Corporate Criminal Liability Discussion Paper Response

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(1) What principles should govern the attribution of criminal liability to non-natural persons?

Since the focus of the discussion is corporate criminal liability, reference is made to corporations rather that "non-natural persons" but no distinction is intended.

1. The recognition of corporate agency

1.1 Since the first questions for an investigating authority are whether a crime appears to have been committed and, if so, who committed it, clear principles regarding the existence and nature of corporate agency need to be established. While the common law identification doctrine has developed in accordance with the fictional view of corporate agency, the statutory failure to prevent model, for example, employed in the context of bribery and tax evasion,[1] attributes direct fault to the corporate body,[2] and implicitly recognises and treats the corporate body as a responsibility-bearing actor, distinct from its individual members. This statutory approach accords with the now widely recognised holistic view of organisations, and that they can become autonomous actors whose behaviour "transcends specific individual contributions".[3] That the two approaches to corporate criminal liability coexist, founded as they are on opposing underlying theories, has not proved problematic in an area of law geared more to pragmatism than philosophical purism. Indeed, as the Law Commission's Discussion Paper sets out, there are almost as many different statutory approaches to corporate liability as there are bespoke corporate offences.[4] While the models employed reflect differences in the nature of the wrongdoing involved, for example gross negligence in the context of corporate manslaughter[5] and knowledge of criminal purpose in the case of supplying specialist printing equipment,[6] they also reflect the perceived gravity of the offending conduct such that some are constructed as strict liability offences for which there is no mens rea element[7] and, as in the case of price-fixing and abuse of a dominant position for example, they may also lack the provision of a due diligence/adequate procedures defence.[8] While the various statutory enactments of the bespoke corporate liability models were not necessarily motivated primarily by the inadequacy of the common law identification principle, they each respond its well-documented deficiency.

1.2 However, save for the gross negligence approach and the strict liability offences that dispense with the need to prove mens rea altogether, corporate liability remains premised on a "parasitic" analysis in that it is linked to the commission of an underlying/ base offence by an

[1] Bribery Act 2010, s.7; Criminal Finances Act 2017, ss. 45 and 46.
[2] Fault is based on the inadequacy of the internal compliance system.
[3] For a discussion of the literature in this area see Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 1; Stephen Copp and Alison Cronin, 'New models of corporate criminality: the problem of corporate fraud – prevention or cure?' (2018) 39(5) Co Law 139.
[4] Law Commission, Corporate Criminal Liability, Discussion Paper June 2021, Chapter 3.
[5] Corporate Manslaughter and Corporate Homicide Act 2007.
[6] Specialist Printing Materials and Equipment (Offences) Act 2015.
[7] For example, offences under the Health and Safety at Work Act 1974 and Money Laundering Regulations 2017.
[8] Competition Act 1998, s.18.

individual. This is the case in both the common law fictional and statutory holistic approaches and, of note, the seemingly much favoured failure to prevent model is constructed in this way. The tendency to link corporate liability with the criminality of individuals is not surprising, given that the criminal law developed with individuals in mind,[9] its emphasis on anthropomorphic mental states as the hallmark of criminal fault and the fact that the language of criminal liability is consequently imbued with individualistic meaning.[10] Although there appears to be no difficulty with the notion that, for example, nations can win wars and teams can lose matches, and that companies can be attributed with activities such as winning or losing contracts, flouting regulations or causing environmental harm, it is still generally perceived that the corporate form cannot perpetrate real crime.

1.3 The continued attachment to individualism means that the criminal law cannot adequately address, for example, criminal outcomes that are the result of a deviant corporate culture and that cannot be reduced to individual criminal activity. Indeed, even the most far-reaching of the corporate liability constructs, the US principle of respondeat superior, is criticised for being overly narrow in scope since it is still necessary to show fault residing in an individual. Consequently, the criminal law is at odds with other areas of law and other disciplines that have more readily accepted theories of groups and collective action.[11]

1.4 However, it is known that individuals are influenced and behave differently in a group than they do when acting outside of that context and it is increasingly accepted that corporate misconduct can be the product of a deviant organisational "culture" rather than individual criminality.[12] In practice, corporate policy and decision-making is often a decentralised process, or the product of other corporate policies and procedures, rather than the result of individual decisions.[13] Corporate outcomes can therefore be the result of numerous contributing factors where there is a complex interplay between external demands and a number of internal forces, such as managers, standard operating procedures, corporate policies and priorities, market demands and

[9] In fact the realist theory of corporations / organisations was the prevailing view at the turn of the twentieth century, endorsed by eminent jurists such as Maitland and Dicey, and this was reflected in the criminal law, see Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 6; *Taff Vale Rly Co. v Amalgamated Society of Rly Servants* [1901] AC 426 (HL). The subsequent demise of the theory and shift to the fictional approach is attributed to its association with the totalitarian image of society as fascism took over in Europe and, in the criminal law, by concerns about trading with the enemy where one of the contracting parties was an English corporation owned and directed by German nationals, *Daimler Co Ltd v Continental Tyre Co Ltd* [1916] 2 AC 307 (HL) and see David Foxton, 'Corporate Personality in the Great War' (2002) 118 LQT 428. Influenced by libertarian politics, group agents thus came to be viewed as a fiction involving nothing more than individual agents acting collaboratively, see Christian List and Philip Pettit, *Group Agency* (OUP 2011) p 8-10.

[10] Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' (1993) Crim LR Aug 551-566 noting that notions such as rationality and autonomy and the use of words such as "person" and "actor" are metaphysically limiting.

[11] For example, economic theory has gone on to recognise group behaviour as a methodology, Karl R. Popper, *The Open Society and Its Enemies* (Routledge & Kegan Paul 1945), Joseph Agassi, 'Institutional Individualism' (1975) 26(2) British Journal of Sociology, June 144-55.

[12] See HM Treasury, Bank of England and FCA, Fair and Effective Markets Review: Implementation Report, July 2016, p. 4 for an example in the financial sector.

[13] C.M.V. Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' [1996] MLR 557, 561.

various other internal forces.[14] Collective blameworthiness is a well-recognised phenomenon[15] and there is wide support for the proposition that companies can gain a momentum and dynamic of their own, temporarily transcending the actions of individual officers, such that the corporation can be recognised as an autonomous actor with a unique personality.[16] It is the recognition of a corporate culture that gives meaning to the attribution of corporate responsibility.[17] Individual action can thus be viewed as a fragment of the patchwork of multiple factors that combine to create the conditions for the offence[18] and, in the context of corporate misconduct, fault can therefore range on a spectrum from that which is wholly attributable to an individual to that which is wholly organisational, with varying degrees of mutual influence and interdependence in between.[19]

1.5 Principles of corporate criminal liability should therefore continue to recognise corporate/non-natural agency and the capacity of such agents for wrongdoing,[20] but this recognition needs to be explicitly articulated if the law is going to move beyond the conceptual limitation of methodological individualism.

1.6 Accordingly, the attribution of corporate fault needs to be decoupled from the issue of individual criminality where circumstances deem it appropriate. This may be where it is impossible to identify the individuals responsible, for example when the corporation obscures internal accountability notwithstanding evident criminality,[21] or, assuming it is possible to identify all the relevant individual participants in a group action, when it is important to hold the group agent, rather than those individuals, responsible.[22] This could be in circumstances where the individual actors are ignorant of the harm they have brought about together, where the individual participation is relatively insignificant or where they may have been acting under such pressure, due to the norms, hierarchies and power imbalances operating in the particular corporate environment,

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[14] J. Bonner and B. Forman, 'Bridging the Deterrence Gap: Imposing Criminal Penalties on Corporations and their Executives for Producing Hazardous Projects' (1993) 20 San Diego Justice Journal 1,1 cited in Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001).

[15] Examples of which can be found in the reports of inquiries such as those following the Herald of Free Enterprise and Aberfan disasters, see Brent Fisse, *Howard's Criminal Law* (5th edn, Sweet & Maxwell 1990) p 591.

[16] Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) p. 24-25, Peter A. French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207, 211 and Peter A. French, *Collective and Corporate Responsibility* (Columbia University Press 1984); Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993); Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) Ch. 4; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003); Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007) p. 226, 227; Philip N. Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 172; Law Commission, Criminal Liability in Regulatory Contexts *(*Law Com No 195, 2010) app. C, para. C.26 – C.28.

[17] James S. Coleman, *The Asymmetric Society: Organisational Actors, Corporate Power and the Irrelevance of Persons* (Syracuse University Press 1982); Larry May and Stacey Hoffman (eds.), *Collective Responsibility, Group Based Harm and Corporate Rights* (University of Notre Dame Press 1987) p. 81 - 82; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993); Maurice Punch, *Dirty Business: Exploring Corporate Misconduct* (Sage 1996) Ch. 5.

[18] Jennifer A. Quaid, 'What's Good for the Goose is Good for the Gander: Considering the Merits of a Presumption of Organizational Capacity in Canadian Criminal Law' in Marie-Eve Sylvestre et al, *Criminal Law Reform in Canada: Challenges and Possibilities* (Editions Yvon Blais 2017).

[19] May Brodbeck, 'Methodological Individualisms: Definition and Reduction' (1958) 25 Philosophy of Science 1, 3- 4.

[20] As is implicit in, for example, the corporate failure to prevent model of liability.

[21] Brent Fisse, *Howard's Criminal Law* (5th edn, Sweet & Maxwell 1990) p. 591 and referring to Jack Katz, 'Concerted Ignorance: the social construction of cover up' (1979) 8 Urban Life 295.

[22] Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) p. 28.

that they cannot be held fully responsible for their contribution to the criminal outcome.[23] Corporate criminality may also be evident, or manifest, where the individual actors are blameless.

1.7 The latter is perhaps most likely in the case of fraud which is peculiar in that it is the dishonesty element that distinguishes the commission of an offence from otherwise lawful behaviour.[24] This means that the criminal harm may result from systemic and pervasive corporate practices that cannot be reduced to frauds perpetrated by individuals because they themselves are not dishonest.[25] For example, if the mis-selling of payment protection insurance in the financial services industry had been considered a dishonest practice tantamount to fraud, the honesty of the individual employees, who were simply selling the product in accordance with corporate policy and industry-wide practice, would not be in doubt.[26] Furthermore, there may be no individual criminal fault, namely dishonesty, on the part of one or more of the company's directors. In such a case, and however serious the harm caused, the potential to find any type of corporate liability would be precluded since the identification principle, the failure to prevent models, and even the far-reaching respondeat superior principle, rely on underlying individual criminality. While the existing approaches and, in particular, the failure to prevent model can be suitably adapted to address other corporate offences, a model of criminal liability is nonetheless required that can recognise distinct corporate agency in situations where fault is not coupled with individual criminality. The provision of such a model would also allay concerns that corporations can tender employees as scapegoats for prosecution[27] and that senior individuals can benefit through a structural distancing from the harmful activity.[28]

1.8 As a matter of principle, the law therefore needs to accommodate the different nature of the agents involved in the misconduct, human and/or non-natural, and characterise their respective roles by the nature and quality of the wrongdoing. In terms of wrongdoing there is a qualitative distinction between the direct commission of a substantive offence and, for example, the failure to prevent another person committing the substantive offence.

1.9 The question of mens rea

1.10 The question of corporate agency is interwoven with the problem of attributing mens rea to the corporate form. Again, it must be acknowledged that the language of criminal fault is saturated with individualist meaning and that this continues to impact the way in which corporate wrongdoing is perceived and attributed to the corporation. Although corporations are real and powerful actors, capable of causing immense harm, language, and therefore the metaphysical construct of mens rea, continues to limit the conception of criminal fault and confine it to the human arena. While the metaphysical approach to blameworthiness is largely the product of the common law's haphazard

[23] Patricia H. Werhane and R. Edward Freeman, 'Corporate Responsibility' in Hugh La Follette (ed.), *The Oxford Handbook of Practical Ethics* (OUP 2003) discussed in Christian List and Philip Pettit, *Group Agency* (OUP 2011) p. 165; Australian Law Reform Commission, Corporate Criminal Liability (ALRC Report 136) April 2020, 4.18.
[24] Stephen Copp and Alison Cronin, 'The failure of the criminal law to control the use of off balance sheet finance during the banking crisis' (2015) 36(4) Co Law 99, the fact that a statement may be both true and at the same time misleading undermines any approach to fraud by false representation that does not encompass the element of dishonesty.
[25] Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 1.
[26] Ibid.
[27] Brent Fisse, *Howard's Criminal Law* (5th edn, Sweet & Maxwell 1990) p. 593.
[28] Christian List and Philip Pettit, *Group Agency* (OUP 2011) p. 167.

development,[29] this has served to inhibit the development of a corporate crime regime[30] and marginalise corporate behaviour.[31] Since the notion of "intention", or perhaps more accurately the orthodox concept of "voluntariness",[32] is at the heart of most philosophical justifications of individual liability and moral blameworthiness, the question is how a non-natural person can behave with any such human characteristic or sentiment.[33] Intention as a mark of corporate culpability has therefore remained in doubt with the consequence that the various models of corporate liability commonly sidestep the mens rea issue in one way or another. For example, strict liability offences are employed, both the common law's identification principle and the American doctrine of respondeat superior equate the mens rea of an individual with that of the corporation and the failure to prevent approach is essentially strict liability with the provision of a due diligence/ adequate procedures defence that serves to address concerns about the issue of blameworthiness.

