was commanded to do the act by a superior. *See* RESTATEMENT (SECOND) OF AGENCY § 395 A (1958) (an agent cannot escape criminal liability simply because he acted for a principal).

well established that the corporate veil is useless to protect a corporate officer or director from the consequences of a criminal act performed in his official capacity for the benefit of the corporation.[8] Similarly, any superior who commands

8. *See, e.g.*, State v. Pilch, 35 Conn. Supp. 536, 394 A.2d 1364 (1977) (corporate officer who issued a worthless check may be held criminally liable under a statute imposing criminal penalties on anyone who with intent to defraud another draws or issues a check to any bank with knowledge that he does not have sufficient funds in such a bank to meet the check); People v. Floom, 52 Ill. App. 3d 971, 368 N.E.2d 410 (1977) (officers and directors may be criminally liable for their actions on behalf of the corporation); People v. Cheff, 37 Mich. App. 1, 194 N.W.2d 401 (1971) (no defense that an agent's action was in accord with the general policy of the company); People v. Johnson, 28 Mich. App. 10, 183 N.W.2d 813 (1970) (defendant having obtained money under false pretenses was liable for his actions regardless of the fact that the act was performed in his official capacity); State v. Lux, 235 Minn. 181, 50 N.W.2d 290 (1951) (defendant, as president, treasurer and general manager of the corporation, apparently knew that a criminal act was being committed; therefore there was sufficient proof to impose criminal liability); People v. Klinger, 164 Misc. 530, 300 N.Y.S. 408 (1937) (existence of corporate entity did not preclude individual liability of defendant, director and secretary of corporation who was charged with the failure to return security deposited under a lease with the corporation, as long as defendant's personal knowledge, participation, or other element of his personal responsibility was established); People v. Cooper, 200 A.D. 413, 193 N.Y.S. 16 (1922) (defendant, who was treasurer and man in charge of incorporated laundry business, could not escape responsibility for crime of creating a public nuisance by pleading agency); State v. Olson, 83 S.D. 493, 161 N.W.2d 858 (1968) (defendant liable for embezzlement because of bad checks issued by the corporation); State v. Cooley, 141 Tenn. 33, 206 S.W. 182 (1918) (president of corporation charged with fraudulently obtaining goods and credit by means of check drawn by him in his official or representative capacity); State v. Thomas, 123 Wash. 299, 212 P. 253 (1923) (defendant convicted of larceny for misappropriating money paid into the corporation since he directly participated in the transactions even though the money was paid into the corporation through an employee who acted under the general direction of the defendant); State v. Lunz, 86 Wis. 2d 695, 273 N.W.2d 767 (1979) (defendant, secretary-treasurer of two corporations, convicted of conveying encumbered property with an intent to defraud); State v. Laabs, 40 Wis. 2d 162, 161 N.W.2d 249 (1968) (secretary-treasurer of corporation indicted for executing false financial statements for purpose of obtaining renewal of dairy license); State v. Milbrath, 138 Wis. 354, 120 N.W. 252 (1909) (defendant, formerly a co-partner in firm engaged in loaning money, convicted of embezzlement of money belonging to his clients through the corporate entity). This common-law doctrine has been codified in some jurisdictions. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 5-5 (Smith-Hurd 1972); KY. REV. STAT. ANN. § 502.060 (Baldwin 1983); N.Y. PENAL LAW § 20.25 (McKinney 1975); TEX. PENAL CODE ANN. § 7.23 (Vernon 1974).

Several cases have interpreted these statutes. See, for example, Butts v. Commonwealth, 581 S.W.2d 565 (Ky. 1979), in which undisputed evidence showed that the corporation intentionally dealt with its customer's property as if it were its own, therefore the corporate agent who executed illegal conversions was responsible by operation of statute. *See also* People v. Sobel, 87 A.D.2d 656, 448 N.Y.S.2d 511 (1982) (defendant liable under the terms of § 20.25 of the penal law despite the fact that

or authorizes a corporate crime is himself liable as a principal.[9] When a corporation is merely an individual's alter ego, courts have found it even more appropriate to hold the individual liable.[10]

Although it is clear that any superior who commands or authorizes a crime is liable as a principal, some affirmative participation in the decision-making process must be proven in order to convict a corporate officer of a crime.[11] For example, participation may be proven by evidence that the corporate manager authorized or consented to the employee's act.[12] In other cases, a supervising manager's mere encouragement of or acquiescence in criminal activity may be a sufficient basis for establishing criminal liability.[13]

Clear evidence of indirect participation in criminal activity is often not available because the act itself was committed

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there was no evidence that the defendant, as opposed to his corporation, stood to gain by his actions); People v. Sakow, 45 N.Y.2d 131, 379 N.E.2d 1157, 408 N.Y.S.2d 27 (1978) (defendant's argument that he could not be held criminally liable because title to the buildings was not in his name but that of the corporation was rejected and the court held him individually liable for failing to comply with the Fire Department Violation Order).

9. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 64, at 506-11 (1972).

10. *See, e.g.*, State v. Picheco, 2 Conn. Cir. Ct. 584, 203 A.2d 242 (1964) (defendant, as president, treasurer, manager and majority shareholder, convicted of keeping his shop open in violation of the Sunday Laws); Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944) (defendant who completely controlled and dominated the corporate nightclub convicted of involuntary manslaughter when a fire in the nightclub resulted in the death of patrons due to the number and condition of safety exits).

11. *See generally* Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930).

12. *See, e.g.*, United States v. Precision Medical Laboratories, Inc., 593 F.2d 434 (2d Cir. 1978) (owner knowingly authorized employees to sign false medicaid and medicare claims); United States v. Berger, 456 F.2d 1349 (2d Cir.) (upholding conviction of president and chief executive officer of corporation who instructed bookkeeper to remove invoices of foreign subsidiary which enjoyed favorable tax position for willful evasion of corporate income tax), *cert. denied*, 409 U.S. 892 (1972); United States v. Hayutin, 398 F.2d 944 (2d Cir.) (sales manager convicted of making fraudulent sales of securities where he dominated and controlled the salesmen and instructed them to make misrepresentations), *cert. denied*, 393 U.S. 961 (1968) ; Meredith v. United States, 238 F.2d 535 (4th Cir. 1956) (upholding conviction of bank employee who instructed subordinates to make false entries in bank records).

13. *See, e.g.*, Dukich v. United States, 296 F. 691 (9th Cir. 1924) (proprietor present at time of unlawful sale of beverages and nodded to the bartender in encouragement).

by a subordinate.[14] This type of misconduct can be hidden beneath multiple layers of corporate decision making. Complex factual situations may cloud the question of whether the person who actually committed the crime acted under the direction of the accused corporate manager.

This evidentiary problem has been resolved in a number of cases in which courts have been willing to infer actual knowledge on the part of corporate officers or directors. For example, in the landmark case of *United States v. Laffal*,[15] the Court of Appeals for the District of Columbia[16] inferred that the president and chief executive officer knew of the illegal conduct of the corporation's business. The court found that based on the defendant's intimate involvement in corporate affairs, there was probable cause to believe that the president knew that the business of the corporation was prostitution and that he "either procured it to be done, or permitted it to be done, or did nothing to prevent it."[17]

Similarly, in *Raleigh v. United States*,[18] the Court of Appeals for the District of Columbia affirmed the conviction of a defendant for operating a house of prostitution.[19] The court emphasized that the defendant, who was president, treasurer and director of the corporation which owned the hotel, maintained an office there and visited frequently. The court stated that "[t]hese facts, coupled with the undisguised and recurrent use of [the defendant's] hotel by prostitutes and their customers, provided sufficient proof that [he] knew the nature of the activities conducted at the Raleigh House."[20]

In *State ex rel. Kropf v. Gilbert*[21] the Wisconsin Supreme Court inferred specific intent from the defendant's acquiescence in the conduct of corporate business affairs. In their

14. *See, e.g.*, People v. Dalsis, 5 A.D.2d 28, 168 N.Y.S.2d 549 (1957) (insufficient evidence that the president of the corporation directly or indirectly participated in grand larceny by misappropriating property entrusted to the company).

15. 83 A.2d 871 (D.C. Cir. 1951).

16. The Court of Appeals for the District of Columbia was formerly referred to as the Municipal Court of Appeals.

17. 83 A.2d at 872.

18. 351 A.2d 510 (D.C. Cir. 1976).

19. *Id.* at 514.

20. *Id.* at 512.

21. 213 Wis. 196, 251 N.W. 478 (1933).

complaint, the plaintiffs in error had alleged that their pretrial detention was unlawful because there was insufficient evidence of their participation in the corporation's criminal acts to warrant a finding of probable cause.[22] The court denied the petition for a writ of habeas corpus by directors and officers charged with fraudulent conversion, stating that acquiescence in the wrongdoing was sufficient participation.[23]

Denying the petition, the supreme court stated that although it may sometimes be difficult to prove the actual participation of the individual corporate officers in the criminal act,[24] those taking an active part in the management of the corporation's business cannot avoid personal liability for acts done in the regular course of business with their acquiescence.[25] The court held that knowledge or authorization of the criminal acts may be inferred from the officers' integral role in the operation of the business, evidence of reports issued to board members at meetings regarding the criminal activity and the failure of the directors to prevent such conversion thereafter by changing the conduct of corporation business.[26]

However, the court stopped short of suggesting that liability should be imposed on an officer who had no knowledge and no opportunity to discover the criminal act.[27] The court emphasized that a corporate officer cannot be charged with a crime solely by reason of his official supervisory powers. "He is only chargeable with such knowledge . . . to the extent that he in fact knew of such [actions] . . . because they were made by him, or at his direction by others acting under his supervision or control, or because they were brought to his attention."[28]

These cases constitute the most commonly noted authority for the proposition that a corporate officer's knowledge of a crime can be inferred from his involvement and acquies-

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22. *Id.* at 199-201, 251 N.W. at 479-80.

