CHRONICLE OF PUNISHING THE 'MAL-FICTION' BEHIND THE FICTITIOUS ENTITY: FROM EVOLUTION TO FUTURE OF CORPORATE CRIMINAL LIABILITY

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ABSTRACT

At the intersection of corporate criminal liability and criminal law, there is a tension between the requirement of mens rea (guilty mind) and the reality that corporations do not commit crimes (lack mens rea) on their own. This article traces the genealogy of corporate criminal liability through the United Kingdom, United States, India and Australia since the notion of corporations being incapable of committing crimes, ***societas delinquere non potest***, through the identification doctrine to the Standard Chartered and Iridium doctrine in India. It also highlights that through vicarious liability, the identification doctrine, aggregation theory, and corporate culture theory have been, to varying degrees of success, trying to ascribe corporate criminal liability to an artificial person. The article details several continuing fault lines in this area, i.e., the difficulty in obtaining evidence showing mens rea, deferred prosecution agreements that provide convenience at the expense of accountability, and differing jurisdictions. The conclusion spotlights that artificial intelligence is creating a paradigm shift from punitive intent to preventing failure of system architecture and will result in the Hybrid Failure to Prevent Model being the next evolutionary phase of the doctrine of corporate criminal liability.

1. Introduction

The Volkswagen emissions scandal, popularly referred to as **"dieselgate"**, emerged in 2015 when it was revealed that they had employed illegal software to manipulate emissions tests for its diesel vehicles and used defeat devices in several models of their cars. The manipulated tests allowed them to pass regulatory standards while, in reality, they emitted hazardous levels of nitrogen oxides, significantly exceeding legal limits. The scandal affected 11 million vehicles worldwide by emitting 40 times the allowable quantity of Nitrogen Oxide (Nox) fumes.[1]

The deception led to millions of people suffering from major health crises and millions of premature deaths from respiratory illnesses. Additionally, millions more people suffered from very poor air quality and smog due to the environmental damage caused by the deception. Volkswagen has paid approximately $39 billion in fines, refits and legal expenses as a result of this scandal. Furthermore, Volkswagen had to recall and buy back thousands of vehicles that had been affected.

In September 2015, the Volkswagen supervisory board finally forced CEO Martin Winterkorn to resign after regulators worldwide had begun investigating and taking action regarding the company's emissions scandal, thus allowing for a "fresh start" and the possibility of conducting an independent inquiry into the company. Winterkorn did not admit any wrongdoing; however, he has taken full responsibility for the crisis which occurred during his administration.[2]

The scandal's use of defeat devices and illegal software didn't just cheat emissions tests; it fueled public health crises, worsened environmental damage, and ultimately drove down sales as customer trust evaporated. Multiple questions arise here: Can the company be held liable for the damage? But the company is an artificial person and is not capable of having the ***mens rea*** to commit the crime. Then who actually is liable? The CEO, the Board, the employees or the corporation itself? The question of liability arises subsequently and in cases where the harm is serious and criminally done with intention, corporate criminal liability emerges.

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[1] Mark Dziak, *Volkswagen Emissions Scandal ("Dieselgate")*, EBSCO Rsch. Starters (2021), https://www.ebsco.com/research-starters/business-and-management/volkswagen-emissions-scandal-dieselgate.
[2] *Volkswagen Chief Martin Winterkorn Resigns Amid Emissions Scandal*, N.Y. Times (Sept. 24, 2015), https://www.nytimes.com/2015/09/24/business/international/volkswagen-chief-martin-winterkorn-resigns-amid-emissions-scandal.html.

This is where the corporate veil is lifted to ascertain who actually is liable and for what actions. This concept recognizes the fact that the corporation is a distinct entity separate from its owners and shareholders, as held in ***Salomon vs. A. Salomon & Co. Ltd. (1897)***[3] saying that there is limited liability on the part of owners, shareholders, directors, etc., but they can be held personally liable in exceptional cases of fraud, evasion and such other kinds. However, in the question of practicality, the acts done by a company are in fact actually done by its directors, managers, employees and other persons. Thus, a company is the name given collectively to that group of people who together work for it with common objectives and can be penalized or punished for their criminal acts, which shall be unveiled when the corporate veil is lifted, as they are nothing but the alter ego of the corporation.

The **Environment Protection Agency (EPA)** announced that Volkswagen had violated the Clean Air Act. The CEO was hit with major criminal charges for fraud, conspiracy and defalcation. Other former CEO's, managers, and the chairman were imprisoned and fined for their acts too.

This popular scandal highlights the concept of **"Corporate Criminal Liability"** very clearly. As the title explains, it is the mal (evil or bad intention) fiction (unseeable act) of the fictitious (intangible) entity. It is a legal principle which tells us that a corporation is recognized as an artificial separate legal person and can be held criminally responsible for offences committed by its employees, directors, officers or agents while acting on behalf of the corporation. It is necessary because a corporation is capable of owning properties, entering into contracts, earning profits, suing and being sued in its name. With these rights comes the possibility of violating and misusing them, which shall be curbed and penalized.

