CORPORATE CRIMINAL LIABILITY: WHAT PURPOSE DOES IT SERVE?

V.S. Khanna*

Although considerable debate surrounds society’s increasing reliance on criminal liability to regulate corporate conduct, few have questioned in depth the fundamental basis for imposing criminal liability on corporations. In this Article, Mr. Khanna explores the underlying rationale for corporate criminal liability and finds it problematic. After summarizing the historical development of corporate criminal liability and surveying the current legal landscape, the Article explores the justifications for such liability. Mr. Khanna argues that corporate civil liability can capture the desirable features of corporate criminal liability, especially criminal liability’s powerful enforcement and information-gathering dimensions. Furthermore, he contends that corporate civil liability avoids the undesirable features of corporate criminal liability. Such undesirable features include criminal procedural protections and criminal sanctions’ stigma effects. Mr. Khanna concludes that a modified form of corporate civil liability could make corporate criminal liability obsolete by capturing the advantages of corporate criminal liability while avoiding or mitigating its disadvantages.

I. INTRODUCTION

Corporate criminal liability under environmental, antitrust, securities, and other laws has grown rapidly over the last two decades both in the United States and overseas.¹ Although the imposition of

* S.J.D. Candidate and John M. Olin Research Fellow in Law and Economics, Harvard Law School. I would like to thank Louis Kaplow, Reinier Kraakman, and Steven Shavell for their invaluable comments, suggestions, and advice. I would also like to thank the participants in the Harvard Law School Seminar in Law and Economics for their comments on this Article and the John M. Olin Foundation for financial support.

¹ See, e.g., RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING § 1.9.2, at 52-55 (1994) (discussing the increase in corporate sanctions and the relatively high rate of prosecution of corporate offenses); John C. Coffee, Jr., Emerging Issues in Corporate Criminal Policy, Foreword to GRUNER, supra, at xix-xxi (discussing Europe’s move toward more expansive corporate criminal liability); Harvey L. Pitt & Karl A. Groskaufmanis, Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 GEO. L.J. 1559, 1563, 1570, 1573-74 (1990) (noting the growth in criminal prosecutions of and sanctions against corporations as well as the growth in corporate criminal liability).
criminal liability on corporations, as opposed to managers or employees, has generated considerable debate; commentators have not comprehensively analyzed why corporate criminal liability exists. After all, corporations cannot be imprisoned. Furthermore, it is not clear that corporate criminal liability is the best way to influence corporate behavior. This Article compares the costs and benefits of corporate criminal liability with the costs and benefits of other possible liability strategies, including various forms of corporate civil liability, managers' personal liability, third-party liability, and administrative sanctions, in an effort to determine the best strategy or mix of strategies for society.

Part II of this Article examines the historical development and avowed purpose of corporate criminal liability in the United States. Part III outlines the system of corporate criminal liability in the United States and compares it to the systems used in Western Europe, highlighting the important similarities and differences. Part IV delineates six important characteristics of corporate criminal liability and argues that only the latter four should be the focus of inquiry when attempting to justify corporate criminal liability.

2 See Richard A. Posner, Economic Analysis of Law 421-23 (4th ed. 1992) (noting that the availability of corporate criminal liability is troubling given the existence of corporate civil liability); Barry B. Baysinger, Organization Theory and the Criminal Liability of Organizations, 71 B.U. L. Rev. 341, 341-46 (1991) (arguing that imputing liability to the corporation is not likely to prompt more lawful behavior by the employees of large diversified firms, because the organizational structure of such firms pressures employees to commit crimes in order to meet short-term financial needs); John C. Coffee, Jr., ‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 447-48 (1981) (discussing briefly why corporate criminal liability may exist and providing predominantly pragmatic or institutional rather than theoretical arguments in support of it); Brent Fisse & John Braithwaite, The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability, 11 Sydney L. Rev. 468, 504-07 (1988) (proposing that courts impose criminal liability on a corporation that covers up criminal conduct); Sanford H. Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423, 430-35 (1963) (advocating a lower actus reus requirement for corporate policymakers and raising questions about the effectiveness of imposing liability on the corporate entity itself); Developments in the Law — Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1231-42 (1979) [hereinafter Developments] (arguing that the need for deterrence and, perhaps, the desire for retribution are justifications for corporate criminal liability); John T. Byam, Comment, The Economic Inefficiency of Corporate Criminal Liability, 73 J. Crim. L. & Criminology 582, 582 (1982) (arguing that corporate criminal liability is inefficient from a deterrence perspective). Some of these authors have addressed the question of why corporate criminal liability exists, but this Article provides a more comprehensive treatment of this question by conducting a comparative analysis of corporate criminal liability and corporate civil liability. This analysis focuses on the relative costs and benefits of the sanctions available under each liability regime, evaluates the need for the procedural protections inherent in the corporate criminal liability regime, considers the enforcement and message-sending characteristics of alternative regimes, and provides a brief historical and comparative backdrop to this discussion.

Parts V through VIII evaluate whether these four characteristics of corporate criminal liability justify its existence. Part V examines the sanctions available against corporations in the criminal context and argues that the stigma sanction is rarely socially desirable. Part VI examines the procedural protections inherent in corporate criminal liability: the beyond reasonable doubt standard of proof, double jeopardy, jury trials, and the grand jury indictment process. It argues that these protections are almost always undesirable in the corporate context. Part VII concludes that the enforcement devices associated with corporate criminal liability will often be socially desirable, but that most of these enforcement devices are already available in other non-criminal corporate liability regimes. Part VIII examines whether corporate criminal liability sends any unique and important messages to society about which activities are worse than others. Part IX concludes that corporate criminal liability should be replaced with a corporate liability strategy that achieves deterrence at lower cost.

II. HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY

The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable.4 In the early 1700s, corporate criminal liability faced at least four obstacles.5 The first obstacle was attributing acts to a juristic fiction, the corporation.6 Eighteenth-century courts and legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality; a more pragmatic approach was not developed until the twentieth century.7 The second obstacle was that legal thinkers did not believe corpor-

---

4 For example, Lord Holt reportedly said in 1701 that “[a] corporation is not indictable, but the particular members of it are.” Anonymous Case (No. 935), 88 Eng. Rep. 1518, 1518 (K.B. 1701). Kathleen Bricky notes that some early commentators relied on this statement to support the contention that corporations could not be criminally liable. See Kathleen F. Bricky, Corporate Criminal Accountability: A Brief History and an Observation, 60 Wash. U. L.Q. 393, 396 (1981) (noting as an example 1 William Blackstone, Commentaries *476). However, the reasons behind Lord Holt’s decision are not clear because the case consists only of this single sentence. See id. at 396. By the mid-nineteenth century, commentators continued to cite the case as precedent, but they observed that the general rule against corporate criminal liability contained some exceptions. See 1 Joel P. Bishop, The Criminal Law §§ 306-307, at 273-74 (1st ed. 1856). See generally L.H. Leigh, The Criminal Liability of Corporations in English Law 1-12 (1969) (discussing the development of English corporate criminal liability).

5 See John C. Coffee, Jr., Corporate Criminal Responsibility, in 1 Encyclopedia of Crime and Justice 253, 253 (Sanford H. Kadish ed., 1983). Because the corporate form was less pervasive at that time, the public may also have been relatively indifferent to corporations’ crimes. See Bricky, supra note 4, at 396-97; James R. Elkins, Corporations and the Criminal Law: An Uneasy Alliance, 65 Ky. L.J. 73, 87-88 (1976).

6 See Coffee, supra note 5, at 253.

7 See Leigh, supra note 4, at 3-5; Glanville Williams, Criminal Law: The General Part § 279, at 855-57 (ad ed. 1961) (describing the elaborate doctrinal innovations that allowed courts to hold corporations criminally liable).
porations could possess the moral blameworthiness necessary to commit crimes of intent. The third obstacle was the ultra vires doctrine, under which courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters. Finally, the fourth obstacle was courts’ literal understanding of criminal procedure; for example, judges required the accused to be brought physically before the court. The following discussion of the historical development of corporate criminal liability emphasizes the first two obstacles — imputing acts and criminal intentions — because they were the most difficult for courts to overcome.

A. Public Nuisance

Courts in both England and the United States first imposed corporate criminal liability in cases involving nonfeasances of quasi-public corporations, such as municipalities, that resulted in public nuisances. Brickey describes these early decisions:

In decisions imposing liability on such public entities, the courts ordinarily observed that the public convenience in question (usually a bridge or road) had been erected before the present inhabitants had taken on the responsibilities of the town, parish, or county; that it had been maintained by former inhabitants; and that present inhabitants were bound to do the same.

8 See Coffee, supra note 5, at 253. One important purpose of the criminal law is punishing the blameworthy. See, e.g., Developments, supra note 2, at 1231-33. Imputing an agent’s intentions to the corporation seemed inconsistent with this purpose; if the corporation itself were blameworthy, imputation would be unnecessary. Additionally, the respondeat superior doctrine had not yet developed enough to allow for the imputation of any kind of mental state. See Leigh, supra note 4, at 5-8; Coffee, supra note 5, at 253-54. Corporate criminal liability, a form of vicarious liability, may also have been impeded because English law had traditionally not recognized vicarious criminal liability between human principals and agents. See Brickey, supra note 4, at 415-21 (discussing the early English cases).

9 See Leigh, supra note 4, at 8-9; Coffee, supra note 5, at 253.

10 See Leigh, supra note 4, at 9-12; Williams, supra note 7, § 278, at 853-54; Coffee, supra note 5, at 253.

11 See Coffee, supra note 5 at 253-55. Courts remedied the latter two obstacles rather easily, as Leigh notes, because the doctrine of ultra vires began to hold less sway, especially in tort and criminal cases, and because courts developed ways around the procedural problems of corporate prosecutions. See Leigh, supra note 4, at 9-12.


13 Brickey, supra note 4, at 402. For example, in the United States in 1834 “the City of Albany was indicted for failing to cleanse the basin of the Hudson River, which had become ‘foul, filled and choked up with mud, rubbish, and dead carcasses of animals.’” Id. at 406 (quoting People v. Corporation of Albany, 11 Wend. 539, 539 (N.Y. Sup. CL 1834)). At that time, “[a] common nuisance” involved “either . . . doing a thing which tends to the annoyance of all the king’s subjects, or . . . neglecting to do a thing which the common good requires.” Corporation of Albany, 11 Wend, at 543.
By the early 1800s, courts began holding commercial corporations criminally liable for the sorts of public nuisances that were previously inflicted by quasi-public corporations. These cases of corporate criminal liability did not fall foul of the first two obstacles. First, “no individual agent of the corporation was responsible for the corporation’s omission.” Second, “there was no imputation of guilt from agent to principal” because “only the corporation was under a duty to perform the specific act in question.”

B. Crimes Not Requiring Criminal Intent

As the presence and importance of corporations grew, courts extended corporate criminal liability from public nuisances to all offenses that did not require criminal intent. Prior to the mid-1800s it was questionable whether corporations could be held criminally liable for misfeasances (positive acts) as well as nonfeasances (omissions). In 1846, Lord Denman ruled in *The Queen v. Great North of England Railway Co.* that corporations could be criminally liable for misfeasance, and American courts soon began making similar rulings. This development eventually encouraged courts to extend corporate criminal liability to all crimes not requiring intent: “Once the principle

---

14 See Elkins, *supra* note 5, at 91-92. Elkins cites several early decisions that imposed commercial corporate liability for public nuisance, including Susquehanna & Bath Turnpike Road Co. v. People, 15 Wend. 267, 268 (N.Y. Sup. Ct. 1836), which supported the development of liability, and McKim v. Odom, 3 Bland 407, 421 (Md. 1828), which expressed some early doubts. See Elkins, *supra* note 5, at 92 & nn.68-69. Elkins also notes that the criminal liability of such private corporations “was a creature not only of judicial decision but of legislative enactment.” *Id.* at 92 (discussing *The General Turnpike Act*, Mass. St. 1804, Ch. 125).


16 *Id.* at 253-54.

17 See *id.* at 254.

18 See Elkins, *supra* note 5, at 93. Elkin’s example of an early decision that rejected corporate liability for misfeasance is *State v. Great Works Milling & Manufacturing Co.*, 20 Me. 41 (1841), which held that a corporation “can neither commit a crime or misdemeanor, by any positive act or affirmative act, nor incite others to do so, as a corporation.” *Id.* at 43, quoted in Elkins, *supra* note 5, at 93.


20 See *id.* at 1298.

21 See Elkins, *supra* note 5, at 93-93. In two mid-nineteenth-century cases, *State v. Morris & Essex Railroad Co.*, 23 NJL. 360 (1832), and *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339 (1854), American courts followed the English precedent and indicted corporations for affirmative acts (misfeasances) that resulted in public nuisances. Brickey notes that in *Morris*, the court held that “once . . . corporations are indictable for nonfeasance, ‘all preliminary and formal objections’ to finding criminal liability . . . must be dispensed with because they apply equally to indictments for nonfeasance and misfeasance.” *Brickey*, *supra* note 4, at 408 (quoting *Morris*, 23 NJL. at 366). Further, the *New Bedford Bridge* court explained that, even if the rule holding corporations liable only for nonfeasance had once made sense, “[experience has shown the necessity of essentially modifying it” *New Bedford Bridge*, 68 Mass. (2 Gray) at 346, quoted in *Brickey*, *supra* note 4, at 409. Intuitively, abandoning the distinction between “acts” and “omissions to act” seems proper; the distinction is one of form rather than substance. See *Brickey*, *supra* note 4, at 409.
that corporations could be convicted of misfeasance for creating a nuisance was established, there was no theoretical impediment to imposing liability for other acts of misfeasance . . .

In order to hold corporations liable for misfeasance, courts imputed agent conduct to corporations, and such imputation would have been theoretically troublesome without the doctrine of respondeat superior. However, the doctrine was established at common law by the time courts decided the first corporate misfeasance cases in the mid-1800s.

The doctrine’s development coincided with the growth in the number and importance of corporations and with society’s subsequent demand for regulation of business activity.

C. Crimes of Intent

Courts were slow to extend corporate criminal liability to crimes of intent. Not until New York Central & Hudson River Railroad Co. v. United States in 1909 did the Supreme Court clearly hold a corporation liable for crimes of intent. The case reached the Supreme Court

---

22 Brickey, supra note 4, at 410. Courts held corporations liable for many nonpublic nuisance offenses not requiring intent See id. (“Courts accordingly held corporations amenable to conviction of such crimes as Sabbath breaking, permitting gaming on a fair ground, charging usurious interest rates, furnishing liquor to minors, and the unauthorized practice of medicine.”) (citations omitted).

23 See Coffee, supra note 5, at 253-54.

24 See id. at 254. For a discussion of the requirements of respondeat superior, see, for example, Developments, cited above in note 2, at 1247-51.


26 See Brickey, supra note 4, at 410; Elkins, supra note 5, at 95-96. For examples of courts’ reluctance to extend corporate criminal liability to crimes of intent, see State v. Morris & Essex Railroad Co., 23 N.J.L. 360, 364 (1852), and Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. (2 Gray) 339, 345 (1854). According to Elkins, one reason for this reluctance was simply that intent raised novel issues because it was not a required element in the first cases that extended criminal liability to corporations. See Elkins, supra note 5, at 95-96. Moreover, some nineteenth-century commentators argued that the criminal law required that the convicted defendant be morally blameworthy and have the capacity to suffer from punishment, and corporations could not fulfill either of these requirements. See, e.g., Nathaniel Lindley, On the Principles Which Govern the Criminal and Civil Responsibilities of Corporations (March 30, 1857), in 2 PAPERS READ BEFORE THE JURIDICAL SOCIETY 31, 34-35 (London, William Maxwell 1863). Furthermore, finding corporations guilty of crimes of intent rather than punishing the agents and principals who actually carried out the crimes seemed to support the controversial and unpopular concept of vicarious criminal liability. Cf Brickey, supra note 4, at 415-21 (noting the relationship between the development of corporate criminal liability and the development of vicarious criminal liability).

27 212 U.S. 481 (1909).