23. *Id.*

24. *Id.* at 217, 251 N.W. at 485 (quoting Salmon v. Richardson, 30 Conn. 360, 373 (1862)).

25. 213 Wis. at 216-17, 251 N.W. at 485.

26. *Id.* at 223, 251 N.W. at 488.

27. *Id.* at 218, 251 N.W. at 486.

28. *Id.* at 219, 251 N.W. at 486.

cence in corporate affairs.[29] The reasoning underlying imposition of criminal liability in the *Laffal* and *Raleigh* cases is analogous to the reasoning used by many courts in imposing criminal liability on the controlling officer of a closely-held corporation.[30] Courts clearly refuse to allow an individual who is intimately involved in corporate activities to hide behind the corporate veil.[31]

The *Gilbert* case stands for the proposition that specific intent may be inferred when a corporate officer acquiesces in the performance of a crime within his realm of authority.[32] The rationale behind this theory of liability is that a supervising manager who knows a crime is ongoing and tolerates its commission actually encourages the employee to continue through a "rule of anticipated reactions."[33] One commentator expressed the theory behind liability this way:

> Outside the context of a corporation, the law has been reluctant to impose criminal liability for knowing of a crime and failing to prevent it. But when a corporate official knows that subordinates within his realm of authority are engaged in illegal activity, his toleration of the conduct is more than a failure to act. By not controlling his subordinates, the official knowingly permits his authority to be used in the commission of a crime.[34]

In conclusion, it should be emphasized that there are limits on how broadly the net of potential liability is stretched by this line of cases. The requirement of proof of specific intent as an essential element of the crime has not been removed.[35] Absent proof of participation by the corporate of-

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29. *See supra* text accompanying notes 15-28.

30. *See supra* text accompanying note 10.

31. For a discussion of personal accountability in the corporate sector, see 3A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 1348-1359 (rev. perm. ed. 1975 & Supp. 1983); Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 16-28 (1928); Comment, *Toward a Rational Theory of Criminal Liability for the Corporate Executive*, 69 J. CRIM. L. & CRIMINOLOGY 75 (1978).

32. *See Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1266 (1979) [hereinafter cited as *Developments in the Law*].

33. *Id.* at 1267 (citing H. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 142-45 (3d ed. 1976)).

34. *Developments in the Law*, *supra* note 32, at 1268.

35. *See supra* text accompanying notes 15-28.

ficer in the crime itself, it is difficult to impose criminal liability for crimes requiring mens rea or a culpable state of mind.[36] As a general rule, a corporate officer will not be held criminally liable for acts of the corporation performed through other officers or agents not acting under his direction or with his permission.[37]

B. Exception to the General Rule: Strict Liability

Although moral culpability is usually necessary to impose criminal liability, the United States Supreme Court has imposed strict liability on corporate officer supervisors in certain areas of regulation such as public health, safety or welfare.[38] As one commentator stated, "[p]ublic welfare legislation utilizes criminal sanctions to regulate conduct that poses an unacceptably high risk of danger to the public at large."[39]

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36. *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978) (general policy against strict liability in corporate crimes enunciated).

37. *See, e.g.*, Stock v. State, 526 P.2d 3 (Alaska 1974) (president of corporation that owned and operated a trailer court not criminally liable merely because he was an officer or agent of the corporation); Harrington v. State, 17 Md. App. 157, 300 A.2d 405 (1973) (officer not criminally liable if he in no way participated with the corporation in the illegal act as principal, aider, abettor, or accessory); People v. Lavender, 48 N.Y.2d 334, 398 N.E.2d 530, 422 N.Y.S.2d 924 (1979) (corporate officer not criminally liable for failure to perform a home improvement contract when he had no connection with it); People v. Seufert, 49 N.C. App. 524, 271 S.E.2d 756 (1980) (where the crime charged involves guilty knowledge or criminal intent, as does embezzlement, it is essential for criminal liability on the part of the officer or agent that he personally did acts which constitute the offense or that acts were done with his authorization); Cincinnati v. Duval, 22 Ohio App. 2d 208, 260 N.E.2d 127 (1970) (president of corporation that owns and operates a cafe not criminally liable on the charge that he unlawfully permitted loud music to be played in violation of a city ordinance where he was not on the premises at the time of such violation and took no active part in its occurrence); Blacketer v. State, 485 P.2d 1069 (Okla. Ct. App. 1971) (officer not criminally liable for the acts of the corporation performed through other officers and agents); State v. Flake, 83 S.D. 655, 165 N.W.2d 55 (1969) (officer of corporation not liable for the acts of the corporation performed through other officers and agents who misappropriated money, unless such acts are done by his authority or permission or with his knowledge and acquiescence); Bourgeois v. Commonwealth, 217 Va. 268, 227 S.E.2d 714 (1976) (insufficient evidence to establish that president of corporation had any connection with the acceptance of duplicate payments received by the corporation).

38. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 254-56 (1952).

39. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses — Another View*, 35 VAND. L. REV. 1337, 1356 (1982).

Strict liability offenses impose criminal liability even without proof of personal participation or criminal intent. Accordingly, public welfare offenses have been distinguished from "true" or "intent" crimes which require proof of both.[40] Traditionally, these offenses have carried modest penalty provisions and have supplemented civil enforcement legislation.[41]

Few regulatory statutes are actually based on strict liability. Most public welfare statutes require proof of knowledge[42] or willfulness[43] as an element of the crime. The Federal Food, Drug, and Cosmetic Act[44] (FFDCA) is an exception to this rule. It is one of the few federal statutes which has been interpreted to impose strict liability for violations. For this reason, it has become the most frequently used vehicle for exploring the potential liability of corporate agents for crimes in which they had no direct role.

In *United States v. Dotterweich*[45] the United States Supreme Court first recognized the possibility of criminal prosecution under the FFDCA without proof of intent or participation in wrongful activity. In prosecuting the president of the Buffalo Pharmacal Company, the government offered no evidence that he had either directly participated in the wrongdoing or had knowledge of its occurrence.[46]

Dotterweich, Buffalo Pharmacal Company's president and general manager,[47] was held personally liable for the corporation's introduction of adulterated and misbranded drugs into interstate commerce. The Court found that "[t]he offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the

40. McAdams & Tower, *supra* note 1, at 68.

41. *Id.* at 68-69. *See generally* Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

42. *See, e.g.*, Federal Water Pollution Control Act of 1972, § 309(c)(2), 33 U.S.C. § 1319(c)(1)-(2) (1976); Clean Air Act of 1970, § 113(c)(1)-(2), 42 U.S.C. § 7413(c)(1)-(2) (Supp. III 1979).

43. *See, e.g.*, Securities Exchange Act of 1934, § 32, 15 U.S.C. § 78 (a) (Supp. III 1979); Federal Water Pollution Control Act of 1972, § 309(c)(1), 33 U.S.C. § 1319(c)(1)-(2) (1976); Occupational Health and Safety Act of 1970, § 17(c), 29 U.S.C. § 666(c) (1976).

44. 21 U.S.C. §§ 301-392 (1976).

45. 320 U.S. 277 (1943).

46. *Id.* at 285-86 (Murphy, J., dissenting).

47. 320 U.S. at 278.

statute outlaws, namely to put into the stream of interstate commerce adulterated or misbranded drugs."[48] The Court specifically held that the FFDCA "dispenses with the conventional requirement of criminal conduct — awareness of some wrongdoing."[49]

In *Dotterweich* the Court unequivocally interpreted the FFDCA as permitting the imposition of criminal liability upon an otherwise innocent person who stands in a "responsible relation to a public danger."[50] Despite this potentially far-reaching pronouncement, Justice Frankfurter, who authored the majority opinion, recognized the factual nature of the determination of personal liability and deliberately declined to define the necessary degree of personal involvement needed to convict an officer or director.[51] Therefore, *Dotterweich* left unresolved the scope of the legal duty imposed on corporate officers.[52]

For instance, it is unclear whether the Court would have imposed criminal liability if Dotterweich had not personally supervised the day-to-day operation, or if he had presided over a large, national corporation.[53] Within the confines of the factual situation in *Dotterweich*, it is very difficult to distinguish this holding from the line of cases in which courts have inferred knowledge on the part of corporate officers from their intimate involvement in the corporate business and their acquiescence in the criminal activity which occurred.[54] It is no wonder that in the aftermath of *Dot-*

48. *Id.* at 284-85.

49. *Id.* at 281.

50. *Id.*

51. *See id.* at 285.

52. *See id. See also* Brickey, *supra* note 39, at 1348-49.