1.11 However, in accordance with the view that corporations are real agents, there is wide academic agreement that, although they to do not have a cerebral mental state, corporations can and do act intentionally[34] or recklessly.[35] This manifests in the form of corporate policy, which is considered the culmination of the internal decision-making processes, and, crucially, corporations also have the capacity to change existing policy and procedures.[36] Corporations may lack feelings and emotions but this is not thought to negate the quality of autonomy since this absence serves to promote rather than hinder considered rational choice. Since it not only has available, but can use far more information than is possible for one individual to compute,[37] the corporation can be recognised as the criminal law's paradigm responsible actor.[38]

1.12 While it may be possible to interpret corporate intention and recklessness in this way, perhaps a more forceful intuition against the recognition of corporate responsibility is expressed in the rhetoric of "no soul to damn, no body to kick".[39] Even if it is accepted that the corporate form has capacity and exhibits intention, there remains some doubt about the applicability of punitive sanctions to the corporate form. It is suggested that the corporation itself cannot be punished as it is insentient, and from this flows the proposition that the invocation of the criminal law serves only to

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[29] See the discussion in Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 3 and 4.

[30] Law Commission, Criminal Liability in Regulatory Contexts *(*Law Com No 195, 2010) Celia Wells, app. C, para. C.47.; Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018).

[31] Celia Wells, 'The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility' (1988) Crim LR Dec 788; Christopher Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Willan 2007).

[32] Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 3.

[33] See for example G.R. Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55(3) CLJ, Nov 515, 532, 537 and his reference to Peter Arenella, 'Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability' (1992) 39 UCLA Rev 1511; S. Wolf, 'The Legal and Moral Responsibility of Organisations' in J. Rowland Pennock and John W. Chapman (eds.*) Criminal Justice* (Lieber-Atherton 1985) p. 276 - 279.

[34] Peter A. French, 'The Corporation as a Moral Person' (1979) 16 Am Phil Q 207, 211; Peter A. French, *Collective and Corporate Responsibility* (New York: Columbia University Press 1984); Philip Pettit, 'Responsibility Incorporated' (2007) 117 Ethics 171, 172.

[35] Celia Wells, 'The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility' (1998) Dec Crim LR, 789.

[36] Peter A. French, *Collective and Corporate Responsibility* (Columbia University Press 1984); Brent Fisse and John Braithwaite, *Corporations*, *Crime and Accountability* (Cambridge University Press 1993) p. 26.

[37] Michael McDonald, 'The Personless Paradigm' (1987) 37 UTLJ 212.

[38] Michael McDonald, 'The Personless Paradigm' (1987) 37 UTLJ 212; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993) p. 30-31.

[39] John C Coffee Jnr, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich L Rev 386.

punish innocent stakeholders. The latter concern, generally termed "collateral damage", is addressed in more depth below (at 1.24, 1.25, 1.32 to 1.34), where it is argued that in most cases the objection is a convenient spoof, while the former concern can be countered by the recognition that conviction can incur significant damage to the unique personality and reputation of the corporate agent. As a highly valuable intangible property, the corporate reputation is of such significance that it is carefully constructed and projected, at great expense, by the corporate public relations machine.

1.13 In that the problem of attributing corporate blameworthiness needs to be confronted in any corporate crime regime, it is suggested that this can be achieved without any departure from existing legal principle. Put simply, a rational reconstruction of traditional doctrine accommodates the direct attribution of corporate "mens rea" in circumstances where, irrespective of any individual fault, it is appropriate to recognise the agency and fault of the corporate form.[40]

1.14 Historical and black letter law analysis reveals that the current approach the attribution of criminal fault is the product of a gradual and unplanned distortion of orthodox doctrine. Linguistic ambiguity in the use of the term "mens rea" inadvertently caused conceptual confusion, as regards the traditional voluntariness and mens rea doctrines, and, as a result, emphasis was shifted to the metaphysical approach which gradually overshadowed the rebuttable evidential presumptions.[41] While this was a slow and inadvertent shift, in combination with other coincidental factors[42] over time, the development of an overarching theory of corporate liability was ultimately impeded.

1.15 Accordingly, a simple restatement of the existing evidential presumptions reveals how capacity and mens rea can be attributed directly to the corporate form. Bearing in mind that the presumptions are rebuttable, the presumption of voluntariness provides the means by which a corporation can be recognised as a responsibility-bearing actor while the presumption of intention, itself based on the criminal law's core presumption of rationality, has obvious application in the context of corporate action.[43] Thus, in the context of the generic fraud offence, for example,[44] the evidential presumptions facilitate the attribution of both capacity[45] and intent to the corporate actor.[46] The corporation can be presumed to be acting voluntarily, which includes the presumption of knowledge of circumstances surrounding the act,[47] and it can also be presumed to intend to make a gain,[48] through the making of an untrue or misleading statement for instance, since this is both the legitimate aim and natural consequence of the commercial activity.[49] Furthermore, "dishonesty", as the defining characteristic that distinguishes the entrepreneurial from the fraudulent conduct, is the

[40] Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018).
[41] Ibid.
[42] For example, the shift from the realist approach to corporations to the fictional analysis that followed concerns in the context of trading with the enemy during the First World War, and heightened judicial focus in the area of indirect intention, see Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) and *Daimler Co Ltd v Continental Tyre and Rubber Co (GB) Ltd* [1916] 2 AC 307 (HL).
[43] For a full discussion see Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 3 and 4.
[44] Fraud Act 2006, s 1.
[45] See too Jennifer A. Quaid, 'What's Good for the Goose is Good for the Gander: Considering the Merits of a Presumption of Organizational Capacity in Canadian Criminal Law' in Marie-Eve Sylvestre et al, *Reformer le droit criminel au Canada: defis et possibilities* (Editions Yvon Blais 2017) p. 93-131.
[46] Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 3 and 4.
[47] Ibid., Ch. 3.
[48] Fraud Act 2006, ss 2(1)(b)(i) and (ii); 3(b)(i) and (ii) and 4(1)(c)(i) and (ii) set out the intention as either to make a gain for oneself or another or to cause loss to another or expose another to a risk of loss.
[49] Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 3 and 4.

subject of a longstanding objective and inferential approach,[50] further underlined by the recent judgment in Ivy v Genting.[51]

1.16 Since the existing evidential presumptions are rebuttable, they accord with accepted theories of criminality in that they afford a "defence" for actors who are not morally blameworthy, much as the failure to prevent model does with the due diligence provision. The corporate defendant, through its representatives, is as capable as the individual defendant of adducing evidence to refute the fundamental evidential presumptions. Furthermore, scientific advancements in the area of neuroscience and the operation of mirror neurons confirm, perhaps surprisingly, that the presumptive approach to both individual and group action is wholly consistent with the criminal law's subjectivist ideal.[52]

1.17 The addition/ recognition of a presumptive, or manifest, model of corporate liability to the prosecutorial armoury conforms with the criminal law's treatment of individuals, and the applicability of the evidential presumptions to them, and would enable the prosecution of a corporation for a substantive offence in the absence of culpable individuals. A corporate prosecution for fraud, for example, perpetrated in the corporate context could therefore take the form of:

a) a substantive fraud offence under the (extended) common law identification principle (see 3.2 to 3.6 below) where there is a culpable "senior manager", or

b) a failure to prevent fraud offence where a lower level employee has committed fraud (see 8. to 8.7 below), or

c) a substantive fraud offence under the presumptive model (see 1.13 to 1.17 above), where it is the corporate wrongdoing is more appropriately characterised as fraud than as a lack of procedural due diligence.

1.18 Legal Principle and Practical Reality

While it is desirable that a principled approach to the development of the substantive law of corporate criminal liability is taken, the transnational nature of much corporate activity means that domestic reform cannot be considered in a jurisdictional vacuum. Since corporate misconduct typically spans multiple jurisdictions, a collaborative approach with other enforcement agencies is inevitable and domestic reform therefore needs to be considered from the comparative perspective and as a part of the overall enforcement approach. It is certainly the case that there is a universal trend to developing and expanding national corporate crime regimes, with an increasingly deterrence-based justification, and, for the reasons set out below, the law of England and Wales cannot be considered in isolation.[53]

1.19 Although different substantive models of corporate criminality are being employed in different jurisdictions, approaches to enforcement have generally been shaped more by pragmatism than by overarching legal principle.[54] Accordingly, and irrespective of the substantive model adopted, there is a common growing trend to enforcement through a settlement approach, with

[50] Ibid., Ch 4.
[51] *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67.
[52] See Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 5.
[53] Christopher Harding and Alison Cronin, *Regulating Bad Practice: Mapping a Framework for Legal Intervention* (Edward Elgar forthcoming 2022) Ch. 5, 6 and 7.
[54] Ibid.

increasing use of the US-inspired deferred prosecution agreement in preference to prosecution.[55] Since the use of deferred prosecution agreements as an enforcement mechanism is becoming so widespread, it is virtually impossible to divorce any discussion of legal principle and substantive models and proposals for substantive domestic reform must therefore consider the implications of their use. Furthermore, although it is unlikely that the respondeat superior model of corporate liability will be adopted outside of the US, it is almost certain that the activities of US enforcement agencies will continue to influence enforcement elsewhere due to the transnational nature of corporate crime. Not only does the US have the most far-reaching model of corporate criminality anywhere in the world, it also has broad scope due to the extent of trade with the US, the large role that the US dollar plays in international finance and US-based stock exchanges.[56]

1.20 Since the US has a longer and relatively greater experience of both prosecuting corporations and using deferred prosecution agreements, a body of empirical research is starting to emerge from the jurisdiction from which valuable insights can be gained. These are set out below.

1.21 Given that an important aim of corporate criminal liability is now to induce corporate cooperation with the settlement process, the significance of the actual substantive model(s) employed is largely diminished. In practice, corporate liability is therefore increasingly seen as a means to this end and, as such, it might be suggested that the easier it is to establish corporate liability, the easier it is for prosecutors to induce the desired outcome of a deferred prosecution agreement.

