

# The Standard of Liability for Corporate Crime: What Can Other Jurisdictions Learn from Canada?

R E E M R A D H I \*

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## INTRODUCTION

It is not surprising that academic and legislative debates on corporate crime in the United Kingdom (UK) and United States (US) are still dealing with fundamental issues on whether and how corporations should be subject to criminal law. In January 2017, the UK issued a call for evidence to change the standard of liability for ‘economic crimes’, highlighting failure of the common law identification doctrine to achieve its twin goals of deterrence and retribution.<sup>1</sup> Similarly, there have been continuous debates in the US

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<sup>1</sup> UK, Sentencing Council, “Environmental Offences: Definitive Guideline” (National Archives 2015), online: <[https://www.sentencingcouncil.org.uk/wp-content/uploads/Final\\_Environmental\\_Offences\\_Definitive\\_Guideline\\_web1.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf)> [Sentencing Council 1]; UK, Sentencing Council, “Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline” (National Archives 2015), online: <<http://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web1.pdf>>; UK, Sentencing Council, “Fraud, Bribery and Money Laundering Offences: Definitive Guideline” (National Archives, 2014) online: <<http://bit.ly/1HhwXgd>> [Sentencing Council 2]; US, Paula Desio, “An Overview of the Organisational Guidelines” (United States Commission, 2016) online: <<http://www.uscc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf>> [Desio].

over whether there should be changes to federal criminal code to include more specific language about criminal intent.<sup>2</sup>

Today, describing the scope of corporate crime, whether it even fulfils the criteria of a 'crime', and the behaviors it should encompass, is difficult. The topic remains highly controversial in today's legislative debates throughout various jurisdictions. Corporate criminal liability can be defined as the mechanism through which corporations can be found to be responsible under the law for the criminal acts of employees that are undertaken during the normal course of business operations to further the goals of that entity.<sup>3</sup> There remains a divergence of views with regards to (a) the theoretical justifications for holding corporations liable under criminal law; (b) the circumstances in which the criminal acts of certain employees should be implicated to the corporation; (c) whether it is theoretically sensible and practical to hold corporations liable for crimes other than strict liability offences that require intent, recklessness and negligence; and (d) the appropriate mechanisms for sentencing.<sup>4</sup>

This article argues that uncertainty surrounding these key inquiries have stunted the development of corporate criminal law. It is apparent that modern criminal law has been insufficient in achieving the goals of deterrence and retribution, a failure that can be traced back to two fundamental reasons. First, the first cases recognizing corporate criminal law have not coherently assessed the objectives of criminalizing corporations and addressed how such objectives can be achieved.<sup>5</sup> Second, the globalization of businesses presents a significant challenge to regulating corporate misconduct across jurisdictions. As a result, the current standards of liability are incompatible with achieving the general goals of sentencing. Focusing on inquiries (b) and (c) from the paragraph above, the paper proposes modifications to the standard of liability for holding corporations liable under criminal law for criminal conduct requiring proof of *mens rea*, drawing

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<sup>2</sup> Justin Sink Politics & Jim Rowley, "Corporate Crime Impasse Stalls Obama Bid to Ease Drug Sentences", *Bloomberg Politics* (2016), online:

<<http://www.bloomberg.com/politics/articles/2016-01-12/corporate-crime-impasse-stalls-obama-bid-to-ease-drug-sentences>>.

<sup>3</sup> UK, Ministry of Justice, *Corporate Responsibility for Economic Crime, A Call for Evidence*, (London: The National Archives, 2017) at 6, online: <<http://bit.ly/2k1eW3g>> [Ministry of Justice].

<sup>4</sup> Brent Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1982) 56 S Cal L Rev 1141 at 1441-43.

<sup>5</sup> *Ibid.*

from insights taken from Canadian law. The Canadian standard of liability provides a balanced approach that overcomes some of the flaws found in the UK and US models

Section 1 discusses the US federal standard of *respondeat superior*. Section 2 evaluates the identification doctrine under UK law and the Model Penal Code adopted by many States in the US, and critiques the recent movement in the UK towards piecemeal reforms focused on adopting different standards of liability for different misconducts. Section 3 proposes reforms to the current liability standards by exploring Canada's approach to liability, which adopts an identification model that takes into accounts the differences between corporate structures and types of corporate offenders.

