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Corporate Criminal Liability

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CORPORATE CRIMINAL LIABILITY

Recently the State Labor Department has rattled a skeleton of the criminal law closet by requesting and being denied prosecution of a corporation on charges of manslaughter.[1] Perhaps the request, although unusual, did not warrant special consideration. However, the dearth of such prosecutions may not be a result of necessity, but rather that the New York law has been long settled and seldom tampered with, that a corporation is not subject to prosecution for homicide under the existing statutes.[2] The fact is not in dispute, but the situation makes proper a consideration of the merit and value of such a rule of law in relation to our changing concepts of that peculiar entity, the corporate body.

THE EVOLUTION OF CORPORATE CRIMINAL LIABILITY

Though an innovation in legal history, the liability of a corporation for crimes has been extended with little restraint. The law has come to the point where it can be entirely reasonable to say that there is no crime for which a corporation should not be held liable.[3] Nevertheless, the courts have shied away

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1. Buffalo Evening News, Final Ed., Dec. 27, 1957, p. 12, col. 4:
> District Attorney Dwyer has been requested by the attorney general's office and the State Labor Department to start action on manslaughter charges [against a prime contractor on a highway construction project] . . . The Labor Department, with the attorney general's office concurring, holds the accident due to negligence by the corporation's agents and to contravention of labor law and industrial code standards.

See also, Buffalo Evening News, Dec. 10, 1952, p. 2, col. 6, where the considered necessity of the above request is reported through Assistant Industrial Commissioner Blackwood.

Within a week District Attorney Dwyer replied that it was not possible to charge the corporation with a crime of this nature. Buffalo Evening News, Jan. 2, 1958, p. 25, col. 3.

2. The leading case of *People v. Rochester Ry. & Light Co.*, 195 N.Y. 102, 88 N.E. 22 (1909) states that:
> A corporation may in many instances be charged criminally with the unlawful purposes and motives of agents through whom it conducts its business . . . A definition of certain forms of manslaughter might be formulated which would be applicable to a corporation and make it criminally liable for various acts . . . when causing death. The present penal code however, defines homicide as 'the killing of one human being by the act, procurement, or omission of another,' meaning another human being, and . . . makes 'such homicide' manslaughter in the 2nd degree under certain circumstances. *Under these definitions* a corporation cannot be guilty of manslaughter. (emphasis added).

See also, N.Y. PENAL LAW, §1042 (Homicide), §1052(3) (Manslaughter).

3. Canfield, *Corporate Responsibility for Crime*, 14 COLUM. L. REV. 469, 473, (1914):
> As late as the close of the eighteenth century it was thought that a corporation could not be indicted for any offense, but

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from holding corporations responsible for certain crimes, particularly those involving personal violence and specifically, homicide or manslaughter.[4] The extension of liability into this field has been hampered by theoretical and practical obstacles.

The reasons generally given for either partial or complete immunity from prosecution in any situation, and which must be overcome before abstract considerations of the social desirability of corporate criminal liability can even be considered, are four-fold.[5]

It was said, and in some instances it is still said, that the corporate body could not (1) have criminal intent, (2) be indicted by criminal procedure, (3) be punished corporally, nor (4) be capable of certain criminal acts which were either void as ultra vires or by their very nature were inherently human. In most instances these barriers to liability have been overcome by judicial decisions and legislative enactments affecting the thought and policy developed in the courts.

The first obstacle, the impossibility of harboring criminal intent, is a vestige of tradition stemming from the theory that a corporate body, without a mind or a will, cannot harbor any intent in its ordinary capacity.[6] The fiction arose that to charge a corporation with intent there must be some indicia of authorization.[7] This partially overcame the narrow aspect of the corporate body that had earlier prevailed, but it was hardly enough. Most courts have come to the settled position that a corporation may be capable of mens rea, by a variety of reasons.[8] An accept-

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> by the middle of the nineteenth century this notion had been thoroughly outgrown.