1.22 The significance of the legal model of corporate liability is diminished further with the recognition that the process of reaching a deferred prosecution agreement typically involves significant departures from established principles of criminal law.[57]

1.23 Enforcement through deferred prosecution agreements.

The perceived value of prosecution agreements can be explained by their history. In 2002, their use was substantially increased by the US Department of Justice, primarily as a reaction to the corporate failure that followed the conviction of Arthur Andersen, the auditor for both Enron and WorldCom. Although the conviction was reversed by the Supreme Court in 2005,[58] the subsequent corporate failure was taken as a stark indication that conviction was tantamount to a corporate death penalty and this served to focus attention on the collateral damage argument that corporate prosecutions serve only to penalise innocent stakeholders. Additional impetus for the settlement approach was provided by the attack on the World Trade Centre which resulted in financial resources being diverted away from corporate criminality to the investigation and prosecution of terror crime. Since evidence is especially difficult to establish in the complex corporate environment and legal fees for corporate investigations can amount to billions of US Dollars,[59] the quickest and simplest way to address corporate crime was through voluntary settlement. Corporations were therefore incentivised to enter into prosecution agreements that are conditional upon their cooperation with the investigative process, including the disclosure of self-incriminating evidence. By requiring a

[55] Although US enforcement agencies also employ non-prosecution agreements and their deferred prosecution agreements lack judicial oversight, the use of the term "deferred prosecution agreement" here and in the discussion that follows simply describes the general settlement approach that averts criminal prosecution.
[56] Brandon Garrett, 'International Corporate Prosecutions' in Darryl Brown et al (eds), *Oxford Handbook of Criminal Process* (OUP 2018).
[57] Christopher Harding and Alison Cronin, *Regulating Bad Practice: Mapping a Framework for Legal Intervention* (Edward Elgar forthcoming 2022) Ch. 6.
[58] *Arthur Andersen LLP v United States* 544 US 696 (2005).
[59] Todd Haugh, 'The Criminalization of Compliance' (2017) 92(3) Notre Dame Law Rev 1215, 1241.

corporation to self-report and cooperate with the investigative process, prosecution agreements effectively overcome the difficulties associated with the detection and investigation of corporate misconduct and, by shifting these tasks to the party that can most effectively perform them at the lowest cost, they are seen to benefit society.[60]

1.24 Although it is now thought that Andersen would have failed in any event, and it has since been shown that the so-called "Andersen effect" is a fallacy, or at least confined to businesses especially vulnerable to the effect of reputational damage, the collateral damage argument continues to justify the use of settlements to avert corporate prosecution.[61] The notion of collateral damage is widely construed to the extent that it includes not only the direct costs that would be borne by the company's share-holders but also those passed on to customers, employees, through potential job losses and reduced employment opportunities, and to the public at large as a result of a diminution of regional prosperity, which increases poverty and crime levels, a loss of investment for research, innovation and development, a reduction in tax revenue, an erosion of capital reserves and lending potential and may even involve a reduction in national or global economic well-being.[62] Consequently, prosecutors are typically bound to have regard to potential collateral damage as a matter of policy when dealing with corporate financial crime.[63]

1.25 While it is also the case that collateral consequences are not intrinsically tied to criminal liability,[64] and the rationale is flawed (see below at 1.24, 1.25, 1.32 to 1.34), the argument implicitly acknowledges that criminal conviction has a particularly more detrimental impact on the defendant corporation's reputation, with greater financial and punitive implications, than any form of civil or regulatory sanction.

1.26 However, it is likely that the use of deferred prosecution agreements will continue to feature as a predominant part of the US and therefore the collaborative approach to corporate enforcement. Aside from the "collateral damage" argument, they are also justified on the basis of information asymmetry, expertise and efficiency arguments,[65] since corporations need to cooperate

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[60] Jennifer Arlen and Samuel W. Buell, 'The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement' (2020) 93 University of Southern California Law Review (forthcoming).
[61] Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15 U. Pa. J. Bus. L. 797; John C. Coffee, Jr, *Corporate Crime and Punishment, The Crisis of Underenforcement* (Berrett-Koehler Publishers, Inc 2020) p. 18.
[62] In 2012 the US Dept of Justice and HSBC made a Deferred Prosecution Agreement where the HSBC had failed to implement US anti-money laundering laws and had facilitated the laundering of at least $881 million of proceeds of crime. Of note, the then Attorney General, Eric Holder, referred to the collateral damage that a prosecution would cause in terms a negative impact on the national, and perhaps the world economy, https://www.marketwatch.com/story/house-committee-says-hsbc-wasnt-prosecuted-due-to-too-big-to-jail-fears-2016-07-11 accessed Aug 29, 2021.
[63] US Dept. of Justice, 'Bringing Criminal Charges Against Corporations' (16 June 1999) part II, A.7 and IX at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF accessed Aug 29, 2021; https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ accessed Aug 29, 2021.
[64] Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 (4) American Crim Law Rev 1481.
[65] R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 126; M. Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* (Demos 2004) p 21; Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992).

with the investigation, and they do, of course, provide a significant source of income[66] not just to the enforcement agencies and government.[67]

1.27 Furthermore, deferred prosecution agreements are seen as an attractive and innovative form of sanction in themselves, with the possible imposition of a requirement to implement an internal compliance programme or to improve the existing one, and this may include some form of ongoing monitoring provision. With strong appeal to rehabilitative aims, the effect can be far more severe than a financial penalty as it may demand a major, or even complete, restructuring of the corporate body.

1.28 However, while deferred prosecution agreements are likely to become a staple part of corporate criminal enforcement, empirical research identifies areas of concern that may have implications for the way in which potential domestic reforms are considered.

1.29 The problems with deferred prosecution agreements

1.30 The core assumption underlying the use of deferred prosecution agreements is that corporations are genuinely committed to effective compliance. While this may be true of a proportion,[68] there are numerous examples of corporate recidivism,[69] following the use of such an

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[66] The former Assistant Chief of the Foreign Corruption Unit pointed out that where "[t]he government sees a profitable program … it's going to ride that horse until it can't ride it anymore" see Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' [2015] 49 UCDL Rev 407 citing Joseph Rosenbloom, 'Here Come the Payoff Police', (June 1, 2010) 12 Corporate Counsel 6, 14.

[67] It is not just enforcement agencies and government who share an interest in the revenue raised through this low-cost approach, members of the so-called "FCPA Inc.", the vibrant, niche industry comprising law, accounting and compliance consulting firms, also profit through their engagement at the enforcement and post-enforcement stage, with additional work arising from the ongoing compliance obligations typically imposed. It is well documented that the emergence and rapid rise of this new industry coincided with the Justice Department's use of non and deferred prosecution agreements and, given the scale of internal investigations usually undertaken at the early stage of the process, these are reputed to be the largest new source of business for major US law firms and have therefore become a matter of intense competition, see John C. Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers Inc 2020) 45. For example, the Siemens bribery investigation is estimated to have cost Euros 650 million which equates to a hefty 66% of the penalty subsequently imposed on the corporation. Unsurprisingly, the positive rhetoric surrounding alternative resolution vehicles has widespread support from the professions, Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' [2015] 49 UCDL Rev 407 at https://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf accessed Aug 29, 2021; Scott A. Resnik & Keir N. Dougall, 'The Rise of Deferred Prosecution Agreements', (Dec 18, 2006) New York Law Journal at https://dougallpc.com/pdf/The_Rise_of_Deferred_Prosecution_Agreements.pdf accessed Aug 29, 2021.

[68] Wulf A. Kaal and Timothy Lacine, 'The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013' (2014) 70(1) Business Lawyer 61-120; Lawrence A. Cunningham, 'Prosecutors in the Governance Business: Improving the Quality of Deferred Prosecution Agreements' (2014) 33(8) Banking and Financial Services Policy Report 1-12. This includes a statement from the Department of Justice that, as a result of their use for offences committed under the Foreign Corrupt Practices Act, companies have undergone dramatic changes, see Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' [2015] 49 UCDL Rev 407 at https://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf accessed Aug 29, 2021.

[69] Marshall B. Clinard and Peter C. Yeager, *Corporate Crime* (Transaction Publishers 2006) citing Pfizer's 4 deferred prosecution agreements that were made between 2002 – 2009; Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement'

agreement, that indicate otherwise and this leads to the additional proposition that their use is resulting in a massive shortfall in deterrence.[70]

1.31 Subjected to economic analysis this is not surprising, the punitive costs of crime must significantly outweigh the benefits if the threat of criminal enforcement is going to serve as an adequate deterrent. As prosecution agreements are purposed to preserve the trading status of the defendant corporation and limit collateral damage, a deterrence deficit is inevitable and gives truth to the critical observation that large enterprises are "too big to fail".[71] However, excessive corporate self-interest, manifesting as unlawful conduct, does not serve the social interest by increasing the economic pie, but operates only to redistribute it in a non-efficient way.[72] Accordingly, if parasitic organisations were driven from the market through robust enforcement, the gap in the market would ultimately be filled by law-abiding, socially responsible corporate citizens. An ambitious domestic reform might address the deterrence deficit by allowing the operation of Darwinian principles in the market[73] and this would be justified by a more comprehensive conception of collateral damage that would include and calibrate the indirect costs of criminogenic corporate activity, for example the elusive damage caused to consumer trust and to market operation generally. Certainly, the misallocation of resources that results from corporate misconduct also incurs significant social costs that include, for example, small businesses being forced into bankruptcy, livelihoods ruined, opportunities lost and the associated impact on people's health and well-being.[74] The notion of collateral damage might also incorporate the burgeoning costs of regulation itself since there are grounds in economic theory to suppose that a general anti-fraud rule, for example, would be more efficient than regulation.[75] As it is, the costs of regulation, including sanctions imposed through non-criminal enforcement, are borne by the same innocent stakeholders that the 'collaborate damage argument' supposedly seeks to protect.[76]

[2015] 49 UCDL Rev 407 at https://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf accessed Aug 29, 2021 and includes examples of Aibel Group Ltd and Marubeni Corporation, 514; Brandon L. Garrett, 'The Rise of Bank Prosecutions' (2016 – 17) 126 Yale LJ Forum 33 which gives examples of AIG, Barclays, Credit Suisse, HSBC, JP Morgan, Lloyds, Royal Bank of Scotland and UBS, 38. Brandon Garrett, *Too Big To Jail: How Prosecutors Compromise with Corporations* (Belknap Press of Harvard University Press 2014); Nicholas Ryder, ''Too Scared to Prosecute and Too Scared to Jail?' A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK' (2018) 82(3) JCL 245-263.

[70] John C. Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers, Inc 2020) p. 9.

[71] Andrew Ross Sorkin, *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System – and Themselves* (Penguin 2009).

[72] Hartmut Berghoff and Uwe Speikermann, 'Shady business: On the history of white-collar crime' Business History (2018) 60(3) 289-304; William Baumol et al, *Good Capitalism, Bad Capitalism, and the Economics of Growth and Prosperity* (Yale University Press 2007) p. 79.

[73] Cogent arguments have been made in support of this approach generally, see Christopher Harding and Alison Cronin, *Regulating Bad Practice: Mapping a Framework for Legal Intervention* (Edward Elgar forthcoming 2022) Ch. 7 and in the specific context of cartel activity where organisations are not viable but for the prohibited conduct, see Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (2nd edn, OUP 2010).

[74] New City Agenda and Cass Business School, Cultural Change in the FCA, PRA and Bank of England, Practising What They Preach? 25 Oct. 2016, p. 13 at http://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural_Change_in_regulators_report.pdf accessed Aug 29, 2021.

[75] Stephen Copp and Alison Cronin, 'The failure of criminal law to control the use of off balance sheet finance during the banking crisis' (2015) 36 (4) Co Law 99.

[76] Ibid.

1.32 Indeed, collateral consequences are not intrinsically tied to criminal liability and there is no fundamental difference between criminal sanctions and civil damages, save for the increased reputational damage that accompanies conviction. The collateral damage argument is applicable to any financial judgment against a corporation since, whatever form it takes, there is a consequent reduction in shareholder equity and the corporation's ability to pay employees and creditors.[77]

1.33 Given that the rationale for incorporation is, after all, to create an entity distinct from shareholders, logic demands that as much as shareholders benefit from the profits of the corporation's criminal conduct, they should also be affected by the corporate losses such conduct might cause. In addition, it is of note that there are no comparable concerns relating shareholder impact as a result of a corporation's liability for breach of contract or a tortious duty and, whatever the nature and cause of the corporate liability, it is only the shareholders' equity in the corporation that is affected and, protected by limited liability, not their personal assets.[78] Projected in principled terms of responsibility and the chain of criminal causation, conviction is not a *novus actus interveniens* and any so-called collateral damage is caused by the corporation's engagement in the criminal activity.