53. Brickey, *supra* note 39, at 1347.

54. *See supra* text accompanying notes 15-28. In its disposition of United States v. Park, 499 F.2d 834 (4th Cir. 1974), *rev'd.* 421 U.S. 658 (1975), the United States Court of Appeals for the Fourth Circuit reversed the conviction of the defendant and distinguished the case from *Dotterweich*. The court noted the difference in the factual settings of the cases:

> Mr. Dotterweich was President and General Manager of Buffalo Pharmacal Company, Inc. The company was small, employing only twenty-six employees, all of whom worked on the upper floor of the building. Mr. Dotterweich was responsible for "general overseeing" of Company operations; he was the direct supervisor of all employees. The trial transcript establishes that Mr. Dotterweich personally made every executive decision and had direct personal

terweich, prosecutions under the FFDCA focused heavily on the small businessman who had a close relationship to business operations.[55]

The focus changed with the increased awareness of the sanitation problems in the food industry in the 1970's.[56] In a 1975 opinion, *United States v. Park*,[57] the United States Supreme Court clarified the questions that it left unresolved in *Dotterweich*. In *Park*, the Court upheld the conviction of John R. Park, president of Acme Markets, Inc., for criminal negligence under the FFDCA, for allowing unsanitary conditions to exist in a food warehouse in Baltimore. Park, the president of a national food chain with 874 outlets and 36,000 employees, had received two direct communications from the Food and Drug Administration (FDA)[58] regarding the unsanitary conditions at the Baltimore plant.[59] He was

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supervisory responsibility over the physical acts which resulted in the interstate shipment of misbranded and adulterated drugs. In the instant case Park is the chief executive officer of Acme, a multistate corporate giant. It is clear that his supervisory responsibility over most employees is indirect. There is no allegation or proof that Park was responsible for the executive decision which resulted in contamination of the food. The facts of *Dotterweich* established the personal responsibility which we find lacking in the case before us.

Park, 499 F.2d at 841 n.3 (emphasis omitted).

55. *See* Brickey, *supra* note 39, at 1357 n.86. The author cites the following cases to illustrate the proposition: United States v. A.B. Gregory Co., 502 F.2d 700 (7th Cir. 1974) (upheld conviction of an officer of bakery supply warehouse who had personal responsibility for all operations), *cert. denied*, 442 U.S. 1007 (1975); United States v. Shapiro, 491 F.2d 335 (6th Cir. 1974) (upheld the revocation of probation of convicted owner, president, and sales manager of cookie company); Lelles v. United States, 241 F.2d 21 (9th Cir.) (upheld conviction of part owner and secretary of dairy products wholesale company who managed its affairs and dominated the company), *cert. denied*, 353 U.S. 974 (1957); Golden Grain Macaroni Co. v. United States, 209 F.2d 166 (9th Cir. 1953) (upheld conviction of president of company who managed plant although he was not physically present when the violation occurred); United States v. Kaadt, 171 F.2d 600 (7th Cir. 1948) (upheld convictions of operators of diabetic clinic in light of the fact that the jury considered the work they performed, their duties and responsibilities, and extent to which they each controlled business of clients); United States v. Diamond State Poultry Co., 125 F. Supp. 617 (D. Del. 1954) (upheld convictions of two major officers who determined corporate policy and supervised the operations of company).

56. *See* Brickey, *supra* note 39, at 1359.

57. 421 U.S. 658 (1975).

58. 21 U.S.C. § 64 (1976). The Secretary of Health, Education and Welfare is directed and authorized to make and enforce such regulations as may be necessary to carry out the purposes of the Act.

59. *Park*, 421 U.S. at 660-62.

charged when a subsequent inspection revealed continued rodent activity and food contamination.[60]

Park's defense in the matter was that many aspects of corporate operations were necessarily delegated to dependable subordinates and that in this instance regional supervisors had been ordered to take corrective action. He argued that these subordinates were responsible for the failure to fulfill the duties delegated to them.[61]

Nonetheless, the jury found Park guilty as charged. The trial judge had instructed them that they could find the defendant guilty if they found that Park's position in the corporation was one of "authority and responsibility in the business of Acme Markets" and if they found that he had "a responsible relation to the situation, even though he may not have participated personally."[62] In reversing the trial court, the United States Court of Appeals for the Fourth Circuit[63] stated that this instruction was impermissible because it led the jury to believe that they could convict Park merely because he was president of the corporation.[64]

The United States Supreme Court reversed and reinstated Park's conviction maintaining that the jury instruction was appropriate under the circumstances. The Court found that Park could be held personally liable for duties necessarily delegated in the course of business and emphasized that:

> The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.[65]

The Court found that Park failed to fulfill a duty imposed upon him on the basis of his managerial relationship to subordinates.[66] The Court held that under the FFDCA, proof that a corporate officer had the responsibility to pre-

60. *Id.*
61. *Id.* at 663-64.
62. *Id.* at 665 n.9.
63. United States v. Park, 499 F.2d 839 (4th Cir. 1974), *rev'd*, 421 U.S. 658 (1975).
64. *Park*, 499 F.2d at 841-42.
65. *Park*, 421 U.S. at 672.
66. *Id.* at 670-71.

vent the violation, and that he failed to prevent it, was sufficient to establish the causal link necessary to convict.[67] The Court stated that causation was shown not by wrongful conduct, but by responsibility in the corporation.[68] The absence of participation in or personal knowledge of the wrongdoing is not a defense in such a prosecution.[69] The Court also emphasized that it is unnecessary to prove that the corporate officer had direct supervisory responsibility over those immediately responsible for the prohibited act.[70]

The cases that followed the *Park* decision illustrate that, at least in this area of federal regulation, a corporate officer may not place unlimited reliance on subordinates to perform delegated tasks. For example, in *United States v. Starr*[71] the defendant, an officer in charge of actual operations of the plant, was held personally liable for violations arising from mouse infestation of the plant despite the fact that he had ordered the janitor to take care of the problem in the presence of the FDA inspector. A subsequent inspection by the FDA revealed that the janitor had not taken care of the infestation.

Although Starr argued that he was justified in delegating to the janitor the duty to comply with the regulation, the

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67. *Id.* at 671.

68. *Id.*

69. *Id.* at 677-78. In *Park*, the only affirmative defense recognized was impossibility. This defense permits a defendant to avoid liability if he can show that he was unable to prevent the wrongful conduct, despite the exercise of extraordinary care. *Id.* at 673. *See also Developments in the Law*, *supra* note 32, at 1263-64 (author notes that a successful defense would require proof that the corporate executive identified conditions which might lead to a violation, acted forcefully to remedy them or implemented alternative ones if remedial remedies were unsuccessful). The defense of impossibility has never been satisfied. *Id.* at 1263. In United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976), a case involving a prosecution under the FFDCA for failing to keep a food storage area free from birds, the trial court had denied the defendant's request for an instruction on the defense of impossibility. The defendant claimed that parts necessary for the construction of the cage which was to enclose the storage area to keep troublesome birds out had not arrived and, therefore, the corporation had been unable to remedy the situation.

The Court of Appeals for the Ninth Circuit rejected their claims and agreed with the trial court that a jury instruction to this effect was unwarranted. The court held that an instruction on the defense of impossibility was inappropriate when the defendants had failed in their duty to consider invoking other alternatives to remedy the situation. 535 F.2d at 511.

70. *Park*, 421 U.S. at 672.

71. 535 F.2d 512 (9th Cir. 1976).

court rejected that argument. The court concluded that Starr could not simply delegate the responsibility to the janitor since he had the ultimate responsibility for maintaining a sanitary warehouse. Starr had responsibility to check the janitor's progress toward correcting the condition.[72]

This sample of case law illustrates the apparently harsh effect of imposing strict liability for violations of the FFDCA.[73] The cases unequivocally state that corporate officers may not delegate responsibility for important tasks which relate to the public welfare. Repeated and uncorrected violations of the FFDCA may result in the imposition of criminal liability on a chief executive officer as a result of his inattentiveness to tasks delegated to others. Corporate officers and agents are charged with an affirmative duty to adequately supervise their subordinates.[74]

Strict liability under the FFDCA is an exception to the general rule that a corporate officer will not be held criminally liable for acts performed by other officers or agents who are not acting under his direction or with his permission.[75] Convictions for violations of FDA regulations stand in stark contrast to convictions for the commission of "intent" crimes, where courts are only willing to infer specific intent on the part of the officer when some affirmative participation in the criminal act is shown. In light of the potential cost to society of ignoring FDA provisions, the Court has carved out a narrowly defined category of criminal violations where strict liability is imposed and an officer or agent

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72. *Id.* at 514-16.

73. Although it is easy to imagine how the potential for expanded criminal liability might wreak havoc on the smooth functioning of the business world, the practical effect is much less extreme. The FDA's administrative enforcement policy ameliorates the apparent harshness of strict criminal liability under the Act. Although the Act does not require that a warning be communicated to the potential defendant, "as a general rule the FDA does not recommend criminal prosecution without first sending the potential defendants a warning letter." Brickey, *supra* note 39, at 1375.

See also Keefe & Shapiro, *Personal Criminal Liability Under the Federal Food, Drug and Cosmetic Act — The* Dotterweich *Doctrine*, 30 FOOD DRUG COSM. L.J. 5 (1975). *See also* Brickey, *supra* note 39, at 1375; Fine, *The Philosophy of Enforcement*, 31 FOOD DRUG COSM. L.J. 324 (1976); Remington, *Liability Without Fault Criminal Statutes — Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin*, 1956 WIS. L. REV. 625.

74. *See supra* text and accompanying notes 45-72.

75. *See supra* text and accompanying notes 7-37.

may be liable if he stands in a "responsible relationship" to the danger.

The FFDCA is one of the few public welfare statutes which has been interpreted to impose strict liability.[76] Therefore, although commentators have pointed to language in cases interpreting this statute as providing a theoretical basis for the imposition of expanded criminal liability, at least in the regulatory setting[77] it is clear that the impact of decisions in this area has been overemphasized. The imposition of strict criminal liability, even in the regulatory setting, is still strongly disfavored by the United States Supreme Court.