2. LANDMARK CASES IN INDIA

In the landmark case of ***Standard Chartered Bank vs. Directorate of Enforcement (2005)***,[4] criminal proceedings were initiated against the bank for alleged violations of the Foreign Exchange Regulation Act, 1973 (FERA) for unauthorized foreign exchange transactions. The revolutionary question, whether a corporate body could face prosecution under penal provisions that prescribed imprisonment as the only form of punishment, was addressed in this

[3] Salomon v. A. Salomon & Co., [1897] A.C. 22 (H.L.) (appeal taken from Eng.).
[4] Standard Chartered Bank v. Directorate of Enforcement, (2005) 4 S.C.C. 530 (India).

case. It reversed the prior ruling of ***Assistant Commissioner vs. Velliappa Textiles Ltd. (2003)***[5] where it was ruled that a corporate entity cannot be prosecuted for offences that mandate a sentence of imprisonment, as a **"juristic person"** cannot be imprisoned.[6] In the 2005 case, the Supreme Court passed a judgment stating that companies are amenable to prosecution even when imprisonment is mandatory for natural persons. It was marked as a major development in Indian criminal jurisprudence, establishing that corporate entities can be held criminally liable where statutes provide for punishment including imprisonment and fine.

The court clarified further in the case of ***Iridium India Telecom Ltd. vs. Motorola Inc. (2010)***[7] company can be prosecuted for offences requiring mens *rea* (criminal intent). It held that corporations which are juristic persons are capable of having criminal intent and can be prosecuted for such offences which contained mens rea. However, it depends on the acts and state of mind of individuals in control of the company's affairs as stated by the **"alter ego"** doctrine.

3. ESSENTIALS

For a corporation to be held criminally liable, it shall firstly exist as a corporate entity, distinct from its shareholders and employees. It shall have the criminal intent ***(mens rea)*** for the act which is committed ***(actus reus)***, these being the two most essential. The wrongful act shall be done within the scope of its authority and must be attributable to the company for its benefit without the absence of a valid defence.

4. HISTORICAL EVOLUTION OF CORPORATE CRIMINAL LIABILITY

Early jurisprudence in the pre-19th century stood by the view that a corporation simply couldn't commit a crime because it did not have a soul; therefore, there was no possibility of establishing mens rea, and it had no body which could be physically imprisoned. From this logic came the Latin maxim ***societas delinquere non potest*** - "a company cannot be guilty of wrongdoing". As corporations gained economic power and transactions increased with the Industrial Revolution during the Mid-19th Century, English Courts began holding corporations liable for the public nuisance and misfeasance caused by them. This was still not true criminal liability

[5] Assistant Comm'r, Assessment-II, Bangalore v. Velliappa Textiles Ltd., (2003) 11 S.C.C. 405 (India)
[6] Shivangi Singh, *Evolution of Corporate Criminal Liability in India*, Int'l J.L. Mgmt. & Human. [IJLMH], https://ijlmh.com/wp-content/uploads/Evolution-of-Corporate-Criminal-Liability-in-India.pdf
[7] Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 S.C.C. 74 (India).

in the modern sense but was closer to a regulatory penalty, as it established the crucial principle that a legal entity could be held responsible for harm caused through the collective action of its members.

The actual breakthrough happened in ***New York Central & Hudson River Railroad Co. vs. United States (1909)*** [8] where the defendant was held criminally liable for the unlawful act of its agent in the payment of rebates to another company, establishing that a corporation may be held criminally liable for the acts of its agents acting within the scope of their authority.[9] Three conditions were formed for liability under ***respondeat superior*** "let the master answer". Firstly, the agent should have committed an illegal act accompanied by mens rea. Secondly, the agent must have acted within the scope of its employment, and lastly, it must have been done with the intention to benefit, even if it actually did not.[10] However, English Law had a different view, rather than holding companies responsible for any employee's act, they developed the **identification doctrine** which said that the wrongdoer was the company's "directing mind and will." This was first brought up in ***Lennard's Carrying Co Ltd vs. Asiatic Petroleum Co Ltd (1915)***[11] which limited the **"directing mind and will"** to directors or very senior executive management.[12] Although it was found to be narrow and difficult to apply in ***Serious Fraud Office vs. Barclays PLC (2018)***[13] where the court found that despite the defendants being senior executive directors, their actions could not be attributed to Barclays because they had not been delegated entire authority.[14]

Frustrated with finding the proof of "directing mind", legislatures shifted the focus from **"Who did it?"** to **"Did the company fail to stop it?"** This came into light in the Corporate Manslaughter and Corporate Homicide Act, 2007; Bribery Act, 2010; Criminal Finances Act,

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[8] New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).
[9] New York Central & Hudson River Railroad Co. v. United States, Casebriefs, https://www.casebriefs.com/blog/law/criminal-law/criminal-law-keyed-to-kadish/group-criminality/new-york-central-hudson-river-railroad-co-v-u-s/
[10] Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375318
[11] Lennard's Carrying Co. v. Asiatic Petroleum Co., [1915] A.C. 705 (H.L.) (appeal taken from Eng.).
[12] Bracewell LLP, *Extension of Corporate Criminal Liability in the United Kingdom*, Bracewell (June 21, 2023), https://www.bracewell.com/resources/extension-of-corporate-criminal-liability-in-the-united-kingdom/.
[13] Serious Fraud Office v. Barclays PLC, [2018] EWHC 3055 (QB) (Eng.).
[14] Gibson, Dunn & Crutcher LLP, *Expansion of Corporate Criminal Liability in UK: Reform of Identification Principle and New Offence of Failure to Prevent Fraud*, Gibson Dunn (Nov. 6, 2023), https://www.gibsondunn.com/expansion-of-corporate-criminal-liability-in-uk-reform-of-identification-principle-and-new-offence-of-failure-to-prevent-fraud/.

