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Commentary: The Interplay Between Corporate Liability and the Liability of Corporate Officers

Norval Morris

ration on probation.[26] The *nolo contendere* plea is already a discretionary decision given to the court.[27] Although the equity fine is not within the inherent power of the court, there is no necessary obstacle to the court accepting such a fine when offered by the defendant *as the alternative to a higher cash fine.* This scenario is more realistic than it at first sounds. Frequently a single criminal transaction will violate multiple criminal statutes. When this happens, a cumulative fine can be levied equal to the maximum fine per count multiplied by the number of counts resulting in conviction. Under the pending Senate Bill (S.B. 1722) to recodify the Federal Criminal Code, the maximum fine for a corporation would be $1,000,000 per count. Thus, very high sentences are possible (particularly in pollution and environmental cases where the behavior tends to have been repetitive over an extended period of time). As a result, the irony may be that it will be the defendant, not the prosecutor, who first asks a sentencing court to consider the possiblity of an equity fine. But clearly, the court could prepare the way for such an offer by imposing a high cash fine on a tentative basis and then suggesting to defense counsel that it consider developing an alternative formula that would offer equivalent deterrence.

Commentary: The Interplay Between Corporate Liability and The Liability of Corporate Officers

Norval Morris*

There is an awareness of the increasing importance of the many difficult problems surrounding corporate liability. Therefore

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26. *See* ABA SENTENCING STANDARDS, Standard § 18-2.8 (1967). *Cf.* Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing,* 89 YALE L.J. 353 (1979).

27. *See* Patterson v. Stovall, *supra* note 15.

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the question that John Coffee is addressing is an important and difficult one. He has presented many original and thought-provoking ideas to help us deal with the dilemma of corporate liability.

I would like, however, to point out the additional problems that I think we must address to completely analyze the dimensions of the topic of corporate liability. First, we must deal with the difficult question of rational sentencing for corporate criminality. In doing so we are immediately faced with the problem of equality in sentencing. We are more rigorous in our treatment of the underprivileged criminal then of the criminal from a more affluent background. This treatment has led to an increasing demand for equality in sentencing but one must question an equality that results in maximizing inefficiencies. What is to be gained from inflicting on the privileged the sufferings of the underprivileged? Furthermore, there is a great risk incurred in the simplistic inflation of penalties that characterizes much of the discussion of corporate liability.

A second problem which, is highlighted by the Pinto case, is the existence of a serious preemption issue. It must be determined to what extent federal regulatory standards defining a minimum flaw preempt the possibility of a state declaring it to be criminal or felonious to do something within those standards. This is a serious problem that must be addressed if the corporate liability issue is to be completely discussed and evaluated.

A third area of concern is the enforcement of the Foreign Corrupt Practices Act.[1] The Act has made it a criminal offense in the United States for any American corporation to give a bribe in a foreign country regardless of the fact that such an action is not a crime in that country. This Act has caused great concern and the difficulties encountered in its enforcement must be analyzed and resolved.

I agree with John Coffee that publicity can be used as an effective deterrent. In fact I am certain that Brent Fisse's[2] work, which Coffee mentioned, was influenced by his awareness of a penalty sanction that has been used in Australia. The Australians have used publicity very effectively in dealing with tax offenders. When penalties are imposed on the taxpayer then his or her name, address, and the amount of the deficiency are published in the news-

1. 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (Supp. I 1977) (amending scattered sections of Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk) (1976).

2. *See* Fisse, *The Use of Publicity As a Criminal Sanction Against Business Corporations*, 8 MELBOURNE UNIVERSITY L. REV. 107 (1971).

paper. This action has proved to be very helpful in coping with tax offenders and suggests possibilities for being utilized for corporate crimes.

A further point to consider is that perhaps we have made an insufficient use of capital punishment in the area of corporations. Capital punishment for the corporation is of course a compulsory winding up of the corporation and prohibiting culpable corporate officers from holding managerial positions in subsequent corporations, similar to our treatment of undischarged bankrupts.

I think, although John Coffee set this aside, there is an extraordinarily difficult balance between corporate liability and the liability of corporate officers. It is very difficult to reach a solution in relation to one without considering the other. I believe that there is a subtle interplay between the two and that an argument must be made for the interrelationship. An illustration of this point is demonstrated by the *United States v. Park*[3] decision in 1975. The case dealt with the Food, Drugs and Cosmetics Act and raised the issue of the imposition of liability for rodent infestation occurring in separate warehouses. The president of this huge company with 13,000 employees and several warehouses was before the United States Supreme Court on the question of *his* individual liability for the rodent infestation. He was the president of the company in one of the warehouses. He had notice of an earlier difficulty and he had known about the second complaint. The Supreme Court divided, but they divided in a way that I find promising for the future (6 to 3). I think the Supreme Court demonstrated that it is on a path of modulation of liability, holding even in strict liability situations (or so-called strict liability situations) the liability of corporate officers when they bear some reasonable managerial responsibility for the failing.

We must also work toward the development of an administrative law that makes clear the degrees of responsibility of different corporate officers for different types of failures. Such a law would accomplish reasonable modulation of corporate criminality and effective deterrence of corporate officers. I do not think the corporate officers check their morals as they enter the boardroom, but I think they are assisted in this area by the thought of personal liability. I am certain that middle management is concerned about this. Why else would Mr. Park be spending money before the Supreme Court of the United States for a fine that cost him less than

3. 421 U.S. 658 (1975).

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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