Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law

Christopher R. Green
University of Mississippi School of Law

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol87/iss1/4

This Article is brought to you for free and open access by the Law College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law

TABLE OF CONTENTS

I. Introduction ........................................ 198
II. Types of Food-Chain Rules for Punishing Corporations. 199
   A. Liberal Rules ........................................ 200
      1. The Federal Rule for Corporate Crime ........ 200
      2. The Goddard-Mobile Rule for Corporate Punitive Damages ......................... 202
      3. An Accounting of Liberal Rules ................ 204
   B. Types of Restrictive Rules ....................... 204
      1. The MPC Rule for Corporate Crime ............ 204
      2. The Restatement Rule for Corporate Punitive Damages .............................. 206
      3. Lake Shore and the Restrictive-Rule Ratification-Requirement-Regress (5R) Problem ..................................... 209
      4. Corporate-Policy Rules ......................... 212
      5. A Survey of Restrictive-Rule Touchstones ...... 215
      6. Amount-of-Punishment Rules ................... 216
      7. Prosecutorial-Discretion Rules ................ 219
   III. The Schizophrenic Landscape of the Law .............. 221
   A. Consistently Liberal Jurisdictions .............. 226
   B. Consistently Restrictive Jurisdictions .......... 229
   C. Federal-Schizophrenia Jurisdictions ............ 239
   D. Pennsylvania-Schizophrenia Jurisdictions ........ 247
   E. Lack of Cross-Fertilization Between Fields ...... 250

Copyright held by the NEBRASKA LAW REVIEW.

* Assistant Professor of Law, University of Mississippi School of Law. Thanks to Mercer Bullard, David Case, Jancy Hoeffel, Mike Hoffheimer, Farish Percy, Paul Secunda, Bob Weems, and an audience at a meeting of the Southeastern Association of Law Schools, and to the Lamar Order of the University of Mississippi School of Law for their generous support. Please send comments to cr-green@olemiss.edu.
I. INTRODUCTION

American law has been persistently unsettled about when corporations should be punished. In particular, American law has been persistently unsettled when answering what I call the food-chain issue: How high must misbehavior go in a corporate hierarchy before a corporation may be punished? When, if ever, can a corporation legitimately claim that punishment is inappropriate because misbehavior should be attributed only to an individual employee, and not to the corporation itself? More specifically, I will look at the food-chain question for criminal mens rea and civil scienter: when should such improper mental states by an employee be imputed to a corporation?

This article uncovers a schizophrenia regarding the food-chain issue which has not previously been explored. Both criminal law and the law of punitive damages feature a deep split of authority on the food-chain issue between states following a broad rule attributing the mental states of any employee to the corporation and those following a narrow rule only attributing the mental states of relatively important employees. Strikingly, the divisions of authority do not match. Many jurisdictions take different approaches to the food-chain issue in punitive damages and criminal law. More surprisingly, no one has analyzed or assessed this schizophrenia before.

In Part II of this paper, I set out the full menu of approaches that American jurisdictions take with regard to corporate punishment in either criminal law or the law of punitive damages. The broad or liberal rule in both fields tracks the traditional respondeat superior scope-of-employment rule for compensatory damages. Different sorts

1. Because I focus on the attribution of mental states to a corporation, when I discuss criminal law I will focus in this Article on felonies. Many jurisdictions that adopt a higher standard for imposing criminal liability on corporations follow the Model Penal Code section 2.07 in adopting a rule more easily allowing the prosecution of corporate misdemeanors, corporate regulatory offenses with no mens rea element, or corporate omissions. I consider only more serious crimes that involve actual corporate action and the attribution of malice or other improper mens rea.
of narrow or restrictive rules, though, set different criteria for exactly when an employer can escape punishment even though an employee misbehaved in the scope of his employment.

Part III gives a complete picture of the current food-chain-issue schizophrenia. Slightly over half of the American jurisdictions (28 of 55, counting federal law, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands) take inconsistent positions on corporate crime and corporate punitive damages. All four possible approaches are well represented among American jurisdictions. Eleven jurisdictions are Consistently Liberal; sixteen are Consistently Restrictive; eighteen follow Liberal Rules for corporate crime but Restrictive Rules for corporate punitive damages, and ten follow Liberal Rules for corporate punitive damages but Restrictive Rules for corporate crime. A survey of the literature on corporate punitive damages and corporate crime reveals that almost no one, either courts or commentators, has given the issue any attention. This lack of cross-fertilization is particularly curious because there are many ways in which litigants might profitably point out the current schizophrenia to foster their own cases. Some litigants in almost all states can profit by pointing out the connections (and inconsistencies) between the resolution of food-chain issues in criminal law and punitive damages.

In Part IV, I consider whether corporate crime and corporate punitive damages should resolve the food-chain issue the same way. I argue that compelling reasons exist to think that criminal law and the law of punitive damages should apply the same rule to decide when to punish a corporation. Several distinctions might be offered to explain the divergence of approaches, but they do not justify it.

II. TYPES OF FOOD-CHAIN RULES FOR PUNISHING CORPORATIONS

In both criminal law and the law of punitive damages, some states follow what I call the Liberal Rule and some other states follow what I call a Restrictive Rule. The Liberal Rule allows courts to punish a corporation if any employee misbehaves in the scope of her employment—thereby imputing to a corporation any employee's malice, knowledge, recklessness or other scienter or mens rea. The Restrictive Rule allows courts to punish corporations only if relatively high-level employees (the usual term is a "managerial" or "high managerial" employee) misbehave while acting in the scope of their employment—thereby imputing to a corporation only such high-level employees' scienter or mens rea. Put another way, we might divide employees between more important Big-Cheeses and less important Small-Fries. The Restrictive Rule punishes corporations only for Big-Cheese misbehavior, but the Liberal Rule punishes corporations for Small-Fry misbehavior too.
Of the fifty-five jurisdictions I survey, I count a thirty-four to twenty-one advantage for Restrictive Rules on corporate punitive damages and a twenty-nine to twenty-six advantage for Liberal Rules on corporate crime. Therefore, among the 110 rules on corporate punishment, I count a sixty to fifty advantage for Restrictive Rules.

The Liberal Rules for corporate punishment are relatively simple; they simply punish corporations for the same conduct that tort law uses for compensatory damages: the actions of any employee in the scope of employment. Sometimes the Liberal Rule is therefore called a "scope-of-employment" rule. However, there are many types of Restrictive Rules, giving different answers to the food-chain question, "how high in the corporate hierarchy is enough?" The Liberal Rule requires no special articulation, which a Restrictive Rule would require, of a Big-Cheese/Small-Fry distinction. I assume, therefore, that states that allow for a type of corporate punishment without specifying a food-chain limit on its availability follow the Liberal Rule.

A. Liberal Rules

Many courts apply a rule that does not allow a corporation to avoid punishment by disavowing a low-level employee's mental states. If an employee is within the scope of his employment, then his mental states are always imputed to the corporation. If the employee is punishable, so is the corporation.

1. The Federal Rule for Corporate Crime

The Liberal Rule for corporate crime is also known as the "federal" rule, after its establishment in the New York Central & Hudson case in 1909 and succeeding cases. The rule holds that a corporation may be punished for the act of any employee within the scope of his employment, applying the same familiar rules that are applied for compensatory damages. New York Central & Hudson approved a

---

2. See infra Part IV. Several commentators, apparently following Prosser, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 2, at 12–13 (5th ed. 1984), have claimed that the Liberal Rule for punitive damages is in a slight majority. See, e.g., Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2616 (2008); In re P & E Boat Rentals, 872 F.2d 642, 650 (5th Cir. 1989); RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b, § 7.03 cmt. e (2006); David W. Robertson, Punitive Damages in American Maritime Law, 28 J. MAR. L. & COM. 73, 123 (1997); Philip A. Lacovara & David P. Nicoli, Vicarious Criminal Liability of Organizations: RICO as an Example of a Flawed Principle in Practice, 64 ST. JOHN'S L. REV. 725, 731 n.41 (1990). If it was true at the time, it is not true today.


statutory provision that provided for criminal liability regarding the regulation of the rates of common carriers. The provision provided that:

The act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person.6

The Court explained:

While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.7

The Court quoted Joel Prentiss Bishop's commentary: "If . . . the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously."8

Subsequent courts following New York Central & Hudson have expanded the scope-of-employment rule to federal crimes in general. The First Circuit recently explained: "[A] corporation may be held liable for the criminal acts of its agents so long as those agents are acting within the scope of employment."9 The Supreme Court expounded on this notion further in 1958:

The business entity cannot be left free to break the law merely because its owners . . . do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment. Thus pressure is brought on those who own the entity to see to it that their agents abide by the law.10

---

7. N.Y. Cent. & Hudson, 212 U.S. at 495–96.
8. Id. at 493 (quoting 2 Joel Prentiss Bishop, New Commentaries on the Criminal Law Upon a New System of Legal Exposition § 417, at 255–56 (8th ed. 1892)).
Cases from fourteen jurisdictions (Federal law, California, the District of Columbia, Florida, Massachusetts, Nebraska, New Hampshire, North Carolina, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Wisconsin) follow the New York Central & Hudson Liberal Rule for corporate crime. Statutes adopt the rule in another four states (Alaska, Indiana, Kansas, and Maine). Another eleven states (Alabama, Connecticut, Maryland, Mississippi, Nevada, New Mexico, Oklahoma, Puerto Rico, South Carolina, the Virgin Islands, and Wyoming) allow corporate criminal liability without suggesting any food-chain limit; I therefore presume they follow a Liberal Rule.

2. The Goddard-Mobile Rule for Corporate Punitive Damages

One of the first cases to consider the food-chain issue in detail for corporate punitive damages and adopt a Liberal Rule was Goddard v. Grand Trunk Railway from Maine in 1869. The Goddard court made an impassioned defense—Prosser and Keeton call it a "classic diatribe"—of corporate punitive damages, resisting any food-chain limit on their availability. The guilt of any servant acting within the scope of employment is sufficient for punishing the corporation itself: "All attempts . . . to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense." The Liberal Rule for corporate punitive damages, like the Liberal Rule for corporate crime, thus follows the same simple standards for punitive damages that tort law follows for compensatory damages: an employer is liable for actions by an employee in the scope of employment.

---

11. See infra notes 196 (California), 201 (the District of Columbia), 203 (Florida), 109 (Massachusetts), 111 (Nebraska), 115 (New Hampshire), 222 (North Carolina), 224 (Rhode Island), 226 (South Dakota), 126 (Tennessee), 228 (Vermont), 230 (Virginia), and 234 (Wisconsin).
12. See infra notes 194 (Alaska), 103 (Indiana), 209 (Kansas), and 105 (Maine).
13. See infra notes 101 (Alabama), 199 (Connecticut), 107 (Maryland), 214 (Mississippi), 217 (Nevada), 220 (New Mexico), 119 (Oklahoma), 121 (Puerto Rico), 124 (South Carolina), 232 (Virgin Islands), and 236 (Wyoming).
14. 57 Me. 202, 1869 WL 2230 (1869).
15. KEETON ET AL., PROSSER AND KEETON ON TORTS § 2, at 13 n.60 (5th ed. 1984).
16. Goddard, 57 Me. at 223, 1869 WL 2230, at *15 (1869). Judge Tapley disapproved at length from the majority, apparently favoring the abolition of corporate punishment altogether. See, e.g., id. at 235, 247–48, 1869 WL 2230, at *23, *31. It is possible that Tapley would allow corporate punitive damages for the actions of a sufficiently important corporate employee, and that these statements merely reflect what I below call a 5R (Restrictive-Rule Ratification-Requirement Regress) Problem. See infra subsection II.B.3.
The Alabama Supreme Court offered another early defense of the Liberal Rule in its 1893 *Mobile & O. R. Co. v. Seals.* The court considered and rejected adopting a Restrictive Rule: that is, "the view taken by some courts of marked ability, namely, that, while corporations cannot be mulcted in punitive damages for the willfulness of such inferior employees as trainmen, they are responsible in such damages for the willful misconduct of such general executive officers as their presidents, general managers, etc." The court responded, "It can no more be said that the corporation has impliedly authorized or sanctioned the willful wrong of its president, in the accomplishment of some end within his authority, than that a similar wrong by a brakeman, to an authorized end, is the wrong of the corporate entity." The U.S. Supreme Court briefly considered and rejected a constitutional challenge to Alabama's Liberal Rule for corporate punitive damages in 1991.

Cases from fourteen states (Alabama, Arizona, Arkansas, Georgia, Indiana, Maine, Maryland, Missouri, Montana, Oklahoma, Oregon, Pennsylvania, South Carolina, and Tennessee) currently follow the Goddard-Mobile scope-of-employment rule for corporate punitive damages under the common law. I count another seven jurisdictions as following a Liberal Rule for punitive damages, but with some sort of caveat:

- Massachusetts and Louisiana follow Liberal Rules for corporate punitive damages under statutes, though they lack punitive damages under the common law.
- Nebraska, Puerto Rico and Washington also lack common law punitive damages and Nebraska requires punitive awards to go to schools, not plaintiffs. None of the three has indicated that it imposes any food-chain limit on statutory punitive damages, so I presume they follow Liberal Rules for them.
- New Hampshire and Michigan follow Liberal Rules for idiosyncratically-characterized punitive damages—New Hampshire calls them "enhanced compensatory damages," while Michigan interprets them as non-punitive.

18. *Id.* at 919. *Lake Shore & Mich. S. Ry. Co. v. Prentice,* 147 U.S. 101 (1893), released in January 1893, seems to be the "court[ ] of marked ability" most clearly in view; *Mobile* was released in December of the same year.
19. *Mobile,* 13 So. at 919. For another classic diatribe, see *Pullman Palace-Car Co. v. Lawrence,* 22 So. 53, 57-58 (Miss. 1897).
21. *See infra* notes 102 (Alabama), 240 (Arizona), 242 (Arkansas), 245 (Georgia), 104 (Indiana), 106 (Maine), 108 (Maryland), 254 (Missouri), 257 (Montana), 120 (Oklahoma), 260 (Oregon), 263 (Pennsylvania), 125 (South Carolina), and 127 (Tennessee).
22. *See infra* notes 110 (Massachusetts) and 247 (Louisiana).
23. *See infra* notes 112–14 (Nebraska), 122–23 (Puerto Rico), and 273–74 (Washington).
3. An Accounting of Liberal Rules

To sum up my conclusions regarding the fifty Liberal Rules, fourteen are presumed (eleven criminal, three punitive damages). Of the thirty-six explicit Liberal Rules, eighteen relate to corporate crime (fourteen cases and four statutes) and eighteen relate to corporate punitive damages (fourteen apply to common law punitive damages, two to statutory punitive damages, and two to idiosyncratically-characterized punitive damages).

B. Types of Restrictive Rules

While the Liberal Rule follows the same scope-of-employment test that generally governs compensatory damages, a Restrictive Rule makes it harder to punish a corporation than to get compensatory damages, in terms of the importance of the misbehaving employee. The basic idea is that there can be a rogue employee who is not totally outside the scope of his employment (so the corporation still has to pay compensatory damages), but whose actions are sufficiently different from what usually characterizes the corporation that once the corporation gets rid of that employee, or gets him back in line, the corporation itself should not be punished. The rogue employee phenomenon is a bit like an insanity defense for individuals, which prevents punishment but not compensatory damages. However, just as with the insanity defense, there are many different ways to spin out this basic idea.

1. The MPC Rule for Corporate Crime

The Restrictive Rule for corporate crime is most prominently featured in section 2.07 of the Model Penal Code (MPC), adopted by the American Law Institute with the rest of the MPC in 1962. The key food-chain term is "high managerial agent." For the most serious crimes, corporations can be criminally liable if "the commission of

26. See Restatement (Second) of Torts § 895J cmt. a (1979); Robert M. Ague, Jr., The Liability of Insane Persons in Tort Actions, 60 Dick. L. Rev. 211, 211 (1956); Francis H. Bohlen, Liability in Tort of Infants and Insane Persons, 23 Mich. L. Rev. 9, 9 (1924).
27. For more minor crimes, the MPC has three other separate rules for corporate criminal liability. First, for either minor "violation[s]" or for "a statute . . . in which a legislative purpose to impose liability on corporations plainly appears," the MPC allows liability if "the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment." Model Penal Code § 2.07(1)(a) (1962). However, the MPC provides a defense if "the high managerial agent having supervisory authority over the subject matter of the offense employed due diligence to prevent its commission," id. § 2.07(5). I discuss this rule below in subsection II.B.4. Second, for criminal
the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.\textsuperscript{28}

The MPC goes on to define its key food-chain term in terms of policymaking power:

"[High managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.\textsuperscript{29}

The MPC thus defines "sufficiently-important misbehaving employee to warrant corporate punishment" as "sufficiently-important employee to make corporate policy." However, only a few of the states adopting MPC-like Restrictive Rules adopt its definition of "high managerial agent." Many of them allow supervision of other employees to count, and not just policymaking authority, in line with the literal meaning of "managerial."

MPC-style statutes on corporate criminal liability have been adopted in twenty jurisdictions; cases from another four follow similar rules.