In the 1978 case *United States v. United States Gypsum Company*,[78] the Court articulated its general policy toward strict criminal liability in the area of corporate crime. The Court stated that proof of intentional wrongdoing was required before liability for price fixing under the Sherman Act[79] would be imposed. It emphasized that strict liability should be the exception, not the rule, with regard to criminal liability.[80] The Court clearly mandated proof of moral culpability for criminal violations if the use of such sanctions is to "square with the generally accepted function of the criminal law."[81]

In light of this addendum to the decision in *United States v. Park*,[82] it is impractical to assume that imposing strict liability under a specific public welfare statute will become the

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76. *See supra* text accompanying notes 42-44. *But see* 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) (liberal reading of *United States v. Park* would support holding a corporate officer liable only when facts support a finding of a departure from a standard of care); *Developments in the Law*, *supra* note 32, at 1264-65 (defense of impossibility actually imposes a standard of extraordinary care and reflects the Court's reluctance to impose strict liability upon criminal defendants).

77. *See* Brickey, *supra* note 39, at 1377; McAdams & Tower, *supra* note 1, at 75. *See also* Note, *Criminal Liability of Corporate Managers for Deaths of Their Employees*: People v. Warner-Lambert Co., 46 ALB. L. REV. 655, 671 (1982) (strict liability standard results in relative ease of proving causation in public welfare offenses generally).

78. 438 U.S. 422 (1978).

79. 15 U.S.C. §§ 1-7 (1982).

80. *See United States Gypsum Co.*, 438 U.S. at 436-37.

81. *Id.* at 442.

82. 421 U.S. 658 (1975).

theoretical basis for expanding criminal liability. In *Park* the Court spelled out an exception to the rule requiring proof of specific intent to impose criminal liability. The exception was specifically tailored to sanitation problems in the food industry in the 1970's.[83] The limits of the decision were delineated in *United States Gypsum Co.*, in which the Court stated that even in the regulatory setting, strict liability was the exception, not the rule.[84] As a means to achieve regulatory compliance, strict liability is reserved for the most exigent problems. In view of this, it is extremely unlikely that the *Park* decision will become the authority for imposing criminal liability upon corporate officers for "intent" crimes committed in their realm of authority.[85]

C. Recent Developments

It is clear that outside the regulatory setting "specific intent crimes" restrict individual accountability in the corporate realm since courts are constrained by the intent requirements prescribed by legislatures.[86] As a general rule, the intent standard prescribed to impose criminal liability on an indirect actor is identical to that prescribed for direct actors, even though their actions in causing the crime are very different.[87] As previously noted, courts will infer the intent necessary to convict an indirect actor if it can be established that he knew or acquiesced in the commission of a crime.[88] However, absent any participation in the commission of the crime, courts generally refuse to impose criminal liability upon a corporate manager based on his position and responsibility within the corporation. Although public welfare laws occasionally impose an affirmative duty upon corporate officers or agents to adequately supervise subordinates, "intent" crimes do not impose such a duty.

One aberrant decision supports the proposition that a corporate manager may be held criminally liable for the

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83. *See supra* text accompanying note 56.

84. *See supra* text accompanying notes 78-81.

85. United States v. Park, 421 U.S. 658 (1975), has never served as authority for that proposition.

86. *See Developments in the Law*, *supra* note 32, at 1269-70.

87. *Id.*

88. *See supra* notes 7-37 and accompanying text.

commission of an "intent" crime because of a failure to fulfill an affirmative duty to supervise. In *United States v. Andreadis*[89] the Court of Appeals for the Second Circuit upheld the conviction of the president of a corporation for knowingly using the mail, radio and television in a scheme to intentionally defraud customers. The conviction was upheld on the basis of the corporate officer's acquiescence in criminal activity. The court held that the president's knowledge of the falsity of the claims could be inferred from the fact that he reviewed and approved the advertising.[90]

In dicta, however, the court stated an alternative basis for liability. The court emphasized that the president should not have been able to insulate himself from liability by claiming he was not told that the advertisements were false.[91] The court asserted that the president "had some affirmative duty to insure that the claims . . . made for . . . his product . . . were true," and that, "[a] person . . . having failed totally to discharge this responsibility in even the slightest measure, should not be permitted to escape the consequences of his inattention."[92]

Commentators still cite *Andreadis* in support of the proposition that a corporate officer may be subject to criminal liability for failing to exercise an affirmative duty to supervise his subordinates.[93] However, the strength of this authority has been diminished by the failure of any courts to impose criminal liability on an individual corporate defendant for an omission of duty.[94] Courts tend to decide that although inclusion of the mental element of specific intent in a criminal offense is a matter of legislative choice,[95] the imposition of severe criminal sanctions in the absence of any

89. 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

90. *Id.* at 430.

91. *Id.*

92. *Id.*

93. For one of the most recent assertions to this effect, see Note, *supra* note 77, at 666. Even though the decision in *Andreadis* involved an "intent" crime, it has also been cited in support of the proposition that it anticipated the decision in United States v. Park, 421 U.S. 658 (1975). *See* McAdams & Tower, *supra* note 1, at 73.

94. *See generally* Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 599 (1958) (noting distinction between an omission and a criminal act).

95. *See generally* United States v. Balint, 258 U.S. 250 (1922).

requisite mental element is incompatible with the basic requirements of Anglo-American jurisprudence.[96]

Recent developments clearly indicate that courts are especially reluctant to expand individual criminal liability of corporate officers for more serious offenses. For example, in its decision in *People v. Warner-Lambert Company*,[97] the New York Court of Appeals dismissed the indictments[98] against four corporate officials[99] charged with second-degree manslaughter[100] and criminally negligent homicide[101] in the deaths of six workers after an explosion at the Freshen-Up Gum factory.[102] The four indicted officials had participated in a management decision to slowly phase out the explosive dustlike lubricant magnesium stearate rather than to take immediate action to remedy the dangerous situation.[103] The officials made this decision even though they had been warned that the large amounts of magnesium stearate presented a substantial hazard of explosion.[104]

In holding that there was insufficient evidence to convict the defendants, the court found that although the evidence established that the defendants were aware of a broad undif-

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96. *See* Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988 (1932). *See generally* Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

97. 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981).

98. The Supreme Court, Queens County, in an unreported decision, dismissed the indictment on the ground that the evidence was not legally sufficient to establish the offense charged. The Appellate Division, Second Department, reversed the Supreme Court in 69 A.D.2d 265, 417 N.Y.S.2d 997 (App. Div. 1979), *rev'd*, 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981).

99. The four corporate officials were the vice-president in charge of manufacturing, the director of corporate safety and security, the plant manager and the plant engineer. *Warner-Lambert*, 51 N.Y.2d at 296, 414 N.E.2d at 661, 434 N.Y.S.2d at 160.

100. "A person is guilty of manslaughter in the second degree when . . . [h]e recklessly causes the death of another person . . . ." N.Y. PENAL LAW § 125.15 (McKinney 1975). "Recklessly" is defined in N.Y. PENAL LAW § 15.05(3) (McKinney 1975) as follows: "[A] person acts recklessly . . . when he is aware of and consciously disregards a substantial and unjustifiable risk . . . ."

101. "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person." N.Y. PENAL LAW § 125.10 (McKinney 1975). Criminal negligence is defined in N.Y.PENAL LAW § 15.05 (McKinney 1975) as follows: "[A] person acts with criminal negligence . . . when he fails to perceive a substantial unjustifiable risk . . . ."

102. *Warner-Lambert*, 51 N.Y.2d at 299, 414 N.E.2d at 661, 434 N.Y.S.2d at 160.

103. *Id.* at 301, 414 N.E.2d at 663, 434 N.Y.S.2d at 162.

104. *Id.* at 301, 414 N.E.2d at 662-63, 434 N.Y.S.2d at 161-62.

ferentiated risk of explosion, the evidence did not establish the specific chain of events that triggered the explosion.[105] The court stated that "the defendants' actions must be a *sufficiently direct* cause of the ensuing death"[106] before criminal liability could be imposed. In this case the defendants could not have foreseen the cause of death because the specific events which triggered the explosion had not been ascertained.[107]

In determining what established the requisite intent element, the court expanded on principles previously articulated in *People v. Kibbe*.[108] In *Kibbe* the defendants were convicted of murder when they abandoned their helplessly intoxicated robbery victim on an unlit highway on a cold winter night without shoes or eyeglasses. The man was eventually struck and killed by a passing truck.[109] The defendants appealed their conviction on the basis that the state failed to prove beyond a reasonable doubt that their actions caused the death of another person.[110] In affirming the convictions of the defendants in *Kibbe*, the New York Court of Appeals found that sufficient causation is established if it can be proven beyond a reasonable doubt that the defendants should have foreseen the ultimate harm that the victim incurred, and that in this case that burden had been met.[111]

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105. *Id.* at 304, 414 N.E.2d at 665, 434 N.Y.S.2d at 163-64. There were two theories of the cause of the explosion. One expert testified that the explosion was attributable to mechanical sparking. Another expert testified that the initial detonation was triggered by liquid nitrogen becoming trapped on parts of the moving machines and then reacting violently when subjected to the movements of the metal parts. *Id.* at 305, 414 N.E.2d at 665, 434 N.Y.S.2d at 164.

106. *Id.* at 306, 414 N.E.2d at 666, 434 N.Y.S.2d at 165 (emphasis in original).

107. *Id. See also* Note, *supra* note 77, at 676 (the author postulates that this decision, because of its emphasis on the foreseeability of specific events, actually makes intent requirements more strict and pushes liability down to the lowest level of corporate decision makers).

108. 35 N.Y.2d 407, 321 N.E.2d 773, 362 N.Y.S.2d 848 (1974), *aff'd sub nom.* Henderson v. Kibbe, 431 U.S. 145 (1977).

109. 35 N.Y.2d at 409-11, 321 N.E.2d at 774-75, 362 N.Y.S.2d at 849-51.