28 See id. at 494-95. English courts took longer to impose liability for crimes of intent. See Elkins, supra note 5, at 89.
on appeal from New York Central’s conviction for an Elkins Act\textsuperscript{29} violation:\textsuperscript{30}

On appeal, counsel asserted that section 1 of the Act, which specifically declared the acts of officers, agents, and employees of a common carrier to be the acts of the carrier, was unconstitutional. To fine the corporation for the acts of its employees . . . amounted to taking money from and punishing innocent stockholders without due process of law.\textsuperscript{31}

The Court disagreed and held that Congress could impose liability on corporations in this manner.\textsuperscript{32}

Brickey notes that a motivating factor for this result was the need for effective enforcement of provisions such as the Elkins Act: “Enforcement of statutes . . . would be effective only if the corporation, which derived the benefit from the unlawful practice, were the target of the prosecution. . . . If corporations were immunized from criminal punishment . . . , Congress would lose its only effective method of controlling corporate misconduct and correcting . . . abuses . . . .”\textsuperscript{33}

The Court, then, apparently considered the case unique both because a failure to hold the corporation liable would compromise law enforcement and because Congress had clearly indicated its intent to impose criminal liability on the corporation.\textsuperscript{34}

Subsequent courts, however, did not limit \textit{New York Central’s} holding to cases of clear congressional intent.\textsuperscript{35} During the early twentieth century courts began to hold corporations criminally liable in

\textsuperscript{29} Act of Feb. 19, 1903, ch. 708, 32 Stat 847 (repealed 1978).
\textsuperscript{30} See Brickey, supra note 4, at 413.
\textsuperscript{31} \textit{Id}.
\textsuperscript{32} \textit{See New York Cent.}, 212 U.S. at 499. Furthermore, Brickey explains, the Court found that “the instant offense belonged to a larger class of offenses consisting merely of purposely doing something prohibited by statute. In cases involving this class of crimes, logic and policy dictated imposition of corporate liability for wrongs committed by agents acting within the scope of their authority.” Brickey, \textit{supra} note 4, at 413 (citation omitted).
\textsuperscript{33} Brickey, \textit{supra} note 4, at 414. “[T]he law ‘cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands.’” \textit{Id}. (quoting \textit{New York Cent}, 212 U.S. at 495).
\textsuperscript{34} \textit{See id}. at 413-14. In addition, the political climate surrounding the decision, which came only a few years after the passage of the antitrust laws and during a general mood of hostility toward big business, would have made the decision more acceptable. \textit{See Coffee, supra} note 5, at 254.
\textsuperscript{35} \textit{See Coffee, supra} note 5, at 254. Courts initially drew distinctions between corporate crimes of general intent and crimes of specific intent. \textit{See Brickey, supra} note 4, at 414. The question soon became “whether there remained a sound reason for drawing a distinction between imputing general and specific intent to corporations. After all, corporations had been held vicariously liable for such intentional torts as assault and battery, libel, and malicious prosecution.” \textit{Id}. (citations omitted). The courts eventually resolved this issue by focusing on the power of the legislature: “The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not... bear discussion.” \textit{Id}. at 414 (quoting United States v. MacAndrews & Forbes Co., 149 F. 823, 835 (C.C.S.D.N.Y. 1906)) (internal quotation marks omitted).
various areas in which enforcement would be impeded without corporate liability.\textsuperscript{36} Indeed, courts were soon willing to hold corporations criminally liable for almost all wrongs except rape, murder, bigamy, and other crimes of malicious intent.\textsuperscript{37}

\textbf{D. A Rationale for the Development of Corporate Criminal Liability?}

Although commentators initially expressed doubts about the extension of vicarious corporate liability to crimes not requiring intent,\textsuperscript{38} they eventually agreed that such liability served a useful purpose.\textsuperscript{39} These early doubts, however, paled in comparison to the decidedly negative reactions of commentators to the extension of corporate criminal liability to crimes of intent. Critics contended that corporate criminal liability for crimes of intent ran contrary to an aim of the criminal

\begin{itemize}
  \item See Brickey, supra note 4, at 415; Coffee, supra note 5, at 254- Examples include “contempt of court, willfully or knowingly obstructing a road, conspiracy to violate federal and state antitrust laws, . . . and even manslaughter.” Brickey, supra note 4, at 415 (citations omitted).
  \item See GRUNER, supra note 1, § 3.2.3(d), at 177-78 (noting that even now corporations have not been held liable for murder, rape, and similar offenses); Brickey, supra note 4, at 410, 413-15. The argument that corporations cannot commit these acts is unconvincing. Once society is willing to accept vicarious liability and to impute agents’ acts to the corporation, the corporation should in theory be capable of “committing” rape or murder. Cf. GRUNER, supra note 1, § 3.2.3(b), at 175-76 (“Since a corporation can engage any sort of agent to undertake any human act, there is no type of conduct that an individual can perform which a corporation, acting through its agents, cannot undertake.”). A more convincing rationale for why corporations cannot be liable for crimes of intent such as rape and murder is that the normal rules regarding imputation of agent behavior to the principal would probably not allow imputation when the conduct falls outside the agent’s scope of employment. Cf. id. § 3.2.3(b), at 176 (“Certain sorts of illegal conduct such as rape or kidnapping are rarely undertaken for corporate benefit or in the course of corporate business activities.”). As Gruner suggests, there is “circumstantial evidence that Congress did not intend to create corporate liability for [crimes such as rape] under prohibitions applicable to ‘persons.’” Id. § 3.2.3(a), at 175.
  \item See, e.g., Coffee, supra note 5, at 256-57; Lindley, supra note 26, at 34-35 (arguing that corporate criminal liability for crimes of intent is inappropriate, but that criminal liability for crimes such as nuisance is acceptable).
  \item See, e.g., LEIGH, supra note 4, at 15; Harold J. Laski, The Basis of Vicarious Liability, 26 YALE L.J. 105, III (1916) (disagreeing with Lord Bramwell, who opposed the idea of vicarious liability); Lindley, supra note 26, at 34-35 (favoring vicarious liability, but noting that some commentators were opposed to the idea).
\end{itemize}
law — punishment of the morally blameworthy\textsuperscript{40} — because it relied upon vicarious guilt rather than personal fault.\textsuperscript{41}

Thus, the majority of early commentary focused on either the extension of vicarious corporate liability to the criminal context or the extension of corporate criminal liability to crimes of intent.\textsuperscript{42} Few commentators appear to have even asked, let alone comprehensively answered, why we have corporate criminal liability at all, given that corporate civil liability also exists.\textsuperscript{43} This question is especially perplexing in light of the fact that courts borrowed most of the doctrines used in corporate criminal liability, such as respondeat superior, from corporate civil liability.\textsuperscript{44} I suggest, however, that a consideration of the types of wrongs for which corporate criminal liability developed may yield a hypothesis as to why corporate criminal liability arose in the first place.

Most of the early instances of corporate criminal liability resulted from public harms, such as nuisance, for which private enforcement

\textsuperscript{40} See Developments, supra note 2, at 1232 (discussing arguments relating to moral blameworthiness); cf. Lindley, supra note 26, at 34 (“Punishment, to be effective, must fall on beings who can feel.”). Indeed, this matter continues to plague modern commentators, who debate ways to construct blame for the corporation rather than, asking why we want to impose liability on corpo-rations based on some conception of blame. See, e.g., William S. Laufer, Corporate Bodies and Guilty Minds, 43 Emory L.J. 647 passim (1994). An example of a liability standard based on corporate fault is an assessment of liability on the basis of corporate “procedures and practices [that] unreasonably fail to prevent corporate criminal violations.” Developments, supra note 2, at 1243. Another possibility is the assessment of corporate fault on the basis of what the corporation and its officers did in reaction to the wrongful act See Brent Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 56 S. Cal. L. Rev. 1141,1197-1201 (1983) (emphasizing the “reactive strategies” of corporations as representative of corporate policy). A more recent approach to corporate blame is the corporate ethos standard. See Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 Minn. L. Rev. 1095, 1121-48 (1991). Finally, one commentator suggests a liability standard based on the general appropriateness of the corporation’s internal procedures and policies. See Peter A. French, Collective and Corporate Responsibility 41-47 (1984).

\textsuperscript{41} See, e.g., Elkins, supra note 5, at 95-96 n.84 (discussing an early commentator’s views on crimes of specific intent); Lindley, supra note 26, at 34-35 (arguing that corporate criminal liability for crimes of intent is inappropriate). But see Laski, supra note 39, at 130-34 (arguing that corporate criminal liability for crimes of intent is desirable). Commentators opposed to the extension of liability to crimes of intent did not seem concerned by the imputation of criminal liability to the corporation for the acts of agents resulting in crimes that did not require intent See, e.g., Lindley, supra note 26, at 35.

\textsuperscript{42} One group of commentators viewed corporate criminal liability in terms of the imposition of liability on the corporation’s shareholders. See Frederic P. Lee, Corporate Criminal Liability, 28 Colum. L. Rev. 1, 4-5, 14 (1928).

\textsuperscript{43} Cf., e.g., Lindley, supra note 26, at 35 (failing to comment on why the public enforcement rationale might justify corporate criminal liability for any offenses besides public nuisance offenses). Undoubtedly, the growth in the scope and number of corporations and the need to regulate them would have provided the impetus for the growth in corporate liability. See, e.g., Charles F. Adams, Jr., A Chapter of Erie, in High Finance in the Sixties 20, 115-16 (Frederick C. Hicks ed., 1929).

\textsuperscript{44} See Elkins, supra note 5, at 97.
was unlikely.\(^4^5\) As a result, public enforcement was necessary to ensure that the corporation and its actors properly internalized the cost of their activities to society.\(^4^6\) From the late 1600s to the early 1900s, the government conducted public enforcement primarily through criminal proceedings.\(^4^7\) Public enforcement using civil proceedings only arose after corporate criminal liability had reached its present level of applicability.\(^4^8\)

For activities causing public harm, public enforcement was essential.\(^4^9\) Holding individuals liable through public enforcement was, of course, one option for addressing public harms. However, when the culpable individual within the corporate hierarchy was judgment-proof or not easily identifiable,\(^5^0\) maintaining optimal deterrence necessitated imposing liability on the corporation.\(^5^1\) Given the absence of widespread public civil enforcement prior to the early 1900s,\(^5^2\) corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability.\(^5^3\) At that time, corporate criminal liability may indeed have served a useful purpose.\(^5^4\)

\(^{4^5}\) See Brickey, supra note 4, at 421-22; Elkins, supra note 5, at 96. For analyses of public and private enforcement, see, for example, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 75-86 (2d ed. 1989); William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. LEGAL STUD. 1 passim (1975); and A. Mitchell Polinsky, Private Versus Public Enforcement of Fines, 9 J. LEGAL STUD. 105 passim (1980). I assume that damages in civil cases were solely compensatory and that parties paid their own legal fees.

\(^{4^6}\) See POLINSKY, supra note 45, at 75-86; infra section VII.A.

\(^{4^7}\) See Graham Hughes, Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process, 47 VAND. L. REV. 573, 587 n.37 (1994) (noting that the first agency to have investigative powers, the Interstate Commerce Commission, did not develop these powers until the late 1800s).


\(^{4^9}\) See Hughes, supra note 47, at 587 n.37.

\(^{5^0}\) See Elkins, supra note 5, at 82-84 (discussing the identifiability problem); infra 1495-96 (discussing judgment-proof managers).

\(^{5^1}\) For more recent deterrence-based arguments in support of corporate liability, consult Alan O. Sykes, The Economics of Vicarious Liability, 93 YALE L.J. 1231, 1232, 1241-42, 1246 (1984). Note that optimal deterrence is maintained “as long as the principal and the agent together have sufficient assets to cover [expected damages].” Id. at 1246. I assume that if the combined assets of the agent and the corporation are not enough to meet expected damages but exceed the agent’s assets alone, then the level of deterrence created by dual liability would be greater than the level resulting from individual liability alone. The dual liability level of deterrence, however, would not be as high as the level of deterrence achieved when the combined assets are sufficient to cover expected damages. See id.

\(^{5^2}\) See Hughes, supra note 47, at 587 n.37.

\(^{5^3}\) Early commentators emphasized that public enforcement was the critical factor in the development of corporate criminal liability. See Laski, supra note 39, at 130-34; Lindley, supra note 26, at 34-35. Other possible reasons for corporate criminal liability, such as stigma, do not arise in the early literature.

\(^{5^4}\) An alternative to relying on corporate criminal liability would be to make corporations civilly liable only upon an individual agent’s conviction. Such an approach, however, has numer-
E. The Expansion of Corporate Criminal Liability

Four historical developments facilitated the continued growth of corporate criminal liability in the twentieth century. First, federal courts in the United States disregarded European liability standards as well as the standards laid out in the Model Penal Code, settling instead on respondeat superior as the vehicle for corporate liability.\(^{55}\) Second, Congress enacted a growing body of legislation authorizing the imposition of criminal liability on corporations.\(^{56}\) The resulting heightened awareness of corporate crime, especially in the 1960s and 1970s, often intensified the debate surrounding the issue to feverish levels.\(^{57}\)

Third, public civil enforcement became more feasible after the dawn of the twentieth century,\(^{58}\) providing the government with a tool other than corporate criminal liability that combined both public enforcement and corporate liability. Public civil enforcement could have impeded the development of corporate criminal liability, given their similarity of purpose, yet it did not.\(^{59}\) By the early 1900s, courts and commentators had already accepted corporate criminal liability, and its existence was therefore unlikely to be a matter of debate. Also, public civil enforcers did not possess as much enforcement power as the criminal enforcers did.\(^{60}\) The discrepancies between enforcement powers in public criminal and public civil cases have greatly diminished.

\(^{55}\) See Developments, supra note 2, at 1247-48. Under respondeat superior, any agent’s acts and intentions may be imputed to the corporation if other elements of the doctrine are satisfied. See id. at 1247. The Model Penal Code alternative focused on the intent of agents high up in the corporate hierarchy. See id. at 1251, 1254. Elkins notes that some early courts required a “link” between the acts and intentions of subordinates and top management See Elkins, supra note 5, at 103-04. However, federal appellate courts have rejected this “link” requirement See id. at 105-06. Although the debate over imputation standards is interesting and important, it does not affect the debate over the form of liability.

\(^{56}\) See Elkins, supra note 5, at 97-99.

\(^{57}\) See, e.g., RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 30-32, 249-51 (1976) (asserting the existence of severe problems with corporate governance, identifying harms to consumers and society, and suggesting harsh sanctions for violators).

\(^{58}\) See Hughes, supra note 47, at 587 n.37.

\(^{59}\) See Elkins, supra note 5, at 97-99.

\(^{60}\) See infra p. 1522.
since that time, raising the question of why corporate criminal liability is necessary today.

The fourth development is the recent issuance of federal sentencing guidelines for crimes committed by organizations. The guidelines have occasioned a scholarly debate on the severity and effectiveness of criminal sanctions on corporations and on how deterrence could be improved. The focus on sanctions has prompted a few commentators to observe that the sanctions in corporate civil and criminal proceedings are essentially the same and to question the need for both forms of liability.

III. CORPORATE CRIMINAL LIABILITY IN THE UNITED STATES AND WESTERN EUROPE

This Part examines the current systems of corporate criminal liability in the United States and Western Europe, inquiring into the acts for which a corporation can be made criminally liable and the standards used to attribute liability to a corporation for the acts of its agents. The analysis indicates that corporate criminal liability in the United States is far more extensive and less restrictive than corporate criminal liability frameworks in other countries and raises the question of why these differences have developed.

The scope of corporate criminal liability in the United States is very broad. A corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder. Similarly, the standards that courts use to

---

61 See infra section VII.B.2 (discussing the information-gathering benefits conferred by the civil investigative demand (CID)).
62 Even though the presence of public civil enforcement did not abate the growth of corporate criminal liability, it may have caused a few commentators to ask this very question. See, e.g., Michael K. Block, Optimal Penalties, Criminal Law and the Control of Corporate Behavior, 71 B.U. L. REV. 395, 414-15, 418 (1991); Coffee, supra note 2, at 447-48 (noting procedural and institutional reasons for preserving corporate criminal liability); Byam, supra note 2, passim. Although Byam’s and Block’s analyses are insightful, this Article explores the question more broadly and in greater depth.

Commentators have noted a number of additional problems with corporate criminal liability: [Such problems include the] discord of corporate criminal liability with the requirements that criminals have intent...; the dubious applicability of constitutional [criminal] protections to corporations; the failure of corporate criminal liability to comport with the consequentialist and retributive rationales for criminal sanctions; [and] the ineffectiveness of the criminal stigma as a deterrent to corporate activities .... Byam, supra note 2, at 602-03 (citations omitted).

65 See, e.g., POSNER, supra note 2, at 423; Block, supra note 62, at 418.
66 See GRUNER, supra note 1, § 3.2.3, at 177-78.
attribute liability to a corporation are easily satisfied. Corporate liability in the United States is based on the imputation of agents’ conduct to a corporation, usually through the application of the doctrine of respondeat superior.67

Under this doctrine, three requirements must be met in order to impose liability on a corporation.68 First, a corporate agent must have committed an illegal act (the actus reus) with the requisite state of mind (the mens rea).69 If a particular agent, regardless of rank in the corporation, had the necessary state of mind, this mens rea can be imputed to the corporation.70 Alternatively, mens rea can be shown “on the basis of the ‘collective knowledge’ of the employees as a group, even though no single employee possessed sufficient information to know that the crime was being committed.”71

Second, the agent must have acted within his scope of employment.72 The scope of employment includes any act that “occurred while the offending employee was carrying out a job-related activity.”73 In fact, this requirement is so broad that courts may hold corporations liable even when corporations have forbidden the wrongful activities.74

67 See New York Cent & Hudson River R.R. v. United States, 212 U.S. 481, 494-95 (1909); Developments, supra note 2, at 1247. Although respondeat superior is the most common basis of liability, corporations can be found criminally liable under a number of related theories. See id. at 1246-47, 1251-53. Some states have embraced alternative standards, such as the Model Penal Code, see id. at 1246-47, and these standards are usually narrower than respondeat superior, see id. at 1251-53. For a discussion of the conspiracy standard of corporate criminal liability, consult GRUNER, cited above in note 1, § 5.2.1-3, at 292-97.

68 See Developments, supra note 2, at 124.

69 See id. at 1247-48.

70 See id.

71 Id. at 1248; see also GRUNER, supra note 1, §4.1, at 263-67 (explaining that the rule of collective liability is a way to foster greater information dissemination within the corporation in order to deter corporate wrongs).


73 Developments, supra note 2, at 1250; see also GRUNER, supra note 1, § 3.5, at 203-28 (discussing in detail the scope of employment restrictions on corporate criminal liability); Developments, supra note 2, at 1250 (discussing why a broad imputation standard is generally desirable).

74 See Developments, supra note 2, at 1249-50. If a corporation’s prohibition of unlawful acts excluded such acts from an agent’s scope of employment, then the corporation would be equipped to avoid selectively any possible respondeat superior liability. See id. at 1250. Allowing a corporation to make such liability determinations is unpalatable; presumably, courts (or perhaps legislatures) should decide when liability attaches and what falls within the scope of an agent’s employment.

