# Corporate Criminal Culpability: An Idea Whose Time Keeps Coming

Keith Welks*

## INTRODUCTION

The corporate structure, perhaps not unlike Frankenstein's monster, was breathed into existence in order to do good, but all too frequently seems to stumble and engage instead in conduct considered unacceptable by the society in which it operates. Legal efforts to hold corporations accountable for such misconduct have included the imposition of vicarious civil liability and, more recently, the imposition of vicarious criminal liability. This article examines the reach of the doctrine of vicarious criminal liability, a doctrine central to the prosecution of corporations under criminal provisions of environmental laws. Part I surveys the historical development of and intellectual foundations for the imposition of criminal responsibility on corporations through the imputation of wrongdoing by their employees. Part II explores a theoretical justification for the extension of imputed liability to the acts of a corporation's independent contractors where particular risks can be associated with certain kinds of business activities and discusses a recent Pennsylvania court decision in which criminal responsibility was imposed on a waste disposal company for the wrongful act of an independent contractor.

## I. CORPORATE CRIMINAL CULPABILITY

### A. *Historical Development of Corporate Criminal Culpability*

Corporations traditionally enjoyed freedom at common law from prosecution and conviction for criminal offenses. As recently as 1908 an English court held that only the members of a corporation, not the entity itself, could be subject to indictment.[1] Blackstone states, to similar effect, that "a corporation may not

* Mr. Welks is Chief Counsel of the Pennsylvania Department of Environmental Resources. From 1980 until 1987, he was the chief of the environmental prosecutions section of the Pennsylvania Office of Attorney General. The views expressed in this article do not necessarily reflect the views of either of these agencies.

1. Anonymous, 12 Mod. 559, 88 Eng. Rep. 1518 (1908).

commit treason, or felony, or other crime in its corporate capacity. . . ."[2] This doctrine of organizational sanctuary enjoyed its own Latinate rendition: *societas delinquere non potest* (a corporation can do no wrong).

Numerous conceptual and policy arguments were developed and advanced to support the notion that the criminal laws were inapplicable to corporate activity. In an oft-repeated synthesis of these views, the second Baron Thurlow explained, perhaps melodramatically but certainly aptly, that a corporation "has no soul to be damned and no body to be kicked."[3] Expressed in the less gaudy vernacular of the legal profession, a corporation could not be criminally culpable, it was held, because it possessed no cognitive ability and therefore could not form the *mens rea* traditionally required for conviction. Moreover, even if a corporation could somehow be convicted, it enjoyed no corporeal existence and consequently could not be imprisoned, the standard form of punishment at common law.[4] Lastly, it was believed that any truly criminal acts by corporate agents would surely be *ultra vires*, or outside their scope of authority; it was therefore presumptively unjust to attempt to punish the principal for such unintended, unforeseeable, and uncontrollable actions of its servants.[5]

The dramatic changes in society and the explosive growth of business organizations in the second half of the 19th century insured that this corporate exemption from criminal liability, notwithstanding its firm purchase in the common law, would not permanently endure. As business organizations extended their scope and became essential participants in every aspect of societal and economic intercourse, the historic reluctance to hold them accountable for real or perceived transgressions became increasingly impractical.[6] While the analytical underpinnings of the immunity may have remained apparently intact, their strength was drained by growing recognition of the tangible realities of modern corporate power. "If, for example, the invisible, intangible essence of air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them,

2. 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 476 (W. Lewis, ed. 1922).

3. R. CROSS & P. JONES, INTRODUCTION TO CRIMINAL LAW 122 (R. Card 10th ed. 1984).

4. W. LAFAVE AND A. SCOTT, HANDBOOK ON CRIMINAL LAW 228 (1972).

5. Jung, *Recognizing a Corporation's Rights Under the Indictment Clause*, 1983 U. ILL. L. REV. 477, 496.

6. *Id.*

it can intend to do it, and can act therein as well viciously as virtuously."[7] It but remained for the underpinnings themselves to be removed and corporate culpability to be substituted as the rule.