2017, etc., which focused on the **"failure to prevent"** model of liability. [15]

Identifying and punishing the wrongdoers or "directing minds" is essential to punish and curb the evil acts, but it parallelly causes job losses, market instability and pension fund collapse, which punishes innocent stakeholders more than wrongdoers. This cause-and-effect relation gave rise to **Deferred Prosecution Agreements (DPAs),** which can be voluntarily entered into by accepting liability and escaping conviction, to which the prosecutor agrees by suspending criminal charges against the defendant in exchange for the fulfilment of specific conditions. During the performance period, if the defendant complies with the prosecutor's conditions, the charges are dismissed; if not, the case proceeds to trial.[16] This meant the company could conduct an internal investigation to ascertain what and who went wrong and set forth a plan of reform rather than unfairly disadvantage the stakeholders and other innocents involved. [17]

Despite the benefits and feasibility of avoiding trial, it faced serious criticisms because shareholders and employees bore fines whereas decision makers faced no major retribution. This came into notice in the **Enron collapse (2001)** where billions were wiped out as fines, destroying valuable savings of employees for the years of fraud, and nobody actually went to prison.[18] As a result, the ***Sarbanes-Oxley (SOX) Act of 2002*** made individual accountability statutory by requiring CEOs and CFOs to personally certify the accuracy of financial statements or they would have to face up to 20 years in prison[19] and can't escape by just paying a fine. Inevitable to acknowledge that ***section 806*** of this act gave provisions to employees to report any fraud in their company they notice without being fired and speak up without hesitation.

Other statutes like ***The Yates Memo (2015)*** required DPAs to name individuals who had wronged so the executives won't be able to buy immunity for themselves.[20] The **"failure to**

[15] *Corporate Criminal Liability*, Prac. L., Thomson Reuters, https://uk.practicallaw.thomsonreuters.com/7-595-5466

[16] Pranav Nair, *Cross-Jurisdictional Analysis of Deferred Prosecution Agreements*, NUALS L.J. (Nov. 13, 2024), https://nualslawjournal.com/2024/11/13/cross-jurisdictional-analysis-of-deferred-prosecution-agreements/.

[17] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

[18] *Enron Scandal*, Encyc. Britannica, https://www.britannica.com/event/Enron-scandal

[19] Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 80 Fed. Reg. 11,865 (Mar. 5, 2015), https://www.federalregister.gov/documents/2015/03/05/2015-05001/procedures-for-the-handling-of-retaliation-complaints-under-section-806-of-the-sarbanes-oxley-act-of.

[20] Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Justice, on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/individual-accountability.

prevent" statutes as mentioned in preceding paragraphs, imposed a proactive duty for which the companies had to build compliance systems or collectively face a criminal liability regardless of who committed the act. [21]

5. THEORIES OF CORPORATE CRIMINAL LIABILITY

Broadly, a company can commit a crime in two ways: either on purpose with an objective (intentional crimes) or without purpose/mens rea (strict liability/regulatory offences). The former is when crimes are committed against property such as corporate theft, criminal breach of trust, economic fraud, etc., whereas the latter includes cases leading to environmental pollution, food adulteration, occupational safety violations, etc., in which law can impose liability for acts or omissions done without intent or knowledge.[22]

The four popular theories have evolved from **individual-focused models** (respondeat superior, identification theory) to **systemic ones** (aggregation theory, corporate culture), indicating that corporate wrongdoing is rarely done by one man alone. The following are the theories explained-

5.1) Respondeat Superior or Vicarious Liability:

As mentioned in the preceding parts, this theory originated from ***New York Central Railway vs. United States (1909)***[23] in which the corporation can be made criminally liable for the acts of its employees or agents provided the act is committed within the scope of its employment and with the intent to benefit the corporation, regardless of whether it did. [24]

This rationale is based on the theory that a company acts and takes decisions through its employees, but eventually it is done in the name of the company and for its benefit.[25] Thus, it is important for the master, who is responsible for the company's activities and reputation, to

[21] Shabir Korotana, 'The Corporate "Failure to Prevent" Principle in the UK Bribery Act 2010: Philosophical Foundations of Economic Crime' (2024) 45(1) Statute Law Review hmae007 https://doi.org/10.1093/slr/hmae007

[22] Lakshmikumaran & Sridharan Attorneys, *Doctrine of Attribution in Corporate Criminal Liability*, LKS L. (Sept. 17, 2013), https://www.lkslaw.com/insights/articles/doctrine-of-attribution-in-corporate-criminal-liability.

[23] New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).

[24] New York Central & Hudson River Railroad Co. v. United States, Casebriefs, https://www.casebriefs.com/blog/law/criminal-law/criminal-law-keyed-to-kadish/group-criminality/new-york-central-hudson-river-railroad-co-v-u-s/

[25] Erathi Anudeep, *Corporate Criminal Liability: Analysis with Respect to Indian Penal Laws*, 12 Int'l J. Creative Rsch. Thoughts 2402049 (2024), https://ijcrt.org/papers/IJCRT2402049.pdf.

have knowledge of what is happening in the company's name and be accountable for it. Consequently, a company can be held liable for its employee's misconduct, so it's extremely important and unavoidable for the superiors to keep a routine check on its agents or employees.