This argument should be distinguished from the argument discussed above, which deals with cases in which courts find that an activity such as murder falls outside the scope of employment See supra note 37. The argument here considers whether a corporation can limit its own liability by simply declaring certain conduct to be outside its agents’ scope of employment.
Finally, the agent must have intended to benefit the corporation. Under this easily met standard, the employee need not act with the exclusive purpose of benefitting the corporation, and the corporation need not actually receive the benefit.

Many European jurisdictions initially refused to recognize corporate criminal liability because the notion that a juristic fiction such as a corporation could possess guilt in the sense necessary for the application of criminal law seemed far-fetched. Even now, Germany does not impose criminal liability on corporations. Instead, its corporations are subject to administrative sanctions “for public welfare or administrative offenses.” Recently, however, other European countries, such as France and the Netherlands, amended their codes to allow for corporate criminal liability, and in 1988 the Council of Europe appeared to support the use of such liability.

Nonetheless, even though corporate criminal liability is becoming more common in Europe, European standards for imputation of an
agent’s actus reus or mens rea to the corporate principal often differ from the American doctrine of respondeat superior. English law, for example, only imputes an agent’s criminal intent to the corporation if the agent is the “alter ego” of the corporation, and courts usually define “alter ego” to mean an agent high up in the corporate hierarchy. In contrast, respondeat superior does not premise imputation of liability upon the rank of the corporate agent who possesses intent. Other imputation standards used in Europe lie somewhere between the British alter ego approach and the American law of respondeat superior.

This brief survey illustrates that corporate criminal liability in Europe is generally more restrictive than in the United States. The comparative analysis and historical developments raise questions about why we have corporate criminal liability in the United States today. This Article examines when corporate criminal liability is socially desirable, given that civil and other liability alternatives exist and that criminal enforcement is no longer the only form of public enforcement.

---

84 See Tesco Supermarkets, Ltd. v. Nattrass, 1972 App. Cas. 153, 170-72 (H.L.) (concurring with the doctrine but objecting to the term “alter ego”); Coffee, supra note 1, at xix (noting that the “alter ego” rule is still the law in England and that it applies to “officers at very senior executive levels”); Leigh, supra note 78, at 1514-15 (discussing Lennard’s Carrying Co. v. Asiatic Petroleum Co., 1915 App. Cas. 705, 713 (H.L.)). This doctrine is similar to the Model Penal Code’s high managerial agent standard. See Developments, supra note 2, at 1251.

85 See Developments, supra note 2, at 1247-48.

86 See Coffee, supra note 1, at xx-xxi. The Netherlands has a two-part test for corporate criminal liability: “(i) did the defendant company have the power to determine whether the employee did or did not do the act in question? and (2) did the corporation ‘accept’ such acts?” Id. at xx (citing Field & Jörg, supra note 81, at 164). This sort of standard appears to be gaining support in Europe:

In 1988, the Council of Europe accepted the recommendation of a select committee... that member states consider revising their criminal codes to recognize corporate liability to reflect the following principles:

(a) Enterprises should be able to be made liable for offenses committed in the exercise of their activities, even when the offense is alien to the purposes of the enterprise.

(b) Liability should attach irrespective of whether a natural person can be identified.

(c) The enterprise should be exonerated where its management is not implicated and has taken all necessary steps to avoid the offense.

(d) Enterprise liability should be additional to any individual managerial liability.

Id. (citing WELLS, supra note 78, at 121-22). Although Germany continues to employ only administrative sanctions for offenses that other European countries punish with criminal sanctions, the imputation standards that Germany uses for administrative liability are similar to those that other European systems use to determine criminal liability. See Leigh, supra note 78, at 1522-23.

87 However, European and American rules for imposing significant penalties on corporations are somewhat similar. See Coffee, supra note 1, at xx-xxi. In Europe, the general standard is that liability attaches when top-level management is involved in corporate misconduct. See id. In the United States, liability attaches when any agent commits a wrongful act, but courts impose significant penalties only when “substantial authority personnel” are involved. See id. at xxi (discussing U.S. SENTENCING GUIDELINES MANUAL §8A1.2 application notes 3(b)-(c), § 8C2.5 (1995)).
IV. THE FRAMEWORK FOR ANALYSIS

To determine when, if at all, the imposition of criminal liability on a corporation is socially desirable, one must compare the net benefits of imposing corporate criminal liability with the net benefits of imposing alternative liability strategies. Such alternative liability options include imposing civil liability on a corporation, imposing civil liability on a manager, imposing criminal liability on a manager, and imposing criminal or civil liability on a third party.

A. Comparison of Liability Strategies — An Introduction

In this analysis of whether corporate criminal liability has any place in an optimal liability mix, I compare corporate criminal liability with corporate civil liability, individual criminal liability, individual civil liability, and combinations of these liability strategies. I begin by asking when imposing criminal rather than civil liability on a corporation is desirable. If corporate civil liability always has greater net benefits than corporate criminal liability does, corporate civil liability should simply replace corporate criminal liability. On the other hand, if corporate criminal liability is sometimes preferable to corporate civil liability, then corporate criminal liability must be compared to the other liability regimes as well.

In order to compare liability regimes effectively, we must develop a more refined conception of the terms “corporate criminal liability” and “corporate civil liability,” both of which are simply labels used to describe certain combinations of characteristics. Corporate criminal liability and corporate civil liability share two important characteristics; both impose liability on the corporation and further the goal of deterring corporate misconduct. However, four other characteristics differentiate them. Corporate criminal liability has stronger procedural protections; more powerful enforcement devices; more severe and, arguably, unique sanctions (such as stigma); and a greater message-sending role than corporate civil liability.88

88 These characteristics are based upon the analyses provided by various commentators and upon my own analysis. See Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L.J. 1795, 1813 (1992) (discussing analogous questions of criminal and civil liability for individuals); Developments, supra note 2, at 1276-1311, 1340-65. Although Mann includes intent on his list of characteristics of individual liability, see Mann, supra, at 1813, I do not discuss it here. Because intent or scienter already may be a requirement in the civil law, it is unlikely to be a factor in a decision to favor corporate criminal liability over corporate civil liability. For similar reasons, the two characteristics shared by corporate criminal and corporate civil liability (imposition of liability on a corporation and deterrence) are not the focus of this Article. However, these two characteristics provide a basis for a comparison of the two corporate liability options because they arise in every instance of corporate liability. In contrast, intent is not an issue in every case of corporate liability. Thus, inquiry into intent is not as relevant to the analysis in this Article as is inquiry into the other two characteristics.
This sort of comparison is undoubtedly oversimplistic. Numerous corporate liability strategies form a continuum between these two extremes. Some corporate liability strategies, such as strategies with powerful enforcement devices and weak procedural protections, have characteristics of both liability paradigms. If we want strong enforcement devices without strong procedural protections, we can employ one of the corporate liability strategies along the continuum, obtaining the desirable characteristics without the undesirable ones. Because these intermediate options are available, corporate criminal liability is the best strategy only when substantially all of its characteristics are socially desirable.

The label placed on each corporate liability strategy along the continuum between criminal and civil liability is unimportant. However, commentators normally refer to the liability strategies on this continuum as forms of corporate civil liability. To maintain consistency with prior literature, I also refer to these intermediate forms as corporate civil liability regimes.

We must ask two questions about each of the characteristics of corporate criminal liability that we examine. First, when, if ever, is the characteristic socially desirable? Second, is the characteristic also part of another corporate liability strategy? The answers to these questions reveal those situations in which substantially all of the characteristics of corporate criminal liability are socially desirable. In such situations, reliance on corporate criminal liability is socially desirable. The answers to these questions also reveal those situations in which only some of the characteristics of corporate criminal liability are socially desirable. In these situations, reliance on a corporate liability strategy that incorporates the desirable traits but not the undesirable ones is preferable.

B. The Imposition of Liability on Corporations and the Goal of Deterrence

This section examines the two characteristics shared by corporate criminal and civil liability: the imposition of liability on the corporation and the goal of deterrence. Before examining when corporate criminal liability is preferable to corporate civil liability, we must un-

89 See, e.g., Mann, supra note 88, at 1813 (noting “a vast middleground” of hybrid liability strategies for individuals). Although Mann describes hybrid strategies for individuals, hybrid strategies of a similar nature also exist for corporations. See Hughes, supra note 47, at 587-89 (discussing civil investigative demands, which are associated with strong enforcement powers but require only the lower civil standard of proof). Note my general assumption that the traits of corporate criminal liability can be made available in corporate civil liability as well. The civil investigative demand provides an example of strong information-gathering powers in the civil sphere. See infra section VII.B.2.

90 See, e.g., Hughes, supra note 47, at 587-59; Mann, supra note 88, passim (labeling individual hybrid strategies as civil strategies or punitive civil sanctions).
nderstand the aims of corporate liability in general as well as how and why corporate liability achieves those aims. I treat deterrence, not retribution, as the aim of both corporate criminal liability and corporate civil liability. Such a treatment accords with the position of many commentators and judges.

Corporate liability may appear incompatible with the aim of deterrence because a corporation is a fictional legal entity and thus cannot itself be “deterred.” In reality, the law aims to deter the unlawful acts or omissions of a corporation’s agents. To defend corporate liability in

91 Some scholars claim that retributive theory is simply not applicable in the corporate arena because a corporation cannot be morally blameworthy. See, e.g., Byam, supra note 2, at 583-85. The Supreme Court has held, however, that mens rea is an element of some crimes committed by corporations. See United States v. United States Gypsum Co., 438 U.S. 422, 434-46 (1978) (holding that the Sherman Act requires intentional misconduct before a court can find a violation). At least one scholarly work has suggested measuring corporate blameworthiness by examining the reasonableness of the corporation’s internal procedures and policies. See Developments, supra note 2, at 1243. Certainly a corporation’s internal processes may be flawed, but such flaws do not provide a convincing rationale for attaching blame to the corporation; the processes are simply the result of decisions by people within the corporation.

Another commentator asserts that a retributive justification for corporate criminal liability is that such liability provides society with a target for its anger and displeasure. See Albert W. Alschuler, Ancient Law and the Punishment of Corporations; Of Frankpledge and Deodand, 71 B.U. L. REV. 307, 312 (1991) (drawing an analogy to the ancient practice of venting anger and displeasure by blaming murder weapons, such as swords). The notion that society has a retributive need so great that it must punish nonhuman entities and label them criminal, however, requires empirical support and seems implausible. In any event, corporate criminal liability, which involves trial, imposition of sanctions, and legal fees, is more costly than simply blaming a sword.

Many of the other rationales for criminal sanctions, such as restraint, education, and rehabilitation of a law-breaking corporation, are “unnecessary, impractical, or nonsensical.” Byam, supra note 2, at 586. Even if these rationales were necessary or practical, civil liability might further them just as well as criminal sanctions do. In civil proceedings, courts can use debarment and probation to incapacitate a corporation, see infra section V.A; require a corporation to engage in a public relations campaign to educate itself and the public; and rehabilitate corporations by encouraging them to develop self-regulatory mechanisms, such as environmental audits, see Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986).

92 Many commentators accept that retribution is not an important aim of corporate criminal liability. See, e.g., Herbert L. Pack, The Limits of the Criminal Sanction 356 (1968); Developments, supra note 2, at 1235 & n.16 (citing a number of sources that suggest that deterrence is the “primary rationale” for corporate criminal liability); Byam, supra note 2, at 585-86. Cf. Kraakman, supra note 3, at 865-68 (comparing corporate and individual liability in terms of deterrence). But see Developments, supra note 2, at 1237-38 (arguing that retribution and blameworthiness are also factors in the corporate context). For a general discussion of retribution, consult Immanuel Kant, The Metaphysical Elements of Justice 101-07 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797). See also Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 1.5(a), at 23-27 (1986) (arguing that criminal liability in general has purposes other than deterrence).

93 For instance, in United States v. Nearing, 252 F. 223 (S.D.N.Y. 1918), Judge Learned Hand noted that corporate civil and corporate criminal liability have the same purpose and that respondeat superior can apply to both. See id. at 231. In general, “[f]ederal law identifies offender reform and the specific deterrence of offenders as primary goals of criminal sentences for offenders including corporations.” Gruner, supra note 1, § 2.3.6, at 144 n.121.
deterrence terms, one must show that it deters corporate managers or employees better than does direct individual liability.\textsuperscript{94}

Direct liability, as its name indicates, directly influences managers’ or employees’ behavior by imposing penalties on these agents whenever they commit certain undesirable acts. Corporate liability works more indirectly. Imposing sanctions on a corporation for the acts of its managers or employees presumably decreases the corporation’s net worth.\textsuperscript{95} Shareholders, who bear the brunt of such a decrease, have an incentive to encourage managers not to commit undesirable acts (assuming that any benefits from the acts do not outweigh the costs to the shareholders).\textsuperscript{96} Shareholders can influence the behavior of corporation managers and employees in a number of ways, such as by modifying employment contracts to provide incentives not to engage in certain types of activities.\textsuperscript{97} The influence of shareholders on managers or employees’ incentives, then, can be similar to the influence of direct liability.

The ability of shareholders to set up effective incentives is tempered by the difficulty of monitoring the activities of the corporation’s managers and employees.\textsuperscript{98} If shareholders can observe employee behavior cheaply, corporate civil liability can work as effectively as direct civil liability.\textsuperscript{99} However, observing managers is often prohibitively costly, and managers’ activities are often imperfectly observable.\textsuperscript{100} Given this situation, some explanation for reliance on corporate liability must exist.

Probably the best reason for relying on corporate liability over direct liability is that corporate agents are often judgment-proof.\textsuperscript{101} For example, if we rely exclusively on direct liability when agents are judgment-proof, then agents will probably “invest inefficiently little . . . in the avoidance of wrongs.”\textsuperscript{102} In addition, when agents are judgment-proof, the production costs to the corporation and its agents

\textsuperscript{94} See, e.g., Lewis A. Kornhauser, \textit{An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents}, 70 \textit{CAL. L. REV.} 1345 \textit{passim} (1982); Kraakman, supra note 3, at 858-67; Sykes, supra note 51, at 1245-56.

\textsuperscript{95} See Byam, supra note 2, at 586-87.

\textsuperscript{96} See id. at 587.

\textsuperscript{97} See, e.g., Kraakman, supra note 3, at 863; Sykes, supra note 51, at 1236-38.

\textsuperscript{98} See Sykes, supra note 51, at 1238-39.

\textsuperscript{99} See id. at 1238-39, 1245-47.

\textsuperscript{100} See id. at 1238-39, 1255-56 (asserting that the observation of agents is often difficult).

\textsuperscript{101} See, e.g., Kornhauser, supra note 94, at 1349, 1351-52, 1362-66; Sykes, supra note 51, at 1244, 1246-52, 1254-55 (examining the implications of agent insolvency for an analysis of vicarious liability).

\textsuperscript{102} Sykes, supra note 51, at 1244. For example, let us assume that an act’s expected harm is $20, the expected benefit to an actor from the act is $20, and the probability of conviction is 50%. In this case, a fine of $40 should result in an expected sanction of $20 — optimal deterrence, assuming the actor is risk neutral. If the actor’s assets are only $30, then his expected sanction of $15 is less than his expected benefit of $20, and he will engage in the activity.
are less than the total costs to society, and the corporation increases the level of production beyond the socially desirable level.\textsuperscript{103} Corporate liability addresses these problems to the extent that the assets of the corporation improve the ability of the corporation and the agent together to pay actual awarded damages.\textsuperscript{104} A corporation exposed to liability internalizes the costs of harm and provides incentives for its managers to avoid harm.\textsuperscript{105} Because the cost of harm is internalized, the costs of production will reflect the true economic costs and the level of production will approach the optimal level.\textsuperscript{106}

Corporate liability may also lead to more efficient risk-sharing between principals and agents. The normal assumption in the literature is that managers bear risk — including legal risk — less efficiently than do shareholders.\textsuperscript{107} Managers who bear legal risk will likely demand compensation up front in the form of a risk premium.\textsuperscript{108} This risk premium is, by hypothesis, higher than the amount that the corporation would have to offer shareholders to bear the risk because shareholders can easily diversify their risk. Thus, reallocating the risk of loss through corporate liability rather than individual liability may result in a social gain without undermining the goal of deterrence.\textsuperscript{109}

Direct liability still exists because corporate liability may not always achieve the optimal result alone,\textsuperscript{110} but in most cases corporate liability remains the most efficient liability strategy. Given that a corporation should be made liable, Part V discusses when the optimal form of corporate liability is criminal liability.

\textsuperscript{103} See id.

\textsuperscript{104} See id. at 1246. Other alternatives to corporate liability, such as individual criminal liability for the agent, would also overcome the problem of judgment-proof agents. Cf. Kraakman, supra note 3, at 876-88 (discussing criminal liability for managers as a supplement to corporate liability); A. Mitchell Polinsky & Steven Shavell, Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?, 13 INT’L REV. L. & ECON. 239, 239-42 (1993) (discussing when imprisoning employees may be socially desirable).

\textsuperscript{105} See Sykes, supra note 51, at 1246. If agents cannot be cheaply monitored, this efficiency-enhancing aspect of corporate liability is reduced, but not eliminated. In these cases, whether corporate liability is preferable to direct liability is debatable. For a more thorough discussion of the complications of expensive or imperfect observability, see Sykes, cited above in note 51, at 1247-S6.

\textsuperscript{106} See id. at 1246.

\textsuperscript{107} See, e.g., Kraakman, supra note 3, at 864-65.

\textsuperscript{108} See id. at 866.

\textsuperscript{109} See id. at 866-67. The risk-sharing benefit may be achieved without corporate liability if managers can obtain insurance or can negotiate with the corporation for some kind of indemnification agreement (assuming barriers to negotiation are trivial). See Sykes, supra note 51 at 1245.