The United States Supreme Court delivered the mortal blow to corporate criminal invulnerability in 1909 in the case of *New York Central & Hudson River Railroad v. United States*.[8] The railroad company and its manager had been convicted of paying rebates to shippers[9] in violation of the Elkins Act.[10] The Act expressly provided that any relevant misdemeanor by a corporate director, officer, receiver, trustee, lessee, agent, or other person acting for the corporation would also be held to be a misdemeanor committed by the corporation.[11] The railroad corporation appealed and marshalled many of the traditional doctrinaire objections to the concept that it could be held criminally culpable. It claimed that it was unconstitutional to impute criminal responsibility to the corporation for actions of its employee manager because that would punish innocent stockholders and deprive them of property without due process.[12] Moreover, there had been no evidence that the directors or stockholders had authorized the criminal rebates; thus any illegal actions by employees were not intended by and could not be charged to the corporation.[13] The Court correctly summarized the railroad's position to be that "a corporation cannot commit a crime of the nature charged in this case."[14]

The Court strained not at all in rejecting this contention. Adopting a doctrine from civil tort law as its navigational aid, the Court charted a direct course through the railroad's position. It stated that: "[i]t is now well established that, in actions for tort, the corporation may be held responsible . . . for the acts of its agent within the scope of his employment,"[15] with accountability based not upon proof of participation by the principal in the wrongful act but on the fact that the act was performed for the

7. 1 J. Bishop, BISHOP'S NEW CRIMINAL LAW § 417 (8th ed. 1892), quoted in New York Central & Hudson River Railroad v. United States, 212 U.S. 481 (1909).

8. 212 U.S. 481.

9. *Id.*

10. Pub. L. No. 57-103, 32 Stat. 847 (1903).

11. 212 U.S. at 491 (interpreting Elkins Act).

12. *Id.* at 492.

13. *Id.*

14. *Id.*

15. *Id.* at 493.

benefit of the principal.[16] As a result of this benefit, the Court reasoned, "justice requires that the [principal] be held responsible . . . ."[17] It observed that the agent's authority need not be pursuant to written authority or strictly construed; rather, it was to be evaluated based upon the corporate power actually employed by the agent.[18]

In a passing nod to policy considerations raised by the pervasive influence of corporations, the Court presumed that the provisions of the Elkins Act imposing corporate criminal liability were a response to reports of the Interstate Commerce Commission that corporations had been evading liability for regulatory violations as a result of the restriction of culpability to hapless corporate employees.[19] According to the Court, "statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment . . . when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments."[20] This statement neatly reversed the essence of the original *ultra vires* defense: rather than accepting that the corporation is unreasonably set upon by prosecutors for employee actions beyond the ostensible scope of their employment, equity and justice instead demand that employees not be the exclusive targets of punishment for conduct which benefitted their corporate employer.

Having thus succinctly rejected the traditional defenses of corporate culpability, identified the inequity in focusing only on agents, and worried about the inefficiency in allowing corporations to avoid sanction for criminal violations, the Court advanced its legal theory. Not surprisingly, in view of its earlier approving reference to it, the Court endorsed application of the doctrine of imputed liability.[21] "Applying the principle governing civil liability, we go only a step further in holding that the act of the agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which

16. *Id.*
17. *Id.*
18. *Id.* at 493-94.
19. *Id.* at 495.
20. *Id.*
21. *Id.* at 494.

he is acting on the premises."[22] The Court, accordingly, found no objection in law to Congress's attempt to regulate interstate commerce effectively by holding responsible those corporations which conduct the majority of interstate transactions.[23]

### B. *Intellectual Foundations for the Imposition of Corporate Criminal Culpability*

Imposition of corporate criminal culpability has developed and burgeoned dramatically since *New York Central*. Not all observers have been enamored of the trend. One commentator compared it to the spread of weeds since "nobody bred it, nobody cultivated it, nobody planted it, . . . It just grew."[24] It is common for critics, for example, to recite horrifics to suggest that the doctrine has reached unsustainable lengths. One commentator identified rulings establishing the following propositions as illustrative of the doctrine's unmanaged growth:

a) the corporation can be held liable regardless of the position of the agent(s) responsible;
b) the corporation can be held responsible without precise identification of the agent(s) responsible;
c) the corporation can be held liable even if the agent(s) are acquitted of the same offense; and
d) the corporation can be held responsible even when the agent violates corporate policy and was specifically directed not to perform the illegal act.[25]

These rulings are viewed by such commentators as indicative of the extremism that they believe characterizes the imposition of corporate criminal liability in American case law.

