# **ARTICLE: Criminal Law's Greatest Mystery Thriller: Corporate Guilt Through Collective Knowledge**

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The views expressed herein represent those of the authors and not the Department of Justice.

**Text**

**[\*65]**

There is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose.

Judge Learned Hand [[1]](#footnote-2)1

I. Introduction to Contemporary Corporate Crime

It is the essence of a modern day political drama . . . with a legal twist. A secret informant notifies federal investigators of payments totaling millions of dollars by a major American-based multi-national to Swiss numbered bank accounts belonging to top politicians of a foreign government. In the past few years, this particular foreign government has entered into lucrative contracts with the American multi-national. The contracts have been applauded nationally as indications of American competitiveness in an overseas market. Any negative publicity, particularly evidence of kickbacks, would have a major impact on the

**[\*66]** multi-national's publicly traded stock and may cause the chief executive officer, a strong ally of the current occupant of the White House, to resign.

The payments are evidenced by a decade of wire transfers between the multi-national's American bank and the foreign politicians' Swiss numbered accounts located in Zurich. The Federal Bureau of Investigation ("FBI") has currently traced the payments back to the corporation's financial department located in Chicago, and from there to one of the corporation's accounts payable clerks whose signature authorized each of the wire transfers. The clerk claims to have no knowledge of the purpose of the money. He asserts that he was simply following the orders of his supervisors. The investigation moves up the chain of command until it dead ends at a committee of senior executives, each of whom are either unwilling to testify or claim to have neither the knowledge nor the authority to make such payments. There are no minutes from any meetings to indicate that payments to the foreign politicians were ever discussed. The FBI is baffled. The payments may violate the Foreign Corrupt Practices Act, as well as other federal laws. [[2]](#footnote-3)2 However, there is no solid evidence to connect even one executive to the decision to make the payments. Overseas, the foreign politicians are fighting for their political lives and not about to cooperate with the investigation.

It is a crime perpetrated by committee without any minutes or documents to link the criminal conduct to a culpable officer or officers. Unable to charge an individual, does the crime end up as an abbreviated episode of "Unsolved Mysteries?" Not necessarily.

Corporations of ever-increasing size and complexity are more frequently finding themselves the target of criminal probes. [[3]](#footnote-4)3 These corporations often employ thousands of people and decentralize corporate functions by delegating tasks to relatively autonomous departments. For example, one department may have sole authority over the preparation of tax documents when, in fact, all the material incorporated into the corporate tax return may come from a separate division. One department may apply for bank credit or a loan based entirely on information supplied by an independent operating division located thousands of miles away. One group of executives may decide to bribe foreign politicians while clerks of another division may ultimately be responsible for making the payments.

The prosecutor may spend months, even years, and a great deal of

**[\*67]** taxpayers' money looking for the culpable person(s). The search may involve entire divisions or even whole subsidiaries. Even though the wrongdoing may be relatively obvious, the culpable person or group of individuals may be impossible to find.

This article discusses the theory of collective knowledge as applied to organizational criminal conduct. Our hypothesis is that corporate guilt may be established not only when a single person or executive acting within the scope of his employment commits all of the elements of a crime, but also when several people, none of whom could be charged individually, commit one or more requisite elements of a crime, which, when taken as a whole, constitute criminal conduct. Simply put, collective knowledge holds a corporation criminally liable where one employee intends an action and another, albeit innocent, employee carries it out. For example, where a series of illegal payments are made to foreign politicians, but the evidence is insufficient to implicate senior officers individually even though a committee of these senior officers approved the payments, the corporation itself may nonetheless be held criminally liable. In essence, collective knowledge applies when the culpability of the corporation may be assessed based upon the sum of the conduct of its employees.

The article concludes by synthesizing leading authorities on each of several other countries with well-developed corporate law, and briefly compares how these countries handle organizational criminal conduct.

II. A Primer on the Jurisprudence of Corporate Criminal Liability

A. Legal Theory

Corporations have long been held liable civilly for the misdeeds of an employee acting within the scope of his employment based upon the doctrine of respondeat superior, which is also known as derivative liability. [[4]](#footnote-5)4 Holding businesses liable for the wrongdoing of their employees is generally regarded as economically and judicially efficient. The imposition of money damages on a business entity is accepted as the most practical way not only to exercise deterrence over a number of individual workers, but also the most realistic way to compensate an injured party.

The application of this principle in a criminal context is a relatively recent phenomenon originating around the turn of the twentieth century. [[5]](#footnote-6)5 **[\*68]** Prior to this time, putting a corporation on trial for criminal wrongdoing was unthinkable, or at least, quickly dismissed. [[6]](#footnote-7)6 Criminal law required that the government prove a culpable mens rea -- the mind to do wrong. [[7]](#footnote-8)7 A mind necessarily presupposes that a body is attached and that a real person, and not some legal fiction or mere definition under a particular statute, is the one to conceive the wrong and commit the criminal act. A corporate body, while analogous in some respects to the human body, differs in that the corporation does not have a singular mind that can discretely formulate intent to violate the law. [[8]](#footnote-9)8

Nonetheless, in modern times, when agents or employees of an organization commit some intentional misfeasance during the course of their employment and in furtherance of the master's business, corporations have been held criminally liable. [[9]](#footnote-10)9 In this situation, the wrongdoing of a particular agent may be attributed to a corporate entity which may or may not be totally ignorant of the acts for which it is ultimately held accountable. [[10]](#footnote-11)10

The theoretical basis of corporate criminal liability rests in part on extrapolating the civil doctrine of respondeat superior for basically the same reasons. However, whereas vicarious civil liability requires neither intent nor misconduct on the part of the master, traditional criminal

**[\*69]** liability requires both. Proof of criminal action on the part of an officer clearly imputes liability to the corporation in straightforward respondeat superior fashion. [[11]](#footnote-12)11 But, when criminal conduct is committed by lower level agents or by individuals who act in violation of express codes of conduct and corporate policy, imputing liability to the corporation is somewhat more difficult. Nevertheless, even where low level employees carry out intentional criminal acts on behalf of the corporate organization, courts have routinely attached corporate liability. [[12]](#footnote-13)12

The impediments to effective and efficient prosecution of organizational wrongdoing are greatly exacerbated by decentralized decisionmaking descending through layers of bureaucracy. [[13]](#footnote-14)13 The jurisprudential dilemma occurs where no one individual or group of individuals can be shown to have committed all the requisite elements of the criminal act. Is it possible to hold an entity liable even where no employee could be charged with a crime? In this day of multi-national corporate structures, should corporations be able to structure their decision-making authority to essentially immunize the corporation and its officers from prosecution?

Courts have begun to recognize that corporations have a unique capacity to compartmentalize information within a hierarchy of descending levels of authority. As a result, courts have recently begun to recognize that the collective knowledge held by various agents and employees of an organization sufficiently articulates corporate intent. [[14]](#footnote-15)14

**[\*70]**

B. Early Struggles with Collective Knowledge

The inherent inconsistency of finding a legal fiction guilty of a crime absent a human wrongdoer has troubled judges and juries alike. As a result, the first cases in which courts applied the principles of collective criminal liability were those involving regulatory violations of law by common carriers. [[15]](#footnote-16)15

In Inland Freight Lines v. United States, [[16]](#footnote-17)16 the defendant motor carrier was charged with a violation of the Interstate Commerce Act, [[17]](#footnote-18)17 a statute which made it a misdemeanor for a motor carrier to knowingly and willfully prepare, keep, and preserve false records in the operation of its business. The criminal information charged that certain drivers had falsely documented their driving time and off-work hours in log books and travel reports. [[18]](#footnote-19)18 No single agent or employee of the corporation could be shown to have actual knowledge of the discrepancies between the logs and the reports. Nonetheless, the government argued that if at least one employee knew of the material contents of the log books and at least one other employee knew of the material contents of the trip reports -- regardless of whether any single employee knew of the discrepancies between the two -- the knowledge of the employees held collectively could be imputed to establish corporate guilt. [[19]](#footnote-20)19