## 1. THE RESPONDEAT SUPERIOR STANDARD

Corporations are held to the *respondeat superior* standard under US federal law for crimes requiring a culpable mind. The US Constitution provides that States have the right to set their own criminal laws, except for any offences that have a federal interest. In this sense, the federal code overlays the codes of all States and the District of Columbia. Federal criminal laws apply to corporations regardless of whether those laws explicitly mention corporations or not. The United States Code states that “unless the context indicates otherwise... the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals.”<sup>6</sup>

*New York Central & Hudson River Railroad Company v United States*<sup>7</sup> (*New York Central*) established the basis for corporate criminal liability in the United States and contains the current standard of corporate liability under US federal law.<sup>8</sup> It specified that, for the purposes of public policy, the tort principle of *respondeat superior* should extend to criminal law also. *Respondeat superior* holds principals liable for the wrongful actions of their agents if the actions were completed for the benefit of the principal and were within the express or apparent scope of their duties. The Court explained that if officers

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<sup>6</sup> *Words Denoting Number, Gender and So Forth*, USC tit 1 §1 (2017).

<sup>7</sup> *New York Central R Co v United States* 212 U.S. 481 (New York Central 1909) [*New York Central*].

<sup>8</sup> MH Baer, “Organizational Liability and the Tension Between Corporate and Criminal Law” (2010) 19:1 *JL & Pol’y* 1 at 4 [Baer]; Edward B Diskant, “Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure” (2008) 118:1 *Yale LJ* 126 at 139.

and agents of corporations make decisions in accordance with the corporations' purposes, motivations, and goals, then the corporation itself can be seen to have intended the moral and/or immoral acts, and should be correspondingly praised and/or held accountable for such acts.<sup>9</sup> In *New York Central*, a railroad company and two of its agents (the general traffic manager and assistant traffic manager) were held liable to pay rebates to sugar refining companies on shipments of goods between states, as they were in violation of the *Elkins Act*.<sup>10</sup> The court considered the constitutional validity of the *Elkins Act*, which stated:

- (a) Anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce...which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanour under said acts, or under this act, shall also be held to be a misdemeanour committed by such corporation; and
- (b) In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person.<sup>11</sup>

The Court held that corporations should be held criminally liable for the acts of their agents that are in violation of the *Elkins Act*. In particular, agents are assumed to have had the power to perform acts within the scope of their employment for the benefit of the principal without the principal having necessarily participated in or expressly authorized that conduct.<sup>12</sup> Because corporations accept the benefits of the agents' conduct through profits derived, it was held to not be contrary to public policy to hold the corporation accountable for unauthorized acts by its agents if they had accepted the benefits of such acts. The Court further explained that since the corporation itself cannot be arrested or imprisoned, its property could be taken for the purposes of punishment or compensation.<sup>13</sup>

Today, the *respondere superior* doctrine, established through *New York Central*,<sup>14</sup> and the corresponding aggregation theory, reflect the current

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<sup>9</sup> *New York Central*, *supra* note 7 at 495.

<sup>10</sup> *Elkins Act*, 32 Stat. at L 847, 708, U.S. Comp. Stat. Supp. 1907, 880, cited in *New York Central*, *supra* note 7 at 491-92.

<sup>11</sup> *Ibid.*

<sup>12</sup> *New York Central*, *supra* note 7 at 495.

<sup>13</sup> *Ibid.* at 493.

<sup>14</sup> *Ibid.* at 481.

standard of liability for crimes requiring proof of mens rea. A corporation can be prosecuted for intent, recklessness or knowledge if an employee commits a crime, as “the only way in which a corporation could act is through the individuals who act on its behalf.”<sup>15</sup> Under the *respondeat superior doctrine*, the criminal act of any employee acting within the scope of his or her employment and on behalf of the corporation, regardless of status within the corporate structure or his or her capability to represent the corporation, can be implicated to the corporation. Further, the aggregation theory adds to this and provides that “corporations could be held criminally liable on the act of one employee and on the culpability of one or more other employees who cumulatively, but not individually, met the requirements of actus reus and mens rea of the crime”.<sup>16</sup>

### CHALLENGING THE RESPONDEAT SUPERIOR STANDARD

Looking at the early cases establishing corporate criminal liability in the United States reveals fundamental issues with adopting the *respondeat superior* standard. *New York Central* failed to appropriately address the theoretical coherence of adopting the standard of liability, as the standard of liability was too broad and does not account for the current variety of corporate governance structures and types of corporations.

