Criminal Law and Procedure

The Food-Chain Issue for Corporate Punishment: What Criminal Law and Punitive Damages Can Learn from Each Other

*By Christopher R. Green**

At the end of this month, the Supreme Court will hear arguments in *Exxon v. Baker* concerning a $2.5 billion punitive award against Exxon for the 1989 Exxon Valdez oil spill. The first question asks when, under federal admiralty law, a corporation may be punished for the actions of its agents. The Ninth Circuit affirmed liability for punitive damages under circuit precedent, following the Restatements of Torts and Agency, allowing corporate punitive damages if a misbehaving agent is "employed in a managerial capacity and acting in the scope of employment." [1] *Exxon v. Baker* presents the Supreme Court with the food-chain question for corporate punishment: how high in the corporate hierarchy must misbehavior go before the corporation itself may be punished? Every American jurisdiction allows corporations to be punished with criminal liability and with some form of punitive damages.[2] In both criminal law and the law of punitive damages, there is persistent division about the food-chain question. However, the fields develop with virtually no contact from one to the other, and the rules states adopt in each field have no correlation with the rules they adopt in the other.

The Food-Chain Issue in Corporate Punitive Damages

While Exxon argues in *Baker* that the Restatement rule for corporate punitive damages allows them too liberally, the Restatement actually adopts a comparatively restrictive approach. Many states allow corporate punitive damages if *any* employee misbehaves in the scope of employment, whether a manager or not. Disagreement between a Liberal Rule (allowing punishment for the actions of *any* employee in the scope of employment) and the Restrictive Rule (allowing punishment only for the actions of higher-level employees in the scope of employment) has persisted as long as the issue has been considered. For instance, in 1869, Maine's *Goddard* case adopted a Liberal Rule for corporate punitive damages. "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." [3] However, Shearman and Redfield's treatise on negligence, published the same year, held that only the misbehavior of "superintending agents" could warrant corporate punishment. They wrote,

> In general, it may be said that exemplary damages cannot be allowed against a master for the negligence of his servants, however gross, if he is personally free from fault, and has maintained personal supervision over them. But this rule is not applicable, without qualification, to the case of a corporation or association having no power to act except through agents. In such cases, the negligence of a superintending agent must be deemed the negligence of the association itself.[4]

Disagreement persisted in 1893. That year, the Supreme Court, making pre-*Erie* general federal common law in the *Lake Shore* case, followed Shearman and Redfield's Restrictive Rule, holding that corporate punitive damages would be possible, but only if a sufficiently important employee misbehaved: "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."[5] This standard required more than the criminal intent of a minor employee. However, writing in evident response to *Lake Shore* later in the year, the Alabama Supreme Court maintained its Liberal Rule in the *Mobile* case. The court considered and rejected "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."[6] The court explained why it thought all employees are created equal for the purposes of corporate scienter: "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."[7]

One way to think of the dispute between the Liberal Rule and the Restrictive Rule is that it is a dispute over whether to recognize a defense of temporary insanity for corporations. Insane people are not punished,[8] but they must still pay compensatory damages.[9] The Liberal Rule, however, would punish a corporation for any actions of employees in the scope of employment—that is, whenever a corporation would be liable for compensatory damages. A Restrictive Rule, however, recognizes that it is improper to punish a corporation temporarily not in full control over a rogue low-level employee—a "temporarily insane" corporation, as it were.

A survey of current law in American jurisdictions (I include the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and federal law, for a total of fifty-five jurisdictions) reveals eighteen states that follow Liberal Rules for corporate punitive damages,[10] plus another three jurisdictions that allow corporate punitive damages without indicating the existence of a food-chain limit.[11] Twenty-three states, plus federal law under Title VII, have Restrictive Rules like that in the Restatement.[12]

* *Christopher R. Green is Assistant Professor of Law at the University of Mississippi.* *This article includes arguments taken from "Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law" (forthcoming), used with permission from the Nebraska Law Review.*

The Restatement itself leaves unsettled exactly who counts as a "managerial" employee.[13] Taken literally, the term suggests that managers are supervisors—that is, those who manage or supervise subordinates. An employee might, however, make very important decisions, like budgetary amounts, without directly supervising anyone. Congress, for instance, makes tremendously important decisions about the federal government without directly supervising members of the executive branch. Six Restatement-style jurisdictions define "managers" as policymakers, but most states lack any clear definition.[14]

Eight more states, plus five jurisdictions that also follow the Restatement, have rules that on their face forbid punishment of a principal unless the principal authorizes or ratifies misconduct by an agent.[15] The basic idea originated in Justice Story's 1818 admiralty opinion in *The Amiable Nancy,*[16] and was repeated in *Lake Shore* in 1893. However, it is not always clear how these rules would apply to a corporation. Because corporations only act through agents, a strict requirement of authorization or ratification would bar corporate punishment altogether. If a low-level employee misbehaves, and a mid-level employee authorizes or ratifies that misconduct, the corporation can still claim that it should escape punishment, because the corporation *itself* never authorized or ratified the mid-level-employee's misconduct. Indeed, as *Mobile* points out, the corporation could say the same even of the very highest-level employees' actions. I call this "the 5R Problem," for Restrictive Rule Ratification Requirement Regress. Because corporate *action* is always vicarious, corporate punitive liability is always vicarious as well; an uncompromising ban on vicarious punishment will therefore ban all corporate punishment. Shearman and Redman noted this fact in explaining their Restrictive Rule in 1869, and other courts and commentators have done likewise.[17] Rules that on their face ban all vicarious punishment must either forbid corporate punishment altogether or be relaxed when applied to corporations. *Lake Shore* takes the latter course. Its discussion begins by appearing to require ratification universally: "A principal … cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent."[18] *Lake Shore* makes clear, however, as quoted above, that corporate punitive damages are *not* eliminated altogether, provided that *scienter* is "brought home" to the corporation via a sufficiently-important employee. Other jurisdictions also make clear that corporate punitive damages are still available, even in the face of a no-vicarious-punitive-liability rule.[19]