The jury was instructed that a conviction was warranted if the corporation "accepted such false logs knowing them to be false, or accepted them without investigation as to their falsity or that the falsity thereof would have been discovered by the defendant if it had performed its duty of inspection." [[20]](#footnote-21)20 The jury accordingly returned a guilty verdict. [[21]](#footnote-22)21

On appeal, the corporation attacked the conviction, claiming that

**[\*71]** imputing the conduct of the employees to the corporation may have established knowledge of the falsehood, but it did not establish willfulness. [[22]](#footnote-23)22 The convictions were reversed, with the appellate court finding that the jury charge had, in effect, reduced the requisite mens rea from willfulness to negligence. [[23]](#footnote-24)23

Despite the reversal, a significant theoretical step was taken. Actual knowledge of the corporation was established by proof that various agents and representatives collectively possessed knowledge of the key facts. [[24]](#footnote-25)24 Proof of willfulness failed because no one employee was shown to have possessed, nor was the knowledge of multiple employees collectively coalesced to demonstrate, the intent required to execute a deliberate and purposeful act. [[25]](#footnote-26)25

Some twenty years after Inland Freight, two other motor carrier cases involving similar regulatory violations provided courts the opportunity to go beyond collective knowledge and apply the theory of collective corporate guilt. In an unprecedented departure from general agency law, United States v. T.I.M.E.-D.C., Inc. [[26]](#footnote-27)26 found the requisite criminal intent based on the knowledge collectively held by several corporate employees. [[27]](#footnote-28)27 The alleged offenses in the T.I.M.E.-D.C. case were misdemeanor violations of section 322(a) of the Interstate Commerce Act. [[28]](#footnote-29)28 Like the regulation at issue in Inland Freight, [[29]](#footnote-30)29 section 322(a) imposed criminal penalties for knowing and willful violations

**[\*72]** under the Act. [[30]](#footnote-31)30

In T.I.M.E.-D.C., dispatchers were responsible for conveying a new company sick-leave policy to the drivers. [[31]](#footnote-32)31 The government alleged that the company developed the policy with the intent of deliberately conveying incomplete or vague information to the drivers in an effort to quell the rising rate of employee absenteeism. [[32]](#footnote-33)32 The evidence showed that two drivers had initially called in sick, were informed of the new policy by the dispatcher, and then subsequently asked to be placed back in the line-up. [[33]](#footnote-34)33 Once on the road, one of the drivers became too ill to continue driving. [[34]](#footnote-35)34

The government was able to show that the drivers were neither formally nor explicitly notified of the new unexcused absence policy. [[35]](#footnote-36)35 Word-of-mouth and gossip appeared to be the company's intended mode of communication; an intent, the government argued, was proven by the dispatcher's vague explanation to whomever happened to call the driver in sick -- often not the drivers themselves. [[36]](#footnote-37)36

There was no dispute that the corporation was aware of the regulations promulgated under the Act. As to whether the company knowingly and willfully violated those regulations, the court found the corporation responsible for the knowledge held collectively by its employees regarding drivers who called in sick and expressed uncertainty about the new unexcused absence policy. [[37]](#footnote-38)37 This finding was consistent with Inland Freight. With respect to willful intent, however, the court in T.I.M.E.D.C. found the existence of union grievances regarding the new policies

**[\*73]** determinative in finding the company not guilty on the first count, but guilty on the second count. Because of the first incident, but prior to the second incident, a union petition had been circulated which the court held put the company on notice that the new policy had the effect of coercing drivers to report to work despite being too ill to drive. [[38]](#footnote-39)38 T.I.M.E.- D.C. was found to have had knowledge of the regulatory violation because "the means were present by which the company could have detected the infractions." [[39]](#footnote-40)39

The court briefly discussed the difference between malum prohibitum and malum in se crimes. A regulatory violation, such as section 322(a) at issue in T.I.M.E.-D.C., requires a lesser standard of proof to establish willfulness than that required for specific intent crimes. [[40]](#footnote-41)40 The court reasoned that the corporation had an affirmative duty to enforce compliance with the Act and had "in effect, left adherence almost entirely the responsibility of its drivers" and did "'willfully' disregard" its statutory duty. [[41]](#footnote-42)41 In this case, therefore, the distance between collective knowledge and assessing organizational guilt was not so great.

United States v. Sawyer Transport, Inc. [[42]](#footnote-43)42 similarly found evidence of drivers submitting false documentation of hours driven. Again, no single employee or agent of the corporation could be found to have knowledge of the falsity sufficient to form the level of intent required for a finding of criminal willfulness. [[43]](#footnote-44)43 Whereas a company policy was the connection between collective knowledge and corporate criminal intent in T.I.M.E.- D.C., the sum of the knowledge of different employees constituted the nexus in Sawyer Transport necessary to impute liability to the corporation. [[44]](#footnote-45)44 Willfulness was established "by proof that the defendant is plainly indifferent to the requirements of the statute and regulations." [[45]](#footnote-46)45 Sawyer Transport is significant in that it heralded the imposition of organizational criminal intent through collective knowledge.

Within a decade, courts had expanded the theory of collective guilt beyond mere regulatory violations. In 1986, United States v. Shortt

**[\*74]** Accountancy Corp. [[46]](#footnote-47)46 held that an accounting firm could be held criminally liable for making and subscribing false tax returns where a number of employees had a hand in preparing the false documents. [[47]](#footnote-48)47 Shortt dealt with the specific intent crime of aiding, preparing or presenting false income tax returns. [[48]](#footnote-49)48 Shortt Accountancy Corporation ("SAC") denied complicity by arguing that it merely assisted the taxpayer in the preparation of his return; only the taxpayer himself, SAC argued, could "make" an income tax return. [[49]](#footnote-50)49

The Ninth Circuit easily rejected this argument as "completely meritless." [[50]](#footnote-51)50 In a special section entitled "Collective Intent in Subscribing the Returns," [[51]](#footnote-52)51 the court held that if SAC's defense was to be accepted, "any tax return preparer could escape prosecution for perjury by arranging for an innocent employee to complete the proscribed act of subscribing a false return." [[52]](#footnote-53)52 The better rationale was to hold that "a corporation will be held liable under section 7206(1) when its agent deliberately causes it to make and subscribe to a false income tax

**[\*75]** return." [[53]](#footnote-54)53

***Kern*** ***Oil*** & Refining Co. v. Tenneco ***Oil*** Co., [[54]](#footnote-55)54 a civil contract dispute, which was also decided by the Ninth Circuit in 1986, came to an entirely different conclusion, holding that ***Kern*** ***Oil*** had not acquired the knowledge collectively held by its employees. [[55]](#footnote-56)55 In ***Kern*** ***Oil***, the court nevertheless referenced T.I.M.E.-D.C. as standing for the proposition that "a corporation could be held criminally responsible for the collective knowledge of its employees." [[56]](#footnote-57)56 However, the court resisted imputing either collective knowledge or intent to ***Kern*** ***Oil*** stating that ***Kern*** ***Oil*** did not have an affirmative legal duty to prevent any violations. [[57]](#footnote-58)57 Unlike Inland Freight and T.I.M.E.-D.C., the ***Kern*** ***Oil*** Court refused to attach liability based essentially upon a willful blindness standard. [[58]](#footnote-59)58 The inconsistency is all the more perplexing because ***Kern*** ***Oil*** is a civil case, whereas Inland Freight, T.I.M.E.-D.C. and Shortt are criminal cases.

C. The Bank of New England Prosecution

A watershed moment occurred in 1987 when the United States Court of Appeals for the First Circuit decided United States v. Bank of New England. [[59]](#footnote-60)59 In Bank of New England, a thirty-one-count guilty verdict was upheld against the Bank of New England, a major commercial bank, for violations of the Currency Transaction Reporting Act. [[60]](#footnote-61)60 At issue was the bank's adherence to Department of Treasury regulations which make it a felony for a bank to fail to file currency transaction reports ("CTRs") of customer currency transactions in excess of $ 10,000 within fifteen days. [[61]](#footnote-62)61

Bank customer James McDonough made lump sum cash withdrawals of over $ 10,000 by using multiple checks -- each check individually less than the trigger amount, all of which were presented simultaneously to a single bank teller. [[62]](#footnote-63)62 Despite the deliberate parsing, the court found

**[\*76]** this method of cash withdrawal sufficient to constitute "a single physical transfer of currency in excess of $ 10,000" [[63]](#footnote-64)63 which, in turn, obligated the bank under the Act [[64]](#footnote-65)64 to report the transaction.