1.34 Likewise, the collateral damage argument cannot be sustained under rule of law principles as there is no concession to the suffering of innocent stakeholders when individuals are prosecuted. Family members within the defendant's economic unit, who may also co-own property with the defendant, are almost certainly affected by the criminal conviction, as are the defendant's creditors and, in some cases, employees. It is particularly of note that none of the innocent stakeholders in these circumstances are able to protect their personal assets, unlike shareholders who enjoy limited liability.[79]

1.35 Contrary to the collateral damage argument, research also demonstrates that prosecution rarely results in significant detriment to the corporation.[80] Furthermore, the costs of deferred prosecution agreements tend to be greater than the costs of prosecution for the defendant corporation. While more research is undoubtedly needed in relation to the respective costs, a recent survey, based on a buy-and-hold returns analysis, reveals that firms subject to deferred prosecution agreements experience significantly lower returns in the 1 to 3 year period following the agreement than firms that were prosecuted, and they also suffer a greater reduction in sales and the number of employees.[81] While these findings sit uneasily alongside the collateral damage justification for the use of deferred prosecutions agreements,[82] they undoubtedly reflect the fact that businesses often have to invest significant resources to comply with the terms of the agreement, incurring both a financial and a management time burden that may consequently necessitate streamlining or cost-

[77] Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46(4) American Criminal Law Rev 1481.
[78] Ibid.
[79] Ibid.
[80] Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) University of Pennsylvania Journal of Business Law 797-842.
[81] Gus De Franco et al, 'The Effect of Deferred Prosecution Agreements on Firm Performance' (2019) at https://accounting.wharton.upenn.edu/wp-content/uploads/2019/10/De-Franco-Small-and-Wahid-2019-WP.pdf accessed Aug 29, 2021.
[82] Although the costs incurred by corporations in the making of deferred prosecution agreements can exceed the costs of prosecution, the financial implications are not perceived as collateral damage albeit they are also borne by the innocent stakeholders in whose name the use of such settlements is primarily justified.

cutting measures.[83] Since the cost of prosecution agreements often exceed the cost of prosecution, and therefore increase rather than decrease collateral damage as it is currently construed, it begs the question as to why corporations choose settlement in preference to prosecution.

1.36 For the defendant corporation, settlement certainly avoids the risk and uncertainty of trial, the potential costs of a highly disruptive investigation and the prospect of multiple long and drawn out prosecutions across multiple jurisdictions.[84] However, while these are no doubt important factors for consideration, experience in the US is giving rise to the more worrying claim that to induce the corporate cooperation needed to achieve a quick and easy outcome, prosecutors use the combination of prosecutorial discretion and the co-existence of overlapping statutory offences to gain leverage against corporate defendants by threatening prosecution for a number of different crimes that cover the same conduct,[85] effectively "stacking charges".[86] Since this gives rise to the potential for sanction accumulation and therefore harsh sentencing implications,[87] corporations opt for the settlement approach and there is an especially strong motivation where a core body of allegations spans multiple jurisdictions over a period of time. In such a case, there is a meeting of different enforcement authorities with overlapping jurisdiction which results in phenomena described as "allegation bundling" and "enforcement bundling".[88] The former entails the inclusion of weaker allegations with strong allegations, for example there may be evidential or jurisdictional issues with the weaker claims, and the latter involves the collaboration of the national prosecution authorities, providing overall leverage of enforcement power and investigative and prosecutorial resources. For instance, the 2017 Rolls-Royce plc agreement with the UK, US and Brazilian enforcement agencies of over US $800 million resolved bribery allegations spanning over two decades and across twelve jurisdictions.

1.37 The need for a collaborative approach to address misconduct spanning multiple jurisdictions will inevitably implicate domestic prosecutions in "bundling" practices, irrespective of the substance of the domestic law. Since allegation bundling is only attractive to corporations if they are sure that other enforcement bodies in other jurisdictions will not prosecute, they are already pushing for co-ordinated law enforcement between national authorities.[89]

1.38 Given that defendant corporation's voluntary settlement can be induced by the threat of sanction accumulation and the resulting "allegation bundling" typically includes weak allegations,

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[83] Gus De Franco et al, 'The Effect of Deferred Prosecution Agreements on Firm Performance' (2019) at https://accounting.wharton.upenn.edu/wp-content/uploads/2019/10/De-Franco-Small-and-Wahid-2019-WP.pdf accessed Aug 29, 2021.

[84] Arlen J, 'Prosecuting beyond rule of law: corporate mandates imposed through deferred prosecution agreements' (2016) 8(1) Journal of Legal Analysis 191-234.

[85] William J Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 Mick L Rev 505, 518-19.

[86] Sara Sun Beale, 'The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization' (2005) 54 Am U L Rev 747.

[87] Described as sanction accumulation.

[88] Branislav Hock, 'Policing corporate bribery: negotiated settlements and bundling' (2020) Policing and Society online publication Aug 19, 2020 at https://doi.org/10.1080/10439463.2020.1808650 accessed Aug 29, 2021. A full discussion is contained in Christopher Harding and Alison Cronin, *Regulating Bad Practice: Mapping a Framework for Legal Intervention* (Edward Elgar forthcoming 2022).

[89] Ibid. Corporations can approach a particular enforcement authority and request that it deals with those in the other jurisdictions and they have also started lobbying for co-ordinated law enforcement between national authorities.

deferred prosecution agreements signal a departure from legal norms.[90] It is suggested that prosecutors are afforded so much leverage that they can, in effect, change the law.[91] If, as anticipated, there will be an increasing use of the deferred prosecution agreements, the construction of the substantive model of corporate criminality is, in practice if not in principle, less critical than might be supposed. Indeed, if prosecutors are going to continue to induce corporations to enter into agreed settlements, it might be suggested that the most far-reaching of the liability models is to be preferred, since that would maximise the leverage available to them.

1.39 Research also suggests that the status quo is not entirely tilted in favour of the prosecuting authority. There is also evidence that corporations can limit their liability by failing to disclose all incriminating evidence and that this practice is rationalised on the basis that simply surrendering such information would undermine the enforcement authority's investigatory role.[92] The real extent of the criminal behaviour is therefore obscured and the corporation also benefits in that, by agreeing the settlement, the corporate slate is effectively wiped clean,[93] with the guarantee that future prosecutions in relation to the same body of conduct, should it come to light, will not be brought.

1.40 Of real importance for the defendant corporation, the settlement process also affords the opportunity for it to negotiate the content of the information released for public consumption. It is suggested that the primary corporate concern is to mitigate the reputational damage that would follow a "toxic interpretation of the facts" contained in public documents and in this regard corporations have the upper hand since they, and not the prosecutor, have better knowledge of reputational impact in their own market.[94] The value of the corporate reputation is further highlighted by the recent push in the US to disposal by non-prosecution agreements, under which no documents are filed with the courts.[95]

1.41 Given the evident link between criminal conviction and corporate reputation, and the fact that reputational damage in the white collar context can be very costly,[96] the case for a robust criminal law, that involves a real threat of prosecution and conviction, is supported on the basis that it would address the current deterrence deficit associated with deferred prosecution agreements.[97]

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[90] Christopher Harding and Alison Cronin, *Regulating Bad Practice: Mapping a Framework for Legal Intervention* (Edward Elgar forthcoming 2022) Ch 6.
[91] William J. Stuntz, 'Plea bargaining and criminal law's disappearing shadow' (2004) 117(8) Harv L Rev 2548-2569.
[92] J. Arlen, 'Prosecuting beyond rule of law: corporate mandates imposed through deferred prosecution agreements' (2016) 8(1) Journal of Legal Analysis 191-234.
[93] Branislav Hock, 'Policing corporate bribery: negotiated settlements and bundling' (2020) Policing and Society online publication Aug 19, 2020 at https://doi.org/10.1080/10439463.2020.1808650 accessed Aug 29, 2021.
[94] Ibid.; Christopher Harding and Alison Cronin, *Regulating Bad Practice: Mapping a Framework for Legal Intervention* (Edward Elgar forthcoming 2022) Ch. 6.
[95] John C. Coffee, Jr, *Corporate Crime and Punishment, The Crisis of Underenforcement* (Berrett-Koehler Pubs Inc 2020) p. 40.
[96] There is a rich literature on this point, see John C. Coffee, Jr, *Corporate Crime and Punishment, The Crisis of Underenforcement* (Berrett-Koehler Pubs Inc 2020) p. 67; Jonathan M. Karpoff and J.R. Lott, Jr, 'The Reputational Penalty That Firms Bear from Committing Criminal Fraud' (1993) 36 Journal of Law and Economics 757-802; Jonathan M. Karpoff et al, 'The Cost to Firms of Cooking the Books' (2008) 43 Journal of Financial and Quantitative Analysis 581-612.
[97] Deferred prosecution agreements do not deter as well as corporate prosecutions, Susan Hawley et al 'Justice for whom? The need for a principled approach to deferred prosecution in England and Wales' in Tina Søreide and Abiola Makinwa (eds.) *Negotiated settlements in bribery cases: a principled approach (*Edward Elgar 2020) 309–346.

1.42 From the economic perspective, while disposal by way of deferred prosecution agreement appears attractive to the state, it relies on internal investigation by the defendant corporation that is eye-wateringly expensive.[98] The corporation's costs are then racked up with the imposition of ever-greater penalties and any additional requirement to satisfy specified rehabilitative terms. It is worth reiterating that none of these expenses are currently considered collateral damage, but there are nonetheless a number of critical points flow from the financial implications:

1.43 It would seem that businesses are now focusing on keeping out the regulatory/enforcement "agents" who can find their way into corporations through the monitoring provisions of deferred prosecution agreements.[99] Since the most economic means to exclude intervention is by successfully navigating the intervention to be avoided, and not through genuine and costly compliance, evading discovery is becoming the corporate priority.

1.44 To achieve such navigation, the lawyers employed in compliance roles are developing programmes that mirror the criminal law such that there is an increasingly aggressive internal approach to employee monitoring.[100] At the same time, prosecutors are essentially becoming the criminal justice system, through threats of offence-stacking and allegation bundling (see above at 1.36), such that enforcement is selective and similarly situated corporate defendants are treated unequally.[101] Since the enforcement approach is seen as arbitrary and discriminatory in the corporate context, the criminal law's legitimacy is eroded in this sphere in both the public and employee perception.[102] This is already evident in the "too large to prosecute" discourse and it is also suggested that the perceived lack of legitimacy provides a premise on which corporations and employees then rationalise continued unethical and criminal behaviour[103] and justify covering it up.

1.45 If the settlement approach continues to rely on a departure from legal norms to gain enforcement leverage, as the American experience suggests, it can be anticipated that the overall effect will be to exacerbate, rather than reduce, the problem of corporate crime. For the settlement approach to work, and thereby induce corporations to both cooperate and genuinely improve their compliance, the overall enforcement regime must encompass a real and legitimate threat of corporate prosecution in addition to the settlement vehicle.

1.46 As the future will undoubtedly involve ongoing collaboration with enforcement agencies from other jurisdictions, the opportunity for a review and reform of the law in England and Wales provides a timely opportunity to lead the way with the development of a criminal law that addresses the problem of under deterrence. Given that collateral damage is the pivotal consideration in the current enforcement response, further research is urgently required to provide a better

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[98] For example, Siemens AG spent in excess of US $ 1 billion on the inquiry into allegations of bribery and this figure excludes the direct and indirect costs of the subsequent settlement agreed, Todd Haugh, 'The Criminalization of Compliance' (2017) 92(3) Notre Dame Law Rev 1215, 1241.
[99] Ibid.
[100] Ibid. 1245-47.
[101] Sara Sun Beale, 'The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization' (2005) 54 AM U L Rev 747, 757.
[102] Allegra M. McLeod, 'Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law' (2012) 100 Geo. L J 1587; Sara Sun Beale, 'The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization' (2005) 54 AM U L Rev 747, 758-59; Todd Haugh, 'The Criminalization of Compliance' (2017) 92(3) Notre Dame Law Rev 1215, 1240-41.
[103] Todd Haugh, 'The Criminalization of Compliance' (2017) 92(3) Notre Dame Law Rev 1215, 1252.

understanding of the costs of corporate crime.

1.47 What is clear is that criminal conviction involves reputational stigma and this is a particularly significant factor in motivating corporate behaviour. For this reason, and in accordance with general principle, the criminal law should be reserved for cases that are truly deserving and employed as a matter of last resort. Unbridled expansion of corporate prosecution, however accommodating the substantive model of corporate crime may be, would be counter-productive and serve only to dilute the criminal law's "reputational capital".[104]

1.48 Summary of principles that should govern the attribution of criminal liability to non-natural persons:

(1) Non-natural persons are not merely fictional, their personality can transcend the sum of the parts and they can have distinct agency and capacity.

(2) In accordance with the rule of law, the principles governing the attribution of criminal liability to non-natural persons should not depart from those governing the attribution of criminal liability to individuals. Accordingly:

(3) Criminal fault should usually be attributed to non-natural actors on fault-based principles and using the existing evidential presumptions.

(4) The aim of a criminal regime should not be to find a means by which criminal liability can be easily attributed to the non-natural person but, having determined the question of agency appropriate in the given circumstances, the mode of attribution should meaningfully capture the nature of actor(s) involved, whether corporate or individual, and the nature of their wrongdoing.