Along with increased responsibility, this theory also contributes to enhancing corporate accountability by making it easier to establish liability. Critically, it may often unfairly punish corporations and innocent shareholders for the actions of lower-level employees or impose liability on senior management when they did not know about the misconduct.

5.2) Identification Theory:

This theory was laid in ***H L Bolton (Engineering) Co Ltd vs. T J Graham & Sons Ltd (1957)***[26] in which Lord Denning reasoned by saying that a company can be likened to that of a human body. Metaphorically, it too has a brain and nerve centre which controls what it does and has hands which act as tools which follow directions from the centre. The state of mind of the managers and directors is referred to as the brain or the directing mind and will of the company, which is followed by the servants and agents who act on their directions, being the hands. [27]

It is based on the doctrine of alter ego, which allows the courts to disregard the separate legal entity status of the company and **"identify"** the wrongdoer/s along with the extent of his/their liability. The focus shall be more on the persons having decision-making authority, i.e., "the directing mind and will" rather than on persons implementing such policies.[28] The criticism which follows this theory is that in modern highly voluminous corporations with diffused decision-making structures, it becomes difficult to ascertain a single directing mind which allows them a gap to escape liability.

5.3) Aggregation Theory:

As inferred from its alternate name **"Collective Knowledge Doctrine"**, it can be said that no single individual possesses all the knowledge necessary to establish criminal intent. It is the knowledge and actions of multiple employees which may be combined to determine the

[26] H.L. Bolton (Eng'g) Co. v. T.J. Graham & Sons, [1957] 1 Q.B. 159 (Eng. C.A.).,,
[27] *reviously Under the Common Law*, LawTeacher, https://www.lawteacher.net/free-law-essays/business-law/previously-under-the-common-law-law-essays.php
[28] Harshita Choudhary, *Corporate Criminal Liability*, iPleaders Blog (Aug. 10, 2021), https://blog.ipleaders.in/corporate-criminal-liability/.

corporation's state of mind. In ***United States vs. Bank of New England (1987)***[29] it was addressed that corporations divide knowledge, expertise, duties and operations into smaller components which means that no single employee would have full knowledge of the violation but collectively as employees they possess all the necessary knowledge. Even though a single person can't be said to possess complete knowledge and mens rea to commit the wrongful act but the aggregated corporate criminal knowledge as a whole is deemed to have known the facts and shall be held liable.

This doctrine is particularly influential in white-collar crimes, banking regulation and securities laws where knowledge and liability of the act go beyond the traditional individual-focused models as discussed prior. However, it is critically said to be over-inclusive when innocents are held liable without actually being culpable, raising concerns about fairness. [30]

5.4) Corporate Culture Model:

Codified in ***section 12 of Australia's Criminal Code Act, 1995***; it is the most modern and progressive theory, which states that instead of looking at an individual's act, the organizational environment within the corporation, its corporate culture and the encouragement, tolerance or failure to prevent the criminal misconduct must be examined.[31] A corporation may therefore be held liable when its policies, practices, incentives, or management systems create conditions that facilitate criminal behaviour. For example, if compliance requirements are ignored and adequate oversight mechanisms are not complied with. Critics say it is difficult to determine the existence of criminal corporate culture as it often requires assessing the internal management and policies of the corporation, which is private to them.

6. Problems with Current Corporate Criminal Liability

The current corporate criminal liability framework struggles with systemic enforcement challenges mainly because corporations are legal fictions and not physical beings which can be confined to imprisonment for punishment. It is challenging to identify and prove the wrongdoer along with criminal intent supporting the acts. The frauds and scams are evidence of the

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[29] United States v. Bank of New Eng., N.A., 821 F.2d 844 (1st Cir. 1987).

[30] Mihailis E. Diamantis, *Corporate Agents in Criminal Law: An Argument for Comprehensive Identification*, 78 Cambridge L.J. 334 (2019), https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/corporate-agent-in-criminal-law-an-argument-for-comprehensive-identification/67E19504E1573BA890E8E92AE23B6823.

[31] Criminal Code Act 1995 (Cth) (Austl.), https://www.legislation.gov.au/C2004A04868/2018-12-29/text.

material fact that fictitious corporations can also commit crimes, regardless of the traditional beliefs that only a soul and body can commit crimes. The following are the current problems attached to ascertaining corporate criminal liability-

6.1) Failure to Develop Liability Rules:

The current standards highlight the flaws of the legislature and courts in developing effective liability rules that accurately and fairly punish the wrongdoer.[32] **Non-Prosecution Agreements (NPAs)** are the most convenient methods to escape full responsibility and accountability, undermining the integrity of law enforcement. Vague norms and lack of expertise of law enforcement agencies constrain the ability of authorities to effectively prosecute corporate entities.

