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the money to get to court that day? Blumstein and Nagen[4] demonstrated the point. Similiarly, in the Electric Heavy Industries[5] cases, the corporate officers served short sentences in relatively comfortable prisons, suffered no physical pain, but were terribly disturbed by the process and went to great lengths to avoid it. In summary, I think that we have to handle both corporate liability and focus the corporate bail on individual liability if we are to bring about an effective solution to this multi-faceted set of problems.

Commentary: The Due Process Considerations in the Imposition of Corporate Liability

Mark Crane*

Professor Coffee's ideas are very stimulating. They are original, in no way derivative; and to me they are somewhat frightening. In particular, I want to focus on one disturbing thread which seems to run through all three of his proposals—disturbing not just because I have represented individual corporate executives in criminal matters, and corporations both in criminal matters and in the civil matters which followed them—but disturbing to me as a lawyer interested in the judicial system itself.

Professor Coffee is engaged in an effort to create a soul and body where there is none. I do not believe this can be done to General Motors or the local asphalt company. Even Professor Coffee

4. *See* Nagin and Blumstein, *The Deterrent Effect of Legal Sanctions on Draft Evasion*, 29 STAN. L. REV. 241 (1977).

5. *See* Watkins, *Electrical Equipment Antitrust Cases—Their Implications for Government and for Business*, 29 U. CHI. L. REV. 97 (1961); Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 623 (1964); Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles*, 57 Nw.U.L.Rev. 29 (1962).

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cannot create a soul or a body for a corporation, so he suggests substituting the souls and bodies of the real live people associated with it, namely, its stockholders and the managers. Doing so creates, it seems to me, some very dangerous precedents for the whole system of law and order. Professor Coffee's proposals are an effort to shortcut the process of trying the individual and imposing a penalty on him. Whether he be stockholder or manager, Professor Coffee would condemn and punish him without going through the procedures we know as due process of law.

Let us consider first the "equity fine" that he proposes. Essentially what he suggests is imposing a fine on the stockholders even though they are innocent of any wrongdoing, and he justifies it because they benefited at least indirectly from the wrongdoing.[1] I question whether they benefited any more than the bondholders who lent the money for the project that involved the illegal activity or the workers who had jobs on that project or even the merchants who sold to those workers. All of these classes of people received an indirect benefit from the wrongdoings.

I disagree with Professor Coffee's view that to penalize the stockholders is a "less intense" penalty than to punish employees.[2] In many cases stockholders may be less able to bear that injury than employees. For example, an employee in his or her 20's can more easily replace a job lost as a result of sanctions against a corporation than a retired stockholder can replace the stock value and dividends diminished by an equity fine. Moreover, in many companies the largest stockholder is a stock purchase or profit sharing plan for current employees. They are hurt as directly by diminished value of their stock holdings as by a reduction in their compensation as a result of corporate misdoing.[3]

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1. *See* Coffee, *Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporation Criminal Sanction*, 1 N. ILL. U. L. REV. 3, 13-20 (1980).

2. *Id.* at 12-13.

3. One of the reasons advanced by Professor Coffee for an equity fine is that it will increase the threat of a takeover because there will be an independent block of stock to be sold to the acquiring company. *Id.* at 12-14. He argues that this will be an effective device for forcing top managers to act lawfully because they will fear for their jobs if a takeover is successful, yet he suggests that it is middle managers who are most likely to commit a white collar crime. Middle managers are not likely to be adversely effected by a takeover and may indeed be benefited, so at least in this regard the proposed punishment does not fit the crime. Moreover, Professor Coffee suggests that the trustee of the "victim compensation fund" could perform a dual role, acting both as a public director and a

The basic point I want to make about the equity fine is that the stockholders are singled out to receive its economic brunt. It is nothing more than a stock dividend to be created by judicial order, and like any other stock dividend it will reduce the value of the outstanding shares and their claim on future cash dividends. It differs from an ordinary stock dividend, however, in that it is not issued to the existing shareholders, and thus diminishes both their investment in the corporation and their share of the corporation's income.[4] The justification for a judicially imposed diminution in

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possible source of a large block of stock for an acquisitive corporation. *Id.* at 15. These are inconsistent duties. The trustee would only act as a public director as long as he owns the stock, but he could facilitate a takeover only if he sells it. Even more fundamental, if he is to be a fiduciary for the victims of crime, principles of trust law may require that he diversify out of the stock in order to spread the risk as a prudent trustee should. SCOTT ON TRUSTS § 230.3 (3d ed. Supp. 1977). While the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, would not apply directly to the trustee of Professor Coffee's victim compensation fund, the principles that require pension fund trustees to diversify, 29 U.S.C. § 1104(a)(1)(c), would seem to be equally applicable to the trustee of such a fund. If so, he would have to dilute his stock position through diversification and be unable to serve for long either as a public interest director or as a source of a substantial block of stock for an acquiring company.

