

'A soul to be damned and a body to be kicked'. Past, present and future of white-collar crime and corporate criminal liability in England and the United States.

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1. Introduction.

This article examines the evolution of white-collar crime and corporate criminal liability in England and the United States.

The first section analyzes the birth of white-collar crime and its evolution from the 17th century to the 20th century, with a particular focus on the identification principle.

The second section analyzes the evolution of white-collar crime and corporate criminal liability in the United States during the 20th century. The American *respondeat superior* doctrine is compared with the identification principle, that regulates corporate criminal liability in England.

The third section explores the scholars' approach to corporate criminal liability, the reasons behind their widespread criticism, and the suggestions for reform in this area of law.

2. White-collar crime and corporate criminal liability under the English law.

2.1. The historical evolution.

The expression white-collar crime was created by the American sociologist Edwin Sutherland in 1949. Sutherland defined it "*a crime committed by a person of respectability and high social status in the course of his occupation*"¹. Although the expression is relatively recent, this kind of crimes has existed for centuries.

¹ Salinger L.M., *Encyclopedia of White-Collar & Corporate Crime*, Volume 1, Sage, 2005, p. 279.

Legal historians find the origins of white-collar crime *"in the tremendous financial growth which accompanied the British Industrial Revolution"*² in the second half of the 18th century.

The Industrial Revolution created a new finance-based economy, and the increasing number of entrepreneurs, brokers and financiers greatly expanded the potential for business crime.

Nonetheless, white-collar crime was already present in an embryonic form in the previous century, following the birth of the first corporations. The idea to join forces to carry out a business already existed in the Middle Ages: the medieval guilds were associations of people who exercised the same activity, but the business was always individual. The creation of the first modern corporations in the 17th century answered two specific needs: *"the need for higher concentrations of capital in business ventures, as well as the need for protection against losses if the venture failed"*³. Large corporations, like the East India Company (created in 1612) were directly engaged in business and owned property. They were soon recognized as persons by the law.

Another major development was the creation of the Bank of England in 1694 to finance the national debt through the issuing of government securities. The upper classes started to invest in the Stock Exchange and these investments very soon became the source of illicit activities. Already in 1697, a parliamentary inquiry found that *"numerous stockbrokers unlawfully Combined and Confederated themselves together, to raise or fall from time to time the Value of such Talleys, Bank Stock, and Bank Bills, as may be most Convenient for their own"*⁴. Moreover, the brokers soon discovered that spreading false rumors - such as the death of the monarch or a victory or defeat in a battle - could greatly affect the value of the government securities. The new corporations also offered great opportunity for fraud and in 1720 the first big scandal exploded. The South Sea Bubble, a speculative operation put in place by the South Sea Maritime Company, *"brought ruin to thousands of humble investors as well as a number of prominent merchants and tradesmen. Criminal allegations were leveled against the South Sea Company, and many of its directors fled abroad"*⁵.

Within a century from the Industrial Revolution, England had become a nation of companies and shareholders and the chances for business crime flourished during the Victorian Age (1837-1901).

² Robb G., *White-Collar Crime in Modern England: Financial Fraud and Business Morality, 1845-1929*, Cambridge University Press, 2002, p. 1.

³ Bernard T.J., 'The Historical Development of Corporate Criminal Liability', 1984, 22, *Criminology* 3, 1-17, p. 4.

⁴ Robb G., *White-Collar Crime in Modern England: Financial Fraud and Business Morality, 1845-1929*, Cambridge University Press, 2002, p. 11.

⁵ *Ibidem*, p. 14.

The greatest opportunities came from the 'railway mania', that is the development of railroad transport. In the words of a legal historian, "*big business on the scale we know it today began with the railways in the nineteenth century*"⁶. It is noteworthy that the first cases of corporate crime, both in England and later in the U.S., involved railroad companies.

Corporate civil liability was acknowledged from the start. It was common opinion that corporations should be civilly liable for the conducts of their agents as were the masters for the wrongful actions of their servants. However, while the civil liability was strict, the master could be held criminally liable only if he had commanded or consented to the servant's action. Thus, "*since corporate persons were not thought capable of giving command or consent, they were generally exempted from criminal liability*"⁷. The only exception concerned public nuisances, that is "*a class of common law offense in which the injury, loss, or damage is suffered by the public, in general, rather than an individual, in particular*"⁸. If the servant created a public nuisance, the master could be held criminally liable for such wrongdoing (vicarious criminal liability). Analogously, municipalities were criminally liable for the public nuisances created by the local officers who failed to maintain roads and waterways running through their jurisdiction. Railroad companies, whose business was the construction and management of transportation facilities, were highly exposed to the risk of creating public nuisance. Indeed, "*many of the early large corporate bodies such as the railway companies were set up under special charters or private Acts which imposed specific duties upon them, analogous to the municipal duties of local authorities*"⁹. Therefore, when the English Courts - and later the U.S. Courts - had to judge on cases of public nuisance, they found no obstacles in holding the corporations criminally liable for the conduct of their employees.