- Five jurisdictions (Arizona, Guam, Kentucky, Pennsylvania, and Texas) adopt the MPC's own definition of "high managerial agent" in terms of policymaking.\textsuperscript{30}
- Seven states (Colorado, Illinois, Missouri, Montana, New York, Oregon, and Washington) expand the definition of "high managerial agent" to include both policymakers and supervisors of other employees.\textsuperscript{31}
- Georgia uses the term "managerial official" instead of the MPC's "high managerial agent," defining it in terms of misbehavior by policymakers or supervisors.\textsuperscript{32}
- Two states (Iowa and North Dakota) define corporate criminal liability directly in terms of misbehavior by policymakers or supervisors.\textsuperscript{33}
- Four states (Arkansas, Delaware, Hawaii, and Utah) have statutes with no definition of "high managerial agent."\textsuperscript{34}

omissions, corporations can obviously be punished without any concern for food-chain issues, because no one did what the corporation was required to do. \textit{Id.} § 2.07(1)(b). Third, there is an exception if a specific statute explains whose misbehavior should count. \textit{Id.} § 2.07(1)(a).

28. \textit{Id.} § 2.07(1)(c). In later quotations from state statutes that follow the MPC, I will omit their provisions relating to omissions or violations and only quote their high-managerial-agent provision for the most serious crimes.

29. \textit{Id.} § 2.07(4)(c).


31. \textit{See infra} notes 128-29 (Colorado), 145-46 (Illinois), 252-53 (Missouri), 255-56 (Montana), 163-64 (New York), 258-59 (Oregon), and 264-65 (Washington).

32. \textit{See infra} notes 243-44.

33. \textit{See infra} notes 151 (Iowa) and 169 (North Dakota).

34. \textit{See infra} notes 241 (Arkansas), 133 (Delaware), 141 (Hawaii), and 182 (Utah).
Ohio's statute, discussed in more detail below, adds a due-diligence defense to an MPC-style rule that has been interpreted to apply to misbehavior by policymakers.35 Cases from four states adopt MPC-like Restrictive Rules for corporate criminal liability. They apply to misbehavior by supervisors (Michigan), policymakers (Minnesota and Idaho), and "officers" (Louisiana).36

2. The Restatement Rule for Corporate Punitive Damages

The Restrictive Rule for punitive damages is most prominently featured in the Restatements of Torts and Agency. Section 909 of the Restatement (Second) of Torts, from 1976, reads:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
(d) the principal or a managerial agent of the principal ratified or approved the act.37

35. See infra subsection II.B.4 and notes 173–74.
36. See infra notes 248–49 (Michigan), 158 (Minnesota), 143 (Idaho), and 246 (Louisiana).
37. RESTATEMENT (SECOND) OF TORTS § 909 (1979). This basic rule was first adopted in section 909 of the First Restatement of Torts, from 1939:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal was reckless in employing him, or
(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
(d) the employer or a manager of the employer ratified or approved the act.

Because subsections (a) and (b) deal with a principal's own conduct, and a corporation acts only through an agent, these sections cannot explain fully when a corporation faces liability. The key standard for our food-chain issue is subsection (c), in particular the phrase "employed in a managerial capacity." Subsection (d)'s "manager of the employer" is presumably synonymous with this phrase from (c). This language has been the basis for all of the ALI's later Restrictive Rules.

The first edition of the Restatement of Agency, completed in 1933, lacked a provision on punitive damages, but section 217C of 1958's second edition copied section 909's provision. The only change was the substitution of "managerial agent of the principal" in the Restatement of Agency for the Restatement of Torts' "manager of the employer" in (d). See Restatement (Second) of Agency § 217C (1958). The Restatement noted a division of authority, however: "The cases are divided; some courts impose liability upon a master for unauthorized wanton acts of servants who are not managers; others do not." Id. cmt. a.

In 1979, the Restatement (Second) of Torts added "or a managerial agent" to subsections (a) and (b) of section 909, so that the section now reads as quoted above.
This revision makes the Restatement's answer to the food-chain issue (whose misconduct counts?) clear to an extent: the misconduct of "managerial agents." The Restatement's commentary, however, gives no more detail on when that standard is met.

Courts dealing with the Restatement's Restrictive Rule commonly struggle with what "managerial" means. The Restatement (Third) of Agency states that "there is no rigid test to determine whether an agent is a 'managerial agent'". The Supreme Court, while adopting the standard for Title VII, noted: "[N]o good definition of what consti-

---

The Restatement (Second) of Agency also included a short provision on corporate crime, section 217D. It says only: "A principal may be subject to penalties enforced under the rules of the criminal law, for acts done by a servant or other agent." Restatement (Second) of Agency § 217D. Comment a added, "It is not within the scope of the Restatement of this Subject to state in detail the rules by which a master or other principal may become subject to a criminal penalty." Id. § 217D cmt. a. Comment d noted with respect to offenses requiring criminal intent, "[A]s in the case of punitive damages, an employer may be penalized for the act of an advisory or managerial person acting in the scope of employment." Id. § 217D cmt. d. The Restatement (Third) of Agency does not include any reference to section 217D of the second edition.

Comment e from the 2006 Restatement (Third) of Agency endorses the earlier Restatements' view, while, relatively mildly, noting the division of authority and commenting that "[t]he approach outlined in § 909 is preferable." Restatement (Third) of Agency § 7.03 cmt. e (2006).

38. Restatement (Third) of Agency § 7.03 cmt. e. The Restatement added, however, these comments that suggest that "managerial agents" are policymakers:

Although there is no rigid test to determine whether an agent is a "managerial agent" for purposes of Restatement (Second) Torts § 909, the determination should focus on the agent's discretion to make decisions that would have prevented the injury to the plaintiff or that determine policies of the organization relevant to the risk that resulted in the injury. The title that an agent holds is not dispositive, nor is the fact that the agent is not among the highest in an organization's hierarchy. If an agent in fact manages a business or enterprise, the agent is a "managerial agent" of the principal on whose behalf it manages, although the agent is external to the principal's own organizational structure.

Id. The initial phrase, "the agent's discretion to make decisions that would have prevented the injury to the plaintiff," seems broader than intended. The injury to the plaintiff was caused by an employee's misbehavior, and even the most minor misbehaving employee had the discretion not to misbehave as he did, and therefore "discretion to make decisions that would have prevented the injury to the plaintiff." (If he lacked such discretion because the misbehavior was required by those higher in the corporate hierarchy, then such higher employees should be the focus of inquiry. There is always someone in a corporate hierarchy with discretion not to do or require whatever led to the plaintiff's injury, but the point of the rule is that punitive damages are not always available against a corporation.). The second phrase, on power to "determine policies of the organization," makes much more sense as a definition of "managerial agent."
tutes a 'managerial capacity' has been found."39 One court called it an "elusive label."40

The Model Punitive Damages Act, adopted in 1996 by the National Conference of Commissioners on Uniform State Laws, sets aside the "managerial" concept, substituting "policymaking authority":

If a director, officer, or agent, with policymaking authority to bind a legal entity or other principal, is found liable for punitive damages under Section 5 for an act or omission occurring in the course and within the scope of exercising the authority on behalf of the entity or principal, the entity or principal is also liable for punitive damages.41

However, the commentary on the Act says that the rule "basically tracks the American Law Institute Restatements regarding vicarious responsibility for punitive awards."42

Twenty-four jurisdictions apply a Restatement-style rule or a variant to corporate punitive damages. Most of them do not give any significant explanation of exactly who counts as a managerial employee, though a few do:

- Three states (Alaska, California, and Minnesota) have adopted Restatement-style statutes.43 California and Minnesota interpret their statutes in terms of the misbehavior of policymakers.44
- Florida and North Carolina have adopted a statute somewhat like the Restatement, allowing corporate punitive damages for the actions of "officers, directors, or managers." The broadest term, "managers," seems similar to (and as incompletely-defined as) the Restatement's "managerial agents." Florida's statute also, however, allows corporate punitive damages for gross negligence, perhaps even by minor employees.45
- Cases from another seventeen jurisdictions (Colorado, Delaware, Guam, Idaho, Illinois, Iowa, New Jersey, New Mexico, New York, Nevada, South Dakota, Texas, Utah, Vermont, Virgin Islands, West Virginia, and Wyoming) follow the Restatements.46 Guam, Illinois, New Jersey, and Nevada interpret "managerial agents" as policymakers, though New Jersey prefers the term "upper management."47 New York says that its rule is "in essence" that of the Restatement, but uses the term "superior officers."

42. Id. § 6 commentary (1996).
43. See infra notes 195 (Alaska), 197 (California), and 158 (Minnesota).
44. See infra notes 198 (California) and 169 (Minnesota).
45. See infra notes 205 (Florida) and 227 (North Carolina).
46. See infra notes 131 (Colorado), 134 (Delaware), 140 (Guam), 144 (Idaho), 147, 149 (Illinois), 152 (Iowa), 218 (Nevada), 221 (New Mexico), 165 (New York), 227 (South Dakota), 181 (Texas), 183 (Utah), 229 (Vermont), 232 (Virgin Islands), 186 (West Virginia), and 237 (Wyoming).
47. See infra notes 140 (Guam), 149 (Illinois), 162 (New Jersey) and 219 (Nevada).
covering them as those who have "a high level of general managerial authority" and represent a corporation's "institutional conscience." 48

- Kansas uses a Restatement-like standard to interpret its statute. 49
- Federal law for Title VII uses a hybrid of the Restatement's rule with a good-faith defense (discussed in more detail below). 50

3. Lake Shore and the Restrictive-Rule Ratification-Requirement-Regress (5R) Problem

Prior to the Restatements, the most prominent Restrictive Rule for corporate punitive damages was an 1893 case from the Supreme Court under the pre-Erie general federal common law, Lake Shore & Michigan Southern Railway Co. v. Prentice. 51 The Court seemed to impose a strict requirement that an agent's misbehavior must be ratified by the principal in order to support punishment of the principal: "A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent." 52

Lake Shore illustrates one recurrent problem that plagues many statements of the Restrictive Rule. Many courts, and a few statutes, say that it is not enough if a low-level employee misbehaves; that misbehavior must be ratified by the corporation (if not specifically authorized in advance). Plainly, such courts reject a Liberal Rule; more is required for corporate punishment than misbehavior by an employee in the scope of his employment. However, it is not at all clear what more is required, because it is not clear who must ratify a low-level employee's actions to justify corporate punishment. One way to view the point is to see that someone who himself misbehaves has, of course, ratified that misbehavior. But if misbehavior by a low-level employee is not enough to justify punishing a corporation, ratification by a low-level employee is obviously likewise not enough. And if a mid-level employee ratifies a low-level employee's misconduct, that ratification is itself misbehavior that, one might think, does not warrant corporate punishment unless it is ratified. Once we require that misbehavior be ratified in order to warrant corporate punishment, we should also apply that rule to the act of improper ratification. But a regress looms—any act of ratification of the improper ratification would be misbehavior that must itself be ratified before corporate

48. See infra note 166.
49. See infra note 211.
50. See infra subsection II.B.4.
51. 147 U.S. 101 (1893).
52. Id. at 107.
punishment would be proper.\textsuperscript{53} Thus the Restrictive-Rule Ratification-Requirement-Regress (5R) Problem. The problem does not plague all statements of the Restrictive Rule, but only Restrictive Rules with an open-ended requirement of ratification. The Restatement, for instance, avoids the 5R Problem by specifying that ratification \textit{by a managerial employee} is what counts in justifying corporate punishment.\textsuperscript{54} If we see misbehavior as implicitly self-ratifying (as we should), then it only makes sense to say that when employees whose ratification of misbehavior counts toward corporate punishment themselves misbehave, corporate punishment is similarly proper. That is, \textit{Restatement} section 909(c) (allowing corporate punishment for a managerial employee’s misbehavior) is the natural complement of \textit{Restatement} section 909(d) (allowing corporate punishment for a managerial employee’s ratification of other’s misbehavior).

\textit{Lake Shore} itself is clear that it does not abolish corporate punitive damages altogether: “No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation.”\textsuperscript{55} The Court did not, however, explain what “brought home” means. The Court clearly rejected the theory that showing just \textit{any} employee’s misbehavior is enough, but the Court did not say how high is high enough.\textsuperscript{56}

\textsuperscript{53} The regress might stop if the board of directors ratified an instance of misbehavior, and we were to treat the board differently from others who act on behalf of the corporation. But the argument might still be raised that the board’s decision was \textit{ultra vires}, or otherwise contrary to corporate policy or not really the corporation’s action, if not ratified. In any event, I assume that those who adopt Restrictive Rules want to allow corporate punishment even when misbehavior is not specifically adopted by the board of directors. However, stating a requirement of ratification does not say when that is possible; thus the 5R Problem.

\textsuperscript{54} \textit{See Restatement (Second) of Torts} § 909 (1979).

\textsuperscript{55} 147 U.S. at 111.

\textsuperscript{56} The cases that \textit{Lake Shore} cites at this point do not, for the most part, answer the food-chain question with much clarity. \textit{Phila., Wilmington. & Balt. R.R. Co. v. Quigley}, 62 U.S. (21 How.) 202, 209–10 (1858), held that a corporation could be liable for libel, which requires malice, but reversed punitive damages without making any food-chain rule clear. In fact, the Court seems to adopt a scope-of-employment Liberal Rule in rejecting the defendant’s claims that it necessarily lacked malice. \textit{Id.} at 214. \textit{Milwaukee & St. Paul R.R. Co. v. Arms}, 91 U.S. 489, 495 (1875), reversed punitive damages because of the lack of willfulness. The Court does not suggest any food-chain limit. \textit{Denver & Rio Grande Ry. Co. v. Harris}, 122 U.S. 597, 610 (1887), affirms punitive damages and notes that the “controlling officers” and “governing officers” were the ones who misbehaved. However, it is not clear whether misconduct by officials of such rank is \textit{required} for punitive damages. \textit{Caldwell v. N. J. Steamboat Co.}, 2 Sickels 282, 1872 WL 9721 (N.Y. 1872), notes only a requirement of notice of an employee’s bad habits, without explaining who in the corporate hierarchy must have such notice. However, the treatise cited in \textit{Caldwell} makes a little headway in answering the food-
An old maritime case from Justice Story, 1818's *The Amiable Nancy*, similarly excluded punitive damages for those who are "innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree."57 Such a requirement, if applied to corporations, similarly poses a 5R Problem (if it does not eliminate corporate punitive damages altogether).

All of the instances of 5R Problems I have uncovered apply only to corporate punitive damages; none deal with corporate crime. Statutes from three states (Ohio, Kentucky, and Kansas)58 and current cases from another ten jurisdictions (federal law, Colorado, Connecticut, Delaware, Hawaii, North Dakota, Virginia, West Virginia, and Wisconsin)59 impose ratification requirements for corporate punitive damages that pose 5R Problems. As noted above, four of these states (Colorado, Delaware, Kansas, and West Virginia) also follow the Restatement, making clear that corporate punitive damages are authorized, but as with *Lake Shore*, it is not clear exactly when.

chain question, suggesting that the misbehavior of "superintending agents" may warrant corporate punishment. *THOMAS G. SHEARMAN & AMAZA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE* § 601, at 676-77 (2d ed. 1870).


58. *See infra* notes 175 (Ohio), 155 (Kentucky), and 210 (Kansas).

59. *See infra* notes 132 (Colorado), 200 (Connecticut), 136 (Delaware), 142 (Hawaii), 170 (North Dakota), 225 (Rhode Island), 231 (Virginia), 187 (West Virginia), and 235 (Wisconsin). A prominent older case from Florida also poses a 5R Problem. *See infra* note 205.
4. **Corporate-Policy Rules**

As noted above, several Restrictive Rules in both corporate crime and corporate punitive damages place emphasis on whether a decision is made by a policymaker. But it might be possible for *policy*, or corporate culture, to exist, even without an explicit decision by a policymaker. For instance, a corporation might have twenty employees governed by a single supervisor who only intervenes occasionally. The employees may, by learning from each other, develop certain informal practices and customs without the dictation of the supervisor. If it is the existence of policy as such that should matter for corporate punishment, then a Restrictive Rule that requires misbehavior or ratification by a policymaker will be too restrictive. Spontaneous order may arise among low-level employees of a corporation, even without any policymaker directing particular actions: "[F]irms . . . are a response to a lack of centralized knowledge on the part of the individuals who make up the firm. The firm coordinates diffuse knowledge both through planned, hierarchical structures and rules and through spontaneously generated, interstitial rules and customs, best captured in the phrase "corporate culture.""

A few states have articulated rules allowing corporations to avoid punishment when misbehavior is contrary to the way corporations' employees usually behave. The District of Columbia allows punitive damages if a corporate defendant engaged in a "general practice" of misbehavior, even if the misbehaving employee is a minor one. Missisippi has reversed a punitive award where a misbehaving employee's actions were contrary to a corporate policy manual, and indicated that punitive damages depend on an assessment of the gen-

60. The existence of informal customs in addition to officially promulgated policies is recognized in the text of 42 U.S.C. § 1983 and is very important for municipal liability. See Monell v. Dept of Soc. Servs., 436 U.S. 658, 690-91 (1978).

61. John M. Czarnetzky, *Time, Uncertainty, and the Law of Corporate Reorganizations*, 67 FORDHAM L. REV. 2939, 2945 (1999) (describing the views of Austrian economists such as Friedrich W. Hayek). The Sentencing Guidelines' reference to the "pervasive" activity among supervisory "substantial authority" employees—which substitutes for actions by policymaking "high level" employees, see infra note 82 and accompanying text—suggests a similar idea of policy that emerges through spontaneous Hayekian processes, rather than only through the explicit actions of policymakers.

62. See Remeikis v. Boss & Phelps, Inc., 419 A.2d 986, 992 (D.C. 1980). Construing West Virginia law, the District Court for the District of Columbia held that a "pattern of conduct" would support corporate punitive damages. Karahmetoglu v. Res-Care, Inc., 480 F. Supp. 2d 183, 189 (D.D.C. 2007). The court combined this rule with one posing a 5R Problem. *Id.* ("[I]n the absence of a showing by the plaintiff that [the corporate defendant] acted with malice or that [the victim's] abuse was part of a pattern of such abuse, the Court will grant summary judgment for the defendants on the punitive damages claim.").

eral character of a corporation. West Virginia excludes corporate criminal liability for "a single offense committed by . . . an agent or servant in violation of the rules of such company."