6.2) Punishing the Innocents:

Fines levied as part of DPAs affect the funds/assets of the company, employees' savings, shareholders' earnings and pension funds. Rather than punishing the wrongdoer by enforcing imprisonment, such fines disadvantage the innocents, and the actual objective of deterrence and punishment is not met. Such hefty fines lead to a reduction in profits, leading to lower share prices for the shareholders and higher prices for consumers. Lowering costs, the company may aim at cutting costs by laying off some employees. There is also a possibility that the executives who actually orchestrated the misconduct may already have retired or resigned after committing the act.[33]

6.3) Difficulty in Proving Mens Rea:

When it comes to traditional crimes like murder, culpable homicide, etc, it is comparatively easier to locate the intent of the accused behind the act than it is to point it out in corporate cases. The accused can be examined and punished for having a guilty mind, but how possibly can the fictitious entity's state of mind be assessed? The scams and frauds can be proved based on numbers and financial records, but can the guilty mind or mens rea be proved? If yes, is it

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[32] William S. Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Univ. of Chicago Press 2006).

[33] Peter Gottschalk, *Deferred Prosecution Agreements as Miscarriage of Justice: An Exploratory Study of Corporate Convenience*, 4 J. Econ. Criminology 100059 (2024), https://doi.org/10.1016/j.jeconc.2024.100059.

actually accurate?

Courts usually identify the corporation's state of mind with that of senior executives like the CEO, CFO, Managing Director, etc., but in modern times decision-making is diffused across the company for the sake of expertise and not confined just to the senior level. Thus, it would be unfair to take that road, and in reality, the intent and act which is to be held criminally liable can not be possessed by just one person who is mainly charged for it, like the CEO. [34]

When the rules and regulations are infringed, the employees responsible at that stage are aware of it, and when they let it pass, they become liable. The responsibility doesn't just end at the top but begins from the bottom.

6.4) DPAs- Accountability Without Consequence:

Such agreements, being popular in the US and UK, have brought fierce criticism for providing a mechanism to allow corporations to purchase immunity for their wrongs and avoid actionable criminal liability by being prosecuted. In the 2008 financial crisis in the US, few companies were termed to be "too big to jail" and that their prosecution would cause great damage to the economy. Corporate criminal liability loses legitimacy when economic importance becomes a practical defence against criminal enforcement. Thus, these are ways in which deterrence and punishment is left non-compliant.[35]

6.5) Corporate Culture is the Culprit:

The company operate on shared values and objectives, and these can be turned to malice with ulterior motives disturbing the culture. The scandals can not be said to be the influence of one bad actor but of the shared values, expectations, incentives and informal norms of the company. Traditional criminal law focuses on individuals, but oftentimes it emerges from systemic pressures, organizational structures and collective decision making which the law fails to capture.

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[34] Alexander Sarch, *Collective Knowledge and the Limits of the Expanded Identification Doctrine*, 44 Oxford J. Legal Stud. 920 (2024), https://academic.oup.com/ojls/article/44/4/920/7713078.

[35] Colin Levy, *Corporate Criminal Liability*, Sidebars Blog (Mar. 11, 2024), https://www.sidebarsblog.com/p/corporate-criminal-liability

6.6) Fines are substantial for the company:

Fines which are imposed for the compensation of damage are intended to be treated as punishment, deterrence and encouragement for future compliance. However, large MNC's earn billions annually, and such fines may not effectively alter their behaviour, while still being profitable in business. When the penalties are lower than profits, this encourages them to act for their benefit with malice, and it wholly rejects the motive of deterrence and is treated as just another business expense.

6.7) Jurisdictional Divergence and Inconsistency:

MNC's tackle business globally across multiple countries. One country might be manufacturing the product while the other would be selling it and another would be designing or processing data. Multiple questions arise when a wrong has been committed as to which country has jurisdiction and which law applies to it. National criminal laws are frequently ill-equipped to regulate global enterprises. This creates enforcement gaps that sophisticated corporations may exploit, which is called **"Regulatory Arbitrage."**[36]

6.8) Emerging Challenge of Artificial Intelligence (AI):

With increased use of AI in business and its activities, the challenges faced are greater than the benefits when it comes to ascertaining liability. Companies rely on AI to predict algorithms; make work faster and more efficient; use it for compliance measures and as a decision-making tool. In this process, AI can cause market manipulation and consumer harm among other damages. So, who would be held liable? There is no single accurate answer. It could be the programmer, the corporation, the directors or the AI itself. The more autonomous AI becomes, the harder it becomes to attribute criminal intent to human actors. This may expose major weaknesses in existing doctrines of corporate criminal liability.

7. Reforming Corporate Criminal Liability

Considering the current problems as mentioned earlier, it is important that reforms and solutions are brought to make accountability more effective, fair, and suitable for modern corporations. The objective is not merely to increase corporate convictions but to create a

[36] *Corporate Criminal Liability*, Slaughter and May, Horizon Scanning 2026, https://www.slaughterandmay.com/horizon-scanning/2026/crisis-management/corporate-criminal-liability/

system that effectively acts as deterrence against wrongdoing; promotes ethical corporate culture and ensures accountability without unfairly punishing innocent stakeholders. The following are suggestive evolutionary reforms-

7.1) Reforming the Identification Doctrine:

Since decision-making is now decentralized in modern corporations, so shall the process for identifying the "directing mind and will. ***Economic Crime and Corporate Transparency Act 2023 (ECCTA)*** addressed this problem by shifting the approach from "Did the company do it to "Did the company try to stop it?" This logically makes it easier to identify the wrongdoer because even if the employee commits fraud to benefit the company, the company automatically becomes liable for it, even if the boss didn't have any idea about it and can escape it only by proving that it had proper and genuine anti-fraud systems which the employee was bound to follow but violated. [37]

7.2) Widening the scope of "Directing Mind":

As per the provisions of ***section 196 of ECCTA***, it is no longer just the CEO or Board of Directors who count as the directing minds but also the senior managers, compliance managers, etc. running a key part of the business because what matters is the level of responsibility and influence and not just the job title.[38]

In the above context, 'senior manager' is understood as any individual who plays a significant role in making decisions about substantial activities and its management. [39]

7.3) Fixing the "Corporate Culture":

Most scandals are not planned and executed by a single employee but emerge from toxic organizational culture and objectives which include aggressive sales targets, reward systems encouraging unethical conduct, etc. ***Australia's Criminal Code Act, 1995*** says that you can

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[37] *Corporate Criminal Liability*, Law Commission, https://lawcom.gov.uk/project/corporate-criminal-liability/

[38] Jeremy Horder, *Corporate Criminal Liability under the Economic Crime and Corporate Transparency Act 2023*, 45(1) **Legal Stud.** 133 (2025), https://www.cambridge.org/core/journals/legal-studies/article/corporate-criminal-liability-under-the-economic-crime-and-corporate-transparency-act-2023/F7D0E827CC261F8B77898617CB687573

[39] David Lowe & Teresa Edwards, *Understanding ECCTA: New Corporate Offence of "Failure to Prevent Fraud"—What Do You Need to Know?* Gowling WLG (Sept. 1, 2025), https://gowlingwlg.com/en/insights-resources/articles/2025/understanding-eccta-new-corporate-offence-of-failure-to-prevent-fraud-what-do-you-need-to-know

prove a company's guilty mind by looking at its culture and not at a single person. It is important to examine if the company had an unspoken attitude which encouraged rule breaking; or looked the other way when employees broke laws where compliance was not taken seriously. Regular checks and penalties for non-compliance must be enforced to ensure the culture doesn't influence the company into misconduct.[40]

7.4) DPAs to be more serious:

When the company is given an alternative to avoid a full criminal conviction by buying their way out of trouble with no real consequences, it inevitably becomes an easier choice. Thus, DPAs shall be made more transparent, judicially supervised and linked more firmly to individual prosecutions so the executives cannot simply hide behind the company's settlement. **Serious Fraud Office/ Serious Fraud Investigation Office (SFO)** should be given more funding and, as an incentive, be allowed to keep a share of DPA revenues to make it more enforceable.[41]

7.5) Bigger and Better Punishments:

Apart from just fines, the companies should be made to publicly disclose what they did wrong, even if it hurts their reputation. They shall carry out community benefit activities and be ordered to reform internally while also disciplining the corrupt individuals. The company shall also be banned from entering into government contracts, as this would potentially harm the company's growth and future opportunities.[42]

7.6) Hybrid Model to the rescue:

No single approach is perfect and efficient. Thus, it is ideal to combine the best of all three. A hybrid approach shall be adopted to make it more flexible, fairer and harder for companies to default. The identification doctrine should be used in those cases where the obvious individual wrongdoers are at the top; aggregation theory to be used when no single person has full

[40] Sarah Jane Sutherland, *Breaking the Cycle: The Development of Corporate Criminal Liability* (LL.B. (Hons.) dissertation, Univ. of Otago, 2008), https://www.otago.ac.nz/__data/assets/pdf_file/0027/327717/breaking-the-cycle-the-development-of-corporate-criminal-liability-041733.pdf
[41] Heath Hyde, *Deferred Prosecution Agreements*, Heath Hyde Lawyer, https://heathhydelawyer.com/deferred-prosecution-agreements
[42] Aoife Ryan, *Failure to Prevent Fraud: A New Era of Corporate Accountability under the ECCTA 2023*, Hill Dickinson (Aug. 4, 2025), https://www.hilldickinson.com/our-view/articles/failure-to-prevent-fraud-a-new-era-of-corporate-accountability-under-the-eccta-2023/

knowledge, and corporate culture should be used to hold companies accountable for their systemic failures even when no one individual is clearly to blame. [43]

7.7) Prevention is better than cure:

The easiest way to prevent scandals is by mandating compliance programs, internal reporting mechanisms, whistleblower protections, fraud-prevention procedures, regular risk assessments, etc. Especially with increased reliance on AI and automated systems, maintaining human oversight, conducting AI risk assessments and documenting AI decision-making process becomes important.