The first relevant case was *R v. Gt North of England Railway Co* in 1846¹⁰. After the company's workers accidentally destroyed a highway while constructing a railway bridge, the directors were charged of giving a false account with intent to avoid the payment of tolls. The Court came to the groundbreaking conclusion that the company was not only civilly liable, but also criminally liable

for the wrongdoing of its directors because they had acted in the interest of the company¹¹.

⁶ Ibidem, p. 31.

⁷ Bernard T.J., 'The Historical Development of Corporate Criminal Liability', 1984, 22 *Criminology* 3, 1-17, pp. 3-6.

⁸ https://en.wikipedia.org/wiki/Public_nuisance

⁹ Wells C., *Corporations and Criminal Responsibility*, Oxford University Press, 2001, p. 88.

¹⁰ *R v Gt North of England Railway Co* (1846) 115 ER 1294, Ex 1846.

¹¹ Wells C., *Corporations and Criminal Responsibility*, Oxford University Press, 2001, p. 93.

In conclusion, corporate criminal liability was created from the combination of two elements: white-collar crime and vicarious criminal liability.

Many factors increased the opportunities for business crime during the 19th and early 20th centuries.

The first one was the lack of specific laws. Until 1844 (when the Government adopted the 'Act for the Registration, Incorporation and Regulation of Joint Stock Companies') there were no laws regulating the formation of companies. The rule that directors must publish the company's accounts, or at least report to the shareholders, is a recent one. In the 19th century there was no real control on the activity of the directors and publicity was not an issue. Moreover, the idea that the Government should not interfere in business matters was still predominant. Therefore, company law was extremely permissive. In the words of one scholar, *"the Victorian ideals of rugged individualism and free trade were not receptive to set rules or restrictions. Many in the business community actually believed that success was incompatible with strict integrity. In financial matters people had little trouble believing that the end justified the means"*¹².

The lack of reliable information was another problem. News were manipulated as easily as two centuries earlier and the public was largely unaware of what happened in the business world. This state of affairs remained basically unchanged until the 1929 crisis, when a huge number of company frauds emerged for the first time. Newspapers only reported the most serious scandals, like the 'Marconi affair' in 1912. This case of abuse of privileged information involved several prominent British politicians, including the Attorney General Isaacs and the Chancellor of the Exchequer Lloyd George. They were accused of having purchased shares in the American Marconi Company at the same time when the British Government was negotiating a lucrative contract with the subsidiary British Marconi Company (whose chairman was the Attorney General's brother) to construct wireless stations for the Navy.

Finally, prosecuting a businessman, or worse a company, was very difficult. Until the end of the 19th century - when a system of public prosecution was developed - many business crimes went unpunished. The costs of the prosecution, the difficulty to find the necessary evidence, the reluctance to publicize the fact that they had been deceived were all factors that discouraged the victims from seeking justice. The companies and their directors had better lawyers and more instruments to defend themselves. Moreover, their wealth and prestige often gave them the opportunity to elude the investigations. The criminal statistics for England and Wales report that in 1900 only 16 fraud prosecutions on 94 were undertaken by the

¹² Robb G., *White-Collar Crime in Modern England: Financial Fraud and Business Morality, 1845-1929*, Cambridge University Press, 2002, p. 169.

Director of Public Prosecutions. Moreover, between 1896 and 1900, fraud trials were an average 115 a year (out of a total average of 51,000 trials a year)¹³.

2.2. The identification principle.

The development of corporate criminal liability under English law can be divided into three periods. In the first period (1846-1915) corporations could be held criminally liable for the conduct of their agents when this caused a public nuisance - as established in the above-mentioned *North of England Railway* case. Corporate criminal liability was only admissible as strict liability, that is for crimes that do not require proof of the mental element (*mens rea*). In the second period (1915-1990) the identification principle was developed. According to this principle, *"the acts and state of mind of those who represent the directing mind and will of the company are imputed to the company itself"*¹⁴. Consequently, the corporations are capable of committing offenses that require *mens rea*. The third period (after 1990) saw the removal of the last remaining barrier, with the recognition of corporate manslaughter.

The first attempts to define corporate criminal liability come from the British scholars of the 18th century. By that time, the concept of corporate personality, i.e. the fact that corporations are autonomous legal entities, was widely accepted. However, many Courts continued to reject the idea that the word 'person' in a criminal statute might include the companies, until this was confirmed by the 1889 Interpretation Act.

The next development was the acknowledgement of the vicarious criminal liability of the corporations.