Such an approach is closely akin to a due-diligence defense, which would allow any employee's misbehavior to count, but would remove liability if corporate policymakers acted diligently to prevent it. The MPC rule for minor crimes allows liability, like the Liberal Rule, for the behavior even of minor employees. However, unlike the Liberal Rule, it allows corporations to defend against liability if "the high managerial agent having supervisory authority over the subject matter of the offense employed due diligence to prevent its commission."

New Jersey takes this approach for all corporate crimes.

A rule that required the corporate defendant to show its due diligence would differ procedurally from a rule that required the government or civil plaintiff to show that the misbehaving employee acted in line with corporate policy or culture, but the substantive rule of conduct—no liability where an employee's misbehavior is contrary to cor-

64. Doe ex rel. Doe v. Salvation Army, 835 So. 2d 76, 81–82 (Miss. 2003) (reversing punitive damages because an employee's actions were inconsistent with the corporate defendant's "goals and doctrines" and what the corporate defendant "promotes").
66. Richard Gruner suggests, contrary to all other observers, that there actually is a due-diligence defense to corporate criminal liability under current federal law. See RICHARD S. GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION § 6.01, at 6-3 to 6-4 (2004). However, he relies on United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), which explicitly rejects such a defense: "[A]s a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent." Hilton Hotels, 467 F.2d at 1007. Perhaps Gruner means to pick up on "as a general rule" to infer the possible existence of a contrary-to-policy defense in other circumstances. However, in the context, that reading seems implausible. This statement from Hilton Hotels is quoted in United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir. 1978). Gruner says that with this quotation, the Fifth Circuit "has endorsed the due diligence defense and corporate criminal liability standards described in Hilton." RICHARD S. GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION § 6.01, at 6-4 (2004). On the contrary; the Fifth Circuit in Cadillac Overall endorsed Hilton's rejection of a due diligence defense to corporate criminal liability. Gruner also cites United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948), which states plainly, "No distinctions are made in these cases [considering corporate criminal liability] between officers and agents, or between persons holding positions involving varying degrees of responsibility." RICHARD S. GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION § 6.01, at 6-4 to 6-5 (2004). The court in Armour noted that management should have been aware of the misbehavior, but did not suggest that it would have arrived at a different result had that not been the case. See 168 F.2d at 343.
68. Id.
69. N.J. STAT. ANN. § 2C:2-7(c) (West 2005).
porate policy and culture—would be the same. There would also be an important difference about what to do where there is no policy on an issue. If the plaintiff or government were required to show conformity of an employee's misbehavior with corporate policy, then such cases would allow no punishment. If, however, the corporate defendant were required to show a contrary corporate policy, then such cases would allow corporate punishment.

It is possible to add a contrary-to-corporate-policy defense to a Restrictive Rule that already limits corporate punishment to misbehavior by relatively-important employees. Applying "the general common law of agency," the Supreme Court fashioned such a Restrictive Rule for Title VII corporate punitive damages in *Kolstad v. American Dental Association.* The Court began with the Restatement's Restrictive Rule, allowing punishment for any actions of managerial employees within the scope of their employment, but argued that this was still too permissive. As a result, the Court also barred punitive damages if a managerial employee's actions were contrary to a corporate good-faith policy to comply with Title VII. The Court explained: "Where an employer has undertaken such good faith efforts at Title VII compliance, it demonstrates that it never acted in reckless disregard of federally protected rights."

A number of commentators have suggested corporate-policy Restrictive Rules. But only the four jurisdictions described above (Mis-

70. We might call this an *ontological* gap in policy—the existence of actions of corporate employees not governed by corporate policy either way. Different burdens of proof address the corresponding *epistemic* gap—where the fact-finder does not know whether or not actions of corporate employees are consistent with corporate policy.


72. *Id.* at 544–46. The Court's rationale for adding a good-faith defense for punitive damages is not based on anything special about Title VII. Whatever sort of misbehavior is at issue, if that misbehavior is contrary to corporate good-faith efforts to comply with the law, there is an equally strong argument against punishing a corporation. We could equally say for any sort of legal obligations that "[w]here an employer has undertaken such good faith efforts at [avoiding misbehavior by employees], it demonstrates that it never acted in reckless disregard of [its legal obligations]." The reward of a punitive-damages defense would be an equally appropriate incentive for any sort of program of following the law.

Mississippi and the District of Columbia's rules on corporate punitive damages, and New Jersey and West Virginia's rules on corporate crime) adopt such rules. Similar to Kolstad's hybrid of the Restatement with a good-faith defense, Ohio's rule for corporate crime also combines a due-diligence defense with a rule limiting corporate liability to misbehavior by policymakers.\(^{74}\)

5. A Survey of Restrictive-Rule Touchstones

Collecting the results for our sixty-one Restrictive Rules (counting federal law as two, for Title VII and the general common law), we find an interesting array of ultimate touchstones for who must misbehave to support corporate punishment.

Particularly striking in this table of Restrictive Rules is the difference between the thirty-six rules for corporate crime and the thirty-five rules for corporate punitive damages. The punitive-damages versions of the rules tend to have much less clarity than the rules for corporate crime. The commentary to the MPC is right in noting that while its own rules "are necessarily very general,[...,] they are considerably more precise than those enunciated by many courts as a matter of decisional law,"\(^{75}\) and in the area of corporate crime, the MPC has had an important influence in favor of more precision. If I am right in my argument below that corporate crime and corporate punitive damages should follow the same food-chain rule, courts applying Restrictive Rules that lack precise definition would do well to pay attention to the variety of standards used in clarifying other Restrictive Rules.

Also, only two of the sixteen jurisdictions with Restrictive Rules in both fields have similar rules for each field; Guam and Minnesota, follow policymaker touchstones in both fields. But Colorado, Delaware,
Hawaii, Idaho, Illinois, Iowa, Kentucky, New Jersey, New York, North Dakota, Ohio, Texas, and West Virginia all follow different rules, or have different degrees of precision, in the two fields.

6. Amount-of-Punishment Rules

The discussions above survey the variety of answers to the threshold question of when an employee’s misbehavior warrants corporate punishment. But there are also very similar food-chain issues related to how much punishment a corporation deserves.

Federal criminal law’s Liberal Rule recognizes no food-chain defense to criminal liability, but chapter 8 of the Federal Sentencing Guidelines recognize the food-chain issue as an important factor in deciding the amount of punishment. The Guidelines lower a corporation’s sentence if only lower-level employees were involved in a crime or if the crime occurred despite an “effective compliance and ethics program.” To implement these rules, the Guidelines divide employees into three categories: “high-level,” “substantial authority,” and others.
The first key term is described in terms of policy-making, the second in terms of discretion and the supervision of others.

The Introductory Commentary for chapter 8 as a whole lists "the existence of an effective compliance and ethics program" as a mitigating factor. Section 8B2.1 gives great detail on what constitutes an "effective compliance and ethics program." In brief, through such a program an organization would "(1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." Section 8C2.5(f)(1) allows a three-point reduction in "culpability points" if an employee's crime occurred in spite of such a program.

The "high level" and "substantial authority" concepts are relevant both for aggravation of culpability (if such employees are involved in a crime) and for its mitigation (if there is an effective compliance program). Section 8C2.5(b) sets out the rules on food-chain aggravation of culpability. They apply if a member of high-level personnel is culpable regarding a crime (i.e., either "participated in, condoned, or was willfully ignorant of the offense"), or if there is "pervasive" tolerance of a crime among substantial-authority personnel.

---

76. U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. n.3(b) (2007).
77. Id. § 8A1.2 cmt. n.3(c).
78. Id. ch. 8, introductory cmt.
79. Id. § 8B2.1(a).
80. Id. § 8C2.5. These points are different from the "offense level" points used to determine sentences throughout the Guidelines. Under the table in section 8C2.6, culpability points affect the range of permitted sentences by allowing a fine to be multiplied by up to 4, or reduced by a factor of up to 20.
81. The reduction does not apply, though, if there is unreasonable delay in reporting the offense to governmental authorities, U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(2) (2007), or if high-level personnel of either an organization or of an over-200-employee unit (or the employee responsible for maintaining the compliance program itself), was culpable regarding the crime. See id. § 8C2.5(f)(3)(A) (referring to "an individual described in § 8B2.1(b)(2)(B) or (C)"); id. § 8B2.1(b)(2)(B) ("Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program."); id. § 8B2.1(b)(2)(C) ("Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program."). For under-200-employee organizations, culpability of high-level personnel only raises a rebuttable presumption that a compliance program is ineffective, and a similar rebuttable presumption arises if substantial-authority personnel are involved for an organization of any size. Id. § 8C2.5(f)(3)(B).
82. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(b). The rules apply if either an entire organization or a unit within an organization has a particular number of employees. For organizations or units over 5000 employees, such aggravating circumstances increase the culpability score by 5 culpability points. Id. § 8C2.5(b)(1). For organizations or units between 1000 and 5000 employees, such aggravating circumstances increase the culpability score by 4 points. Id. § 8C2.5(b)(2). For organizations or units between 200 and 1000 employees, such
In general, the Federal Sentencing Guidelines represent a far more detailed assessment of the quantum of punishment appropriate to different sorts of misbehavior than anything in the law of punitive damages. The constitutional standards of BMW v. Gore and its progeny, for instance, merely state the importance of reprehensibility, amount of actual harm, and comparison to other penalties,\(^8\) while state statutes on the size of punitive damages generally only list several factors to be considered by the jury.\(^4\) Oklahoma and Minnesota's statutes list the food-chain issue among these size-of-punitive-damages factors, but most such statutes do not.\(^5\) Guidelines to govern the size of punitive damages, akin to sentencing guidelines, may make more sense than the current laundry lists of factors.\(^6\) Especially for Liberal Rule states, it would make eminent sense to include food-chain issues in such guidelines, as in the Sentencing Guidelines. Even Restrictive Rule states might, however, distinguish among relative Big-Cheeses in its hierarchy; a misbehaving employee might be important enough to warrant some punishment, but sufficiently low-level that such punishment should be relatively small.

aggravating circumstances increase the culpability score by 3 points. Id. § 8C2.5(b)(3). For organizations smaller than 200 employees, the guidelines both omit the "unit" prong, and find aggravating circumstances if a substantial-authority employee is culpable regarding the crime. See id § 8C2.5(b)(4)-(5). For organizations between 50 and 200 employees, such aggravation adds 2 points. Id. § 8C2.5(b)(4). For organizations between 10 and 50 employees, such aggravation adds 1 point. Id. § 8C2.5(b)(5).


85. See MINN. STAT. ANN. § 549.20(3) (West 2000) (listing as a factor for the size of punitive damages “the number and level of employees involved in causing or concealing the misconduct”); OKLA. STAT. ANN. tit. 23, § 9.1(A)(6) (West 2008) (listing as a factor for the size of punitive damages “[i]n the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct”).

86. See generally Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2629 (2008) (“[A]s long as there are no punitive-damages guidelines, correspondingly to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary.” (quoting Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003))); Jenny Mao Jiang, Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law, 94 CAL. L. REV. 793, 795 (2006).
In future work I will defend an approach to food-chain issues that recognizes that the rogue-employee phenomenon need not be an all-or-nothing issue, but can come in degrees. If that is right, then food-chain issues should inform both the amount of punishment as well as its availability. Here I merely highlight the issue because it is usually overlooked; an amount-of-punishment approach is a way to adopt a Liberal Rule while recognizing in part the factors that motivate courts to adopt the Restrictive Rule.

7. Prosecutorial-Discretion Rules

In addition to these food-chain issues in federal criminal sentencing, the federal Liberal Rule for corporate crime is tempered by rules governing prosecutors. Near-identical memoranda by Deputy Attorneys General Eric Holder in 1999, Larry Thompson in 2003, and Paul McNulty in 2006 recognize food-chain issues as relevant to the federal charging decision. The memoranda list several factors that guide whether to indict a corporation, five of which include:

- "The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management."90
- "The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it."91
- "The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges."92
- "The existence and adequacy of the corporation's compliance program."93

90. Holder Memorandum, supra note 87, part II(A)(2); see also McNulty Memorandum, supra note 89, part III(A)(2), at 4 (repeating same language); Thompson Memorandum, supra note 88, part II(A)(2) (repeating same language).
91. Holder Memorandum, supra note 87, part II(A)(3); see also McNulty Memorandum, supra note 89, part III(A)(3), at 4 (repeating same language); Thompson Memorandum, supra note 88, part II(A)(3) (repeating same language).
92. Holder Memorandum, supra note 87, part II(A)(4); see also McNulty Memorandum, supra note 89, part III(A)(4), at 4 (repeating same language, but omitting "including, if necessary, the waiver of the corporate attorney-client and work product privileges"); Thompson Memorandum, supra note 88, part II(A)(4) (repeating same language).
93. Holder Memorandum, supra note 87, part II(A)(5); see also McNulty Memorandum, supra note 89, part III(A)(5), at 4 (repeating same language, but adding
• "The corporation's remedial actions, including any efforts to implement an
effective corporate compliance program or to improve an existing one, to
replace responsible management, to discipline or terminate wrongdoers, to
pay restitution, and to cooperate with the relevant government
agencies." 94

The memoranda comment on when a prosecutor should acknowledge a
rogue employee as a reason not to prosecute:
Charging a corporation for even minor misconduct may be appropriate where
the wrongdoing was pervasive and was undertaken by a large number of em-
ployees or by all the employees in a particular role within the corporation, e.g.,
salesmen or procurement officers, or was condoned by upper management.
On the other hand, in certain limited circumstances, it may not be appropriate
to impose liability upon a corporation, particularly one with a compliance pro-
gram in place, under a strict respondeat superior theory for the single isolated
act of a rogue employee. . . . Of these factors, the most important is the role of
management. Although acts of even low-level employees may result in crimi-
nal liability, a corporation is directed by its management and management is
responsible for a corporate culture in which criminal conduct is either discour-
aged or tacitly encouraged. 95

Past conduct is relevant because it suggests a deficient corporate cul-
ture. 96 Corporate willingness to help in the prosecution of employees,
while not conclusive, is a relevant factor for corporate culpability. 97
The memoranda are quick to point out that corporate compliance pro-
grams are not a defense, 98 but note some factors in assessing them as
a reason not to prosecute. 99

(and stressing) that compliance programs should be "pre-existing"; THOMPSON
MEMORANDUM, supra note 88, part II(A)(5) (repeating same language).
94. HOLDER MEMORANDUM, supra note 87, part II(A)(6); see also McNULTY MEMORAN-
dum, supra note 89, part III(A)(6), at 4 (repeating same language); THOMPSON
MEMORANDUM, supra note 88, part II(A)(6) (repeating same language).
95. HOLDER MEMORANDUM, supra note 87, part IV(A)–(B). The memorandum then
quotes the statement on "pervasiveness" in U.S. SENTENCING GUIDELINES MAN-
ual § 8C2.5 cmt. n.4 (2006). HOLDER MEMORANDUM, supra note 87, part IV(B);
see also McNULTY MEMORANDUM, supra note 89, part V(A)–(B), at 6 (repeating
same language and quotation from Sentencing Guidelines); THOMPSON MEMORAN-
dum, supra note 88, part IV(A)–(B) (repeating same language and quotation from
Sentencing Guidelines).
96. HOLDER MEMORANDUM, supra note 87, part V(B) (citing U.S. SENTENCING GUIDE-
lines Manual § 8C2.5(c)(2006)); see also McNULTY MEMORANDUM, supra note 89,
part VI(B), at 6–7 (repeating same language); THOMPSON MEMORANDUM, supra
note 88, part V(B) (repeating same language).
97. HOLDER MEMORANDUM, supra note 87, part VI(B); see also McNULTY MEMORAN-
dum, supra note 89, part VII (B)(5), at 12 (repeating same language); THOMPSON
MEMORANDUM, supra note 88, part VII(B) (repeating same language).
98. See HOLDER MEMORANDUM, supra note 87, part VII(B) ("A corporate compliance
program, even one specifically prohibiting the very conduct in question, does not
absolve the corporation from criminal liability under the doctrine of respondeat
superior."); McNULTY MEMORANDUM, supra note 89, part VIII (B), at 13 (repeating
same language); THOMPSON MEMORANDUM, supra note 88, part VII(B) (repeating
same language).
99. HOLDER MEMORANDUM, supra note 87, part VII(B). The Holder Memorandum
cites the U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. n.3(k) (2006) for "a
PUNISHING CORPORATIONS

In general, then, these guidelines highlight the same factors as the Restrictive Rules explained above. Corporate culture and implicit policy as well as the behavior of supervisors and policymakers are all important, but the guidelines do not specify exactly how important. These memoranda are, of course, not enforceable parts of federal law, and even if they were, they do not set any clear rules. They do, however, suggest that those in charge of administering the federal criminal law think that there should be a food-chain limit on corporate punishment, even though federal criminal law as such, following a Liberal Rule, does not recognize one.100

III. THE SCHIZOPHRENIC LANDSCAPE OF THE LAW

I will now classify American jurisdictions regarding their adherence to either a Liberal Rule or Restrictive Rule with respect to corporate crimes and corporate punitive damages. Four possibilities exist. States can be Consistently Liberal or Consistently Restrictive in both areas of the law. They can also adopt the Liberal Rule for corporate crimes but the Restrictive Rule for corporate punitive damages (what I call Federal Schizophrenia) or do the reverse, adopting a Liberal Rule for punitive damages but a Restrictive Rule for corporate crimes (what I call Pennsylvania Schizophrenia).

detailed review of these and other factors concerning corporate compliance programs." See Holder Memorandum, supra note 87, at n.5; see also McNulty Memorandum, supra note 89, part VIII(B), at 14 & n.6 (repeating same language); Thompson Memorandum, supra note 88, part VII(B) & n.6 (repeating same language).

