THE INTRACORPORATE CONSPIRACY TRAP

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In the recent case of Commonwealth v. Lynn*, Pennsylvania prosecuted a Roman Catholic priest who had not abused children himself but who, to protect the archdiocese that employed him, covered up information about priests who had abused children and reassigned the priests to new parishes. This case was the first of its kind to bring criminal charges against an official of the Church solely for how he supervised the careers of priests to protect his employer.*

Because the intracorporate conspiracy doctrine prohibits it, the state—as is now typical of both state and federal jurisdictions around the country—was unable to prosecute Monsignor Lynn and the Archdiocese for their involvement in the conspiracy. This failure illustrates the misalignment of current conspiracy law with the way the law should be designed to incentivize employees and organizations to prevent harm from both the commission and the cover-up of crimes.

The intracorporate conspiracy doctrine provides immunity from conspiracy suits to enterprises based on the legal fiction that an enterprise and its employees are a single actor incapable of the meeting of two minds to form a conspiracy. This Article argues that the un-checked growth of the intracorporate conspiracy doctrine from its proper place in antitrust and sovereign immunity cases to swallow criminal law and tort claims misplaces employee and employer incentives in contravention of agency law, criminal law, tort law, and public policy. Ultimately, the doctrine's uninhibited growth permits harmful behavior to be ordered and performed without

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consequences, and it leaves the victims of the behavior without appropriate remedy.

As the Nuremberg trials famously taught the world, for human beings to operate responsibly in social groups, each individual in the group must be responsible for his own actions. This same moral hazard exists when the intracorporate conspiracy doctrine swallows the penalties that should otherwise be in place for the coordinated harms that employers and their employees inflict in tort and criminal law.

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INTRODUCTION

In the recent case of *Commonwealth v. Lynn*,[1] Pennsylvania prosecuted a Roman Catholic priest who had not abused children himself but who, to protect the archdiocese that employed him, covered up information about priests who had abused children and reassigned the priests to new parishes. This case was the first of its kind[2] to bring criminal charges against an official of the Church solely for how he supervised the careers of priests to protect his employer.[3]

Because the intracorporate conspiracy doctrine prohibits it, the state was unable to prosecute Monsignor Lynn and the Archdiocese for their involvement in the conspiracy. The intracorporate conspiracy doctrine is a now widespread feature of common law across the country. Monsignor Lynn's case made both national and international headlines for its significance as a message to corporate organizations.[4] Most fundamentally, the inability to prosecute Monsignor Lynn is symptomatic of the misalignment of conspiracy law nation-wide with the way the law should be designed to incentivize employees and organizations to prevent harm from both the commission and the cover-up of crimes.

The intracorporate conspiracy doctrine provides enterprises immunity from conspiracy suits[5] based on the legal fiction that an

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1 Commonwealth v. Lynn, No. CP-51-CR-0003530-2011 (Pa. Ct. Com. Pl. 2012), *rev'd*, 83 A.3d 434 (Pa. Super. Ct. 2013), *appeal granted in part*, 91 A.3d 1233 (Pa. 2014) (per curiam).

2 *Roman Catholic Church Official Convicted of Endangerment in Priest-Abuse Trial*, NBC NEWS (June 22, 2012, 3:43 PM), http://usnews.nbcnews.com/_news/2012/06/22/12359748-roman-catholic-church-official-convicted-of-endangerment-in-priest-abuse-trial?lite [hereinafter NBC NEWS]. Lynn's case is different from the case of Bishop Finn and the Diocese of Kansas City–St. Joseph; the Kansas City indictment was for failing to report suspected child abuse, not for moving the priest around to cover up further abuse. A.G. Sulzberger & Laurie Goodstein, *Bishop Indicted; Charge Is Failing to Report Abuse*, N.Y. TIMES, Oct. 15, 2011, at A1.

3 Although the case against Monsignor Lynn was the first of its kind to charge criminal conspiracy against the Church, it may not be the last. The evidence in new cases may show similar patterns of reassigning priests and attempts to protect the Church from liability that form the basis of the charges against Monsignor Lynn. *See, e.g.*, Gillian Flaccus, *Prosecutors to View LA Church Abuse Files*, BOS. GLOBE (Jan. 23, 2013), http://www.bostonglobe.com/news/nation/2013/01/23/will-review-los-angeles-church-files-for-crimes/soevSetKD0Y1eH2nbcLnMJ/story.html ("Thousands of pages from the internal disciplinary files of 14 priests made public Monday show Mahony and other top aides maneuvered behind the scenes to shield molester priests and provide damage control for the church. Some of the documents provide the strongest evidence to date that Mahony and another key official worked to protect a priest who revealed in therapy sessions that he had raped an 11-year-old boy and abused up to 17 boys.").

4 *See, e.g.*, *US Court Quashes Priest's Conviction for Abuse Cover-Up*, BBC NEWS (Dec. 26, 2013), http://www.bbc.co.uk/news/world-us-canada-25523221.

5 Enterprises covered by the "intracorporate" conspiracy doctrine may be all types of associations. *See, e.g.*, Robin Miller, Annotation, *Construction and Application of "Intracorporate Conspiracy Doctrine" as Applied to Corporation and Its Employees—State Cases*, 2 A.L.R. 6th 387, § 3 (2005) ("While the intracorporate conspiracy doctrine is typically applied to business corporations, it applies to corporations generally, including religious corporations and municipal

enterprise and its employees are a single actor incapable of the meeting of two minds to form a conspiracy.[6] This Article argues that the unchecked growth of the intracorporate conspiracy doctrine from its proper place in antitrust[7] and sovereign immunity cases[8] to swallow criminal law and tort claims misplaces employee and employer incentives in contravention of agency law, criminal law, tort law, and public policy. Ultimately, the doctrine's uninhibited growth permits harmful behavior to be ordered and performed without consequences, and it leaves the victims of the behavior without appropriate remedy.

An essential test of whether a conspiracy exists is whether the employer and employee share a common purpose in performing their illegal acts: the more an employee's intent is to protect the reputation and interests of his employer, the more the employee and employer may demonstrate a common purpose in performing the illegal acts. But the intracorporate conspiracy doctrine's provision of immunity from prosecution is strongest exactly when the employee acts on behalf of his employer. The limited exception to the doctrine's immunity applies when the employee's actions fall outside the scope of his employment: when he acts for his own benefit and not for the benefit of the employer. The more this exception to the intracorporate conspiracy doctrine applies, the more it also undermines the common intent requirement of criminal and tort law.

The new contribution that this Article makes to the academic debate over the intracorporate immunity doctrine is to illustrate and discuss the specific misalignment of incentives on an individual level that makes application of the doctrine to criminal and tort law so

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corporations and other governmental bodies. The doctrine applies to all levels of corporate employees, including a corporation's officers and directors and owners who are individuals." (footnotes omitted)). Accordingly, this Article uses the term "corporation" in relation to the doctrine to cover the same enterprises.

6 *See* 16 AM. JUR. 2D *Conspiracy* § 56 (2014) ("[A] corporate entity cannot conspire with itself because employees of a corporation are considered part of the corporate entity . . . ." (footnotes omitted)).

7 Antitrust cases under the Sherman Act can be civil or criminal. *See* 15 U.S.C. §§ 1, 29 (2012). The references to criminal law in this Article are to cases outside of the scope of antitrust law.

8 The sovereign immunity cases in which the intracorporate conspiracy doctrine applies have mainly been civil cases under 42 U.S.C. § 1985(3) (2012) of the Ku Klux Klan Act of 1871. *See, e.g.*, Catherine E. Smith, *(Un)Masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL'Y & L. 129, 132 (2004) ("The majority of federal courts have extended the intracorporate conspiracy doctrine to § 1985(3), essentially immunizing corporate and government entities from § 1985(3) liability for internal agreements to engage in racial discrimination."); *see also* Barry Horwitz, Note, *A Fresh Look at a Stale Doctrine: How Public Policy and the Tenets of Piercing the Corporate Veil Dictate the Inapplicability of the Intracorporate Conspiracy Doctrine to the Civil Rights Arena*, 3 NW. J.L. & SOC. POL'Y 131, 143 (2008) (noting in discussion of civil rights applications that "[b]y the mid-1980s, many courts extended the intracorporate conspiracy doctrine to cover the acts of agents of municipal entities. . . . [due to] similarities between public and private educational institutions").

dangerous. The argument that the intracorporate conspiracy doctrine is best suited to antitrust cases has been made by select commentators in the battle over application of the doctrine to civil rights cases.[9] Even where academic articles have generally called for greater liability for non-director corporate officers, however, they have missed the central importance of reforming the intracorporate conspiracy doctrine in their efforts.[10]

In addition, no other articles have focused squarely on the intracorporate conspiracy doctrine's inconsistency with the Restatements of the law in the areas of agency and torts. Professor Pritikin's article on the logical inconsistency of the agent's immunity rule, which he applies to the "privilege" of conspiracy with the principal,[11] is the closest work in this area. Professor Martin, by contrast, enthusiastically embraces expansion of the intracorporate conspiracy doctrine into the realms of tort and contract law on the basis that the legal fiction of corporate unity, as discussed later in this Article,[12] should be strengthened.[13]

This Article breaks new ground in each of these areas and contributes significantly to the development of scholarly debate about the appropriate legal rules to encourage corporate social responsibility and prevent enterprise conspiracy.