8. Future of Corporate Criminal Liability: From Human Fault to Systemic Accountability

Corporate Crime Law is refocusing its attention from "Intent" to "Architecture". The question has shifted from "Who intended for this crime to happen?" to "Who owns the architecture of the system that produced this crime?" The liability for a corporate crime should be based on the level of ownership and control over the system and the way it was designed, built, deployed and the benefits derived from the evil act. The person or individuals who designed, released into commerce and profited from that product cannot hide behind the justification that no one intended for harm to come from the use of that product. Although the corporation may be a legal 'fictitious' entity, the result of the crime committed is a 'real' consequence experienced by the economy and society, so is the power that created that real consequence. With the fusion of AI in the "real world work", the game of governance and regulation has shifted in the following ways:

8.1) The Death of the Traditional "Guilty Mind" Approach:

Earlier, the liability depended on identifying and punishing the human actor who possessed mens rea, but now in modern times companies have adopted machine-learning algorithms, AI-based compliance tools and automated decision-making systems which do not remove or even reduce the incidence of corporate harm. The classical doctrines of identification theory and vicarious liability become increasingly inadequate because the misconduct might occur without

[43] Abigail Gill, Henry Hall & Lindsay Apted, *Australian Corporate Criminal Responsibility Regime to Be Overhauled*, Corrs Chambers Westgarth (Sept. 4, 2020), https://www.corrs.com.au/insights/australian-corporate-criminal-responsibility-regime-to-be-overhauled

a clearly identifiable human decision-maker.[44]

8.2) The "Extended Corporate Mind" Theory:

When AI generates harmful outputs, there are real victims of that and real damage is done to them, but for it, there is no obvious person to punish. Empirical research says that AI systems can actively assist in concealing corporate wrongdoing, which is dangerous because then AI would become instruments of obstruction of justice.[45]

Utilization of algorithms for making decisions means that AI systems, which act as the extended mind of the corporate, must be considered as part of the corporate decision maker under corporate criminal law. The corporate entity should be considered to possess the AI's "knowledge" and "intent" in the same way that attributes are attributed to humans as agents of the corporation. This provides an important closure to a legal loophole that has allowed corporations to escape liability by substituting people for machines. The legal consequences for corporate wrongdoing attributable to AI systems will be borne by all individuals with a degree of control over the system, making the execution, design or development of a harmful AI system legally accountable for any misconduct committed by the algorithm.[46]

8.3) Emergence of "Failure-to-Prevent" Offences:

Instead of proving intent, prosecutors may win by establishing evidence that the company, while using AI, failed to follow reasonable safeguards to prevent and monitor its misuse. The future of corporate criminal law may resemble public health regulation where corporations will be punished not merely for causing harm but for failing to manage foreseeable risks.[47]

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[44] Mattia Cutolo, *Corporate Criminal Liability and Artificial Intelligence: Doctrinal Overview, Problems and Perspectives*, 2(1) **Open Access J. Criminology Investigation & Just.** (2024), https://medwinpublisher.org/index.php/OAJCIJ/article/view/3339

[45] Mark Pieth & Radha Ivory, *Emergence and Convergence: Corporate Criminal Liability Principles in Overview*, in **Corporate Criminal Liability: Emergence, Convergence, and Risk** 3 (Mark Pieth & Radha Ivory eds., Springer 2011), https://link.springer.com/chapter/10.1007/978-94-007-0674-3_2

[46] Australian Law Reform Commission, *Corporate Criminal Responsibility: The Case for Reform* (Dec. 31, 2020), https://www.alrc.gov.au/news/corporate-criminal-responsibility-the-case-for-reform/

[47] David Bario, *Extension of Corporate Criminal Liability in the United Kingdom*, Reuters (May 28, 2025), https://www.reuters.com/legal/legalindustry/extension-corporate-criminal-liability-un is punishableited-kingdom-2025-05-28/,

8.4) The EU Artificial Intelligence Act:

It prohibits AI violations which would otherwise attract fines of up to €35 million or 7% of total worldwide annual turnover, whichever is higher and non-compliance with high-risk obligations up to €15 million or 3% of total worldwide annual turnover.[48] Italy became the first EU jurisdiction to introduce explicitly AI-specific criminal liability provisions by establishing fines of up to a maximum of €774,685 and in serious cases, disqualifying measures for up to one year, including disqualification from conducting business, suspension or revocation of authorizations, a ban on contracting with the public administration, and exclusion from grants, financing and contributions. For crimes committed with the support of AI for creating unlawful AI-generated or altered content such as deepfakes is punishable by imprisonment of one to five years.[49]

8.5) Hybrid Model of Liability- The Next Evolutionary Stage of Corporate Criminal Liability:

Traditionally, only humans were responsible and accountable for the decision-making of the company, but AI challenges this assumption, and if it does any wrong, then who would be criminally liable for it? When humans were concerned, it was simpler because they would be held liable for the wrong done on their part, but when it comes to AI, there is an **"accountability gap"**. Following the previously mentioned theories- under Identification Theory, prosecutors may struggle to locate a single "directing mind", under Vicarious Liability, the AI is not considered an employee; and under Corporate Culture Theory, proving a defective culture may be difficult.[50]

The Hybrid Model counters the traditional position that liability is solely upon either humans or corporations, such that it also splits responsibility across many levels of decision-making. This model will allocate responsibility according to the following principle: Responsibility will be given to whoever has control over it, supervises it and benefits from it. Thus, anyone who

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[48] Jeremy Horder, *Corporate Criminal Liability under the Economic Crime and Corporate Transparency Act 2023*, 45(1) **Legal Stud.** 1 (2025), https://www.researchgate.net/publication/388810399_Corporate_criminal_liability_under_the_Economic_Crime_and_Corporate_Transparency_Act_2023