110. *Id.*

111. *Id.* at 412-13, 321 N.E.2d at 776, 362 N.Y.S.2d at 851-52. In its decision upholding the decision of the court of appeals, the United States Supreme Court noted that it was unclear if "ultimate harm" meant merely the victim's death or if it referred to the specific cause of death. Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

In *Warner-Lambert*, the court clarified the requirement of causation as articulated in *Kibbe*.[112] It stated that sufficient causation is established only if the defendants could have anticipated the "chain of particularized events which in fact led to the victim's death."[113] The court held that since the cause of the explosion was undetermined, the prosecution had failed to meet its burden of production.

The decision in *Warner-Lambert* is indicative of the general reluctance of courts to loosen intent and causation requirements in order to expand individual criminal accountability in the corporate sector. Because the courts have failed to impose criminal liability for specific intent crimes on the basis of an omission of duty, many commentators continue to urge the imposition of greater personal accountability of corporate officers.[114] They persuasively argue that liability should fall on those officers with the responsibility and power to prevent the illegal conduct.[115]

This trend has recently manifested itself in pressure for a legislative solution. Several commentators have called on legislatures to enact an intermediate standard between "strict liability" and "specific intent" for imposing criminal liability on individual corporate officers.[116] The proposed intermediate standard would expand individual accountability for corporate crimes, but still require proof of some moral blameworthiness as an element of the offense.[117]

One proposed alternative is to hold a corporate officer liable for a misdemeanor if there has been inadequate supervision,[118] under a standard of either "negligent" or "reckless" supervision.[119] Under a standard of liability based on "negligent" supervision, a corporate supervisor would be

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112. *See Warner-Lambert*, 51 N.Y.2d at 406, 414 N.E.2d at 666, 434 N.Y.S.2d at 165.

113. *Id.*

114. *See supra* note 77.

115. *See* Note, *supra* note 77, at 667.

116. *See, e.g.*, *Developments in the Law*, *supra* note 32, at 1270-75. *See also* Davids, *Penology and Corporate Crime*, 58 J. CRIM. L.C. & P.S. 524, 530 (1967) (proposing that the law should impose a responsibility of supervision on corporate executives so that they could be held liable for a misdemeanor for remaining ignorant of the actions of subordinates).

117. *See Developments in the Law*, *supra* note 32, at 1270-75.

118. *See id.*

119. *See generally* Davids, *supra* note 116, at 530.

"criminally liable whenever he knew or should have known of a substantial risk that an illegal act was occurring or would occur within his realm of authority."[120] Although this standard eliminates any incentive to avoid knowledge of the illegal actions of subordinates, it poses substantial problems with regard to fair notice[121] and over-deterrence.[122]

A second alternative is to impose criminal liability under a standard of "reckless" supervision.[123] A corporate manager would incur criminal liability if he recklessly permitted a crime to occur in his realm of authority.[124] Liability would be imposed if a corporate manager knew of facts creating a substantial likelihood of illegal conduct and did not inquire further, or if a corporate manager knew of a hazardous condition and failed to take remedial action. In this sense the standard of reckless supervision is not very different from cases in which the defendant's knowledge is inferred from his acquiescence in the illegal conduct.[125]

The effectiveness of either approach is limited. The intermediate standard between strict liability and specific intent affects lower level managers who are closer to the crime. Those who set corporate policy will continue to be shielded from criminal liability by the multiple levels of decision making within the corporate structure. The net of potential liability formed by loosening intent requirements traps only those who should have known that an illegal act was occurring in their realm of authority. It will not affect high corpo-

120. *Developments in the Law*, *supra* note 32, at 1270-71.

121. *Id.* The author cites Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 432 (1963) in support of this proposition. *Id.* at 1271 n.148.

122. Under this theory of liability, corporate officers would have difficulty protecting themselves from criminal liability. The resulting over-deterrence might inhibit job performance and result in a decline in creativity and efficiency. *See Developments in the Law*, *supra* note 32, at 1271. *But see* Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 YALE L.J. 1091, 1127 (1976) (illustrating the benefits of routine procedure in the delegation of authority).

123. *See Developments in the Law*, *supra* note 32, at 1272.

124. Under this standard recklessness involves a conscious disregard of a substantial risk. *Id.*

125. *Id.* at 1273. The author notes that this requires proof of actual knowledge and in that respect is similar to inferring knowledge from acquiescence in criminal activity, although less specific information in the hands of the corporate officer would be necessary to convict. *Id.*

rate officials who are completely unfamiliar with the situation. The standard of liability is not broad enough to hold top officers responsible when they are not directly involved.

It is also questionable whether the intermediate standard of liability will be an effective deterrent to those corporate officers or agents who are likely to be affected by its imposition. The penalties imposed under such a standard are likely to be minimal because the crime is only a misdemeanor. Furthermore, if the intent requirements of "true" crimes are loosened to accommodate the societal desire to punish responsible corporate officers, the moral stigma attached to such crimes may also be relaxed.[126] Accordingly, this increases the public's sympathy for convicted white collar criminals.[127]

In short, the trend toward increasing individual criminal liability for corporate crimes is limited by the scope of recent decisions, as well as the traditional requirements of Anglo-American jurisprudence. The general rule still stands: A corporate officer will not be criminally liable for acts of the corporation performed through other officers or agents who are not acting under his direction or with his permission. In light of the lack of authority supporting the imposition of criminal liability on high level corporate managers for actions committed within their realm of authority, perhaps the goal of deterrence would be better served by strengthening existing penalties and sanctions.

III. STRENGTHENING EXISTING SANCTIONS

A. Effectiveness of Existing Criminal and Civil Sanctions

Imposing criminal liability upon individual corporate officers has generally been an ineffective means of deterring

126. *See* Radin, *Corporate Criminal Liability for Employee-Endangering Activities*, 18 COLUM J.L. & SOC. PROBS. 39, 51-52 (1983) (author notes with regard to public welfare offenses that the casual use of criminal sanctions to punish business activity which is not culpable leads to "the dulling of the moral stigma normally attached to a conviction . . . .").

127. *See id.* Similarly, the analogy can be extended to proposals to make "negligent" or "reckless" supervision a misdemeanor. If enacted these standards might also tend to blur the distinction between criminal and civil liability and reduce the moral stigma associated with the commission of corporate crimes.

illegal corporate conduct. "The criminal label traditionally attaches itself only to conduct that is judged particularly worthy of the moral condemnation of the community."[128] In a capitalistic system in which profit maximization is an accepted goal, much of the business practice which is labeled criminal is perceived as "undeserving of condemnation, let alone . . . harsh criminal sanctions."[129] As a result, use of criminal sanctions to punish individuals for conduct which is barely distinguishable from socially acceptable business practice has been limited.[130] Light penalties are generally imposed upon individual corporate officers who engage in criminal activity, especially if such illegal action was undertaken for the benefit of the corporation.[131]

A recent survey of judicial attitudes indicates that many judges believe that by the time of sentencing, a corporate officer has been sufficiently punished as a result of his or her loss of reputation and career.[132] Imprisonment is considered too harsh a penalty for nonviolent white collar criminals.[133]

By not imposing a prison sentence, or by imposing only a nominal sentence, judges avoid removing the white collar offender from his community.[134] Since convicted corporate executives often have exemplary records, judges tend to view

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128. Radin, *supra* note 126, at 50.

129. Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 511 (1980).

130. Radin, *supra* note 126, at 50. *See also* Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 435-40 (1963) (author discusses the reasons why invoking criminal sanctions to combat corporate crime has had limited effect).

131. Comment, *Occupational Disqualification of Corporate Executives: An Innovative Condition of Probation*, 73 J. CRIM. L. & CRIMINOLOGY 604, 613 (1982).

132. Mann, Wheeler & Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 482-86 (1980) (suggesting that fear of criminal prosecution, even in the absence of conviction, may effectively deter corporate executives from engaging in illegal activity).

133. *Id.* at 486-87. This type of attitude indicates an inherent bias within the system in favor of upper middle-class defendants. Judges believe that white-collar criminals "are more sensitive to the impact of the prison environment than are non-white-collar defendants." *Id.* at 486. Judges may express concern for the health and safety of convicted corporate officers incarcerated in a hostile prison environment. *Id.* at 486-87. A term of imprisonment for such a person may be a "more painful sanction than it is for someone who grows up somewhere where people are always in and out of prison." *Id.*

134. *Id.* at 488.

the crime committed as "one negative characteristic amidst a cluster of other positive characteristics."[135] Presentence reports often reveal that a corporate defendant is married and has children, that he is reported to be a good parent, that he is active in his church and local charities, and that he is a professional person with clients who are dependent on him.[136] In this situation, "the judge wants to impose a deterrent sentence, but would like to do it without also punishing the defendant's spouse and children who will lose their source of emotional and financial support, his employees or clients who will lose their employment or professional service, and the general community that will lose an otherwise exemplary citizen."[137]

The result is that corporate offenders are much less likely to be incarcerated than other criminals. Therefore, if intent requirements for "true" crimes are lowered to increase individual accountability for corporate wrongdoing, greater deterrence will be achieved only through increased prosecution.[138] As the culpability associated with illegal conduct decreases, convictions will be harder to achieve and the punishments imposed upon corporate officers at sentencing are likely to be minimal.