\textsuperscript{110} See Kraakman, supra note 3, at 867-68 (describing three circumstances — asset insufficiency, sanction insufficiency, and enforcement insufficiency — under which corporate liability alone would fail).
V. SANCTIONING CHARACTERISTICS

The arguably unique sanctioning characteristic of criminal liability is the criminal sanction’s potentially stigmatizing effect. In setting out when the different types of sanctions available in the corporate context are desirable and when the stigma sanction factors in, I assume that, all other things being equal, the socially desirable penalty structure would use the socially cheapest sanctions first and then rely on the more expensive sanctions, if needed, to obtain optimal deterrence.

A. Legally Imposed Sanctions

Legislatures permit judges and administrative agencies to impose many sanctions in corporate criminal proceedings, including cash fines, probation, debarment, loss of license, and other related penalties. Nonmonetary penalties, such as imprisonment, are not applicable in the corporate context.

Normally, cash fines are optimal, although sanctions such as loss of license, debarment, and probation in addition to a cash fine may prove optimal in some circumstances. The reason for this hierarchy of sanctions is that the fine is cheaper to administer than other legally imposed sanctions. The costs of imposing a cash fine are the costs of determining what the optimal sanction should be (administrative costs) and effecting the transfer of the cash fine after judgment (enforcement costs). Other sanctions engender greater administrative

111 See Karpoff & Lott, supra, note 64, at 758 (“Reputational cost . . . constitutes most of the cost incurred by firms accused or convicted of fraud.”). But see Posner, supra note 2, at 422 (“[C]orporate punishment carries with it little or no stigma . . . .”). A discussion of stigma as a sanction against individuals is beyond the scope of this Article.

112 Other commentators make similar assumptions. See, e.g., A. Mitchell Polinsky & Steven Shavell, The Optimal Use of Fines and Imprisonment, 24 J. PUB. ECON. 89, 95 (1984) (arguing that, because fines are cheaper to administer than imprisonment, society should first exhaust the deterrence potential of fines and then supplement the fines with imprisonment). See generally Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169, 193-98 (1968) (discussing socially costly penalties).


114 “Debarment is an extended exclusion preventing the affected party from serving as a government contractor for a lengthy period specified in the party’s debarment order.” GRUNER, supra note 1, § 13.2.3, at 757. “Suspension is a [shorter] temporary exclusion . . . limited to 18 months unless the government initiates debarment proceedings . . . within that period.” Id.

115 See id. § 13.2.3, at 759.

116 See id. § 13.2.3, at 756. “A number of federal benefits programs provide for the exclusion of parties following related criminal convictions.” Id.

117 See Polinsky & Shavell, supra note 112, at 90, 95, 98.

and enforcement costs. The loss of license remedy, for example, removes or suspends a corporation’s license to practice a certain type of activity. To determine the cost of the loss of license remedy, we must determine the optimal sanction (as with cash fines) and determine whether barring a corporation from engaging in some activity will cost the corporation exactly that optimal amount. These determinations would require estimating the corporation’s profits for future years, hypothesizing about how much would be lost by the imposition of the penalty each year, and calculating the amount of damages in present value terms. Thus, the costs of imposing a loss of license sanction exceed the costs of imposing cash fines, and fines are clearly the better method for achieving optimal deterrence.

If the defendant corporation cannot pay the entire amount of the appropriate cash fine at the time of judgment, then the fine will not be enough to obtain optimal deterrence. In this case, other sanctions, such as a loss of license, may improve deterrence. A loss of license sanction for three years may result in a present value loss of $40, for example, but it does not place an immediate drain of $40 on the corporation’s cash assets. A court could impose such a sanction on a corporation that is judgment-proof with respect to the optimal cash fine. However, the fact that the loss of license sanction is useful in these situations does not justify exclusive reliance upon it. If the corporation had only $30 in net cash assets, then the optimal penalty structure would be both a cash fine of $30 and a loss of license penalty with a present value of $10 (for a total sanction of $40). This combined penalty has the same deterrent effect as a $40 loss of license penalty, but would be less costly to society.

119 See GRUNER, supra note 1, § i3-2.3(d), at 759; cf. id. § 13.2.3(c), at 757-59 (discussing the operation of the debarment remedy). The cost of debarment would be analogous to the cost of a loss of license sanction; both approaches involve determining the optimal sanction and ascertaining whether the remedy at issue would result in that sanction.

120 Denial of license may also result in a deadweight loss to society if no other corporation can provide the required service or if other corporations provide the service less efficiently than the corporation that lost its license.

121 The fine would underdeter for the same reasons that judgment-proof managers are not optimally deterred by direct liability. See supra pp. 1495-96.

122 I assume that the corporation can afford to suffer, say, a $16 loss each year over three years but does not have $40 in liquid assets to pay a cash fine immediately. Revoking a corporation’s license also has its limits, however, because the legal system cannot impose a sanction greater than the corporation’s net present value. If the legal system wanted to impose even more severe sanctions to deter corporate misconduct, it could sanction managers, see Kraakman, supra note 3, at 869-71, or connected third parties, see id. at 888-96.

123 For example, let us assume that a loss of license penalty of $40 costs society $0.80 and a cash fine of $40 costs society $0.40. Further, assume that sanctioning costs rise linearly as sanctions increase. Combining the loss of license (a $10 penalty at a cost of $0.20) and the cash fine sanction (a $30 fine at a cost of $0.30) would result in a total penalty of $40 but a cost of only $0.50. The $0.50 sanctioning cost is less than the $0.80 cost of using just the loss of license penalty but produces the same effective result (a $40 penalty). The desirability of relying more on
When a corporation does not have sufficient net assets to pay the optimal cash fine, other penalties, such as loss of license, probation, and debarment, may supplement the fine. The preferable supplemental sanction depends on the operations and history of the corporation, the desired severity of the penalty, and the nature of the firm’s misconduct. For example, debarring the corporation from access to government contracts would be most effective when the firm’s primary customer or supplier is the government. When the government is not the primary supplier or customer of the corporation and we still desire a large penalty, we may use loss of license to prevent the corporation from dealing with all of its customers in the applicable market. Probation may be desirable when, for example, we want to rearrange or improve some of the corporation’s internal procedures. All of these sanctions are or can easily be made available in corporate civil liability regimes.

B. Social Sanctions

Both society and the legal system impose sanctions. The most powerful sanction that society can impose on a corporation is lost reputation or stigma. Section 1 explains what is meant by “reputation” in the corporate context, isolating two types of reputational effects of corporate criminal liability—one on the corporation and the other on its top management. Section 2 examines the first of these effects and seeks to determine when imposing reputational loss on a corporation is desirable. Section 3 discusses whether corporate criminal liability can ever impose a more effective reputational penalty on a corporation than can corporate civil liability, and section 4 makes the same comparison with respect to the managers of a corporation. The analysis indicates that reputational loss in any form is rarely a socially desirable sanction in the corporate context.

cash fines is strengthened if the loss of license sanction results in deadweight losses. See supra note 120.

124 See GRUNER, supra note 1, § 12.3.2(b), at 722, § 12.4, at 745; U.S. SENTENCING GUIDELINES MANUAL § 8D1 (1996). Courts may place corporations on probation and restrict their activities. See id. § 8D1. Such restrictions appear to be the corporate criminal law equivalent of a civil law injunction. One purported difference is that courts might enforce probation requirements more quickly than injunctions. See Coffee, supra note 2, at 447 (noting that criminal cases are generally resolved sooner than civil cases). However, civil injunctions do not have to be en-forced more slowly than criminal probations; for example, courts can issue interim injunctions in intellectual property cases. See, e.g., ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY, PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL § 26.1, at 402 (2d ed. 1990).

125 For example, fines are the criminal law equivalent of civil law damages. Corporations convicted of certain crimes may face debarment, see GRUNER, supra note 1, § 13.2.3(c), at 757-59, and courts and enforcement agencies may also use debarment when the corporation is found liable in civil proceedings. See White Collar Crime Comm., Collateral Consequences of Convictions of Organizations, 1991 A.B.A. SEC. CRIM. JUST. 34.
1. Reputational Loss in the Corporate Context. — The term “reputation” carries with it more than one meaning. For individuals, reputational loss connotes both the individual’s sense of shame and others’ increased reluctance to do business in the future with the individual.  

126 For corporations, however, reputational loss refers only to the reluctance of others, such as customers and workers, to deal with the corporation in the future.  

127 Of course, the managers of the corporation may feel shame about their corporation’s conviction.  

128 As applied to corporations, reputation refers, for example, to the supracompetitive price that a firm with a good reputation can charge customers for its products or the lower wages that a “good” employer can pay while still attracting workers.  

129 This Article only examines the issues surrounding a corporation’s reputation among its customers, although the reasoning is analogous for other areas of corporate reputation.

However, in certain situations reputational sanctions are not effective against corporations. Because activities that harm third parties, such as environmental pollution, do not directly affect a firm’s customers, the firm will be unlikely to suffer a reputational loss for engaging in those activities.  

130 Also, firms that lack reputations, such as “fly-by-night” firms, cannot really suffer a reputational loss.

2. The Socially Desirable Use of Reputational Penalties. — In order to examine the desirability of reputational penalties, I briefly set out the assumptions underlying my analysis. I also highlight the role of government in influencing reputational sanctions.

Reputational penalties arise once the share market becomes aware of possible corporate misconduct. This awareness often results from news reports — of the government filing charges or taking other legal action against the corporation, for instance — reaching the share market through sources such as the Wall Street Journal.  

131 Assuming the market efficiently translates this news into share price, then the price of corporate stock moves to reflect market perceptions of likely future


127 This idea is eloquently expressed in the now-famous statement of Edward, First Baron Thurlow: “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?” Coffee, supra note 2, at 386 (citing MERVYN A. KING, PUBLIC POLICY AND THE CORPORATION 1 (1977)). Herbert Packer also expresses the idea that corporations cannot be stigmatized. See Packer, supra note 92, at 361.

128 Cf. Charny, supra note 126, at 397 (discussing “social and psychic losses” suffered by managers who mistreat workers).

129 See id. at 396-97; Karpoff & Lott, supra note 64, at 761, 763.

130 See Karpoff & Lott, supra note 64, at 797-98.

131 See id. at 769-73.
Thus, government action can spur the share market to impose reputational penalties on corporations.

In addition, government can influence the magnitude of the reputational penalty that the market imposes. To show this, I assume, as do some commentators, that reputational sanctions and cash fines are generally, albeit not perfectly, substitutable as means of assuring high quality products or services. The implication is that the government, by adjusting the amount of the cash fine, has some influence over the magnitude of the reputational loss a corporation suffers.

An important question to ask when examining corporate reputation is when a firm would want to invest resources in building a reputation as a supplier of high quality products or services. As a general matter, firms make these investments when customers desire assurances of high quality and are willing to pay for that quality. If a firm invests in reputation and provides inferior quality, and if customers become aware of this low quality, then they may withhold their patronage from the firm. Consequently, the firm’s profitability and stock price will decline, and both the value of the corporate reputational asset and the prices the corporation can charge for its goods will diminish. The threat of the diminution in value of corporate reputation provides corporations with incentives to produce high quality and customers with assurances that high quality will be provided.

The next inquiry is whether any other sanction could provide the corporation with an incentive to produce high quality. The government could impose a cash fine on the corporation every time it produced inferior quality and, in theory, such fines would provide the

---

132 I assume that the market is at least semi-strong efficient. See Ronald J. Gilson & Reinier H. Kraakman, The Mechanisms of Market Efficiency, 70 Va. L. Rev. 549, 555 (1984) (defining semi-strong market efficiency as the situation created when “categories of publicly available information of obvious interest to investors” are quickly reflected in share price, thereby denying traders “lucrative trading opportunities”). I further assume that any information in publications such as the Wall Street Journal about government legal action against corporations is information falling within the semi-strong model.

133 See Karpoff & Lott, supra note 64, at 762-64 (noting that fines and reputational penalties are not perfect substitutes). Karpoff and Lott’s argument implicitly assumes that, although different parties impose cash fines and reputational losses, both penalties can work as quality assurance devices. See id. at 762-63.

134 Cf. id. at 762-64 (outlining the limited ability of government fraud penalties to impose reputational costs).

135 See id. at 761 (“People who buy cars at flea markets are probably not making systematic mistakes — they simply value additional quality assurance less than do people who buy from new car dealers. Flea market customers are more likely to be defrauded, but they also pay lower prices for cars.”). The implication is that if customers do not desire high quality assurances via reputation, firms will have little incentive to make investments in reputation. See id. at 761-62.

136 See id. at 763; see also id. at 780-89 (discussing the value of reputational losses).

137 Cf. id. at 759-60 (noting that threatened reputational losses can induce companies to include safety features in their products).
corporation with an incentive to produce high quality. Given that both cash fines and reputational penalties can induce firms to produce high quality, the next question is whether these sanctions can be substituted for each other. At this point I make a strong assumption, to be relaxed later, that cash fines and reputational penalties are perfectly substitutable. Thus, if the government has set the cash fine at an amount sufficient to produce the desired quality level, customers have little need to seek further quality assurances in the form of investments in reputation. The firm therefore has little incentive to make investments in reputation. This analysis implies that the government can determine the magnitude of the reputational penalty by adjusting the cash fine it imposes. Perfect substitutability means that if the cash fine is increased by $5, then the reputational penalty should decrease by $5.

Of course, the perfect substitutability assumption is unrealistic. However, even under a weaker assumption that cash fines and reputational penalties are generally substitutable, the government maintains some influence over the reputational loss suffered by corporations. An implication of this assumption is that if cash fines are increased by $5, then reputational penalties should decrease by less than $5, but the exact amount of the decrease is uncertain ex ante. Thus, the gov-

138 See id. at 760-72 (noting that criminal and civil fines can often induce corporations to provide high quality). But see id. at 763 (discussing why cash fines may not always assure customers of high quality).
139 See id. at 762-73. Presumably, firms will only invest in their reputations for good quality if their customers desire such an investment Cf. id. at 761 (discussing why flea market vendors do not invest much in reputation).
140 See id. at 761.
141 Cf. id. at 763-64 (noting that larger fines result in smaller reputational losses when corporate fraud is relatively easy to prove to third parties). Despite the substitutability of fines and reputational losses, a large cash fine may actually result in a large reputational penalty. If the large cash fine is sufficient for the quality level desired, reputational penalties should be small, but if the large cash fine still does not ensure the desired level of quality, reputational penalties may persist.
142 See id. at 762-63. To develop this idea further, let us assume that customers desire high quality and that the corporation would provide high quality if it were threatened with a $20 sanction for providing inferior quality. We may then impose a cash fine of $20 or a reputational penalty of $20 to induce high quality. The question is whether we can use both sanctions together. If they are perfectly substitutable, using both together is easy. See id. at 762-63. For example, assume the government sets a fine at $5, an amount insufficient to induce the corporation to provide high quality. When customers recognize this and demand higher quality, the firm will make investments in reputation. Under these circumstances, the sanction for providing inferior quality is $15 of reputational loss and $5 of cash fines. If the sanctions are not perfectly substitutable, this calculation is unlikely to result in the optimal sanction. Cf. id. at 763-64 (explaining that if fines are less effective than reputational sanctions on the margin, fine increases will not work well enough to allow concomitant reductions in reputational sanctions).
143 See id. at 763-64 (discussing reasons why reputational penalties and cash fines are not perfect substitutes).
144 See id.
145 See id. at 763.
ernment can trigger reputational penalties and, by adjusting the level of cash fines, influence the magnitude of reputational penalties, but cannot set the magnitude of these penalties precisely.

With this in mind, we must ask when reputational penalties are the socially desirable sanction. There are two main approaches to this question. The first line of inquiry compares reputational penalties with other possible sanctions in order to determine which sanctions are socially cheaper. The analysis suggests that the sanctioning costs of reputational penalties are almost always higher than the costs of other sanctions. The second line of inquiry investigates whether reputational penalties might still be desirable despite their high costs. This inquiry concludes that, because reputational penalties are imposed early in the proceedings, a qualified case can be made in support of reputational penalties.

The first line of inquiry requires a comparative analysis of the sanctioning costs of various legally imposed sanctions and the sanctioning costs of reputational penalties. I initially assume that the corporation is not judgment-proof and, therefore, that we may use cash fines or reputational penalties to impose the optimal sanction on the corporation. I then perform the same analysis assuming that the corporation is judgment-proof with respect to the optimal cash fine. This analysis discusses when we should choose reputational sanctions rather than other sanctions (such as loss of license) to bridge the deterrence gap.

Let us then examine the case in which the corporation is not judgment-proof. In this case, society can choose a reputational penalty of $1 million or a cash fine of $1 million to obtain the optimal sanction. Here the choice of sanction should depend, as in the example presented in section V.A, on which sanction has the lowest sanctioning costs.

Reputational penalties have costs. First, according to Karpoff and Lott, “[r]eputational penalties are costly because they arise from the quasi rents established when consumers pay high prices for high quality assurance.”146 Reputational penalties reduce these quasi rents and result in the destruction of assets; these penalties are therefore costly to society.147 Put more simply, no one receives a corporation’s lost reputation, whereas someone — the government or a private party — receives the cash fine. Second, in order to impose the optimal sanction on the defendant, the government would not only have to determine the size of that optimal sanction, but also would have to determine how much, in monetary terms, the criminal stigma would cost the corporation.148 “[A] corporation’s sales fluctuate in response to countless

146 Karpoff & Lott, supra note 64, at 761.
147 See Charny, supra note 126, at 393.
148 See Byam, supra note 2, at 600.
variables, and the government would have to weed through sales and income data to determine, ex ante, a criminal conviction’s profit effect.” In addition, corporations can take measures to mitigate the effects of a reputational penalty by generating some of their own publicity and negating the effects of the government’s actions. Inquiring into the impact of a reputational penalty on corporate sales and the impact of corporate mitigation efforts could prove very costly because reputational penalties may be subject to considerable uncertainty.