(5) Crime committed in the corporate context cannot be accommodated within a one size fits all approach to corporate liability, the range of models of liability and offences available must be capable of suiting the various different agents and the various different natures of offending behaviour.

(6) The question of punishment should not be confused with question of criminal liability in the case of non-natural persons. Any departure from traditional legal principle and criminal process, such as the use of deferred prosecution agreements, should be clearly explained and cogently justified.

(7) The criminal law should be used as a matter of last resort.

(2) Does the identification principle provide a satisfactory basis for attributing criminal responsibility to non-natural persons? If not, is there merit in providing a broader basis for corporate criminal liability?

2. The principle does not provide a satisfactory basis of corporate criminal liability in the

[104] Gerard Lynch, 'The Role of Criminal Law in Policing Corporate Misconduct' (1997) 60 Law and Contemp. Prob. 23.

context of larger companies and may even serve as a real incentive to senior managers to "turn a blind eye" to questionable or dubious practices and as a disincentive for the internal reporting of suspected illegality.[105] The deficiencies are already so well-documented that they will not be repeated here, however, it is as a result of the identification principle's limitations that bespoke statutory offences have been enacted for a range of offences.

2.1 It is not surprising that the identification principle is unsuited to addressing misconduct perpetrated in the context of the large modern corporation, it is not the product of any overarching theory but the result of coincidental developments in law that have occurred on a case by case basis over time in response to factual contexts that have happened to both arise and be brought before the courts.[106]

2.2 The identification principle attributes a form of direct liability and is satisfactory in the context of small businesses where the company has a relatively simple, pyramidal managerial framework and the corporate form is, in essence, the alter ego of the director(s). The principle should be retained to address wrongdoing of this nature that is perpetrated in this limited context but there is considerable merit in extending it to apply to senior management to reflect the reality of dispersed decision-making in large corporations (see below at 3.2 to 3.6).

2.3 An additional mechanism for corporate fault attribution, the presumptive model, is proposed for instances of corporate criminality in which it is not possible or appropriate to inculpate the corporation by reference to individual fault, either via the proposed extension to the identification principle or via the failure to prevent model (see above at 1.13 to 1.17).

(3) In Canada and Australia, statute modifies the common law identification principle so that where an offence requires a particular fault element, the fault of a member of senior management can be attributed to the company. Is there merit in this approach?

3. The Australian Criminal Code[107] reflects and expands those to whom the identification principle of corporate liability can be applied and currently refers to those in the position of "high managerial agent". However, the Australian Law Reform Commission has recently observed that that there are unresolved definitional issues with this term[108] and, of note, it is recommending a further extension that would replace it with the much broader category of "officer, employee, or agent of the body corporate, acting within actual or apparent authority". It suggests that the application of the principle to a broader range of persons would better reflect the reality of modern corporate decision making, be more agnostic to corporate size and structures and would also employ the more familiar concepts of the law of agency.[109] Significantly, the Australian Law Reform Commission suggests that this provision should continue to be counterbalanced by the availability of a reasonable precautions defence on that basis that this would serve to decouple individual fault from that of the corporation and therefore focus attention on corporate blameworthiness.[110]

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[105] HMRC "Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion", (Consultation document, 16 July 2015).
[106] Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018) Ch. 7
[107] Section 12.3(2)(b).
[108] Australian Law Reform Commission, Report on Corporate Criminal Liability (ALRC Report 136) April 2020, 6.82 – 6.89; Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press 2011) 231.
[109] Australian Law Reform Commission, Corporate Criminal Liability, (ALRC Report 136) April 2020, 6.9.
[110] Ibid., 6.79.

3.1 Although the inclusion of familiar legal concepts are generally welcome in developments in the law, if the recommended Australian model were to be employed in England and Wales, it would blur the boundaries of the proposed extended identification principle (see below at 3.2 to 3.6) with the "failure to prevent" model, currently employed for some statutory offences, and it would therefore cause confusion.

3.2 The Canadian modification of the identification principle extends its application to "senior officers" who are described as representatives who play an important role in the establishment of an organisation's policies or are responsible for managing an important aspect of the organisation's activities and, in the case of a body corporate, includes a director, its chief executive and its chief financial officer.[111] The prosecution therefore needs to prove that an "important role" or "important aspect of the organisation's activities" is undertaken by the individual.

3.3 In Petroles Global Fuels (2013)[112], a case involving price fixing by a regional manager, it was held that the context and the structure of the organisation should be should be taken into account as well as the actual function performed by the person in question.[113] The court acknowledged that a "senior officer" could be seated in middle management[114] while in Metron Construction (2012) it was held that an independent contractor could be a "senior officer" for the attribution of corporate liability by virtue of contractual wording or operational authority.[115] While this seems to extend the scope of corporate liability significantly beyond the originally conceived "directing mind and will", it has been suggested that the handful of cases that have been brought in Canada do not go beyond what would have been possible in any event under the previous identification theory.[116] However, this is not necessarily evidence that the senior management approach is unsatisfactory in substance and there may any number of reasons to explain why more corporate prosecutions have not been brought by the Canadian authorities. The extension to the level of senior managers, by reference to structural form and functional substance, appears far more reflective of the dispersed nature of management in large corporations than the current identification principle in England and Wales and there is merit in this approach.

3.4 Of note, the Canadian approach has also been criticised for not going far enough to offset methodological individualism that permeates the process of corporate fault attribution and that the senior management approach perpetuates the idea that organisations are always reducible to the actions and intent of individuals.[117] Accordingly, the Canadian regime still has no application where there is no obvious individual who has committed the offence and it therefore continues to personalise the analysis of organisational liability around individual conduct, even if this mischaracterises the nature of the corporate role in the commission of the offence.[118]

3.5 Again, this criticism does not necessarily indicate that the senior management approach is itself deficient. Framed in this way, the model serves to express, where appropriate, the nature and

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[111] Criminal Code of Canada, s. 2.
[112] *R c Petroles Global Inc*., 2013 QCCS 4262.
[113] Todd Archibald et al, 'Critical Developments in Corporate Criminal Liability: Senior Officers, Wilful Blindness and Agents in Foreign Jurisdictions' (2013-2014) 60 Crim L Q 92.
[114] Reem Radhi, 'The Standard of Liability for Corporate Crime: What Other Jurisdictions Can Learn from Canada' (2017) 17 Asper Review of Int'l Business and Trade Law 163.
[115] *R v Metron Construction Corp* (2012) 1 CCEL (4th) 266, 2012 Carswellont 9497, [2012] O.J. No. 3649 (Ont. C.J.) (Metron).
[116] Jennifer A. Quaid, 'What's Good for the Goose is Good for the Gander: Considering the Merits of a Presumption of Organizational Capacity in Canadian Criminal Law' in Marie-Eve Sylvestre et al, *Criminal Law Reform in Canada: Challenges and Possibilities* (Editions Yvon Blais 2017).
[117] Ibid.
[118] Ibid.

circumstances of the corporate wrongdoing by reference to the identifiable criminal acts of its senior personnel and would, like the existing identification principle, have general application to criminal offences.

3.6 In the context of England and Wales, any extension to a senior officer principle of identification would continue to be supplemented by the bespoke failure to prevent offences, which capture a difference in the nature of the offending conduct, and, it is proposed, by the additional presumptive/ manifest model of corporate criminal liability in cases where it is not possible or appropriate to reduce liability to individuals (see above at 1.13 to 1.17). The addition of the latter approach to a corporate liability in the domestic prosecutorial armoury would clearly recognise the corporate form as a real and powerful actor and negate objections on the grounds of methodological individualism.

(4) In Australia, Commonwealth statute modifies the common law identification principle so that where an offence requires a particular fault element, this can be attributed to the company where there is a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant law. Is there merit in this approach?

4. To the extent that the statute recognises the realist nature of organisations, there is merit in the approach. However, although the Australian Criminal Code has recognised the "corporate culture model" since 1995,[119] and it is the most sophisticated approach to corporate liability taken anywhere in the world,[120] the corporate culture provisions are largely untested. It is also of note that this is not an approach that has been adopted elsewhere, let alone expanded within the Australian jurisdiction.[121] Indeed, it was because the approach had only been used in rare cases, with a consequent dearth of judicial guidance, that Australia's Attorney-General asked the Law Reform Commission to inquire into the corporate criminal liability regime in 2019.

4.1 The concept of a corporate culture has been described as "nebulous" and so difficult to define by any objective measure that the evidential burden may be too high to meet with certainty.[122] Furthermore, a defective culture will not be inferred as a result of the offending conduct[123] such that the prosecution must prove that the necessary conditions and attitudes exist within the organisation. While the Law Reform Commission has acknowledged that the complexity of the provisions and the number of steps between corporate culture and proof of fault mean that juries may be inclined to acquit,[124] it has concluded that the rarity of corporate prosecutions is probably due to regulators preferring to pursue civil penalty proceedings and negotiated settlements.[125] However, this preference is likely due to the higher evidential standard that criminal prosecution necessitates.

4.2 Furthermore, since the Australian code only provides the mechanism to attribute intention,

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[119] Schedule to the Criminal Code Act 1995 (Cth) Part 2.5.
[120] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (OUP 2002) p. 138; Tahnee Woolf, 'The Criminal Code Act 1995 (Cth) – Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 Criminal Law Journal 257, 262.
[121] It has been excluded from a number of Commonwealth statutes, including Chapter 7 of the Corporations Act 2001, which regulates the financial services industry, and the Competition and Consumer Act 2010 (Cth).
[122] Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' Sydney Law School Legal Studies Research Paper No. 17/14, University of Sydney, Feb 2017, 16.
[123] *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 Sept 2015).
[124] Australian Law Reform Commission, Corporate Criminal Liability, (ALRC Report 136) April 2020, 6.105.
[125] Ibid. 4.16

recklessness and knowledge to a corporation, its application to fraud, a classic dishonesty offence, is doubtful[126] and this leaves a lacuna in the law. Although the Criminal Code does not prevent the creation and use of other states of mind,[127] when the mens rea element is not pleaded with the s. 12.3 structure the attribution of fault becomes uncertain and complex. However, when prosecutors did bring the charge of dishonesty on the basis of s. 12.3(1) in R v Potter & Mures Fishing,[128] the court held that this section was not applicable to it and there was therefore no case to answer. Curiously, given Australia's lead in recognising corporate agency through the lens of corporate culture, the Law Reform Commission has stated that corporate prosecutions for dishonesty offences will be a rarity since these are more directed to human conduct.[129] This is particularly surprising since the Commission also recognises that dishonesty[130] is not a state of mind, but a character given to the fault element (knowledge) in a particular circumstance.[131] Furthermore, if enacted, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill[132] will insert a new definition of "dishonest" into the Dictionary of the Criminal Code, following the judgment in Ivey v Genting,[133] and which requires simply that the defendant's knowledge, belief or intent was dishonest according to the standards of ordinary decent people.[134] It might have been thought that focus on the objective approach would have underlined the applicability of the dishonesty element to corporate behaviour.

4.3 Although it has been little used in practice, there is no appetite for abandoning the corporate culture model. On the contrary, the Australian Law Reform Commission justifies holding the corporate form criminally responsible on this basis by reference to criminological, psychological and management research that demonstrates the unique criminogenic capacity of the corporate context.[135] This body of research supports the proposition that misconduct can be properly seen as the product of a deficient culture, defective due diligence/ compliance measures or systemic failures such that the corporate form can be criminally responsible.[136]

4.4 Of note, the Australian Law Reform Commission also adverts to a "normative power in having an express pathway to criminal liability if a corporate culture requiring compliance is not created and maintained".[137] Aside from the normative power aspect, the twinning of corporate culture and compliance is interesting in the respect that, although the nature of the offending behaviour is not an exact match to the Australian culture model, compliance is the central feature of the failure to prevent model of corporate criminal liability now gaining traction in England and Wales and other jurisdictions. However, what distinguishes the Australian corporate culture model is that it cuts free of the individualistic constraint altogether and, unlike the "parasitic" nature of the corporate failure to prevent approach, corporate liability does not rely on the underlying criminality of an individual who has committed the substantive offence.