B. Occupational Disqualification as a Sentencing Alternative

Since judges are reluctant to incarcerate white collar criminals, various creative conditions of probation have developed. Community service sentences are frequently imposed in lieu of prison terms.[139] It is not unusual for a judge to require corporate executives to donate time to community charitable organizations.[140] Some judges have even gone so far as to require professionals, such as dentists, physicians or

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135. *Id.*

136. *Id.*

137. *Id.* Alternatives include imposing a fine or requiring the defendant to make restitution to the victim. *Id.* at 491-92, 496-98. The authors believe that judges generally do not consider fines to be an appropriate sanction to impose on a convicted criminal. "[T]he frequency of fines in white-collar cases would overrepresent their perceived importance as an effective criminal sanction . . . ." *Id.*

138. *Id.*

139. *Id.* at 492-95.

140. *Id.* at 493.

attorneys, to provide free services for a certain period of time as a condition of probation.[141] In this respect, the corporate defendant is sentenced to something more than just probation and forced to make amends to the community for the crime committed.[142] The imposition of special conditions of probation provides a suitable compromise for judges who are "torn between leniency and severity."[143]

A growing number of observers have asserted that creative conditions of probation should be utilized more frequently. One of the most innovative sanctions proposed is "occupational disqualification."[144] This approach deters illegal conduct by imposing a penalty which jeopardizes the wealth and prestige that the white collar criminal was attempting to augment through his criminal act.[145]

> It is intended to penalize an executive officer or manager of a business organization who has been convicted of an offense committed in furtherance of the interest of the organization. Disqualification, imposed as a condition of probation for a limited period of time and under stated circumstances, would bar this person from postconviction exercise of managerial functions bearing a reasonably direct relationship to the conduct constituting the offense.[146]

The rationale behind this approach is that "[s]ociety may justifiably protect itself by incapacitating those who have demonstrated their readiness to succumb to illegality."[147] Under this approach, punishment bears a reasonable relationship to the corporate criminal act since disqualification bars the offender from pursing his chosen occupation.[148]

Loss of earnings makes disqualification equivalent to a fine.[149] However, since the price paid after conviction is a temporary loss of wages, the penalty bears a closer relation-

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141. *Id.*
142. *Id.* at 492-93.
143. *Id.* at 495.
144. *See* Comment, *supra* note 131, at 604.
145. *Id.* at 615.
146. *Id.* at 604-05 (footnotes omitted).
147. *Id.* at 617.
148. *Id.* at 615.
149. *Id.*

ship to the financial ability of the defendant than statutory fines which are often too low to deter illegal behavior.[150]

Disqualification also works to change lenient attitudes toward criminal activity within the corporation.[151] Indemnification of corporate officials for fines that are imposed in sentencing will no longer be sufficient to compensate a manager who is temporarily out of work.[152] Few managers will risk the consequences of illegal conduct when their own livelihood is at stake. The cost of illegal activity will outweigh the benefit since the corporation will stand to lose, at least temporarily, its most valuable asset: managerial talent accumulated through years of careful recruiting.

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150. Mann, Wheeler & Sarat, *supra* note 132, at 497.

151. Comment, *supra* note 131, at 616.

152. *Id.* The author states:

> A probation condition which disqualifies the executive from corporate office will have the effect of making such legally gratuitous payments to a disqualified executive more difficult to implement than with an executive on simple probation who continues to perform his preconviction duties; a shareholder could claim in a derivative suit that the indemnification payments are unwarranted and, if successful, enjoin payments to the disqualified employee.

Id. Indemnification is usually permissible if the corporate officer acted in good faith and had no reason to believe his conduct was unlawful. See, for example, WIS. STAT. § 180.05(1) (1981-82), which provides:

> (1) A corporation may indemnify any person who was or is a party or threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he or she is or was a director, officer, employe or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employe or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses, including attorney fees, judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding *if the person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful.* The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of no contest or its equivalent shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she resonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

(Emphasis added). *See generally* Note, *Indemnification of Corporate Directors: A Disincentive to Corporate Accountability in Indiana*, 17 VAL. U.L. REV. 229 (1983) (by employing a combination of statutory indemnification provisions and insurance policies, coupled with the protection afforded under the business judgment rule, corporations are often able to effectuate for their officers an impenetrable shield from personal liability).

Moreover, occupational disqualification imposed as a special condition of probation will facilitate even-handed sentencing of corporate offenders. There is a widespread perception on the part of the public that corporate criminals go unpunished. Since judges seem unwilling to incarcerate corporate offenders, they have an obligation to use their broad sentencing discretion to develop sentencing alternatives that deter illegal activity within the corporate sector.

Ultimately the issue must be resolved on a case-by-case basis. Generally, the exercise of judicial discretion in sentencing will be upheld on appeal.[153] When reviewing challenges to the imposition of special conditions of probation, the standard is whether the trial judge abused his discretion.[154]Appellate courts will generally focus on several factors in evaluating the validity of occupational disqualification as a condition of probation:

> (1) Is the prohibited occupational activity one in which the defendant was engaged when he committed the offense?
>
> (2) Is the condition a reasonable, if not the best, way to prevent similar offenses from reoccurring and therefore a reasonable way to protect the public?
>
> (3) Does the condition have a reasonable relationship to the treatment of the accused by preventing his exposure to temptation to resume illegality?[155]

It seems clear that judges are free to develop new creative conditions of probation.[156] The only restraint on a judge's

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153. *See* Comment, *supra* note 131, at 630-33.

154. *Id.* at 632-33.

155. *Id.* at 633. *See also* United States v. Villarin Gerena, 553 F.2d 723 (1st Cir. 1977) (no abuse of discretion in trial judge's conditioning probation of a police officer on his resignation from the force). *Cf.* United States v. Pastore, 537 F.2d 675 (2d Cir. 1976) (probation condition which ordered appellant's resignation from the bar struck down).

156. Occupational disqualification may also be imposed by statute. For instance, disqualification has been extremely effective in prohibiting corrupt leadership from participation in union affairs. Section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959 "forbids convicted felons from holding union office or serving as a labor relations consultant during the five years following conviction for enumerated felonies involving 'moral turpitude.'" Comment, *supra* note 131, at 626. Under this federal statute disqualification is mandatory and not restricted to crimes committed in the course of union duties. *See* 29 U.S.C. § 504(a) (1976).

This statute was originally passed because of concern over union corruption. However, in view of the increasing prevalence of illegal corporate activity, there is no

discretion is that he must be able to justify its exercise on review.[157] Therefore, given the flexibility in the sentencing process, creative conditions of probation may increase individual accountability for corporate crimes without necessitating the revision of traditional theories of "criminal intent."

C. Fines Imposed as Civil or Criminal Sanctions

Many federal statutes authorize the imposition of civil remedies and criminal sanctions for the same conduct.[158] The civil-criminal distinction is subtle in the area of corporate violations because a court may impose either a civil or criminal fine.[159] Generally, criminal prosecutions for violations result only when there has been a flagrant and willful disregard of the law on the part of corporate officials.[160]

Although administrative agencies do not have the power to prosecute criminal cases, they do have responsibility for implementing civil enforcement and recommending criminal prosecution.[161] Responsibility for this determination vests a considerable amount of discretion in administrative officials.[162] Although the decision to proceed criminally is based on the seriousness of the violation, the determination of seriousness is largely a subjective inquiry.[163]

In this respect, the offending conduct is viewed on a continuum: (1) is the conduct serious enough to require the im-

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longer any reason for the unequal treatment of union and corporate officials. It is arguable that a similar legislative solution is necessary to restrain illegal corporate activity. *See* Comment, *supra* note 131, at 626-28.

157. Comment, *supra* note 131, at 632-33. States such as Wisconsin may have a more narrow view of the appropriate exercise of discretion in this area. *See* State v. Dean, 102 Wis. 2d 300, 306 N.W.2d 286 (1981) (probation requirement that doctor provide services to the poor for three years exceeded authority of judge). *But see* State *ex rel.* Mulligan v. Department of Health and Social Servs., 86 Wis. 2d 517, 273 N.W.2d 290 (1979) (probation condition that individual no longer partake in alcohol held valid); Ramaker v. State, 73 Wis. 2d 563, 243 N.W.2d 534 (1976) (probation requirement that defendant not associate with children upheld).

158. *See Developments in the Law*, *supra* note 32, at 1300.

159. *Id.* at 1301.

160. *See* Comment, *supra* note 131, at 613.

161. *Developments in the Law*, *supra* note 32, at 1300 n.1. It is constitutional for administrative agencies to impose civil penalties. *Id.* at 1300 n.1 (citing Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 334-35 (1932)).

162. *Developments in the Law*, *supra* note 32, at 1307.

163. *Id.* at 1308.

position of a sanction? and (2) if so, is the conduct serious enough to proceed criminally?[164] Administrative agencies will generally not recommend criminal prosecution unless the corporate offender has been put on notice that his conduct violates the law.[165] If the decision is made to proceed criminally then the administrative agency must forward the case to the Justice Department.[166]

In recent years, because of increased public awareness of corporate crime, a debate has raged over what type of punishment will best deter illegal corporate behavior. Many commentators have argued for increased criminal penalties, including more frequent incarceration of white collar defendants. However, given the hesitancy of courts to subject nonviolent white collar criminals to the full force of the criminal system, an effective system of civil penalties may

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164. *Id.* at 1307.