Some courts have fashioned Restrictive Rules for corporate punitive damages that emphasize corporate policy or corporate culture, rather than the precise status of misbehaving employees. On the one hand, the Restatement allows corporate punishment only if a managerial employee misbehaved in the scope of employment, barring corporate punishment even if the behavior of the low-level employee was consonant with the corporation's implicit and informal customs, policies, practices, and culture. On the other hand, the Restatement allows corporate punishment for the actions of managerial employees, even when those managers violate corporate policy. The actions of managers, rather than corporate policy as such, determine whether corporate punitive damages are available. Three jurisdictions have incorporated corporate policy into their Restrictive Rules. The Supreme Court in its 1999 Title VII food-chain case, *Kolstad*, began with the Restatement rule, but added a good-faith defense.[20] A corporate defendant can escape punitive damages under Title VII be showing *either* (a) that the misbehaving employee was not "managerial," *or* that (b) even a managerial employee's actions were contrary to a good-faith corporate policy to comply with Title VII. Two jurisdictions have corporate punitive damages rules that, in essence, adopt only *Kolstad*'s second element, allowing even low-level employees' misbehavior to support corporate punishment, but providing a defense if employees' actions are contrary to general corporate policies to abide by the law.[21]

The Food-Chain Issue in Corporate Criminal Liability

Turning to criminal law, we find a very similar menu of possible approaches. We have a Liberal Rule, allowing corporate punishment for any employees' misbehavior in the scope of employment, and a variety of forms of Restrictive Rule, allowing corporate punishment only when a relatively high-level employee misbehaves. A Liberal Rule for corporate crime, following the same scope-of-employment rule that governs compensatory damages, and which the *Goddard-Mobile* tradition adopts for corporate punitive damages, was approved for federal law in *New York Central & Hudson* in 1909, and has been reiterated many times since then.[22] Eighteen states follow the same rule,[23] and another eleven jurisdictions allow corporate criminal liability without suggesting a food-chain limit.[24]

The federal Liberal Rule is tempered by two acknowledgements of the food-chain issue outside federal criminal law proper. First, chapter 8 of the Federal Sentencing Guidelines includes complicated rules that decrease corporate sentences if only low-level employees are involved, or if the crime occurs in spite of a corporate compliance program.[25] Second, near-identical Department of Justice memoranda issued by Deputy Attorneys General Eric Holder in 1999, Larry Thompson in 2003, and Paul McNulty in 2006 suggest that a generally law-abiding corporate culture, effective programs of corporate law-compliance, law-abiding history, and effective repudiation of employee misconduct all counsel against indicting a corporation.[26]

Unlike punitive damages, there is not a long tradition of states adopting food-chain limits on corporate criminal liability. However, the Model Penal Code's Restrictive Rule, adopted in 1962, has been influential. For major crimes, the MPC allows corporate punishment only for the actions of "high managerial agents," which it defines as policymakers.[27] Twenty-four states follow MPC-style rules,[28] seven defining the key term as policymakers,[29] eleven as including both policymakers and supervisors,[30] one as just supervisors,[31] and five lacking a definition.[32]

As in punitive damages, three jurisdictions have Restrictive Rules for corporate crime that incorporate corporate policy. One state follows a *Kolstad*-like rule, layering a due-diligence defense with a restriction to the acts of high managerial agents,[33] while two states allow a corporation to avoid punishment if an employee's action is contrary to corporate policy.[34]

Reasons for Corporate Crime and Corporate Punitive Damages to Follow the Same Rule

The most striking thing about the two rosters of jurisdictions is that there is no correlation between the food-chain rules states adopt for corporate crime and the food-chain rules they adopt for corporate punitive damages. Counting jurisdictions that allow corporate punishment without acknowledging a food-chain limit as following a Liberal Rule, I count eleven Consistently Liberal jurisdictions allowing either corporate criminal liability or corporate punitive damages for the acts of low-level employees,[35] sixteen Consistently Restrictive jurisdictions that impose food-chain limits on either form of corporate punishment,[36] eighteen "Federal Schizophrenia" jurisdictions imposing food-chain limits only on corporate punitive damages,[37] and ten "Pennsylvania Schizophrenia" jurisdictions imposing food-chain limits only on corporate criminal liability.[38] Slightly more American jurisdictions—twenty-eight to twenty-seven—take different sides of the food-chain issue in the two fields.