4. Professor Coffee suggests that this reduction in value is desirable because, as a result, an equity fine would cause investors to shun the stock of potential law violators so that "punishment would to a degree precede the crime." Coffee, *supra* at 16-20. If this happens at all, and even Professor Coffee seems to have his doubts, it will be only in the clumsiest sort of way. Investors will not know which companies are actually operating close to the legal line. They can only identify those industries where economic conditions make law violations likely. If investors become "gun shy" of, for example, old line industrial companies because price-fixing is more common there, or chemical companies because environmental problems are more common there, law-abiding companies in those industries will be punished along with those that are potential, or even actual but undiscovered, law violators. This denies due process to companies trying to obey the law, punishing them along with the guilty because they belong to a suspect group. Equally important, shunning the stock of potential law violators in our basic industries reduces stock values in precisely those corporations where there is the greatest need to raise additional equity capital to modernize plants and equipment. Newspapers and business magazines are replete with discussions of the falling productivity in our basic industries and the need to modernize their factories and machinery. *See e.g., The Reindustrialization of America*, Bus. Week, June 30, 1980 at 12-20. They are competing with more efficient foreign companies and are unable to raise adequate capital because their stock already sells well below book value. Economists tell us that retooling these industries to make them modern and efficient is essential to increase productivity, which is the key to lower inflation, and to reduce trade deficits, which is a key to a stronger dollar. *Economic Report of the President, Transmitted to the Congress*, January, 1980. It is un-

value is not that the stockholders were involved in the crime—they are concededly innocent—but that they were unjustly, albeit unknowingly, enriched. It is rather like punishing a storekeeper for buying stolen goods without having to prove that he knew or had reason to know the goods were stolen when he bought them. This goes to the very heart of the concept of criminality, which is that you punish somebody for knowingly or recklessly doing something wrong.[5]

Now let us turn to the sanction of publicity. I believe, along with Professor Coffee, that adverse publicity is a very important sanction, and that it is especially important to the individual executive. But I understand Professor Coffee's suggestion to go far beyond publicizing the results of the verdict in a completed criminal case. He proposes substituting for a criminal trial, with all of its procedural safeguards, a trial by a special counsel, like John McCloy, or by an investigative journalist, like Woodward and Bernstein, or Mike Wallace. A court would give the investigative reporter access to all the evidence available concerning a convicted corporation's wrongdoing, regardless of whether it was introduced at the trial of the corporation, and even if it could not have been introduced because it was inadmissible under the rules of evidence, that is, even if it were judged unreliable under the standards of our court system.[6] The corporation's executives would be required, as part of the corporation's sentence, to submit to interviews with the special counsel, designated as a "special pre-sentence officer," who would then turn the results over to the investigative journalist, or they could even be required to submit to interviews by the journalist himself pursuant to a "journalistic subpoena" enforced by the court—all without any mention of the executives' right to counsel

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sound public policy to complicate these problems by further depressing stock prices because a possible law violation by companies in those industries could result in substantial equity fines.

5. Some authority under the Pure Food and Drug Act has been read to impose strict criminal liability, that is, liability without fault. United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277 (1943). I read these cases as imposing liability only if a responsible corporate official negligently fails to discharge a duty directly affecting the public health and safety—a high standard of care but nonetheless one bottomed on personal fault. Even in these cases, the individuals punished had a duty to insure that the corporation act carefully and failed to discharge that duty; the imposition of the penalty was designed to assure that this duty was exercised diligently. Stockholders are not and should not be similarly charged with corporate management.

6. Coffee, *supra* at 21-22.

or right against self-incrimination.[7]

What all this adds up to is that, instead of having a public trial in a court, there would be a private trial in a conference room. Yet the purpose of such a trial would be to impose a sanction on an individual—not on the corporation as a whole but on the individual. And this would be done without any of the procedural safeguards to which the individuals would be entitled at a trial in court. I am very bothered by this.

Professor Coffee's third proposal is to rationalize the criminal penalty with the treble damages or other civil remedy by making the treble damages remedy available only after a criminal trial or plea. The purpose behind this procedure is, concededly, to hold the treble damages remedy as a "bludgeon" over the head of the company, so that the company will willingly, as part of a plea bargain, make single restitution.[8] This raises two serious questions.