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9 *See, e.g.*, Geoff Lundeen Carter, Comment, *Agreements Within Government Entities and Conspiracies Under Section 1985(3)—A New Exception to the Intracorporate Conspiracy Doctrine?*, 63 U. CHI. L. REV. 1139, 1141 (1996) ("Section III argues that, despite some judicial language to the contrary, antitrust precedents provide a poor legal footing for applying the intracorporate conspiracy doctrine to § 1985(3) claims against employees of a single government entity. Because such an application would frustrate the purposes underlying § 1985(3), courts should refuse to apply the intracorporate conspiracy doctrine in this context."); *accord* Smith, *supra* note 8, at 166–72 (limiting the article's argument against application of the intracorporate conspiracy doctrine to the wording and history of the Ku Klux Klan Act).

10 *See, e.g.*, Z. Jill Barclift, *Scheme Liability and Common-Law Fraud Under State Law: Holding Corporate Officers and Their Co-Conspirators Accountable to Shareholders*, 26 T.M. COOLEY L. REV. 273, 278 (2009) (failing to note either the intracorporate conspiracy doctrine or the agent's immunity rule in general).

11 Martin H. Pritikin, *Toward Coherence in Civil Conspiracy Law: A Proposal to Abolish the Agent's Immunity Rule*, 84 NEB. L. REV. 1, 3–4 (2005).

12 *See* discussion *infra* Part I.A–B.

13 Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 442, 446–47 (1998); *see also* Renner v. Wurdeman, 434 N.W.2d 536, 541–42 (Neb. 1989) (noting that "[a] corporation cannot conspire with an agent when that agent is acting within the scope of his authority. . . . [because] the acts of the agent are the acts of the corporation" (citations and internal quotation marks omitted)); Atl. Richfield Co. v. Misty Prods., Inc., 820 S.W.2d 414, 420–21 (Tex. Ct. App. 1991) (reversing liability for various business-related torts and holding that, "[a]s a matter of law, a parent corporation cannot conspire with its fully owned subsidiary" and that "a corporation cannot conspire with itself, no matter how many agents of the corporation participate in the alleged conspiracy"); Martin, *supra*, at 457–58 ("If the so-called 'shield' created by corporate unity simply demarks the limits of agency principles as applied to intracorporate conduct, this fact ends the appropriate judicial inquiry. Courts are not permitted to ignore these limits simply because it might be expedient or socially beneficial to do so, just as the plurality requirement itself could not be ignored under similar circumstances.").

The fundamental problem created by importing the intracorporate conspiracy doctrine—allegedly based in agency law[14]—into criminal and tort law is that the obedience to be rewarded and protected in agency law is the same behavior that, in its extreme, should be restrained and punished when it forms the basis of criminal and tort harms. When courts improperly extend the intracorporate conspiracy doctrine into criminal and tort law, the limiting principles of those other areas of law are destroyed for the employee who acts in the best interest of his employer. In addition, the more closely that the employer orders and supervises the employee's illegal acts, the more the employer is protected from liability as well.

The intracorporate conspiracy doctrine should be rolled back to its proper place in antitrust and sovereign immunity litigation. A corporate conspiracy should be litigated squarely as a corporate conspiracy. Once that roll-back is established, the incentives of employees everywhere would be re-aligned to stay within the proper limits of criminal and tort law.[15] As demonstrated by the *Lynn* case, Monsignor Lynn should not have been able to transfer "predator priests" from parish to parish to protect his archdiocese without legal consequences to himself and to the archdiocese that ordered the transfers for the harm that those priests caused.[16]

Additionally, rolling back the intracorporate conspiracy doctrine would have benefits outside the direct employer-employee relationship. The growth of the intracorporate conspiracy doctrine into criminal and tort law has been pushed in recent years by attorneys who argue that they should not be doctrinally liable for their actions as clients' agents.[17]

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14 *See, e.g.*, Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 922, 952–53 (1959) [hereinafter *Criminal Conspiracy*] (explaining the traditional reasoning of the intracorporate conspiracy doctrine as based in agency law because "all the agents represent the same principal and can all be considered 'fingers of the same hand'").

15 *Cf.* Martin Petrin, *The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59 AM. U. L. REV. 1661, 1663 (2010) ("[In the tort context,] current approaches neglect the separate corporate personality of the corporation, unduly shift the risk of doing business to directors and officers, and undermine the heightened liability protections provided by corporate law.").

16 Note that the next time the type of conduct that Monsignor Lynn engaged in reappeared within the Church, the only sanction appears to have been that the Church cut ties with its employee—in effect, sacrificing the employee for the public relations benefit to the organization. *See* Marc Santora & Laurie Goodstein, *Newark Monsignor Loses Job for Failing to Stop Priest's Work with Children*, N.Y. TIMES, May 26, 2013, at A16 (describing the firing of the Monsignor from the Newark Archdiocese for publicity purposes, but failing to mention any plans for criminal or civil prosecution).

17 *See, e.g.*, Allon Kedem, Comment, *Can Attorneys and Clients Conspire?*, 114 YALE L.J. 1819, 1819–20 (2005) (describing the push, for example, behind the Eleventh Circuit's case of *Farese v. Scherer*, 342 F.3d 1223 (11th Cir. 2003), which held it impossible for a conspiracy to violate federal civil rights to exist between attorney and client); *see also* Heffernan v. Hunter, 189 F.3d 405 (3d Cir. 1999) (holding attorney-client conspiracy impossible by analogy to the intracorporate conspiracy doctrine); Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108 (7th Cir. 1990)

But, as described extensively in a second article,[18] these attorneys' concern is misplaced.[19] Other legal doctrines and the rules of attorney ethics already harbor behavior within ethical boundaries, and they better maintain the profession's reputation.

Finally, as described in the additional article,[20] rolling back the intracorporate conspiracy doctrine would help to repair the damage that the spread of the intracorporate conspiracy doctrine has inflicted on related doctrines in the common law.[21]

In sum, the overexpansion of the intracorporate conspiracy doctrine asks the wrong questions and sends the wrong signals throughout the law.

This Article makes its argument in an Introduction, four Parts, and a Conclusion. The Introduction describes the warped incentives for the employee and employer caused by misapplication of the intracorporate conspiracy doctrine to criminal and tort law. Part I presents the doctrine and its history in more detail. Part II illustrates the problem with how conspiracy can be charged now that the doctrine is so strong through the lens of the Monsignor Lynn case. Part III demonstrates why the intracorporate conspiracy doctrine should not be applied to agency, criminal, and tort law by examining the historic basis of responsibility for collective action in those areas of law. Part IV reveals potential cracks in the wall of the intracorporate conspiracy doctrine itself. The Conclusion explores implications for Monsignor Lynn's case and similar examples of principal-agent direction of illegal activities.

I. THE INTRACORPORATE CONSPIRACY DOCTRINE

As will be discussed, the problem that the prosecutor had in trying the Philadelphia Archdiocese as Lynn's co-conspirator is rooted in the intracorporate conspiracy doctrine.

(finding that a corporation and its outside counsel could not conspire under the intracorporate conspiracy doctrine).

18 *See* J.S. Nelson, The Corporate Conspiracy Vacuum (Feb. 4, 2014) (unpublished manuscript) (on file with author).

19 *Accord* Kedem, *supra* note 17, at 1819 ("This Comment argues that the Eleventh Circuit's limitation on attorney-client conspiracies is illegitimate as a matter of statutory interpretation and ill advised as a matter of policy. . . . [A] categorical rule against attorney-client conspiracies is misguided.").