There are several good reasons for the law of corporate punitive damages and corporate criminal liability to follow the same rules—that is, for thinking that Federal Schizophrenia and Pennsylvania Schizophrenia really are pathological. First, the two areas of law pursue the same two goals: retribution and deterrence. This fact has undergirded analogies between the two areas before.[39] Second, a survey of the cases discussing the rationales for either a Liberal Rule or a Restrictive Rule reveals a consistent repetition of the same four arguments related to retribution and deterrence. Proponents of the Restrictive Rule claim that vicarious punishment is inherently unjust and that one cannot deter actions of one person by imposing punishment on a second person. Proponents of a Liberal Rule claim that corporations only act through agents and that corporations will only have the proper incentive to prevent low-level-employees' misbehavior if they feel a punitive sting whenever that misconduct occurs. All four of these arguments apply just as well in either criminal law or punitive damages. Third, the two fields feature similar mens rea and scienter requirements.[40] Because the food-chain issue in corporate punishment is essentially the problem of assessing corporate mental states, such similarity of guilty-mental-state requirements in the two fields should dictate similar resolution of the food-chain issue. Fourth, the decision between a Liberal Rule and a Restrictive Rule amounts to a decision about the extent of the corporate duty to stop low-level employees' misbehavior, simply by virtue of being a corporation. Given that criminal law and punitive damages both seek to enforce essentially the same duties to prevent anti-social conduct, there is no reason to enforce the corporate duty to stop low-level employee misconduct with only one form of punishment or the other. Fifth, ordinary, non-legal decisions about whether or not to blame an organization will also frequently raise food-chain issues: the more important a misbehaving employee is, the more likely that ordinary citizens will regard the organization itself as (pre-legally) blameworthy. If the law should mete out punishment based on ordinary citizens' pre-legal notions of blameworthiness, then both fields should resolve the food-chain issue the same way.

Jurisdictions suffering either Federal or Pennsylvania Schizophrenia should, therefore, attend to the unjustified difference in approaches in the two fields. Likewise, states adopting Restrictive Rules for both corporate punitive damages and corporate criminal liability should adopt the same rule in both fields. Assuming that the MPC's "high managerial" is more selective than the Restatement's "managerial," the two ALI approaches represent Pennsylvania Schizophrenia writ small—imposing Restrictive Rules in both fields, but a more restrictive one for corporate criminal liability than for corporate punitive damages. Of the sixteen Consistently Restrictive jurisdictions, only two adopt the same rule in both fields,[41] while three states have looser rules for corporate criminal liability—Federal Schizophrenia writ small.[42]

Lessons

I draw the general lesson that courts and commentators should devote more attention to the mismatch between corporate criminal liability and corporate punitive damages. Courts and legislators should not adopt a rule in one field without considering whether it makes sense in light of a contrary rule in the other. But there are three more particular lessons.

First, a lesson for corporate criminal liability from corporate punitive damages: *Where there is pressure for the full enforcement of a Liberal Rule, its shortcomings are more readily apparent.* Of the four possible approaches for corporate punishment, the most common is Federal Schizophrenia, allowing corporate criminal liability liberally but corporate punitive damages restrictively. While the difference is not enormous, the rules for corporate punitive damages are generally more restrictive than the rules for corporate crime.

One explanation for this difference, though not a justification, is that the criminal law is never fully enforced. As William Stuntz explains, because prosecutors need not prosecute every case that falls under statutory definitions of crime, lawmakers feel free to legislate broadly, worrying far more about negative errors (the possibility that serious misbehavior will improperly *fail* to be criminalized) than positive errors (the possibility that relatively minor misbehavior will be improperly over-criminalized).[43] In the food-chain context, legislators can leave the Liberal Rule in place, counting on politically accountable prosecutors to pick out the corporations that truly deserve punishment (for instance, by following the criteria of the Holder-Thomson-McNulty memoranda). Unelected plaintiffs, however, will reliably enforce a Liberal Rule for corporate punitive damages to the full, so there will always be more pressure to adopt a Restrictive Rule for corporate punitive damages.

The Holder-Thomson-McNulty criteria, and corresponding patterns of prosecutorial restraint at the state level, are a significant reason why broad statutory Liberal Rules are able to survive. Legislators should not, however, leave the application of the Holder-Thomson-McNulty criteria solely to prosecutorial discretion. As others have suggested, corporate defendants should have the chance to defend themselves by explaining that a particular employee's misbehavior was inconsistent with the general customs, culture, and policies of the corporation.[44] A corporate insanity defense makes sense.

Statutory codification of such standards would allow more systematic application of these criteria and require prosecutors to articulate their application in particular cases.

Turning our attention the other direction, I draw two lessons for corporate punitive damages from corporate criminal liability. First: *Rules crafted specifically for corporations avoid open-ended ratification-or-authorization requirements.* It is striking that, though several states have adopted ratification-or-authorization requirements for vicarious punitive damages, not one jurisdiction has adopted one that applies to corporate criminal liability. One possible explanation is that the rules for corporate punitive damages have almost always emerged out of a general discussion of vicarious liability, including individuals. The Restatements' managerial-employee approach applies both to individual principals and to corporations, but the MPC's rule, and every statute on corporate criminal liability that I have found, applies only to corporations.[45] An exclusive focus on corporations would make the 5R Problem a more salient objection to a general ratification-or-authorization requirement for vicarious criminal liability, and may explain why such rules are never adopted in criminal law.

As explained above, a no-vicarious-punishment rule, taken literally and not allowing for exceptions for some category of higher-level employees, would eliminate corporate punitive damages altogether. Unless the Court intends to foreclose corporate punitive damages in admiralty altogether, it should hold in *Exxon v. Baker* that the *Amiable Nancy* no-vicarious-punitive-liability rule does not apply to corporations. One way to do that might be to follow the Restatement; another way might be to follow the Fifth Circuit's suggestion that the *Amiable Nancy* rule should only apply if a corporation has proper policies for complying with the law; a third way would be to follow *Kolstad*'s hybrid of the two approaches.