Despite the critics' focus on the seeming overzealousness of prosecutors and the judiciary (or perhaps because of this focus), there has been only limited critical thinking directed at the precise nexus needed between the actions of the employee and the corporation itself in order to impute culpability. While it is correct to say that corporate culpability is a form of vicarious responsibility premised upon the civil doctrine of *respondeat superior*, that statement alone spawns more questions than it resolves. For example, it is commonly believed that corporate criminal liability,

22. *Id.*
23. *Id.* at 495-96.
24. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 21 (1957).
25. Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 289-91 (1985).

because it is based on imputed conduct, is in fact strict liability. This belief is not, strictly speaking, correct.[26] An agent's commission of a wrongful act, whether tortious or criminal, must be proved before liability can be imputed. Thus, the foundation of any action against the corporation is always a demonstration that all the requisite elements of liability are present in the agent's conduct.[27] In a civil case, this may involve showing that the agent acted negligently; in a prosecution, it may require proof that the agent acted knowingly, wilfully, or with some other statutorily required form of *scienter*.[28]

Identification of the mental requirement for the predicate wrongful employee conduct is only part of the inquiry. Some basis for coupling it to the corporation must be described. One way to examine the nexus between wrongful employee conduct and the corporation is to consider the question as one of corporate *mens rea*: what, if any, additional element demonstrating corporate *scienter* should be required to support imputing the agent's conduct to the corporation in order to hold it legally culpable? At least four different theories of corporate *mens rea* have been offered, by various authorities, as the appropriate additional element which would justify corporate criminal liability.

By far the most narrow theory is that calling for proof of strategic *mens rea* by the corporation. Strategic *mens rea* has been de-

26. Pun unintended.

27. *See generally* W.P. Keeton, PROSSER AND KEETON ON TORTS 499 (5th ed. 1984) [hereinafter PROSSER & KEETON]. This assertion is not inconsistent with Lederman's critical identification of cases in which employee acquittal failed to require corporate acquittal. Lederman, *supra* note 25, at 289-90. The cases cited by Lederman do not hold that corporate culpability can exist when employee conduct itself does not comprise the essential elements of the crime. They observe only that inconsistencies in jury verdicts never establish trial error or require dislodging findings of guilt, and that the acquittal of specifically charged employees evidences nothing about the conduct of other, unindicted, employees whose actions might be imputed to the corporation. Magnolia Motor and Logging Co. v. United States, 264 F.2d 950, 953 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959); American Medical Ass'n v. United States, 130 F.2d 233, 252 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); United States v. General Motors, 121 F.2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

28. Of course, it may be that the requisite standard for liability in a particular instance is strict, as in actions for damages resulting from ultra-hazardous activities, Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868), or in prosecutions for misuse of controlled substances. United States v. Behrman, 258 U.S. 280 (1922); United States v. Balint, 258 U.S. 250 (1922). Imputed corporate responsibility in such circumstances would be based upon strict liability, but only as a function of the minimal proof requirements of those cases, and not as an essential consequence of the doctrine of vicarious culpability.

fined as "*mens rea* manifested by a corporation through its express or implied policies."[29] While this concept may be the only one that requires a genuine demonstration of corporate fault, it is also the one most difficult for the government to prove. It is highly unlikely that corporations will generate and disseminate documents exhorting their employees to break criminal laws. Much more frequently, corporations churn out turgid anti-crime directives, and then attempt to utilize these expressions of corporate saintliness to ward off criminal charges based on employee conduct that remained somehow undeterred by the directives.[30] Indeed, it may be virtually impossible to secure a conviction if proof of strategic *mens rea* is required. To date, the concept has enjoyed far greater vogue with academic observers than with jurists. Even a leading proponent observes that it has only been hinted at in reported decisions.[31]

A seemingly more workable approach, described as managerial *mens rea*, requires a showing that the criminal conduct was committed, directed, or tolerated by a managerial agent high enough in the organization to formulate and implement policy or discretionary decisions. According to this theory, the action of a senior official could rationally be identified as an action of the company and would seem to introduce some level of genuine corporate *scienter*.[32] However, the concept of managerial *mens rea* has numerous shortcomings. First, the distinction it draws between managerial and ministerial employees may not be a sound one for purposes of finding a corporation responsible for acts of its employees. It is no less conceivable that a high-level agent would ignore express corporate anti-crime directives than a ministerial employee. Indeed, a senior manager is more likely to profit personally (through bonuses or advancement) from corporate success and therefore theoretically enjoys greater incentive to ignore genuine corporate antipathy for criminal practices if he or she believes he or she can avoid detection of wrongful acts which advance legitimate organizational goals. Thus, the concept

29. Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1190 (1983).