In 1915 the identification principle was firstly introduced in case-law with the *Lennard's case*¹⁵. Identification means that, when those who represent the *"directing mind and will"* of the company act in its interest, they can be identified with it. In other words, they are the *alter ego* of the company: their acts and state of mind are imputed to the company and, when they act, it is the company that is acting. According to the *Lennard's* judgment: *"[A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the company, the very ego and centre of the personality of the company ... somebody who is not merely a servant or agent for whom the company is liable upon the footing respondent*

¹³ Ibidem, pp. 161-162.

¹⁴ <https://www.cps.gov.uk/legal-guidance/corporate-prosecutions>.

¹⁵ *Lennard's Carrying Co. Ltd v Asiatic Petroleum Ltd* (1915) AC 705.

*superior, but somebody for whom the company is liable because his action is the very action of the company itself*¹⁶.

The *Lennard's* judgement was certainly groundbreaking, even though "it was not until 1971 that any clear guidance emerged as to who for the purposes of criminal liability might be regarded as a company's alter ego"¹⁷.

The issue was brought before the House of Lords in *Tesco Supermarkets Ltd v. Natrass*¹⁸.

Tesco was charged under the 1968 Trade Descriptions Act for having sold goods at a price higher than the one indicated by the Act. Tesco claimed that the misleading price was caused by the default of a store manager and that such default was beyond the control of the company.

In the view of the House of Lords, "only those who control or manage the affairs of a company are regarded as embodying the company itself. The underlying theory is that company employees can be divided into those who act as the 'hands' and those who represent the 'brains' of the company, the so-called anthropomorphic approach. The identification principle essentially meant that a company would be liable for a serious criminal offense (only) where one of its most senior officers had acted with the requisite fault"¹⁹. The alter egos of the company are defined as "those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company"²⁰. The House of Lords made a comparison between the *Lennard's* and *Tesco* cases. In *Lennard's* the accused had been delegated functions of management with full discretion to act on behalf of the company. On the contrary, Tesco successfully proved that the incriminated store manager was not part of the 'brain' of the company, but was a mere employee. As a consequence, his conduct was not attributable to the company, whose directors had "taken all reasonable precaution and exercised all due diligence"²¹. In the end, Tesco was acquitted.

The identification principle is still valid (as highlighted in the 2016 *R v A Ltd* case²²), but in recent years there has been increasing criticism. According to some scholars, the principle shows all its limits when it comes to dealing with modern corporate practice, which is dominated by large corporations. Indeed, directors of big companies "seldom have sufficient proximity to the

¹⁶ *Lennard's*, paragraph 713.

¹⁷ Wells C., *Corporations and Criminal Responsibility*, Oxford University Press, 2001, p. 97.

¹⁸ *Tesco Supermarkets v Natrass* (1972) A.C. 153.

¹⁹ Wells C., *Corporations and Criminal Responsibility*, Oxford University Press, 2001, p. 101.

²⁰ *Tesco*, paragraphs 199-200.

²¹ *Criminal Liability in Regulatory Contexts*, Law Commission Consultation Paper No 195, 2010, p. 188.

²² *R v A Ltd* (2016) WECA Crim 1469.

*unlawful act to be personally liable and without such personal liability on the part of a person who is the directing mind and will of the corporation, liability cannot be attributed to it*²³. As a result, larger corporations have greater power to harm but it is much more difficult to prosecute them; while on the other hand, prosecuting smaller corporations is easier but serves no practical purpose.

In 2007, the Parliament adopted a new statutory regime for corporate criminal liability for manslaughter. The Act is *"the product of a public outcry after corporate actors escaped criminal liability for several deadly incidents"*²⁴. One of the most relevant cases involved, once again, a railroad company: the Ladbroke Grove rail crash in London that killed 31 people in 1999. The Act provides that a corporation is guilty of manslaughter *"if the way in which its activities are managed or organized causes a person's death, and amounts to a gross breach of a relevant duty of care owed by the organization to the deceased"*²⁵. According to Section 1(3) the corporation is guilty *"only if the way in which its activities are managed or organized by its senior management is a substantial element in the breach"*. Therefore, it is no longer necessary to show that a person who is the *alter ego* of the company is personally responsible for the wrongdoing (as in the previous common law offense). For the first time in the history of English law, corporate manslaughter is not extraordinary. Indeed, the effect of the Act is to *"widen the scope of the offense so that the focus of the offense is now on the overall management of the organization's activities rather than the actions of particular individuals"*²⁶. The new statutory regime is a first victory for those who criticize the traditional individualistic model of responsibility as inadequate, in the light of *"the collectivist nature of today's corporations"*²⁷. Nonetheless, some commentators criticize the fact that the new provisions *"may make harder to convict a larger corporation in which authority is diffused through a complex organizational structure"*²⁸. Suggestion for reform is twofold. On the one side, England should adopt the U.S. model of vicarious liability, instead of the obsolete identification principle. In this way, the corporation would be liable for the crimes committed by all its employees, independently of their hierarchical status. On the other side, corporate criminal liability should be decoupled from individual culpability: the corporation should be directly

²³ Pinto A., Evans M., *Corporate Criminal Liability*, Sweet and Maxwell, 3rd ed., 2013, p. 50.