A second lesson for corporate punitive damages from the criminal law: *Food-chain issues should inform the amount of corporate punishment, not merely its availability***.** The Federal Sentencing Guidelines establish an elaborate series of rules to measure whether a particular corporate defendant deserves a lower sentence because a rogue employee committed the crime. Neither the constitutional rules for the size of punitive damages nor most states' rules for the size of punitive damages, however, take account of the food-chain issue.[46] The law of punitive damages likewise should recognize that food-chain issues may warrant a *lower* corporate penalty, even if they do not warrant a bar on corporate punishment altogether. There is no good reason that the food-chain issue should produce only all-or-nothing answers.

Approaches to the food-chain issue that focus on corporate policy or corporate culture fit well with this conclusion. Corporate cultures can be more or less criminogenic; particular misbehavior can be a product of corporate culture and fit with corporate policy to a greater or lesser degree. One corporation may have policies that on their face require law-abiding behavior, but which are insufficiently enforced, allowing an informal corporate culture to tolerate misbehavior. A second corporation, however, may lack such policies entirely, and a third corporation may have policies which actively encourage illegal behavior. Applying a corporate-culture test for corporate punishment, all three might deserve punishment, but they deserve different amounts of it. Accordingly, corporations with a single bad apple should avoid punishment altogether, while corporations with increasing numbers of bad apples—that is, progressively criminogenic corporate cultures—should face correspondingly more severe punishment.

CONCLUSION

Resolving issues regarding the punishment of corporations may seem hard enough when we consider either corporate criminal liability or corporate punitive damages alone. Attempting to solve an issue in both fields at once may seem like an exercise in masochism. However, we should see the strong analogy between the two fields not as a way to make a difficult task even more difficult, but as a tremendously valuable problem-solving resource. Including both fields in our view at once can help us avoid pitfalls into which we would otherwise fall and see solutions we would otherwise miss. Seeing the pathology of both Federal and Pennsylvania Schizophrenia and attending to divergences in the development of corporate punitive damages and corporate criminal liability can help us see how either field can best approach corporate punishment.

Endnotes

1 Restatement (Second) of Torts § 909(c) (1976); Restatement (Second) of Agency § 217C(c) (1958) (same); *cf.* Restatement (Third) of Agency § 7.02 cmt. e (2006) (noting division of authority between Restatement and a less restrictive rule, commenting, "[t]he approach outlined in § 909 is preferable."); *see In re* Exxon Valdez, 270 F.3d 1215, 1233-36 (9th Cir. 2001) (following Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1386 (9th Cir. 1985), in following § 909). Other sections of § 909 allow for corporate punishment if a managing agent authorizes or ratifies misbehavior or recklessly retains a misbehaving employee. Exxon's brief in *Baker* says that this rule originated from the 1958 Restatement of Agency, *see* 2007 WL 4439454, *23, but in fact the language in § 217C was itself taken directly from § 909 of the *first* Restatement of Torts, from 1939.

2 As explained below, some states have idiosyncratic punitive-damages regimes: New Hampshire allows only "enhanced compensatory damages" for malicious torts; Michigan says that punitive damages are not really punitive; Nebraska requires civil fines to go to schools; and Louisiana, Massachusetts, Puerto Rico, and Washington all allow punitive damages only under statutes. The vast majority of American jurisdictions, though, allow common-law corporate punitive damages, and all of them allow corporate criminal liability.

3 Goddard v. Grand Trunk Ry., 57 Me. 202, 1869 WL 2230, *15 (1869).

4 Shearman & Redfield, A Treatise on the Law of Negligence § 601, at 654-55 (1869).

5 Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 111 (1893). The Court relied for this proposition in part on Caldwell v. New Jersey Steamboat Co., 47 N.Y. (2 Sickels) 282, 1872 WL 9721 (N.Y. 1872), which in turn relied on Shearman and Redfield's treatise. *See id.* at *9.

6 Mobile & O. R. Co. v. Seals, 13 So. 917, 919 (Ala. 1893).

7 *Id.* at 919-20.

8 Preferred Risk Mut. Ins. Co. v. Saboda, 489 So.2d 768, 770-71 (Fla. App. 1986).

9 Restatement (Second) of Torts § 895J, cmt. a (1976); 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).

10 These are Alabama, Arizona, Arkansas, Georgia, Indiana, Louisiana, Maine, Massachusetts, Maryland, Michigan, Missouri, Montana, New

Hampshire, Oklahoma, Oregon, Pennsylvania, South Carolina, and Tennessee. *See* Mobile & O. R. Co. v. Seals, 13 So. 917, 919-20 (Ala. 1893); Haralson v. Fisher Surveying, Inc., 31 P.3d 114, 119-20 (Ariz. 2001); J.B. Hunt Transport, Inc. v. Doss, 899 S.W.2d 464, 469 (Ark. 1995); Johnson v. Allen, 613 S.E.2d 657, 663 (Ga. App. 2005); Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135, 137 (Ind. 1988); Rivera v. United Gas Pipeline Co., 697 So.2d 327, 336 (La. App. 1997) (punitive damages under statute); 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."); Kansallis Finance Ltd. v. Fern, 659 N.E.2d 731, 737-38 (Mass. 1996) (punitive damages under statute); Embrey v. Holly, 442 A.2d 966, 970-71 (Md. 1982); Joba Const. Co., Inc. v. Burns & Roe Inc., 329 N.W.2d 760, 773-74 (Mich. App. 1982); Fischer v. MAJ Inv. Corp., 631 S.W.2d 902, 906 (Mo. App. 1982); Rickman v. Safeway Stores, 227 P.2d 607, 612-13 (Mont. 1951); Vratsenes v. N. H. Auto, Inc., 289 A.2d 66, 72 (N.H. 1972); Kurn v. Radencic, 141 P.2d 580, 581 (Okla. 1943); Johannesen v. Salem Hosp., 82 P.3d 139, 142 (Ore. 2003); Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1278 (3rd Cir. 1979) (Pennsylvania law); Hooper v. Hutto, 158 S.E. 726, 727 (S.C. 1931); Odom v. Gray, 508 S.W.2d 526, 533 (Tenn. 1974). Michigan and New Hampshire characterize exemplary damages idiosyncratically. Michigan calls them non-punitive, *see* Ray v. City of Detroit, 242 N.W.2d 494, 495 (Mich. App. 1976), while New Hampshire allows "enhanced compensatory damages" for malicious torts, see Figlioli v. R.J. Moreau Companies, Inc., 866 A.2d 962, 966 (N.H. 2005).