Of the fifty-five American jurisdictions I survey, just over half, twenty-eight, take inconsistent positions on corporate crime and corporate punitive damages. All four possible approaches are well-represented among American jurisdictions.

- Eleven jurisdictions (Alabama, Indiana, Maryland, Maine, Massachusetts, Nebraska, New Hampshire, Oklahoma, Puerto Rico, South Carolina, and Tennessee) are Consistently Liberal; they allow corporate punishment for any employees' misbehavior, either under criminal law or through punitive damages.
- Sixteen jurisdictions (Colorado, Delaware, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Minnesota, New Jersey, New York, North Dakota, Ohio, Texas, Utah, and West Virginia) are Consistently Restrictive; they impose a food-chain restriction on either sort of corporate punishment.
- Eighteen jurisdictions (federal law, Alaska, California, Connecticut, the District of Columbia, Florida, Kansas, Mississippi, Nevada, New Mexico, North Carolina, Rhode Island, South Dakota, Vermont, Virginia, the Virgin Islands, Wisconsin, and Wyoming) suffer from Federal Schizophrenia, imposing food-chain restrictions only on corporate punishment through punitive damages, but allowing corporate criminal liability more liberally.
- Ten states (Arizona, Arkansas, Georgia, Louisiana, Michigan, Missouri, Montana, Oregon, Pennsylvania, and Washington) suffer from Pennsylvania Schizophrenia, imposing food-chain restrictions only on corporate criminal liability, while allowing punitive damages more liberally.

Table 2 sets out these lists of states in a table, while table 3 gives more detail about the types of rules within these broad divisions. Figures 1, 2, and 3 illustrate a seeming lack of any significant geographical pattern among the groups of states. Tables 4 through 8 give more details about each type of jurisdiction, especially the relevant touchstone, if specified, for Restrictive Rules.
<table>
<thead>
<tr>
<th>Liberal Rule for Corporate Punitive Damages (paradigm: Goddard &amp; Mobile)</th>
<th>Liberal Rule for Corporate Crime (paradigm: federal law)</th>
<th>Restrictive Rule for Corporate Crime (paradigm: MPC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consistently Liberal</td>
<td>Pennsylvania Schizophrenia</td>
<td></td>
</tr>
<tr>
<td>Alabama</td>
<td>New Hampshire</td>
<td>Arizona</td>
</tr>
<tr>
<td>Indiana</td>
<td>Oklahoma</td>
<td>Arkansas</td>
</tr>
<tr>
<td>Maine</td>
<td>Puerto Rico</td>
<td>Georgia</td>
</tr>
<tr>
<td>Maryland</td>
<td>South Carolina</td>
<td>Louisiana</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Tennessee</td>
<td>Pennsylvania</td>
</tr>
<tr>
<td>Nebraska</td>
<td></td>
<td>Michigan</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Restrictive Rule for Corporate Punitive Damages (paradigm: Restatements)</th>
<th>Federal Schizophrenia</th>
<th>Consistently Restrictive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal law</td>
<td>New Mexico</td>
<td>Colorado</td>
</tr>
<tr>
<td>Alaska</td>
<td>North Carolina</td>
<td>Delaware</td>
</tr>
<tr>
<td>California</td>
<td>Rhode Island</td>
<td>Guam</td>
</tr>
<tr>
<td>Connecticut</td>
<td>South Dakota</td>
<td>Hawaii</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>Vermont</td>
<td>Idaho</td>
</tr>
<tr>
<td>Florida</td>
<td>Virginia</td>
<td>Illinois</td>
</tr>
<tr>
<td>Kansas</td>
<td>Virgin Islands</td>
<td>Iowa</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Wisconsin</td>
<td>Kentucky</td>
</tr>
<tr>
<td>Nevada</td>
<td>Wyoming</td>
<td>Utah</td>
</tr>
</tbody>
</table>

* Application of Liberal-Rule presumption for criminal law.
* Punitive damages available only under statutes.
* Application of Liberal-Rule presumption for punitive damages.
* Idiosyncratically-characterized punitive damages.

Table 2: Distribution of jurisdictions on food-chain issue in corporate crime and corporate punitive damages.
### Table 3: Detailed grid of rules on food-chain issues.

<table>
<thead>
<tr>
<th>Corporate Crime</th>
<th>Explicitly Liberal</th>
<th>Presumed Liberal</th>
<th>Liberal &quot;non-punitive&quot;</th>
<th>Consistently Liberal</th>
<th>Pennsylvania Schizophrenia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Explicitly Liberal</td>
<td>RI, AL, MD, OK, SC</td>
<td>AR</td>
<td>GA, MO, MP, OR</td>
<td>AZ, PA, LA</td>
<td></td>
</tr>
<tr>
<td>Presumed Liberal</td>
<td>NH</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Liberal &quot;non-punitive&quot;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Restrictive Unclear</td>
<td>AK, FL, NM, UT</td>
<td></td>
<td>ID, IA, TX</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5R Problem</td>
<td>AR, FL, KS, RI, VA</td>
<td></td>
<td>DE, HI, WV, OH, CO, ND, KY</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Policy</td>
<td>PA, NJ, MS</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rolled Hybrid</td>
<td>GA, NV</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Policymakers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Supervisors</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Officers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Superior Officers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*General common law.*

*Title VII.*
Figure 1: Map of jurisdictions on food-chain issue in corporate crime.

- Liberal Rule (federal criminal law)
- Restrictive Rule (MPC)

Figure 2: Map of jurisdictions on food-chain issue in corporate punitive damages.

- Liberal Rule (Goddard-Mobile)
- Restrictive Rule (Restatements)
A. Consistently Liberal Jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Liberal Rule for Criminal Law</th>
<th>Liberal Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Liberal Rule presumed(^{101})</td>
<td>Mobile (1893)(^{102})</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Liberal Rule for Criminal Law</th>
<th>Liberal Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana</td>
<td>Statute(^{103})</td>
<td>Hibschman Pontiac (1977)(^{104})</td>
</tr>
<tr>
<td>Maine</td>
<td>Statute(^{105})</td>
<td>Goddard (1869)(^{106})</td>
</tr>
<tr>
<td>Maryland</td>
<td>Liberal Rule presumed(^{107})</td>
<td>Embrey (1982)(^{108})</td>
</tr>
<tr>
<td>Massachusetts</td>
<td><em>Beneficial Finance</em> (1971)(^{109})</td>
<td><em>Kansallis Finance</em> (1996)(^{110}) Punitive damages only under statute</td>
</tr>
</tbody>
</table>


106. Goddard v. Grand Trunk Ry., 57 Me. 202, 1869 WL 2230 (1869). See *supra* subsection II.A.2; *see also* Muratore v. M/S Scotia Prince, 663 F. Supp. 484, 489 n.6 (D. Me. 1987) ("Although an 1869 case, Goddard continues to be good law."); Muratore, 663 F. Supp. at 488–89 (rejecting suggestion to apply the Restatement "managerial capacity" rule).


Gruner suggests that Massachusetts does not follow a standard Liberal Rule, and refers instead to the "Beneficial Finance" rule as a third way distinct both from the federal scope-of-employment rule and from the MPC "high managerial employee" sort of rule. *See* Gruner, *supra* note 66, § 7.03, at 7-11 to 7-14. However, Massachusetts courts since *Beneficial Finance* have restated their rule in terms indistinguishable from the federal rule. *See*, *e.g.*, Angelo Todesca, 842 N.E.2d at 938 (referring to "acts . . . performed by corporate employees, acting within the scope of their employment and on behalf of the corporation").

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Liberal Rule for Criminal Law</th>
<th>Liberal Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nebraska</td>
<td>Mueller (1985)(^{111})</td>
<td>Liberal Rule presumed;(^{112}) Punitive damages only under statute(^{113}) and money must go to schools(^{114})</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Zeta Chi (1997)(^{115})</td>
<td>Vratsenes (1972);(^{116}) No punitive damages,(^{117}) but “enhanced compensatory damages” for malicious torts(^{118})</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Liberal Rule presumed(^{119})</td>
<td>Bierman (2008)(^{120})</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>Liberal Rule presumed(^{121})</td>
<td>Liberal Rule presumed;(^{122}) Punitive damages only under statute(^{123})</td>
</tr>
</tbody>
</table>

114. See Id. at 933, 104 N.W.2d at 689 (double or treble damages violate NEB. CONST. art. VII, § 5).
PUNISHING CORPORATIONS

Table 4: Consistently Liberal Jurisdictions.

B. Consistently Restrictive Jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>Statute, MPC.128 supervisors or policymakers;129 But see Overland Cotton (1904), Liberal Rule130</td>
<td>Holland Furnace (1965), 5R Problem;131</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Odom (1999), Restatement132</td>
</tr>
</tbody>
</table>

128. COLO. REV. STAT. § 18-1-606(1)(b) (2007) (mandating that business entities are guilty if an offense is committed by “the governing body or individual authorized to manage the affairs of the business entity or by a high managerial agent acting within the scope of his or her employment or in behalf of the business entity.”).
129. Id. § 18-1-606(1)(b)-(2)(a).
130. Overland Cotton Mill Co. v. People, 75 P. 924, 926 (Colo. 1904).
131. Holland Furnace Co. v. Robson, 402 P.2d 628, 631 (Colo. 1965) (“The principal cannot be held liable in exemplary damages for the act of an agent, unless it is shown that it authorized or approved the act for which exemplary damages are claimed; or, that it approved of or participated in the wrong of its agent; or, that it failed to exercise proper care in selecting its servants.”).
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware</td>
<td>Statute, MPC; 133 no definition</td>
<td>Brandt (2006), Restatement; 134</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Lankford Signs (1998), &quot;corporate officers;&quot; 135</td>
</tr>
<tr>
<td></td>
<td></td>
<td>DiStefano (1985), 5R Problem; 136</td>
</tr>
<tr>
<td></td>
<td></td>
<td>But see McLane (1838), Liberal Rule 137</td>
</tr>
<tr>
<td>Guam</td>
<td>Statute, MPC, 138 policymakers 139</td>
<td>Park (2004), Restatement, policymakers 140</td>
</tr>
</tbody>
</table>

136. DiStefano v. Hercules, 1985 WL 189309, at *1 (Del. Super. Ct. Nov. 8, 1985) ("[An employer will not be liable for wilful or wanton conduct of an employee unless employer ratified or authorized the wilful or wanton actions."); see also Ramada, 1988 WL 15825 at *5 ("In Delaware, a corporation remains innocent of wrongdoing even if its employee has been found to have committed a tort and some further fault on the part of the corporation is necessary before the award of punitive damages is proper.").
137. See McLane v. Sharpe, 2 Harr. 481, 482–84, 1838 WL 171, at *2 (Del. Super. Ct. 1838); see also Ford v. Charles Warner Co., 37 A. 39, 41–42 (Del. Super. Ct. 1893) (citing McLane). The Delaware Supreme Court has suggested that Ford was wrong to allow punitive damages for gross negligence, but without suggesting that its food-chain analysis, or that of McLane, was wrong. Jardel Co., Inc. v. Hughes, 523 A.2d 518, 530 n.9 (Del. 1987).
138. Guam Code Ann. tit. 9, § 4.80(a)(1) (1996) ("A corporation may be convicted of... any offense committed in furtherance of its affairs on the basis of conduct performed, authorized, requested, commanded or recklessly tolerated by... the board of directors; [or] a managerial agent acting in the scope of his employment...").
139. Id. tit. 9, § 4.80(c) ("[M]anagerial agent means an agent of the corporation having duties of such responsibility that his conduct may fairly be found to represent the policy of the corporation.").
140. Park v. Mobil Oil Guam, Inc., 2004 Guam 20, 2004 WL 2595897, at *9 (Guam 2004) ("[A] managerial agent under the Restatement is an employee who exercises substantial discretionary authority which results in the ad hoc formulation of policy over an aspect of the corporation's business.").
PUNISHING CORPORATIONS

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>Statute, MPC,(^\text{141}) no definition</td>
<td>Beerman (1980), 5R Problem(^\text{142})</td>
</tr>
<tr>
<td>Idaho</td>
<td>Adjustment Department (1971), supervisors or policymakers(^\text{143})</td>
<td>Openshaw (1971), Restatement(^\text{144})</td>
</tr>
</tbody>
</table>

---

141. **Haw. Rev. Stat.** § 702-227(2) (1993) (referring to the actions of “the board of directors of the corporation or . . . the executive board of the unincorporated association or by a high managerial agent acting within the scope of the agent’s office or employment and in behalf of the corporation or the unincorporated association.”).

142. Beerman v. Toro Mfg. Corp., 615 P.2d 749, 755 (Haw. Ct. App. 1980) (“We note that there are Hawaii Supreme Court cases holding that punitive damages may be recovered against corporate defendants . . . only if the corporations expressly or impliedly authorized the allegedly tortious act before or after it was committed.”).

143. State v. Adjustment Dept’. Credit Bureau, Inc., 483 P.2d 687, 691 (Idaho 1971). *Adjustment Department* is one of the only cases in this survey that makes contact between corporate punitive damages and corporate crime. See infra note 268. However, the state still uses differently-worded rules for the two areas of law.

144. Openshaw v. Or. Auto. Ins. Co., 487 P.2d 929, 932 n. 3 (Idaho 1971); Boise Dodge, Inc. v. Clark, 453 P.2d 551, 554—55 (Idaho 1969). There is language in some cases indicating that both managerial employees and directors must be involved. See Student Loan Fund, Inc. v. Duerner, 951 P.2d 1272, 1280 (Idaho 1997) (“A corporation is liable for punitive damages based upon the acts of its agents if the directors and managing officers participated in, or authorized or ratified, the agents’ acts.”) (emphasis added); Openshaw, 487 P.2d at 932 (“To be entitled to an award of punitive damages against a corporation the complaining party must show that . . . its directors and managing officers . . . participated in or authorized or ratified the agent’s acts.”); Manning v. Twin Falls Clinic & Hosp., Inc., 830 P.2d 1185, 1192 (Idaho 1992) (quoting Openshaw).
**Jurisdiction**  | **Restrictive Rule for Punitive Damages**
--- | ---
Illinois | Statute, MPC, supervisors or policymakers
Iowa | Statute, supervisors or policymakers

145. 720 ILL. COMP. STAT. ANN. 5/5-4(a)(2) (West 2002 & Supp. 2007); see also Morris v. Ameritech Illinois, 785 N.E.2d 62, 67-68 (Ill. App. Ct. 2003) (disallowing liability of corporate "high managerial agent" for an employee's eavesdropping where superiors did not actually know of eavesdropping); People v. O'Neil, 550 N.E.2d 1090, 1098 (Ill. App. Ct. 1990) (stating that a corporation is criminally responsible for offenses authorized, requested, commanded, or performed by a high managerial agent whenever the managerial agent possesses the requisite mental state and the criminal offense was within the scope of employment).

146. 720 ILL. COMP. STAT. ANN. 5/5-4(c)(2) (West 2002 & Supp. 2007).


152. Briner v. Hyslop, 337 N.W.2d 858, 867 (Iowa 1983) (one of the few cases to attempt a comprehensive review of the division of authority on corporate punitive damages).
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kentucky</td>
<td>Statute, MPC, policymakers</td>
<td>Statute, 5R Problem, Northeast Health Management (2001), supervisors</td>
</tr>
</tbody>
</table>

154. Id. § 502.050(2)(b).
155. Id. § 411.184(3) ("In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question."). Another part of the same statute was struck down as unconstitutional in Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998), but this provision has not been challenged. See Berrier v. Bizer, 57 S.W.3d 271, 283-84 (Ky. 2001). For other applications of the statute that do little to help clarify the 5R Problem, see Jones v. Blankenship, No. 6:06-109, 2007 WL 3400115, at *3-*4 (E.D. Ky. Nov. 13, 2007); McGonigle v. Whitehawk, 481 F. Supp. 2d 835, 841-42 (W.D. Ky. 2007); Estate of Presley v. CCS of Conway, No. 3:03CV-117-H, 2004 WL 1179418, at *4 (W.D. Ky. May 18, 2004); Steinhoff v. Upriver Rest. Joint Venture, 117 F. Supp. 2d 598, 605 (E.D. Ky. 2000); Ky. Farm Bureau Mut. Ins. Co. v. Troxell, 959 S.W.2d 32, 35-36 (Ky. 1997); Kroger Co. v. Willgruber, 920 S.W.2d 61, 68 (Ky. 1996).
156. NE. Health Mgmt., Inc. v. Cotton, 56 S.W.3d 440, 449 (Ky. Ct. App. 2001); Simpson County Steeplechase Ass'n, Inc. v. Roberts, 898 S.W.2d 523, 527 (Ky. Ct. App. 1995); see also Kroger Co. v. Willgruber, 920 S.W.2d 61, 68 (Ky. 1996) (citing KY. REV. STAT. ANN. § 411.184(3)).
158. MINN. STAT. ANN. § 549.20 (West 2000 & Supp. 2007); see also Muehlstedt v. City of Lone Lakes, 473 N.W.2d 892, 896 (Minn. Ct. App. 1991) ("By statute, punitive damages can properly be awarded against an employer if the employee worked in a managerial capacity and acted in the scope of employment.").
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
<td>Statute, due-diligence defense¹⁶⁰</td>
<td>Lehmann (1993), upper management;¹⁶¹</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cauuoti (1999), policymakers¹⁶²</td>
</tr>
<tr>
<td>New York</td>
<td>Statute, MPC,¹⁶³ supervisors or policymakers¹⁶⁴</td>
<td>Loughry (1986), &quot;superior officer,&quot;¹⁶⁵ &quot;institutional conscience,&quot;¹⁶⁶ &quot;a high level of general managerial authority;&quot;¹⁶⁷ Zurich Insurance (1994), those representing &quot;corporate culture&quot;¹⁶⁸</td>
</tr>
</tbody>
</table>

¹⁶⁰. N.J. STAT. ANN. § 2C:2-7(a)(1) (West 2005) (allowing punishment for minor employees' misbehavior); id. § 2C:2-7(c) (West 2005) (stating that for crimes included in (a)(1), "it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission").