20 *See* Nelson, *supra* note 18.

21 Using alternative doctrines to trigger liability for what should be corporate conspiracy results in inconsistent decisions and disproportionate liability. As commentators have noted about those distorted doctrines, they thus appear "[l]ike lightning . . . rare, severe, and unprincipled." Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985); *accord* Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195, 205–10 (2009) (expressing frustration with the unpredictability of alternate methods of imposing liability on enterprises).

In addition, the intracorporate conspiracy doctrine has been used by the Church to block conspiracy suits by the victims of sexual abuse by priests before without attracting the attention that it should. For example, in a 1997 Connecticut case, employees of the Roman Catholic Church very much like Lynn were alleged to have covered up the sexual misconduct of a priest, enabling him to continue to abuse children entrusted to the Church's care by virtue of his office.[22] When sued for civil conspiracy by victims, the employees' defense was that they were acting in the best interest of the corporation.[23] The silenced Connecticut case and its subsequent history will be discussed at the end of Part V in discussing potential cracks in the doctrine.

Part II of the Article details what the intracorporate conspiracy is. The discussion then outlines the growth and power of the intracorporate conspiracy doctrine to reach the point that it could defeat cases for conspiracy to cover up the behavior and existence of predator priests.

A. *The Details of the Intracorporate Conspiracy Doctrine*

The intracorporate conspiracy doctrine holds that, because an association and its employees are one legal entity, there are no two minds that can meet to conspire. As the American Jurisprudence (2d) entry on conspiracy explains: "a corporate entity cannot conspire with itself because employees of a corporation are considered part of the corporate entity."[24] Thus, for example, the "intracorporate conspiracy doctrine prevents liability from being imposed under the federal civil rights conspiracy statute for actions of coemployees of a governmental entity."[25]

In Pennsylvania, where Monsignor Lynn was tried, "[i]t is well-settled that a corporation cannot conspire with its subsidiaries, its agents, or its employees."[26] More generally, according to American Jurisprudence (2d),

> a corporation cannot conspire with its agent when the agent is acting within the scope of his or her authority, or in his or her official

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22 See v. Bridgeport Roman Catholic Diocesan Corp., 20 Conn. L. Rptr. 271, 1997 WL 466498 (Super. Ct. 1997); s*ee also* Medgansis v. Bridgeport Roman Catholic Diocesan Corp., 19 Conn. L. Rptr. 331, 1997 WL 219829 (Super. Ct. 1997) (same).

23 *See*, 1997 WL 466498, at *9–10.

24 16 AM. JUR. 2D *Conspiracy* § 56 (2014) (internal citations omitted).

25 *Id.*

26 Glessner v. Kenny, 952 F.2d 702, 710 (3d Cir. 1991) (applying Pennsylvania's intracorporate conspiracy doctrine); Duffy v. Lawyers Title Ins. Co., 972 F. Supp. 2d 683, 698 n.32 (E.D. Pa. 2013) (citing Michael v. Shiley, Inc., No. 93–1729, 1994 U.S. Dist. LEXIS 1973, at *46–47 (E.D. Pa. Feb. 25, 1994) (same)).

> capacity, and a corporation cannot be a party to a conspiracy consisting of the corporation and the persons engaged in the management, direction, and control of the corporate affairs where the individuals are acting only for the corporation and not for any personal purpose of their own.[27]

The way around the protection provided by the intracorporate conspiracy doctrine is to allege that the agent of the enterprise was acting outside the scope of his duties. Thus, a corporate official may "conspire with his or her corporation if he or she is acting in his or her individual capacity or outside the scope of his or her employment."[28] The agent's "immunity to a conspiracy claim is excepted when . . . [he] has an 'independent personal stake' in achieving the corporation's impermissible objectives."[29]

In other words, "[f]or a claim of intracorporate conspiracy to be actionable, the complaint must allege that the corporate officials, employees, or other agents acted outside the scope of their employment and engaged in conspiratorial conduct to further their own personal purposes and not those of the corporation."[30]

Most courts have read the acting "outside of the scope" of an agent's authority very narrowly. For example, even in civil rights litigation under Sections 1985(1) and (2) of Title 42, the U.S. Court of Appeals for the Third Circuit, which includes Pennsylvania, has held that a conspiracy between a corporation and its officer may exist solely "if the officer is acting in a personal, as opposed to official, capacity."[31] Thus, according to the Third Circuit, the fact that the agent may have acted in bad faith or even with illegitimate purpose toward the principal, does not, by itself, bring the agent's actions outside the scope of the relationship. As long as the agent was not "acting in a purely personal . . . capacity,"[32] the intracorporate conspiracy doctrine immunizes the agent's actions.

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27 16 AM. JUR. 2D *Conspiracy* § 56 (citations omitted).

28 *Id.*

29 *Id.* (internal citations omitted).

30 *Id.*

31 Heffernan v. Hunter, 189 F.3d 405, 412 (3d Cir. 1999) (internal quotation marks omitted). Note that this formulation echoes the test for qualified sovereign immunity doctrine as well. *See* discussion *infra* Part IV.B.

32 Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003) (citation and internal quotation marks omitted).

B. *The Spread of the Doctrine*

From its initial application in antitrust law,[33] a brief survey of the doctrine and how courts have applied it shows that the intracorporate conspiracy doctrine has quietly become widespread and powerful.

The intracorporate conspiracy doctrine emerged as one of a series of common law doctrines to define what constitutes a single legal entity.[34] Another of the doctrines in this vein is the now-discredited doctrine that a man and his wife could not conspire because they compose a single entity within a marriage.[35] That doctrine and most others in the vein have been overturned with modern understandings of individual responsibility.[36] As the U.S. Supreme Court wrote in 1960, "[c]onsidering that legitimate business enterprises between husband and wife have long been commonplaces in our time, it would enthrone an unreality into a rule of law to suggest that man and wife are legally incapable of engaging in illicit enterprises, and therefore, forsooth, do not engage in them."[37]

The intracorporate conspiracy doctrine, however, continues to be rooted in two legal fictions.[38]

The first fiction is that a corporation is a legal "person." This fiction has only become stronger over time,[39] but it remains weakest in the criminal law. The Supreme Court, for example, has held that corporations are not entitled to the right against self-incrimination under the Fifth Amendment.[40]

The second legal fiction is corporate unity. This idea that a corporation and its agents are one body is based on agency law. As the courts explain, "[u]nder elementary agency principles, a corporation is personified through the acts of its agents. Thus, the acts of its agents

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33 *See, e.g.*, John T. Prisbe, *The Intracorporate Conspiracy Doctrine*, 16 U. BALT. L. REV. 538, 544 (1987) ("The intracorporate conspiracy doctrine first gained popular recognition in the field of antitrust law." (footnote and citations omitted)).

34 *See, e.g.*, Martin, *supra* note 13, at 409 (discussing marital unity and other forms of unity doctrines as similar "legal fictions"); *accord* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIM. L. § 12.4(c) (West 2d ed. 2003) (describing issues arising from the plurality requirement of conspiracy law).

35 *See, e.g.*, Dawson v. United States, 10 F.2d 106, 107 (9th Cir. 1926) ("It has been uniformly held that, as husband and wife are considered one in law, they cannot be guilty of conspiracy." (internal quotation marks omitted)), *disapproved by* United States v. Dege, 364 U.S. 51 (1960).

36 *Dege*, 364 U.S. at 52–55; *see also* Pegram v. United States, 361 F.2d 820, 821–22 (8th Cir. 1966) (upholding defendant's conviction for marital conspiracy on the basis of the *Dege* holding).

37 *Dege*, 364 U.S. at 52.

38 Martin, *supra* note 13, at 408–10.

39 *See generally, e.g.*, Citizens United v. FEC, 558 U.S. 310, 342–43 (2010) ("The Court has recognized that First Amendment protection extends to corporations. . . . Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." (citations omitted)).