11 These are Nebraska, Puerto Rico, and Washington. *See* State ex rel. Stenberg v. American Midlands, Inc., 509 N.W.2d 633 (Neb. 1994) (allowing statutory corporate civil penalties, as long as the money goes to fund for schools, without suggesting food-chain limit); 1 L.P.R.A. § 13(e); 1 L.P.R.A. § 14 (allowing corporate punitive damages under civil rights statute); Garcia Pagan v. Shiley Caribbean, 22 P.R. Offic. Trans. 183, 191 (P.R. 1988) (applying 1 L.P.R.A. § 14 without suggesting food-chain limit); Rev. Code Wash. § 9.73.230(11) (exemplary damages allowed against police agency for illegal wiretapping); Kadoranian by Peach v. Bellingham Police Dept., 829 P.2d 1061 (Wash. 1992) (interpreting § 9.73.230(11) without suggesting any rogue-police-officer defense); Rev. Code Wash. § 19.86.090 (treble damages for unfair business practices); Edmonds v. John L. Scott Real Estate, Inc., 942 P.2d 1072 (Wash. App. 1997) (interpreting § 19.86.090 without suggesting food-chain limit).

12 These are Alaska, California, Colorado, Delaware, Florida, Guam, Idaho, Illinois, Iowa, Kansas, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, South Dakota, Texas, Utah, Vermont, Virgin Islands, West Virginia, and Wyoming, plus federal law. *See* Alaska Stat. § 09.17.020(k); Cal. Civ. Code § 3294(b); Fitzgerald v. Edelen, 623 P.2d 418, 423 (Colo. App. 1980); Brandt v. Rokeby Realty Co., 2006 WL 1942314, *22 (Del. Super. 2006); Fla. Stat. § 768.72(3)(b)-(c); Park v. Mobil Oil Guam, Inc., 2004 WL 2595897, *9 (Guam Terr. 2004); Openshaw v. Oregon Auto. Ins. Co., 487 P.2d 929, 932 n. 3 (Idaho 1971); Mattyasovszky v. West Towns Bus Co., 330 N.E.2d 509, 512 (Ill. 1975); Briner v. Hyslop, 337 N.W.2d 858, 867 (Iowa 1983); Smith v. Printup, 866 P.2d 985, 1003, 1004 (Kan. 1993); Minn. Stat. § 549.20(2); Smith's Food & Drug Centers, Inc. v. Bellegarde, 958 P.2d 1208, 1214 (Nev. 1998); Cavuoti v. New Jersey Transit Corp., 735 A.2d 548, 554 (N.J. 1999); Albuquerque Concrete Coring Co., Inc. v. Pan Am World Services, Inc., 879 P.2d 772, 777 (N.M. 1994); Loughry v. Lincoln First Bank, N.A., 494 N.E.2d 70, 74-75 (N.Y. 1986); N.C. Gen.Stat. § 1D-15(c); Dahl v. Sittner, 474 N.W.2d 897, 903 (S.D. 1991); Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387, 391 (Tex. 1997); Johnson v. Rogers, 763 P.2d 771, 778 (Utah 1988); Staruski v. Continental Telephone Co. of Vt., 581 A.2d 266, 273 (Vt. 1990); Hendricks v. Transportation Services of St. John, Inc., 1999 WL 395121, *7 (V.I. 1999); Baker v. Wheat First Securities, 643 F.Supp. 1420, 1428 n.4 (S.D.W.Va. 1986); Farmers Ins. Exchange v. Shirley, 958 P.2d 1040, 1052 (Wyo. 1998); Kolstad v. American Dental Association, 527 U.S. 526, 543 (1999).

13 For some confusion about who should count, *see* Kolstad v. American Dental Association, 527 U.S. 526, 543 (1999) ("[N]o good definition of what constitutes a 'managerial capacity' has been found.") (quoting 2 Ghiardi & Kircher, Punitive Damages: Law And Practice § 24.05, at 14 (1998)); Shoucair v. Brown University, 917 A.2d 418, 434 (R.I. 2007) ("elusive label"); Restatement (Third) of Agency § 7.03 cmt. e ("[T]here is no rigid test to determine whether an agent is a 'managerial agent'…."); *cf.* People v. Lanzo Const. Co., 726 N.W.2d 746, 753 (Mich. App. 2006) (similar confusion in corporate crime).