¹⁶¹. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) ("The company official committing, approving or ratifying the act need not be the highest officer in the corporate hierarchy, but only must be a 'person of such responsibility as to arouse the 'institutional conscience'"’) (New Jersey law) (quoting statement of New York law in Doralee Estates, Inc. v. Cities Serv. Oil Co., 569 F.2d 716, 722 (2d Cir. 1977)); Cauuoti v. New Jersey Transit Corp., 735 A.2d 548, 554 (N.J. 1999); Lehmann v. Toys R Us, Inc., 626 A.2d 445, 464 (N.J. 1993).

¹⁶². Cauuoti, 735 A.2d at 559–61.


¹⁶⁴. Id. § 20.20(1)(b).


¹⁶⁶. Loughry, 494 N.E.2d at 76.

¹⁶⁷. Id.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
</table>

¹⁷⁰. *Rickbeil* v. Grafton Deaconess Hosp., 23 N.W.2d 247, 260 (N.D. 1946) (“[P]unitive damages are not recoverable against the employer, unless he participated in the wrongful act of the employee, or approved thereof either before or after its commission.”); *see also* *Mahanna* v. Westland Oil Co., 107 N.W.2d 353, 363 (N.D. 1961) (“While there is a substantial conflict of authority as to a corporation’s liability for exemplary damages for the acts of its agents[,] it is the settled rule in this jurisdiction that a corporation is not so liable unless it authorized or ratified the wrongful act of its agent.” (citation omitted)); *Voves* v. Great Northern Ry. Co., 143 N.W. 760, 763 (N.D. 1913) (answering no to the question “whether defendant corporation can be held for punitive damages for the unauthorized and unratified malicious acts of its employee”).
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio</td>
<td>Statute, MPC-plus-due-diligence, CECOS International (1988)</td>
<td>Statute, 2004, 5R Problem; Gray (1977), 5R Problem; <em>But see Atlantic Railway</em> (1869), Liberal Rule</td>
</tr>
</tbody>
</table>

173. *Ohio Rev. Code Ann.* § 2901.23(A)(4) (LexisNexis 1996) (basic MPC-style rule); *id.* § 2901.23(C) (LexisNexis 1996) (due-diligence defense). This defense does not apply to strict liability offenses. As noted above, the MPC has a due-diligence defense, but it only applies to minor crimes for which any employee's actions establish a *prima facie* affirmative case. There is perhaps a slight incongruity in allowing a defense based on the actions of high managerial employees when we are focused on misbehavior by a high managerial employee in the first place. For more on layering a due-diligence defense on top an impeachment defense, see the discussion of *Kolstad*, *supra* subsection II.B.4.


175. *Ohio Rev. Code Ann.* § 2315.24(C)(1) (LexisNexis 2005) ("[P]unitive or exemplary damages are not recoverable from a defendant in question in a tort action unless . . . [t]he actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.").

176. Gray v. Allison Div., Gen. Motors Corp., 370 N.E.2d 747, 752 (Ohio Ct. App. 1977) ("The employer is not to be punished for the personal guilt of his servant or agent unless the employer authorized, ratified or participated in the wrongdoing."); *see also* Columbus Ry., Power & Light Co. v. Harrison, 143 N.E. 32, 32 (Ohio 1924) ("[A]s punitive damages are recoverable only for guilty motive, or for wanton and malicious misconduct, they should not be allowed against the principal or master in cases where no such motive, wantonness, or malice upon his part is alleged nor shown."); *id.*, 143 N.E. at 33 (following *Lake Shore*); Brief of Appellants at 28, Prymas v. Kassai, 858 N.E.2d 1209 (Ohio Ct. App. 2006 (No. 05-087114), 2006 WL 3368567 ("It is well-established in Ohio that punitive damages may not be recovered against a corporation in the absence of evidence that the corporation authorized, participated in, consented to, acquiesced in, or ratified the malicious or outrageous conduct of its employees."). Despite the 5R Problem, these courts did allow corporate punitive damages. *Gray*, 370 N.E.2d at 753.

177. Atl. & Great W. Ry. Co. v. Dunn, 19 Ohio St. 162, 167-69 (Ohio 1869).
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td>Statute, MPC,\textsuperscript{178} policymakers\textsuperscript{179}</td>
<td>\textit{Fort Worth Elevators} (1934), “vice principals,” hiring and firing or running department or division;\textsuperscript{180} \textit{Hammerly Oaks} (1997), Restatement\textsuperscript{181}</td>
</tr>
<tr>
<td>Utah</td>
<td>Statute, MPC,\textsuperscript{182} no definition</td>
<td>\textit{Johnson} (1988), Restatement\textsuperscript{183}</td>
</tr>
</tbody>
</table>

\textsuperscript{178} \textsc{Tex. Penal Code Ann.} § 7.22 (Vernon 2003 & Supp. 2007). Before the legislature acted, “for years Texas was the only jurisdiction in which corporations bore no general criminal responsibility . . . .” Vaughan and Sons, Inc. v. State, 737 S.W.2d 805, 810 (Tex. Crim. App. 1987).

\textsuperscript{179} \textsc{Tex. Penal Code Ann.} § 7.21(2)(b)–(c) (Vernon 2003 & Supp. 2007).


\textsuperscript{181} \textsc{Utah Code Ann.} § 76-2-204(2) (2003).

\textsuperscript{182} \textsc{Johnson} v. Rogers, 763 P.2d 771, 778 (Utah 1988); \textit{id.} at 784 (Zimmerman, J., concurring). While the Court adopted the Restatement, one of its formulations posed a 5R Problem. \textit{See id.} at 784 (Zimmerman, J., concurring) (“[A]n employer may be liable for punitive damages as a result of a tortious act of an employee, but only so long as that liability is premised on the conduct of the employer . . . .”). The Court said that “[t]he issue of when an employer can be held vicariously liable for punitive damages because of the acts of nonmanagerial employees is one of first impression in Utah,” 763 P.2d at 776, but later suggested that earlier law had adopted a Liberal Rule. \textit{Hodges v. Gibson Prods. Co.}, 811 P.2d 151, 163 (Utah 1991).
If we take a closer look at Table 1, but with only the Consistently Restrictive jurisdictions included, we see that only two of these sixteen jurisdictions (Guam and Minnesota) have adopted the same Restrictive Rule in both fields. Illinois, New Jersey, and New York have explicitly looser rules for corporate crime than for corporate punitive damages (Federal Schizophrenia writ small), while the other eleven states have one rule, or both, that is unclear.


187. Hains v. Parkersburg, M. & I. Ry. Co., 84 S.E. 923, 926 (W. Va. 1915) ("[I]t is the better rule, and more consistent with justice, not to extend the doctrine of liability for exemplary damages to corporations other than public carriers, unless the servant's negligence is authorized or ratified . . . ."); Addair v. Huffman, 195 S.E.2d 739, 745 (W. Va. 1973) ("[I]n an agency relationship a master can be liable for exemplary, as well as compensatory damages through the acts of his servants . . . . If a master knowingly employs or retains a careless and incompetent servant, he thereby impliedly authorizes or ratifies his negligent acts, committed in the course of his employment, and, if the servant's negligence is wanton and willful or malicious, the master is liable for exemplary or punitive damages."). (quoting Hains, 84 S.E. at 925)). Hains affirms a punitive damage award against the corporate defendant on the ground that the defendant ratified the misbehaving employee's actions by retaining him in employment, but it is not clear how high in the corporate hierarchy the knowledge of such misbehavior must go before such retention-based ratification is effective. A corporation might claim that a mid-level employee's improper retention of a low-level employee was itself not a corporate act; if ratification is again required of that decision, it is not clear where the demand for additional ratification legitimately stops, unless there are some employees whose misbehavior requires no additional ratification.

188. Karaahmetoglu v. Res-Care, Inc., 480 F. Supp. 2d 183, 190 (D.D.C. 2007) (applying West Virginia law) ("[I]n the absence of a showing by the plaintiff that [the corporate defendant] acted with malice or that [the victim's] abuse was part of a pattern of such abuse, the Court will grant summary judgment for the defendants on the punitive damages claim.").
<table>
<thead>
<tr>
<th>Type of Restrictive Rule</th>
<th>Jurisdictions With Rule for Corporate Crime</th>
<th>Jurisdictions With Rule for Corporate Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Superior Officers</td>
<td>Guam</td>
<td>New York</td>
</tr>
<tr>
<td></td>
<td>Kentucky</td>
<td>Guam</td>
</tr>
<tr>
<td></td>
<td>Minnesota</td>
<td>Illinois</td>
</tr>
<tr>
<td></td>
<td>Texas</td>
<td>Minnesota</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New Jersey</td>
</tr>
<tr>
<td>Policymakers</td>
<td>Colorado</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Idaho</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Illinois</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Iowa</td>
<td></td>
</tr>
<tr>
<td></td>
<td>New York</td>
<td></td>
</tr>
<tr>
<td></td>
<td>North Dakota</td>
<td></td>
</tr>
<tr>
<td>Policymakers or Supervisors</td>
<td>Colorado</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Idaho</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Illinois</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Iowa</td>
<td></td>
</tr>
<tr>
<td></td>
<td>New York</td>
<td></td>
</tr>
<tr>
<td></td>
<td>North Dakota</td>
<td></td>
</tr>
<tr>
<td>Corporate Policy</td>
<td>New Jersey</td>
<td></td>
</tr>
<tr>
<td></td>
<td>West Virginia</td>
<td></td>
</tr>
<tr>
<td>Corporate Policy/Managerial Employee Hybrid</td>
<td>Ohio</td>
<td>Colorado</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Delaware</td>
</tr>
<tr>
<td>Ratification Requirement (5R Problem)</td>
<td></td>
<td>Hawaii</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Kentucky</td>
</tr>
<tr>
<td></td>
<td></td>
<td>North Dakota</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Ohio</td>
</tr>
<tr>
<td></td>
<td></td>
<td>West Virginia</td>
</tr>
<tr>
<td>No clear definition of &quot;high managerial agent&quot; or &quot;managerial agent&quot; or &quot;manager&quot;</td>
<td>Delaware</td>
<td>Idaho</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Hawaii</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Texas</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Utah</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Liberal Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal law</td>
<td>New York Central &amp; Hudson (1909);Sentencing Guidelines, amount-of-punishment;Prosecutorial guidelines</td>
<td>Lake Shore (1893), 5R Problem;Kolstad (1999), Restatement and Good-Faith-Defense Hybrid</td>
</tr>
</tbody>
</table>

**Table 6: Types of Restrictive Rule in Consistently Restrictive Jurisdictions.**

**C. Federal-Schizophrenic Jurisdictions**

189. See supra subsection II.A.1.
190. See supra subsection II.B.6.
191. See supra subsection II.B.7.
192. See supra subsection II.B.3.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Liberal Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Statute(^{194})</td>
<td>Statute, Restatement(^{195})</td>
</tr>
<tr>
<td>California</td>
<td>W.T. Grant (1972)(^{196})</td>
<td>Statute, Restatement(^{197})</td>
</tr>
<tr>
<td></td>
<td></td>
<td>White (1999)(^{198})</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Liberal Rule presumed(^{199})</td>
<td>Maisenbacker (1899), 5R Problem(^{200})</td>
</tr>
</tbody>
</table>


196. W. T. Grant Co. v. Superior Court, 100 Cal. Rptr. 179, 180 (Cal. Ct. App. 1972). W.T. Grant relies on a Third Circuit case which in turn vigorously states the Liberal Rule and denies any sort of food-chain limit on corporate criminal liability. See id. at 180 (citing U.S. v. Armour & Co., 168 F.2d 342, 344 (3d Cir. 1948)); see also Sea Horse Ranch, Inc. v. Superior Court, 30 Cal. Rptr. 2d 681, 687 (Cal. Ct. App. 1994) (“In California, a corporation may be criminally liable for the conduct of its officers or agents or employees.”) (following W.T. Grant). While Sea Horse Ranch follows W.T. Grant, which in turn clearly follows the federal Liberal Rule, it may leave the door open for a Restrictive Rule. The court notes that the employee at issue “was not a casual or low-level employee with no decision-making authority.” 30 Cal. Rptr. 2d at 687. This may point to a willingness to alter the rule adopted in W.T. Grant, or may only indicate that the case would not be one where the Restrictive and Liberal Rules would reach different results. One nonprecedential opinion read the “decision-making” language in Sea Horse as adopting an important restriction. See People v. Mountain Cascade, Inc., 2003 WL 22971131, at *5 (Cal. Ct. App. 2003). Gruner, however, cites Sea Horse as endorsing the federal Liberal Rule. Gruner, supra note 66, at 7-36 to -38.


200. Maisenbacker v. Soc’y Concordia of Danbury, 42 A. 67, 70 (Conn. 1899) (following Lake Shore, where “this question is very fully discussed”); Vanderburgh v. Nat’l R.R. Passenger Corp., No. 3:06cv585, 2007 WL 549740, at *14 (D. Conn. Feb. 16, 2007) (following Maisenbacker); Matthiessen v. Vanech, 836 A.2d 394, 404 (Conn. 2003) (relying on Maisenbacker in construing statute); Silva v. Arroyo, 1996 WL 410708, at *2-*3 (Conn. Super. Ct. 1996) (following Maisenbacker). For the 5R Problem, see Maisenbacker, 42 A. at 70 ("As its agent was acting within the scope of his employment, the law compels the defendant to compensate the plaintiff for the injuries she has sustained from the wrongful acts of the agent, but it does not punish the defendant for the malicious purpose or intent which prompted the agent’s conduct. To render the principal liable in exemplary damages for the acts of his agent in the course of his employment, but done with such malicious intent, some misconduct of the former beyond that which the law implies from the mere relation of principal and agent must be shown."). The Court does note that corporate punitive damages are available in some cases. Id. at 69-70.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Liberal Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>District of Columbia</td>
<td><em>Sherpix (1975)</em>[^201]</td>
<td><em>Remeikis (1980)</em>, “executive officer of high rank” or “general practices” amounting to “corporate policy”[^202]</td>
</tr>
</tbody>
</table>

[^201]: United States v. Sherpix, Inc., 512 F.2d 1361 (D.C. Cir. 1975). The rule is not perfectly clear as to D.C. law; the Court applies both federal and D.C. law without suggesting that they follow different rules on the food-chain issue.


[^205]: *Mercury Motors Exp., Inc. v. Smith*, 393 So. 2d 545, 549 (Fla. 1981) (“Before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part.”).


[^207]: *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 533 (Fla. 1985) (*Mercury Motors* “was not intended to apply to situations where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation.”). The definite article “the managing agent” has been taken in some cases to require it to be of high rank in the corporate hierarchy. See *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 521 (Fla. Dist. Ct. App. 1994) (“[The misbehaving employee] was not the managing agent or primary owner of the bank . . . . One of several bank vice-presidents, [he] was not a member of the Board of Directors or the loan committee.” (citation omitted)); see also *Pier 66 Co. v. Paulos*, 542 So. 2d 377, 381 (Fla. Dist. Ct. App. 1988) (“[T]he misbehaving employee was only the hotel manager for [the corporate owner of a hotel]; he was clearly not a managing agent of [the owner of the corporate owner of the hotel].”)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Liberal Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kansas</td>
<td>Statute(^{209})</td>
<td>Statute, 5R Problem;(^{210}) Smith (1993), managerial employees;(^{211}) Kline (1983), Restatement;(^{212}) But see Wheeler &amp; Wilson (1887), Liberal Rule(^{213})</td>
</tr>
</tbody>
</table>


\(^{210}\) Id. § 60-3702(d) (2005 & Supp. 2006) ("In no case shall exemplary or punitive damages be assessed pursuant to this section against (1) [a] principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or (2) an association, partnership or corporation for the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct."). Because of the 5R Problem, it is not clear what level employee can "expressly empower" another employee to ratify or authorize misbehavior.


PUNISHING CORPORATIONS

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Liberal Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mississippi</td>
<td>Liberal Rule presumed(^{214})</td>
<td>(\text{Gamble (2003), corporate policy;}^{215}) But see Pullman (1897), Liberal Rule(^{216})</td>
</tr>
</tbody>
</table>

214. Edward Hines Yellow Pine Trs. v. State, 94 So. 231, 232 (Miss. 1922), allows corporate criminal liability without suggesting a food-chain limit.