165. See Comment, *supra* note 131, at 609 n.26, in which the author discusses approaches taken by administrative agencies:

> The Justice Department brings criminal antitrust charges only in cases involving well-defined types of trade restraints. Baker & Reeves, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 619, 623-24 (1977) ("[w]here complex and novel issues of law are involved, or where there is clear evidence that the defendants did not appreciate the consequences of their actions, the [Antitrust] Division proceeds civilly."). *See also* Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 409 (1978) ("[m]ost criminal antitrust cases involve hard-core price-fixing and market allocations in which the defendants have clear notice and the Department has no responsible choice except to proceed by criminal indictment . . . .").
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> In criminal prosecution of food adulteration, when individuals were criminally prosecuted, the firms under their control had a history of prior sanitation problems and, in every case, some form of warning and follow-up inspection preceded prosecution. *See* O'Keefe & Shapiro, *Personal Criminal Liability Under the Federal Food, Drug, and Cosmetic Act — The* Dotterweich *Doctrine*, 30 FOOD DRUG COSM. L.J. 5, 28-30 (1975).
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> The Environmental Protection Agency and the Justice Department, when dealing with environmental abuse, bring criminal charges against corporate officials only when the Government believes that "(1) They [corporate officials] had actual knowledge that the corporation was violating a standard or order; and (2) They failed to correct the violation or to prevent it from re-occuring." Statement of James Moorman, former Assistant Attorney General, Land and Natural Resources Division, Third Toxic Substances Control Conference (Dec. 5, 1978), 10-11 *quoted in White-Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 169, 369 n.1718 (1980).

166. *Developments in the Law*, *supra* note 32, at 1307. At that point it becomes the Justice Department prosecutor's decision to proceed. *Id.*

ensure a higher level of deterrence than can be achieved through criminal sanctions.

One commentator, Richard A. Posner,[167] believes that fines are the optimal penalty to deter corporate misconduct.[168] Posner, a theorist in the study of economics in the law states:

> In a social cost-benefit analysis of the choice between fining and imprisoning the white collar criminal, the cost side of the analysis favors fining because . . . the cost of collecting the fine from one who can pay it (an important qualification) is lower than the cost of imprisonment. On the benefit side, there is no difference in principle between the sanctions. The fine for a white-collar crime can be set at whatever level imposes the same disutility on the defendant, and thus yield the same deterrence, as the prison sentence that would have been imposed instead. Hence, fining the affluent offender is preferable to imprisoning him from society's standpoint because it is less costly and no less efficacious.[169]

Posner argues that because the term of imprisonment imposed for corporate crimes is short, a fine equivalent exists for most prison sentences.[170] He states that as long as the fine can be collected from the offender,[171] the imposition of a fine is a less expensive sanction for society to impose than

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167. At the time Richard A. Posner wrote the article referred to in this comment, he was a Lee and Brena Freeman Professor of Law at the University of Chicago. He has since been appointed to the United States Court of Appeals for the Seventh Circuit.

168. *See generally* Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980).

169. *Id.* at 410.

170. *See id.*

171. *Id.*

> It should be noted also that the affluent offender presents interesting opportunities for society to exercise its ingenuity in the collection of fines. For example, a penalty that takes the form of barring the defendant from pursuing his occupation — a penalty frequently used by the SEC in dealing with securities fraud and by state authorities in dealing with misconduct by lawyers — is the equivalent of a fine. The amount of the 'fine' is simply the difference between the defendant's future income in the occupation from which he is barred and the income in his best alternative occupation, discounted to present value. This device offers a means of collecting a large fine from an individual who has a large earning capacity but little wealth. An alternative possibility is the collection of a large fine in periodic installments.

Id. at 412.

incarceration.[172] He posits, however, that the moral stigma of criminal conviction is costly in itself and yields no revenue for society.[173] Posner argues that in many instances deterrence can be effectively accomplished through civil penalties enforced by private parties and administrative agencies.[174] In support of this proposition, he notes that in civil antitrust suits there is the possibility of recovering treble damages, an award that is typically higher than the maximum statutory fine imposed for a criminal antitrust violation.[175] Posner states that "a good deal of punishment is meted out in civil penalty suits."[176]

Conversely, Posner's traditional adversary, John Collins Coffee, Jr.,[177] asserts that the threat of incarceration is a greater deterrent than the threat of a fine.[178] He states that the legal threat of incarceration of an individual offender will exceed any applicable range of monetary penalties and that this greater threat cannot be offset by increasing the severity of monetary penalties.[179]

Coffee argues that deterrence will be achieved only if the "expected punishment cost"[180] of the illegal conduct exceeds the "expected gain."[181] He states:

> This concept of the expected punishment cost involves more than simply the amount of the penalty. Rather, the expected penalty must be discounted by the likelihood of apprehension and conviction in order to yield the expected punishment cost. For example, if the expected gain were $1 million and the risk of apprehension were 25%, the penalty would have to be raised to $4 million in order to make the expected punishment equal the expected gain. . . . The crux of the dilemma arises from the fact that the maxi-

172. *Id.* at 410.
173. *Id.* at 417.
174. *Id.*
175. *Id.*
176. *Id.*
177. John Collins Coffee, Jr., is a Professor of Law at Georgetown University Law Center.
178. Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 422-23 (1980).
179. *Id.* at 423.
180. Coffee, *"No Soul to Damn; No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 389 (1981).
181. *Id.*

> mum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth.[182]

Coffee believes that the greatest deterrent is achieved by the threat of incarceration of the individual. He argues that if a mere fine is imposed upon an individual for illegal corporate action, the individual can escape the effect through indemnification by the corporation.[183] Moreover, he states that fines do not incapacitate the offender and prevent corporate recidivism.[184] Finally, Coffee notes that fines discriminate against the poor.[185] For these reasons, Coffee does not believe that fines, particularly civil penalties, are the answer to corporate criminality.

This classic debate illustrates the need to develop a mixed system of sanctions including incarceration. Since corporate crime is viewed by judges as a breed apart from other criminal conduct, there must be sentencing options to deal with corporate misconduct, especially with regard to the marginal cases that can be prosecuted either civilly or criminally.

Therefore, it is imperative that the viability of the fine as a civil or criminal penalty be restored. The use of fines to achieve deterrence requires flexible penalties because corporate offenders vary in size and wealth. Maximum statutory fines in criminal actions should be abolished and a discretionary standard for setting the monetary fine should be substituted. Similarly, civil penalties should be flexible. The administrative agencies should have the power to determine the amount of fines in accordance with statutory guidelines.

D. Conviction of the Corporation

At common law a corporation could not be convicted of

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182. *Id.* at 389-90.

183. Coffee, *supra* note 178, at 425.

184. *Id.*

185. *Id.* Posner acknowledges that there is discrimination in the imposition of punishment. He states that since the disutility of imprisonment rises with income, a uniform prison term discriminates against the rich. He posits that "if we want not to discriminate against the rich through an imprisonment system, we can make the length of the sentence inverse to the offender's income." Posner, *supra* note 168, at 415. We also can choose to discriminate against the rich further by progressively increasing fines with the offender's wealth. *Id.* "In either case the choice to discriminate is independent of the form of the punishment." *Id.*

a crime[186] because it was not capable of forming the criminal intent[187] required and had no body to imprison.[188] These conceptual barriers to the criminal liability of corporations have been reexamined in light of the increasing importance of the corporation in the modern business world and the corresponding need to regulate corporate behavior.

In recent years there has been a movement away from the common-law rule. Under the modern view, a corporation can be held criminally liable for conduct performed by an agent on its behalf within the scope of his employment.[189] Courts are now willing to impute the necessary intent to hold a corporate entity criminally liable.[190] Old statutory prohibitions against the prosecution of a corporation when incarceration is the only punishment authorized are disappearing.[191] Typically, in order to facilitate the prosecution of corporate entities for criminal activity, fines will be imposed upon corporations as punishment for offenses which do not otherwise give rise to such a penalty.[192]

But even in light of judicial recognition of the validity of prosecuting a corporation for a criminal act, the applicability of particular statutory offenses to corporations is not certain. Every statute must be analyzed separately. Courts generally consider the nature of the crime and the legislative intent to

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186. W. LAFAVE & A. SCOTT, *supra* note 9, § 33 at 228.

187. *But cf.* United States v. Mac Andrews & Forbes Co., 149 F. 823 (C.C.S.D.N.Y. 1906) (it is as logical to impute an evil mind to a corporation, as a contractual obligation).

188. Older cases indicate that a corporation may not be charged with any crime for which the only penalty prescribed is imprisonment. *See, e.g.*, People v. Strong, 363 Ill. 602, 2 N.E.2d 942 (1936).

189. In support of the general proposition that a corporation is criminally liable for the acts of its agents in the scope of their authority, see United States v. Wise, 370 U.S. 405 (1962); United States v. Johns-Manville Corp., 231 F. Supp. 690 (E.D. Pa. 1964); State v. Adjustment Dep't Credit Bureau, Inc., 94 Idaho 156, 483 P.2d 687 (1971); State v. Dried Milk Prod. Coop., 16 Wis. 2d 357, 114 N.W.2d 412 (1962).

190. *See, e.g.*, New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909) (landmark case under which corporations may be held responsible and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them).

191. *See, e.g.*, United States v. Van Schaick, 134 F. 592, 602 (C.C.S.D.N.Y. 1904) (landmark case in which the absence of appropriate statutory authorized punishment did not bar liability since legislative intent was not to immunize corporations).

192. W. LAFAVE & A. SCOTT, *supra* note 9, § 33, at 229-30.

determine whether a corporation can be prosecuted pursuant to the statute.[193]

Homicide indictments against corporations have been particularly problematic.[194] In one of the earliest cases, *People v. Rochester Rail & Light Company*,[195] the New York Court of Appeals held that although a corporation can commit most crimes, the statutory definition of homicide, defined as "the killing of one human being by the act, procurement or omission of another,"[196] does not apply to a corporation because the word "another" was intended to be limited to human beings.[197]

The New Jersey Supreme Court broke through this semantical barrier in 1917 in *State v. Lehigh Valley Railroad Co.*,[198] recognizing that homicide statutes need not be read to preclude indictments against corporations.[199] This common sense approach was considered to be aberrational for more than fifty years.