30. *Id.* at 1192 n.239 (offers, as example, a General Electric policy directive which the Corporation used in defending indictments for price-fixing).

31. *Id.* at 1190.

32. *Id.* at 1186.

introduces no valid element of purely corporate fault.[33] Second, the diffusion of responsibility in modern corporations often makes the effort to identify the actual policymaker in a particular area of corporate conduct an extremely elusive undertaking. Finally, placement of particular employees within the corporate hierarchy and characterization of their positions as policymaking, hence appropriate for identification with the corporation for purposes of imputing culpability, is usually a task of exquisite futility.[34]

Few states have expressly endorsed strategic *mens rea* as necessary to extend criminal liability from employee to corporate employer.[35] Interestingly, however, the Model Penal Code suggests that, absent a countervailing express legislative provision, corporate criminality can only be based upon offenses "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent, acting on behalf of the corporation within the scope of his office or employment."[36]

A variant of strategic *mens rea*, called composite *mens rea*, has been proposed in at least one case of modern vintage.[37] Composite *mens rea* contemplates the aggregation of the collective knowledge of all employees for imputation to the corporation. If this composite knowledge, were it possessed by an individual person, would establish the requisite *scienter*, corporate *mens rea* is established.[38] As this description suggests, composite *mens rea* is a highly artificial and mechanical construct that has not captured many adherents. In addition to being conceptually difficult, the doctrine "fails to reflect true corporate fault; discrete items of in-

33. *Id.* at 1187.

34. *Id.* at 1187-88.

35. Lederman, *supra* note 25, at 294.

36. MODEL PENAL CODE § 2.07(1)(c) (1962).

37. United States v. T.I.M.E. D.C., Inc., 381 F. Supp. 730, 738-39 (W.D. Va. 1974).

38. Readers having difficulty conceptualizing this doctrine may be aided by recalling any of an unending string of B melodramas from the 1940s and 1950s in which a large disembodied brain preserved in a giant glass jar manages to receive and process sensory information, apparently directly through the glass, as though it still had eyes, ears, a nose, etc. For purposes of clarifying composite *mens rea*, the corporation itself may be thought of as the brain, possessing and responsible for the knowledge of all of its employees even though it exhibits no obvious mechanism for receiving such knowledge. Incidentally, the giant brain was also usually held guilty at the end of its story, although the punishment was invariably more spectacular and engrossing than the quotidian fines currently imposed on guilty corporations.

formation within an organization do not add up to corporate *mens rea* unless there is an organizational *mens rea* in failing to heed them."[39]

A final theory is the one introduced in the *New York Central* case, and is the theory that requires the least additional proof by the government beyond the predicate criminality of the employee. As announced in *New York Central*, the corporation may be held criminally culpable merely by a showing that the employee acted within the scope of his or her employment for the benefit of the corporation.[40] This theory has become the prevailing view in most states. Pennsylvania, for example, premises corporate criminal liability generally upon a showing that "the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment."[41] The general rule now established in the federal courts is that "the status of the actor within the corporate hierarchy is not determinative of whether the individual may bring criminal sanctions upon the corporation and that no 'link' is required between the subordinate actor and the 'inner circle'."[42] While the corporation is not culpable for all wrongful conduct of its agents, its vicarious liability is indeed premised upon a broad range of wrongful employee behavior, without any additional *mens rea* by the corporation being required.

## II. Extension of Corporate Criminal Liability for the Acts of Independent Contractors

A recent state court decision[43] suggests that a civil law doctrine closely related to that of vicarious liability for servants may be newly applied in the criminal area, leading to a substantial growth in the criminal exposure of corporations under environmental laws. The extension of liability involves imputing to corporations

39. Fisse, *supra* note 29, at 1189-90.

40. Judicial explication of the meanings of scope of employment and benefit of the corporation are beyond the scope of this article. As Lederman suggests, however, these terms have been given very broad readings by the courts. Lederman, *supra* note 25, at 289-91.

41. 18 Pa. Cons. Stat. § 307(a)(1) (1983). Pennsylvania law also authorizes prosecution based upon managerial *mens rea*. 18 Pa. Cons. Stat. § 307(a)(3) (1983) ("The commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by . . . a high managerial agent.").

42. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 Ky L.J. 73, 106 (1976).

43. *See infra* note 70 and accompanying text.

the wrongful acts of agents who are not their servants but rather are only their independent contractors.

### A. *The Peculiar Risk Doctrine*

The general rule of tort law has traditionally been that corporations are not vicariously liable for wrongful conduct of their independent contractors.[44] This rule is most frequently explained as reflecting the historical difference between a servant, over whom the corporation is authorized to exercise control, and a contractor, as to whom the corporate employer has no right to exercise direction regarding the manner in which a project is to be done.[45] Since a contractor retains the ability to control his or her own enterprise, the theory argues, he or she alone should be responsible for accepting the risk of damages from failure to conduct the enterprise properly.[46]

Predictably, exceptions to this rule have been recognized in tort actions. In particular, numerous courts have been willing to impose liability upon the employer of an independent contractor whose work results in "some rather specific risk or set of risks to those in the vicinity, recognizable in advance as calling for definite precautions."[47] In construing and applying this exception, courts tend to emphasize the peculiar nature of the risk that was realized and caused damage, and the concomitant need for special, unusual care.[48]

Application of the "peculiar risk" doctrine of vicarious liability for acts of independent contractors in the environmental law area may be found in a pair of rarely cited decisions from the Seventh Circuit. In *United States v. Marathon Pipe Line Company*[49] and *United States v. Tex-Tow, Inc.*,[50] the Seventh Circuit addressed issues of liability and proximate cause in the assessment of civil penalties under the Federal Water Pollution Control Act[51] for oil discharges resulting only indirectly from the appellants' activities.

44. *See* Dahle v. Atlantic Richfield Co., 725 P.2d 1069 (Alaska 1986); Young v. Tennessee River Pulp and Paper Co., 640 F. Supp. 1162, 1167 (N.D. Miss. 1986); PROSSER & KEETON, *supra* note 27, at 509.

45. PROSSER & KEETON, *supra* note 27, at 509.

46. *Id.*

47. *Id.* at 514, citing cases.

48. *Id.*

49. 589 F.2d 1305 (7th Cir. 1978).

50. 589 F.2d 1310 (7th Cir. 1978).

51. 33 U.S.C. § 1321(b)(6) (1988).

In *Marathon*, a properly constructed, recorded, and marked pipeline had been ruptured by a bulldozer operator hired by the owners of the land in which the line was buried.[52] In *Tex-Tow*, a company's barge discharged gasoline into a river as a result of a puncture by a submerged and undisclosed steel piling that struck the hull as the barge was filled.[53] Neither appellant was at fault in any way for the discharges.[54] Nonetheless, the Seventh Circuit affirmed the penalty assessments by the Coast Guard in each case.[55]

In *Marathon*, the court focused on whether the absence of fault in the Act's liability scheme rendered it constitutionally infirm.[56] Noting that the test was whether the congressional enactment carried a reasonable relation to a proper legislative purpose,[57] the court identified two purposes to the imposition of liability without fault. First, strict liability performed "a residual deterrent function."[58] Second, the proceeds of penalties collected were to be deposited in a fund utilized for, *inter alia*, the containment, dispersal, and removal of spills.[59]

In language at least suggesting the concept that a "peculiar risk" justified the imposition of liability where it otherwise might not lie, the court approved the "legislative determination that polluters rather than the public should bear the costs of water pollution."[60] A concurring opinion characterized the court's legal analysis in language evoking the peculiar risk doctrine, and criticized it, stating that "[the company] in no way caused the accident, except it was in business. Just being in the business of supplying critical energy or other needs for our society scarcely justifies this type of penalty. . . ."[61]

52. 589 F.2d at 1306.
53. 589 F.2d at 1312.
54. *Marathon*, 589 F.2d at 1306; *Tex-Tow*, 589 F.2d at 1312.
55. *Marathon*, 589 F.2d at 1310; *Tex-Tow*, 589 F.2d at 1316.
56. 589 F.2d at 1308-09.
57. *Id.* at 1308.
58. *Id.* at 1309.
59. *Id.* Strict liability, of course, made the successful attainment of each of those goals all the more likely.
60. *Id.*
61. *Id.* at 1310. As noted, *Marathon* is rarely cited. Among the few cases citing it is United States v. Coastal States Crude Gathering Co., 643 F.2d 1125 (5th Cir. 1981), which held that the defendant pipeline company, having chosen to profit from the use of navigable waters and adjacent areas, was properly liable for resulting pollution when a third party ruptured one of its lines. Furthermore, contrary authority does exist. *See* United States v. Georgetown University, 331 F. Supp. 69 (D.C. Cir. 1971), predating *Marathon* and