215. In Gamble ex rel. Gamble v. Dollar Gen. Corp., 852 So. 2d 5 (Miss. 2003), the Court affirmed compensatory damages. \(\text{Id. at 14.}\) Thus finding that the misbehaving employee acted in the scope of employment, but reversed punitive damages because his actions were contrary to corporate policy expressed in an employee handbook. \(\text{Id. at 15; see also Doe ex rel. Doe v. Salvation Army, 835 So. 2d 76, 81 (Miss. 2003) (distinguishing a case addressing "scope of employment in a general context and not in terms of punitive damages" from a statute that applies "[i]n the punitive damage context").}\) However, the misbehaving employee was outside the scope of his employment. \(\text{Id. at 81 ("[The Salvation Army, the corporate defendant,] is a Christian organization that promotes the Scriptures and God, not sexual assault on minors. [The misbehaving employee] was clearly not acting within the scope of his employment with [the Salvation Army] at the time of the assault . . . . [I]t cannot be said that [the misbehaving employee's] actions were within the scope of his employment as a counselor . . . . Assaulting young boys has nothing to do with the goals and doctrines of [the Salvation Army] and its Christian philosophy.").}\) Compensatory damages were awarded against the corporate defendant for negligent supervision, not the actions of the assaulting employee. \(\text{Id. at 77.}\)

Gamble and Doe relied on Mississippi's punitive damages statute, Miss. CODE ANN. § 11-1-65 (West 1999), which requires that a defendant misbehave in one of a number of ways before punitive damages may be imposed. The Liberal Rule would not disagree, however, with that proposition, but would only hold that the actions even of minor employees within the scope of their employment are the actions of the corporate employer. One dissenting judge has suggested that by referring to misbehavior by a defendant, the statute adopts a ratification requirement; if it did, it would have a 5R Problem. See Duggins v. Guardianship of Washington Through Huntley, 632 So. 2d 420, 433 (Miss. 1993) (Lee, J., dissenting) ("[O]ur legislature has recently mandated that punitive damages are only proper where 'the defendant against whom punitive damages are sought' has acted with actual malice, gross negligence, etc . . . . This statute absolutely forecloses vicarious liability for punitive damages in actions arising after the effective date." (quoting Gardner v. Jones 464 So. 2d 1144, 1149 (Miss. 1985) (emphasis in original))). Several federal district courts have picked up the idea.


216. See Pullman Palace-Car Co. v. Lawrence, 22 So. 53, 57-58 (Miss. 1897) (applying Illinois law). Pullman is frequently quoted and cited. For cases quoting Pullman at length, see for example Miller v. Blanton, 210 S.W.2d 293, 296–97 (Ark. 1948); Little Rock Ry. & Elec. Co. v. Dobbins, 95 S.W. 788, 792 (Ark. 1906); Mayo Hotel Co. v. Danciger, 288 P. 309, 312–13 (Okla. 1930). For cases citing Pullman, see
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Liberal Rule for Criminal Law</th>
<th>Restrictive Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nevada</td>
<td>Liberal Rule presumed</td>
<td>Smith's Food &amp; Drug (1998), Restatement; Nittinger (2003), policymakers</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Liberal Rule presumed</td>
<td>Albuquerque Concrete (1994), Restatement, policymakers</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Ice &amp; Fuel (1914)</td>
<td>Statute, &quot;officers, directors, or managers&quot;</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Eastern Coal (1908)</td>
<td>AAA Pool Service &amp; Supply (1984), 5R Problem</td>
</tr>
</tbody>
</table>

for example Am. Soc. of Mech. Eng'r's, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 n.14 (1982) (citing Pullman as emblematic of "the trend of late 19th century decisions"); S. Pac. Co. v. Boyce, 223 P. 116, 120 (Ariz. 1924); see also Sandifer Oil v. Dew, 71 So. 2d 752, 758 (Miss. 1954) (apparently utilizing the Liberal Rule); Rivers v. Yazoo & M. V. R. Co., 43 So. 471, 472 (Miss. 1907) (following this reasoning in the context of slander); Alfred G. Nichols, Jr., Comment, Punitive Damages in Mississippi: A Brief Survey, 37 Miss. L.J. 131, 149 (1965) (stating that Mississippi follows the broad Liberal Rule).


218. Smith's Food & Drug Ctrs., Inc. v. Bellegarde, 958 P.2d 1208, 1214 (Nev. 1998) ("We take this opportunity to clarify this aspect of our punitive damages jurisprudence. We now exclusively embrace the Restatement . . . approach with regard to an employer's liability for punitive damages for the acts or omissions of its agents . . . .")


223. N.C. GEN. STAT. ANN. § 1D-15(c) (West 2003) ("Punitive damages may be awarded against a person only . . . if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.").

224. State v. E. Coal Co., 70 A. 1, 7 (R.I. 1908) (agreeing that "criminal intent will be imputed to the corporation from acts done by its agents").

225. AAA Pool Serv. & Supply, Inc. v. Aetna Cas. & Sur. Co., 479 A.2d 112, 116 (R.I. 1984) ("Punitive or exemplary damages will not be allowed in situations in which a 'principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act.'" (quoting Hagan v. Providence & Worcester R.R. Co., 3 R.I. 88, 91...}

226. State ex rel. Botsford Lumber Co. v. Taylor, 147 N.W. 72, 73 (S.D. 1914) (citing United States v. Alaska Packers' Ass'n & Babler, 1 Alaska 217, 1901 WL 312 (D. Alaska 1901) for the proposition that corporations may be indicted); Alaska Packers, 1 Alaska at 219, 1901 WL 312, at *1 ("[A] corporation may be punished upon indictment for a felony as it may for a misdemeanor."); id. at 220, 1901 WL 312 at *2 (quoting the same statement from 2 Joel Prentiss Bishop, New Commentaries on Criminal Law Upon a New System of Legal Exposition § 417 (8th ed. 1892) quoted in N.Y. Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481 (1909)). Botsford Lumber itself cites "Bishop's New Crim. Proc. § 417" in support of the proposition that corporations can be indicted. However, the reference seems to be to the Liberal Rule stated in Bishop's substantive work on Criminal Law, because section 417 of his work on criminal procedure is a rule on indictments and lesser-included offenses. See 1 Joel Prentiss Bishop, New Criminal Procedure, or, New Commentaries on the Law of Pleading and Evidence and the Practice in Criminal Cases § 417, at 258 (4th ed. 1895) (discussing "crime within crime" and not mentioning corporations).

While Botsford Lumber follows N.Y. Cent. & Hudson R.R. Co. and its reasoning, direct precedents are limited to minor crimes. State v. First Nat'l Bank of Clark, 51 N.W. 587, 587-88 (S.D. 1892), allows corporate criminal liability without suggesting a food-chain limit, but is limited to crimes lacking mens rea elements. A recent case clearly adopts a Liberal Rule with respect to "certain offenses." State v. Hy Vee Food Stores, Inc., 533 N.W.2d 147, 149 (S.D. 1995) (citing N.Y. Cent. & Hudson R.R. Co.). The court considered and rejected a suggestion that it adopt a Restrictive Rule, but its reasoning was confined to regulatory offenses. Hy Vee, 533 N.W.2d at 149–50.

227. Dahl v. Sittner, 474 N.W.2d 897, 903 (S.D. 1991). The punitive-damages case Wyman v. Terry Schulte Chevrolet, Inc., 584 N.W.2d 103, 106 (S.D. 1998), is one of the very few that makes contact between the two fields of criminal punishment, quoting Hy Vee, 533 N.W.2d at 149, though the food-chain issue was not involved. See Wyman, 584 N.W.2d at 106 ("Although [Hy Vee] pertained to criminal liability, we find the rule of law also applies here."). However, Wyman did not acknowledge the Restrictive Rule of Dahl.


Jurisdiction | Liberal Rule for Criminal Law | Restrictive Rule for Punitive Damages
---|---|---
Virginia | Andrews (2003)<sup>230</sup> | Freeman (1963), 5R Problem<sup>231</sup>
Virgin Islands | Liberal Rule presumed<sup>232</sup> | Hendricks (1999), Restatement<sup>233</sup>
Wisconsin | Dried Milk Products (1962)<sup>234</sup> | Mid-Continental Refrigerator (1970), 5R Problem<sup>235</sup>

<sup>230</sup> Andrews v. Ring, 585 S.E.2d 780, 787 (Va. 2003); see also Postal Tel.-Cable Co. v. City of Charlottesville, 101 S.E. 357, 358 (Va. 1919) (same reasoning); Crall v. Commonwealth, 49 S.E. 638, 639-40 (Va. 1905) (same reasoning). One case relied on Francis Wharton’s treatise. Crall, 49 S.E. at 640 (citing 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 247, at 272 (9th ed. 1885)). Wharton noted a scope-of-employment Liberal Rule for corporate crime: “[A]s it is only by agents that corporations can act, it is not necessary to prove, on charging a corporation with a criminal act performed by an agent, within his range of duty, that this act was specifically authorized by the corporation.” Id. at 273.

<sup>231</sup> Freeman v. Sproles, 131 S.E.2d 410, 414 (Va. 1963) (“The trial court correctly ruled that the corporate defendants . . . were not liable for punitive damages. This is true because such damages ‘cannot be awarded against a master or principal for the wrongful act of his servant or agent in which he did not participate, and which he did not authorize or ratify.’”) (quoting Hogg v. Plant, 133 S.E. 759, 761 (Va. 1926)). While Freeman has a 5R Problem, the case from which it takes its rule relies on Lake Shore, suggesting some form of corporate punitive damages should be available. See Hogg, 133 S.E. at 760 (citing Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893)).

See also Doe v. Harris, No. CL5544, 2001 WL 34773877, at *9 (Va. Cir. Ct. April 11, 2001) (“In Virginia, punitive damages cannot be awarded against an employer who is vicariously liable unless the employer authorized or ratified the conduct.”); Goleseokhi v. Lufthansa German Airlines, No. 96-2211, 122 F.3d 1061 (Table), 1997 WL 560013, at *2 (4th Cir. 1997) (“[I]n Virginia, a corporation must authorize or ratify the acts of its employees before punitive damages can be imposed upon it.”).


<sup>235</sup> Mid-Continental Refrigerator Co. v. Straka, 178 N.W.2d 28, 33 (Wis. 1970) (referring to a “well-established line of cases refusing punitive damages in tort against a corporate defendant without proof that the defendant authorized or ratified the alleged tortious act of its employee”) (citing Garcia v. Samson’s, Inc., 103 N.W.2d 565 (Wis. 1960)); see also Jeffers v. Nyssee, 297 N.W.2d 495, 499 n.3 (Wis. 1980) (quoting Mid-Continental Refrigerator, 178 N.W.2d at 33).
Table 7: Federal-Schizophrenic Jurisdictions.

D. Pennsylvania-Schizophrenic Jurisdictions

<table>
<thead>
<tr>
<th>State</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Liberal Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Statute, MPC; policymakers²³⁸</td>
<td>Haralson (2001)²⁴⁰</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Statute, MPC;²⁴¹ no definition</td>
<td>J.B. Hunt (1995)²⁴²</td>
</tr>
<tr>
<td>Georgia</td>
<td>Statute, MPC, &quot;managerial official,&quot;²⁴³ supervisors or policymakers²⁴⁴</td>
<td>Sightler (1993)²⁴⁵</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Chapman Dodge (1983), officers or board of directors²⁴⁶</td>
<td>Rivera (1997)²⁴⁷ punitive damages available only under statute</td>
</tr>
</tbody>
</table>

²³⁹. Id. § 13-305(B)(2).
²⁴³. GA. CODE ANN. § 16-2-22(a)(2) (2003) ("A corporation may be prosecuted for the act or omission constituting a crime only if . . . [t]he commission of the crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation."). Quite oddly, this statute is read as if it abolishes corporate criminal liability altogether in Byrne v. Nezhat, 261 F.3d 1075, 1105 (11th Cir. 2001) ("Under Georgia law, a corporation qua corporation, cannot be held to answer for a crime.").
<table>
<thead>
<tr>
<th>State</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Liberal Rule for Punitive Damages</th>
</tr>
</thead>
</table>

248. People v. Hock Shop, Inc., 681 N.W.2d 669, 672 (Mich. Ct. App. 2004). The court in *Hock Shop* distinguished *People v. Gen. Dynamics Land Sys., Inc.*, 438 N.W.2d 359 (Mich. Ct. App. 1989), which found that “a corporation is sufficiently a ‘person’ to be the perpetrator of a manslaughter.” *Gen. Dynamics*, 438 N.W.2d at 361. This distinction was based on the fact that in *General Dynamics*, the misbehavior at issue “was [performed] pursuant to [the] policies of the defendant corporation.” *Hock Shop*, 681 N.W.2d at 672.


251. *E.g., Ray*, 242 N.W.2d at 495 (“The terms ‘exemplary’ damages, ‘punitive’ damages and ‘vindictive’ damages have frequently been confused or used interchangeably. However, in Michigan only exemplary damages which are compensatory in nature are allowable . . . . They are never allowed, however, for the purpose of punishing or making an example of a defendant.”). This idiosyncratic understanding of the nature of punitive damages is important, because it was involved in Michigan’s adoption of its Liberal Rule. *Lucas v. Mich. Cent. R.R. Co.*, 56 N.W. 1039 (Mich. 1893), is frequently cited as supporting a Liberal Rule for corporate punitive damages and sets a broad scope-of-employment rule for “exemplary” damages. *See Briner v. Hyslop*, 337 N.W.2d 858, 864 (Iowa 1983); *2 John J. Kircher & Christine M. Wiseman, Punitive Damages: Law and Practice* § 24.07 n.1 (2000); *Philip H. Corboy, Vicarious Liability for Punitive Damages: The Effort to Constitutionalize “Tort Reform,” 2 Se ton Hall Const. L.J. 5, 16 n.50 (1991).* But *Lucas* actually relies on the Supreme Court’s Restrictive Rule in *Lake Shore* for its result, specifically on the Supreme Court’s restatement of standard scope-of-employment *respondeat superior* doctrine for compensatory damages. *See Lucas*, 56 N.W. at 1040–41 (“In *Lake Shore* . . . the court expressly recognize [sic] the rule that, if any wantonness or mischief on the part of the agent acting within the scope of his employment causes additional injury to the plaintiff in body or mind, the principal is liable to make compensation for the whole injury suffered, and a number of cases are cited in support of the doctrine.”). *Lucas* thus sees no need to disagree with one of the leading Restrictive Rule cases, in light of Michigan’s regime of not-really-punitive damages. *Lucas* and its progeny are thus weak support for the Liberal Rule for normal punitive damages.
<table>
<thead>
<tr>
<th>State</th>
<th>Restrictive Rule for Criminal Law</th>
<th>Liberal Rule for Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Missouri</td>
<td>Statute, RPC, <em>252 supervisors or policymakers</em></td>
<td>Fischer (1982)*254</td>
</tr>
<tr>
<td>Montana</td>
<td>Statute, RPC, <em>255 supervisors or policymakers</em></td>
<td>Rickman (1951)*257</td>
</tr>
<tr>
<td>Oregon</td>
<td>Statute, RPC, <em>258 supervisors or policymakers</em></td>
<td>Stroud (1975)*260</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Statute, RPC, <em>261 supervisors or policymakers</em></td>
<td>Chuy (1979)*263</td>
</tr>
</tbody>
</table>

253. Id. § 562.056(3)(2).
256. Id. § 45-2-311(3)(b).
259. Id. § 161.170(2)(b).
E. Lack of Cross-Fertilization Between Fields

The law of corporate punitive damages has evolved with virtually no consideration of the law of corporate crime, and the law of corporate crime has evolved with virtually no consideration of corporate punitive damages. It is astonishing that almost none of the cases that I have surveyed make cross-references between the fields of criminal liability and the law of punitive damages. There are a few exceptions amid the hundreds of cases. But the amount of cross-fertilization is astonishingly small, given the similarity of the issues and existence of similar splits of authority. For instance, in Westlaw’s ALLCASES its agent that resulted in the award of punitive damages.”). Assuming that corporate health care providers can be punished at all, it is not clear what level employee must misbehave to show that a corporation “knew of and allowed” the underlying misbehavior. One case suggests that “senior management” must be culpable. Gallagher v. Temple Univ. Hosp., No. 2643, 2004 WL 5135898 (Pa. Com. Pl. Sept. 23, 2004) (“When a high-level official of a corporate defendant takes... obviously inappropriate action, it is proper—particularly in the absence of evidence to the contrary—to assume that she did so with at least the tacit approval of, and possibly even at the direction of, senior management.”).

265. Id. § 9A.08.030(1)(c).
268. See State v. Adjustment Dept’ Credit Bureau, Inc., 483 P.2d 687, 690 (Idaho 1971) (“The reasoning in Boise Dodge, Inc. v. Clark, which involved an issue of punitive damages, is applicable in this [criminal] case involving extortion.” (citation omitted)); State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 19 (Minn. 1984) (“If a corporation can be liable in civil tort for both actual and punitive damages for libel, assault and battery, or fraud, it would seem it may also be criminally liable for conduct requiring specific intent.”); United States v. New York Herald Co., 159 F. 296, 297 (C.C.S.D.N.Y. 1907) (“To fasten this species of knowledge [criminal mens rea] upon a corporation requires no other or different kind of legal inference than has long been used to justify punitive damages in cases of tort against an incorporated defendant.”); State v. Balt. & Ohio R.R. Co., 15 W. Va. 362, 1879 WL 2989 (W. Va. 1879) (“[I]n view of the further fact that [corporations] may... be subjected to exemplary or punitive damages, I hesitate to accede to the settlement that they cannot be held liable to an indictment for any offenses which derive their criminality from evil intention.”).
database, 121 cases include both "Restatement" and "217C"—the section for the Restatement of Agency's Restrictive Rule—and 25 cases include both "Model Penal Code" and "2.07"—the section for the MPC's Restrictive Rule. But these two sets of cases do not overlap.269 I am aware of no case in the twenty-eight schizophrenic jurisdictions even mentioning the conflict I highlight here.