40 United States v. White, 322 U.S. 694, 700–01 (1944); Balt. & Ohio R.R. v. ICC, 221 U.S. 612, 622 (1911); Hale v. Henkel, 201 U.S. 43, 69–70, 74–75 (1906).

become the acts of the corporation as a single entity."[41] A traditional version of this reasoning is that "all the agents represent the same principal and can all be considered 'fingers of the same hand.'"[42] The basic principles of agency law and of conspiracy law, however, are at odds in application of the intracorporate conspiracy doctrine to corporations.[43]

Historic resistance to application of the intracorporate conspiracy doctrine outside of antitrust cases is best articulated by Justice Harlan's concurrence in the 1962 case of *United States v. Wise*.[44] Justice Harlan wrote that "the fiction of corporate entity . . . had never been applied as a shield against criminal prosecutions."[45]

As Justice Harlan explained, the corporate unity leg of the doctrine was becoming significantly weaker as courts began to hold corporate entities liable for crimes in addition to their agents.[46] Since 1890, agents have been held liable for the crimes of the corporation for which they serve.[47]

In the 1983 case of *United States v. Hartley*,[48] the U.S. Court of Appeals for the Eleventh Circuit wrote a decision that was typical for its time,[49] in that the court held that a corporation and its employee could be convicted of criminal conspiracy because they satisfied the Racketeer Influenced and Corrupt Organizations Act's (RICO) requirement for the presence of both an individual and an enterprise. Continuing the historical progression that Justice Harlan had outlined, the court explained that "[b]y personifying a corporation, the entity was forced to answer for its negligent acts and to shoulder financial responsibility for them. The fiction was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identity of the other."[50]

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41 United States v. Hartley, 678 F.2d 961, 970 (11th Cir. 1982); *accord* Martin, *supra* note 13, at 409.

42 *Criminal Conspiracy*, *supra* note 14, at 952–53.

43 *See, e.g.*, Prisbe, *supra* note 33, at 541 ("Under the intracorporate conspiracy doctrine, principles of agency law are subordinated to the principles of conspiracy law in order to impose conspiratorial liability on the corporation or its agents.").

44 370 U.S. 405 (1962).

45 *Id.* at 417 (Harlan, J., concurring).

46 *Id.* at 417–18.

47 *Id.*

48 678 F.2d 961 (11th Cir. 1982), *abrogated by* United States v. Goldin Indus., Inc., 219 F.3d 1268, 1271 (11th Cir. 2000).

49 *Hartley*, 678 F.2d at 970 ("Ours is not the first court to be unpersuaded by the attempted application of this agency principle in the conspiracy context." (citing Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 608 (5th Cir. 1981)); Novotny v. Great Am. Sav. & Loan Ass'n, 584 F.2d 1235, 1258 (3d Cir. 1978) (en banc) (limited to conspiracy among officers), *vacated on other grounds*, 442 U.S. 366 (1979); United States v. Consol. Coal Co., 424 F. Supp. 577 (S.D. Ohio 1976)).

50 *Hartley*, 678 F.2d at 970 (citations omitted).

Noting that the intracorporate conspiracy doctrine was limited to the antitrust context,[51] the *Hartley* court refused to accept the legal fiction that a corporation and its agents were a single entity in criminal law. "In these situations, the action by an incorporated collection of individuals creates the 'group danger' at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose."[52]

Also in 1983, legendary corporate law professor Phillip Areeda published his bravely-titled article *Intraenterprise Conspiracy in Decline*.[53] He acknowledged that the intracorporate conspiracy doctrine should apply, as the Supreme Court's *Copperweld Corp. v. Independence Tube Corp.* case would hold the next year,[54] to "relations among [a company's] managers, employees, or divisions [that] cannot constitute a contract, combination . . . or conspiracy under section 1 of the Sherman Act,"[55] but predicted the doctrine's decline in other areas of antitrust law. As Professor Areeda explained, "the availability of that doctrine induces unsuccessful suits that would not otherwise occur, complicates and lengthens independently meritorious suits, confuses judges and juries, and sometimes leads to the condemnation—without justification in antitrust policy—of unilateral behavior."[56]

As recently as 1984, law review articles described the intracorporate conspiracy doctrine as appearing most frequently in antitrust cases, with mere mention of the doctrine appearing in other areas of law.[57] That was the year, however, that the Supreme Court decided *Copperweld*.[58]

In *Copperweld Corp. v. Independence Tube Corp.*,[59] the U.S. Supreme Court held that the intracorporate conspiracy doctrine shielded a parent company from being able to conspire with its wholly-

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51 *See id.* at 970–71 (discussing the uniqueness of antitrust legislation and concluding that "[a]ntitrust litigation is a peculiar form of legal action").

52 *Id.* at 970 (quoting *Dussouy*, 660 F.2d at 603) (internal quotation marks omitted).

53 Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451 (1983). For other critiques of the doctrine, see *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766 n.12 (1984) (Stevens, J., dissenting) (listing ten academic articles on the intracorporate conspiracy doctrine after the simple statement that "[t]he doctrine has long been criticized"), and Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981) (arguing against application of the intracorporate conspiracy doctrine even in antitrust cases)).

54 *Copperweld*, 467 U.S. at 767 ("We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.").

55 Areeda, *supra* note 53, at 451 (internal quotation marks omitted).

56 *Id.*

57 *See, e.g.*, Samuel R. Miller & Lawrence C. Levine, *Recent Developments in Corporate Criminal Liability*, 24 SANTA CLARA L. REV. 41, 49 (1984).

58 467 U.S. 752.

59 *Id.*

owned subsidiary for purposes of Section 1 of the Sherman Act because they should not be considered separate economic entities.[60]

Under Section 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[61] Section 1 applies to collusion between and among firms to manipulate markets;[62] Section 2 apples to monopoly conditions.[63] The inquiry and penalties for violation of Section 1 are more harsh than under Section 2.[64]

The *Copperweld* Court's analysis was based on whether Section 1 sanctions should apply because more than one interest existed in the economic market: conspiracy under the Sherman Act is measured by how many firms there are in an existing market and what power those firms have in that market. If a firm acts as a single entity within a market, that economic analysis has no bearing on whether a conspiracy exists within the firm to deprive employees of their civil rights, to cover up illegal behavior by the firm, or to engage in other socially undesirable behavior. As the Court explained in its limited holding,

> an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 [of the Sherman Act] was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition.[65]

A conspiracy requires at least two parties. The *Copperweld* Court found that there were not two parties under a Section 1 analysis when looking at a corporation and its wholly-owned subsidiary because the Court was employing only an economic test of whether the corporation and its subsidiary have divergent interests in a competitive marketplace

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60 *Id.* at 777.

61 15 U.S.C. § 1 (2012).

62 *Copperweld*, 467 U.S. at 768 ("Section 1 of the Sherman Act, in contrast [to Section 2], reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral.'" (citations omitted)).

63 *Id.* at 767 ("The Sherman Act contains a 'basic distinction between concerted and independent action.' The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization." (footnote and citation omitted)).

64 *Id.* at 768 ("Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused." (citation omitted)).

65 *Id.* at 769.

for consumers.[66] As the Court explained, "[b]ecause coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants [Section] 1 scrutiny."[67]

The decision did not apply to partially-owned subsidiaries,[68] nor did it employ any analysis other than a purely economic lens in examining the number of actors in a market. Nonetheless, although the Court ruled only on Section 1 of the Sherman Act in *Copperweld*, it is now generally accepted that its analysis applies to most antitrust cases.[69]

In 1996, an article still printed that "courts do not apply the intracorporate conspiracy doctrine in criminal conspiracy cases, in part because criminal conspiracies pose threats too significant to allow the corporate structure to shield the employees from criminal liability."[70]

Surveying the huge impact of *Copperweld* on the courts, the 1996 article found two reasons why courts might broadly apply the intracorporate conspiracy doctrine to antitrust cases. First, in the antitrust context, as discussed above, "[b]ecause intracorporate agreements do not pose the same group dangers as other agreements, the intracorporate conspiracy doctrine properly shields corporate employees from antitrust conspiracy liability."[71]

Second, because the range of behaviors covered by the antitrust laws are so broad—consider that Section 1 of the Sherman Act starts with a description of "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . "[72]—"courts reason that without the doctrine, conspiracy law would reach even the most mundane, day-to-day business decisions."[73] If the Sherman Act embraced without other qualification for suit decisions

66 *Id.* ("The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.").

67 *Id.* at 770–71.

68 *Id.* at 767 ("We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.").

69 *See, e.g.*, Mark Fogelman, *Antitrust Defense May Not Apply to Subsidiary That Is Heavily Regulated*, FINDLAW (Mar. 26, 2008), http://corporate.findlaw.com/litigation-disputes/antitrust-defense-may-not-apply-to-subsidiary-that-is-heavily.html ("The *Copperweld* doctrine frequently has barred Sherman Act claims alleging unlawful antitrust combinations solely between the members of a single corporate family. The doctrine also appears to bar claims for intracorporate antitrust combinations in violation of California's state antitrust law, the Cartwright Act."). There are two main sections of the Sherman Act and multiple other antitrust statutes. 15 U.S.C. §§ 1–7 (2012).