Third, assuming precise figures are not available, reliance on reputational losses results in overdeterrence or underdeterrence. Reliance on fines, on the other hand, essentially involves only the costs of determining the optimal sanction and transferring the cash from the defendant to the government. Therefore, the sanctioning costs associated with reputational penalties should not be less than those associated with criminal or civil fines on corporations. In other words, we should prefer cash fines over reputational sanctions as long as the corporation is not judgment-proof.

If the corporation is judgment-proof, a reputational sanction may achieve optimal deterrence when a cash fine cannot. The use of

---

149 Id.

150 See Amar Bhide & Howard H. Stevenson, Why Be Honest if Honesty Doesn’t Pay, HARV. BUS. REV., Sept-Oct 1990, at 121, 125 (discussing the “ambiguities” of reputational penalties); Coffee, supra note 2, at 425-29 (discussing problems with adverse publicity). Mitigation of the reputational sanction is another reason why such a sanction is not perfectly substitutable for cash fines (which presumably cannot be mitigated).

151 Presumably, the government may underestimate or overestimate the impact, in monetary terms, of reputational penalties. If these errors are evenly balanced, then reliance on an average estimate of reputational penalties may still produce the optimal level of deterrence. I suspect, however, that underestimation is frequently a problem in the calculation of reputational penalties, and that this problem makes achieving optimal sanctions, even on average, somewhat difficult. The possibility that reputational loss could occur even in the absence of a finding of liability — an “innuendo loss” — further exacerbates the uncertainty inherent in reliance on reputational sanctions. There is some evidence of the lack of correction of initial reputational losses in the corporate context See Karpoff & Lott, supra note 64, at 777 (describing a study that found that declines in stock prices caused by allegations of fraud were not reversed when new information about the fraud was published).

152 See supra note 142.

153 See Karpoff & Lott, supra note 64, at 761 (noting that cash fines have “administrative and enforcement costs”); Posner, supra note 118, at 410 (suggesting that the social cost of fines is lower than the social cost of imprisonment).

154 This analysis assumes that reputational penalties and cash fines sanction different sources. A cash fine reduces the available net assets of the corporation, whereas a reputational penalty reduces the total value of the corporation (as reflected in its stock price). See Karpoff & Lott, supra note 64, at 772 (employing a methodology that assumes that reputational loss harms the corporation’s stock price). The different sources provide different upper limits on the sanction imposed. For instance, suppose a corporation was worth $2 million and had cash assets of $200,000. The maximum cash fine that courts can impose without threatening the solvency of the corporation is $200,000, but the maximum reputational penalty is $2 million. Thus, if the optimal sanction were $300,000, this sanction could only be created through a combination of reputational penalties and cash fines.
reputation is nonetheless problematic, because reputational sanctions are inaccurate and affect only firms with good reputations.\footnote{See supra section V.B.1.} Furthermore, reputational sanctions generally are not the most efficient means of obtaining optimal deterrence. In addition to the remedies that have already been discussed, such as loss of license and debarment, the literature suggests others, including equity fines.\footnote{See Coffee, supra note 2, at 413-24.} An equity fine might require a “convicted corporation . . . to . . . issue such number of shares to the state’s crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity.” An equity fine, by reducing the price of corporate stock, has an effect similar to that of a reputational sanction.\footnote{Id. at 413.} In fact, the maximum penalty under both equity fines and reputational penalties is the same — approximately the total share value of the corporation.\footnote{See id. at 413-15 (noting that equity fines dilute share prices); Karpoff & Lott, supra note 64, at 772-73 (treating reputational penalties as harmful to a corporation’s stock value).} However, equity fines are likely to be socially cheaper to impose because they are more precise than reputational sanctions\footnote{This similarity follows from the premise that equity fines, like reputational sanctions, serve primarily to lower share value. See Coffee, supra note 2, at 413-15. If the two sanctions target the same source, then their upper limits are likely to be the same.} and courts can more easily determine their impact. Further, equity fines do not result in the destruction of assets as reputational penalties do.\footnote{By definition, courts impose equity fines after calculating what effect they will have on share prices. See id. at 413.} Thus, equity fines and other comparable legally imposed sanctions, such as debarment, are generally more efficient than reputational loss as supplements to cash fines for judgment-proof corporations.

Although reputational penalties are expensive sanctions, they may still be socially desirable in two cases, regardless of whether the corporation is judgment-proof, because of the time at which they take effect. Cash or equity fines only impact a corporation once it has been convicted or found liable, whereas reputational penalties begin to take their toll as soon as the share market becomes aware that the corporation has legal troubles.\footnote{Equity fines dilute share prices for existing shareholders. See Coffee, supra note 2, at 415; see also id. at 413-21 (discussing other advantages of equity fines). Note that the greater precision of equity fines means that the overdeterrence and underdeterrence concerns associated with reputational penalties, see supra note 142, are a lesser concern here.} Let us then assume that the reputational loss is incurred at an early point in the proceedings (before trial, for example). Let us further assume that the reputational loss does not

\footnote{At least one empirical study of reputational loss found that the largest part of such loss occurs at the time of the initial news report of legal troubles. See Karpoff & Lott, supra note 64, at 775-85.}
vary with the later finding of guilt or innocence, which means that an overestimation of liability is rarely corrected.\textsuperscript{163} In this case, a reputational penalty may provide a higher expected sanction than would cash fines and equity fines or any other combination of penalties that courts impose after conviction, and it may also save enforcement costs by leading to an early resolution of the case.

I develop the higher expected sanction case by example and highlight the critical factors in the analysis. Let us assume that the probability of detection and conviction (that is, the probability of a fine) is 10% and the probability of detection and discovery by the share market (that is, the probability of a reputational penalty) is 35%. In addition, assume that the optimal expected sanction is $800,000, the maximum cash fine is $1 million (the corporation’s net available assets), and the maximum reputational penalty (which is imposed before trial) is $2 million. The expected sanction in criminal proceedings is then the optimal expected sanction of $800,000 ($2,000,000 x 35% plus $1,000,000 x 10%). If instead we relied on a $1 million cash fine and a $2 million equity fine (also the maximum that can be imposed), then the expected sanction is only $300,000 ($3,000,000 x 10%).\textsuperscript{164} Because cash and equity fines cannot be increased any further, the greater reliance on reputational penalties provides a higher expected sanction and might be preferable in some cases for deterrence purposes. The critical factor in the analysis is not the timing of the reputational penalty per se, but the fact that the probability of imposing a reputational penalty is higher than the probability of imposing any other sanction. Because the expected value of a sanction equals the sanction times the probability that it will be imposed, a higher probability of imposing a sanction increases the expected sanction.

However, there may be other ways to increase the expected sanction without relying on reputational penalties. We could authorize the imposition of a cash fine on a corporation as soon as the corporation is charged with a crime (that is, at the same time the corporation becomes subject to reputational loss). This system, however, would im-

\textsuperscript{163} See id. at 777 (suggesting that later announcements fail to correct initial reputational losses).

\textsuperscript{164} Note that we could try hybrid strategies as well. For example, the imposition of $1 million in cash fines, $1 million in equity fines, and $1 million in reputational penalties would result in an expected sanction of $550,000 an amount too low for optimal deterrence. This result might call into question the assumption that underlies this Part of the Article — that the optimal penalty structure should exhaust the cheapest sanctions first and then move on to the more costly sanctions. See supra p. 1497. The assumption seems questionable because, although equity fines are cheaper than reputational penalties, in the examples given we have not exhausted the total potential for equity fines (which is $2 million) before relying on reputational penalties. This apparent incongruity arises from the implicit assumption made throughout the Article that the probability of imposition for each type of sanction is the same. Here I have relaxed that assumption and have reached a different result These varying results are not surprising — they indicate only that starting assumptions both clarify and restrict analysis.
pose a sanction without proof of violation of any law and thus seems unrealistic and probably unconstitutional. Instead, we might make corporate liability suits more expensive to defend or subject corporate officers to heavier penalties.\(^{165}\) These two options are better than reputational penalties because they often have lower sanctioning costs and can be measured more precisely. However, an important concern with these alternative sanctions is that many have yet to be tried. Developing them will undoubtedly prove valuable, but until then reputational sanctions remain desirable in a narrow range of cases — cases in which a high expected sanction is necessary but is not available through legally imposed penalties.

Alternatively, we might consider applying consent decrees,\(^{166}\) which are imposed earlier than cash fines, as substitutes for reputational penalties when a high expected sanction is needed. Consent decrees may indeed be valuable. However, because the probability of their imposition is most likely lower than the probability of the imposition of reputational penalties,\(^{167}\) consent decrees might also need to be supplemented by reputational penalties. Overall, reputational penalties may provide a benefit by allowing for higher expected sanctions.

In addition to increasing expected sanctions, the early imposition of a reputational penalty may encourage faster settlement and thereby avoid a costly trial. If the optimal sanction can be imposed using either post-trial cash fines or pretrial reputational sanctions, we should choose reputational sanctions when the litigation costs avoided by settling exceed the extra sanctioning costs of reputational penalties compared to cash fines.\(^{168}\) Assuming that this balance favors reliance on

---

165 One option is to increase the costs of suit. Alternatively, we might stagger the times at which the defendant and prosecution incur the costs of suit in such a way that the defendant pays up front, whereas the prosecution pays later in the trial. I assume that the government brings the suit and that malicious suits are less likely in the public enforcement context than in the private civil enforcement context I also assume that if the government brings a false suit and fails to obtain conviction, the corporation will not fully recover from the reputational loss inflicted early on because some consumers will remain doubtful that the corporation was truly innocent Cf. Karpoff & Lott, supra note 64, at 777 (emphasizing the irreversibility of the reputational loss caused by initial news reports of fraud).


167 Karpoff and Lott’s study provides evidence relating to the probability of the imposition of consent decrees or settlements compared to the probability of imposition of reputational penalties. See Karpoff & Lott, supra note 64, at 769, 775-85- In the cases Karpoff and Lott examined, reports to the Wall Street Journal about the investigation preceded settlement, see id. at 769, and most reputational loss occurred at the earliest reporting of problems with the corporation, see id. at 775-85. This finding implies that most of a corporation’s reputational loss is suffered before a settlement is reached.

168 For example, let us assume that the probability of detecting a wrong is 40% and that the probability of convicting a corporation for the commission of that wrong is 5%. Further, the enforcement cost to detect the harm is $500,000 and the cost to obtain a successful conviction is an additional $3 million. The optimal expected penalty is $1 million; hence, the optimal cash sanction is $20 million and the optimal reputational loss is $2.5 million. Let us also assume that
reputational sanctions, we should note that trials can often be avoided by relying on any sanction that is imposed early on, such as the charging sanction or increased cost of suit. These sanctions are superior to reputational loss because they can realize the enforcement savings without the higher sanctioning costs associated with reputational sanctions. Again, because no legal framework for imposition of these other sanctions is yet in place, reputational sanctions may offer the best solution currently available.

Thus, the early imposition of reputational penalties renders these penalties desirable in certain narrow areas. This desirability alone, however, is not grounds for imposing corporate criminal liability, because we have the choice of imposing reputational loss through either civil or criminal proceedings.

3. A Comparison of Corporate Reputational Loss Due to Civil and Criminal Liability. — The literature suggests that reputational losses result both from criminal convictions and from civil liability. Before we conclude that imposing criminal reputational sanctions are preferable, we must first establish that the reputational consequences of a criminal conviction exceed those of an unfavorable civil judgment. One commentator who conducted a limited examination of the issue concludes that there was no significant difference between the corporation’s reputational sanctions in these two types of proceedings. Intuitively, this result seems proper; it is hard to believe that consumers would ascribe stigma to a corporation solely on the basis of the category of legal proceedings in which it was involved. For example, if Exxon is convicted of a criminal offense for violating environmental laws and is fined $1 billion, and Shell is found liable for violating the same environmental laws in the civil sphere and pays $1 billion in damages, society is unlikely to perceive any significant difference between the two corporations.

Discussions with government agency representatives and members of the legal community indicate, however, that this result may not al-
ways hold true, especially for cases that do not command the sort of sensational appeal of the Exxon Valdez case.\textsuperscript{172} If we desired a very severe sanction that could not be obtained either through other legally imposed sanctions or through the reputational loss penalty in civil cases, then we could obtain a greater reputational loss from corporate criminal liability. However, the type of grandiose corporate wrong that would call for such a response would probably fall into the “sensational” category — the category in which the reputational penalties are the same in both liability regimes.

If, on the other hand, we wish to save enforcement resources by imposing early penalties, then corporate criminal liability is desirable only when the reputational penalty of corporate civil liability is not large enough for optimal deterrence.\textsuperscript{173} This use of the criminal process, however, may seem rather perverse and unpalatable. This is because we normally view the availability of severe sanctions as a justification for the high costs of criminal trials, yet here we use the severe early reputational sanctions as a factor that decreases the need for a criminal trial. An alternative is to develop sanctions in civil proceedings that can be imposed early in the litigation process. For instance, increasing the costs of defending a suit encourages early settlement and avoids expensive trials, avoids the high sanctioning costs of criminal reputational penalties, and avoids the unseemly use of the criminal process to impose pretrial penalties. Clearly, this alternative is preferable.

4. A Comparison of Managers’ Reputational Loss Due to Civil and Criminal Liability. — Managers, as well as corporations, may incur reputational losses.\textsuperscript{174} It has been suggested that there is a rub-off effect on top management if a corporation is convicted, but that there is no rub-off effect if the corporation is found liable in civil court because civil cases are such common occurrences.\textsuperscript{175}

\textsuperscript{172} See Interview with Louis Kaplow, Professor, Harvard Law School, in Cambridge, Mass. (Mar. 5, 1993); Interview with Peter Kenyon, Regional Counsel’s Office, Environmental Protection Agency, in Boston, Mass. (Mar. 6, 1995). For example, a criminal conviction for a banking law violation, rather than a finding of civil liability, might result in higher reputational losses.

\textsuperscript{173} In order for society to benefit from the imposition of corporate criminal liability, the reputational penalty of corporate civil liability must be inadequate for optimal deterrence. Other-wise, we could rely on the reputational sanction of corporate civil liability and avoid the higher sanctioning costs of corporate criminal liability. See supra section V.B.2. I assume that sanctioning costs increase as reputational penalties increase.

\textsuperscript{174} See, e.g., Developments, supra note 2, at 1366 (noting the possibility of such a penalty, but considering it unlikely).

\textsuperscript{175} See Interview with Philip Heymann, Professor, Harvard Law School, former Deputy Attorney General of the United States, in Cambridge, Mass. (Mar. 8, 1995); Interview with Peter Kenyon, supra note 172. Some commentators are skeptical that this rub-off effect exists even in the criminal context. See Developments, supra note 2, at 1366 & nn.5-6. If there is indeed a rub-off effect associated only with criminal liability, it must be due to the criminal label itself rather than to the fact that the government is bringing suit. Otherwise, the reputational rub-off associated
Even if we make the highly questionable assumption that reputational rub-off exists in the criminal context, we must still determine whether we want to use this type of sanction to achieve deterrence. The use of a reputational rub-off penalty would be worthwhile only if corporate liability and individual liability together did not sufficiently deter the corporation and its agents. Such underdeterrence would occur if the corporation were judgment-proof and if the responsible manager were either judgment-proof or difficult to find and convict. If these conditions existed, then imposing a general reputational rub-off penalty on top management might encourage them to supervise the activities of their subordinates more carefully and dissuade them from masterminding corporate delicts.

Using corporate civil liability and individual civil liability, however, produces the same sanctioning effect as reputational rub-off and is socially cheaper. Civil liability might allow us to impose a sanction directly on members of top management without proving that they did anything wrong. For instance, we could impose a monetary penalty on top management, based on strict liability, for certain types of corporate wrongs. This method would be preferable to the indirect reputational rub-off for two reasons: fines are socially cheaper than reputational loss, and fines are more accurate than reputational loss. The latter is an important consideration because managers are risk averse and because overdeterrence is possible.

Reputational rub-off penalties may be more desirable, however, if the manager’s available assets are less than the optimal damages, but the manager’s available assets plus his potential reputational losses exceed or at least equal optimal damages. It is not clear, however, how often this is the case. Moreover, we need to assume that the manager cannot negotiate a higher salary to compensate him for this reputational rub-off penalty. If he can negotiate, then the corporation is in effect paying the penalty, and we can produce the same result by opting with public criminal enforcement would be the same as the rub-off associated with public civil enforcement.

176 See, e.g., Developments, supra note 2, at 1366.
177 I assume that imprisoning members of top management simply because their corporation has been convicted would be impermissible.
178 A strict liability fine is equivalent to a reputational penalty in the sense that neither requires proof that the manager was at fault.
179 See supra pp. 1503-04.
180 See supra pp. 1503-04. The rapidity with which top management turns over exacerbates the danger of inaccuracy. See Posner, supra note 2, at 422 (noting that personnel changes in corporations are frequent). For example, although the top management of corporation X may have been cavalier in 1987, the corporation might not be sued until 1993. The members of top management may have changed several times during this period. These changes would result in the reputational rub-off affecting the wrong individuals. A strict liability fine, in contrast, could target the responsible managers more effectively.
181 See supra p. 1496.
ing for a strict liability fine and allowing the corporation to insure top management.\textsuperscript{182} If the manager cannot negotiate, we still need to ask whether imposing this type of liability on top management is more desirable than imposing insurable strict liability fines.\textsuperscript{183} Finally, there may be a time lag between the harmful event and the suit (and, hence, the reputational penalty) in which the identity of top managers may have changed. When such a change occurs, reputational penalties affect the wrong people, thus exacerbating managerial risk aversion.\textsuperscript{184}

This analysis indicates that there are several preconditions for preferring a reputational rub-off penalty: corporate liability that is insufficient for deterrence; conditions in which managerial insurance is not optimal; judgment-proof top management; top management with the capacity to suffer some reputational loss; inability to find and convict the truly responsible manager; conditions in which the benefits of the reputational rub-off penalty would be greater than its costs (inaccuracy and sanctioning costs); and a net benefit that is greater than that of any other sanctioning option such as direct cash fines. Given the number of necessary conditions, such a situation is probably exceedingly rare.