"Willfulness" under section 5322 requires "'proof of the defendant's knowledge of the reporting requirements and his specific intent to commit the crime.'" [[65]](#footnote-66)65 The question presented to the jury was whether the defendant bank "knowingly and willfully broke the law by failing to report $ (the currency transactions$ )." [[66]](#footnote-67)66 General charges relating to knowledge and willfulness were given to the jury. [[67]](#footnote-68)67 The jury was then instructed that it could infer knowledge if the defendant avoided learning of its reporting obligations. [[68]](#footnote-69)68 The court further instructed that the knowledge held by bank employees was to be imputed to the bank. [[69]](#footnote-70)69 The trial judge then went on to debunk the fiction of treating a corporation charged with a crime like a natural person:

In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment. So, if Employee A knows of one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such

**[\*77]** a requirement existed. [[70]](#footnote-71)70

The bank objected to the instructions, claiming that the charge failed to state that the bank had to have violated a known legal duty. [[71]](#footnote-72)71 The bank argued that the trial court erred by giving the collective knowledge instruction from which the jury could find "that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half." [[72]](#footnote-73)72

The court dismissed the argument that a collective knowledge instruction is inappropriate in the context of corporate criminal liability. It noted that:

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular **[\*78]** operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation. . . . Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper, but necessary. [[73]](#footnote-74)73

The court further noted that the instructions directed the jury not to convict for "accidental, mistaken, or inadvertent acts or omissions." [[74]](#footnote-75)74 The evidence presented was sufficient to prove that certain bank personnel knew the transactions were reportable, but chose not to report them. Other bank employees were shown to be suspicious of McDonough's transactions yet failed to inquire as to whether they were reportable. [[75]](#footnote-76)75 Thus, the collective knowledge of the bank's employees, even though insufficient to charge any individual employee, was sufficient, when taken as a whole, to impute guilt to the Bank of New England itself.

The Bank of New England decision marks the first clear and concise holding by an appellate court that organizational guilt may be proven by collectivizing the conduct of disparate and unrelated corporate employees. The court's recognition that contemporary organizational behavior decentralizes both information and authority opened the door to a new era for corporate criminal liability. [[76]](#footnote-77)76

Bank of New England similarly established a new standard by which corporate conduct can be measured. Of the many implications of this new standard, three stand out. First, does the imposition of corporate criminal liability predicated upon collective knowledge result in an efficient use of the judicial system's dwindling resources? Next, does the application of corporate guilt based upon collective knowledge unduly diminish the concept of mens rea, particularly when dealing with specific intent white collar crimes? In addition, what impact does this standard have on foreign corporations doing business in the United States and subject to a legal system probably far more confrontational and intrusive than the system they deal with at home? Part III begins to discuss these difficult issues.

**[\*79]**

III. The Impact of a Collective Guilt Standard on Corporate Crime

A. Efficient Economics in the Judicial System

As noted earlier, the number of prosecutions against organizations has continued to increase steadily. [[77]](#footnote-78)77 If one presupposes that the advent of corporate criminal liability merely recognized, but did not cause a proliferation of corporate crime, then one or more factors must be responsible for popularizing the prosecution of the corporate entity.

One motivation for prosecuting a corporate entity for criminal conduct can be the availability of large sums of money to pay a criminal fine or restitution. With few exceptions, an individual is unlikely to be able to pay the same criminal fine or restitution as a corporation. Results of recent corporate criminal prosecutions bear this out. [[78]](#footnote-79)78 Just like the evolution of civil corporate liability, the corporate entity has become the "deep pocket" of the American criminal justice system. Before one is repulsed by a concept of targeting a corporate defendant because of its bank account, there is a more palatable economic justification for expanded application of corporate collective guilt. The prosecution of the corporate entity is simply the most efficient use of judicial resources. This efficiency is borne out by at least two interrelated goals: the pursuit of a fair and just result, and the achievement of such a result with the minimum legal costs borne both by taxpayers and by defendants.

Investigations of white collar offenses are extremely expensive, both for the government and for the corporation. For the government, grand jury investigations can extend from one grand jury to another, spanning

**[\*80]** practically the entire statute of limitations. [[79]](#footnote-80)79 For corporations, most of whom will find separate counsel both for employees subpoenaed as witnesses or designated as targets, and for the corporation itself, [[80]](#footnote-81)80 the cost can easily run into the millions of dollars. Very often, the investigative phase of a white collar case is similar to civil discovery in its length and cost, except that the fact finding forum is the grand jury.

Absent the doctrine of collective guilt, the prosecutor must search for the one or more individuals who committed all the requisite elements of the crime while acting on behalf of their employer. [[81]](#footnote-82)81 This search continues until either a culpable person is found, or until a decision is reached not to prosecute anybody, including the corporation. Without the collectivization of guilt, the costly investigation may go on for years without resolution.

With the expansion of corporate criminal liability to include collective knowledge, the judicial system can act more fairly and more efficiently. Once it is established that wrongdoing has occurred, the quest to point the finger at a single person need not be pursued to the exclusion of any other criminal remedy. The labyrinth of autonomous corporate departments need not be exhaustively culled for the one or more executive culprits. Just as in a classic respondeat superior situation, the corporation itself is available as a defendant. Where there is a total decentralization of corporate authority, the corporation itself may be the only viable defendant. In addition, wrongdoing will not go unpunished due to a failure of proof which is a direct result of the culpable corporation's own organizational structure.

To those who believe that imprisonment is the best remedy for crime in the board room, the fact that no individual is charged may seem like an abomination. It is true that convicted corporations, unlike hockey teams, do not designate an executive to serve time in the penalty box for an infraction of the rules. [[82]](#footnote-83)82 However, the concentration of judicial resources and the deterrent effect of a substantial fine must be

**[\*81]** acknowledged and balanced against the concern that somehow the "bad" executive has eluded capture.

B. The Imposition of Corporate Criminal Liability Based Upon Collective Knowledge Can Effectively Make Corporations Strictly Liable For Specific Intent Crimes

Most white collar crimes have as an element that the conduct must be committed willfully and knowingly; i.e., with specific intent. [[83]](#footnote-84)83 Willfulness is defined as a voluntary, intentional violation of a known duty. [[84]](#footnote-85)84 Knowing conduct is defined as behavior that the defendant "realized he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident." [[85]](#footnote-86)85 Previously, under the pure doctrine of respondeat superior, since a corporation acts only through its employees and agents and none of these natural persons had performed a criminal act knowingly and willfully, the corporation was incapable of acting with the requisite mens rea to commit a specific intent crime.

Collectivization of employee conduct by imputing the aggregate of that conduct to the corporation expands the criminal liability of the corporation. In other words, specific intent is imputed to the corporation, even though no individual can be shown to possess the specific intent.

Courts have grappled with this expansion with varying degrees of success. Willful blindness has allowed the imposition of criminal liability for specific intent crimes without the commission of any affirmative or purposeful act. [[86]](#footnote-87)86 Being in a position to know, but still doing nothing to prevent wrongdoing, is enough to constitute willful blindness. [[87]](#footnote-88)87

**[\*82]** Also, the Supreme Court's decision to uphold Alford-type pleas, where no wrongdoing is acknowledged, has furthered the effort of achieving a just resolution of criminal cases while sidestepping the issue of specific intent. [[88]](#footnote-89)88

No matter how the issue is finessed, the end result is that Bank of New England allows corporations to be prosecuted for criminal acts committed negligently or recklessly by its employees if the sum total of such conduct can be found to constitute specific intent on the part of the organization. Thus, the seventy-five year old prophesy of Judge Learned Hand, that "there is no distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose," has been fulfilled. [[89]](#footnote-90)89 Because the imposition of criminal and civil liability on corporations has two main features in common, the quest for monetary punishment and deterrence, it is hard to disagree with Judge Hand.