Complete extension of corporate liability is suggested by Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1927). Frances, *Criminal Responsibility of the Corporation*, 18 ILL. L. REV. 305, 323 (1924), suggests that there is no sound reason to hold corporations liable ". . . . until and unless it is demonstrated that the social good demands [such liability]."

4. See 10 FLETCHER, CYC. CORPS. 677 (perm. ed. 1931); Comm. v. Proprietors of New Bedford Bridge, 2 Gray 339, 345 (Mass. 1854); Comm. v. Illinois Cent. Ry., 152 Ky. 320, 153 S.W. 459 (1913). *Cf.* State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910):

> That corporations cannot be convicted of an offense where intent is an ingredient is no longer tenable. They are as fully liable in such cases as individuals. They are liable for libel, assualt and battery, etc.

5. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 22 (1957); Note, 14 COLUM L. REV. 241, 242 (1914). An extended discussion of each of these prosecution barriers appears in Edgerton, *supra* note 3, at 827-832.

6. Edgerton, *supra* note 3, at 828.

7. 1 BISHOP, NEW CRIMINAL LAW 640-643 (8th ed. 1892).

8. U. S. v. McAndrews & Forbes Co., 149 Fed. 823, 835 (C.C. S.D.N.Y. 1906).

> . . . defendant corporations claim that since in conspiracy evil intent is of the essence of the crime, inherent impossibility

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ance of the recent Reality theory of corporate nature would make this conclusion readily available in any instance.[9]

The procedural obstacles have been overcome by legislation[10] and are no longer a serious consideration, except that in some instances they may not provide sufficient deterrent sanctions. As most corporate crimes will stem from economic objectives, it is entirely possible that a corporation might readily subject itself to a maximum fine of five thousand dollars if the fruits of the crime were to outbalance this sum.[11] But the incalculable effect of conviction on the public attitude toward the corporation is probably a most forceful deterrent. The punishment does exist and the social value of its effect becomes a legislative problem.

A strong remnant of the Fiction theory of the corporate nature has sustained the view that there are corporate acts which are ultra vires and of no legal effect.[12] The outlook sometimes prevails that a corporation cannot be guilty of a particular crime, for that is ultra vires in itself,[13] but it is no impossible feat of logic to reason that no such crime exists.[14] The considered range of these ultra vires acts has been so narrowed by the modern extension of corporate liability that the

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> renders the accusation futile. I think this is but a remnant of a theory, always fanciful and in the process of abandonment.

U.S. v. Union Supply Co., 215 U.S. 50 (1909); People v. Canadian Fur Trappers Corp., 248 N.Y. 159, 161 N.E. 455 (1928); Comm. v. Proprietors of New Bedford Bridge, 2 Gray 339, 345 (Mass. 1854). See State v. Parker, 114 Conn. 354, 158 Atl. 797 (1932), citing many authorities from other states. *Contra,* 2 MORAWETZ, CORPORATIONS §732 (2d ed. 1886).

9. Colson, *Corporate Personality,* 24 GEO. L.J. 638 (1936); Laski, *The Personality of Associations,* 29 HARV. L. REV. 404 (1916); 3 MAITLAND, COLLECTED PAPERS 304, 316 (1911). See also note 20 *infra.*

10. In *People v. Equitable Gas Light Co.,* 6 N. Y. Cr. R. 189, 5 N.Y. Supp. 19 (Ct. Gen. Sess. 1888), the existing statutory means of compelling personal appearance of a defendant at arraignment, trial, and verdict, were held insufficient to obtain jurisdiction of a corporation in a felony case. This deficiency was corrected by N.Y. CODE CRIM. PROC. §§675-82. N.Y. PENAL LAW §1932 obviates the corporal punishment, or impossibility of incarceration difficulty by providing that:

> In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punished with imprisonment, as for a felony, such corporation is punishible by a fine of not more than five thousand dollars.