First, *New York Central* did not provide a reason beyond ‘public policy’ for extending *respondeat superior* (a tort principle) to criminal law.<sup>17</sup> It cited *The Queen v The Great North of England Railway Co*,<sup>18</sup> an English case which held that a corporation was criminally liable for illegally cutting through and obstructing a highway.<sup>19</sup> It specified that for the purposes of public policy, *respondeat superior* should extend to criminal law. This evidences that the standard of liability arose not necessarily as a reasoned policy choice but rather due to “shifting trends in legal formalisms” and that the growing size and power of corporations had enabled them to cause harm to society in

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<sup>15</sup> *Ibid.*

<sup>16</sup> Anca I Pop, “Criminal Liability of a Corporations-Comparative Jurisprudence.” online: (2006) 1:1 MSU College of Law 1 at 4, online: <<http://bit.ly/2vNjOw1>> [Pop].

<sup>17</sup> John Hasnas, “The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability” (2009) 46:4 Am Crim L Rev 1329 at 1337 [Hasnas].

<sup>18</sup> *The Queen v Great North of England Railway* 9 Q B 315, 319 (1846).

<sup>19</sup> *Ibid.*

pursuit of their economic goals without being held accountable.<sup>20</sup> Regulating corporations using criminal law was justified by its expediency and effectiveness in responding to these problems that could not be solved through the private remedies that existed.<sup>21</sup>

Hasnas states, “*New York Central* was a mistake when it was decided, remains a mistake today, and should be explicitly overruled.”<sup>22</sup> Hasnas rejects the extension of the tort *respondeat superior* theory to criminal law because of its distinct purposes. Criminal liability is imposed for the purpose of punishment, whereas the purpose of imposing tort law is to achieve ‘corrective justice’, which would require an individual even without personal fault to pay compensation to restore an injured party for an act they caused or benefited from. Using public policy as a reason to extend this principle to criminal law authorizes a form of collective punishment that directly contradicts the fundamental principles of a liberal society historically advocated by Anglo-American criminal law.<sup>23</sup> Additionally, Hasnas argues that corporations cannot possess a particular state of mind when committing an act; hence ‘*mens rea*’ cannot be satisfied by a corporation.<sup>24</sup>

One central premise of this article centers around the failure of early cases to explain the adoption of a certain standard of liability and how such a standard would fulfill the objectives of the law, often defined as retribution and deterrence under current sentencing policies.<sup>25</sup> Although this article does not deal with theoretical arguments as to whether corporations should be held morally responsible, it is generally believed that eliminating ‘morality’ out of the discussion over whether criminal law should be applied would open the doors to justifying corporate criminal liability on many grounds. By focusing on this traditional standard of liability, vicarious liability in practice fails to take into account the differences between corporations. In sum, corporations should not be held responsible for unauthorized decisions made by employees.<sup>26</sup>

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<sup>20</sup> A Weissmann & D Newman, “Rethinking Criminal Corporate Liability.” (2007) 82 Ind LJ 411 at 418; see also W Robert Thomas, “When and How Corporations Became Persons Under the Criminal Law, and Why It Matters Now” (2016) Fla St UL Rev 44:1 [forthcoming in 2017] [Thomas]; Baer, *supra* note 8 at 3.

<sup>21</sup> Thomas, *supra* note 20; Baer, *supra* note 8.

<sup>22</sup> Hasnas, *supra* note 17 at 1329.

<sup>23</sup> *Ibid* at 1349.

<sup>24</sup> *Ibid* at 1338.

<sup>25</sup> Sentencing Council 1, *supra* note 1; Sentencing Council 2, *supra* note 1; Desio, *supra* note 1.

<sup>26</sup> Baer, *supra* note 8.