The preceding analysis demonstrates that relying on a reputational sanction, regardless of whether it attaches to the corporation or to top management, is rarely socially desirable in the corporate context. We should therefore prefer the socially cheaper sanctions imposed by the law. Among legally imposed sanctions, we should prefer cash fines to other options, such as loss of license, because cash fines are the cheapest options. Consequently, we should rely on cash fines until their deterrent effect is exhausted and then use the other legally imposed sanctions until their deterrent effects are exhausted as well. If higher sanctions are still needed to achieve optimal deterrence, we could consider sanctioning managers and third parties or increasing the costs of proceedings. Reputational penalties could still prove desirable, however, because they take effect at an early point in the proceedings. Nonetheless, criminal reputational sanctions are probably not superior to civil reputational sanctions. Furthermore, reputational sanctions will likely lose this early-penalty advantage if other early-penalty sanctions with the same probability of imposition as the reputational penalty emerge.

Therefore, in most instances, corporate civil liability that permits the imposition of cash fines supplemented by loss of license and equity fines is more desirable than corporate criminal liability. Within this regime, loss of license and equity fines should generally be available to supplement cash fines if the court or agency believes that the optimal

\begin{itemize}
\item \textsuperscript{182} See Kraakman, \textit{supra} note 3, at 870-71.
\item \textsuperscript{183} See id. at 876-88 (discussing absolute liability for managers).
\item \textsuperscript{184} See \textit{supra} note 180.
\end{itemize}
sanction is greater than corporate assets available for payment of a cash fine. We should not therefore rely on corporate criminal reputational penalties and reliance on any corporate reputational penalty should be minimal.

VI. PROCEDURAL CHARACTERISTICS

The norms of traditional criminal proceedings determine the procedural protections available to corporate criminal defendants.185 The primary purpose of these protections is the prevention or correction of false convictions; the system is far less concerned with correcting false acquittals.186 Although there may be many good reasons to offer these protections to individuals, false convictions of corporations are not as problematic to society as false convictions of individuals. This Part examines the desirability of four criminal procedural safeguards for corporate defendants:187 a higher standard of proof; the prohibition of double jeopardy; the right to a jury trial; and the requirement of grand jury indictment.188 This examination reveals that these protections are rarely, if ever, desirable in the corporate context.

A. Standard of Proof

In criminal proceedings, the prosecution must prove its case beyond a reasonable doubt to obtain a conviction.189 A more lenient preponderance of the evidence standard is used in civil cases. Because of the higher standard of proof, criminal cases are typically more costly than civil cases.

185 See Developments, supra note 2, at 1276. Indeed, the typical corporate criminal case goes through essentially the same process as any other criminal case, save for the vast amount of documentary evidence required for a corporate conviction. See id. Given the constitutional nature of criminal procedural protections, I assume, for now, that these protections must attach whenever something is labeled criminal.

186 For works in which this proposition is the operating assumption, see Posner, cited above in note 2, at 553, and Byam, cited above in note 2, at 601-02.

187 This Part focuses on the differences between the procedural protections available to corporations in criminal trials and the protections available to corporations in traditional civil proceedings. We want to narrow the analysis to those protections that we may be able to avoid if we decide to opt for civil instead of criminal corporate liability. Certain protections, such as the Fifth Amendment privilege against self-incrimination, the Fourth Amendment protection against unreasonable search and seizure, and attorney-client privilege, are available in both corporate civil and criminal cases. See Developments, supra note 2, at 1277-93. Some other constitutional protections of lesser significance, including substantive due process and equal protection of the laws, also apply in both contexts. See Gruner, supra note 1, § 5.7.1—.7.3, at 322-24.

188 See Developments, supra note 2, at 1302, 1341-50.

Optimally, the standard of proof should be set at the level that equates the marginal costs of false convictions and false acquittals. Assuming that the costs to society from a false conviction and a false acquittal are approximately the same, a higher standard of proof might be beneficial if it would reduce the number of false convictions by more than it would increase the number of false acquittals. The unique difficulties associated with detecting, investigating, and proving corporate criminality suggest, however, that the number of false corporate convictions is already very low and that the higher criminal standard of proof is thus unnecessary in the corporate context.

If we then assume that the number of false corporate acquittals exceeds the number of false corporate convictions, a higher standard of proof is only justifiable if the cost of a false corporate conviction exceeds the cost of a false acquittal. Posner argues that a false conviction wrongfully imposes socially costly penalties, such as imprisonment, on the individual defendant. Hence, the social cost of a false conviction of an individual is likely to exceed the cost of a false acquittal. The requirement of proof beyond a reasonable doubt therefore minimizes the costs of error to society by ensuring that the chance of a false conviction of an individual is less than the chance of false acquittal. However, for purely civil cases, the costs of a false finding of liability are about the same as the costs of a false finding of no liability because the sanction, such as a cash award, is a low-cost sanction. Its social costs may be merely the rather small transaction costs of transferring money from one party to another. Therefore, employing the preponderance of the evidence standard of proof for civil liability is desirable because the standard is only slightly weighted in favor of false findings of no liability.

The lower civil standard is socially desirable in the corporate context because cash fines imposed on risk-neutral corporations are essen-

---

190 For example, let us assume that the civil standard of proof produces 40 incorrect decisions, each costing society $1, of which 25 are false convictions and 15 are false acquittals. The error cost to society is $40. Further, let us assume that under a higher standard of proof the number of false convictions falls to 18 and the number of false acquittals rises to 20. The higher standard thus decreases the error cost to society to $38.

191 See, e.g., GRUNER, supra note 1, § 1.7.1, at 29-36 (discussing problems of detection and investigation); Hughes, supra note 47, at 576-80 (explaining that compulsory process has developed in civil cases in response to the difficulty of investigating corporate offenses); see also infra sections VII.C.1-.2 (discussing strategic benefits and error correction benefits).

192 See POSNER, supra note 2, at 553. I assume that increasing the standard of proof results in one fewer false conviction and one more false acquittal (a one-for-one ratio).

193 See id.; see also Kaplow, supra note 189, at 360-61 & n.150 (discussing how socially costly sanctions may make a higher standard of proof optimal).

194 See POSNER, supra note 2, at 553.

195 See id.

196 See id. at 550-53.

197 See id. at 552.

198 See id. at 553.
Somewhat similar arguments can be made in the context of other sanctions imposed on corporations. Nevertheless, a monetary fine may have consequences outside of the simple transfer of funds involved. For example, the possibility of a severe sanction under an uncertain legal standard may chill desirable behavior (a problem commonly associated with antitrust cases and treble damages). A higher standard of proof may be useful to mitigate this chilling effect.

However, concern over the risk of chilling desirable behavior seems low. The recent increases in the severity of corporate sanctions in both the civil and criminal spheres may indicate a belief that sanctions are still not stiff enough to deter undesirable behavior. Because concern about the ill effects of undesirable behavior generally outweighs any concern about chilling desirable behavior, the possibility of...
chilling is not a convincing justification for the higher standard of proof.

The higher criminal standard of proof would be justifiable, then, only in those cases in which there would otherwise be either chilling of desirable corporate behavior or an excess of false convictions over false acquittals. Given what we know about corporate sanctions and the difficulty of proof in the corporate context, the criminal standard of proof would simply not be desirable. 204

Moreover, even if there is some danger of a chilling effect or a higher number of false convictions than false acquittals, we should not necessarily opt for raising the standard of proof to the criminal standard. Raising the standard of proof “decreases the rate of [false] convictions,” but it also “increases the rate of [false] acquittals.” 205 There are, however, ways in which we can reduce false convictions without increasing false acquittals. 206 Examples include using the appeals system to correct false convictions and improving the accuracy of the original decision by increasing the information-gathering powers of government agencies. 207 In addition, sanctioning actors other than the corporation could reduce the severity of errors. In this case, the threat of chilling might be lower — or, more generally, the social costs might be lower — but the social benefits would still exist. 208 Thus, even if

204 Let us assume, however, that sometimes the criminal standard of proof is desirable in the corporate context. Even so, devising an enforcement apparatus that would impose this protection only in those cases in which it would be efficient would be difficult and perhaps not worth the necessary effort. Let us assume, more specifically, that for some subset of antitrust cases the criminal standard of proof will often be preferable. We do not know ex ante which cases fall into this category, but we may be able to tell whether the higher standard is desirable by examining the facts of each case. We might then leave to prosecutors the determination of whether the higher standard applies. In fact, we already give the prosecuting agency discretion to determine whether to pursue corporate criminal liability. See Developments, supra note 2, at 1307-08. Nonetheless, this option seems odd, because we would be giving the prosecution the option to impose upon itself a higher standard of proof — an action most prosecutors are unlikely to take. Moreover, prosecutorial discretion is subject to error and abuse. Thus, to cajole prosecutors to behave as desired, we may have to provide for criminal sanctions that are much more severe than available civil sanctions, or we may need to compel prosecutors to choose criminal proceedings when we have reason to believe that the system produces many more false convictions than false acquittals. The former approach may work insofar as we need high sanctions for effective deterrence. The latter approach, compelling prosecutors to choose the higher standard, appears more difficult because it might require delineating areas of law that have more false corporate convictions than false corporate acquittals. I am not aware of empirical evidence that indicates whether false corporate convictions are common in any particular area of law. If such evidence is not forthcoming, designing a system that would impose a higher standard of proof only when that standard is necessary seems very difficult.

205 Kaplow, supra note 189, at 356.

206 See id.

207 See id. (discussing information gathering and accuracy in relation to the standard of proof); Steven Shavell, The Appeals Process As a Means of Error Correction, 24 J. LEGAL STUD. 379 passim (1995).

208 I assume that spreading sanctions across actors creates the same level of deterrence with less chilling; no one defendant would face severe sanctions, but all would have some incentive to
the civil standard does not sufficiently reduce error costs, we must examine whether increasing the standard of proof is the most efficient way to reduce the total error cost to society.\textsuperscript{209}

Even if the standard needs to be strengthened, we need not raise it to the level of the criminal standard. Instead, we could reduce false convictions by using an intermediate clear and convincing evidence standard.\textsuperscript{210} I suggest that an intermediate standard is more appropriate when we are concerned with the social costs of chilling desirable behavior; the criminal standard is more appropriate when the concern is social costs of wrongful imprisonment.

The criminal standard is best left only to criminal proceedings against individuals. In drawing this conclusion, we should also remember that a high standard of proof is not the only procedural pro-

---

\textsuperscript{209} For example, assume that under a civil standard of proof in a society with average information-gathering powers there are 40 incorrect decisions, of which 23 are false convictions and 15 are false acquittals, each costing society $1. Under this standard, the total cost to society is $40 (system A). Assume further that with a higher standard of proof and average information-gathering powers the number of false convictions falls to 16, the number of false acquittals rises to 18, and the total cost to society is $34 (system B). Next assume that with a civil standard and high information-gathering powers the number of false convictions falls to 17, the number of false acquittals falls to 12, and the total cost to society is $29 (system C). Finally, assume that with a higher standard of proof and high information-gathering powers there are 15 false convictions, 15 false acquittals, and a total cost to society of $30 (system D). System C imposes the least total cost on society. Given these facts, reliance on the civil standard and higher information-gathering powers is optimal.

This fact pattern arises because error costs are not the only costs to society. Other relevant costs, such as enforcement costs, are higher with a higher standard of proof and greater information-gathering powers (for example, more hours of labor are necessary to get all of the necessary data). In addition, I assume that the government would use its powers to achieve correct decisions rather than simply to convict (in other words, although a minimal effort may result in a conviction and greater effort would be necessary to reveal that conviction is not justified, the government would go this extra mile). This analysis also indicates that the higher standard of proof is not tied to higher information-gathering powers — these two factors are essentially independent. See Kaplow, \textit{supra} note 189, at 356.

\textsuperscript{210} Many statutes use the clear and convincing evidence standard as a requisite to the award of punitive damages. \textit{See}, e.g., \textsc{Ga. Code Ann.} § 51-12-5.1(b) (Supp. 1995); \textsc{Kan. Stat. Ann.} § 60-3701(c) (Supp. 1996). The similarity between punitive damages and severe sanctions against corporations suggests that this intermediate standard (if appropriate for punitive damages) is also appropriate for corporate sanctions.
tection against erroneous imposition of corporate criminal liability. Other protections, such as double jeopardy, a jury trial, and the grand jury indictment process are discussed below. Nevertheless, as I demonstrate, the effects of these other procedural protections are likely to be more muted than the effect of a higher standard of proof.

B. Double Jeopardy

Although protection against double jeopardy applies to corporations as well as individuals, the rationales for its application are weaker in the corporate context. One plausible rationale for double jeopardy protection is that it prevents false convictions. This rationale is evidenced by the rule, unique to double jeopardy, that bars government appeals but not defendant appeals. However, as the discussion regarding the standard of proof demonstrates, a concern with false convictions is unwarranted in the corporate context. Another plausible rationale for double jeopardy protection is that it “restricts the ability of the government to use its power and resources to inflict the uncertainty and financial drain of trial on a defendant more than once.” Again, however, this concern does not seem compelling in the context of cases involving large corporations. In any event, the application of double jeopardy protection may be of little consequence because legislation that clearly delineates different offenses can easily avoid double jeopardy.

211 See Developments, supra note a, at 1344; cf. id. at 1341 & n.6 (discussing res judicata); id. at 1341-42 & n.7 (discussing collateral estoppel). Double jeopardy protection is only available against government suits brought with the object of punishment (a purpose attributed to criminal suits and some civil suits with “punitive sanctions”). In United States v. Halper, 490 U.S. 435 (1989), the Supreme Court held that defendants who have undergone criminal punishment cannot be subjected to governmental civil sanctions for the same act if the sanctions “cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes.” Id. at 448. Similarly, in Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994), the Court held that double jeopardy barred the levying of a tax based on criminal conduct after the imposition of criminal punishment See id. at 1948. For further discussion of Halper and Kurth Ranch, see The Supreme Court, 1993 Term — Leading Cases, 108 HARV. L. REV. 139, 171-81 (1994).

Some restrictions on double jeopardy protection are worth noting. “Simultaneous or successive prosecutions of corporate employees, managers, or directors and their firm do not raise double jeopardy issues as the corporation is deemed a separate party from the individuals and each is only subject to one prosecution.” GRUNER, supra note 1, § 5.7.11, at 331-33. Parent and subsidiary corporations are also considered separate parties. See id. Further, double jeopardy does not prevent separate state and federal prosecutions for the same underlying conduct. See id.

212 See Developments, supra note 2, at 1343. I consider the rule unique because the doctrines of res judicata and collateral estoppel do not bar government appeals. See id.

213 Id. For further discussion, consult GRUNER, cited above in note 1, § 5.7.11, at 331-33, and Howard M. Friedman, Some Reflections on the Corporation as Criminal Defendant, 55 NOTRE DAME L. REV. 173, 195-98 (1979).

214 See Friedman, supra note 213, at 196-97.

215 Double jeopardy protection applies only when two offenses are “the same,” but the standard for determining the sameness of offenses is unclear. See Developments, supra note 2, at
C. Right to a Jury Trial

The Sixth Amendment right to a jury trial may, arguably, be available to corporate defendants.\(^{216}\) Assuming that jury trials are more expensive than nonjury trials due to jury selection, sequestering, and other costs, a criminal case will generally be more costly to prosecute than will a civil case.\(^{217}\) It is not clear that these extra costs are justified.

If our concern is with error reduction, we may argue, as in the higher standard of proof context, that false corporate convictions are infrequent. Thus, two other purposes of the right to a jury trial ought to be considered: defendants should be protected from government oppression by being judged by their peers, not by judges who may not fully appreciate the situation in which the defendants live;\(^{218}\) and the jury brings community standards to bear on the application of laws.\(^{219}\) Both of these reasons are inapplicable in the corporate context. First, individual jurors are not “peers” of a corporation, so they are unlikely to empathize with a corporate defendant. Further, concerns with government oppression do not seem as strong when the defendant is a large corporation.\(^ {220}\) Also, because jurors may feel adverse to business

\(^{216}\) See Gruner, supra note 1, § 5.7.6, at 326-28; Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, Modern Criminal Procedure 1388 (8th ed. 1994); Friedman, supra note 213, at 198-201. The Supreme Court has yet to decide whether a corporation has the right to a jury trial, although some circuits have recognized this right See Gruner, supra note 1, §§5-7-6, at 326-28. An issue that has arisen in the circuit courts is whether the “petty offense” doctrine, which deprives defendants accused of crimes with minor penalties of the right to a jury, should have a different scope when applied to corporate defendants. Id. The Second Circuit has elaborated a test based on the amount of monetary penalties: “[A] jury trial must be available when ever the organizational fine threatened ... exceeds $100,000. For fines below $100,000,... a jury trial must still be offered if the maximum fine for a charged offense will have a significant financial impact on a corporate defendant” Id. §5.7.6, at 327 (footnote omitted) (discussing United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 665 (2d Cir, 1989), cert, denied, 493 U.S. 1021 (1990)).

\(^{217}\) The right to a jury trial is more likely to apply in criminal cases than in civil cases. See Developments, supra note 2, at 1302.