²⁴ Harlow J.W., 'Corporate Criminal Liability for Homicide: a statutory framework', *Duke Law Journal*, 2011, Vol. 61, No 1, 123-166, p. 149.

²⁵ *Corporate Manslaughter and Corporate Homicide Act 2007*, Section 1(1).

²⁶ <https://www.cps.gov.uk/legal-guidance/corporate-manslaughter>

²⁷ Chondury B., Petrin M., *Corporate duties to the public*, Cambridge University Press, 2019, p. 168.

²⁸ Harlow J.W., 'Corporate Criminal Liability for Homicide: a statutory framework', *Duke Law Journal*, 2011, Vol. 61, No 1, 123-166, p. 152.

liable - not only for failing to prevent the offenses committed by individuals within its organization - but for its own culpability.

3. The evolution of white-collar crime and corporate criminal liability in the United States.

As mentioned above, the concept of white-collar crime was created by the American sociologist E.W. Sutherland. The book *White-collar crime*, published in 1949, is considered one of the most important contributions to criminology. Sutherland gave a name to what he considered "*a long-established American tradition*", that is "*crime in the upper or white-collar class, composed of respectable or at least respected business and professional men*"²⁹. Sutherland compares white-collar crime to organized crime for its pervasiveness, combined with low levels of repression and the impotence of the victims. Crimes belonging to this category have three main common features. Firstly, the fact that the authors enjoy an appearance of respectability deriving from their social status. Secondly, they are - more than other crimes - the result of a balancing exercise. The potential benefits of the crime (the chance to make profits) are assessed in relation to the risk of being caught and punished, which is relatively low. The third feature is the violation of trust, which can take many forms including misrepresentation, misappropriation, corruption, conflict of interests and fraud. That is why impersonal trust in business relationships, that is a prominent feature of modern society, enhances the opportunity for white-collar crime³⁰.

The idea that corporations can be criminally prosecuted for their misdeeds is relatively recent. The meaning of the word 'person' in criminal statutes - an issue that was also discussed in English Courts - was widely debated in the U.S. For example, in 1909 the Rochester Railroad & Light Company was prosecuted for having caused the death of a man through its negligent installation of a gas appliance³¹. The Court had to decide on the applicability of Art. 179 of the Penal Code for the State of New York, which defined homicide as "*the killing of one human being by the act, procurement or omission of another*". In the end the company was acquitted because, in the view of the Court, "*the word another naturally meant another human person*"³². The Article was amended only 65 years later, when 'another' was changed in 'another person' in order to include both individuals and legal entities.

²⁹ Friedrichs D.O., *Trusted Criminals: White Collar Crime In Contemporary Society*, Wadsworth Cengage Learning, 4th ed., 2009, p. 4.

³⁰ *Ibidem*, pp. 9-11.

³¹ *People v. Rochester Ry. L. Co.*, 195 N.Y. 102 (1909).

³² Wells C., *Corporations and Criminal Responsibility*, Oxford University Press, 2001, p. 133.

Until the early 20th century the majority of scholars refused to acknowledge corporate criminal liability. They relied on the traditional argument that legal entities cannot have the guilty state of mind (*mens rea*) that is a necessary element of any crime. This argument comes from the 1765 Blackstone Commentaries on the Laws of England, that were the basis for the development of U.S. common law. Blackstone's theory that "*a corporation cannot commit treason or felony, or other crime, in its corporate capacity though its members may, in their distinct individual capacities*"³³ delayed the recognition of corporate criminal liability for more than a century. Moreover, the U.S. scholars regarded the concept of individual liability as a cornerstone of modern criminal law. Collective guilty, on the contrary, was considered an unacceptable legacy of the medieval justice system. In their view, admitting corporate criminal liability meant that innocent people could be held indirectly liable for the misdeeds of others³⁴.

The first attempts to charge corporations with criminal offenses date back to the beginning of the 20th century. Predictably, the first cases concerned unintentional crimes, that is crimes committed with negligence or recklessness with no intent to cause harm. Corporations were charged with manslaughter (as in the *Rochester* case), while murder was excluded together with any other crime requiring "*corrupt intent or malus animus*"³⁵.

In 1908 *New York Central and Hudson River R. Co.*³⁶ was the first case of corporate criminal liability to be brought before the Supreme Court, that had to decide on "*the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him*"³⁷.

The New York Central Railroad Company was convicted - together with one of its directors - for lowering the shipping rates by paying rebates to other companies, in violation of the federal Elkins Act. The company appealed before the Supreme Court, arguing that "*the Congress lacked authority to impute to a corporation the commission of criminal offenses or to subject a corporation to criminal prosecution*". According to the Court "*the subject matter of making and fixing rates was within the scope of the authority and employment of the agents of the company whose acts in this connection are sought to be charged upon the company. [...] Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing*

³³ Blackstone W., Commentaries on the Laws of England, 1765, Vol. 1, p. 476.