*Respondent superior* implies that the acts of low level employees in an international firm can be implicated to the corporation, even if committed without the authorization of the firm. Such a standard does not necessarily align with the goal of deterring corporations from committing corporate wrongs if they can still be held liable for criminal acts committed by employees who do not follow otherwise compliant corporate policies. Although prosecution does take into account whether the specific employee made efforts to hide his unauthorized conduct, the corporation will often still be held liable.<sup>27</sup> The corporation would still be required to “enter a deferred or non-prosecution agreement, whereby the company agrees to pay extensive fines, cease certain activities, agree to an outsider monitor, and engage in additional reforms set out by the relevant prosecutor.”<sup>28</sup> However, the Sentencing Commission Guidelines state that the fines can be reduced by up to 95% if the corporation can show evidence of an effective compliance sentence, but that would ultimately be contingent upon reporting to authorities and that the conduct was not committed by high level personnel.<sup>29</sup>

## 2. THE IDENTIFICATION DOCTRINE

The identification doctrine reflects the corporate criminal liability standard in UK common law and in several States in the US who have adopted the *Model Penal Code*.

First, UK law holds that the type of crime determines the parameters of corporate criminal liability.<sup>30</sup> Corporations can be held liable for any crimes committed by individuals under the separate legal personality principle.<sup>31</sup> The ‘alter ego principle’, otherwise known as the ‘directing mind’ or identification doctrine, applies to criminal offences requiring *mens rea*.<sup>32</sup> In *Tesco v Natrass*,<sup>33</sup> one of the leading cases explaining this standard of liability, Lord Diplock stated:

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<sup>27</sup> Desio, *supra* note 1.

<sup>28</sup> Baer, *supra* note 8.

<sup>29</sup> Desio, *supra* note 1.

<sup>30</sup> Celia Wells, “Corporate Liability for Crime: The Neglected Question” (1995) 42 *International Banking and Financial Law* 42 at 42 [Wells]; Pop, *supra* note 16 at 23.

<sup>31</sup> MV Sankaran, “The Criminal Liability of Corporations in Anglo-American Law” (Seminar on Criminal Law 1978), online: <<http://bit.ly/2vVPguA>>.

<sup>32</sup> Wells, *supra* note 30 at 42.

<sup>33</sup> *Tesco Supermarkets Ltd v Natrass* (1971), [1971] UKHL, [1972] AC 153 (HL) [*Tesco v Natrass*].

What natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise or due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.<sup>34</sup>

Under the doctrine, only agents in high positions capable of making decisions on behalf of the company or who play a key function within the corporation's decisional structure who, acting within the scope of their employment, can replicate the corporation's intention are held to represent the corporation (even if they acted against corporate policy). This is because they are considered to have "[directed] the mind of the company towards commission of an offence."<sup>35</sup> Therefore, a corporation would not be liable unless these identified agents are evidenced to have had the requisite *actus reus* and *mens rea* for the relevant offence.<sup>36</sup>

Furthermore, the UK Parliament has passed a few acts that set different standards of liability for different types of corporate misconduct. Notably, the *Corporate Manslaughter and Corporate Homicide Act, 2007* abolished the common law manslaughter offence that followed the alter ego principle.<sup>37</sup> Under the Act, an organization can be found criminally liable "if the way its activities are managed or organized- (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organization to the deceased."<sup>38</sup> The corporation would only be found liable if the activities were managed or organized by one or more members of 'senior management', which are defined as those who have:

significant roles in (i) the making of decisions about how the whole or substantial part of its activities are to be managed or organized or (ii) the actual managing or organizing of the whole or a substantial part of those roles.<sup>39</sup>

Therefore, the Act takes a broader approach than the common law approach because it does not require identification of the culpable act or mind of a specific individual within the corporation, but instead puts the onus on the prosecution to prove that the criminal act was associated with the

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<sup>34</sup> *Ibid* at 200.

<sup>35</sup> Wells, *supra* note 30 at 42.

<sup>36</sup> *Ibid* at 43.

<sup>37</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19, s 20.

<sup>38</sup> *Ibid*, s 1.

<sup>39</sup> *Ibid*, s 1(4).

way senior management conducted its affairs before liability can be established.

Moreover, under the *Bribery Act, 2010* an organization can be held liable if a person associated with the organization bribed a person with the intention of “[obtaining or retaining] business for the organization, or [obtaining or retaining] an advantage in the conduct of business for the organisation”.<sup>40</sup> Unless the organization proves they had “adequate procedures designed to prevent persons associated with the organisation from undertaking such conduct,”<sup>41</sup> a person is considered to be associated with the organization if they perform services for or on behalf of the organization, regardless of their capacity (including employees, agents or subsidiary). Additionally, employees are assumed to perform services for, or on behalf of, the organization unless it can be proven otherwise.<sup>42</sup>