4.5 This leads to the proposition that, to achieve a desired break from methodological

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[126] Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018).
[127] Criminal Code s. 5.1(2).
[128] *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 Sept 2015).
[129] Australian Law Reform Commission, Corporate Criminal Liability, (ALRC Report 136) April 2020, 6.63.
[130] Per *R v Ghosh* [1982] QB 1053.
[131] Australian Law Reform Commission, Corporate Criminal Liability, (ALRC Report 136) April 2020, 6.64 citing Stephen Odgers, *Principles of Federal Criminal Law* (4th ed., Lawbook Co 2019) 5.1.170 and the discussion in Attorney-General's Department et al, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 323.
[132] 2019 (Cth)[25], [204].
[133] *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2018] UKSC 67.
[134] *Peters v The Queen* (1998) 192 CLR 493.
[135] Australian Law Reform Commission, Corporate Criminal Liability, (ALRC Report 136) April 2020, 4.4.
[136] Ibid., 4.5 et seq.
[137] Ibid., 6.114, citing Allens, *Submission 31*.

individualism, the failure to prevent approach could also[138] be modified such that corporate liability would turn on either the failure to prevent a wrongdoer, as is currently the case, or the failure to prevent a manifest criminal wrongdoing, where an offence has "obviously" been committed. This shift in focus from individual perpetrator to harmful outcome would have the benefit of decoupling individual fault and corporate fault within the existing and familiar model. Furthermore, since the failure to prevent model provides a corporate defence of adequate procedures, the objection to the inferential approach, encountered in the Australian corporate culture construction, and the evidential problems this creates, would simply not arise. The law of England and Wales would thereby enjoy the benefit of what is, in essence, a corporate culture-based liability without the evidential burdens that the explicit Australian model imports. This approach would work well in cases where it is not appropriate or it is not possible to identify individual criminality and the nature of the corporate wrongdoing is better captured by its description as a failure to prevent than as the direct commission of the specific substantive offence (in which case it would be effected through either the expanded identification principle or the proposed presumptive model of direct liability, see above at 3.2 to 3.6 and 1.13 to 1.17).

(5) In the United States, through the principle of respondeat superior, companies can generally be held criminally liable for any criminal activities of an employee, representative or agent acting in the scope of their employment or agency. Is there merit in adopting such a principle in the criminal law of England and Wales? If so, in what circumstances would it be appropriate to hold a company responsible for its employee's conduct?

5. The principle of respondeat superior is one of three different approaches to corporate liability in the US,[139] originally recognised by the federal courts as the means to establish corporate liability for mens rea offences where it is in the interests of public policy.[140] It now constitutes the predominant approach to corporate liability in the federal courts and in most of the state courts. Although there is much diversity among the state criminal codes, the Model Penal Code, adopted by the American Law Institute in 1962, prompted reforms of the state codes in the 1960s and 1970s such that they display a number of similarities. However, the Code provides a complex approach to corporate criminality that includes three distinct systems of liability. The first applies to crimes of intent where there appears to be no legislative purpose to impose corporate liability such that it can only be liable for a crime committed by an agent acting in the scope of his office if it was performed, authorised or recklessly tolerated by the board of directors or a person of high managerial official. The second system of corporate liability also concerns crimes of intent but deals with those for which the legislature plainly intended to impose corporate liability. This operates like the respondeat superior model but includes a due diligence defence. The third system applies to strict liability crimes and assumes corporate liability will be imposed unless a contrary intention is plainly evident. Respondeat superior applies to the third system but there is no need for evidence of specific intent on the part of an employee or an intention to benefit the corporation and there is no due diligence defence. The Code also sets out a small category of offences, viewed as integral to the third system, that are based on the failure to discharge a specific corporate duty that requires positive performance.

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[138] In addition to the proposed extension of the identification principle to senior management and the proposed enactment of a presumptive model of corporate liability where it is not possible or appropriate to inculpate individuals.

[139] Anon, 'Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' (1979) 92(6) Harv L Rev 1227.

[140] *New York Central and Hudson River Railroad Co v US* 212 U.S. 481 (1909) at 494.

5.1 Under the respondeat superior doctrine the corporation is considered an aggregation of its agents, it is not necessary to prove that a specific person acted illegally, just that some person committed the crime in question. Moreover, some courts have been open to finding that the defendant corporation acted knowingly or willingly through the 'collective knowledge doctrine' that imputes the aggregate constructive knowledge of all or a number of its employees, even if there is no single employee entirely at fault.[141] Although the doctrine prevents a corporation evading liability by dividing employee duties, it is a controversial approach and one that has been firmly rejected by the English courts.

5.2 Given that respondeat superior is also still controversial in the US,[142] as it attributes the fault of an individual to the corporate form without proof of corporate blameworthiness, there may be strong objections to the introduction of corporate liability in England and Wales on this basis.

5.3 It appears that the judiciary are resistant to strict liability and therefore try to preserve some requirement of mens rea as a precondition to criminal liability.[143]

5.4 Furthermore, respondeat superior is still a form of indirect, or derivative liability and does not accord with the holist account of corporations. While it is criticised for being too broad in that the wrongdoing of any employee is enough to attribute corporate fault, respondeat superior is also considered too narrow in that it is still tied to methodological individualism.

(6) If the basis of corporate criminal liability were extended to cover the actions of senior managers or other employees, should corporate bodies have a defence if they have shown due diligence or had measures in place to prevent unlawful behaviour?

6. No, if what is suggested is an extension of the identification principle to senior management, in effect this defence would blur or reduce all corporate liability to a failure to prevent offence. Accordingly, although it would place the evidential onus on the corporate form to demonstrate due diligence, with consequent economic efficiencies for the prosecuting authority, it would mean that all corporate criminality would, in essence, be characterised as a form of failure to prevent. This would mischaracterise the nature of the corporate criminality in some cases and in others it would be absurd, and it would certainly not accord with principles of fair labelling. For example, applied in the case of R v Kite and OLL Ltd[144] the corporate conviction would be more akin to a failure to prevent offence even though the director was at fault. Either the fault of a senior manager is equated with the fault of the corporation or it is not. This proposal, which combines the extension of the identification principle and the failure to prevent model's due diligence defence, blurs an important distinction between different forms of corporate offending conduct.

6.1 No, if what is suggested is that corporations should be liable for the substantive crimes of lower level employees but have a defence of due diligence, this is still tied to methodological

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[141] Michael Nagelberg, Christopher Balser et al, 'Corporate Criminal Liability' (2017) 54 Am Crim L Rev 1073 citing *United States v. Philip Morris USA, Inc*., 566 E3d 1095, 1121 (D.C. Cir. 2009) (holding a corporation's collective knowledge was sufficient to allow a jury to infer its specific intent to defraud); *United States v. Penagaricano-Soler*, 911 F.2d 833, 843 (1st Cir. 1990) (imputing to corporation various employees' collective knowledge obtained within scope of their employment); *Bank of N. Eng*., 821 F.2d at 856

[142] Mihailis E. Diamantis, 'Corporate Criminal Minds' (2016) 91 Notre Dame Law Review 2014; John C. Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers, Inc 2020).

[143] John C. Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers, Inc 2020) p. 21.

[144] R v Kite and OLL Ltd, The Times, 8 Dec 1994.

individualism. The presumptive approach is better for the reasons set out above (see 1.3 to 1.8).

(7) What would be the economic and other consequences for companies of extending the identification doctrine to cover the conduct along the lines discussed in questions (3) to (5)?

7. Corporations have existing compliance obligations and are expected to be law abiding. The proposals mooted do not constitute an extension of the substantive law but would simply extend the reach of the criminal process to make it more suited to addressing corporate criminality. For law abiding companies there should be no economic consequences, they should already be committed to genuine compliance and have appropriate compliance measures in place.

7.1 Extending the identification principle in any shape or form should only affect corporations that are not already law abiding. While corporations who commit crime under any of the models proposed should face economic consequences, the financial implications faced by a defendant company when their criminality is discovered needs to be balanced against the financial and other costs caused by their criminal activity. As discussed above (at 1.31), corporate criminal behaviour results in the misallocation of resources through which, for example, smaller businesses can fail, and consumer trust and market operation is damaged.

7.2 Furthermore, while the current non-criminal enforcement approaches, including the use of deferred prosecution agreements, are failing to deter corporate recidivism, and sanctions are therefore perceived as a morally neutral cost of doing business, the eye-watering cost of increasingly detailed regulation will continue to escalate. The regulatory edifice is such that compliance costs create a significant barrier to entry[145] and these need to be added to the operating costs of the regulators themselves. The total administrative costs of the FCA, PRA, Financial Ombudsman Service, Financial Services Compensation Scheme and Money Advice Service alone were assessed at almost £1.2 billion per annum five years ago, representing a six-fold increase since 2000.[146]

7.3 While regulation expands in response to the continuing misconduct of some corporations, the enormous costs of regulation are not borne by them but by their stakeholders, by law abiding businesses, by consumers and by society generally.

7.4 As the better deterrent, economic theory indicates that a robust criminal law is more efficient than regulation.[147] While truly deserving criminogenic companies would invoke the force of the criminal law, and the financial implications that flow, the regulatory burden on innocent stakeholders and law abiding businesses should decrease.

7.5 It is not suggested that the criminal law should not be invoked in all cases of breach, it should be saved for the worst excesses and those truly deserving of the stigma of criminal law. Only companies who are engaged in serious criminality and with disregard for genuine compliance should face economic implications.

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[145] For example, the FCA and PRA rulebooks, guidance and supervisory statements exceed 13,000 pages, see New City Agenda and Cass Business School, New City Agenda and Cass Business School, "Cultural Change in the FCA, PRA and Bank of England, Practising What They Preach?" 25 October 2016 p. 38 at http://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural-change-in-regulators-report_embargoed.pdf accessed Aug 29, 2021.

[146] Ibid., p. 58.

[147] Stephen Copp and Alison Cronin, 'The failure of criminal law to control the use of off balance sheet finance during the banking crisis' (2015) 36 (4) Co Law 99.

(8) Should there be "failure to prevent" offences akin to those covering bribery and facilitation of tax evasion in respect of fraud and other economic crimes? If so, which offences should be covered and what defences should be available to companies?

8. Not only is economy to be found in the use of a familiar framework, the failure to prevent model combines the creation of a serious corporate offence with a defence that requires the demonstration of regulatory-type compliance.[148] Indeed, an important determining factor in the adoption of a failure to prevent offence for bribery was that companies themselves are best placed to address the problem and this model takes advantage of that. It is therefore particularly attractive from the prosecution perspective in that the evidential onus is placed on the corporation to demonstrate due diligence.

8.1 Described as criminally-backed compliance, the corporation is afforded a central role in self-regulation through its internal compliance system. From regulatory perspective, the approach is advantageous where regulatory agencies lack the proximity to understand volatile corporate risks that may have complex causes and need ongoing monitoring. The model is therefore premised on expertise and efficiency arguments and, as a form of "regulated self-regulation",[149] it can respond to challenges arising from complex technologies and information asymmetries between businesses and the state. It recognises that the corporation has better access to information regarding its own operations and makes it responsible for the regulatory detail, contained in the internal compliance system, while incentivising self-regulation with external force.[150]

8.2 The failure to prevent offences sit in tandem with the common law identification doctrine such that the corporation may be liable for the substantive offence, where the nature of both the misconduct and the agent involved makes it appropriate, or for the failure to prevent lower level employees committing the substantive offence.

8.3 In principle there is no bar to the application of the failure to prevent model to any economic, or other, crime particularly where there are existing compliance requirements. Money laundering is an obvious serious offence for which the corporate liability for failure to prevent model could be readily applied, as is false accounting.[151]

8.4 The failure to prevent model of corporate liability would also work in the context of fraud, where it is possible to identify lower level employees who have committed the substantive offence. The addition of such an approach to corporate fraud is recommended and would result in a range of offences available to suit various circumstances. The Fraud Act 2006 would continue to deal with instances of individuals who perpetrate fraud in the corporate context but are nonetheless criminally liable as individuals. The common law identification principle would still address instances

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[148] Stephen Copp and Alison Cronin, 'New models of corporate criminality: the development and relative effectiveness of "failure to prevent" offences' (2018) 39(4) Co Law 104; Stephen Copp and Alison Cronin, 'New models of corporate criminality: the problem of corporate fraud – prevention or cure?' (2018) 39(5) Co Law 139.

[149] Christopher Harding and Alison Cronin, *Regulating Bad Practice: Mapping a Framework for Legal Intervention* (Edward Elgar forthcoming 2022) Ch. 6.