First, a remedy would be created for injured people—namely treble damages—with the intention that they would be denied the right to use that remedy by reason of a single damage settlement reached as part of the sentence in the criminal case. This is doubly troublesome. From the potential plaintiff's viewpoint, the remedy is illusory; he is told that the law provides treble damages for him when the system is actually constructed so that he can never get them. This can only breed contempt for the law, nurturing the view that it is a shell game which serves the initiated only. From the defendant's point of view, the remedy is fashioned expressly to compel him to forego his day in court on the damages he owes by making the risk of trial so great that he surrenders his right to it. We are back to a recurring theme in Professor Coffee's proposals—corporate form makes punishment so hard to impose that devices must be fashioned which shortcut procedural due process in the interest of "effective" enforcement.

Second, I am concerned as an antitrust lawyer because Professor Coffee's suggestion would remove the treble damages remedy from the very situation in which it was designed to function. The purpose behind the treble damages remedy was to provide an incentive to a private plaintiff to act as an attorney general when the public attorney general did not have the time or resources to investigate.[9] The idea was that, instead of having a larger attorney gen-

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7. Coffee, *supra* at 22-23.

8. Coffee, *supra* at 24-25.

9. *See* Perma-Life Muffler, Inc. v. Industrial Parts Co., 392 U.S. 134, 139

eral's office, private parties would enforce the law. Professor Coffee's suggestion turns this concept on its head by proposing a treble damages remedy only in situations where the government has already done the work for the private lawyers.[10]

These are the things that bother me about Professor Coffee's proposals, imaginative and innovative though they may be. Does this mean that, because a corporation has no soul or body to punish, there is nothing we can do about the problem of corporate crime? No. There is much that we can do, and most of it is in effect now, at least in the antitrust area with which I am the most familiar. It is not perfect; it needs some adjustment, but the basic structure is there.

The solution, it seems to me, is like a stool with three legs. First—and I doubt that either Dean Morris or Professor Coffee will disagree with this—I believe that the criminal prosecution of individual corporate executives is a very effective sanction. My experience confirms Professor Coffee's analysis that most of corporate crimes occur at the middle management level, and for precisely the reason he says. These managers are told how much money to make, but not how to make it. If the law focuses on the individual manager, it will, without any of the procedural problems which I have tried to articulate, achieve almost exactly what Professor Coffee wants to do. The stigma will be there, the publicity will be there, all directed at the proper miscreants, and more importantly, effective traditional sanctions can be imposed—either monetary penalties or better, in my view, jail.

Professor Coffee cites the Blumstein and Nagin study[11] as indicating that white collar criminals are more fearful of the stigma of conviction than of jail, but I doubt that that is true of white collar criminals generally.[12] Executives are clearly worried about

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(1968); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947).

10. I would also take issue with Professor Coffee's suggestion that the country is better off to have the "prosecutorial discretion" exercised by the government than by private parties because private enforcers are "misinformed" and uninterested in a "rational body of law." Coffee, *supra* at 23. In my experience private plaintiffs' counsel bring justifiable cases and prosecute them at least as vigorously and imaginatively as government lawyers.

11. Blumstein and Nagin, *Deterrent Effect of Legal Sanctions on Draft Evasion*, 29 STAN. L. REV. 241 (1977).

12. Perhaps one factor at work in the Blumstein-Nagin study was the nature of the crime. Draft evaders expect a type of incarceration either way; jail may not appear more confining than the army, and it does not carry with it the possibility of capital punishment on the battlefield. In addition, draft evaders are young; jail

the stigma of conviction, but they are terrified of jail; when it comes time to plead, and they walk up before the judge, and it is time to say, "I'm guilty, and now Your Honor, what do I do?", they are very worried about being sent to the Federal Corrections Center. It results in hypertension; it causes heart attacks; it is very serious. I am convinced a period in jail is the most effective sanction of all.[13]

More importantly, making the manager criminally accountable gives him a weapon to resist pressures from his superiors. Corporate officials will not ordinarily tell a subordinate to commit a crime, particularly a crime for which the subordinate can go to jail. The problem, as Professor Coffee correctly points out, is that senior management demands performance, and leaves the means of achieving it to the discretion of the middle manager. It is at this point that the possibility of a prison term becomes an effective deterrent. When the subordinate comes to selecting the means of reaching his management's objective, he must weigh the fact that he may be prosecuted, and if he is prosecuted he will go to jail, and if he goes to jail he will lose his job. (I agree with Professor Coffee that once an executive goes to jail, he has to be dismissed in almost all cases). When he considers these possibilities, the middle manager will be inclined to pull back and refrain from illegal actions. It all adds up to an effective deterrent, more effective than that provided by sanctions against the corporation.