Second, the American Law Institute’s *Model Penal Code* (MPC) codified substantive criminal laws and is often relied upon by courts to interpret and apply the law.<sup>43</sup> A number of US States have adopted some or revised provisions of the MPC. Robinson and Dubber state: “if there can be said to be an “American criminal code,” the Model Penal Code is it...even within the minority of states without a modern code, the Model Penal Code has great influence, as courts regularly rely upon it to fashion the law that the state’s criminal code fails to provide.”<sup>44</sup>

The MPC sets the circumstances in which corporations can be held criminally liable. This evidences an approach that is more restrictive, and is more similar to the English identification model approach, with limited exceptions.<sup>45</sup> Section 2.07 states that strict liability statutes apply to corporations unless indicated otherwise by legislation, and specifies three situations for non-strict liability offences where a corporation can be found to be criminally liable:

- (1) The first base of liability is when an agent acting on behalf of the corporation within the scope of his employment, commits a misconduct that violates

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<sup>40</sup> *Bribery Act 2010* (UK) c 23, s 71.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, s 8.

<sup>43</sup> Paul H Robison & Markus D Dubber, “The American Model Penal Code: A Brief Overview” (2007) 10:3 *New Crim L Rev* 319 at 323.

<sup>44</sup> *Ibid.* at 319.

<sup>45</sup> Sara Sun Baele, “The Development and Evolution of the U.S. Law of Corporate Criminal Liability” (German Conference on Comparative Law, September 2013) at 10, online: <[http://scholarship.law.duke.edu/faculty\\_scholarship/3205](http://scholarship.law.duke.edu/faculty_scholarship/3205)>.

statutes outside the Code and plainly state that there is a legislative purpose for imposition of the liability.

- (2) The second base of liability applies when corporation fails to meet a duty of affirmative performance imposed by law.<sup>46</sup>
- (3) The third base of liability applies to all situations where the board of directors or a high managerial agent acting on behalf of the corporation within the scope of their employment “authorised, requested, commanded, performed or recklessly tolerated” an offense.<sup>47</sup> A high managerial agent is defined as an officer of a corporation that has “duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.”<sup>48</sup>

The MPC has a more restrictive approach because the third base of liability adds an approach similar to the identification doctrine and reserves a ‘due diligence’ defence for the first base of liability that is governed by the *respondet superior* doctrine and aggregation theory.

### CHALLENGING THE IDENTIFICATION DOCTRINE STANDARD

The common law identification doctrine is a deficient tool for the effective enforcement of criminal law against large modern corporations as it fails to address the complexity of current corporate structures. It is often difficult to identify the specific senior officer(s) responsible for a violation of a certain criminal law. Limiting liability to ‘high managerial agents’ fails to recognize that those who have managerial positions can, in practice, delegate tasks to those below who then commit the offence.<sup>49</sup> Given the complexity of corporate structures, it is also difficult to identify specific agents within the corporation to fulfill both the *actus reus* and *mens rea* components.<sup>50</sup> Tariq states that “critically, the larger the company is, the harder the prosecutor’s task is to locate first, the culpable alter ego of that corporation.”<sup>51</sup> In the context of large modern international corporations it is difficult to attribute responsibility to directors and individuals who have official duties alone.

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<sup>46</sup> US, American Law Institute, *Model Penal Code*, 1040 (Philadelphia: American Law Institute, 1985), s 2.07 (a)(b), online: <<http://bit.ly/1OTZb2T>>.

<sup>47</sup> *Ibid*, s 2.07(c).

<sup>48</sup> *Ibid*, s 2.07(a)(b).

<sup>49</sup> Constantine Ntsanyu Nana, “Corporate Criminal Liability in South Africa: The Need to Look Beyond Vicarious Liability” (2011) 55:1 J Afr Law 86 at 100.

<sup>50</sup> *Ibid* at 103; Anjali Anchayli, “The ‘Directing Mind and Will’ Test in Corporate Attribution: Iridium and Meridian – A Comparison” (2012) *Company Lawyer* 252 at 256.

<sup>51</sup> Mohammed Saleem Tariq, “A 2013 Look at the Corporate Killer” (2014) *Company Lawyer* 17 at 17.