C. Corporate Criminal Liability Beyond United States Borders [[90]](#footnote-91)90

The legal evolution and acceptance of collective knowledge can be seen as an anomaly unique to American jurisprudence's relationship to the corporate entity, to the individuals within that organization, and their capacity to commit a crime. In America today, the corporation is a predominant form of business enterprise: it supplies raw materials and consumer goods, and it develops production processes that fuel our economy. Yet, American society recognizes that the same business activities and corporate growth which contribute to our economic prosperity can also endanger lives, wreak ecological devastation, misappropriate funds, cheat the government, and commit any number of criminal acts. [[91]](#footnote-92)91 Moreover, the news media routinely report corporate dereliction, the result being that a corporation's potential liability is viewed as intertwined with the public interest -- whether that involves a defective

**[\*83]** automobile, a disastrous ***oil*** spill, or a bribery scandal. [[92]](#footnote-93)92

American courts' willingness to stretch beyond derivative liability can also be seen as a reflection of the economic maturity of the American state and the autonomy of the American legal order. [[93]](#footnote-94)93 The same broad social policies that prompted earlier courts to find corporations criminally liable for public welfare and regulatory offenses [[94]](#footnote-95)94 may well be extrapolated today to find guilt based on culpable conduct which is diffused throughout the corporate body. [[95]](#footnote-96)95

Foreign corporations doing business in the United States may not know that the developing doctrine of collective knowledge, as applied in American courts, is not limited to domestic companies. The doctrine of corporate guilt through collective knowledge exposes foreign-based multi-nationals, doing business in the United States, to a much wider scope of criminal liability than they have heretofore experienced, perhaps well beyond what they face at home or in other foreign markets. For example, the law in European countries has generally tended to favor the imposition of criminal liability against individuals as opposed to corporate entities. [[96]](#footnote-97)96 A brief survey of how various countries other than the United States view corporate criminal liability follows.

1. The United Kingdom and Common Law Countries

The theoretical parameters of corporate liability in the United Kingdom have evolved in a manner similar to the United States: first, by de-personifying mens rea in misdemeanor regulatory offenses, [[97]](#footnote-98)97 and

**[\*84]** then by conceptualizing corporate intent in terms of an interchangeable mens rea. [[98]](#footnote-99)98 Thus, the mens rea of certain employees is treated as the mens rea of the corporation itself. [[99]](#footnote-100)99 In the United Kingdom, however, the judicially crafted tests for determining corporate culpability have done little to simplify prosecutions. [[100]](#footnote-101)100 Generally, only the most senior officers are deemed to have the requisite authority to direct the mind of the organization. [[101]](#footnote-102)101 This standard, known as the "identification" or "controlling officer" test, "distinguishes . . . very senior officers who act and think as the company from the rest of the company's staff who are mere servants or agents of the company." [[102]](#footnote-103)102 This doctrine views only certain individuals as the embodiment of the corporation: "Their acts and states of mind are the company's acts and states of mind and it is held liable, not for the acts of its servants, but for what are deemed to be its own acts." [[103]](#footnote-104)103 In an age of increasing decentralization within the corporate structure, especially with respect to safety policies and procedures, this doctrine is widely criticized. [[104]](#footnote-105)104

The problem of defining guilt by vicarious liability, therefore, continues to exculpate corporations in the United Kingdom because the line of decision-making is often too difficult for prosecutors to trace to the top. [[105]](#footnote-106)105 However, some scholars note that where criminal negligence is the charged offense, attributing criminal liability to the corporation should not present too great a theoretical obstacle, as a negligence standard dispenses with the need to prove specific intent. [[106]](#footnote-107)106 Using a negligence standard, it is sufficient to show what a reasonable corporation, acting through its reasonable employees, should have known and should have done or not done. In other words,

identifying the "mind and will" of the company may be a misguided

**[\*85]** approach . . . because

"if manslaughter by criminal negligence rests on an objective standard, why is the search for the mind and will of the company relevant? Why should we not conclude in particular circumstance, for example, that in failing to set up effective channels of communication to ensure that senior management does become aware of knowledge spread throughout the company, a particular company has fallen considerably short of the standard which a reasonable company would have exercised, in circumstances where the reasonable company would have realized the probability that serious harm would result?" [[107]](#footnote-108)107

However, individual determinism, which is the social policy undergirding the "corporate officer" test for corporate liability in common law countries, cautions that at least:

in the context of a homicide prosecution, there is a strong argument that as a matter of social policy, a narrow class of individuals, representing the company, should be construed. The negligent conduct of any employee would not suffice: the relevant individual should be in a position to determine high corporate policy and possess autonomy in decision-making. [[108]](#footnote-109)108

The identification doctrine draws a sharp distinction between corporate officers and lower-level employees, and does not appear to take organizational structure into consideration for purposes of assessing criminal liability. [[109]](#footnote-110)109 It completely rejects any notion of collectivization or aggregation of fault. [[110]](#footnote-111)110 In R. v. H.M. Coroner for East Kent, Ex parte Spooner and Others, [[111]](#footnote-112)111 it was submitted that the fault of several directors of the organization should be aggregated so that their various acts of negligence or recklessness could be coalesced as proof of more serious fault on the part of the corporation. [[112]](#footnote-113)112 The court tersely dismissed the argument that individual liability was not necessary to prove corporate guilt: "I do not think the aggregation argument assists the applicants. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such." [[113]](#footnote-114)113

**[\*86]**

2. The Netherlands

Dutch law today comes much closer to American law with respect to collective knowledge and criminal liability. Prior to 1976, a Dutch corporation could be found liable for criminal acts done by persons in the course of their employment or by others who acted in the "sphere of the corporation." [[114]](#footnote-115)114 The acts for which a corporation could be deemed criminally responsible, though, were generally strict liability regulatory offenses against the public welfare that were devoid of any moral culpability or stigma. [[115]](#footnote-116)115

Since the enactment of Article 51 of the Dutch Criminal Code in 1976, however, the law now states simply that offenses can be committed both by human beings and by corporations, and that charges may be brought and penalties assessed against corporations. [[116]](#footnote-117)116 If it is within the corporation's power to determine whether an employee does a particular act and if the corporation accepts the act or the benefits which flow from the act, liability will attach. [[117]](#footnote-118)117

These concepts of "power" and "acceptance" closely approximate the nature of the modern collective enterprise and require Dutch courts to analyze the accused corporation's institutionalized practices and levels of decision-making authority. [[118]](#footnote-119)118 It was due to this judicial scrutiny that in 1987, a hospital was prosecuted and convicted for negligent homicide. [[119]](#footnote-120)119 The corporate entity was found grossly negligent for using out-of-service anesthetic equipment which had not been properly maintained or properly connected to the patient. [[120]](#footnote-121)120 The court assessed liability because it found that the hospital did not have in place an adequate **[\*87]** system of supervision and control over the technical department responsible for such equipment. [[121]](#footnote-122)121 Moreover, there was no monitoring of safety standards -- records were incomplete, instructions on repairs were absent, and technicians did not know that the equipment was obsolete. [[122]](#footnote-123)122 Ignorance was not a viable defense; rather, the court found the hospital liable because the corporation did not know. [[123]](#footnote-124)123 The "hospital case" demonstrates how Dutch courts impose a reasonableness standard to corporate conduct as opposed to one of strict liability. [[124]](#footnote-125)124 At least where the business at hand involves stringent safety considerations, a corporation will be held liable for practices it should have undertaken pursuant to internal monitoring mechanisms. [[125]](#footnote-126)125

The "power" and "acceptance" criteria employed by Dutch courts are applied throughout the corporate hierarchy. [[126]](#footnote-127)126 They underscore the import of collective processes upon minor individuals over and above the affirmative acts of higher-level officials, requiring an examination of the relationships between groups and inquiring into how decisions are communicated between the different levels of the organization. [[127]](#footnote-128)127 Moreover, a Dutch corporation does not have to memorialize acceptance in company policy; a court will look at what is routinely tolerated as well as that which is explicitly sanctioned, recognizing that corporations rarely break the law according to company policy or documented internal directives. [[128]](#footnote-129)128 Rather, it is because companies can foster a corporate climate that tends to discourage adherence to external standards that non-decision making and informal practice can be found to be as culpable as positive acts and express institutional policy. [[129]](#footnote-130)129

The law of the Netherlands and the United Kingdom diverge sharply with respect to two facets of corporate criminal liability. First, Dutch law rejects the "identification" or "controlling officer" doctrine, drawing little distinction between the brain and the hands of an organization. [[130]](#footnote-131)130

**[\*88]** Second, and more importantly, Dutch courts accept the aggregation of fault as a basis of liability. [[131]](#footnote-132)131 Where two or more individuals can be shown to be at fault, their combined culpability is attributed to the corporation. [[132]](#footnote-133)132 For example, in a 1951 case, [[133]](#footnote-134)133 a Dutch court held that there was no requirement that a corporation's crime had to be traced to particular individuals acting on its behalf; it was sufficient for liability to be imposed if the relevant misconduct was within the normal sphere of the company's operation. [[134]](#footnote-135)134 Nearly forty years later, the 1987 "hospital case" illustrates that the aggregation or collectivization doctrine is still employed today in the Netherlands. [[135]](#footnote-136)135 It is not necessary to show any particular individual is responsible for the default; it is instead a collective failure on the part of both management and staff that provides the basis of corporate criminal liability.