Although it was not explicitly mentioned, the peculiar risk doctrine appears to even more powerfully inform the companion *Tex-Tow* opinion. Rather than framing its argument in terms of when liability without fault is impermissible, the appellant contended that liability should not be imposed because it did not "cause" the spill.[62] The court found this contention unpersuasive, noting that it "ignor[ed] the absolute nature of the civil penalty liability, as well as the penalty's remedial and economic rather than deterrent objectives."[63] While even a strict liability statute requires causation on which to found liability, Tex-Tow's barge at the pier was sufficient cause in fact for the spill.[64]

The court emphasized, however, that more than the mere presence by the Tex-Tow barge was implicated by the facts of the case.[65] Tex-Tow performed "work in which there is a high degree of risk in relation to the particular surroundings,"[66] a type of work that could justify imposing liability for actions and consequences not ordinarily attributable to either the corporation or its employees. The court's language captures the essence of the peculiar risk doctrine:

> Tex-Tow was engaged in the type of enterprise which will inevitably cause pollution and on which Congress has determined to shift the cost of pollution when the additional element of an actual discharge is present. . . . Foreseeability both creates legal responsibility and limits it. An enterprise such as Tex-Tow engaged in the transport of oil can foresee that spills will result despite all precautions and that some of these will result from the acts or omissions of third parties. Although a third party may be responsible for the immediate act or omission

*Tex-Tow*, where the court held that the University could not be held criminally liable for a spill of oil into a river caused by failure of an employee to turn off a transfer valve. The Georgetown case is factually unique. Indeed, the court expressly noted that the "decision is limited to the peculiar facts and circumstances of the instant case." 331 F. Supp. at 69-70. Among the distinguishing factors: the University was neither in the petroleum generating, storage, or transporting business nor in the waste management business; the oil spilled from a new power plant not yet accepted by the University from the contractor because of construction defects; the University employee operating the valves which caused the spill was assisting the contractor in testing the plant and was under the control of the contractor, not the University, at the critical time; and the University, not being in control of the plant, was in no position to prevent the harm that occurred.

62. 589 F.2d at 1312.

63. *Id.*

64. *Id.* at 1314.

65. *Id.*

66. The quoted language is from Prosser's discussion of the peculiar risk doctrine. PROSSER & KEETON, *supra* note 27, at 514.

> which "caused" the spill, Tex-Tow was engaged in the activity or enterprise which "caused" the spill.[67]

Accordingly, Congress was authorized to define, for purposes of liability, the cause of the spill to be Tex-Tow's oil-related activities, not the precipitating conduct of a third party.[68]

### B. *Application to Criminal Liability:* Waste Conversion, Inc. v. Commonwealth

The chasm between this conceptual underpinning and its application to a criminal environmental law was first spanned by a provision in the 1980 Solid Waste Management Act in Pennsylvania,[69] which was relied on in *Waste Conversion, Inc. v. Commonwealth*.[70] Section 610(8)(i) of the Act reads in pertinent part:

> It shall be unlawful for any person or municipality to:
>
> * * *
>
> (8) Consign, assign, sell, entrust, give or in any way transfer residual or hazardous waste which is at any time subsequently, by any such person or any other person;
>
> (i) dumped or deposited or discharged in any manner into the surface of the earth or underground or into the waters of the Commonwealth unless a permit for the dumping or depositing or discharging of such residual or hazardous waste has first been obtained from the department [the Pennsylvania Department of Environmental Resources].[71]

Violations of provisions of the Act are punishable as misdemeanors of the third degree, carrying a maximum sentence of $25,000 per day of violation, one year imprisonment, or both.[72]

The statutory provision reveals an express intention to impose vicarious liability on the originator of a transfer of residual[73] or hazardous waste if the waste subsequently is exposed to any illegal management practice. The originator need not have intended, desired, known, or controlled the later actions of the

67. 589 F.2d at 1314.