In 1974, however, in *People v. Ebasco Services, Inc.*[200] a New York court interpreted the word "person" to include corporate entities and subjected a corporation to liability for homicide.[201] Following this decision, at least two other state courts have held that liability can be imposed on corporations under statutes defining homicide as the unlawful killing of one person by another.[202]

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193. *Id.* at 230.

194. For a discussion of the theoretical implications of prosecuting a corporation for homicide, see Comment, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W.L. REV. 465, 471-74 (1981); Comment, *Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions*, 8 PEPPERDINE L. REV. 367, 394-409 (1981).

195. 195 N.Y. 102, 88 N.E. 22 (1909).

196. *Id.* at 107, 88 N.E. at 24. The word "person" is commonly defined in general statutory definitions to include corporations. *See* W. LAFAVE & A. SCOTT, *supra* note 9, § 33, at 230.

197. 195 N.Y. at 107-08, 88 N.E. at 24.

198. 90 N.J.L. 372, 103 A. 685 (1917).

199. *Id.* at 376, 103 A. at 686.

200. 77 Misc. 2d 784, 354 N.Y.S.2d 807 (1974).

201. *Id.* at 787, 354 N.Y.S.2d at 811.

202. *See* Note, *Corporate Homicide: A New Assault on Corporate Decisionmaking*, 54 NOTRE DAME LAW. 922 (1979) (citing State v. Ford Motor Co., No. 5324 (Ind. Super. Ct., filed Sept. 13, 1978)); *see also* Commonwealth of Pennsylvania v. McIlwain School Bus Lines, 283 Pa. Super. 1, 423 A.2d 413 (1980).

The most notable of these two decisions is *State v. Ford Motor Company*.[203] In the *Ford Motor* case, the corporation was charged with reckless homicide for deaths caused by defects in the Pinto model which were concealed from the consumer by the corporation. The trial judge followed the *Ebasco* reasoning and determined that the legislature intended the term "person" to include corporations with regard to the commission of a homicide.[204] The Ford Corporation was, therefore, subjected to a homicide prosecution, notwithstanding the restrictive statutory language.

In addition to establishing a significant precedent which provides a basis for interpreting homicide statutes, the Pinto case presented a number of novel issues.[205] The Ford prosecution was one of the first which involved not just a single agent, but an act which was the product of a complex business decision.[206] This approach highlights the greatest advantage of imposing criminal liability on a corporation: prosecution of the corporate entity may be possible even when the specific culpable agent or agents are impossible to pinpoint.[207]

Although it has been argued that the imposition of criminal liability on a corporation is a less effective means to combat corporate crime than the imposition of liability on the individual,[208] in this type of situation it may be the only alternative for the prosecutor. Moreover, even though it is extremely difficult to measure the deterrent value of a

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203. No. 5324, slip. op. at 8 (Ind. Sup. Ct. Sept. 13, 1978).

204. *Id.*

205. Note, *supra* note 202, at 922.

206. *Id.*

207. Note, *supra* note 77, at 674.

208. Many commentators believe that imposing criminal liability on a corporate entity is undesirable. It has been asserted that any adverse impact achieved by imposing criminal liability on a corporate entity tends to fall heavily on innocent parties. *See* Note, *supra* note 202, at 922. It also tends to result in all corporate agents being stigmatized by the criminal conduct. Note, *supra* note 77, at 675. It has been postulated that it is unfair to shareholders, who are generally powerless to control the course of corporate conduct and who stand to lose their investment. *See* Note, *supra* note 202, at 921. *But see* Radin, *supra* note 126, at 52 (asserting that since shareholder is not personally liable, loss is limited to the shareholder's capital investment). It has been argued that the risk of loss may fall on even less blameworthy parties such as creditors, employees and consumers. *See id.* at 53.

Similarly, it is argued that the imposition of criminal liability on the corporate entity does not accomplish this deterrent purpose since the imposition of nominal fines generally has only a small financial impact on the corporation. *Id.*

particular penalty, social and moral condemnation results from imposing criminal liability on a corporation, particularly for serious crimes.[209] This condemnation might deter potential investors,[210] result in ruined product lines,[211] or threaten future revenues.[212] In this respect, corporations might very well be deterred from cold, calculating risk-analysis[213] in light of the potential business impact.

Furthermore, the government is not limited to choosing between prosecuting the corporation and the individual corporate agent.[214] The government may prosecute both the corporation and the individual at a joint trial.[215] As a rule of thumb, whenever possible, the prosecution should attempt to indict the corporate entity and all individuals involved in the decision-making process. This joinder will prod courts to invoke many common criminal statutes and apply them to the corporate entity.[216] This approach also maximizes the deter-

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209. *See* Note, *supra* note 202, at 923.

210. Note, *supra* note 77, at 674.

211. *See* Note, *supra* note 202, at 923.

212. *Id.*

213. *See* Radin, *supra* note 126, at 55 n.121. The author cites to a broadcast over the CBS Television Network, 60 Minutes, "Is Your Car Safe?," June 11, 1978, which stated that in marketing its Pinto, the Ford Motor Company anticipated 180 burn deaths and 180 serious burn injuries. Ford calculated that each life was worth $200,000, and each serious burn was worth $67,000, resulting in a total liability of $48,060,000, while the cost of modifying the Pinto would have been $137 million.

214. *See* State v. Shouse, 177 So.2d 724 (Fla. Dist. Ct. App. 1965) (that corporation is being held liable for embezzlement does not render immune from prosecution the agent who committed or authorized the corporate act); State v. Loucheim, 36 N.C. App. 271, __, 244 S.E.2d 195, 203-04 (1978) (holding that "[w]here the agent of a corporation in the course of his and his employer's business obtains anything of value for the corporation by false pretenses both the corporation and the agent may be convicted.").

215. Consistency of the verdicts against the corporation and the individual is not required. *See* Magnolia Motor & Lodging Co. v. United States, 264 F.2d 950 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959).

216. For example, corporations are subject to criminal liability for offenses punishable by a fine or imprisonment or both. A corporation cannot be imprisoned and therefore it is not subject to criminal liability where the only penalty is imprisonment. 53 Op. Wis. Att'y Gen. 132 (1964). *But see* State v. Adjustment Dep't Credit Bureau, Inc., 94 Idaho 156, 483 P.2d 687 (1971) (under a statute which indicates the word "person" as used in statutes includes corporations, as well as natural persons, a corporation may be found guilty of a crime even where a criminal statute makes no reference to corporations).

rence value by punishing the corporation, as well as the individuals involved.[217]

IV. CONCLUSION

The trend toward increased personal criminal liability for corporate actions is limited by the scope of recent decisions as well as by the traditional requirements of Anglo-American jurisprudence. Some commentators have seized upon the sweeping language in the cases interpreting public welfare statutes as providing the theoretical underpinnings for expanding the criminal accountability of corporate officers.[218] Yet despite sweeping language in cases such as *United States v. Park*,[219] the effect of these decisions is limited by the regulatory nature of public welfare offenses and subsequent Supreme Court decisions[220] which reinforce the traditional view that strict liability in criminal law is reserved only for exceptional regulatory offenses and is not to be applied on a broad basis.[221]

Proof of specific intent and causation remain the basic requirements for the imposition of liability in "true" crimes.[222] These requirements make it all but impossible to impose criminal liability on high-level corporate managers who did not affirmatively participate in or know of the criminal activity.[223] Courts are especially unwilling to loosen intent and causation requirements and impose criminal liability for serious offenses when the conduct of the high-level executive is not clearly culpable.[224]

However, in spite of this, commentators continue to urge that individual liability be expanded because of the perceived need to develop some effective deterrent to criminal corporate conduct. Although far reaching solutions, such as

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217. *See, e.g.*, People v. American Medical Centers of Mich., Ltd., 118 Mich. App. 135, 324 N.W.2d 782 (1982) (individual defendants sentenced to five years probation while all defendants, including the defendant corporation, were ordered to make restitution for numerous counts of Medicaid fraud).

218. *See supra* note 77 and accompanying text.

219. 421 U.S. 658 (1975).

220. *See, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422 (1978).

221. *See supra* text accompanying notes 38-85.

222. *See supra* text accompanying notes 7-37.

223. However, a corporate superior who commands or authorizes a corporate crime may be held criminally liable. *See supra* text accompanying note 11.

224. *See supra* text accompanying notes 86-127.

loosening the intent requirement for "true" crimes, seem attractive, there are more practical measures which can be invoked to refine the law in this area. The goal of deterrence is better served by strengthening existing penalties and sanctions. Alternatives in sentencing must be explored because judges are less willing to incarcerate corporate officers than other criminals.[225] Judicial experimentation with innovative conditions of probation, such as occupational disqualification, should be encouraged.[226] The use of the fine as a viable criminal or civil penalty must be restored.[227] And finally, prosecutors should test the applicability of criminal statutes to the corporate entity by indicting the corporation, as well as the specific individual actors, whenever possible.[228] This approach will maximize the deterrence potential by punishing both the principal and the agent responsible for the illegal action.[229] The corporation thus will be less able to hide illegal activity within a complex or multi-layered decision-making process.[230] The net result of these incremental changes will be increased pressure on the corporate decisionmakers to eliminate illegal activity from corporate policy.

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225. *See supra* text accompanying notes 128-40.
226. *See supra* text accompanying notes 141-57.
227. *See supra* text accompanying notes 158-85.
228. *See supra* text accompanying notes 186-217.
229. *Id.*
230. *Id.*