\(^{218}\) See Kamisar, LaFave & Israel, supra note 216, at 1388 (quoting Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968)).

\(^{219}\) See id. at 1395-97 (discussing jury nullification).

\(^{220}\) See Friedman, supra note 213, at 198.
interests, the jury is probably less “sympathetic than a judge.” Finally, the availability of a jury trial probably makes little practical difference; many corporations might choose not to have a jury trial for the reasons just noted.

D. Grand Jury Indictment

Grand juries serve at least two functions: screening out weak cases and gathering information. This section focuses on the grand jury’s task of screening out cases that lack merit. Section VII.B discusses the grand jury’s information-gathering powers.

It is unlikely that grand juries truly minimize the chance of false convictions. The vast majority of grand juries, at least at the federal level, indict. In addition, it is not clear that society needs to weed out false corporate convictions because, as the discussion regarding standards of proof indicated, false convictions do not appear to be frequent outcomes. Furthermore, any desirable information-gathering powers of the grand jury are, as demonstrated in section VII.B, obtainable without the grand jurors.

221 Id. However, a corporation might opt for a jury trial because corporate managers perceive that they have a better chance of avoiding liability if they face a jury rather than a judge. In many cases in which the jury has acquitted all corporate managers yet held the corporation liable, the judges have indicated their amazement. See Developments, supra note 2, at 1249 & n.30; see also GRUNER, supra note 1, § 3.7.4, at 254-58 (explaining inconsistent verdicts by pointing to a jury’s unwillingness to punish an individual disproportionately for a company’s organizational wrongdoing). If judges and juries really have such different perspectives, then corporate managers may indeed have a preference for choosing juries. This rationale is not applicable, however, when the corporation is the only defendant.

222 See KAMISAR, LAFAVE & ISRAEL, supra note 216, at 689. A grand jury indictment is not always required in a federal corporate criminal case; an information may be sufficient. See GRUNER, supra note 1, § 5.7.3, at 323-24.

223 I assume that the financial expense of the grand jury screening function is similar to that of the jury trial because the court must select and retain grand jurors, the jurors must listen to evidence, and so forth.

224 See KAMISAR, LAFAVE & ISRAEL, supra note 216, at 992 (discussing a study that reported that in 1984 federal grand jurors returned 17,419 indictments and only 68 “no true bills” — a rejection rate of about 3 in 1000). The low rejection rate might arise because of poor screening by grand jurors or the careful exercise of prosecutorial discretion in selecting strong cases to bring before the grand jury. The latter explanation appears unlikely. See Jerold H. Israel, Grand Jury, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE, supra note 5, at 810, 816; Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 CORNELL L. REV. 260, 264 (1995) (arguing that grand jurors must defer to prosecutorial judgments because the jurors are not qualified to make judgments of legal sufficiency). Grand juries have been severely criticized, even outside the corporate context. See Leipold, supra, at 264. Many countries, including England, have abandoned the grand jury system altogether. See Hughes, supra note 47, at 581 n.24. Graham Hughes suggests that “the volume of crime, the high degree of mobility, and a greater reluctance by citizens to cooperate with the police [might] make the use of compulsory process in the investigation of serious crimes a more urgent need in the United States than in England.” Id. at 581. See generally KAMISAR, LAFAVE & ISRAEL, supra note 216, at 689-700, 987-93 (evaluating both the investigatory and screening roles of grand jury proceedings).
In sum, criminal procedural protections are rarely desirable for corporate defendants.\(^{225}\) These protections would be desirable if sanctions were so severe and legal standards so uncertain that chilling of desirable behavior would occur and if no other method of error correction or reduction, such as an intermediate standard of proof, would be more efficient. Alternatively, the protections would be desirable if false corporate convictions outnumbered false corporate acquittals of equal social cost and if no other method of error correction or reduction were more efficient. Because these conditions are not met, however, relying on criminal procedural protections would make obtaining convictions more difficult and costly, thereby weakening deterrence and increasing costs for society without any significant countervailing benefits.

In most instances, corporate civil liability without criminal procedural protections is desirable. However, in areas of law in which sanctions are high and legal standards are uncertain, increasing the accuracy of decisionmaking or allowing for a clear and convincing evidence standard may be preferable. An example of such an area is antitrust law, under which research and development joint ventures may face treble damages (high sanctions) for violation of the rule of reason standard (uncertain legal standard).\(^{226}\)

VII. ENFORCEMENT CHARACTERISTICS

This Part examines the enforcement characteristics of corporate criminal liability to determine when they may be desirable and how they are, or could be, replicated in corporate civil liability. There are four particularly important enforcement characteristics of corporate criminal liability: the use of public enforcement agents; information-gathering powers at the prelitigation stage; the presence of parallel criminal and civil liability; and cost savings from bringing two suits of the same type (that is, criminal suits against both the corporation and an individual manager, rather than a criminal suit against the manager and a civil suit against the corporation).

A. Public and Private Enforcement Compared

As a general matter, both public and private actors can enforce legal norms.\(^{227}\) Private enforcement maximizes efficiency when “corpo-

---

\(^{225}\) When unnecessary, these protections are true costs of corporate criminal liability. Moreover, the added costs attributable to these protections take limited federal enforcement funds away from other proceedings. This resource drain reduces the number of civil cases against corporations that the government can pursue.

\(^{226}\) See supra note 2, at 594-95. For a more detailed discussion of public and private enforcement, see Posner, cited above in note 2, § 22.1-2, at 595-602, and Landes & Posner, cited above in note 45, at 30-33. Generally, the Justice Department brings a corporate criminal suit on
rate offenses . . . have identifiable victims, and . . . leave the victims aware of the violation and the violator’s identity.” 228 In this situation, private parties have both the knowledge and incentive to sue. 229

Public enforcement is preferable, however, when these conditions are not met. If, for example, a firm emits toxic waste into a neighboring area, residents may not know that the waste is harming them. Even if they did, they would probably lack “the resources needed to single out the offending firm from surrounding non offending firms.” 230 In this context, public enforcement would promote efficiency.

Public enforcement against corporations is available, however, in civil as well as criminal proceedings. Indeed, government agencies regularly use civil proceedings 231 to achieve the advantages of public enforcement. 232 However, detection and prosecution may sometimes be so difficult that public enforcement — whether civil or criminal — may not result in optimal deterrence. In such situations, supplemen-
tary enforcement devices, such as strong information-gathering powers, may be necessary to enhance deterrence.

B. Information-Gathering Powers

In addition to asking whether public enforcement is sometimes preferable to private enforcement, we need to consider whether the government’s information-gathering powers in the criminal process produce a higher level of deterrence than civil proceedings do. The recent emergence of a new legal tool — the civil investigative demand — suggests that public civil proceedings may allow for information-gathering powers similar to those available in criminal proceedings.

1. Comparison of Information-Gathering Powers in Criminal and Traditional Civil Proceedings. — Although enforcement agents can gather information before litigation, during discovery, or at trial, the prelitigation and discovery stages are the most relevant stages for the comparative analysis undertaken in this Article. At the prelitigation stage in federal criminal proceedings, the use of the grand jury provides a substantial information-gathering advantage over traditional civil proceedings. This prelitigation information-gathering advantage in criminal cases is partially offset, however, by the lesser information-gathering powers available during discovery. Although recently the scope of both civil and criminal discovery has broadened substantially, civil discovery is still more far-reaching than criminal discovery.

The information-gathering capabilities of enforcement agents under the criminal enforcement model are desirable when information available before litigation is more important than information that could be acquired through later discovery. A reasonable assumption is that at the prelitigation stage, the primary question is whether an offense has occurred, whereas at the discovery stage, the issue is whether the particular defendant is responsible for an offense already shown to have occurred. Cases against corporate defendants often, though not always, collapse at the former stage because corporations can conceal

---

233 Cf. Hughes, supra note 47, at 574-75 (focusing on the prelitigation and discovery stages).
234 See id. at 578.
235 See id.
236 See id. at 574-75. Initially there was some reluctance to expand criminal discovery. See 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 474-82 (1984).
237 See Hughes, supra note 47, at 574-75.
238 The enhanced prelitigation information-gathering powers available in criminal proceedings are desirable when the benefits outweigh the added enforcement costs and attendant reduction of information-gathering powers at discovery. Sometimes the civil discovery findings in one case make their way into criminal discovery in another case. Thus, it is possible that the scope of criminal discovery may in practice be nearly as broad as the scope of civil discovery. See Developments, supra note 2, at 1321-30. Sometimes government enforcers continue with civil litigation even when they see that criminal prosecution is likely. Whether this practice is appropriate is a debated issue. See Hughes, supra note 47, at 619-21; Developments, supra note 2, at 1335-36.
their activities and the harm. This risk of early collapse suggests that the criminal enforcement model may sometimes be more effective than traditional civil enforcement: the criminal model’s prelitigation information-gathering advantage may provide the crucial information necessary to sustain an otherwise ill-fated case.

2. **The Rise of the CID.** — Recognition of the importance of prelitigation information gathering does not resolve the debate, because it may yet be possible to increase information-gathering powers at the prelitigation stage in corporate civil liability regimes. The advent of the civil investigative demand (CID) provides a particularly compelling illustration that greater information-gathering powers are possible in the civil sphere. CID powers are vested in the Justice Department’s Antitrust division, the Securities and Exchange Commission

---

239 See GRUNER, supra note 1, §1.7.1, at 29-36. As a general matter, different law enforcement priorities may require different emphases on information gathering. Let us assume that, because some environmental harms are difficult to detect, effective enforcement may require greater information-gathering powers than are available in traditional civil proceedings. However, other environmental harms, such as gigantic oil spills, may not be difficult to detect. This pattern presumably holds true in many broad areas of corporate crime, such as environmental and anti-trust law; some wrongs will be difficult and others will be relatively easy to detect. Therefore, greater information-gathering powers will not be needed in every case.

Because an ex ante determination that these extra powers and costs are necessary may not be possible, the presence of parallel civil and criminal liability might be useful insofar as it allows prosecutors the opportunity to look at a case and decide whether the case requires the use of strong information-gathering tools.

It is not clear, however, that information-gathering concerns in fact play any role in a prosecutor’s decision to pursue corporate criminal liability. At the federal level, the Department of Justice determines in particular cases whether corporate criminal prosecution is desirable. In deciding whether to prosecute, the government enforcer must consider three factors: the availability and adequacy of alternate noncriminal proceedings; whether a “substantial federal interest would be served”; and whether the potential defendant would be “subject to effective prosecution in another jurisdiction.” 8 UNITED STATES DEP’T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL §9-27.220, at 9-504 (1995). The enforcers may also consider other factors, including federal enforcement priorities, the seriousness of the offense, and the availability and likelihood of sanctions in alternate proceedings. See id. §§9-27.230 to .250, at 9-506, 9-510, 9-511. In other words, the manual is silent on what role, if any, information-gathering concerns should play in the exercise of discretion.

240 See Hughes, supra note 47, at 587-89.

241 Hughes describes the powers of the CIDs used by the Justice Department’s Antitrust Division:

The Antitrust Civil Process Act . . . confers on the Attorney General and the Assistant Attorney General in charge of the Antitrust Division of the Justice Department power to compel the production of documents, to compel written answers to written interrogatories, and to compel oral testimony whenever they believe the person may have information relevant to a civil antitrust investigation.

. . . .

. . . . The 1976 amendments provide that such material generally shall not be made available to third parties without the consent of the person from whom they were [sic] obtained. Id. at 595-96 (citations and footnotes omitted) (summarizing 15 U.S.C. §§ 1312-1313 (1994)). Disclosure of materials obtained through a CID is less strictly limited than disclosure of materials collected for a grand jury. See id. at 596-97.
The power to compel oral testimony is fast becoming an attribute of CED authority, an authority that already includes the power to compel disclosure of documentary material. In addition, secrecy rules are more relaxed for information obtained from CIDs than for grand jury information. Furthermore, “judicial scrutiny of ... civil investigative demands has been patterned on ... principles applicable to the grand jury and, indeed, now almost exactly mirrors the standards for challenging a grand jury subpoena”

Thus, in terms of information gathering at the prelitigation stage, public civil enforcement provides powers virtually identical to those provided by public criminal enforcement. Nonetheless, public civil enforcement may prove more effective because of the lower standard of proof in civil cases, the greater interagency sharing of information.
obtained through the CID, and the strong information-gathering powers available at the discovery stage of civil proceedings.

C. Benefits of Parallel Liability

Bringing two suits against a corporation (one criminal and one civil) may provide society with strategic and error-correction benefits.

1. Strategic Benefits. — Pursuing criminal liability along with civil liability against a corporation can place the corporation in a strategically poor position. First, the corporate defendant may in the initial court proceeding disclose some of its litigation strategies, and the government could use this knowledge to its advantage in the later proceedings. Second, the corporation may have an incentive to lose issues in the civil case in order to increase its chances of avoiding a criminal conviction. In both cases the prosecution/plaintiff benefits from the possibility of parallel liability, because that possibility provides the plaintiff/prosecution with extra leverage in the trial or in plea bargaining/settlement negotiations.

However, if we assume that parallel liability is more socially costly than public enforcement with high information-gathering powers, and that public enforcement with high information-gathering powers is more costly than public enforcement without such powers, then it follows that parallel liability is appropriate only when the other enforcement regimes have failed to achieve optimal deterrence. In other words, parallel liability may be needed when a conviction is difficult to obtain in a regime of public enforcement with high information-gathering powers. However, even when a conviction is difficult to ob-

248 Hughes notes two limitations on the grand jury that do not apply to CIDs. First, “[t]he fruits of the grand jury’s subpoenas (whether documents or testimony) are not automatically open for inspection by all government officers or agencies. . . Thus, inspection of grand jury materials by other government officers is hedged about with restrictions and may only be obtained on application to the court” Hughes, supra note 47, at 577-78 (citations omitted) (discussing United States v. Procter & Gamble Co., 356 U.S. 677, 684-85 (1958)). Second, “the breadth of the grand jury’s range of inquiry and powers of compulsion has been viewed as justifiable only in the context of a criminal investigation.” Id. at 577. For further details on administrative access to information in the grand jury context, see Developments, cited above in note 2, at 1312-17.

250 See Hughes, supra note 47, at 574-75, 579.

251 See Developments, supra note 2, at 1333.

252 See id. at 1336-37.

253 See id. at 1333-34.

254 Although some commentators have noted that parallel liability prejudices the defendant, they have not explicitly described the nature of the prosecution’s strategic benefits. See Hughes, supra note 47, at 589-93, 601-29, 635-56; Developments, supra note 2, at 1333.

255 This analysis assumes that high information-gathering powers are only available through public enforcement. If high information-gathering powers are available through private enforcement, then the calculus obviously would change.
tain, it is important to inquire whether two civil proceedings can achieve the same advantages as parallel liability.

One strategic advantage is revelation of the corporation’s defense strategy. Such a revelation might facilitate a successful civil suit afterwards. But why must the first case be criminal? Another civil proceeding based on another legal claim would provide the same strategic advantage. Consequently, this benefit is not a reason to pursue both corporate criminal and corporate civil liability rather than simply bringing two corporate civil suits.

Another advantage of parallel liability for civil enforcement agents is that a corporation may sacrifice a civil issue to avoid losing a criminal case. But why would a corporation rather lose a civil case than a criminal one? Perhaps such a preference exists because criminal sanctions may be more severe than civil sanctions. However, as noted before, the possibly higher sanctions in criminal proceedings can be replicated in civil proceedings. Thus, the specter of severe civil sanctions might make corporate criminal and civil liability equally unattractive. In fact, relying solely on corporate civil liability is preferable if the high sanctions threatened in a single civil case induce a corporation to settle, obviating the need to threaten, and occasionally bring, a costly parallel suit.

2. Error-Correction Benefits. — The disclosure of the corporation’s defense strategy illustrates parallel liability’s possible error-correction benefits. By exploiting disclosures made in the initial case, the prosecution in the subsequent case may correct any errors — prior false acquittals or findings of no liability — that resulted from clever defense strategies. This section examines two ways in which later suits can correct errors. First, errors in an initial criminal trial might be corrected if the corporation is found liable in a later civil suit. Second, if an unsuccessful civil suit is brought first, a later criminal suit might, in theory, correct the error in the initial civil suit. In both scenarios, two civil suits, rather than one criminal and one civil suit, can achieve the error-correction benefits.

In the first scenario, when the criminal suit is brought first and the civil suit later, the only plausible advantage is that the prosecution may believe that it can win a civil case only if it has brought and lost an earlier criminal case. If bringing a criminal case is not necessary to

---

256 See, e.g., GRUNER, supra note 1, § 1.7.1, at 29-36 (discussing the difficulty of detecting corporate crime).
257 Cf. Developments, supra note 2, at 1336-37 (discussing disclosure of strategy when the first case is civil and the second is criminal).
258 See id. at 1333-34.
259 See supra section V.A.
260 The second scenario is unlikely because government prosecutors rarely bring a criminal suit after having lost a civil suit. See Interview with Philip Heymann, supra note 175; Interview with Peter Kenyon, supra note 172. Nonetheless, I consider it here for analytical completeness.
win the civil suit, then the criminal case and its additional costs should be avoided. Assuming that a criminal case is necessary to enhance the chances of victory in the later civil case, the crucial question is why bringing a criminal case rather than a civil suit first would improve the chances of victory in the second civil case. One reason could be that holding the criminal trial first might result in the disclosure of the defense’s strategy. However, as indicated in section VII.C.1, this disclosure would occur even if the first suit were civil. This first scenario, therefore, provides scant support for corporate criminal liability.

In the second scenario, the criminal suit is brought in order to correct an error in an earlier and unsuccessful civil suit. To more fully examine this scenario, it needs to be compared to other methods of correcting false acquittals or findings of no liability, such as appeals or improvements in trial accuracy. Under what circumstances, if any, does parallel liability correct errors more efficiently than the other alternatives?