The identification standard also encourages corporations to decentralize responsibilities to avoid liability by making it difficult to identify any one senior individual in charge of a particular operation. In practice, senior officers can delegate their tasks to low level employees to avoid criminal liability, thus making it difficult to identify the specific agents that fulfill the *actus reus* and *mens rea* components of many criminal offences. It is often hard to prove whether the delegation actually took place at all, as the corporation can always argue that the lower level employee committed the act without any authority from the corporation itself. The UK Ministry of Justice has stated that the identification doctrine may encourage bad corporate culture and practices, such as manipulating meeting minutes through not recording those present in order to conceal the presence of board members, or creating and using zero-asset companies to handle negotiations with third party agents.<sup>52</sup>

In the United Kingdom, the approach by the courts has not always been consistent, particularly with regards to ‘hybrid’ regulatory offences that have defences based on due diligence or lack of knowledge, or where the definition of the offence requires constructive knowledge.<sup>53</sup> The approach of the courts in classifying these offences has been to consider the specific circumstances of each case. In *Tesco v Natrass*, Lord Reid states that “Parliament has chosen to deal with the problem piecemeal... the main object of these provisions must have been to distinguish between those who are in some degree blameworthy and those who are not, and to enable the latter to escape from conviction if they can show that they were in no way to blame.”<sup>54</sup>

In *Tesco v Natrass*,<sup>55</sup> a corporation was charged with an offence under the *Trade Descriptions Act, 1968* when a cashier employee sold a product above the advertised price, contrary to the training the employee received and the orders of the corporation. The defence to the violation invoked was mistake; that is, either reliance on flawed information supplied to the person or an accident beyond the control of a person could excuse the commission of the offence (provided the person took all reasonable precautions and exercised due diligence).<sup>56</sup> The defence was raised based on the fact that the criminal acts of a manager in a store could not be attributed back to the corporation.

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<sup>52</sup> Ministry of Justice, *supra* note 3.

<sup>53</sup> Wells, *supra* note 30 at 42; Celia Wells, “Case Comment: Corporate Liability for Crime - *Tesco v Natrass* on The Danger List?”, *Archbold News* (1996) at 6.

<sup>54</sup> *Tesco v Natrass*, *supra* note 33 at 169-70.

<sup>55</sup> *Ibid* at 153.

<sup>56</sup> *Ibid* at 168.

Here, all reasonable precautions and due diligence were exercised by the corporation to avoid the commission of such an offence by himself or someone under his control.<sup>57</sup> The Court held that vicarious liability could only apply if the criminal act was committed by an employee without the consent of the corporation and that the corporation could not be blamed for the acts of employees conducted against the procedures of the corporation.<sup>58</sup> This approach is still followed by recent cases including *Ferguson v British Gas Trading Ltd*<sup>59</sup>, *Jetivia SA and another v Bilta (UK) Limited (in liquidation) and others*<sup>60</sup> and *G-Star Raw Cv v Rhodi Ltd*.<sup>61</sup>

On the other hand, the case was distinguished in *Tesco v Brent London*.<sup>62</sup> In that case, the court held that in certain hybrid offences the vicarious liability route towards establishing liability would be followed when a manager of a store sold a video with an age classification certificate to a person below the specified age. Section 11 of the *Video Recordings Act, 1984* regulated the selling and supplying of video work with age classification certificates. It would thus be an offence to sell or supply a video to someone under the age listed in the classification certificate.<sup>63</sup> The defences offered included a lack of knowledge or reasonable grounds to believe that the classification certificate contained the age statement, or a lack of knowledge or reasonable grounds that the person was not of the required age.<sup>64</sup> The Court held that regulations would be followed in order to hold the corporation liable and the corporation could not rely on the defence of ‘lack of knowledge’ in that case. Importantly, the case did not have a ‘due diligence’ defence like *Tesco v Natrass*. Additionally, the act was committed by a senior manager rather than an employee. Lord Buckley stated “Can a company which contracted to supply a video rely on a defence ...on the basis that its employee’s state of mind cannot be imputed to itself? ...No.”<sup>65</sup> The

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<sup>57</sup> *Ibid* at 153, 167.

<sup>58</sup> *Ibid* at 173.

<sup>59</sup> *Ferguson v British Gas Trading Ltd*. [2010] 1 WLR 785.

<sup>60</sup> *Jetivia SA and another v Bilta (UK) Limited and others* (2015), [2015] USKC 23; *Tesco Natrass*, *supra* note 33.