[150] Marc Engelhart, The Nature and Basic Problems of Compliance Regimes (2018) https://pure.mpg.de/rest/items/item_2643714_7/component/file_3007899/content accessed Aug 29, 2021.

[151] Stephen Copp and Alison Cronin, 'New models of corporate criminality: the development and relative effectiveness of "failure to prevent" offences' (2018) 39(4) Co Law 104.

where the individual fraudster is at whatever level of seniority the law determines, such that his/her guilt can be attributed to the corporation. A statutory offence of corporate failure to prevent fraud would inculpate companies who had failed to put in place procedures adequate to prevent the commission of fraud by lower level officers, employees and associates. However, because of the peculiar nature of the fraud offence (discussed at 1.7 above), this would still leave a lacuna in the law.

8.5 Since the failure to prevent lower level employees committing fraud is parasitic in nature, corporations would evade liability if the individuals involved in the conduct are not themselves dishonest and are therefore not guilty of fraud. In the absence of dishonesty at the individual level, it may be that the fraudulent activities are more appropriately recognised as those of the corporation itself, where the requisite dishonesty is expressed through its policies, determined via its decision making structure, or the consequence of numerous divergent factors which have led to a criminogenic corporate culture.

8.6 Restricting the attribution of corporate liability to a parasitic basis may serve only to inculpate carefully selected scapegoats while the risk-averse organisation remains unscathed and undeterred.

8.7 Both the lacuna identified and the methodological individualism concern would be addressed in two ways (as set out above at 4.5 and 1.3 to 1.8), namely the extension of the failure to prevent model to include liability for a failure to prevent the manifest wrongdoing or through the use of the presumptive model of corporate liability where the substantive offence, rather than a failure to prevent it, is alleged.

(9) What would be the economic and other consequences for companies of introducing new "failure to prevent" offences along the lines discussed in question (8)?

9. The same arguments apply here as those set out above at 7. to 7.5.

9.1 Since the failure to prevent model is used as an accessory to existing civil and public law obligations, the development of the criminal law to encompass compliance not only harnesses the criminal law's superior deterrent effect but that it does so without the creation of additional obligations.[152]

9.2 Furthermore, if the adequate/reasonable procedures defence is employed, this requires a compliance system proportionate to the specific corporate context and the risks it faces.

(10) In some contexts or jurisdictions, regulators have the power to impose civil penalties on corporations and prosecutors may have the power to impose administrative penalties as an alternative to commencing a criminal case against an organisation. Is there merit in extending the

[152] Marc Engelhart, The Nature and Basic Problems of Compliance Regimes (2018) https://pure.mpg.de/rest/items/item_2643714_7/component/file_3007899/content accessed Aug 29, 2021 referring to Michael Breland, *Lernen und Verlernen von Kriminalität* (Springer 1975), Klaus Tiedemann, *Wirtschaftsstrafrecht und Wirtschaftskriminalität* (Rowohlt 1976) 249; see also Klaus Tiedemann, 'Corporate Criminality as Third Track' in Dominik Brodowski et al (eds.), *Regulating Corporate Criminal Liability* (Springer 2014) 11-18 and recent research at the Max Planck Institute for Foreign and International Criminal Law confirming the criminal law measures are more effective than imposing administrative or civil sanctions, Ulrich Sieber and Marc Engelhart, *Compliance Programmes for the Prevention of Economic Crimes* (Duncker & Humblot 2014) p. 162, 178.

powers of authorities in England and Wales to impose civil penalties, and in what circumstances might this be appropriate?

10. Much as the use of deferred prosecution agreements marks a departure from legal norms and traditional principles of criminal law (discussed above at 1.38), for many jurisdictions the distinction between civil, administrative and criminal enforcement is also becoming increasingly blurred. In some jurisdictions, such as the US, deferred prosecution agreements are commonly employed in tandem with civil penalties and in the EU, for example, enforcements that are administrative in form are deemed criminal in substance, affording corporate defendants the greater procedural safeguards that come with it. That this mix and match or hybrid approach is occurring is no doubt indicative of the pragmatism that has always been employed in dealing with corporate crime. The availability of non-criminal penalties adds to the prosecutorial armoury and may be appropriate in circumstances where the corporate misconduct is not so seriously reprehensible that it demands the full force of the criminal law (see above at 1.47).

10.1 In practice, the universal and dramatic expansion in regulation was accompanied by a gradual increase in the severity of sanctions available and then imposed for regulatory breaches. However, with deterrence assuming prominence as the dominant aim in all jurisdictions there has also been an incremental expansion of national criminal laws for the most serious forms of corporate wrongdoing, notwithstanding the strong doctrinal resistance to the concept of corporate moral agency that is still felt in many of the European civil law jurisdictions. The influence of supranational, intergovernmental and international organisations has also been a significant driver, together with the increasing frequency of collaborative and parallel prosecutions that are being brought across legal systems.

10.2 In principle, however, the use of civil penalties for corporate misconduct that would incur the prosecution of similarly situated individuals offends rule of law principles. Furthermore, by undermining the legitimacy of the law in this way, it is suggested that the differential approach serves to rationalise the continued criminality of corporations and employees (see above at 1.44).

10.3 From the normative perspective, the inherent nature of economic crimes, and the extent of harm they cause to individuals and markets, demands that the criminal law should be invoked[153] where the wrongdoer has engaged in seriously reprehensible conduct[154] and the stigma of conviction is therefore deserved. In its work on Criminal Liability in Regulatory Contexts, the Law Commission defined serious offences as those involving dishonesty, intention, knowledge or recklessness[155] and the criminalisation of fraud based offences was specifically envisaged[156] where the harm relates to a moral failing that goes beyond the mere breach of a rule or departure from a standard.[157] The Law Commission suggested that the harm done or risked should be regarded as serious enough to warrant criminalisation if, in some circumstances, an individual could justifiably be sent to prison for a first offence, or an unlimited fine is necessary to address the seriousness of the wrongdoing.[158] It is submitted that this is the correct approach to distinguishing misconduct appropriate for criminal enforcement and that more suited to non-criminal measures.

10.4 The extent of financial misconduct witnessed in the last few decades certainly provides a

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[153] Richard B. Macrory (Better Regulation Executive), *Regulatory Justice: Making Sanctions Effective, Final Report* (Nov 2006).
[154] Law Commission, Criminal Liability in Regulatory Contexts (2010) p.8, para.1.28.
[155] Ibid., p.28, para.3.10.
[156] Ibid., p.11, para.1.42.
[157] Ibid., p.68, para.4.2.
[158] Ibid., p.8, para.1.29.

strong case for the intervention of the criminal law in appropriate cases. Indeed, the inadequacy of the regulatory approach, resulting in deficient consumer protection in the financial services sector, has been identified as a major contributor to the global financial crisis of 2007/2008[159] and, for example, the mis-selling of financial products has been the cause of significant consumer harm, to the general detriment of market efficiency.[160]

10.5 The efficacy of non-criminal enforcement to deal with "real crime" has been a matter of real doubt for a considerable time.[161] In the context of financial services regulation, the 2013-14 Parliamentary Commission on Banking Standards observed that, "misconceived and poorly-targeted regulation has been a major contributory factor across the full range of banking standards failings ... (r)egulators were complicit in banks outsourcing responsibility for compliance to them by accepting narrow conformity to rules as evidence of prudent conduct".[162] Similarly, the limitations of ever more detailed regulation are well recognised.

10.6 While there is increasing resort to civil and administrative penalties, there is also recognition that this is due to the higher evidential standard required in the criminal process,[163] rather than any demands of legal principle. The problem of obtaining evidence is particularly acute in the corporate context and, as has been discussed above (at 1.23), this has also led to the use of deferred prosecution agreements, the availability of which depend on corporate cooperation with the investigation process. The use of administrative penalties to address corporate misconduct in the German jurisdiction is simply the product of its particular constitutional history, and the consequent principle of compulsory prosecution, rather than any overarching theory or other justification.[164] In fact, a high number of corporate crimes are discovered every year, for example 63,000 cases in 2014,[165] and it was the discovery of the Siemens corruption case that added further impetus to the European adoption of the criminally-backed compliance approach, having highlighted the deterrent

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[159] European Parliament, Directorate General For International Policies, Policy Department A: Economic and Scientific Policy, Consumer Protection Aspects of Financial Services, 2014

[160] Ibid.

[161] See for example James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003); M. Levi, *Regulating Fraud* (Tavistock, 1987); M. Levi, *The Economic Cost of Fraud Report for the Home Office* (London, NERA 2000); M. Levi, 'The Roskill Fraud Commission Revisited: An Assessment' (2003) *Journal of Financial Crime* 11(1), 38-44; Michael Levi, *The Phantom Capitalists* (Ashgate 2008); Levi Michael et al, *The Nature, Extent and Economic Impact of Fraud in the UK* (London: ACPO, 2007); The Royal Commission on Criminal Justice *The Investigation, Prosecution and the Trial of Serious Fraud*: (London: HMSO, 1993); J.E. Parkinson, *Corporate Power and Responsibility, Issues in the Theory of Company Law* (Clarendon 2000); D. Sugarman, 'Law Economy and the State in England 1750-1914: Some Major Issues' in D. Sugarman (ed.) *Legality, Ideology and the State* (Academic Press 1983); Edward S. Herman, *Corporate Control, Corporate Power* (Cambridge University Press 1981); G. Slapper and S. Tombs, *Corporate Crime* (Longman 1999); G.P. Gilligan, 'The Origins of UK Financial Services Regulation' (1997) 18(6) Co Law 167-176; S.P. Shapiro, 'Collaring the Crime, Not the Criminal: Reconsidering the Concept of White Collar Crime' (1990) 55 *American Sociological Review* 346-65; G. Scanlan, 'Dishonesty in Corporate Offences, A Need for Reform?' (2002) 23(4) Co Law 114-119; G. Scanlan, 'Offences concerning directors and officers of a company – fraud and corruption in the United Kingdom – the future' (2008) 29(9) Co Law 264 – 271; J.L. Masters, 'Fraud and Money Laundering: the evolving criminalization of corporate non-compliance' (2008) *Journal of Money Laundering Control* 103.

[162] Parliamentary Commission on Banking Standards, "Changing banking for good, First Report of Session 2013-14", Vol.1, p.18, para. 21.

[163] Australian Law Reform Commission, Corporate Criminal Liability, (ALRC Report 136) April 2020.

[164] John H. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1973-1974) 41 U Chi L Rev 439; Joachim Herrmann, 'The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany' (1973-1974) 41 U Chi L Rev 468, 492; See Christopher Harding and Alison Cronin, *Regulating Bad Practice: Mapping a Framework for Legal Intervention* (Edward Elgar forthcoming 2022) Ch 5.

[165] https://www.nortonrosefulbright.com/en/knowledge/publications/800922a0/corporate-criminal-liability-in-germany accessed Aug 29, 2021.

power of corporate criminal liability as a stimulant to compliance and co-operation.[166] The extensive discussion that has taken place in recent years was reignited by the Volkswagen emissions scandal and Porsche's failed takeover attempt in 2008. Due to concerns about the sufficiency of sanctions, a concern that has been shared universally, the maximum fine for corporate crime increased to Eur 10 million in 2013 and, in 2017, the law was reformed in relation to the disgorgement of profits from criminal wrongdoing such that the amount was increased and disgorgement was even made possible for time-barred offences. More recently, in areas such as banking supervisory and cartel law, there has been a substantial increase in fines accompanied by an increasingly vigorous approach to corporate prosecution.[167]

10.7 The tendency to the expansion of national corporate crime regimes was also evidenced by the German coalition government's proposal to introduce criminal liability for corporations. It envisaged obligatory prosecution, the availability of a due diligence/adequate procedures defence, and harsher penalties calibrated by reference to the financial circumstances of the defendant company.[168] The revised draft bill on Sanctions for Corporate Crimes, the *Verbandssanktionen,* was published in May 2020, albeit it was described as a hybrid system between criminal law and regulatory offence[169] because of the principle of culpability under constitutional law. The act would have distinguished between wilful and negligent offences and, of note, for entities belonging to a group with an average annual turnover in excess of Eur 100 million, the ceiling for the fines did not conform to the principle of distinct corporate personality, but was set at a percentage of the average worldwide group turnover. The extraterritorial reach of the German criminal jurisdiction was also extended such that corporations with a registered office in Germany at the time of the offence could be sanctioned for offences committed abroad, even if the individuals involved were beyond the reach of the German criminal law because of an insufficient nexus. Corporate liability could be imposed if the conduct was company-related, punishable under the laws of the state where it was committed and would constitute an offence under German criminal law.[170] It was thus envisaged that a corporation could be liable for events for which it had no control and no responsibility. Bearing in mind the transnational nature of corporate activity, the efficiencies of the collaborative approach, enforcement bundling and the increasing use of deferred prosecution agreements, it is without doubt that the German corporate crime regime would have influenced and impacted on enforcement in other jurisdictions, had it been enacted. Although the legislative plan has been abandoned, this decision appears to have been made on the grounds that internal investigations would not have been covered by legal privilege,[171] such that the legislation would have discouraged companies from investigating and would not have served as an incentive to clear up misconduct.[172] It is, however, of note that it is a procedural rather than a substantive concern that has served to

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[166] Marc Engelhart, The Nature and Basic Problems of Compliance Regimes (2018) https://pure.mpg.de/rest/items/item_2643714_7/component/file_3007899/content accessed Aug 29, 2021

[167] Robert Henrici, *Stricter rules on corporate criminal liability in Germany* at https://uk.practicallaw.thomsonreuters.com/w-023-5391?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 accessed Aug 29, 2021.