The first level of comparison is between multiple adjudications (parallel liability or appeals) and policies to improve trial court accuracy. Clearly, policies to improve trial court accuracy involve “extra expenditure in every case” regardless of the presence of error. In contrast, multiple adjudications, whether on appeal or through a second suit brought by the government in a parallel liability regime, have the advantage of weeding out weak cases. Given litigation costs, parties will bring another suit if they feel that the first suit was incorrectly decided (the separation effect). The separation induced by

---

261 See Developments, supra note 2, at 1336-37.
262 The doctrines of collateral estoppel and res judicata may create another reason for bringing a criminal suit and then a civil suit rather than bringing two civil suits. See id. at 1341-42 & nn.6-7 (discussing collateral estoppel and res judicata in general). Because criminal trials involve a higher standard of proof than do civil trials, issues lost in a criminal case may be retried in a later civil suit See id. at 1349-50. However, if both cases are civil, the standard of proof is the same in each, and the doctrines may bar the second civil suit. See id. This situation seems to indicate that bringing a criminal suit followed by a civil suit is necessary to achieve error correction.

This approach to error correction, however, is flawed. First, bringing a criminal suit followed by a civil suit may not violate res judicata or collateral estoppel rules, but it may infringe on double jeopardy protection. See supra note 211. Second, bringing two civil suits may not create res judicata and collateral estoppel problems; these doctrines may not apply if the second civil action is not the same as the first civil action. See Developments, supra note 2, at 1341-42 & nn.6-7.
263 These alternatives are not mutually exclusive. See Steven Shavell, The Appeals Process as a Means of Error Correction, 24 J. LEGAL STUD. 379, 387 (1995). The inquiry here is designed to determine when relying on parallel liability is desirable. The desirability of parallel liability does not, however, preclude the possibility that the other alternatives might also be desirable.
264 See id. at 381-82.
265 Id.
266 See id. at 381, 384-85.
litigation costs could result in lower costs than improving trial accuracy. Only a few cases — most likely the incorrectly decided cases — have the added expense of appeals, whereas the administrative costs of improving accuracy would apply to all cases.\footnote{See id. at 381-82.}

Assuming that a later suit is sometimes more efficient than improving trial court accuracy, we need to determine when an appeal is more efficient than parallel liability. Because only the plaintiff/prosecution may bring the second suit in a two-suit regime, the second suit can only address false acquittals (or findings of no liability). In addition, most appeals are restricted to errors relating to questions of law,\footnote{See id. at 418-19.} whereas second suits presumably could address errors relating to questions of fact. These factors indicate that litigants may use parallel liability to correct false acquittals and factual errors that are not subject to appeal.\footnote{Presumably, second suits can concern a matter of law when the issues being litigated are nearly identical to those in an earlier case. However, under such circumstances double jeopardy may bar the second suit. See supra section VII.B.} Because corporate cases, criminal or civil, likely create many false acquittals due to factual errors,\footnote{See GRUNDER, supra note 1, § 1.7.1, at 29-36 (discussing the difficulty of detecting corporate crime). I assume that the difficulty of detection arises because gathering the necessary evidence is difficult or because the evidence is ambiguous (a factual error). However, I also assume that the evidence may become more compelling in the second trial because further information of relevance might be revealed at the first trial.} they are tailored to a two-suit regime.

The next question is whether two civil suits can achieve the advantages of one criminal and one civil suit. Let us assume that the only difference between corporate criminal and civil liability is the standard of proof. Does anything justify the higher standard of proof in a second suit? Indeed, the argument that second suits may be useful in correcting errors seems counterintuitive because the higher standard of proof in the second criminal suit makes error correction more difficult. However, if litigation costs are low enough that separation may not occur naturally in a two-suit system, then the state may need to impose additional costs, such as a higher standard of proof, to encourage separation and obtain the benefit of any multiple suit system.\footnote{See Shavell, supra note 263, at 388, 421-22 (discussing appeal fees).}

Although this benefit has some appeal, discussions with government officials suggest that the government rarely brings a criminal case after losing a civil one; it normally brings the criminal case first.\footnote{See Interview with Philip Heymann, supra note 175; Interview with Peter Kenyon, supra note 172.} In any event, we may achieve separation benefits through a second civil case by imposing a fee for bringing the second suit instead of by increasing the standard of proof and labeling the suit “crimi-
nal. Thus, neither scenario supports corporate criminal liability over corporate civil liability for error-correction benefits.

**D. Cost Savings and Prosecutorial Convenience**

In many criminal suits against corporations, prosecutors also seek convictions of individual managers. When they do, it may be cheaper to file two criminal indictments (one against the corporation and the other against the manager) than to file a criminal suit against the employee and a civil suit against the corporation. If an individual manager is found criminally liable, the doctrine of respondeat superior makes imputing either civil or criminal liability to the corporation rather easy. Furthermore, if both suits (against the individual and the corporation) are criminal, then presumably only the Justice Department brings them and only one judge hears them. If one suit is criminal and the other is civil, then two agencies bring suits — the Justice Department and another government agency, such as the SEC — and two judges hear the cases. Thus, when pursuing individual criminal liability is optimal, pursuing corporate criminal liability rather than corporate civil liability economizes on prosecutorial and judicial resources and does not affect the level of deterrence.

However, if we assume that no liability regime can completely eliminate reputational losses and that the reputational loss associated with corporate criminal liability is greater than that associated with corporate civil liability, then corporate criminal liability may have higher sanctioning costs than civil liability. Therefore, we must trade off the enforcement cost savings with the sanctioning cost losses. This tradeoff often favors enforcement cost savings if reliance on reputational penalties is low.

Consequently, corporate criminal liability may be desirable when managerial criminal liability is optimal. The irony of this argument

---

273 Using fees to weed out weak cases does not appear to be common. See Shavell, supra note 263, at 421.
274 See GRUNER, supra note 1, §1.9.2(d), at 53-54, see also id. § 13.6.1, at 794 (noting that about two-thirds of successful corporate prosecutions also resulted in convictions of individuals).
275 This analysis assumes that the indictments will be tried together. See Coffee, supra note 5, at 261 (noting that bringing two criminal suits at the same time and in front of the same judge is optimal).
276 See Developments, supra note 2, at 1255-56 (noting that respondeat superior is a broad standard and difficult to evade). Thus, because corporate liability of some sort is likely upon conviction of an agent, the difference between pursuing corporate criminal or civil liability is minimal because the standard of proof for the corporation is functionally irrelevant.
277 Cf. Coffee, supra note 5, at 261 (noting cost savings when two criminal trials are brought before the same judge at the same time instead of before separate judges).
278 One caveat to this argument is that when the government brings charges against both an individual and a corporation, there is often a possibility that the individual will be acquitted and the corporation found guilty. See Developments, supra note 2, at 1249. In such situations, the cost savings argument becomes tenuous. Seeking corporate criminal liability may reduce the like-
is that corporate criminal liability, which normally makes prosecutorial success difficult due to the defendant’s procedural protections, is beneficial here because it is cheaper for the prosecution.

Nevertheless, corporate civil liability may, in the future, replicate the enforcement economies of corporate criminal liability. Assuming such replication is possible, corporate civil liability would be preferable to corporate criminal liability because civil liability imposes lower sanctioning costs.

A summary of the analysis in this section may prove useful. Generally, the cheapest enforcement device should be used first to obtain optimal deterrence; we should rely on more expensive mechanisms only if they are necessary for added deterrence. Thus, we may desire greater information-gathering powers when public enforcement would not suffice for deterrence purposes. If more information-gathering is not sufficient to obtain optimal deterrence, we should rely on the strategic benefits of parallel liability. Most of the enforcement features of corporate criminal liability are sometimes desirable, but corporate civil liability or other options that adopt only the enforcement features of corporate criminal liability are better vehicles for realizing the benefits of those features.

Thus, in most instances corporate civil liability enforced by government agencies with the discretion to use CIDs and to bring parallel civil suits is desirable. Allowing agencies to decide, on a case-by-case basis, whether CIDs or parallel suits are cost effective is also desirable. In this context, a government agency is probably a more effective decisionmaker than Congress because the agency can balance, on a case-by-case basis and in the context of its budgetary constraints, the costs of using more powerful and expensive enforcement tools against the likely deterrence benefits of using such tools.

On the other hand, the analysis identifies one benefit of corporate criminal liability — cost savings in situations in which pursuing managerial criminal liability is optimal — that has yet to be replicated in a civil corporate liability regime. Thus, we should rely on corporate

lihood of the criminal conviction of the manager, and the possibility of such a conviction was the impetus for bringing a criminal rather than a civil suit in the first place.

Nevertheless, prior analysis indicates that punishing employees along with the corporation may be beneficial: “[T]he magnitude of public sanctions — fines and imprisonment — may exceed the highest sanctions that a firm itself can impose on its employees; therefore, the threat of public sanctions can induce employees to exercise greater — and socially more appropriate — levels of care than they otherwise would.” Polinsky & Shavell, supra note 104, at 239-40.

I suggest that we might consider adjusting the civil process by granting judges the power to hear corporate civil and employee criminal cases together and by granting agencies the power to bring both kinds of cases.

This reasoning is analogous to the reasoning in the discussion of the socially desirable penairy structure. See supra Part V.

See supra note 239.
criminal liability in these situations until an effective replacement comes into being.

VIII. MESSAGE-SENDING CHARACTERISTICS

One function of the criminal law is to shape preferences and convey society’s condemnation of certain types of behavior. Thus, criminal liability may be warranted simply because criminal liability is a valuable mode of communication to society.

This view, however, seems flawed. Corporate criminal liability is not the only means of sending messages about corporate behavior to society. The government presumably could use many other tools, such as news conferences, corporate civil liability, and managerial criminal liability, to accomplish this end. The presence of alternatives is important because sending messages through corporate criminal liability may not be a precise way of conveying information. Labeling something criminal may send a message to society that the activity is undesirable. However, citizens might find imposing criminal liability on fictional entities farcical, and this response may decrease the criminal label’s effect for other types of crimes.

In light of the alternatives, a few questions must be asked about the message-sending function. First, when do messages need to be sent? The answer is not clear. If everyone already thinks that an activity is undesirable or if no amount of message sending will create distaste for an activity, why send messages at all? Message sending

282 See Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 DUKE L.J. 1, 2-3. Message sending involves communicating information to society about the quality of a certain act, whereas a reputational penalty is directed at damaging the interests of the corporation and its top management. Undoubtedly, the two ideas may often go together, damaging the interests of certain parties may sometimes also communicate information to society. However, these two notions do not completely overlap. Message sending may be possible when imposing a reputational loss would not be. Consider the case of a new company that commits an illegal act when it enters a new area of business. Because the company is new, it is unlikely to have any reputation to speak of, and a reputational penalty is therefore unlikely. Furthermore, top management may not be implicated in the wrong in question, or the illegal act may have occurred under another manager’s watch. Despite these problems with imposing a reputational penalty, sending a message to society that the act in question is socially disfavored may still be important.

283 In the Justice Department’s manual on initiating criminal prosecution, the requirement that prosecutors consider the seriousness of the offense may be a proxy for determining when a message needs to be sent. See 8 UNITED STATES DEP’T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL § 9-27.230, at 9-507 (Supp. 1993).

284 Cf. Packer, supra note 92, at 339-60 (noting that the use of the criminal sanction for morally neutral conduct has tended to decriminalize such conduct in the mind of the general public). For a pessimistic view about halting the trend of “over-criminalization,” see John C. Coffee, Jr., Paradigms Lost: The Blurring of the Criminal and Civil Law Models — And What Can Be Done About It, 101 YALE L.J. 1875, 1877 (1992).

285 Sending a message, even about something society accepts as harmful, may be desirable simply because it is always important to condemn, the activity. Nevertheless, in this case message
may only be desirable for activities about which we do not have relatively fixed views.

Second, which tools should be used to send the message? Let us assume that in some cases sending messages may actually be socially desirable. We should then assess whether society can send messages more effectively by attaching the criminal label to a corporation, using corporate civil liability and issuing a well publicized letter condemning the corporation’s activities, or simply using managerial criminal liability. Due to expensive procedural protections and sanctioning costs from higher reputational penalties, sending the message through corporate criminal proceedings costs society more than sending the message through civil liability, and we should assess whether we think the tradeoff is desirable. In most instances, corporate civil liability plus some publicity or individual criminal liability sends sufficiently effective messages.

IX. CONCLUSION

Corporate criminal liability is an institution of considerable antiquity. However, there is little understanding of what, if anything, it is designed to achieve. The historical development of corporate criminal liability suggests that it may have arisen in order to use public enforcement and later developed to exploit the greater information-gathering powers it possessed relative to corporate civil liability. However, as time passed, corporate civil liability acquired a public enforcement apparatus and made strong prelitigation information-gathering possible. Thus, the question has become whether corporate criminal liability serves any purpose now.

To determine the purpose of corporate criminal liability, we must realize that it is only one of a number of different liability strategies that can regulate behavior in and around corporations. Therefore, we must compare corporate criminal liability against other liability strategies. The analysis in this Article indicates that corporate criminal liability is socially desirable when substantially all of its traits are socially desirable. If only some traits are desirable, we should prefer another corporate liability regime.

This Article concludes that the circumstances in which substantially all of the traits of corporate criminal liability are socially desirable are nearly nonexistent. Corporate criminal liability is socially desirable when corporate liability is optimal, when detection and pros-
Execution are difficult, when sanctions on corporations need to be extremely high to maintain deterrence (yet not so high that parties other than the corporation should be sanctioned as well), and when these extremely high sanctions chill desirable behavior or there are a large number of false convictions compared to false acquittals that cannot be efficiently remedied other than through the protections of criminal procedure. All of these events must occur at about the same time that we want to send messages to society about the propriety of certain activities. This analysis suggests that corporate criminal liability would only be socially desirable in the rarest of circumstances. Therefore, pursuing corporate criminal liability results in society bearing the higher sanctioning costs of stigma penalties and the increased costs of deterring corporate misbehavior created by the procedural protections of criminal law.

To avoid these costs, we must consider the other corporate liability strategies examined in this Article. The analysis suggests that, in most cases, corporate civil liability is socially desirable. A desirable system should permit the imposition of cash fines and supplementary sanctions, such as equity fines or a loss of license, when cash fines are insufficient. Both private parties and government agencies should be able to enforce the law. Government agencies should have the discretion to utilize stronger enforcement tools, such as CIDs and parallel

287 The existence of a natural constituency that would oppose corporate criminal liability and desire to replace it with corporate civil liability is doubtful. For example, because juries sometimes convict only the corporation when both managers and the corporation are tried criminally, see Developments, supra note 2, at 1249, managers have little incentive to object to corporate criminal liability or to prefer corporate civil liability. Shareholders have little reason to object to corporate criminal liability because sanctions are nearly identical under corporate criminal and civil liability. See supra note 125. Although reputational losses may differ under the various regimes, if reliance on reputational sanctions is minimal, then the difference may not matter much. In addition, corporations and shareholders do not object to corporate criminal liability because procedural protections make it more difficult to impose liability in criminal cases than in civil cases. In fact, the advantages conferred by these procedural protections may outweigh the danger of the higher reputational penalty associated with criminal proceedings. Prosecutors who oppose corporate criminal liability because of its procedural protections can pursue corporate civil liability instead. See Developments, supra note 2, at 1307-08 (discussing administrative discretion, in deciding whether to pursue corporate criminal liability). Why then might a prosecutor actually bring a criminal prosecution? There is no definitive answer, but two reasons can be posited: some prosecutors may wish to send a message, and others may be politically ambitious. Neither rationale is appealing. Furthermore, Congress incurs almost no cost in making the corporation criminally as well as civilly liable. In fact, society suffers from the higher costs and weakened deterrence accompanying corporate criminal liability. However, this analysis assumes that, because of a considerable collective action problem, society is unable to prevent these costs and hence is unlikely to oppose corporate criminal liability. Of course, the picture is not this bleak; there are signs that corporate civil liability is becoming a more powerful and popular tool. See Hughes, supra note 47, at 579-80, 587-89; Mann, supra note 88, at 1798. The rise in popularity of publicly enforced corporate civil liability and punitive civil sanctions appears, at least to one commentator, to be motivated by the fact that, because “they are not constrained by criminal procedure, imposing them is cheaper and more efficient than imposing criminal sanctions.” Mann, supra note 88, at 1798, I encourage the trend toward civil liability.
liability, when needed. Finally, the same judge should hear a civil case against a corporation and a criminal case against a manager for related wrongs. Also, the same agency (or multiple agencies sharing files and expertise freely to achieve cost savings) should bring both cases. The SEC is a very good current, albeit imperfect, model of the system just described. \(^{288}\) A desirable improvement to the SEC model would be to allow the same judge to hear and the same agency to bring the different types of cases to achieve cost savings.

In the absence of such an improvement to corporate civil liability systems, corporate criminal liability may continue to provide enforcement cost savings in situations in which pursuing managerial criminal liability is optimal. However, we should adapt corporate civil liability to replicate these cost savings.

Thus, some justification for corporate criminal liability may have existed in the past, when civil enforcement techniques were not well developed, but from a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations. Indeed, the answer to the question the title poses — “corporate criminal liability: what purpose does it serve?” — is “almost none.”

\(^{288}\) See Ciota, Park, Potenza & Tuckett, supra note 227, at 872 (noting that the SEC may bring parallel civil and administrative proceedings); id. at 869-70 (noting the variety of penalties available to the SEC in securities fraud cases and implicitly suggesting that sanctions other than cash fines are harder to impose); Hughes, supra note 47, at 597-98 (discussing the CID powers of the SEC).