³⁴ Fishkel D.R., Skyes A.O., 'Corporate Crime', The Journal of Legal Studies, Vol. 25, No 2, June 1996, 319-349, p. 333.

³⁵ *State v. Morris & Essex Ry.*, 23 N.J. Law, 360 (1852).

³⁶ *New York Central and Hudson River R. Co. v. United States*, 212 U.S. 481 (1909).

³⁷ *New York Central*, paragraph 494.

*his act to his employer and imposing penalties upon the corporation for which he is acting in the premises". The Court concluded that "is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them"*³⁸.

The conclusion of the Supreme Court is that if a corporation is civilly liable for the acts of its employees, it would be unreasonable to deny its criminal liability, provided that the crime is not one that requires intent. Therefore, intent marks the limit of corporate criminal liability.

The Supreme Court decision in the *New York Central* occurred at the same time when the Congress enacted legislation to broaden the scope of federal law. At the end of the 19th century, the U.S. experienced a great economic expansion enhanced by the end of the Civil War and the fast development of railroads. As highlighted by legal historians, *"the growth in interstate transportation and commerce created new problems that were beyond the reach of individual states"*³⁹. Introducing a new legislation for corporate criminal liability became a priority and the 1903 Elkins Act regulated for the first time the criminal liability of railroad companies. Under the Act *"it was possible to prosecute both the railroad and the employees, and the railroad's penalty was \$18,000 for each violation, for a total of \$108,000. Adjusted for inflation, this would be more than \$4.5 million in 2012"*⁴⁰. The following years witnessed the creation of a growing body of legislation regulating corporate criminal liability.

The number of prosecutions against corporations increased, especially during the 1970s. It is noteworthy that two of the most famous cases of corporate crime occurred in this decade: the *Tesco* case in England (1972) and the *Ford Pinto* case in the U.S. (1979). In fact, the 1970s were, especially in the U.S., a period of *"declining confidence in the political and business leadership. [...] Emerging movements of behalf of minorities, consumers and the environment highlighted social inequities and injustices and fed into increasing attention to white collar crime"*⁴¹.

In *Ford Pinto* for the first time in history a corporation was charged for reckless homicide before a U.S. court. In 1971 the Ford Motor Company started to sell a new car (the Pinto) that became very popular, also due to its

³⁸ *New York Central*, paragraphs 492-494.

³⁹ Beale S., 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability', 126 *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 27-54, 2014, p. 2.

⁴⁰ *Ibidem*, p. 6.

⁴¹ D.O., *Trusted Criminals: White Collar Crime In Contemporary Society*, Wadsworth Cengage Learning, 4th ed., 2009, p. 17.

convenient price. However, the Pinto turned out to be extremely dangerous for the passengers because the fuel tank was positioned in a way that rendered the car vulnerable to fuel leakage and fire in case of rear-end collision. The company's managers were informed of the problem and ordered a cost-benefit analysis. This suggested that *"it would be more cost-effective to continue with the same fuel tank design rather than change it"*⁴². Consequently, Ford didn't recall the Pintos from the market, even after the first incidents were reported in 1973. According to recent studies, this decision caused the death of more than five-hundred people who were burned in their vehicles following crashes⁴³.

A civil suit was settled in 1978 and the jury awarded \$125 million (later reduced to \$6 million) to the victims. In 1979, following the death of three teenagers in a rear-end collision, Ford faced prosecution for homicide in Indiana. One year later Ford was acquitted: the Jury found that the company had done everything possible to recall the Pintos after 1978 (when the Government started to investigate the complaints). The victims' families agreed to conclude a settlement agreement.

Despite this unfavorable outcome, the importance of the *Ford Pinto* case cannot be diminished. It broke a *"psychological barrier"*⁴⁴, that is the idea that corporations cannot be charged with reckless homicide. The charge of recklessness *"entails an element of criminal intention not found in the charge of negligence. The person who acts recklessly purposefully and knowingly, that is consciously, creates the risk of harm"*⁴⁵. However, even the Public Prosecutor Cosentino spoke of *Ford Pinto* as a rare and isolated case, and not as a first step toward the widespread prosecution of corporations⁴⁶. Indeed, the 1970s saw a *"prosecutorial wave"* of corporate prosecution for homicide in the wake of the *Pinto* case, but this was not followed by a stable increase. In the next decades there were few significant cases and most of them were *"against small companies, in which ownership and management were united in the same individuals, who were also charged individually"*⁴⁷.