The paradigm instances of the rules in one field do not discuss the other field. New York Central & Hudson, which established the federal Liberal Rule for corporate crime in 1909, mentioned Lake Shore from 1893, but only for the proposition that "[i]t is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment."270 New York Central & Hudson did not mention Lake Shore's holding on corporate punitive damages, or its Restrictive Rule for them. Goddard in 1869 established a Liberal Rule for corporate punitive damages without mentioning a case from just the year before holding that Maine did not allow corporate crime at all where malice was an element.271 Kolstad, which adopted a Restrictive Rule for Title VII corporate punitive damages, did not mention the federal Liberal Rule for corporate crime.272 The commentary to the MPC appeals to the Restatement for support, but without noting or explaining why it uses "high managerial agent" as its touchstone, rather than the Restatements' "managerial agent."273 The Restatement (Second) of Agency briefly mentions corporate criminal punishment in § 217D, but not the MPC (under preparation by the American Law Institute when it adopted that Restatement in 1958) or the division of opinion on the subject. The Restatements of Torts and Restatement (Third) of Agency do not mention corporate crime at all.

The scholarship on the corporate punitive damages food-chain issue, which has greatly increased since Kolstad addressed it in 1999,274 barely mentions the same issue in corporate crime.275 Like-

269. Two cases do mention both Model Penal Code section 2.07 (1962) and a neighboring section of the Restatement, Restatement (Second) of Agency section 217D (1958). However, none mention both section 2.07 of the Model Penal Code and section 217C of the Restatement.


271. See Cumberland & Oxford Canal Corp. v. City of Portland, 56 Me. 77, 78, 1868 WL 1758, at *2 (Me. 1868); cf. Androscoggin Water Power Co. v. Bethel Steam Mill Co., 64 Me. 441, 444, 1875 WL 3949 (Me. 1875) (following Cumberland & Oxford on this point but without mentioning Goddard).


274. Among the articles discussing corporate punitive damages under Kolstad at length, but not mentioning corporate crime, see Ann M. Anderson, Note, Whose Malice Counts?: Kolstad and the Limits of Vicarious Liability for Title VII Punitive Damages, 78 N.C. L. REV. 799 (2000); Amy L. Blaisdell, Note, A New Stan-
wise, a vast literature on corporate crime, especially the American Criminal Law Review’s annual surveys,276 discusses the food-chain is-


PUNISHING CORPORATIONS

sue in criminal law in depth, while barely mentioning corporate punitive damages.277


When writers in one of these fields do mention the other field, they sometimes leave misleading impressions about it. For instance, in the field of corporate punitive damages, one writer suggests that the law of corporate crime generally repudiates vicarious liability, while


See, e.g., Gary T. Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. Cal. L. Rev. 133, 136 (1982): Consider now the problem of vicarious liability for punitive damages. As a general matter, our existing criminal law regards vicarious liability as an impermissible basis for punishment (except, perhaps, for a limited range of minor penalty regulatory offenses): one man cannot be judged morally guilty on account of another man's crime. By contrast, our civil law of torts warmly embraces vicarious liability, apparently because the employer is in the best position to control the behavior of his own em-
another mentions only the federal Liberal Rule. In the field of corporate crime, one writer suggests that the Liberal Rule for corporate punitive damages is uncontroversial, while another suggests that the Lake Shore Restrictive Rule is the general rule.

A few articles do mention both splits of authority, or both fields, but without aiming to give a comprehensive assessment of food-chain issues. One pair of commentators has noted the federal-schizo-

ployees. If punishment is the chief purpose of punitive damages, then the criminal law model should prevail and vicarious liability should be rejected.

Of course, if anything, criminal law is more receptive to vicarious punitive liability as applied to corporations than the law of punitive damages. See J. Dennis Hynes & Mark J. Loewenstein, Agency, Partnership, and the LLC 240-41 (6th ed. 2003) (setting out the division of authority on vicarious liability for punitive damages, and noting an analogy to vicarious criminal liability, but suggesting that it would only be appropriate for strict-liability offenses, contrary to the actual approach in the law of corporate crime).

279. Corboy, supra note 251, at 46 & n.203 (comprehensively surveying the law of punitive damages, but mentioning only the federal Liberal Rule for corporate crime: “[C]riminal law recognizes vicarious liability for criminal violations by agents under the doctrine of respondeat superior,” citing N.Y. Cent. & Hudson R.R. Co. 212 U.S. 481, 491-93 (1909), but no states following the MPC); cf. Corboy, supra note 251 at 16 n.50 (comprehensively listing states following Liberal Rule for corporate punitive damages); Corboy, supra note 251, at 25 n.79 (comprehensively listing states following Restrictive Rule for corporate punitive damages).


281. Deborah A. DeMott, Organizational Incentives to Care About the Law, 60 LAW & CONTEMP. PROBS. 39, 51 (Autumn 1997) (seeming to assume that the Restatement-Lake Shore Restrictive Rule is standard for corporate punitive damages: “In contrast to the broad principle applicable to criminal misconduct, only high level complicity, or liability stemming from the act of a managerial agent, warrants vicarious liability for punitive damages.”); id. at 44 (noting the tension between the Liberal Rule for federal criminal law and the Restrictive Rule that applies to federal corporate punitive damages: “The principle of vicarious liability within federal criminal law also contrasts with the complicity requirement—comparable to the Model Penal Code—imposed by federal common law for vicarious liability for punitive damages in civil litigation.”). The RESTATEMENT (THIRD) OF AGENCY (2006), however, for which DeMott was the reporter, notes the division of authority on corporate punitive damages. See supra notes 37 and 38.

282. See Daniel R. Fischel & Alan O. Sykes, Corporate Crime, 25 J. LEG. STUD. 319 (1996) (analyzing the proper amount of corporate punishment without setting out the divisions of authority in any detail); id. at 337 n.32 (briefly noting difference between federal rule and MPC); id. at 348 (“Our discussion of corporate criminal liability also has implications for the imposition of punitive civil liability against corporations.”); id. (concluding that to avoid excessive investment in monitoring, a corporation should only pay, either in punitive damages or in a criminal fine,
phrenic conflict between the Kolstad Restrictive Rule for corporate punitive damages under Title VII and the federal-criminal-law Liberal Rule, but without examination of the division of authority in each field.283

It is particularly striking that the mismatch between corporate punitive damages and corporate crime has gone without extended analysis because many sorts of litigants could raise such issues to their advantage when the rules are being reconsidered. If I am right in my arguments below that a mismatch between corporate crime and corporate punitive damages is not justified, then those litigants facing a less favorable rule in one field should draw an analogy to the other.

Because federal-schizophrenic jurisdictions have a more corporate-defendant-friendly rule for punitive damages than for criminal law, punitive-damages plaintiffs and criminal-law corporate defendants should have a strong incentive to point out the schizophrenia to courts (or, in some cases, legislatures). Plaintiffs seeking punitive damages in such jurisdictions should suggest that there are no good reasons to have a more restrictive rule for them than for criminal prosecutors. Corporate criminal defendants in such jurisdictions can profitably argue that there is no good reason to treat them more harshly in the context of criminal law than they are treated in the context of punitive damages.284 In Connecticut, Mississippi, Nevada, New Mexico, the


284. For one such suggestion on behalf of corporate criminal defendants under federal law, pointing out the existence of a food-chain defense to punitive damages under Title VII, see Weissman & Newman, supra note 283. The Title VII plaintiffs in...
Virgin Islands, and Wyoming, where I use my presumption of a Liberal Rule, corporate criminal defendants can argue that my presumption in favor of a simpler rule should be replaced by a Restrictive Rule like that governing punitive damages in the jurisdiction.

Pennsylvania-schizophrenic states, however, have more corporate-defendant-friendly rules for criminal law than they do for punitive damages. Prosecutors facing heightened standards can suggest that they should be relaxed to match the rules governing punitive damages. On the other hand, corporate defendants seeking to defend against punitive awards should suggest that the standards from criminal law be imported into punitive damages. In Washington, where I apply my Liberal-Rule presumption, corporate civil defendants can use the state's MPC-style statute limiting corporate criminal liability to argue in favor of a similar limit on corporate punitive damages.

While courts and legislatures in either Federal-Schizophrenia or Pennsylvania-Schizophrenia states should attend to this conflict in their approaches to punishing corporations, Consistently Restrictive states can also learn from a comparison of the fields, chiefly by attending to the variety of different Restrictive Rules that are available. Courts interpreting relatively undeveloped or unclear Restrictive Rules have a rich source of analyses if they consider both the rules applying to corporate punitive damages and those governing corporate crime. In particular, eight states have unclear Restrictive Rules for corporate punitive damages (Colorado, Idaho, Iowa, Kentucky, North Dakota, Ohio, Texas, and West Virginia) but relatively clear Restrictive Rules for corporate crime. None of the sixteen Consistently Restrictive jurisdictions make any explicit link between their two Restrictive Rules for corporate punishment, and only two (Guam and Minnesota) adopt the same rule; three (Illinois, New Jersey, and New York) adopt different rules in the two fields.285

The arguments below against Federal or Pennsylvania Schizophrenia also counsel against adopting differing sorts of Restrictive Rules for corporate crime and for corporate punitive damages. There does not, therefore, seem to be any justification for the MPC adopting a "high managerial" standard in distinction to the Restatements' "managerial" standard. Such a higher standard for corporate crime than for corporate punitive damages would be Pennsylvania Schizophrenia writ small. Likewise, a higher standard for corporate punitive damages than for corporate crime, as in New Jersey and Illinois, is Federal Schizophrenia writ small. As in fully Federal-Schizophrenic jurisdictions, corporate criminal defendants and plaintiffs seeking punitive

---

285. See supra Table 5.

Kolstad might have profitably pointed out the discrepancy as an argument in favor of the Liberal Rule, however, by citing New York Central & Hudson and its progeny.
damages would do well to highlight this mismatch to courts and legislatures.

Finally, a comparison between fields can help courts in Consistently Liberal jurisdictions where I apply my Liberal-Rule presumption for one field or the other. Prosecutors in Alabama, Maryland, Oklahoma, and South Carolina can use their states' Liberal Rules for corporate punitive damages to argue for following the federal rule, while civil plaintiffs in Nebraska can use their state's Liberal Rule for criminal law to argue for a similar rule to govern punitive damages (though in Nebraska, such damages must go to the schools286).

IV. WHY CRIMINAL LAW AND PUNITIVE DAMAGES SHOULD HAVE THE SAME FOOD-CHAIN RULE FOR PUNISHING CORPORATIONS

When we take the effort to lay the two food-chain divisions of authority side by side, we notice that several jurisdictions use very different rules for criminal law and for the law of punitive damages. Is there any justification for using different rules for the two different regimes? I will offer five reasons to think that these different rules are, in fact, pathological.

A. Identical Functions: Deterrence and Retribution

Courts describing the purposes of punitive damages have explained repeatedly that their function is deterrence and retribution, not remediation or compensation. Their very name suggests that they are designed, like the criminal law, to be punitive.287 Both areas of law allow society to blame communally the most culpable and most reprehensible conduct in its midst. For instance, in 2001's Cooper Industries, the Supreme Court considered the standard of review for BMW constitutional challenges to the size of punitive damages.288 They decided to use a de novo standard in part because excessive-fine challenges to proportionality are reviewed de novo, and punitive damages serve the same purposes as criminal law.289

286. See supra note 114 and accompanying text.
287. Michigan and New Hampshire are the only two states with a contrary view. See supra notes 251 (Michigan) and 117 and 118 (New Hampshire).
289. Id. at 432. See also, e.g., MISS. CODE ANN. § 11-1-65(1)(e) (West 1999) ("The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future."); Philip Morris USA v. Williams, 127 S. Ct. 1057, 1066 (2007) (Stevens, J., dissenting) ("There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages . . . . [A] punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003);
It is true that criminal law in general also seeks to incapacitate and rehabilitate. But these are not particularly prominent goals for criminal law as such, at least as applied to corporations. If we merely want to incapacitate or restrain corporations, or change how they operate without exacting retribution, we generally use administrative regulations rather than the criminal law pertaining to the most serious crimes.290

B. Applicability of Reasons to Both Fields

The debates between Restrictive and Liberal Rules feature four arguments most prominently—one argument each rooted in either retribution or deterrence and favoring either a Restrictive or a Liberal Rule. Because all of these arguments apply equally well in either the context of punitive damages or criminal law, I conclude that the two debates should be resolved similarly.

The retribution-based argument for a Restrictive Rule is that vicarious punitive liability, as such, is unjust. Prosser and Keeton explain that courts supporting a Restrictive Rule, like Lake Shore, "lay[ ] stress on the injustice of a punishment inflicted upon one who has been entirely innocent throughout."291 This objection, if it is a good

---

290. Cf. Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) ("[A] 'crime' is . . . not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a 'criminal' penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."). An argument might also be made that, although both criminal law and punitive damages pursue the same two goals, deterrence and retribution, they pursue a different distribution between them. For instance, we might think that the function of one field is mainly deterrence, but the function of the other is mainly retribution. However, if this were the case, we would expect to see more general differences between criminal mens rea and punitive-damages-level scienter outside the area of corporations.

291. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 2, at 12 (5th ed. 1984); see also State v. Casey's Gen. Stores, Inc., 587 N.W.2d 599, 601 (Iowa 1998) ("Vicarious liability occurs when 'one [person] is made liable, though without personal fault, for the bad conduct of someone else.' . . . This doctrine is contrary to the 'basic premise of criminal justice that crime requires personal fault.'") (quoting WAYNE LA FAVE & AUSTIN W. SCOTT, JR. CRIMINAL LAW § 3.9, at 250 (2d ed. 2008).
one, undermines the Liberal Rule for either crime or punitive damages.

Courts defend the retributive propriety of a Liberal Rule, however, by stressing that corporations act only through agents. It therefore does not make sense to distinguish between high-level and low-level employees. Liability is vicarious in either case, so there is no special problem for low-level employees; if punishment of the servant is proper because of his mental state and his outward action, then punishment of the corporation is equally proper, because it has performed the same outward action with the same mental state. The Goddard and New York Central paradigms of Liberal Rules each make this argument. Goddard stated:

A corporation... has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants’ minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense...292

Joel Prentiss Bishop, quoted in New York Central, reasons, "[S]ince a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done."293 Again, the argument is the same in both fields.

1986)); Restatement (Third) of Agency § 7.03, cmt. e (2006) ("The approach outlined in § 909 [of the Restatement of Torts] is preferable because it requires consideration of circumstances relevant to a principal’s culpability."); Restatement of Torts § 909 cmt. a (1939) ("[T]he reasons for awarding punitive damages... make it improper ordinarily to award such damages against one who himself is personally innocent."); Restatement (Second) of Torts § 909, cmt. b (1979).


293. 2 Joel Prentiss Bishop, New Commentaries on the Criminal Law Upon a New System of Legal Exposition § 417, at 255–56 (8th ed. 1892) (quoted in N.Y. Cent. & Hudson R.R. Co., 212 U.S. 481, 492–93 (1909)); see also Embrey v. Holly, 442 A.2d 966, 970 (Md. 1982) ("[A]s a corporation can only act through its agents, logic would dictate that the ‘fault’ of the agent be imputed to the corporation for purposes of determining responsibility for a wrongful act...."); Pullman Palace-Car Co. v. Lawrence, 22 So. 53, 58 (Miss. 1897) ("Having, by the constitution of their being, to act solely by agents or servants, [corporations] must, as matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrong while performing the master’s business, and in the scope of their employment."); Jones v. Shannon, 175 P. 882, 885 (Mont. 1918) ("A corporation... is an artificial person, and can only act through agents; and if the malignant motives of the agent are not imputable to it, it would necessarily follow that it could not be held liable for the malicious acts of its agents in any case."); State v. Louisville & N. R.R. Co., 19 S.W. 229, 229 (Tenn. 1892) ("Being a corporation [the defendant] necessarily acts only through its agents. If the obstruction is the
Turning to deterrence, some courts justify a Restrictive Rule by saying that we cannot deter rogue employees by punishing the corporation:

It is obvious, however, that there can be no effective deterrence unless there is some conduct which can be deterred. Thus, if an employer is only vicariously liable and could have done nothing to prevent the misconduct of its employee, it seems of little value to award punitive damages against the employer. In many instances there is probably little that an employer can do to prevent the employee from committing outrageous torts.2\textsuperscript{94}

This argument applies in both fields too. If this argument were cogent, the failure of the Liberal Rule to account for rogue employees would undermine its rationale in either field; neither sort of Liberal Rule would properly deter misbehavior.

Courts favoring a Liberal Rule, however, argue that a Liberal Rule will properly deter corporate misbehavior by producing a proper incentive to monitor low-level employees. Goddard stated:

Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and band-boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations; and that is, the pocket of the monied power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.2\textsuperscript{95}

The Supreme Court added in a later defense of the Liberal Rule for corporate crime:

The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment. Thus pressure is brought on those who own the entity to see to it that their agents abide by the law.2\textsuperscript{96}

This argument, too, applies equally well in either field. If it is sensible to motivate corporate monitoring of low-level employees by making them feel the sting whenever such employees misbehave, then both the sting of criminal liability and the sting of punitive damages should be effective toward that end.2\textsuperscript{97}

\begin{footnotesize}
\begin{itemize}
\item act of its agents, it is the act of the corporation provided the agent did the act in the course and scope of his duty as an agent.
\item Goddard v. Grand Trunk Ry., 57 Me. 202, 224, 1869 WL 2230, at *15 (1869).
\item In my work in progress, I evaluate these four arguments and argue that they end largely in a stalemate.
\end{itemize}
\end{footnotesize}
C. Similar Mens Rea and Scienter Requirements

A third reason why corporate crime and corporate punitive damages should follow the same food-chain rule is that they are both, in essence, just applications of the problem of corporate mens rea or corporate mental states. Restrictive Rules decline to impute "rogue" employees' guilty mental states to the corporations, while Liberal Rules recognize no such category.