The second leg on my stool is criminal prosecution of the corporation itself. The principal purpose of the prosecution is not to punish the corporation, but to facilitate the subsequent damages actions.[14] To this end, the criminal conviction should determine the question of liability conclusively, not simply provide a prima facie case as the existing antitrust laws now do.[15] I agree completely with Professor Coffee's suggestion that *Parklane*[16] should

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does not interfere with deeply established lives or impose difficulties on others, such as a wife who has to go to work and raise children alone while her husband languishes in jail. The penalties of jail tend to be more serious to older white collar criminals.

13. This is one reason that I question the use of alternative public service sentences, such as working in a hospital or a settlement house.

14. The importance of the prior criminal case in facilitating subsequent antitrust damage actions is well recognized. *See* Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 319 (1965).

15. 15 U.S.C. § 16(a) (1970); *see* AREEDA and TURNER, ANTITRUST LAW § 324c (1978).

16. Parklane Hosiery Company, Inc. v. Shore, 435 U.S. 1006 (1979).

be extended by statute so that the decision in the criminal case is conclusive proof of liability in a subsequent civil case. The Antitrust Procedural Improvements Act of 1980, Pub. L. 9-349, 94 Stat. 1154 (effective September 12, 1980) amended Section 5a of the Clayton Act (15 U.S.C. § 16(a)) to provide that a criminal conviction would be "at least" prima facie evidence in subsequent treble damage actions and to assert that "[n]othing contained in this section shall be construed to impose any limitation on the application of collateral estoppel." This falls short of adopting the suggestion made by both Professor Coffee and myself during our oral presentations in April, 1980 because it leaves to the courts the development of a doctrine of collateral estoppel which applies even where mutuality of application is absent and opens a Pandora's box of problems in deciding, under the *Parklane* test, when the defendant in the first action had a sufficient interest to litigate that case "fully and vigorously." This would avoid that bane of civil litigation, the cost and delay of discovery on liability. It would also reduce enormously the plaintiffs' burden by limiting their proof to evidence of their injury, and remove the risk of litigation by placing in doubt only the amount of their recovery.[17]

Because the risk is so limited, I question whether treble damages are necessary to stimulate private suits following a government prosecution. My present inclination would be to provide for only single damages in civil cases in which the plaintiffs have the benefits of collateral estoppel from a prior criminal case and provide for treble damages in cases where the plaintiffs have to prove both liability and damages. I would apply these principles not only to the antitrust laws[18] but also to other statutes involving corpo-

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17. In certain cases an additional question may be presented, *e.g.*, whether the injury sustained is one for which the law provides recovery. This is sometimes called "fact of damage" and in the antitrust area has resulted in rulings that indirect purchasers cannot recover damages, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and that certain categories of plaintiffs were not in the "target area" protected by the antitrust laws. *See e.g.*, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (denying theatre landlords standing to sue); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (denying stockholder standing to sue). Rulings of this kind increase the risk of success by plaintiffs indirectly injured by a corporate criminal violaton, but those directly injured could sue with little risk under the proposed collateral estoppel rules.

18. This would require amendment of Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970).

rate wrongdoing. In suggesting this modification of present treble damages rules, I am assuming that the plaintiffs' counsel would receive their fees from the convicted corporation so that the full single damage award would flow through to the injured persons. This would require further statutory modification, but such a provision is, in my judgment, a necessary part of any statute providing for single damages in civil actions following in the wake of a criminal conviction.

The third leg to my stool is publicity of the sentence, not only to stigmatize the corporation (although I agree with Professor Coffee that this may be appropriate), but also to identify potential plaintiffs so that they can bring their cases. I firmly believe, along with Professor Coffee,[19] that the damage action is the surest way to impose a meaningful monetary penalty on a corporation. The judge is free from maximum fine limitations imposed by Congress and, more importantly, he is focusing, not on what is a fair penalty for the corporation, but rather on how much he has to award in order to compensate the injured person adequately. This results in judgments that are larger than fines would be under the same circumstances. It is, therefore, imperative that the potential plaintiffs be alerted to the existence of their claims. Publicity as to the conviction, by mail or in the media, is an important step toward that end.[20]

Thus, with fairly modest adjustments the present system is adequate, at least in the antitrust area, to deal with the problem of corporate crime. Working within the present system will be more effective than trying to find a body and a soul in a corporation where there are none. When we try (and fail) to do that, and then substitute surrogates for a corporate body and soul that does not and cannot exist, I do indeed feel that we are playing "on a cloth untrue with a twisted cue and elliptical billiard balls."[21]

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19. Coffee, *supra* at 24-25.

20. *See* Crane, *Reform of the Federal Criminal Laws: A Major Change in Criminal Antitrust Liability*, XIX ANTITRUST BULLETIN No. 3, 493, 521-22 (1974).

21. GILBERT & SULLIVAN, THE MIKADO, Act II (1885).