11. See Edgerton, *supra* note 3, at 883.

12. Ashbury Ry. v. Riche, L.R. 7 H.L. 653 (1875); Central Trans. Co. v. Pullman's Palace Car Co., 139 U.S. 24, 59 (1891).

13. BISHOP, *op. cit. supra* note 7, at §§417, 418, 422; FLETCHER, *op. cit. supra* note 4, at 688 suggests that only those crimes which "under no circumstances could be committed for the benefit of a corporation," or for a corporate purpose should be considered ultra vires (e.g. rape, sodomy, mayhem, bigamy).

14. *E.g.* The corporate officers direct that a member or agent of the corporation enter a bigamous relationship for the purpose of deriving economic and social benefit for the corporation through the influence of the innocent spouse. Edgerton suggests that it is entirely rational that an agent might take a chance of personal responsibility because of loyalty or from hopes of bettering his position in the organization. Edgerton, *supra* note 3, at 833.

paths of this trend become of prime concern.[15] It is through a digest of the means and manner effected to narrow this range of impossible corporate crimes that we forecast and justify the future extent of corporate criminal liability. Having surmounted the pitfalls of procedure,[16] and intent,[17] the courts must then be concerned with the problem of capacity presented by the peculiar nature of the corporate personality, for in applying the law relating to a subject that is vexed with theoretical differences the law will often vary and be applied according to the theory currently in vogue.[18] The schools of thought concerning the nature of corporate personality can readily be divided into two factions, the earliest being the exponents of the Fiction theory,[19] followed by the advocates of the Reality theory.[20]

The classic statement of the import of the Fiction theory was by Chief Justice Marshall:

> A Corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of creation confers on it.[21]

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15. Joplin Merchantile Co. v. U.S., 213 Fed. 926, 929 (8th Cir. 1914), *aff'd*, 236 U.S. 531 (1915) (conspiracy); State v. Lehigh Valley Ry., 90 N.J.L. 372, 103 Atl. 685 (1917) (Homicide); People v. Canadian Fur Trappers Corp., 248 N.Y. 159, 161 N.E. 455 (1928) (Larceny); *Cf.* dictum in *Nat'l Bank v. Graham*, 100 U.S. 699, 702 (1879): "Corporations are liable for every wrong they commit and in such cases the doctrine of ultra vires has no application." See also Note, 14 COLUM. L. REV. 241, 242 (1914).

16. See note 10 *supra*.

17. See note 8 *supra*.

18. Do our concepts of the effect of an object on us really evolve into concepts of what that thing is to us? The "logical" philosophy contends they do. PIERCE, CHANCE, LOVE, AND LOGIC (1923). Broadening and applying this theory to juridical "subjects," such as the right and duty bearing unit it is said that ". . . there are some things, bodies singular and corporate, which clearly act differently or have different consequences depending on whether or not they possess rights and duties, and according to what specific rights they possess, and what obligations are placed on them." Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

19. An early arrival on the American legal scene, the doctrine in America is ascribed to Chief Justice Marshall, when in *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch.) 61 (1809), he held that the "corporate aggregate is certainly not a citizen." See also, contemporaneous decisions in *Hope Ins. Co. v. Boardman*, 9 U.S. (5 Cranch.) 57 (1809), and *Maryland Ins. Co. v. Woods*, 10 U.S. (6 Cranch.) 29 (1810); Chief Justice Marshall later spoke of his "regret" that those decisions were made as they were.

The later case of *Louisville & C. Ry. v. Letson*, 43 U.S. (2 How.) 497 (1844) settled the issue by allowing corporations citizenship in their domicile state.

20. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES 26 (1902) Gierke's position was that "A universitas (or corporate body) . . . is a living organism and a real person, with a body and members, and a will of its own. Itself can will, itself can act . . . it is a group-person and its will is a group-will."

21. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 536 (1819). This definition is said to reflect the early unpopularity of corporations a result of "legal jealousy" says Colson, *supra* note-9, at 652. See also WORSMER, FRANKENSTEIN, INCORPORATED 9-13 (1931).

This has led to the prevailing concept of the corporate nature—that a corporation is an entity distinct from its members and officers, and with rights and liabilities of its own. An adjunct of the Fiction theory is the Concession theory, whereby the corporate existence depends on positive sanction of law. Because of the close alliance of the Fiction and Concession theories, both deriving their powers from the governmental body, it is said that the latter is essentially included in the former and the two did eventually flow together in their influence on American jurisprudence.[22] The Reality theory sees the corporate body with an existence and social significance of its own, regardless of legal recognition. In many instances statutes do not specifically include the corporation in their apparent coverage, and the Reality theory readily provides the flexibility of application of such existing laws which is required where the need for extended liability exists.[23]

THE EFFECT OF THE THEORIES UPON THE LAW

It is conceivable that by mental manipulation an advocate of one of the theories of corporate personality might readily align his reasoning to a just result in any given instance.[24] But ordinarily the theory in vogue will determine the seeming justice of any conclusion. Therefore, a criticism of the relative merits of the theories as applied to our present legal concepts may aid us in choosing a working hypothesis with which to serve jurisprudence in the realm of corporate activity.

Although the Fiction theory is said to be the prevailing influence in corporate jurisprudence,[25] it is clear that the theory, in an unadulterated form does

22. Colson, *supra* note 9, at 645; see also Dewey, *supra* note 18, at 666-669. The Concession theory had its origin in the rise of the national state. Dewey, *op. cit. supra* note 18, at 666, 667 where the author states ". . . there is nothing essentially in common between the [theories], although they both aim at the same consequence, as far as limitation of the corporate body is concerned." The author goes on to note that the fiction theory is philosophical, with the corporate body a thing of the intellect alone. The Concession theory may be indifferent to the question of the reality of the corporate body. It must insist, however, that the corporate powers are derived.

23. See notes 9, 20 *supra*.

24. The realists contend that the Fiction theory is, or was theoretically unable to apply intent to a corporation. See note 9, *supra*. But, in Machen, *Corporate Personality*, 24 HARV. L. REV. 253 (1911) it is said that:

> If the corporate personality is imaginary there is no limit to the characteristics and capacities which may be attributed to that personality . . . If you can imagine a corporate personality as a person, you can also imagine that person has a mind.

See also Dewey, *supra* note 18, at 668.

25. 1 MORAWETZ, CORPORATIONS 277 (2d ed. 1886); Machen, *supra* note 24, These authors are in agreement that the corporation as an association is a real thing, a fact, but that it is devoid of a personality.

not fully accord with many settled principles of corporate law.[26] Depending on what value is to be preserved or upon what is to be denied, the courts will apply often without specific reference, one form or another of the philosophies pertinent to the nature of the corporate personality. It is said that the Concession theory is especially suitable in a period when individual rights, privileges, and immunities are to be valued.[27] The assumption that a conceded corporate body can readily be assimilated to a singular person is appealing. However, the Concession theory would present a difficulty in the treatment of foreign corporations, for if strictly applied, the corporation would be without existence outside the borders of its incorporating power.[28]

Perhaps the Fiction theory could overcome these residence and migration problems,[29] but the Fiction theory itself is fraught with anomalies. It necessarily presupposes an existing corporate form, the state, which gives rise to the corporation. In so doing it applies a realist principle that there does exist some corporate body here—that is, the very body which compiles the laws generating the conceded corporation. It is not logically applied when disregarding the fiction of the corporate subsidiary to place liability upon the parent,[30] for only by a second fiction of masking its creation can it ignore it once had endowed its existence. The Fiction theory has other limitations which the courts have judiciously circumvented by the application of such doctrines as de facto corporations [31] and vicarious

26. 1 FLETCHER, CYC. CORPS. 77 (perm. ed. 1931); Colson, *supra* note 9, at 644-651.