70 Carter, *supra* note 9, at 1139.

71 *Id.* at 1163.

72 15 U.S.C. § 1 (2012).

73 Carter, *supra* note 9, at 1164.

such as "the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served, or the quality of goods to be produced,"[74] the law would be unworkable.

Facing increasing caseloads and budget cuts,[75] courts across the country, however, seized on the intracorporate conspiracy doctrine in all areas to turn away conspiracy cases. Regarding the battle raging in the mid-1990s over the doctrine's application to civil rights claims, an article reported that

> [t]he federal courts disagree about whether the intracorporate conspiracy doctrine should apply to civil rights conspiracy claims brought under [Section] 1985(3) of the Ku Klux Klan Act of 1871. A majority of the federal courts, relying on antitrust precedents, has held that the intracorporate conspiracy doctrine does apply to [Section] 1985(3) claims. A minority of the federal courts, however, has relied on criminal conspiracy precedents to hold that it does not.[76]

But the tides were already changing. The Eleventh Circuit was the last circuit to find contrary to its previous decision in *United States v. Hartley*.[77] In 2000, the Eleventh Circuit wrote in *United States v. Goldin Industries*[78] that "[w]e now agree with our sister circuits that, for the purposes of 18 U.S.C. [Section] 1962(c), the indictment must name a RICO person distinct from the RICO enterprise."[79] According to the court, even the government's brief on appeal "concedes that *Hartley* was wrongly decided."[80] As the *Goldin Industries* court summarized after surveying other courts,

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74 Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952) (case cited approvingly by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 n.15 (1984)).

75 See the historical discussion of caseload and budgetary pressures in Nelson, *supra* note 18, at 20.

76 Carter, *supra* note 9, at 1140 (footnote omitted); *accord* Douglas G. Smith, Comment, *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U. L. REV. 1125, 1148 (1996) ("The majority of circuits accept some form of the intracorporate conspiracy doctrine under Section 1985 where the alleged violation involves the single act of an agent acting within the scope of his employment.").

77 678 F.2d 961 (11th Cir. 1982), *abrogated by* United States v. Goldin Indus., Inc., 219 F.3d 1268, 1271 (11th Cir. 2000). As a proxy for the spread of the intracorporate conspiracy doctrine's application from antitrust into criminal and tort law, the Eleventh Circuit listed the dates of the other appellate court decisions on interpreting RICO's Section 1962(c) requirement that an indictment must name a person distinct from a conspiring enterprise. In 1982, two courts of appeals ruled against the holding in *Hartley*; in 1984, three courts of appeals ruled against *Hartley*; in 1985, one court ruled against *Hartley*; in 1986, two courts ruled against *Hartley*; and in 1987, another court ruled against *Hartley*. Finally, in 1989, the last two appellate courts outside of the Eleventh Circuit ruled against *Hartley*. *See Goldin Indus.*, 219 F.3d at 1270 (providing a timeline for these decisions in other circuits).

78 219 F.3d 1268.

79 *Id.* at 1271.

80 *Id.*

> [t]hese courts have reasoned that the plain language of [Section] 1962(c) envisions two separate entities, which comports with legislative intent and policy. The rule adopted by our sister circuits reflects Congress' intention in [Section] 1962(c) to target a specific variety of criminal activity, "the exploitation and appropriation of legitimate businesses by corrupt individuals." The distinction between the RICO person and the RICO enterprise is necessary because the enterprise itself can be a passive instrument or victim of the racketeering activity.[81]

This concern, however, that the company is either the passive instrument or the victim of the illegal activity seems diametrically at odds with the exception within the intracorporate conspiracy doctrine that operates only when the employee acts outside of his scope of employment. The more that the employee acts as the agent of the enterprise, the more that the intracorporate conspiracy doctrine applies to protect the agent and the enterprise from conspiracy charges.

Moreover, an enterprise that is the passive instrument or victim of the illegal activity would not be directing the employee's actions the way that a principal directs its agent. Instead, the way that the courts have read the RICO Section 1962(c) requirement seems to have morphed the intracorporate conspiracy doctrine into a version of piercing the corporate veil doctrine—applicable when the agent abuses the corporate form by not taking direction from it as the principal, but instead uses it inappropriately as the individual's alter ego. In piercing the corporate veil doctrine, there is only one entity because the individual has himself breached the protection of the corporate form by rendering the corporate form a mere shell that the agent controls.

In the alternative, the argument that the courts make for sympathy towards the corporation merely as a passive instrument or the victim of illegal activity throws the law backwards in what Justice Harlan had identified as progress. Since 1890, agents of the corporation have been held responsible for the corporation's actions. The progress that the law was making by 1962 was in holding the corporation responsible for its own actions in directing illegal activities as well. In this regard, the courts' approach to the *Hartley* case sounds like a version of the responsible corporate officer doctrine: hold the corporate officers responsible for the corporation's behavior and let the corporate form itself off the hook. A separate article[82] further describes the distortions created by using piercing the corporate veil doctrine and responsible corporate officer doctrine to reach behavior that should be prosecuted as intracorporate conspiracy.

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81 *Id.* at 1270–71 (citations omitted).

82 *See generally* Nelson, *supra* note 18.

C. *The Current Power of the Intracorporate Conspiracy Doctrine*

Simply to illustrate the current power of the intracorporate conspiracy doctrine in the courts, in an opinion criticized by other appellate courts, the U.S. Court of Appeals for the Eleventh Circuit has been unique in halting the application of the intracorporate conspiracy doctrine at the door of criminal liability.[83] The few commentators other than Professor Pritikin[84] who have argued against application of the intracorporate conspiracy doctrine have limited their objection to its application primarily to suits under the federal civil rights Ku Klux Klan Act of 1871, now codified as 42 U.S.C. § 1985(3).[85]

Beyond the Supreme Court's antitrust context of a parent and wholly-owned subsidiary in *Copperweld*,[86] the intracorporate conspiracy doctrine has now been approved by large numbers of states in contexts from civil rights[87] to economic frauds[88] and other conspiracies.[89] Even pro-consumer states such as California apply the intracorporate conspiracy doctrine broadly.[90] Virginia courts have held that a bank and its agent are the same person for purposes of proving conspiracy.[91] In the middle of the county, two subsidiaries of the same corporation

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83 *Compare* United States v. Hartley, 678 F.2d. 961, 970 (11th Cir. 1982), *with* Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 790 (D.C. Cir. 1988) (distinguishing *Hartley*), *and* B.F. Hirsch v. Enright Ref. Co., 751 F.2d 628, 633 (3d Cir. 1984) (declining to follow *Hartley*).

84 *See generally* Pritikin, *supra* note 11.

85 *See, e.g.*, Smith, *supra* note 8, at 134 (limiting argument against the intracorporate conspiracy doctrine to the wording and history of the Ku Klux Klan Act); *see also* Carter, *supra* note 9, at 1139–40 (same); Horwitz, *supra* note 8, at 133 (limiting argument against the intracorporate conspiracy doctrine to the civil rights arena).

86 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 770–71 (1984) (applying the intracorporate conspiracy doctrine in the antitrust context and holding that a parent corporation and its wholly owned subsidiary cannot conspire under Section 1 of the Sherman Act).

87 *See, e.g.*, Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 839–41 (6th Cir. 1994) (applying the intracorporate conspiracy doctrine in the context of civil rights).

88 *See, e.g.*, Transocean Grp. Holdings Pty Ltd. v. S.D. Soybean Processors, LLC, 663 F. Supp. 2d 731 (D. Minn. 2009) (dismissing business suit against soybean processor for civil conspiracy).

89 *See, e.g.*, Renner v. Wurdeman, 434 N.W.2d 536, 542 (Neb. 1989) ("A corporation cannot conspire with an agent when that agent is *acting within the scope of his authority*." (citation omitted)); Collins v. Union Fed. Sav. & Loan Ass'n, 662 P.2d 610, 622 (Nev. 1983) ("Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." (citation omitted)); Gray v. Marshall Cnty. Bd. of Educ., 367 S.E.2d 751, 755 (W. Va. 1988) ("A corporation, as a single business entity, acts with one 'mind' and the unilateral acts of a corporation will not satisfy the requirement of a [conspiracy].").