In the early 2000s a number of big cases of corporate criminal liability *"destabilized the stock market and led to the loss of billions in shareholder*

⁴² Schwartz M.S., 'Ford Pinto 'in (edited by) Kolb R., Encyclopedia of Business Ethics and Society, SAGE, 2008, p. 924.

⁴³ Ibidem.

⁴⁴ Becker P.J. et al., 'State of Indiana v. Ford Motor Company Revisited', Am Journal Cr J., 2002, Vol. 26, No 2, 181-202, p. 185.

⁴⁵ Bernard T.J., 'The Historical Development of Corporate Criminal Liability', 1984, 22, Criminology, 3, 1-17, p. 12.

⁴⁶ Becker P.J. et al., 'State of Indiana v. Ford Motor Company Revisited', Am Journal Cr J., 2002, Vol. 26, No 2, 181-202, p. 189.

⁴⁷ Harlow J.W., 'Corporate Criminal Liability for Homicide: a statutory framework', Duke Law Journal, 2011, Vol. 61, No 1, 123-166, pp. 126-133.

*equity and the loss of tens (or perhaps even hundreds) of thousands of jobs*⁴⁸. The Enron case is emblematic. Enron was the seventh most valuable company in the U.S. in 2001, when it *"rapidly collapsed following the sudden disclosure of massive financial misdealing that revealed the company to be a shell rather than a real business"*⁴⁹. In particular, it was revealed that Enron had used *"deceptive accounting devices to shift debt off its books and hide corporate losses [...] for more than \$100 billion in shareholder equity before it filed for bankruptcy"*⁵⁰. The most shocking aspect of the Enron scandal was that *"a significant number of executives had engaged in improper actions despite the company having in place the key elements and best practices of a comprehensive ethics and compliance program"*. This was followed by the revelation that *"the traditional U.S. corporate governance watchdogs - attorneys, auditors, and directors - had either aided and abetted the responsible executives or had been grossly negligent in supervision of those executives"*⁵¹.

The Enron case has become the emblem of corporate malpractice. However, Enron was not alone in using fraudulent accounting practices that resulted in massive losses for shareholders and employees. In the same period other famous companies were involved in similar scandals, such as Dynegy, Adelphia Communications, WorldCom, and Global Crossing. All these cases demonstrate that *"because of their size, complexity, and control of vast resources, corporations have the ability to engage in misconduct that dwarfs that which could be accomplished by individuals"*⁵². If, after September 11, 2001 the investigators and the public opinion became more focused on the fight against terrorism, with the 2008 crisis the *"immense public anger at Wall Street exercises with catastrophic consequences generated new attention to high-level white collar crime"*⁵³.

4. The structure of corporate criminal liability under the U.S. law.

Corporate criminal liability has two requisites: the crime should be committed within the scope of employment and with the intent to benefit the company.

⁴⁸ Beale S., 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability', 126 *Zeitschrift Für Die Gesamte Strafrechtswissenschaft*, 27-54, 2014, 1-32, p. 13

⁴⁹ Windsor D., 'Enron Corporation', in (edited by) Kolb R., *Encyclopedia of Business Ethics and Society*, SAGE, 2008, p. 716.

⁵⁰ Beale S., 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability', 126 *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 27-54, 2014, p. 13.

⁵¹ Windsor D., 'Enron Corporation', in (edited by) Kolb R., *Encyclopedia of Business Ethics and Society*, SAGE, 2008, p. 717.

⁵² Beale S., 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability', 126 *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 27-54, 2014, p. 13.

⁵³ Friedrichs D.O., *Trusted Criminals: White Collar Crime In Contemporary Society*, Wadsworth Cengage Learning, 4th ed., 2009, p. 17.

As for the first requisite, the corporation is liable for all the crimes committed by its employees within, or in connection with, a job related activity. This kind of vicarious liability is known by the term *respondeat superior* (meaning that the superior answers for the misdeeds of his subordinates).

Scholars comment that "*corporate criminal liability in the United States is far more extensive and less restrictive than corporate criminal liability frameworks in other countries*"⁵⁴. There is an evident difference, not only with the civil law countries - that do not have a tradition of corporate criminal liability - but also with respect to English law. In fact, the standard of proof is much lower than under the identification doctrine: while in the latter it is necessary to prove that the perpetrator of the crime acted as an *alter ego* of the company, under the *respondeat superior* principle it is sufficient to demonstrate that he was employed by the company.

As for the *mens rea*, both the intent to commit the crime and to benefit the corporation must be proved. Therefore, corporate liability is excluded when the employee violates the fiduciary duty that he owes to the company. The most typical case is that of a crime committed in order to gain personal profit. The intent to benefit the company may take two forms: individual intent or collective knowledge. The concept of collective knowledge was developed during the 1980s in order to take into account the fact that, within the large corporations, the decisions are not taken on an individual basis. Therefore, it may be almost impossible to prove that a single employee had the intent to commit the crime. As an alternative, it is sufficient to prove that some of the employees knew about the crime.