14 These are California, Guam, Illinois, Minnesota, Nevada, and New Jersey. *See* White v. Ultramar, Inc., 88 Cal.Rptr.2d 19, 22, 28 (Cal. 1999); Park v. Mobil Oil Guam, Inc., 2004 WL 2595897, *9 (Guam Terr. 2004); Kemner v. Monsanto Co., 576 N.E.2d 1146, 1157-58 (Ill. App. 1991); Tennant Co. v. Advance Mach. Co., Inc., 355 N.W.2d 720, 724 (Minn. App. 1984); Nittinger v. Holman, 69 P.3d 688, 691-92 (Nev. 2003); Cavuoti v. New Jersey Transit Corp., 735 A.2d 548, 559-61 (N.J. 1999).

15 The eight non-Restatement states are Connecticut, Hawaii, Kentucky, North Dakota, Ohio, Rhode Island, Virginia, and Wisconsin; the five jurisdictions also following the Restatement in some form are Colorado, Delaware, Kansas, West Virginia, and federal law. *See* Roget v. Grand Pontiac, Inc., 5 P.3d 341, 346 (Colo. App. 1999); Maisenbacker v. Society Concordia of Danbury, 42 A. 67, 70 (Conn. 1899); Ramada Inns, Inc. v. Dow Jones & Co., Inc., 1988 WL 15825, *5 (Del. Super. 1988); Beerman v. Toro Mfg. Corp., 615 P.2d 749, 755 (Haw. App. 1980); Kan. Stat. § 60-3702(d); Ky. Rev. Stat. § 411.184(3); Mahanna v. Westland Oil Co., 107 N.W.2d 353, 363 (N.D. 1961); Ohio Rev. Code § 2315.21(C)(1); AAA Pool Service & Supply, Inc. v. Aetna Cas. and Sur. Co., 479 A.2d 112, 116 (R.I. 1984); Freeman v. Sproles, 131 S.E.2d 410, 414 (Va. 1963); Hains v. Parkersburg, M. & I. Ry. Co., 84 S.E. 923, 926 (W.Va. 1915); Mid-Continent Refrigerator Co. v. Straka, 178 N.W.2d 28, 33 (Wis. 1970); Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893). *See also* Mercury Motors Exp., Inc. v. Smith, 393 So.2d 545, 549 (Fla. 1981) (later superseded by statute).

16 *The Amiable Nancy*, 16 U.S. (3 Wheat) 546, 559 (1818) (punitive damages improper against 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"). It is worth keeping in mind that *The Amiable Nancy* involved an individual rather than a corporate defendant, and so had no occasion to consider whether different rules would apply to entities who only act through agents.

17 *See, e.g.*, Boise Dodge, Inc. v. Clark, 453 P.2d 551, 554 (Idaho 1969):

> We recognize that Idaho is one of those states which applies the rule that a principal is liable for punitive damages based upon the acts of his agents only in which the principal participated or which he authorized or ratified. Of course, a wooden application of this rule, which we reject, would effectively insulate all corporations from punitive damage liability, for a corporation can act only through its agents. On the other hand, it is wise policy from the standpoint of proper corporate responsibility to recognize that, when corporate officials and managing and policy-making agents engage in fraudulent activity in furtherance of corporate profits which inure to the benefit of shareholders, the acts of such agents must be attributed to the corporation.

See also American Law Institute, Enterprise Liability for Personal Injury II.C.9.III (1991) ("It is important to recognize … that dispensing with vicarious liability would de facto discard punitive damages in the enterprise setting. Corporations and other organizations who operate in that setting must act through their human employees…"); Commonwealth v. Angelo Todesca Corp., 842 N.E.2d 930, 937-38 (Mass. 2006) ("The defendant maintains that a 'corporation' cannot 'operate' a vehicle.… [But] [b]ecause a corporation is not a living person, it can act only through its agents. … By the defendant's reasoning, a corporation never could be liable for any crime."); 1 Stein on Personal Injury Damages § 4:31 (3rd ed., updated 2007) ("all jurisdictions apply vicarious liability [for punitive damages] in some circumstances").

18 *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893).

19 *See, e.g.*, Gray v. Allison Division, General Motors Corp., 370 N.E.2d 747, 752-53 (Ohio App. 1977) (allowing punitive damages against GM despite ratification requirement); Maisenbacker v. Society Concordia of Danbury, 42 A. 67, 69-70 (Conn. 1899) (noting that corporate punitive damages can still be available in some cases); Smith v. Printup, 866 P.2d 985, 1003, 1004 (Kan. 1993) (adhering to Restatement in face of statute with ratification requirement); Boise Dodge, Inc. v. Clark, 453 P.2d 551, 554 (Idaho 1969) ("Of course, a wooden application of this rule, which we reject, would effectively insulate all corporations from punitive damage liability, for a corporation can act only through its agents."); *cf. Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (suggesting that *Amiable Nancy*'s no-vicarious-punitive-liability rule only protects a corporation "if the corporation has formulated policies and directed its employees properly").

20 Kolstad v. American Dental Association, 527 U.S. 526, 542 (1999).

21 These are the District of Columbia and Mississippi. *See* Remeikis v. Boss & Phelps, Inc., 419 A.2d 986, 992 (D.C. 1980) ("general practice" of minor employees can support punitive damages); Gamble v. Dollar General Corp., 852 So.2d 5, 15 (Miss. 2003) (not allowing punitive damages where store manager's actions were contrary to corporate policy manual); Doe ex rel. Doe v. Salvation Army, 835 So.2d 76, 81 (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"). The Fifth Circuit's rule for admiralty also suggests that corporate policy is the key. *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (corporate punitive damages improper "if the corporation has formulated policies and directed its employees properly").