68. *Id.*

69. PA. STAT. ANN. tit. 35, § 6018.101 -1003 (Purdon Supp. 1990).

70. 130 Pa. Commw. 443, 568 A.2d 738 (Pa. Commw. Ct.), *appeal denied*, 525 Pa. 621, 577 A.2d 892, *cert. denied*, 111 S. Ct. 253 (1990).

71. PA. STAT. ANN. tit. 35, § 6018.610(8)(i) (Purdon 1990). Section 103 of the Act defines "person" to include "any corporation." *Id.* at § 6018.103.

72. *Id.* at § 6018.606(b).

73. Residual waste is a statutorily defined category of waste best summarized as nonhazardous waste resulting from any industrial process. *Id.* at § 6018.103.

actual predicate violator, and the violator need not be an agent or employee of the originator.[74] Indeed, the section contemplates that more than just a generator and disposer would be involved in the arc of management of a waste stream; several intermediaries, brokers and transporters, for example, might form links in a chain between the originator of the waste and the violator who ultimately disposes of the waste illegally.

In *Waste Conversion*, the scope and legality of Section 610(8)(i) received its first judicial review, and the result does not suggest that the gardeners in the fields of vicarious corporate liability are making headway in recapturing the crops from the weeds. In its decision, the Pennsylvania Commonwealth Court rejected a claim that the imposition of criminal liability under Section 610(8)(i) violated the federal and state constitutional protections against denial of due process.[75] The stipulated trial facts established that the defendant, a licensed[76] hazardous and residual waste facility, loaded non-hazardous processed waste onto the truck of an independent hauler for transport to and disposal in Michigan. The trucker was "hired" by a trucking company which was itself hired by the defendant for this transaction.[77] The truck was loaded by the defendant's employees in excess of the allowable state weight limit, causing the driver to choose a route utilizing back roads in order to avoid a state police weigh station. Unable to negotiate a hill, the driver stopped, raised the bed of his truck, and attempted to redistribute the load. In so doing, a substantial amount of the waste slid from the truck onto the roadside. The driver abandoned the fallen waste and proceeded to the disposal site.[78]

Waste Conversion was convicted of violating Section 610(8)(i).[79] On appeal, it argued that the imposition of criminal liability in these circumstances offended due process for at least two reasons: the statutory provision could impose liability on a defendant for acts extraordinarily remote in time and place from the actual commission of the waste management violation by the

74. *Id.* at § 6018.610(8)(i).

75. *Id.*

76. The opinion uses the term "license." The Pennsylvania statute requires the issuance of facility permits, not licenses, PA. STAT. ANN. tit. 35, § 6018.401 (Purdon 1990), and the author is aware from personal knowledge that the facility possessed such a permit.

77. *Waste Conversion*, 130 Pa. Commw. at 446, 568 A.2d at 740.

78. *Id.*

79. The opinion reports that the independent trucker and the trucking company were also charged, but it does not reveal the disposition of those cases.

perpetrator,[80] and the provision would impose liability for the conduct of an independent contractor over whom the defendant exercised no control.[81] Neither argument elicited even the slightest enthusiasm from the court.

In fact, the court simply refused to address the first. It implied that the claim that other persons in a transactional chain, some more remote from the crime than Waste Conversion, might be unfairly subject to a similar prosecution, was a facial attack on the statute, a disfavored form of challenge. The court declined "to adjudicate the rights of parties not presently before [us]. . . ," tersely electing to "confine this opinion to the facts before us."[82]

Waste Conversion's contention that due process required it to have some degree of actual control over the wrongful actor before vicarious liability could be imposed fared better only to the extent that the court deigned to address it briefly before rejecting it. Waste Conversion could "be deemed to have such control"[83] because of its willing entry into the business of waste management. Pennsylvania had enacted a comprehensive regulatory statute in order to protect the public health and its precious natural resources[84] from deficient solid waste practices, and corporations securing authorization from the state to operate in the hazardous waste business owed the public the highest duty of responsibility.[85]

The defendant, having assumed responsibility for the processing and disposal of waste, was obligated to insure "that the citizens of this state are protected from *the dangers necessarily a part of*

80. The defendant appears to have suggested in its brief that the prosecution's theory would have made the United States Marine Corps—the actual generator of the waste who entrusted it originally to Waste Conversion for lawful processing and disposal—equally culpable, even though the Corps was one step further removed from the eventual dumping of the waste on the roadside by the independent trucker. Opinion and Order of the Court of Common Pleas of Lycoming County, No. 87-11, 202 (June 21, 1988).