[49] *Corporate Criminal Liability - some practical proposals from Australia*, Lexology (January 30, 2020), https://www.lexology.com/library/detail.aspx?g=0429c896-7ab5-4236-9f06-3971d7d2dbb2

[50] Martin Petrin, *AI Accountability from the Outside In: Corporate Liability, AI Goverthere werenance, and Managerial Duties*, Eur. Corp. Governance Inst., Law Working Paper No. 935/2026 (May 30, 2026).

contributes to the development and implementation of an AI system, or any of those who receive a financial benefit from said system, should be accountable to some extent for the misuse of, or the unintended consequences (good or bad) created through the use of the AI system. This model is being increasingly referenced in the developing literature discussing the impact of AI on corporate wrongdoing and failures of governance.[51]

9. Conclusion

Historically, crime in corporations meant the wrongful act and the human intent behind it, but now it includes the harm, systemic failure which caused the harm and inadequate oversight to prevent it. The focus has moved from finding a guilty individual to identifying a defective system. The traditional theories or models were not wrong fundamentally, but their approach for ascertaining liability has evolved in the following way-

9.1) Individual Liability- Senior executives and directors would remain personally liable if the answers to the following questions are yes. The law would ask if the directors conducted adequate AI risk assessments, ignored any foreseeable risks, deliberately reduced human oversight to maximize profits or whether the warnings from compliance teams. In the AI era, directors may be judged not only for what they know, but for what they should have known about the systems they deploy.

9.2) Corporate Liability- The company will still have to be held liable because the company created the environment in which the AI operated, which the courts would examine in terms of the governance structure, compliance monitoring of AI and internal systems, auditing procedures for AI, etc. This changes the focus from individual (misconduct) liability to organizational (fault) liability. This is also consistent with the Corporate Culture Theory, which most scholars believe is now a better way to characterize the behaviour of modern corporations than older methods such as the traditional theories of identification. The corporation should not escape liability merely because decision-making has been delegated to an algorithm. Otherwise, corporations could deliberately use AI as a shield against criminal accountability.[52]

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[51] Gloria Shajobi-Ibikunle & Shajobi Oseghale Deborah Oluwadamilola, *Artificial Intelligence and Corporate Criminality: Emerging Challenges in Liability and Accountability*, 5(3) **L. & Soc. Just. Rev.** (2024), https://nigerianjournalsonline.org/index.php/LASJURE/article/view/1991

[52] Neil Cavanagh, *Corporate Criminal Liability: An Assessment of the Models of Fault*, 75(5) **J. Crim. L.** 414 (2011), https://journals.sagepub.com/doi/10.1350/jcla.2011.75.5.729

9.3) Failure to Prevent Liability- The steps taken by the company to prevent the crime from happening are what is more important than the criminal intent behind the act. So, the question a prosecutor might ask is "Did the corporation take reasonable steps to prevent foreseeable harm?" This model is already gaining prominence because it overcomes many of the evidentiary difficulties associated with proving corporate mens rea.

9.4) Technical and Governance Accountability- Future corporate criminal liability may punish governance failures before it punishes intentional misconduct. It evaluates the quality of governance systems rather than focusing exclusively on individual intent.

10. Wrap-up

Eleven years since the defeat device scandal led to an inquiry into corporate identity, this essay has come to recognize that corporations are not a single person, but rather a structure. The identification doctrine sought a single directing mind, due to the early law's inability to recognize guilt unless it had an associated face; aggregation theory acknowledged that knowledge and authority are now distributed among departments such that no individual can see both in their entirety; corporate culture theory conceded the unspoken acceptance of cutting ethical corners could be as culpable as any boardroom directive; and the failure-to-prevent theory finally ceased to be concerned with "who" meant it but rather who didn't prevent it from occurring - whether they had the actual authority or not. No theory was wrong, but rather, they were the law catching up to an established truth shown through Salomon's case in 1897- that while a corporation may be fictitious in a legal sense, its actions have immediate and sometimes far-reaching consequences.

The "theory of corporate liability," the notion that a corporation is capable of being found liable for its wrongs based upon the existence of a "guilty mind," is reflected in the manner in which corporations have been treated with respect to civil law for decades. The problem with this approach to corporate liability is that it assumes that a corporation is an entity that has the capacity to be found liable for the actions of its employees, officers, and agents, and that there is a single individual or multiple individuals within a corporation who constitute the "guilty mind" of that corporation. This approach to corporate liability allows a corporation to camouflage its real wrongs, as they can be hidden behind an artificial entity that is too diffuse to hold accountable and/or a corporation that is simply too profitable to be imprisoned.

Because artificial intelligence will increasingly absorb the actions of a corporation through the application of technology (and, therefore, eliminate the location of the corporate "guilty mind"), the traditional (or existing) view of how to seek the corporate "guilty mind" will become old-fashioned, and the traditional (or existing) view of how corporations are held liable will become inconsistent with the evolving view of corporate liability.

Thus, when artificial intelligence replaces human decision-making, the new view of corporate liability is that corporations will not be held liable based upon the existence of a "guilty mind," but rather based on "what did you build, what did you know it could do, and what did you do to prevent it from causing harm?" A corporation may not have a soul to call evil and a body to imprison, but the system it builds and profits from does have consequences when defaulted, and it is high time the law makes such systems answer for themselves.