<sup>61</sup> *G-Star Raw CV v Rhodi Ltd & Ors* (2015), [2015] EWHC 216 (Ch).

<sup>62</sup> *Tesco Stores Ltd v Brent London Borough Council* [1993] 2 All ER 718 [*Tesco v Brent London*].

<sup>63</sup> *Video Recordings Act 1984* (UK), c 39, s 11(1).

<sup>64</sup> *Ibid*, s 11(2).

<sup>65</sup> *Tesco v Brent London*, *supra* note 62 at 1045.

Court reasoned that if the directing mind approach was followed and that defence was to be applied, no large company could ever be held liable.<sup>66</sup>

The requirement for identifying agents and obtaining sufficient evidence that they committed a criminal act and that they intended to commit that act makes it difficult to hold corporations with complex organizational structures liable. In *Tesco v Natrass*, the Court held that when an agent delegates managerial functions within a corporation with the result that the commission of a criminal act occurs, this comes within the directing mind and will principle and the corporation should accordingly be held liable.<sup>67</sup> Celia Wells rightly argues that the traditional theories of corporate liability fail to “[tackle] the question of corporate risk taking.”<sup>68</sup> It is often still difficult, however to prove whether criminal conduct has in fact been delegated to an employee or not in the appropriate sense of the term.

The UK Parliament has attempted to overcome such difficulties by codifying new standards of liability for different types of corporate misconduct. The *Bribery Act* carves out a due diligence defence and the *Corporate Manslaughter and Corporate Homicide Act* introduces a holistic approach to identifying whether management has failed to meet the standard required under the law. The UK Ministry of Justice’s recent call to change the standard of liability limits some reforms to the law for economic crimes, which are limited to money laundering, fraud, and false accounting.<sup>69</sup> The report recognizes the failure of the identification model in combatting corporate crime due to the inherent difficulties of finding corporations liable described above. The question remains: is such a move going in the right direction?

This article argues that legislative reform in the United Kingdom and United States is necessary and inevitable. Nevertheless, there should still be steps taken towards a comprehensive reform of the law rather than reform on a piecemeal basis. Economic crimes could, for instance, encompass misconduct well beyond that specified in the call for evidence; corporations can always be said to be committing criminal misconducts for economic benefit. Reforming the law narrowly would likely lead to different standards of liability for comparable misconduct, leading to a fragmented system. The next section will explore the benefits of adopting an alternative standard that

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<sup>66</sup> *Ibid* at 1042.

<sup>67</sup> *Tesco v Natrass*, *supra* note 33 at 174.

<sup>68</sup> Wells, *supra* note 30 at 44.

<sup>69</sup> Ministry of Justice, *supra* note 3.

overcomes the flaws discussed with regards to the *respondeat superior* standard and the identification doctrine.

### 3. LESSONS FROM CANADA: MOVING TOWARDS AN ALTERNATIVE 'IDENTIFICATION DOCTRINE' STANDARD

The Canadian federal system may be an alternative standard which offers a multi-dimensional approach through legislation. House Government Bill C-45 was passed in 2003 to amend the Criminal Code<sup>70</sup> and “modernise the law with respect to the criminal liability of corporations and sentencing of corporations.”<sup>71</sup>

Corporations are covered under the Criminal Code. Section 2.1 states that ‘every one’, ‘person’, or ‘owner’ includes “public bodies, bodies corporate, societies, companies.”<sup>72</sup> Section 22.1 governs offences where negligence must be proven for an organization to be prosecuted for a criminal offence. It states:

In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if:

- (a) acting within the scope of their authority
  - (i) one of its representatives is a party to the offence, or
  - (ii) two or more of its representatives engage in conduct, whether by act of omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (b) the senior officer who is responsible for the aspect of the organisation’s activities that is relevant to the offence departs - or the senior officers, collectively, depart - markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organisation from being a party to the offence.

In *R v Metron Construction*,<sup>73</sup> an Ontario corporation was convicted of criminal negligence when an independent contractor hired by the corporation as a site supervisor departed from the standard of care expected of a reasonably prudent person. He was hired to work as a site supervisor to manage a project restoring concrete balconies in Toronto. The way the

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<sup>70</sup> *The Criminal Code* R.S.C. 1985.

<sup>71</sup> Department of Justice, “A Plain Language Guide Bill C-45 – Amendments to the Criminal Code Affecting the Criminal Liability of Organisations”, (1 July 2015) Government of Canada (website), online: <<http://www.justice.gc.ca/eng/rp-pr/other-autre/c45/#sec1>>.

