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Corporate Intent and Corporate Crime: A Matter of Inference

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Mihailis Evangelos Diamantis, *Corporate Criminal Minds*, 91 *Notre Dame L. Rev.* ____ (forthcoming 2016), available at SSRN.



Caroline Bradley

The Yates Memo emphasizes the need to fight corporate crime by imposing criminal liability on individual criminal perpetrators. But critiques of corporate deferred prosecution agreements and cascades of examples of corporate criminality involving crimes such as bribery, manipulation, tax evasion and sanctions-busting raise questions about criminal liability of corporations as well as the liability of individual wrongdoers. Whether sanctioning individuals or the corporations they work for would be more effective in achieving deterrence or vindicating society's interest in ensuring legal compliance and sanctioning legal violations is an empirical question. But improving the rules about corporate criminality does not require abandoning efforts to sanction individual criminality.

The problem Mihailis Diamantis addresses in this article is not a new one: corporations may be subject to civil and criminal liability for their acts, but assigning criminal liability to a corporation depends on an “antiquated gimmick—*respondeat superior*,” which focuses on attribution of employees' intent to the corporation, rather than on any real theory. Diamantis states that *respondeat superior* results in assigning criminal liability to corporations where the criminal acts resulted from the actions of a few rogue employees, and insulating the corporation from criminal liability inappropriately merely because no single employee has the requisite *mens rea*. He argues that whereas *respondeat superior* may have made sense as the basis for the attribution of *mens rea* in the context of small corporations it makes no sense in the context of large complex modern business enterprises. Corporate personhood may be a legal fiction, but it is one to which the law is committed, and therefore it is necessary to be able to identify the mental state of these fictional persons.

The solution Diamantis offers is a “new theory of corporate *mens rea* that could be plugged into the current framework of criminal liability” rather than a radical overhaul of the criminal law.

Diamantis concedes that he is not the first to acknowledge the deficiencies of *respondeat superior* or to suggest improvements (for example approaches that rely on ideas of an inner circle, or collective knowledge, or corporate ethos). Diamantis' proposed solution involves “further anthropomorphizing corporations in the eyes of the law, and adjudicating their mental states just as courts do those of natural persons— inference to the best explanation from acts and surrounding circumstances.” The problem of working out what was in the mind of the corporation is not so different from the problem of identifying the mental state of a natural person. We should infer intent from action. The argument is elegant in its simplicity.

Diamantis says that his solution to the corporate *mens rea* problem “harmonizes with recent discoveries in

cognitive science and social psychology about how people actually assess the blameworthiness of groups like corporations.” People behave as though corporations are real, rather than merely fictional, entities and are willing to attribute blame to them in much the same way that they attribute blame to individuals. Why, then, would the law behave differently?

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