Collective knowledge can be limited to lower-lever employees, but in this case the corporation can defend itself by proving that those who had supervisory responsibility acted with due diligence.

United States v. Bank of New England is the leading case about collective knowledge⁵⁵. In 1987 the Bank of New England was charged with failure to file reports of multiple transactions over \$10,000 from a single customer to the U.S. Treasury. The Bank's defense was that no one employee had the necessary willful intent to violate the reporting requirements, because those who conducted the transactions were unaware that the law required the reports to be filed, and the employees who knew of the reporting requirements did not know of the transactions.

The Court rejected the defense, stating that the corporations "*compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant*

⁵⁴ Khanna V.S., 'Corporate Criminal Liability: What Purpose Does It Serve?', Harvard Law Review, 1996, Vol. 109, No 7, 1477-1534, pp. 1484-1485.

⁵⁵ *United States v. Bank of New England*, NA, 640 F. Supp. 36, D. Mass. (1986).

*whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation*⁵⁶. In conclusion, the organizational structure prevented the employees from understanding that the operations were illegal, but the units involved - and consequently the Bank as a whole - knew about the violation⁵⁷.

5. The detractors of corporate criminal liability.

Criticism of corporate criminal liability has a long history both in England and the United States. Many scholars have expressed skepticism towards the concept of corporate criminal liability. In the 19th century the English Lord Chancellor Thurlow posed the rhetorical question: *"Did you ever expect a corporation to have a conscience when it has no soul to be damned and no body to be kicked?"*⁵⁸. Several contemporary scholars have used the same argument. In 2009 Alschuler stated *"attributing blame to a corporation is no more sensible than attributing blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime"*⁵⁹. In 2011 Punch noticed, though with less emphasis than the previous commentators, that *"criminal law has never quite adapted to dealing with corporates"*⁶⁰.

Criticism focuses on two aspects: the difficulty to attribute a criminal conduct to a fictional entity and the consequences of the punishment of a company. As for the second issue, Alschuler highlights that *"the punishment of innocent shareholders and employees should not be regarded as 'collateral' or 'secondary'*⁶¹. *Corporate criminal law is seen as "a form of collective punishment that targets the innocent as a means to discouraging the wrongful conduct of the guilty"*⁶².

As for the first issue, blamelessness is the most traditional argument against corporate criminal liability. Early commentators argued that charging corporations with crimes of intent *"ran contrary to an aim of the criminal law - punishment of the morally blameworthy - because it relied upon vicarious guilt rather than personal fault"*⁶³. The *respondeat superior* principle belongs

⁵⁶ *Bank of New England*, paragraph 54.

⁵⁷ Beale S., 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability', 126 *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 27-54, 2014, p. 9.

⁵⁸ Alschuler A.W., 'Two Ways to Think about the Punishment of Corporations', *Am Crim L Rev*, 2009, 46, 1359-1392, p. 1367.

⁵⁹ *Ibidem*, p. 1392.

⁶⁰ Punch M., 'The organizational component in corporate crime', in *European Developments in Corporate Criminal Liability*, edited by Gobert J., Pascal A., 1st ed., 2011, Routledge, p. 102.

⁶¹ Alschuler A.W., 'Two Ways to Think about the Punishment of Corporations', *Am Crim L Rev*, 2009, 46, 1359-1392, p. 1359.

⁶² Hasnas J., 'The centenary of a mistake, one hundred years of corporate criminal liability', *Am Crim L Rev*, 2009, 46, 1329-1358, p. 1344.

⁶³ Khanna V.S., 'Corporate Criminal Liability: What Purpose Does It Serve?', *Harvard Law Review*, 1996, Vol. 109, No 7, 1477-1534, pp. 1484-1485.

to tort law, where it is a commonplace that *"one who is without personal fault, but who has nevertheless caused or benefited from an injury to an innocent party, may be required to pay compensation to restore the injured party to his or her previous condition"*. On the contrary, the logic of restitution is foreign to criminal justice, whose primary aim is not to offer compensation to the victim. Accordingly, *"applying respondeat superior tort liability in the criminal sphere is not going 'only a step farther' (as stated by the Supreme Court in the famous New York Central case) but leaping a broad conceptual chasm"*⁶⁴.

Corporations may be treated as individuals for some purposes, but should not be regarded as individuals altogether. As fictional entities, they cannot possess a mental state, a requisite essential to the existence of any crime, and they can't bear the most 'individual' kind of liability. The issue of moral responsibility is less controversial: it is widely accepted that corporations are morally responsible for the actions of their employees because they can exert a causal influence on their behavior. The reason has to be found in the collective decision making process: according to the sociologists *"when individuals gather together in groups, they can get each other, or lead each other, to behave in ways that no one would engage if he was acting alone"*⁶⁵. Already in 1854 the sociologist Herbert Spencer noticed that *"as a body, directors would do unethical things that they would shrink from doing as individuals"*⁶⁶. However, this 'criminogenic' power of the corporation could never be sufficient, by itself, to assess its blameworthiness for the purposes of criminal liability.