90 Among the state courts, courts in California have applied the intracorporate conspiracy doctrine particularly broadly to immunize corporate actors when they act within the scope of their employment and on behalf of the corporation. *See, e.g.*, Black v. Bank of Am. N.T. & S.A., 35 Cal. Rptr. 2d 725, 728 (Ct. App. 1994) (holding that "there is no entity apart from the employee with whom the employee can conspire" among bank and its officers when the bank allegedly conspired to fail to renew loans or to grant new loans to debtors).

91 Charles E. Brauer Co. v. NationsBank of Va., N.A., 466 S.E.2d 382 (Va. 1996).

cannot conspire for the same reason.[92] The court in that case was interpreting claims based in Missouri law, but stated that "the case was not based on any concept unique to Missouri," and it cited for support in applying the intracorporate immunity doctrine both U.S. Supreme Court and Eighth Circuit precedent.[93] Articulating the position of many courts, the Supreme Court of Tennessee broadly promulgates "that there can be no actionable claim of conspiracy where the conspiratorial conduct alleged is essentially a single act by a single corporation acting through its officers, directors, employees, and other agents, each acting within the scope of his employment."[94]

A last holdout in RICO doctrine is in the federal courts of appeal on the application of the intracorporate conspiracy doctrine to the section of the RICO statute that prohibits conspiracies with others, specifically listing a "principal."[95] The U.S. Courts of Appeals for the Seventh,[96] Ninth,[97] and Eleventh[98] Circuits have held that civil RICO claims for conspiracy under Section 1962(d)[99] are not barred by the intracorporate conspiracy doctrine. The Courts of Appeals for the Fourth[100] and Eighth[101] Circuits have held that the intracorporate conspiracy doctrine does bar these civil RICO claims.

In sum, the wall to victims' recovery from the intracorporate conspiracy doctrine appears most impenetrable in the state courts. At the federal level, beyond the argument about civil RICO conspiracy that

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92 Davidson & Schaaff, Inc. v. Liberty Nat'l Fire Ins. Co., 69 F.3d 868, 870–71 (8th Cir. 1995).

93 *Id.*

94 Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 703–04 (Tenn. 2002).

95 RICO's Section 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (2012). Section (a) specifically describes a principal, for which the person in 1962(d) might be the agent:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, U.S. Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id. § 1962(a).

96 Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989) (holding that, in contrast with the goals of antitrust laws, "intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers").

97 Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 787 (9th Cir. 1996) ("We agree with the reasoning of our sister circuit, and hold that § 1962(d) applies to intracorporate conspiracies." (citation omitted)).

98 Kirwin v. Price Commc'ns Corp., 391 F.3d 1323, 1327 (11th Cir. 2004) ("Corporations and their agents are distinct entities and, thus, agents may be held liable for their own conspiratorial actions." (citation omitted)).

99 18 U.S.C. § 1962(d).

100 Detrick v. Panalpina, Inc., 108 F.3d 529, 544 (4th Cir. 1997).

101 Fogie v. Thorn Ams., Inc., 190 F.3d 889, 899 (8th Cir. 1999).

will soon be lost, there is still some room to pursue criminal cases in the Eleventh Circuit, and some small flexibility in how narrowly federal courts define the scope of an employee's work.

The relative rigidity of the intracorporate conspiracy doctrine wall, however, explains much of the landscape of where conspiracy cases are charged. In 2012, the federal courts handled 75,290 criminal cases[102] and 285,260 civil cases,[103] for a total caseload of 360,550. By contrast, in 2006, the most recent year for which aggregated data are available, there was a record high of 102.4 *million* incoming cases in the state courts.[104] Fifty-four percent[105] of those 102.4 million cases were traffic-related, but subtracting these cases still leaves 47.1 million substantive cases in the state courts. The total federal caseload is thus roughly 0.076 percent of the substantive state caseload.

But more conspiracy cases are filed in federal court than in the state courts.[106] This makes little sense given that the federal courts handle a tiny percentage of the nation's caseload (0.076 percent), while the vast majority of the nation's cases—130 times more substantive cases—are filed in state courts. It is true that federal prosecutors have more resources to pursue conspiracy cases, and that they tend to prosecute more complex crimes such as drug crimes that often give rise to conspiracy charges. But the nuts-and-bolts system of prosecuting crime in the United States is the state court system. As the Monsignor Lynn case from Pennsylvania and cases from other states demonstrate, the overwhelming amount of abuse may thus be at the level where it is most difficult for victims to receive recourse.

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102 *U.S. District Courts—Criminal Cases Commenced, Terminated, and Pending (Including Transfers) During the 12-Month Periods Ending March 31, 2011 and 2012*, tbl.D, U.S. CTS., http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/D00CMar12.pdf.

103 *Id.* at tbl.C.

104 *State Court Caseload: Summary Findings*, BUREAU JUST. STAT., U.S. DEP'T OF JUST., http://www.bjs.gov/index.cfm?ty=tp&tid=30 (last visited Dec. 11, 2014).

105 *Id.*

106 Martin, *supra* note 13, at 411 ("[S]tate prosecutors rarely use the conspiracy laws, [and] the majority of conspiracy prosecutions are brought in the federal system . . . ." (quoting Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155, 1178 n.116 (1982))). These data on the relative number of conspiracy charges in the two court systems are not easily available through the Bureau of Justice Statistics.

II. THE MONSIGNOR LYNN CASE AND THE PROBLEM WITH HOW CONSPIRACY IS CHARGED

To best illustrate the problems of the intracorporate conspiracy doctrine in action, this Article examines the recent case of *Commonwealth v. Lynn*.[107]

A. *The Facts of the Monsignor Lynn Case*

The facts of Monsignor Lynn's case help to highlight the current state of conspiracy law, and particularly the problem of insulating shared intent from prosecution under the intracorporate conspiracy doctrine. Shared intent is strongest between an enterprise and an employee acting for its benefit, exactly where the intracorporate conspiracy doctrine applies to grant enterprises immunity from prosecution.

For twelve years, from 1992 to 2004, as Secretary for Clergy, Monsignor William Lynn's job within the Philadelphia Archdiocese was to supervise priests, including the investigation of sex-abuse claims.[108] In 1994, Monsignor Lynn compiled a list of thirty-five "predator" priests within the archdiocese.[109] He compiled the list from secret church files containing hundreds of child sex-abuse complaints.[110] On the stand, Lynn testified that he hoped that the list would help his superiors to address the growing sex-abuse crisis within the Archdiocese.[111] But for twelve years Lynn merely re-assigned suspected priests, and he hid the abuse within the church.[112] His superiors never acted on the list that Lynn gave them—in fact, they ordered all copies of the list destroyed[113]—and Lynn never contacted outside authorities. As late as

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107 Commonwealth v. Lynn, No. CP-51-CR-0003530-2011 (Pa. Ct. Com. Pl. 2012), *rev'd*, 83 A.3d 434 (Pa. Super. Ct. 2013), *appeal granted in part*, 91 A.3d 1233 (Pa. 2014) (per curiam).

108 NBC NEWS, *supra* note 2.

109 Ralph Cipriano, *A Shredded Memo, A Dead Cardinal, and A Bunch of Liars*, PHILA. PRIEST ABUSE TRIAL BLOG (May 14, 2012, 8:51 PM), http://www.priestabusetrial.com/2012/05/shredded-memo-dead-cardinal-and-bunch.html [hereinafter *Shredded Memo*].