3. Germany

The state of corporate criminal law enforcement today in Europe's most powerful economy is unsettled, especially in light of the multitude of problems associated with unification and the passage of European Economic Community ("EEC") agreements pertaining to criminal law enforcement. [[136]](#footnote-137)136 While Germany has established "white collar prosecutor's offices" and "white collar courts" to handle complex corporate crime, [[137]](#footnote-138)137 it is still recognized as a country which follows a restrictive view of corporate liability.

Indeed, Germany provides rather fertile soil for financial fraud. Prior to unification, Germany maintained bank secrecy regulations relating to individual clients and transactions that hindered Securities and Exchange Commission ("SEC") investigations of Americans who committed insider trading violations in the United States and then absconded or parked their ill-gotten gains in Germany. [[138]](#footnote-139)138 In fact, in Germany, insider trading **[\*89]** risks no criminal sanctions whatsoever. [[139]](#footnote-140)139 Furthermore, German law expressly encourages commercial banks to trade actively in the stock market, thereby engendering the same close relationship between regulated financial institutions and corporations found in Japan and elsewhere. [[140]](#footnote-141)140 By virtue of this narrow scope of corporate liability, German law does not recognize a collective guilt theory such as found in Bank of New England.

Corporate criminal liability is generally imposed only for administrative offenses. [[141]](#footnote-142)141 Nonetheless, these administrative penalties provide a strong deterrent against criminal undertaking by imposing substantial monetary sanctions against representative officials or departments. [[142]](#footnote-143)142 The German system thus somewhat blurs the distinction between administrative liability, which is viewed as morally neutral, and corporate guilt, which assumes an intent to do wrong. [[143]](#footnote-144)143

4. Japan

The Bank of New England decision as well as the entire concept of collective knowledge would probably be greeted with confusion and astonishment by companies based in Japan. Such a response would be based upon several aspects of the Japanese criminal justice system. Japan has one of the highest clearance rates in the world [[144]](#footnote-145)144 -- and its conviction rate is over 99.8%. [[145]](#footnote-146)145 As a result, holding an entire corporation criminally liable where no wrongdoer is prosecuted would probably be dismissed out of hand. To the Japanese, if there is a crime, the perpetrator will be caught and punished. If not, then perhaps there was never a crime at all.

Another aspect of Japanese life governs corporate criminal liability. In Japan, extraordinary prosecutorial discretion takes into account powerful business interests and political alliances resulting in very few prosecutions of white collar crime. [[146]](#footnote-147)146 Interlocking business and political **[\*90]** networks can effect the willingness of the prosecutor's office to go forward. White collar wrongdoing like insider trading, tax fraud or commercial bribery goes unpunished unless and until brought to public attention. [[147]](#footnote-148)147 Even then, the result is not what one would expect in the United States. [[148]](#footnote-149)148

In summary, Japanese society is inherently non-litigious. [[149]](#footnote-150)149 It is a system whose goal is not based on winning or losing: in other words, a jury filing in and announcing a verdict of guilty is not the prosecutorial victory in Japan that it is in the United States. For Japanese companies doing business in the United States, the American criminal justice system is truly a different experience. The Bank of New England decision is an example of the type of rude awakening that could await a Japanese corporation in an American court.

5. Summary

Whether the headquarters of a corporation are located in a country that ascribes to a system of corporate criminal liability or the more restrictive administrative liability, foreign companies doing business in the United States must view the theory of collective guilt espoused in Bank of New England as heralding a new dawn in criminal liability to which they may well be subjected. Caution, therefore, mandates strict internal policing via corporate codes of conduct, zealous adherence to regulatory schemes, and strict monitoring of compliance with internal standards and procedures.

IV. Conclusion

Imposing criminal liability on organizations based upon collective knowledge has arrived, and with good reason. Complex multi-nationals with decentralized decision-making authority vested in autonomous departments should not be able to escape punishment routinely handed out to small businesses. Nonetheless, individuals should not be charged and punished unless their guilt as to all elements of the crime can be proven.

The result of a collective knowledge standard is that organizations stand trial for criminal offenses and, if convicted, pay handsomely in monetary terms and imposition of enhanced compliance measures.

**[\*91]** Wrongdoing does not go unpunished, nor are individual executives charged in a reckless quest to avenge the criminal conduct.

This standard should satisfy the prosecutor, the public and the organization. Our sense of fairness is just marginally offended when only a corporation is charged. On the other hand, the bad deed does not go unpunished and, theoretically, the organization has the incentive to prevent future illegal conduct by its work force.

Surely, the theory of collective knowledge as played out in the real world is not optimal. Nonetheless, it is better than designating a corporate officer as the "Vice President in Charge of Going to Jail," or allowing wrongdoers to go unpunished.

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1. 1 United States v. Nearing, 252 F. 223, 231 (S.D.N.Y. 1918). [↑](#footnote-ref-2)
2. 2 15 U.S.C. section 78dd-1 (1984). [↑](#footnote-ref-3)
3. 3 Mark A. Cohen, Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts 1988-1990, 71 B.U. L. Rev. 247, 251-52 (1991). [↑](#footnote-ref-4)
4. 4 See, e.g., Stockwell v. United States, 80 U.S. (13 Wall.) 531 (1871). [↑](#footnote-ref-5)
5. 5 See, e.g., New York Cent. & H. R.R. v. United States, 212 U.S. 481 (1909). [↑](#footnote-ref-6)
6. 6 See, e.g., State v. Great Works Milling & Mfg. Co., 20 Me. 4 (1841); 1 William Blackstone, Commentaries on the Laws of England \*476 (1765); Harry G. Henn & John R. Alexander, Laws of Corporations and Other Business Enterprises section 184 (3d ed. 1983). [↑](#footnote-ref-7)
7. 7 Smith v. California, 361 U.S. 147, 150 (1959) ("The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."). [↑](#footnote-ref-8)
8. 8 See Francis Bowes Sayre, Mens Rea, 45 Harv. L. Rev. 974, 974 (1932). [↑](#footnote-ref-9)
9. 9 See generally United States v. Richmond, 700 F.2d 1183 (8th Cir. 1983); Jones v. Dixie Ohio Express, Inc., 156 S.E.2d 388, 389 (Ga. App. 1967) ("'The test is not that the act of the servant was done during the existence of the employment -- that is to say, during the time covered by the employment -- but whether it was done in the prosecution of the master's business . . . .") (quoting Louisville & N. R.R. v. Hudson, 73 S.E. 30, 31 (1911)); Harry L. Pitt & Karla A. Groskaufmanis, Minimizing Corporate, Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 Geo. L.J. 1559 (1990). [↑](#footnote-ref-10)
10. 10 Dixie Bonded Warehouse v. Allstate Fin. Corp., 755 F. Supp. 1543, 1554 (M.D. Ga. 1991) (part-time agent who defrauded another company could not form the basis of vicarious liability because an employment contract restricted the agent to certain express responsibilities; to hold the corporation liable under these circumstances "would amount to nothing more than an effort to tap a liquid source of funds without regard to actual fault"). [↑](#footnote-ref-11)
11. 11 United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir. 1949), cert. denied, 337 U.S. 959 (1949). [↑](#footnote-ref-12)
12. 12 See, e.g., United States v. Gibson Prod. Co., Inc., 426 F. Supp. 768 (S.D. Tex. 1976) (salesman illegally selling guns binds parent corporation of department store). [↑](#footnote-ref-13)
13. 13 John C. Coffee, Jr., Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response, 63 Va. L. Rev. 1099, 1113 (1977). [↑](#footnote-ref-14)
14. 14 Pamela H. Bucey, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 Minn. L. Rev. 1095, 1099 (1991); see also B. Fisse, Corporate Criminal Responsibility, 15 Crim. L. J. 166, 173 (1991). Fisse points out that:

    Corporate policy is the corporate equivalent of intention, and a company that conducts itself with an express or implied policy of non-compliance with a criminal prohibition exhibits corporate criminal intentionality. It is therefore false to assume that the idea of a guilty mind "has no meaning when applied to a corporate defendant, since an organization possesses no mental state."