22 New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909).

23 These are Alaska, California, the District of Columbia, Florida, Indiana, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Wisconsin. *See* Alaska Stat. § 11.16.130(a)(1)(A), (b); W. T. Grant Co. v. Superior Court, 100 Cal. Rptr. 179, 180 (Cal. App. 1972); United States v. Sherpix, Inc., 512 F.2d 1361 (D.C. Cir. 1975); West Val. Estates, Inc. v. State, 286 So.2d 208, 209 (Fla. App. 1973); Indiana Code § 35-41-2-3(a); Kan. Stat. § 21-3206(1)-(2); 17-A Me. Rev. Stat. Ann. § 60(1); Commonwealth v. Beneficial Finance Co., 275 N.E.2d 33, 72-73 (Mass. 1971); Mueller v. Union Pacific R.R., 371 N.W.2d 732, 738 (Neb. 1985); State v. Zeta Chi Fraternity, 696 A.2d 530, 534-35 (N.H. 1997); State v. Ice & Fuel Co., 81 S.E. 737, 738 (N.C. 1914); State v. Eastern Coal Co., 70 A. 1 (R.I. 1908); State ex rel. Botsford Lumber Co. v. Taylor, 147 N.W. 72, 73 (S.D. 1914); State v. Louisville & Northern Railroad Co., 19 S.W. 229, 229 (Tenn. 1892); State v. Vermont Cent. R. Co., 27 Vt. 103, 1854 WL 3704 (Vt. 1854); Andrews v. Ring, 585 S.E.2d 780, 787 (Va. 2003); State v. Dried Milk Products Co-op, 114 N.W.2d 412, 415 (Wis. 1962).

24 These are Alabama, Connecticut, Maryland, Mississippi, Nevada, New Mexico, Oklahoma, Puerto Rico, South Carolina, the Virgin Islands, and Wyoming. For authorizations of corporate criminal liability without any suggestion of a food-chain limit, see Ala. Code § 13A-12-200.1(7); Ala. Code § 13A-8-23; Ala. Code § 13A-9-70(3); Ala. Code § 13A-11-70(3); Ala. Code § 13A-14-3; Conn. Gen. Stat. § 53a-3(1); Conn. Gen. Stat. § 53-303c; Conn. Gen. Stat. § 53a-281; Md. Code, Crim. Law, § 1-101(h); Randall Book Corp. v. State, 558 A.2d 715 (Md. 1989); Edward Hines Yellow Pine Trustees v. State, 94 So. 231, 232 (Miss. 1922); Nev. Rev. Stat. § 193.160 (sentencing of corporations); N.M. Stat. § 31-1-2(E); 22 Okla. Stat. Ann. § 516; 22 Okla. Stat. Ann. §§ 1301-1308; 21 Okla. Stat. Ann. § 105; 21 Okla. Stat. Ann. § 187.2; 21 Okla. Stat. Ann. § 331; 21 Okla. Stat. Ann. § 839.1; 21 Okla. Stat. Ann. § 839.1A; 21 Okla. Stat. Ann. § 918; 21 Okla. Stat. Ann. § 1513; Hardeman King Co. v. State, 233 P. 792, 792 (Okla. Crim. App. 1925); 33 L.P.R.A. § 3174; Pueblo v. Mena Peraza, 1982 WL 210571 (P.R. 1982); College of Engineers and Sewers of Puerto Rico v. Puerto Rico Aqueduct and Sewer Authority, 131 D.P.R. 735, 1992 WL 755500 (P.R. 1992); 33 L.P.R.A. §§ 3241-46 (sentencing of corporations); S.C. Code § 17-25-320; S.C. Code § 16-17-30; § S.C. Code § 40-5-320(A); Government of Virgin Islands v. O'Brien, 1985 WL 47217 (V.I. 1984); Wyo. Stat. § 6-1-104(a)(vii).

25 *See* U.S.S.G. § 8B2.1 (defining "effective compliance and ethics program"); § 8C2.5(f)(1) (allowing reduction in "culpability points" if crime occurred despite program); § 8C2.5(b) (increasing culpability points if higher-level employee is involved).

26 *See* Holder, Federal Prosecution of Corporations (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html; Thompson, Federal Prosecution of Business Organizations (January 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; McNulty, Principles of Federal Prosecution of Business Organizations (December 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf. These factors are listed in part II(A) of the Holder and Thompson memoranda and part III(A) of the McNulty memorandum.

27 *See* MPC § 2.07(1)(c); (4)(c). A broader rule applies to "violations" and statutes that clearly apply to corporations. *See* MPC § 2.07(1)(a), (5) (for such crimes, allowing liability for action of any employee, but allowing defense if high managerial agents acted diligently to prevent it).

28 These are Arkansas, Arizona, Colorado, Delaware, Georgia, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Utah, and Washington. *See infra* notes 29 to 32.

29 These are Arizona, Guam, Kentucky, Minnesota, Ohio, Pennsylvania, and Texas. *See* Ariz. Rev. Stat. § 13-305(B)(2); 9 Guam Stat. § 4.80(c); Ky. Stat. § 502.550(2)(b); State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 19-20 (Minn. 1984); State v. CECOS Intern., Inc., 526 N.E.2d 807, 811 (Ohio 1988); 18 Pa. C.S. § 307(f); Tex. Penal Code § 7.21(2)(b)-(c).