In the United States, the criticism concerns also the distorted use of corporate criminal liability, that is the fact that criminal law is used as an instrument of pressure on the corporations to adopt compliance programs and to cooperate in the prosecution of their employees. On the one side, the number of prosecutions against corporations that end with an indictment has been constantly decreasing. On the other side, *"the broad potential for criminal liability has significant consequences for a wide range of corporate behavior. Corporations have powerful incentives to perform internal investigations, cooperate with both regulators and prosecutors, and actively pursue settlement of claims of misconduct. To avoid criminal liability, corporations also enter into deferred prosecution agreements that often require changes in corporate business practices and governance as well as monitoring to ensure compliance"*⁶⁷. In other words, the imposition of criminal liability

⁶⁴ Hasnas J., 'The centenary of a mistake, one hundred years of corporate criminal liability', *Am Crim L Rev*, 2009, 46, 1329-1358, p. 1348.

⁶⁵ *Ibidem*, p. 1332.

⁶⁶ Robb G., *White-Collar Crime in Modern England: Financial Fraud and Business Morality, 1845-1929*, Cambridge University Press, 2002, p. 173.

⁶⁷ Beale S., 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability', *126 Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 27-54, 2014, p. 1.



forces the corporation "to invest in cost-justified precautions to prevent crimes from occurring [and] to internalize the costs of its activities". At the same time, it allows the Government "to economize on enforcement costs. Rather than having to invest resources to hierarchy and decision-making structure to deter particular individuals, the state can simply penalize the firm"⁶⁸.

The Government resorts to the threat of criminal punishment even when less invasive instruments, such as moral suasion, market discipline or civil liability, are a sufficient deterrent for illicit activity. As a result, the *respondeat superior* principle has been reshaped in a way that is "inconsistent with the fundamental principles of a liberal society", that is a society where "both the breadth and type of criminal statutes that the Government may employ in its mission to suppress harmful conduct" are restrained in order to "preserve the civil liberties of the citizenry"⁶⁹.

As mentioned before, the *respondeat superior* principle allows a broad application of corporate criminal liability. The corporation may be held liable for almost any crime committed by the employees within the scope of their employment. Nonetheless, the number of prosecutions and convictions of companies in the U.S. is not high. For example, the convictions were, on average, less than 200 per year between 2007 and 2012⁷⁰. Prosecutions are also constantly decreasing and 2018 saw the lowest number in twenty years⁷¹. Many cases conclude with a settlement, meaning that corporations avoid criminal liability by accepting civil liability and paying significant fines. Agreements with the Prosecution - like negotiated guilty pleas, deferred prosecution agreement or non-prosecution agreements - are also available. The economic consequences of a criminal proceeding can be devastating for a company, that is already subject to significant financial penalties for the wrongdoings of its employees in the form of compensatory and punitive damages. That is why the Principles of Federal Prosecution of Business Organizations⁷² adopt a discretionary approach. The decision to prosecute must take into account ten factors: the nature and seriousness of the offense; the pervasiveness of wrongdoing within the corporation; the corporation's history of similar misconduct; its willingness to cooperate; the adequacy and

⁶⁸ Fishkel D. R., Skyes A.O., 'Corporate Crime', The Journal of Legal Studies, Vol. 25, No 2, June 1996, 319-349, pp. 321-322.

⁶⁹ Hasnas J., 'The Discordance of New York Central Jazz, Regulation, Vol. 33, No 1, Spring 2010, 46-53, p. 53.

⁷⁰ Hasnas J., 'The centenary of a mistake, one hundred years of corporate criminal liability', Am Crim L Rev, 2009, 46, 1329-1358, p. 1346.

⁷¹ <https://trac.syr.edu/tracreports/crim/514/>

⁷² The Principles of Federal Prosecution of Business Organizations were adopted in 1999 by the U.S. Department of Justice to standardize the factors to be considered by Federal Prosecutors in determining whether to charge a corporation (available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300>).

effectiveness of the compliance program; the corporation's timely and voluntary disclosure of wrongdoing; the remedial actions; the collateral consequences; the adequacy of remedies such as civil or regulatory enforcement actions; and the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.

The commentators acknowledge that the Principles of Federal Prosecution address some of the criticism of the *respondeat superior* doctrine. Indeed, "*prosecutorial discretion focuses on corporate culpability and cooperation, and these factors also guide organizational sentencing*". Nonetheless, the fact that "*the breadth of potential liability generates significant pressure to cooperate at the investigative stage, and to settle when wrongdoing is uncovered*"⁷³ highlights the need for procedural reform.

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