110 *Id.*

111 *Id.*

112 NBC NEWS, *supra* note 2, at 3.

113 A memorandum at trial showed that the Archbishop of Philadelphia, Cardinal Anthony J. Bevilacqua, ordered in 1994 that the list be shredded. Matthew Gambino, *Conspiracy Counts Dismissed in Case Against Philadelphia Priests*, NAT'L CATHOLIC REP. (May 21, 2012), http://ncronline.org/news/faith-parish/conspiracy-counts-dismissed-case-against-philadelphia-priests. In 2002, Church officials told the Archdiocese's top lawyer that they could not produce the document. *Id.* In 2006, the document was discovered again in a top administrator's safe, which had been opened upon his death. *Id.*

2012, one of the "predator" priests on Lynn's list was still serving in a parish.[114]

All parties agree that Lynn's actions in transferring priests who molested children allowed those priests to continue to abuse children, sheltered the priests from potential prosecution, and directly protected the Philadelphia Archdiocese's reputation.[115]

The Commonwealth of Pennsylvania charged Lynn with child endangerment and criminal conspiracy.[116] Lynn had two co-defendants with whom he was charged with conspiracy.[117] The first alleged co-conspirator was the Reverend James Brennan, who was also charged with the attempted rape of a fourteen-year-old boy in 1996 and child endangerment.[118] The second alleged co-conspirator was the Reverend Edward Avery, who was already serving prison time for the rape of a ten-year-old altar boy in 1999, seven years after Lynn had silenced another of Avery's accusers.[119]

Before the case went to the jury, the judge dismissed the count of conspiracy against Lynn for conspiring with Reverend Brennan.[120] The judge's reasoning was that, as the facts of the case had been presented, Lynn could not have "shared criminal intent" for the children to be molested by Brennan.[121] Pennsylvania law requires "the common understanding that a particular criminal objective" be shared among co-conspirators.[122] This hurdle will be discussed *infra*.[123] Presumably

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114 NBC NEWS, *supra* note 2, at 3.

115 *See, e.g.*, Maryclaire Dale, *Pa. Priest Case Points up Conscience vs. Obedience*, ASSOCIATED PRESS (June 23, 2012, 6:04 PM), http://bigstory.ap.org/article/pa-priest-case-points-conscience-vs-obedience ("Submissive to the end, [Lynn] said he declined to request his next assignment.").

116 Criminal Docket at 6–7, Commonwealth v. Lynn, No. CP-51-CR-0003530-2011 (Pa. Ct. Com. Pl. 2011) [hereinafter Lynn Trial Court Docket], *available at* https://ujsportal.pacourts.us/docketsheets/CPReport.ashx?docketNumber=CP-51-CR-0003530-2011 (showing the charges against Lynn).

117 *Id.*

118 *Id.*; NBC NEWS, *supra* note 2, at 2.

119 Lynn Trial Court Docket, *supra* note 116; NBC NEWS, *supra* note 2, at 2.

120 Lynn Trial Court Docket, *supra* note 116, at 26 ("Motion for judgment of acquittal denied as to endangering the welfare of children and conspiracy with Edward Avery. Granted as to conspiracy with James Brennan.").

121 Max S. Kennerly, Esq., *What Did The Prosecution Prove About Monsignor Lynn?*, LITIGATION & TRIAL (May 19, 2012), http://www.litigationandtrial.com/2012/05/articles/sexual-abuse/prosecution-proof-monsignor-lynn [hereinafter Lynn Prosecution] (describing the reasoning behind Judge Sarmina's dismissal of the conspiracy charge against Lynn); *see also* Ralph Cipriano, *Jury Didn't Buy Prosecution's Grand Conspiracy Theory*, PHILA. PRIEST ABUSE TRIAL BLOG (June 25, 2012), http://www.priestabusetrial.com/2012/06/jury-didnt-buy-prosecutions-grand.html [hereinafter Lynn Jury Interview] (describing the jurors' problems with the conspiracy claim as charged).

122 18 PA. CONS. STAT. § 903 (2014); Commonwealth v. Lambert, 795 A.2d 1010, 1016 (Pa. Super. Ct. 2002). *But see generally Criminal Conspiracy*, *supra* note 14, at 932 (articulating the broad principle of conspiracy law that, although "[t]he man who performs an act dangerous to human life, heedless of its consequences, may have no real desire for or 'stake in' effecting the death of any individual; yet he is held to have the intent to kill requisite for a murder conviction").

123 *See* discussion *infra* Section II.B.

because Lynn had silenced one of Avery's previous accusers, the judge permitted the charge of conspiracy with Avery to proceed.[124]

The jury found Lynn not guilty of conspiracy with Avery.[125] As an interview with the jurors reports, no one believed that "the monsignor got up every morning and said, 'hey, what can I do today to keep our bad boys in collars, so [that] they can continue to rape, pillage and molest more innocent children.'"[126] As the jurors understood the conspiracy case against Lynn, the charge was not about Lynn covering up the sexual abuse problem by "passing them [abuser priests] on from parish to parish."[127] Instead, the conspiracy had to be rooted in an affirmative attempt by Lynn to help "get [a predator priest] to another parish so [that] he can continue to enjoy what he likes to do."[128]

Lynn was convicted by the jury on the sole remaining charge of endangering the welfare of children.[129] That conviction, however, was recently overturned by an appellate panel, which held that Pennsylvania's child endangerment law could not apply to an administrative church official who did not directly supervise children.[130] According to the appellate court, although there was "more than adequate evidence" that Lynn had "prioritized the Archdiocese's reputation over the safety of potential victims of sexually abusive priests," adequate evidence had not been presented of intention "to molest . . . any other child."[131] Potential revision of duties under Pennsylvania's child endangerment law should be the subject of additional articles.[132]

To date, Lynn's case has been discharged.[133] Public reaction has been strong. According to a victims' advocate "[t]his ruling gives corrupt Catholic officials encouragement to continue deceiving police, stonewalling prosecutors, ignoring victims, destroying evidence, fabricating alibis, hiding crimes, and protecting pedophiles."[134]

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124 Lynn Trial Court Docket, *supra* note 116, at 26 ("Motion for judgment of acquittal denied as to endangering the welfare of children and conspiracy with Edward Avery. Granted as to conspiracy with James Brennan.").

125 *Id.*

126 Lynn Jury Interview, *supra* note 121 (describing the jurors' problems with the conspiracy claim as charged).

127 *Id.* (quoting the jury foreman).

128 *Id.* (same).

129 Lynn Trial Court Docket, *supra* note 116, at 1; *see also* 18 PA. CONS. STAT. § 4304 (2014).

130 Commonwealth v. Lynn, 83 A.3d 434, 453–54, 457 (Pa. Super. Ct. 2013).

131 *Id.* at 455, 457.

132 *See also* Lynn Jury Interview, *supra* note 121 (noting that Assistant District Attorney Mariana Sorenson was moved to write an article calling for the closing of legal loopholes in Pennsylvania's child endangerment law).

133 *Lynn*, 83 A.3d at 457.

134 Tamara Audi, *Court Reverses Philadelphia Monsignor's Conviction: Decision Dismisses Criminal Case Against Msgr. Lynn*, WALL ST. J. (Dec. 26, 2013), http://online.wsj.com/news/

Turning, however, to the problem that Lynn's judge and the jury had in applying the conspiracy charge to Lynn's twelve years of hiding the problem of sexual abuse within the archdiocese by reassigning priests, this case highlights issues with both *what* the conspiracy was and *who* the co-conspirators were.

B. *Defining* What *a Conspiracy Should Be: A Focus on Shared Criminal Intent*

Initially, in following the shape of the law in the *Lynn* case, the definition of criminal conspiracy is well-established. Pennsylvania's criminal conspiracy law is typical of the vast majority of states' laws because it tracks the 1962 Model Penal Code (MPC).[135] Both the Pennsylvania law and the MPC define "conspiracy" as:

> (a) Definition of conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
>
> > (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
> >
> > (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.[136]

The Pennsylvania courts, as is typical of courts around the country, require "shared criminal intent."[137] The comments to the MPC describe a common "object of the conspiracy" and agreement among co-conspirators on its "result and conduct elements."[138] The MPC comments emphasize that the "mens rea does not include, however, a corrupt motive or an awareness of the illegality of the criminal objective."[139]

In the *Lynn* case, the crime that Lynn was conspiring to commit was the cover-up of sexual abuse within the archdiocese. Lynn's ultimate "intent of promoting or facilitating [the crime's] commission"[140] was to protect his employer's reputation. The Associated Press's trial coverage

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articles/SB10001424052702303345104579282473952990990 (quoting David Clohessy, director of Survivors Network of those Abused by Priests).

135 MODEL PENAL CODE § 5.03 (Proposed Official Draft 1962).

136 18 PA. CONS. STAT. § 903 (2014); MODEL PENAL CODE § 5.03.

137 18 PA. CONS. STAT. § 903; Commonwealth v. Lambert, 795 A.2d 1010, 1016 (Pa. Super. Ct. 2002).