Just as punitive damages and criminal liability share the same goals of deterrence and retribution, they also share the same requirement of mens rea or scienter. The Supreme Court's 1983 review of punitive-damages law in Smith v. Wade pointed to "criminal indifference to civil obligations" as the touchstone for punitive damages.\(^{298}\) Lake Shore referred to "criminal intent" as the requisite.\(^{299}\)

Concerning retribution, it is true that corporations act only through agents. As a result, the argument against the justice of vicarious punitive liability is therefore really an argument against any sort of corporate punishment, not an argument for a Restrictive Rule. However, it might still be possible to impute some employees' mental states to a corporation, but not others; the only-through-agents principle does not forbid making the sorts of distinctions among such agents made in a Restrictive Rule, any more than the principle that corporations act only through human beings forbids making distinctions regarding a corporation's responsibility for various human beings.

Concerning deterrence, it is true that, strictly speaking, punishing one person cannot deter the misbehavior of someone else. The devotee of deterrence argues that misbehavior will stop if we make it painful enough, but that will not necessarily work if the pain and misbehavior are located in different people. The argument that a Liberal Rule will encourage monitoring of lower-level employees does supply an intelligible rationale for the rule. However, such monitoring is costly, and it is not obvious how much investment in crime prevention we want to require of corporate employers.

After this evaluation, then, the key question is how much investment in preventing misbehavior by low-level employees we may properly demand of a corporation. On the basis of an analogy with individual character, I answer that we may properly demand enough such investment to cleanse a corporate culture of criminogenic tendencies. Accordingly I favor a view like that discussed above in section II.B.4: if an employee's misbehavior fits with corporate culture as embodied in explicit and implicit policies, then corporate punishment is proper.

298. Smith v. Wade, 461 U.S. 30, 41 (1983) (quoting Phila., Wilmington. & Balt. R.R. Co. v. Quigley, 62 U.S. (21 How.) 202, 214 (1858)). In dissent, then-Justice Rehnquist argued that the criminal-law standard should require intent, rather than mere recklessness, but agreed that punitive damages and criminal law follow the same standard for improper mental state. Smith, 461 U.S. at 87 (Rehnquist, J., dissenting) ("19th century decisions consistently justified the imposition of a quasi-criminal 'fine' by reference to the 'wickedness' or 'evil' conduct of the defendant, just as Oliver Wendell Holmes drew a sharp distinction between accidentally and intentionally kicking an animal.").

299. Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 111 (1893) ("[A] corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation.") (emphasis added); see also Cheatham v. Pohle, 789 N.E.2d 467,
The food-chain issue is just the problem of corporate mental states. If a low-level employee misbehaves, a high-level employee need only add an improper mental state—a ratifying "well done, good and faithful servant"—to make the action warrant corporate punishment. No additional outward actions from high-level employees are required. It is common ground among all of the Restrictive Rules that a low-level employee's outward action, coupled with a sufficiently-high-level employee's approval, will be enough to warrant corporate punishment. The issue dividing the Restrictive Rule from the Liberal Rule is simply how demanding we want to be regarding corporate mens rea or scienter. If, then, criminal law and the law of punitive damages use the same mens rea and scienter standards as a general matter, they should also use the same such standards when they consider corporations.

D. Clarity in the Corporate Duty to Prevent Employee Misbehavior

A fourth reason why corporations should face the same food-chain rules in corporate crime and corporate punitive damages is that the rules specify the same duty on the part of the corporation: the duty to monitor and prevent low-level employees' misbehavior. Liberal Rules take the view that a corporation, just in virtue of being a corporation, has the legal duty, enforced by punitive sanctions, to prevent all criminal misbehavior or reprehensible conduct by any employee. Restrictive Rules instead take the view that a corporation has only the duty to prevent criminal behavior or reprehensible conduct by sufficiently important employees. It makes no sense for the same sovereign to enforce with punitive sanctions two differently-sized duties on corporations regarding the prevention of exactly the same misbehavior by low-level employees.

E. Punishing Corporations and Blaming Corporations

A final reason to think that both criminal law and the law of punitive damages should follow the same rule on the food-chain issue is that our communal acts of blaming and assessing responsibility are simply large-scale versions of our individual acts of blaming and assessing responsibility. Those practices of blaming encompass both in-

---

individual human beings and corporations. In our ordinary, everyday lives, we have to decide whether to blame corporations for things, and we have to resolve food-chain issues to do so.

Consider two examples of individual reactive attitudes toward corporations involving food-chain questions, but unrelated to the law.

Suppose a bank employee is rude to me. Do I regard that misbehavior as the misbehavior of the bank itself, or just the employee? It will depend on all the same considerations that courts use to decide food-chain issues: Did the bank apologize to me for the employee's rudeness? Was the person who was rude the branch president, or just a teller who was fired as a result? Are people at that bank typically rude in a whole range of cases, or was this incident aberrational?

As a second example, I have for the last few years generally not shopped at a certain grocery store chain, because I was very unhappy with the corporation's actions during the rezoning of land across the street from my house. I think that a corporation that treats neighbors of proposed stores the way that this corporation treated me is not deserving of my good will and my business. Now, in being unhappy with the corporation for its treatment of me, I am attributing the mental states of particular employees of the corporation to the corporation itself. But I might reason that these particular employees were too far down the chain of command to blame the entire corporation for their misdeeds. It might not make sense, for instance, to avoid the corporation's stores in Mississippi just because of something that happened in Indiana.

Both criminal law and the law of punitive damages frequently recur to the criteria ordinary people use in deciding whether to blame a criminal or civil defendant. My thesis is simply that both criminal law and punitive damages should, in deciding food-chain issues, use the same factors and rules that ordinary people use in deciding whether to blame a corporation. Both criminal law and the law of punitive damages should, therefore, recognize a food-chain defense to corporate punishment whenever our ordinary attitudes of placing blame on corporations would recognize such a defense.

The function of both corporate criminal liability and corporate punitive damages is to express blame on the structures responsible for


301. See, e.g., Hart, supra note 290, at 405 (stating that a crime is "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community"); Franz v. Calaco Dev. Corp., 818 N.E.2d 357, 371 (Ill. App. Ct. 2004) (explaining that the role of the jury in the assessment of punitive damages is "to articulate community values in evaluating the reprehensibility of a defendant's conduct").
anti-social conduct and thereby to prevent it. Because the food-chain issue is rooted in pre-legal issues of corporate blame and responsibility, rather than anything distinctive about the criminal process or the process of imposing punitive damages, we would expect both areas to converge on the same body of law. Because the two areas of law are approaching the same problem, they should be mutually informative, and a lack of uniformity between the two areas should be seen as a symptom that one or the other approach, or both, is ill-considered.

F. Possible Defenses of a Mismatch

As noted above, no one has set out the mismatch between criminal law and punitive damages, let alone defended it, and I think there are compelling reasons why corporate punitive damages and corporate crime should follow the same rule. What might be said, however, on the other side of the issue? Are there any good reasons to justify either Federal or Pennsylvania Schizophrenia—that is, to explain why it is not really schizophrenic, but just good sense? I can think of five possible ways one might attempt to argue that either Federal or Pennsylvania Schizophrenia is not really schizophrenic, but they do not seem compelling.

One defense of either Federal or Pennsylvania Schizophrenia is that the Liberal Rules for corporate punishment might be offsetting. We only need so much punishment of corporations for the misdeeds of minor employees, the argument would go. To the extent that we allow broad criminal punishment of corporations, there is less need for corporate punitive damages, and vice versa. If we only need to have one sort of Liberal Rule, having two is overkill.302

If, however, punitive damages and criminal liability are unfairly duplicative in the case of punishment for minor-employee misbehavior, they would be similarly duplicative in the case of any sort of corporate punishment. If it is overkill to have two Liberal Rules, it would be just as much overkill in general to have two ways of punishing corporations—or indeed, two ways of punishing individuals. However, every jurisdiction (with the possible exceptions of Michigan and New Hampshire’s idiosyncratic forms of punitive damages) allows both

302. This sort of argument is similar to one once adopted by Indiana, which held that punitive damages on top of criminal liability was akin to double jeopardy. See Eddy v. McGinnis, 523 N.E.2d 737 (Ind. 1988) (reviewing history of the rule and concluding that the legislature could change it). At least one state uses the existence of other penalties as a mitigating reason not to impose large punitive damages. Miss. CODE ANN. § 11-1-65(1)(f)(ii)(4) (West 1999). However, BMW of N. Am., Inc. v. Gore and its progeny hold that the existence of a heavy criminal penalty for particular conduct is a reason in favor of relatively large punitive damages, not a reason to avoid them. See BMW of N. Am. v. Gore, 517 U.S. 559, 583 (1996); Philip Morris USA v. Williams, 127 S. Ct. 1057, 1061 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003).
forms of corporate punishment. Using an argument against multiple punishments to justify getting rid of one Liberal Rule while simultaneously allowing multiple punishments of a corporation in the case of high-level misbehavior, and allowing multiple punishments of misbehaving individuals, does not seem sensible.

The remaining arguments I consider here offer possible reasons why either Federal or Pennsylvania Schizophrenia might make sense. However, we cannot explain both of them by pointing to systematic bias in favor of one or the other. Because Federal and Pennsylvania Schizophrenia are both common, the best explanation for them is probably simple failure to consider the other field, or failure to consider it in enough detail. Legislatures adopting criminal codes to apply to corporations do not pay attention to the state of the law regarding corporate punitive damages, and courts considering the punishment of corporations with punitive damages do not consider that an identical problem confronts criminal law. The randomness of the patterns of legal schizophrenia suggests that simple inattention is the most likely explanation.

One defense of Pennsylvania Schizophrenia would point to the fact that, in certain ways, criminal liability is more serious than liability for punitive damages. The criminal law has a wider variety of sanctions at its disposal than do civil courts. Of the corporation’s three chief interests—liberty, property, and reputation—punitive damages strike only at one, corporate property. A corporate criminal conviction, however, may lead to restrictions on its liberty through probation conditions,303 or to public shaming.304 Because these criminal sanctions are higher, the argument would go, we should have stricter standards for corporate crime than for corporate punitive damages. So Pennsylvania Schizophrenia makes sense.

If, though, the higher sanctions in criminal law justify a stricter food-chain rule there, then they would also justify a stricter approach to mens rea than we take to punitive-damages-worthy scienter. If the fact that criminal liability is more serious than punitive damages is sufficient to require heightened mental state requirements for corporations, that fact would justify heightened mental state requirements for individuals. Indeed, because individuals can be sent to prison, the argument would be far stronger in the case of individuals. But as explained above, states take the same approach to improper mental states in both fields.

303. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 8D1.3(c) (2007).
304. See, e.g., id. § 8D1.4(a). However, shaming may not be unique to criminal law; "there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award." Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting).
On the other hand, one defense of Federal Schizophrenia would highlight the lower procedural standards for punitive damages. Punitive damages are assessed on the basis of a lower standard of proof; either proof by a preponderance of evidence or by clear and convincing evidence, rather than proof beyond reasonable doubt. Punitive damages lack a requirement that particular conduct be forbidden in advance, as under criminal law. Punitive damages may be available to many different plaintiffs, making one-stop shopping more difficult than in the criminal law, where a single prosecutor will be in charge (per jurisdiction, at least). In sum, as the Supreme Court has explained, "[a]lthough these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding."305 If the law is justifiably more concerned about excessive punishment of corporations in such a setting, one remedy might be to adopt a Restrictive Rule for corporate punitive damages. But the heightened procedural safeguards in criminal law might make us think that we can have looser rules for corporate crime.

As with the explanation for Pennsylvania Schizophrenia above, however, there is no reason to show special solicitude for corporations regarding the fact that punitive damages are in certain ways easier to obtain than criminal convictions. If these procedural differences warrant a higher standard for punitive damages, then we would expect to see a generally higher requirement for punitive-damages-worthy *scienter* than we do for criminal *mens rea*. However, we do not.

Another structural difference between punitive damages and criminal law, also conceivably favoring Federal Schizophrenia, is the fact that the criminal law is not fully enforced.306 Prosecutors may decide not to go after a particular corporation, for instance, if they decide that corporate criminal liability is not in the public interest. Civil plaintiffs who are harmed by corporations' misdeeds, however, will presumably not be willing to forego the chance to recover punitive damages simply because they think that punishing a particular corporation is not the right thing to do. This structural difference can be overstated, however. Most states do not allow punitive damages simply as a matter of right. Punitive damages are generally discretionary, so particular fact-finders can decide not to punish particular corporate wrongdoers. A measure of such discretion, however, also exists with respect to criminal law, where the sentencing judge may decide that a large fine on a corporation, or heavy probation restrictions, are not in the public interest. Criminal law, then, has two opportunities for mercy—the government may decline to prosecute, and the sentencing

judge may decline to punish—while punitive damages has only one
discretionary opportunity for mercy.\textsuperscript{307} Given the existence of elected
prosecutors who can short-circuit the full enforcement of the criminal
law, there may be a structural reason to make criminal liability
broader than liability for punitive damages. Further, the federal
prosecutorial guidelines may act, if enforced fully, as a de facto Re-
strictive Rule for federal corporate crime (though they would not ex-
plain the other seventeen jurisdictions afflicted with Federal
Schizophrenia, but without such prosecutorial policies).

However, the tendency of criminal law to expand far beyond the
actual conduct worthy of punishment, while relying on prosecutorial
discretion to pick out the offenders who really deserve prosecution, is
rightly called a pathology.\textsuperscript{308} If our distrust of punitive-damages
plaintiffs justifies a Restrictive Rule for corporate punitive damages,
we have equally good reason not to trust prosecutors either. If the
Holder-Thompson-McNulty memoranda are proper limits on federal
criminal liability, they should be codified so that other participants in
the criminal justice system besides prosecutors can assess whether
they apply to particular cases.

A final structural difference between criminal law and punitive
damages might favor Pennsylvania Schizophrenia: the fact that puni-
tive damages are usually paid to victims, producing pressure for the
 expansion of the availability of punitive damages where there would
 not be pressure for the expansion of criminal liability.\textsuperscript{309} Victims
might argue that they are more worthy recipients of money flowing
from a Liberal Rule penalty than the state. This structural difference
might also be overstated. Criminal law can feature restitution orders
that compensate victims, and without requiring them to prosecute a
lawsuit themselves.\textsuperscript{310} Those who are harmed by corporate misbehav-
ior have, then, some incentive to push for expanded corporate criminal
liability as well as for expanded corporate punitive damages, and if
victims deserve a Liberal Rule for corporate punitive damages, they
also deserve a Liberal Rule for corporate crime when such restitution
orders might be at stake. Still, there may be a greater motive for an

\textsuperscript{307} Some states give judges discretion to reduce punitive awards as well as juries,
but this leeway is generally confined. See, e.g., Miss. Code Ann. § 11-1-
65(1)(f)(i)(West 1999) ("Before entering judgment for an award of punitive dam-
ages the trial court shall ascertain that the award is reasonable in its amount
and rationally related to the purpose to punish what occurred giving rise to the
award and to deter its repetition by the defendant and others.").

\textsuperscript{308} See Stuntz, supra note 306, at 509.

\textsuperscript{309} Some states have “split-recovery” statutes requiring in certain circumstances
that a portion of punitive awards go to the state and, except in Nebraska, at least
some of the money goes to the victim. See, e.g., Meredith Matheson Thoms, Puni-
tive Damages in Texas: Examining the Need for a Split-Recovery Statute, 35 St.
Mary’s L.J. 207, 211 (2003).

\textsuperscript{310} See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 8B1.1(a)(1)(2006).
expansion of punitive damages, since plaintiffs can recover the entire amount that a fact-finder finds appropriate to deter a corporate wrongdoer, rather than merely the limited amount available from a restitution order.

However, the tendency to use punishment as a means of compensating victims, rather than expressing blame for culpable conduct, is an abuse of the system of punitive damages. As noted above, the purpose of punitive damages (except in Michigan and New Hampshire)\(^{311}\) is deterrence and retribution, not compensation. Pursuing a secret goal of compensation under the guise of these goals is improper. The Supreme Court has said that “[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis.”\(^{312}\) It is likewise improper for courts to promote compensation under the guise of retribution or deterrence.

In short, the existence of plaintiffs with a vested interest in the expansion of the law of punitive damages may give an explanation, but not a justification, for Pennsylvania Schizophrenia. If the arguments that civil plaintiffs give for a Liberal Rule are good ones, then they would be just as good when made by prosecutors.

V. CONCLUSION

Courts and legislatures have struggled with whether and how to recognize a rogue-employee defense to criminal liability or to punitive damages. Some states in both fields recognize such a defense, but others do not. These states, however, do not match up. There is no good reason for criminal law and punitive damages to punish corporations using different rules. Both fields pursue the same retributive and deterrent functions; the same arguments are offered in favor of each sort of rule in both fields; both fields require the same culpable mental state for punishment; both fields specify what duty corporations have, as corporations, to stop employee misconduct; and both fields aim to track blameworthiness. Alternative explanations for the divergence of approaches are not compelling. Many sorts of litigants would profit by pointing out the discrepancy to courts when rules are uncertain or are being reconsidered. Courts assessing either corporate criminal liability or the assessment of punitive damages against a corporation would be well-served to consider both fields at once.

\(^{311}\) Because of this idiosyncratic characterization of punitive damages, Michigan’s case of Pennsylvania Schizophrenia is less pathological than other states’. See supra note 251.