27. Dewey, *supra* note 18, at 668. But see, FREUND, STANDARDS OF AMERICAN LEGISLATION 39 (1917):

> It is hardly possible to overestimate the theory that corporate existence depends on positive sanction as a factor in public and legislative policy. It is natural that the charter or incorporation laws should be made the vehicle of restraints or regulations which might not be readily imposed upon natural persons acting in their own initiative, and the course of legislative history bears this out.

See 1 FLETCHER, *op. cit. supra* note 26, at 28, 29, on when a corporation is a person within the Federal Constitution.

28. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 5 (1918).

29. As Dewey suggests, "imaginary creatures are notoriously nimble." Dewey, *supra* note 18 at 668, n. 17; see note 24 *supra*.

30. 1 FLETCHER, *op. cit. supra* note 26, §§24, 41; see Commonwealth v. Sunbury Converting Works, 286 Pa. 545, 134 Atl. 438 (1926); Commonwealth v. J. G. Brill Co., 287 Pa. 59, 134 Atl. 441 (1926).

31. This is often in effect, an application of the Reality theory that a corporate body, though not sanctioned by the state has social existence. See Colson, *supra* note 9 at 648; instances of this application are collected in BALLANTINE, CORPORATIONS c. 3 (rev. ed. 1946).

liability,[32] and in avoidance of the ultra vires principle.[33] In so doing they have tread closely to the Reality theory, which is logically adapted to an increasing social need. As earlier stated, the Reality theory sees the corporate body as a distinct social entity, not requiring legal recognition to give it existence. By accepting this rationale the state through its courts and legislatures could recognize the social effect of the corporate form, and at the same time effectively control its functioning by comprehensive legislative enactments. This would in no way hinder the state in its rights and duties. At the same time it would give the lawmakers the absolute power of recognition and control which could be so flexibly applied in desirable situations unhampered by the unreal technicalities of a corporate fiction.

It is unavoidable that punishment of the corporate body in any instance will create unusual results because of the very structure of the body. Not the least of the problems is the effect upon the "innocent" stockholder,[34] or of creditors,[35] the former championed unfailingly by advocates of restricted liability. In the criminal responsibility vein the objectives of punishment must be considered in respect to the social and economic effect of imposing sanctions.[36] It is not unjust,

32. As the courts originally adhered strictly to the Fiction theory there was no early instance of liability of a corporation for acts committed by its agents, even though such acts were directed to the benefit of the corporation. Orr v. Bank of U.S., 1 Ohio 36, 41-45 (1822). But see Holdsworth, *English Corporation Law*, 31 YALE L.J. 386-90 (1922), where the author says "it would seem that so far as criminal or civil liability is concerned the courts have always been prepared to hold that a corporation is as capable of being held liable as a natural person." It is now the settled law that a corporation may be liable for torts and crimes, even involving malicious intent. 10 FLETCHER, *op. cit. supra* note 4, at 334, 655.

33. Colson, *supra* note 9, at 648 says that the retreat from ultra vires which the courts "have been compelled to make under one guise or another" has caused confusion and inconsistency. See also Warren, *Executed Ultra Vires Transactions*, 23 HARV. L. REV. 495 (1910).

34. As was pointed out in *U.S. v. Cotter*, 60F.2d 689, 694 (2d Cir. 1932), ". . . [The defendant] agrees that: [a fine] merely takes from the victims of the fraud . . . part of the little that was left them. We agree." The charge was using the mails for fraudulent sale of stock. For a suggestion that any effect upon the shareholders is confined to their corporate, not personal, capacity see Winn, *The Criminal Responsibility of Corporations*, 3 CAMB. L.J. 398, 412 (1928).