<sup>72</sup> *Ibid.*

<sup>73</sup> *R v Metron Construction Corporation*, 2013 ONCA 541, OJ No 3909 (QL).

operations were conducted resulted in the death of four workers on the site.<sup>74</sup> He failed to ensure that the workers received written instructions in their respective languages for the use of fall protection systems and did not instruct the workers to use the swing stage in accordance with safety practices, nor did he prevent bodily harm and death through ensuring that lifelines were used during work hours. The Court held that the independent contractor came within the definition of a senior officer as defined by section 2 of the Criminal Code.

Section 22.2 further governs conduct that is based on a *mens rea* standard, excluding negligence. It states:

In respect of an offence that requires the prosecution to prove fault – other than negligence- an organisation is a party to the offence if, with the intent at least in part to benefit the organisation, one of its senior officers

- (a) acting within the scope of their authority, is party to the offence;
- (b) having the mental state required to be party to the offence and acting within the scope of their authority directs the work of other representatives of the organisation so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organisation is or is about to be party to offence, does not take all reasonable measures to stop them from being a party to offence.

Importantly, Section 217.1 concerning the Duties Tending to Preservation of Life states that:

everyone who undertakes, or had the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Clarifying the meaning of these provisions, Section 21(1) states that parties to offences include those who “actually commit the crime, does or omits to do anything for the purpose of aiding any person to commit it; or abets any person in committing it.” Section 2 defines a senior officer as:

a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.

In *Global Fuels (R c Pétroles Global Inc)*,<sup>75</sup> a corporation was found liable when a regional manager illegally participated in price fixing and, with his

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<sup>74</sup> *Ibid.*

<sup>75</sup> *R c Pétroles Global inc.*, 2013 QCCS 4262.

knowledge, allowed his six territory managers to engage in price fixing also. The case affirmed that middle managers are included in the definition of 'senior officer' under Section 2 of the Criminal Code, and that their criminal conduct can indeed be attributed to the corporation.

The Canadian approach advantageously takes into account the differences between corporate structures for offences requiring *mens rea*. Through this approach, corporations are unable to evade liability simply by delegating duties to lower level managers, and would not be held responsible when low level employees commit criminal acts that the corporation did not authorize and took reasonable steps to avoid. It helps address the perspective that corporations are more easily held liable than the rest of society. This would not undermine the protection and restoration of rights of individuals within the society, and would serve to increase public confidence in the criminal justice system on the whole.

Having discussed the recent call for evidence by the UK Ministry of Justice for further piecemeal codification of certain types of corporate misconduct, Canada's identification principle offers an approach that benefits from an overall examination of corporate criminal liability. Reforms that categorize corporate misconduct and adopt different standards of liability for such misconduct run the risk of miscategorizing and setting different standards of liability for criminal acts that may fall under more than one category.

Movement towards codification of the law may be interpreted as a practical impossibility given that it would involve abolishing a number of recent laws passed in recent years. Theoretically, however, there are advantages to adopting two standards of liability that categorize misconduct according the type of *mens rea* required. The process of changing the law must include agreement on why and when corporations should be criminally liable and theoretical approaches to retribution and deterrence need to be considered in order to justify such changes. Further, the impacts of punishment on stakeholders and the complexity and variety of corporate structures as well as the short and long-term impact of prosecution on the operations of defendant corporations and other corporations in similar industries must be factored.

## CONCLUSION

Overall, this article argues for changes to the current standards of corporate criminal liability in the UK and USA in order to better combat current changes in corporate activities, corporate governance structures, and increased globalization, all of which are necessary to achieve the criminal law

goals of deterrence and retribution. The failure of early cases to examine the objectives of criminal law as applied to corporations and to address how such objectives could be achieved resulted in the adoption of standards of liability that are not aligned with the objectives of sentencing. Canada offers an alternative approach that stands as a compromise between the *respondeat superior* standard and the strict identification model. It also provides insight into the advantages of a comprehensive regime that categorizes the standard of liability in criminal negligence and states of mind, as opposed to various standards of liability which depend on the specific type of the corporate misconduct. Such an approach would overcome the flaws of over-deterrence and bring unity to the different standards of liability that may fall under more than one category.