30 These are Colorado, Georgia, Idaho, Illinois, Iowa, Missouri, Montana, New York, North Dakota, Oregon, and Washington. *See* Colo. Stat. § 18-1-606(b); Ga. Code § 16-2-22(b)(2); State v. Adjustment Dept. Credit Bureau, Inc., 483 P.2d 687, 691 (Idaho 1971); Ill. Stat. ch. 720, § 5/5-4(c)(2); Iowa Code § 703.5(2); Mo. Stat. § 562.056(3)(2); Mont. Stat. § 45-2-311(1)(b); N.Y. Penal Law § 20.20(1)(b); N.D. Cent. Code § 12.1-03-02(1); Ore. Stat. § 161.170(2)(b); Rev. Code Wash. § 9A.08.030(1)(c).

31 This is Michigan. *See* People v. Lanzo Const. Co., 726 N.W.2d 746, 753 (Mich. App. 2006).

32 Arkansas, Delaware, Hawaii, and Utah lack a definition of "high managerial agent," while Louisiana applies its rule to "officers." *See* Ark. Stat. § 5-2-502(a)(2); 11 Del. Code § 281(2); Haw. Stat. § 702-227(2); Utah Code § 76-2-204(2); State v. Chapman Dodge Center, Inc., 428 So.2d 413, 420 (La. 1983).

33 This is Ohio. *See* Ohio Rev. Code § 2901.23(A)(4) (basic MPC-style rule); Ohio Rev. Code § 2901.23(C) (due-diligence defense applicable to all crimes).

34 These are New Jersey and West Virginia. *See* N.J. Stat. 2C:2-7(c) (allowing defense if offense occurred despite the due diligence of the relevant high managerial agent); State v. Baltimore & O.R. Co., 64 S.E. 735, 735-36 (W.Va. 1909) (excluding corporate criminal liability for "a single offense committed by… an agent or servant in violation of the rules of such company."). The New Jersey approach, which applies to all crimes, is what the MPC applies to minor crimes ("violations"). *See* MPC § 2.07(1)(a), (5).

35 These are Alabama, Indiana, Maryland, Maine, Massachusetts, Nebraska, New Hampshire, Oklahoma, Puerto Rico, South Carolina, and Tennessee.

36 These are Colorado, Delaware, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Minnesota, New Jersey, New York, North Dakota, Ohio, Texas, Utah, and West Virginia.

37 These are 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.

38 These are Arizona, Arkansas, Georgia, Louisiana, Michigan, Missouri, Montana, Oregon, Pennsylvania, and Washington.

39 *See, e.g.,* Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); 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."); Smith v. Wade, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting).

40 Smith v. Wade, 461 U.S. 30, 41 (1983).

41 These are Guam and Minnesota, whose Restrictive Rules in both fields make the actions of policymakers the key.

42 These are Illinois, which follows a policymaker-or-supervisor rule for corporate crime but a policymaker rule for corporate punitive damages; New Jersey, which has a due-diligence defense for corporate crime but a policymaker rule for corporate punitive damages; and New York, which follows a policymaker-or-supervisor rule for criminal law but a stricter rule for corporate punitive damages. For New York's "superior officer" punitive damages rule, *see* Loughry v. Lincoln First Bank, N.A., 494 N.E.2d 70, 76 (N.Y. 1986) ("The term 'superior officer' obviously connotes more than an agent, or 'ordinary' officer, or employee vested with some supervisory or decision-making responsibility.").

43 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).

44 *See, e.g.*, Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 Am. Crim. L. Rev. 1319 (2007); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095 (1991); *Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1257-58 (1979).

45 The fact that the Restatements' rule applies both to corporate and individual principals is important for understanding some comments that Exxon highlights in its brief in *Baker*. When the ALI discussed the Restatement (Second) of Torts in 1973, the reporter, Dean Wade, mentioned, "Many states now do not award punitive damages against an employer, and the trend, I think, although not heavily, is in the direction of not doing it." Am. Law Inst., 50th Annual Meeting Proceedings 1973 at 236 (1974). However, in reply, Albert Rosenthal noted, "I hope that this section is not removed from the Restatement, but secondly, if there are any comments to the effect that the trend is against this, against having punitive damages imposed upon the principal, that this be delineated in such fashion as to indicate that that does not apply to cases of corporations, who could, of course, be liable only through their agents, unless there is a trend away from imposing punitive liability upon corporations as well, which I suspect there probably is not." *Id.* at 238. The ALI then retained the section, as Rosenthal wished, without any commentary on the drift of the law. This distinction is particularly relevant because Exxon's brief in *Baker* highlights Wade's statement, *see* 2007 WL 4439454, *23, without noting the subsequent discussion of the distinction between vicarious punitive damages for corporations and vicarious punitive damages for individuals.

46 *See, e.g.*, Philip Morris USA v. Williams, 127 S.Ct. 1057, 1062-63 (2007) (constitutional rule considers reprehensibility, the ratio to compensatory damages, and the existence of other penalties). For rules on the size of punitive damages that list several factors, but not the food-chain issue, *see, e.g.*, Alaska Stat. 09.17.020(c); 21 Okla. Stat. § 9.1(A); Ky. Rev. Stat. § 411.186(2); Kan. Stat. § 60-3702(b); Mont. Stat. § 27-1-221(7)(b); Minn. Stat. § 549.20(3); Miss. Code § 11-1-65(e); Crookston v. Fire Ins. Exchange, 817 P.2d 789, 808 (Utah 1991); Model Punitive Damages Act § 7(a). Oklahoma and Minnesota's punitive damages statutes do list food-chain criteria. See 21 Okla. Stat. § 9.1(A)(6) (listing as factor for 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"); Minn. Stat. § 549.20(3) (listing as factor for size of punitive damages "the number and level of employees involved in causing or concealing the misconduct").