    Id. (quoting Note, Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1241 (1979)). [↑](#footnote-ref-15)
15. 15 E.g., Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951). [↑](#footnote-ref-16)
16. 16 Id. [↑](#footnote-ref-17)
17. 17 49 U.S.C. section 322(g) (1970). For purposes of this article, where a court omits the date of a relevant statute, citation is made to the statute in effect at the time of the decision. [↑](#footnote-ref-18)
18. 18 Inland Freight, 191 F.2d at 314. [↑](#footnote-ref-19)
19. 19 Id. at 315. Several courts had previously found motor carriers guilty under traditional principles of respondeat superior. See, e.g., Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963); Riss & Co., Inc. v. United States, 262 F.2d 245 (8th Cir. 1958). [↑](#footnote-ref-20)
20. 20 Inland Freight, 191 F.2d at 316 (corporate custody of the documents entailed, at a minimum, that the log books and trip reports be inspected and reconciled against each other if for no other reason than for reporting purposes under the Interstate Commerce Act). [↑](#footnote-ref-21)
21. 21 Id. at 314. [↑](#footnote-ref-22)
22. 22 Id. at 314-16. The corporation argued that it could not be held criminally responsible for the acts of its drivers unless the corporate entity itself had actual knowledge of the drivers' false reporting and willingly permitted the fraudulent documents to become part of the company records. Id. Error was assigned to the jury instruction as a charge on negligence, whereas an essential element of the offense under the Act called for willfulness. Id. [↑](#footnote-ref-23)
23. 23 Id. at 316. The ruling in Inland Freight clearly implied that absent proof of willful intent to execute a deliberate and purposeful act by one or more employees, criminal conduct, proven by collectivizing the actions of different employees, could not support a conviction of a specific intent crime. [↑](#footnote-ref-24)
24. 24 Inland Freight, 191 F.2d at 315-16. [↑](#footnote-ref-25)
25. 25 Id. at 316. [↑](#footnote-ref-26)
26. 26 381 F. Supp. 730 (1974). [↑](#footnote-ref-27)
27. 27 Id. at 738. [↑](#footnote-ref-28)
28. 28 T.I.M.E.-D.C., 381 F. Supp. at 732-33. The Interstate Commerce Act, promulgated as Federal Highway Administration Regulations, 49 C.F.R. section 392.3 (1974), prohibits both motor carriers and their drivers from driving with impaired abilities or under circumstances likely to impair their ability, making driving unsafe. 49 U.S.C. section 322(a) (1970). [↑](#footnote-ref-29)
29. 29 See supra note 17 and accompanying text. [↑](#footnote-ref-30)
30. 30 49 U.S.C. section 322(a) (1970). [↑](#footnote-ref-31)
31. 31 The violations derived from the motor carrier's attempt to stem the tide of driver absenteeism. T.I.M.E.-D.C., 381 F. Supp. at 733. T.I.M.E.-D.C. had instituted a new company policy whereby a dispatcher would inform the driver calling in sick that his absence would be considered unexcused unless and until the driver submitted documented verification of the ailment. Id. Without some sort of doctor's excuse, the driver would receive an unexcused absence letter, a copy of which would also be placed in the driver's personnel file. Id. The letter would be expunged only when the driver presented documented proof of the ailment; after that, a follow-up letter would issue to the driver excusing the absence. Id. [↑](#footnote-ref-32)
32. 32 T.I.M.E.-D.C., 381 F. Supp. at 736. [↑](#footnote-ref-33)
33. 33 Id. at 733-36. [↑](#footnote-ref-34)
34. 34 Id. at 736. [↑](#footnote-ref-35)
35. 35 Id. at 737. [↑](#footnote-ref-36)
36. 36 Id. [↑](#footnote-ref-37)
37. 37 T.I.M.E.-D.C., 381 F. Supp. at 738. "It is the court's opinion that the Company had sufficient information available to it, through its various employees, to know that the driver$ ('s$ ) ability to drive $ (in the second incident$ ) was impaired, or likely to become impaired, as to make it unsafe for him to begin his trip." Id. at 739. [↑](#footnote-ref-38)
38. 38 Id. at 739. [↑](#footnote-ref-39)
39. 39 Id. [↑](#footnote-ref-40)
40. 40 Id. at 740-41. [↑](#footnote-ref-41)
41. 41 Id. at 741 (citation omitted). [↑](#footnote-ref-42)
42. 42 337 F. Supp. 29 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1972). [↑](#footnote-ref-43)
43. 43 Id. at 31. [↑](#footnote-ref-44)
44. 44 Id. [↑](#footnote-ref-45)
45. 45 Id. at 30. [↑](#footnote-ref-46)
46. 46 785 F.2d 1448 (9th Cir. 1986). [↑](#footnote-ref-47)
47. 47 Id. at 1454. [↑](#footnote-ref-48)
48. 48 Pursuant to federal law, it is illegal to "willfully make and subscribe any return, statement, or other document, which contains or is verified by a written declaration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter." 26 U.S.C. section 7206(1) (1989). Furthermore, it is illegal to:

    willfully aid or assist in, or procure, counsel, or advise the preparation or presentation under, or in connection with any matter arising under the internal revenue laws of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

    26 U.S.C. section 7206(2) (1989). [↑](#footnote-ref-49)
49. 49 United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1451 (9th Cir. 1986). The taxpayer in Shortt became a government informant after SAC advised him to purchase "straddle" investments; i.e., "the simultaneous holding of a contract to purchase and a contract to sell a specific commodity at some time in the future." Id. at 1450. To effect the purchase, it would be necessary to back-date a promissory note because the tax laws had recently changed, disallowing deductions for straddle investments after a certain date. Id. The chief operating officer advised the taxpayer of this plan, knowing it was fraudulent; a different accountant, who was presumably unaware that the deduction was improperly claimed, actually prepared the return. Id. at 1451. [↑](#footnote-ref-50)
50. 50 Shortt, 785 F.2d at 1454. [↑](#footnote-ref-51)
51. 51 Id. [↑](#footnote-ref-52)
52. 52 Id. [↑](#footnote-ref-53)
53. 53 Id. (emphasis added). [↑](#footnote-ref-54)
54. 54 792 F.2d 1380 (9th Cir. 1986) (The court did not find that employees' collective knowledge amounted to a "knowing and voluntary" overpayment where one employee knew what was paid to the seller and another employee knew the contractual ceiling on the price), cert. denied, 480 U.S. 906 (1987). [↑](#footnote-ref-55)
55. 55 ***Kern*** ***Oil***, 792 F.2d at 1386-87. [↑](#footnote-ref-56)
56. 56 Id. at 1387. [↑](#footnote-ref-57)
57. 57 Id. [↑](#footnote-ref-58)
58. 58 Id. at 1387. [↑](#footnote-ref-59)
59. 59 821 F.2d 844 (1st Cir. 1987). [↑](#footnote-ref-60)
60. 60 31 U.S.C. sections 5311-5322 (1982). [↑](#footnote-ref-61)
61. 61 31 C.F.R. section 103.22 (1986). [↑](#footnote-ref-62)
62. 62 Bank of New England, 821 F.2d at 848. McDonough would go to the same branch of the same bank only once in a single day. Id. He would simultaneously present to one teller two to four checks, payable to cash, for various amounts under $ 10,000 which, when added together, amounted to over $ 10,000. Id. In return, the same bank teller would then present McDonough cash totalling more than $ 10,000. Id. [↑](#footnote-ref-63)
63. 63 Id. [↑](#footnote-ref-64)
64. 64 31 U.S.C. section 5313 (1982). [↑](#footnote-ref-65)
65. 65 Bank of New England, 821 F.2d at 854 (citations omitted). [↑](#footnote-ref-66)
66. 66 Id. at 853. [↑](#footnote-ref-67)
67. 67 Id. at 855. The trial court instructed the jury that: "'Knowingly simply means voluntarily and intentionally. It's designed to exclude a failure that is done by mistake or accident, or for some other innocent reason. Willfully means voluntary, intentionally, and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law.'" Id. [↑](#footnote-ref-68)
68. 68 Id. This so-called willful blindness instruction is another illustration of the courts' reduction of the requisite mens rea for specific intent crimes. [↑](#footnote-ref-69)
69. 69 Bank of New England, 821 F.2d at 855 (The trial court instructed the jury that "'if . . . any employee knew that multiple checks would require the filing of reports, the bank knew it, provided the employee knew it within the scope of his employment.'"). [↑](#footnote-ref-70)
70. 70 Bank of New England, 821 F.2d at 855. From this instruction on collective knowledge, the trial court then narrowed the focus in its charge on specific intent:

    There is a similar double business with respect to the concept of willfulness with respect to the bank. In deciding whether the bank acted willfully, again you have to look first at the conduct of all employees and officers, and, second, at what the bank did or did not do as an institution. The bank is deemed to have acted willfully if one of its employees in the scope of his employment acted willfully. So, if you find that an employee willfully failed to do what was necessary to file these reports, then that is deemed to be the act of the bank, and the bank is deemed to have willfully failed to file.

    . . . .

    Alternatively, the bank as an institution has certain responsibilities; as an organization, it has certain responsibilities. And you will have to determine whether the bank as an organization consciously avoided learning about and observing CTR requirements. The Government to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the evidence as to the bank's effort, if any, to inform its employees of the law; its effort to check on their compliance; its response to various bits of information that it got in August and September of '84 and February of '85; its policies, and how it carried out its stated policies.

    . . . .

    If you find that the Government has proven with respect to any transaction either that an employee within the scope of his employment willfully failed to file a required report or that the bank was flagrantly indifferent to its obligations, then you may find that the bank has willfully failed to file the required reports.

    Id. (internal quotations omitted). [↑](#footnote-ref-71)
71. 71 Id. at 855-56. This is the objection that stood in the way of a conviction in ***Kern*** ***Oil***, 792 F.2d at 1387. [↑](#footnote-ref-72)
72. 72 Bank of New England, 821 F.2d at 856. [↑](#footnote-ref-73)
73. 73 Id. [↑](#footnote-ref-74)
74. 74 Id. Curiously, the court alluded to willful blindness, pointing out that "with respect to federal regulatory statutes . . . willfulness $ (is defined$ ) as 'a disregard for the governing statute and an indifference to its requirements.'" Id. (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 127 (1985)). [↑](#footnote-ref-75)
75. 75 Bank of New England, 821 F.2d at 857. [↑](#footnote-ref-76)
76. 76 Nonetheless, as of yet, the Bank of New England theory has not been widely embraced. In both the Second and Third Circuits, district courts have held that while "knowledge possessed by employees is aggregated so that a corporate defendant is considered to have acquired the collective knowledge of its employees . . . specific intent cannot be aggregated similarly." United States v. LBS Bank--New York, Inc., 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990) (citations omitted); see First Equity Corp. v. Standard & Poor's Corp., 690 F. Supp. 256, 260 (S.D.N.Y. 1988). [↑](#footnote-ref-77)
77. 77 See supra note 3 and accompanying text. [↑](#footnote-ref-78)
78. 78 See United States v. General Elec. Corp., CR-1-92-87 (S.D. Ohio July 22, 1992) (pleas of guilty to defrauding the United States, false claims against the United States, engaging in monetary transactions in criminally derived property, failure to make and keep accurate books and records, resulted in $ 9,500,000 criminal fines and $ 59,500,000 in civil penalties); United States v. Georgia-Pacific Corp., No. 1:91-CR321 (N.D. Ga. Oct. 2, 1991) (plea of guilty to one count of tax evasion in connection with charitable donation of property results in $ 21,000,000 in criminal fines, back taxes, penalties and interest); United States v. Lockheed Corp., CR79-00270 (D. D.C. July 1, 1979) (pleas of guilty to wire fraud, false statements, and customs currency violations related to payments of $ 1,800,000 in currency to the office of then-Japanese Prime Minister Tanaka results in $ 647,000 fine). [↑](#footnote-ref-79)
79. 79 Fed. R. Crim. P. 6(g). Grand juries serve for a maximum of 24 months; statutes of most financial crimes are five years, whereas tax crimes have a six-year statute of limitations. [↑](#footnote-ref-80)
80. 80 Bucey, supra note 14, at 1167. [↑](#footnote-ref-81)
81. 81 Essentially the civil respondeat superior doctrine. See supra notes 9-10 and accompanying text. [↑](#footnote-ref-82)
82. 82 National Hockey League, Official Rule Book section 4, Rule 27(b), at 75 (1992-1993 season) ("penalty involves the removal from the ice of one player of the team against which the penalty is assessed for a period of two minutes. Any player except a goalkeeper of the team may be designated to serve the penalty by the manager or coach . . . . "). [↑](#footnote-ref-83)
83. 83 See, e.g., 26 U.S.C. section 7201 (1988) (tax crimes); 18 U.S.C. sections 1341, 1343 (1988) (mail and wire fraud); 41 U.S.C. section 52 (1988) (anti-kickback and bribery). [↑](#footnote-ref-84)
84. 84 United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam); United States v. Bishop, 412 U.S. 346, 360 (1973); see also Edward J. Devitt & Charles B. Blackman, Federal Jury Practice and Instructions (3d ed. 1977) (modified); Committee on Federal Criminal Jury Instructions of the Seventh Circuit, III Federal Criminal Jury Instructions section 6.03 (1986); Committee on Model Jury Instructions Ninth Circuit, Manual of Model Criminal Jury Instructions for the Ninth Circuit section 5.07 (1992). [↑](#footnote-ref-85)
85. 85 Committee on Federal Criminal Jury Instructions of the Seventh Circuit, Federal Criminal Jury Instructions section 6.04 (1980). [↑](#footnote-ref-86)
86. 86 See, e.g., Mattingly v. United States, 924 F.2d 785 (8th Cir. 1991); United States v. Martin, 773 F.2d 599 (4th Cir. 1985). [↑](#footnote-ref-87)
87. 87 United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam); United States v. Bishop, 412 U.S. 346, 360 (1973) ("The word willfully . . . generally connotes a voluntary intentional violation of a known legal duty."). [↑](#footnote-ref-88)
88. 88 North Carolina v. Alford, 400 U.S. 25, 31 (1970) (guilty plea accepted where factual basis exists, but defendant continues to assert his innocence). [↑](#footnote-ref-89)
89. 89 United States v. Nearing, 252 F. Supp. 223, 231 (S.D.N.Y. 1918). [↑](#footnote-ref-90)
90. 90 As the concept of corporate criminal liability expands, American jurists, litigators, and scholars will, by necessity, turn to the law of other international actors. It is the intent of the authors, with this portion of the article, to synthesize leading authorities on each of several countries, and by so doing, provide an overview of how these countries handle corporate criminal conduct. Where necessary, this portion of the article uses secondary sources to discuss cases reported in foreign languages. [↑](#footnote-ref-91)
91. 91 United States v. Van Schaick, 134 F. 592 (C.C.S.D.N.Y. 1904); see generally Kathleen F. Brickey, Death in the Workplace: Corporate Liability for Criminal Homicide, 2 Notre Dame J.L. Ethics & Pub. Pol'y 753 (1987). [↑](#footnote-ref-92)
92. 92 See supra text accompanying notes 77-78. [↑](#footnote-ref-93)
93. 93 For a theoretical discussion of legitimacy of the law, see David Trubeck, Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law, 11 Law & Soc'y Rev. (1977). [↑](#footnote-ref-94)
94. 94 See, e.g., State v. Lehigh Valley R.R., 103 A. 685 (N.J. 1917). Refusing to be limited by the conventional definition of "person" under the statute, the court upheld an indictment for homicide against the corporation on public policy grounds and stated:

    We need not consider whether the modification of the common law by our decisions is to be justified by logical argument; it is confessedly a departure at least from the broad language in which the earlier definitions were stated, and a departure made necessary by changed conditions if the criminal law was not to be set at naught in many cases by contriving that the criminal act should be in law the act of a corporation.