35. A large enough fine might wipe out the corporate assets. BALLANTINE, CORPORATIONS 280, 281 (rev. ed. 1946); Standard Oil Co. of Indiana v. U.S., 164 Fed. 376, 387 (7th Cir. 1908). See, Little, *Punishment of the Corporation, The Standard Oil Case*, 3 ILL. L. REV. 446 (1909).

36. Deterrence is generally considered the moving end of criminal sanctions. MARSHALL AND ADLER, CRIME, LAW AND SOCIAL SCIENCE 6-19 (1933); Note, 48 COLUM L. REV. 794, 797 (1948); the considerations of reformation, retribution, and disability should not be overlooked, though the latter is perhaps of negligible importance in modern penology. Francis, *supra* note 3, at 315. Concerning retribution, see People v. Sheffield Farms Co., 225 N.Y. 25, 32, 121 N.E. 474, 477 (1918). Cumulative resposibility in the corporate body as well as the individual offender may further serve the deterrent purpose. N.Y. Central Ry. v. U.S., 212 U.S. 481 (1909). See also note 14 *supra*.

if the social good demands it, to punish a stockholder indirectly, for his "innocence" can be subordinated to the general interest by law[37] and by reason.[38]

CONCLUSION

Though suggestions are found that corporate criminal liability be restricted,[39] or even discarded,[40] the trend is toward extension of liability which may eventually approach full liability,[41] as in the case of the individual. An adoption of the Reality theory could readily dispel any hindrance to extended liability. There is no inherent impossibility impeding full extension of criminal responsibility to the corporate form. The considerations of social value to be preserved however will determine the desired extent of that responsibility.

The issue raised by the denial of prosecution mentioned above should not be lightly discarded. Twenty-one years ago the New York Law Revision Commission reported their opinion that, "Immunity of the corporation from punishment for this crime [homicide] is an unwarranted exception to the rule of corporate liability."[42] It cannot be said that any material aspect has since arisen to challenge the validity of this statement.

The social and economic utility of the corporate form should not immunize the components of that body from the existing criminal liabilities directed toward the individual. To deny full liablity is to allow the corporate body a peculiar economic and social position that is not justifiable.

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37. *E.g.,* Vicarious tort liability. Phillips Petroleum Co. v. Jenkins, 297 U.S. 629 (1935) (statutory liability of employer for personal injuries to an employee through the negligence of another employee). Also, "without fault" crimes, FLETCHER, *op. cit. supra* note 4, at 670; MORAWETZ, *op. cit. supra* note 8.

38. Is the social interest in compensation for tort injury any greater than that of prevention of crime? Edgerton, *supra* note 3, at 827 suggests it is not. If not, then the same vicarious application can readily be made in criminal law by the legislature. But see BALLANTINE, *op. cit. supra* note 35, at 279.

39. This is a popular thesis. The suggestions are many and varied, ranging from liability only for "without fault" crimes, and its adjunct the "public necessity" rationale, to liability only for acts of, or acts authorized by primary representatives, "superior agent" rationale. See BALLANTINE, *op. cit. supra* note 35 at 281, and Canfield, *supra* note 2, at 481 (without fault crimes); Note 60 HARV. L. REV. 283, 285 (1946) (Public necessity); Winn, *supra* note 34, at 414 and Denver & R.G. Ry. v. Harris, 122 U.S. 597 (1887) (Superior agents); C.I.T. Corp. v U.S., 150 F. 2d 85 (9th Cir. 1945), and Note, 4 UNIV. OF CHI. L. REV. 142, 145 (1936) (Directors only).

40. This is the novel suggestion of Francis, *supra* note 3.

41. This is the quest of Edgerton, *supra* note 3. See also Laski, *supra* note 9, at 416. Extension of corporate criminal liability is called the "modern tendency" in FLETCHER, *op. cit. supra* note 4, at 659.

42. See Leg. Doc. (1937) No. 65 (P), p. 323.