[168] https://www.jdsupra.com/legalnews/germany-introduces-a-corporate-criminal-47632/ accessed Aug 29, 2021.

[169] Dirk Seiler and Nathalie Isabelle Thorhauer, Herbert Smith Freehills, *German Ministry of Justice releases official draft Corporate Sanctions Act*, 23 April 2020 at https://hsfnotes.com/fsrandcorpcrime/2020/04/23/german-government-parties-agree-on-corporate-sanctions-act/ accessed Aug 29, 2021.

[170] Dr Thomas Helck et al, German legislative initiative on new corporate sanctions law at www.whitecase.com/publications/alert/german-legislative-initiative-new-corporate-sanctions-law accessed Aug 29, 2021.

[171] German Code of Criminal Procedure s. 97.

[172] https://www.noerr.com/en/newsroom/news/corporate-sanctions-act-dropped accessed August 27, 2021.

derail the legislation, at least for now, and that there is clear indication of Germany's tough stance on the problem of corporate criminality.

10.8 At EU level there has also been a strengthening of the administrative offences such that, notwithstanding their form, they are treated as criminal in substance.[173] Historically, greater emphasis was placed on the retributive analysis of the criminal law in the Continental systems such that the belief that a juridicial person could not be recognised as capable of guilt endured for a much longer period than in the common law tradition. It was not until the late 1970s that many Western European nations began to envisage corporate liability, when scholars and commentators started to recognise the increased economic influence of corporations and the consequent threats that they pose to consumer markets and the environment. For members of the European Economic Community,[174] the Treaty of Rome Articles 81 and 82 imposed corporate liability for anti-competitive conduct and, notwithstanding the civil form of the sanctions available to the Commission, their severity led to the development of principles that treat breaches as criminal in substance. Of note, the quasi-criminal supranational regime speaks to large corporate actors, rather than individuals, and is concerned with corporate rule-breaking rather than individual wrongdoing. It therefore breaks the traditional mould of national criminal laws and is not constrained by methodological individualism.

10.9 The issue of corporate criminality was brought into focus again in 1988 when the Council of Europe recommended specific corruption and environmental offences and also that member states should consider the need to standardise the general approach to corporate criminal liability.[175] Although standardisation has not occurred, the development of national laws has been influenced by the OECD and Lisbon Treaties, the EU and the Council of Europe's general endorsement of corporate liability and the EU's distinctive quasi-criminal approach that imposes penal sanctions for administrative breaches.[176]

10.10 The Amsterdam Treaty paved the way for corporate liability provisions and sanctions and subsequent instruments are increasingly more explicit as to the minimum requirements for sanctions for legal persons, including reference to criminal or non-criminal fines, disqualification, judicial supervision and judicial winding up. Since 2008 the EU has made efforts in relation to various offences, with the adoption and amendment of various legal instruments, in areas such as market abuse, money laundering, counterfeiting the euro and protecting the EU's financial interests. These emphasise criminal liability and the qualitative difference between administrative and criminal enforcement. Although Member States are not required to provide for corporate criminal liability, detailed rules on liability, punitive aims and types of sanction mean that liability can be deemed "criminal" irrespective of its formal legal categorisation as either administrative or civil.

10.11 Although the EU has not developed an independent theory of criminal law, lacking a consensus regarding a theory of corporate criminal liability,[177] deterrence has overtaken retributivism and principles have evolved on the basis of "*effet utile"* or "just and reasonable

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[173] Christopher Harding and Alison Cronin, *Regulating Bad Practice: Mapping a Framework for Legal Intervention* (Edward Elgar forthcoming 2022) Ch 5.

[174] The forerunner of the European Union.

[175] Liability of Enterprises for Offences, Recommendation No R(88) 18, see Sara S. Beale and Adam G. Safwat, 'What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability' (2005) 89(8) Buffalo Crim L Rev 89-163.

[176] Christopher Harding, 'The System of EU Antitrust Law: Characteristics, safeguards and differences from traditional criminal law' (2019) 90 Revue Internationale de Droit Penal 85.

[177] Vanessa Franssen, 'The EU's Fight Against Corporate Financial Crime: State of Affairs and Future Potential' (2018) 19(5) German Law Journal 1221-1249.

treatment". The hybrid combination that has emerged from the EU neatly sidesteps the traditional distinction between administrative matters and criminal offences.[178]

10.12 Interestingly, the traditional bifurcation of civil and criminal penalties is also blurred in the US, despite the respondeat superior model of liability that affords a relatively easy mechanism by which corporations can be inculpated. The Sentencing Reform Act 1984 provides for the enforcement of civil penalties against corporations for a range of financial crimes and these are frequently employed in conjunction with deferred prosecution agreements.[179] Prosecution agreements are the primary means by which the Department of Justice resolves offences committed under the Foreign Corrupt Practices Act 1977[180] and almost half of the agreements made between 2001 and 2012 did not involve criminal fines.[181] In 2015 federal prosecutors settled an unprecedented 80 cases against banks, imposing record penalties totalling $9 billion[182] and these amounts were additional to civil proceedings brought by private parties[183] for a range of financial misconduct and for which sanctions in excess of $15.3 billion were collected in 2016 alone.[184]

10.13 Since the criminal law needs to be used sparingly to harness its unique expressive force,[185] preserve and maximise its deterrent value, there is merit in extending the powers of authorities in England and Wales to impose civil penalties in cases where the conduct is not considered so reprehensible as to demand criminal sanction.

(**11) What principles should govern the sentencing of non-natural persons?**

11. The question of principles that should govern the sentencing of corporations will be largely overshadowed in practice if, as anticipated, there will be an increasing use of deferred prosecution agreements.

11.1 However, for as long as the collateral damage argument is used to constrain the process and disposal of corporate crime, whether through the use of deferred prosecution agreements to avoid conviction altogether or through the imposition of relatively lenient sentences, the criminal law will fail in its deterrent aim (see generally at 1.31 above).

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[178] Christopher Harding, 'The System of EU Antitrust Law: Characteristics, safeguards, and differences from traditional criminal law' (2019) 90 Revue Internationale de Droit Penal 85.

[179] Nicholas Ryder, ''Too Scared to Prosecute and Too Scared to Jail?' A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK' (2018) 82(3) JCL 245. Over 400 cases were dealt with in this way between 2002 – 2016, John Bostwick, 'US v UK Deferred-Prosecution Agreements: Some History and Key Differences' July 8, 2017 at https://www.radiusworldwide.com/blog/2017/8/us-vs-uk-deferred-prosecution-agreements-some-history-and-key-differences accessed Aug 29, 2021 and quoting the then current edition of the New Yorker.

[180] As amended, 15 U.S.C. §§ 78dd-1, et seq; Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015 – 2016) 49 UCDL Rev 497.

[181] Brandon L. Garrett, *Too Big to Fail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) p. 69.

[182] Brandon L. Garrett, 'The Rise of Bank Prosecutions' (2016 – 17) 126 Yale LJ Forum 33.

[183] Private civil proceedings are brought under the Financial Institutions Reform, Recovery and Enforcement Act 1989.

[184] https://www.justice.gov/opa/pr/justice-department-collects-more-153-billion-civil-and-criminal-cases-fiscal-year-2016 accessed Aug 29, 2021and Nicholas Ryder, ''Too Scared to Prosecute and Too Scared to Jail?' A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK' (2018) 82(3) JCL 245.

[185] Australian Law Reform Commission, Corporate Criminal Liability, (ALRC Report 136) April 2020, 5.67-5.94.

11.2 The current conception of collateral damage is fundamentally flawed and, in any event, conviction does not signal corporate failure in most cases. More research into the economic (including market) implications of a) corporate criminality, b) corporate conviction and, c) deferred prosecution agreements is required in order to provide a more comprehensive and realistic understanding of "collateral damage" and the way and extent to which this conception should be related to sentencing.

11.3 Fines do not work well and, in the wake of an announcement of a fine, the corporation's stock price usually rises significantly. The threat of a fine will not necessarily compel a corporation to cooperate or comply. The equity fine, however, does not impact creditors, employees or other innocent stakeholders[186] and more consideration may be given to this form of sanction.

(12) What principles should govern the individual criminal liability of directors for the actions of corporate bodies? Are statutory "consent or connivance" or "consent, connivance or neglect" provisions necessary or is the general law of accessory liability sufficient to enable prosecutions to be brought against directors where they bear some responsibility for a corporate body's criminal conduct?

12. The mens rea for accessorial liability in the general criminal law differs from that required for liability for consent, connivance and neglect. The additional statutory provisions of consent etc are necessary for the law to conform to fair labelling principles and adequate express the nature of the directors' wrongdoing in given circumstances.

(13) Do respondents have any other suggestions for measures which might ensure the law deals adequately with offences committed in the context of corporate organisations?

13. In summary, it is suggested that a regime comprising the following range of corporate crime models is required:

Corporate liability for substantive offences attributed via general principle by

a) an extended common law identification principle where there is a culpable directing mind/senior manager (see 3.2 to 3.6) such that a corporation can be convicted of a substantive offence, or

b) a presumptive model of corporate liability (see 1.13 to 1.17 above) where it is not possible or appropriate to identify a culpable individual and it is more appropriate to characterise the corporation's wrongdoing as the substantive offence than a lack of procedural due diligence.

Corporate liability for failure to prevent/lack of due diligence via bespoke statutory offences for

c) a failure to prevent whereby the corporation can be criminally liable, in the absence of adequate

[186] John C. Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers, Inc 2020) p. 87-91

procedures, for failing to prevent either

i) an individual wrongdoer (see 8. to 8.7 below), or
ii) a manifest criminal wrongdoing.

13.1 Although deferred prosecution agreements overcome the primary problem in the corporate context, i.e. obtaining evidence, they are not an adequate deterrent. To harness the full force of the criminal law's deterrent value, there must be a real threat of prosecution and the problem of evidence needs to be addressed in another way. Since whistle-blowers play an integral role in the identification and investigation of corporate crime,[187] an obvious solution may be to employ strategy developed in the context of cartels and anticompetitive behaviour and to incentivise witnesses to come forward by providing immunity or leniency. Much as individuals need to be induced to report criminal corporations, corporations need to be induced to turn in criminal senior officials and employees. Incentives to give evidence against the other could, it is suggested, be maximised using the 'prisoner's dilemma' approach and competition to cooperate created by showing leniency for a confession and harsh treatment for a failure to do so.[188] Considered in this context, corporate criminal liability becomes a means to an end and not an end in itself.

13.2 Of note, banks may need to be dealt with differently. Imposing a huge fine in the wake of a bank bail-out, for example, is counter intuitive and there may be a fear that indicting a bank could cause a run on it.[189] Since a criminal conviction for such firms may have unacceptable consequences, it may be that the use of the deferred prosecution agreements is to be preferred.[190]

[187] Australian Law Reform Commission, Corporate Criminal Liability, (ALRC Report 136) April 2020, para 1.61, p. 63.
[188] John C. Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers, Inc 2020) p. 13, 76, 147.
[189] John C. Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers, Inc 2020) p. 20
[190] Ibid. 50. This is an area that undoubtedly warrants further research.