    Id. at 685. [↑](#footnote-ref-95)
95. 95 See supra Part II.C regarding the Bank of New England prosecution. [↑](#footnote-ref-96)
96. 96 L. H. Leigh, The Criminal Liability of Corporations and Other Groups: A Comparative View, 80 Mich. L. Rev. 1508, 1509 & n.5 (1982). [↑](#footnote-ref-97)
97. 97 David Burles, The Criminal Liability of Corporations, 141 New L.J. 609, 609 (1991) (breaches of statutory duty made up the bulk of these prosecutions). [↑](#footnote-ref-98)
98. 98 Id. at 610. [↑](#footnote-ref-99)
99. 99 Id. [↑](#footnote-ref-100)
100. 100 Id. [↑](#footnote-ref-101)
101. 101 Id. [↑](#footnote-ref-102)
102. 102 Burles, supra note 97, at 610. [↑](#footnote-ref-103)
103. 103 Smith & Hogan, Criminal Law 171 (6th ed. 1989). [↑](#footnote-ref-104)
104. 104 Celia Wells, Manslaughter and Corporate Crime, 139 New L.J. 931, 931 (1989); see also Burles, supra note 97, at 611 ("Is it right that a company, which has caused avoidable death and injury because of gross negligence spread throughout its organization, should be considered innocent just because no senior employee is guilty of the crime in his own right?"). [↑](#footnote-ref-105)
105. 105 Id. at 932. [↑](#footnote-ref-106)
106. 106 Chris Corns, The Liability of Corporations for Homicide in Victoria, 15 Crim. L.J. 351, 359 (1991). [↑](#footnote-ref-107)
107. 107 Id. at 360 & n.40 (quoting Criminal Laws: Materials and Commentary on Criminal Law and Process of South Wales 600 (D. Brown et al. eds., 1990)). [↑](#footnote-ref-108)
108. 108 Id. at 360. [↑](#footnote-ref-109)
109. 109 Wells, supra note 104, at 931. [↑](#footnote-ref-110)
110. 110 Wells, supra note 104, at 931. [↑](#footnote-ref-111)
111. 111 88 Crim. App. 10 (1989). [↑](#footnote-ref-112)
112. 112 Id. at 16. [↑](#footnote-ref-113)
113. 113 Id. at 10. [↑](#footnote-ref-114)
114. 114 Stewart Field & Nico Jorg, Corporate Liability and Manslaughter: Should we be going Dutch?, 1991 Crim. L. Rev. 156, 163 (quoting Economic Offenses Act section 15 (Staatsblad van het Kroninkrijk der Nederlanden)). [↑](#footnote-ref-115)
115. 115 Id. (citing Vroom, Hoge Raad der Nederlanden, Feb. 27, 1948, 1948 Nedarlandse Jurisprudentie 197) (holding that corporation could only be held liable if it was within the corporation's power to determine whether the employee acted the way he did and whether the employee's acts were within the sphere of acts accepted by the company as being in the normal course of business). [↑](#footnote-ref-116)
116. 116 Id. at 157 & n.10 (quoting Criminal Code, art. 51(1) and 51(2)). [↑](#footnote-ref-117)
117. 117 Id. at 163-64 (citing Ijzerdraad, Hoge Raad der Nederlanden, Feb. 23, 1954, 1954 Nederlandse Jurisprudentie 378). [↑](#footnote-ref-118)
118. 118 Id. at 164. [↑](#footnote-ref-119)
119. 119 Stewart Field & Nico Jorg, Corporate Liability and Manslaughter: Should we be going Dutch?, 1991 Crim. L. Rev. 156, 158 (citing Rechtbank Leeuwarden, Dec. 23, 1987, partially reported at 1988 Nederlandse Jurisprudentie 981). [↑](#footnote-ref-120)
120. 120 Id. [↑](#footnote-ref-121)
121. 121 Id. at 165. [↑](#footnote-ref-122)
122. 122 Id. [↑](#footnote-ref-123)
123. 123 Id. [↑](#footnote-ref-124)
124. 124 Stewart Field & Nico Jorg, Corporate Liability and Manslaughter: Should we be going Dutch?, 1991 Crim. L. Rev. 156, 165. [↑](#footnote-ref-125)
125. 125 Id. [↑](#footnote-ref-126)
126. 126 Id. at 166. [↑](#footnote-ref-127)
127. 127 Id. [↑](#footnote-ref-128)
128. 128 Id. [↑](#footnote-ref-129)
129. 129 Stewart Field & Nico Jorg, Corporate Liability and Manslaughter: Should we be going Dutch?, 1991 Crim. L. Rev. 156, 166 (quoting French, 157 Health and Safety Information Bulletin 62 (1989)). [↑](#footnote-ref-130)
130. 130 Id. at 167. [↑](#footnote-ref-131)
131. 131 Id. at 166. [↑](#footnote-ref-132)
132. 132 Id. [↑](#footnote-ref-133)
133. 133 Id. (citing ATO, Hoge Raad der Nederlanden, Jan. 27, 1951, 1952 Nederlandse Jurisprudentie 474). [↑](#footnote-ref-134)
134. 134 Stewart Field & Nico Jorg, Corporate Liability and Manslaughter: Should we be going Dutch?, 1991 Crim. L. Rev. 156, 166. [↑](#footnote-ref-135)
135. 135 Id. [↑](#footnote-ref-136)
136. 136 Klaus J. Hopt, The German Inside Trading Guideline--Spring Gun or Scarecrow?, J. Comp. Bus. & Cap. Market L. 381, 393-94 (1986). [↑](#footnote-ref-137)
137. 137 Professor Dr. Gunther Kaiser, Developments in Criminal Law and Penal Systems, 1978: West Germany, 1979 Crim. L. Rev. 719, 721. [↑](#footnote-ref-138)
138. 138 Peter Q. Noack, West German Bank Secrecy: A Barrier to SEC Insider Trading-Investigations, 20 U.C. Davis L. Rev. 609, 609-12 (1987). [↑](#footnote-ref-139)
139. 139 Hopt, supra note 136, at 381. [↑](#footnote-ref-140)
140. 140 Noack, supra note 138, at 610 n.6 (citing Gesetz Uber das Kreditwesen KWG section 1(1)(4)-(6), 1976 Bundesgesetzblatt BGBl I 1121). [↑](#footnote-ref-141)
141. 141 Leigh, supra note 96, at 1522-23. [↑](#footnote-ref-142)
142. 142 Leigh, supra note 96, at 1523. [↑](#footnote-ref-143)
143. 143 Leigh, supra note 96, at 1523. [↑](#footnote-ref-144)
144. 144 Daniel H. Foote, The Benevolent Paternalism of Japanese Criminal Justice, 80 Cal. L. Rev. 317, 342 (1992) (clearance rate is defined as the percentage of crimes solved). [↑](#footnote-ref-145)
145. 145 Id. at 351. [↑](#footnote-ref-146)
146. 146 Mark D. West, Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion, 92 Col. L. Rev. 684, 717-18 (1992). [↑](#footnote-ref-147)
147. 147 Tomoko Akashi, Regulation of Insider Trading in Japan, 89 Col. L. Rev. 1296, 1296-97 (1989). [↑](#footnote-ref-148)
148. 148 Id. at 1296-98. [↑](#footnote-ref-149)
149. 149 Charles R. Stevens, Japanese Law and the Legal System: Perspectives for the American Business Lawyer, 27 Bus. Law. 1259, 1271-73 (1972). [↑](#footnote-ref-150)