81. 130 Pa. Commw. at 448-49, 568 A.2d at 741. The court also addressed several defense arguments not germane to this article.

82. *Id.* at 448, 568 A.2d at 741.

83. *Id.* at 449, 568 A.2d at 741.

84. *Id.* at 449, 568 A.2d at 741. The opinion quotes in its entirety the state's "environmental amendment," which guarantees to present and future generations the right to clean air, pure water, and natural esthetic values of the environment. PA. CONST. art. I, § 27.

85. The significance of the court's reference to responsibility for *hazardous* waste management is unclear since the opinion earlier describes the particular wastes which were illegally dumped as non-hazardous. *Id.* at 449, 568 A.2d at 741-42.

*waste disposal*."[86] This phrase, of course, echoes the policy justifications for the tort law peculiar risk doctrine. Although the *Waste Conversion* court did not expressly so state, it suggested that one of the foreseeable and peculiar dangers to be attributed to a waste management corporate principal is the misdeed of its proxy, whether employee or otherwise. The court held that "because Appellant has assumed responsibility in the waste disposal process, Appellant maintains control of the independent contractors it hires for the purpose of its waste disposal activities."[87] The corporation could not escape liability by the claim that it exercised no control over those that it chose to utilize in conducting its business.[88]

The *Waste Conversion* decision merely establishes a new beachhead in the effort to continue to extend vicarious liability to more, and more unorthodox, situations and relationships. The court does little more than announce the result and, almost conclusorily, assert its applicable analytical underpinnings. While the language of the opinion suggests that the statute has been defended under the peculiar risk doctrine, there is no discussion of whether there are limitations to the kinds of risks, even in the waste management area, which justify imputing liability to a participant in a particular transaction. One question neatly dodged by the court is whether it is appropriate to impose vicarious liability, perhaps quite remotely, on a person who is not actively in the waste disposal business, such as a generator who only sends out an occasional shipment of waste and exercises due care in doing so. Will Pennsylvania courts be willing to impose such liability on an active waste industry participant where a particular shipment is not actually mishandled until two or three links further along the chain? One can imagine a sequence of events in which a landfill corporation sends leachate to a treatment facility, which consigns the resulting processed sludge to a hazardous waste transporter, who delivers it to another disposal facility, which then commits an environmental violation involving the sludge. Can liability be imposed on the original landfill?

Moreover, it is possible that *Waste Conversion* will be limited to its particular circumstances. While the court does not overtly base any of its decision on actual fault of the defendant, it is nev-

86. *Id.*, 568 A.2d at 742 (emphasis supplied).
87. *Id.* at 450, 568 A.2d at 742.
88. *Id.* at 450-51, 568 A.2d at 742.

ertheless clear that the defendant was in some causal way linked to the illegal dumping because its facility was the source of the weight overload which led to the route alteration by the trucker (to evade a weigh station) and the eventual roadside dumping. Thus, subsequent courts may evaluate Section 610(8)(i) afresh and distinguish *Waste Conversion* as a decision influenced (even if not controlled) by the actual fault of the employer of the independent contractor. The *Waste Conversion* opinion, in short, raises at least as many questions as it purports to address.

## Conclusion

The imposition of criminal culpability upon corporations through the application of the traditional civil law concept of *respondeat superior*, or vicarious liability, is a relatively recent idea but one that has become solidly entrenched. Despite the description of various forms of *mens rea* which might arguably demonstrate what some believe would be genuine corporate fault, most prosecutions are successful upon a mere showing that an agent acted criminally while within the scope of his employment and to benefit the corporation. Recently, criminal liability has been imputed to a waste management corporation vicariously for the actions of an independent contractor not under the actual control of his employer. In imposing liability, the court employed language suggesting that, at least as to companies actively in the waste disposal business, wrongful conduct by independent contractors was a risk for which they agreed to accept responsibility by entering the waste management industry. This analysis strongly evokes the "peculiar risk" doctrine, a concept of tort law which authorizes the imposition of civil vicarious liability for tortious conduct of independent contractors, and suggests that civil doctrines will continue to be influential as the courts seek to impose criminal liability on corporations in areas of heightened public concern, such as environmental protection.