138 MODEL PENAL CODE § 5.03 explanatory note on section (1) (Proposed Official Draft 1962).

139 *Id.*

140 18 PA. CONS. STAT. § 903(a).

reported that, "[b]y his own account, Lynn was an adept bureaucrat. He was organized. He was hardworking. And he was discreet."[141]

Lynn was never alleged to have abused children himself, nor was it alleged that Lynn in any way thought that such abuse was a good goal. Had law enforcement officials been actively investigating sexual abuse within the Archdiocese and it could be proven that Lynn knew of the investigation,[142] Lynn could have been charged with obstruction of justice or the equivalent. But such an investigation and knowledge could only exist if Lynn and the Archdiocese had not been so successful at covering up the sexual abuse and silencing victims. Without an investigation and knowledge, Lynn was more likely "aiding and abetting"[143] a cover-up in violation of the Archdiocese's duty to report.[144] Note that this prosecution would be for another form of conspiracy charge. In addition, because it would be a conspiracy charge, Lynn need not have had a corrupt motive or an awareness of the illegality of the Archdiocese's purpose.[145] Nonetheless, as the jury correctly held, Lynn was not co-conspiring with the priests themselves to abuse children.

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141 Dale, *supra* note 115, at 2.

142 This condition and Lynn's theoretical knowledge of any such investigation would have been a stumbling block, among other possibilities such as a different statute of limitations, to any direct prosecution. *See generally, e.g.*, John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 LA. L. REV. 49, 54 (2004) ("Most courts agree that there are three elements to a charge of obstruction of justice: (1) there must be a judicial proceeding pending, (2) the defendant must have knowledge of the proceeding, and (3) the defendant must have corruptly endeavored to influence, obstruct, or impede the due administration of justice.").

143 Judge Wald in *Halberstam v. Welch*, 705 F.2d 472, 481–86 (D.C. Cir. 1983), for example, reviewed in detail the nature and scope of civil liability for aiding and abetting tortious conduct. The Restatement (Second) of Torts holds that liability "[f]or harm resulting to a third person from the tortious conduct of another . . . [can be imposed upon a party who] (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." RESTATEMENT (SECOND) OF TORTS § 876(b) (1979). The Restatement provision has been applied by a number of state and federal courts in civil litigation. *See, e.g.*, Smith v. Thompson, 655 P.2d 116 (Idaho Ct. App. 1982) (finding that employer could be held liable for encouraging employee to burn down plaintiff's house); *see also* Rael v. Cadena, 604 P.2d 822 (N.M. 1979) (holding defendant liable under § 876(b) for encouraging third party to assault plaintiff). *But see* Petro-Tech, Inc., v. W. Co. of N. Am., 824 F.2d 1349, 1352 (3d Cir. 1987) ("We hold further [under the federal RICO statute] that a § 1962(c) enterprise cannot be liable as an aider and abettor.").

144 Most jurisdictions have had such reporting requirements that apply to the Church since the 1970s. *See, e.g.*, Andy Newman, *Cardinal Egan Criticized for Retracting Apology on Sexual Abuse Crisis*, N.Y. TIMES CITY ROOM BLOG (Feb. 7, 2012, 6:47 PM), http://cityroom.blogs.nytimes.com/2012/02/07/cardinal-egan-criticized-for-retracting-apology-on-sex-abuse-crisis/?_r=0 (noting in the Bridgeport example that the law has required reporting such cases to authorities since the 1970s).

145 *See* MODEL PENAL CODE § 5.03 explanatory note on section (1) (Proposed Official Draft 1962) ("The mens rea [for criminal conspiracy] does not include, however, a corrupt motive or an awareness of the illegality of the criminal objective.").

C. *Defining* Who *Conspired: Who Shared Lynn's Intent?*

But then, with *whom* was Lynn conspiring to aid and abet the cover-up of sexual abuse? This question leads to the much more complicated issue that is the centerpiece of this Article.

The Pennsylvania conspiracy statute defines the scope of a conspiratorial relationship as:

> (b) Scope of conspiratorial relationship.—If a person guilty of conspiracy, as defined by subsection (a) of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, to commit such crime whether or not he knows their identity.[146]

The MPC's language is almost exactly the same.[147] As a famous survey of conspiracy law concludes, "the criminal act of the modern crime is not the communication of agreement, but the act of agreement itself, that is, the continuous and conscious union of wills upon a common undertaking."[148]

In addition, as to the duration of a conspiracy, which helps to define co-conspirators' relationship, the Pennsylvania statute states that:

> (g)(1) conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired.[149]

Section 5.03(7)(a) of the MPC differs by the use of one grammatical word.[150]

The standard for civil conspiracy contains elements similar to criminal conspiracy. The U.S. District Court for the Eastern District of

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146 18 PA. CONS. STAT. § 903(b) (2012).

147 MODEL PENAL CODE § 5.03(2) (Proposed Official Draft 1962). The MPC defines the scope of a conspiratorial relationship as follows:

> (2) Scope of Conspiratorial Relationship. If a person guilty of a conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

Id.

148 *Criminal Conspiracy*, *supra* note 14, at 926.

149 18 PA. CONS. STAT. § 903(g)(1).

150 MODEL PENAL CODE § 5.03(7)(a) (Proposed Official Draft 1962). It states:

> (a) conspiracy is a continuing course of conduct that terminates when the crime or crimes that are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired . . . .

Id.

Pennsylvania recently reviewed Pennsylvania's standard for civil conspiracy, and found that:

> In order to establish liability for civil conspiracy, a plaintiff must show that: (1) two or more defendants conspired with a common purpose to do (a) an unlawful act, or (b) a lawful act by unlawful means or for an unlawful purpose; (2) defendants committed an overt act in furtherance of the conspiracy; and (3) the plaintiff suffered legal damages.[151]

The key difference in the standard for criminal versus civil conspiracy—other than the obvious burden of proof on the moving party—is that only civil conspiracy requires full completion of an actionable harm. Criminal conspiracy typically requires an "overt act" by one of the parties, which may or may not be the actual commission of a crime.[152] By contrast, for liability under civil conspiracy, the full underlying tort must have been committed by the parties.[153] Certainly, under Pennsylvania law, "[a] claim for civil conspiracy cannot stand without some underlying [tortious] act which is actionable in and of itself."[154]

D. *Background and Policy in Applying Conspiracy Law*

Conspiracy law was developed to address special dangers present in collective action. The structure of conspiracy law seeks to combat the problems of collective action both in magnifying consequences and in blind subservience to others within collective structures.

Traditionally, criminal law has been highly suspicious of individuals acting in groups. As a survey on the origins of criminal conspiracy describes: "collective action toward an antisocial end involves a greater risk to society than individual action toward the same end."[155] The U.S. Supreme Court explains:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts.

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151 Duffy v. Lawyers Title Ins. Co., 972 F. Supp. 2d 683 (E.D. Pa. 2013) (citing Weaver v. Franklin Cnty., 918 A.2d 194, 202 (Pa. Commw. Ct. 2007)); McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 660 (Pa. Super. Ct. 2000).

152 18 PA. CONS. STAT. § 903(e); MODEL PENAL CODE § 5.03(5) (Proposed Official Draft 1962).

153 *See, e.g.*, *Criminal Conspiracy*, *supra* note 14, at 923 (tracing the limitation of an "overt act" to the 1611 Star Chamber *Poulterers Case*, which held "that the agreement itself was punishable even if its purpose remained unexecuted").

154 *Duffy*, 972 F. Supp. 2d at 698 (citing *McKeeman*, 751 A.2d at 660); *accord* Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 406 (3d Cir. 2000) (applying Pennsylvania law and reversing judgment for civil conspiracy for lack of both an agreement and either a criminal act or intentional tort).

155 *Criminal Conspiracy*, *supra* note 14, at 923–24.

> Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group is formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.[156]

Organized social groups have power to orchestrate actions far beyond what a single individual could accomplish, and when the power of those social groups is directed towards anti-social ends, the law provides magnified penalties for those involved in conspiracies.

Moreover, in a statement that has additional power when considering the role of an employee within an organization, the Supreme Court warned that "[a] conspirator who has committed himself to support his associates may be less likely to violate this commitment than he would be to revise a purely private decision."[157] The social pressure of a group—and especially perhaps having the employee's job on the line—can make an employee do things within the employer's subculture that he would not do on his own. This is the suggestion made by the testimony and comments regarding Monsignor Lynn's trial.[158]

Finally, the law has an uneasy relationship with the corporate form, and profit-making organizations in particular. This distrust of whether corporations may seek to achieve goals that might not be in the public interest exists from at least the days of securing permission for a royal charter.[159] There is a natural tension inherent in the corporate form: the corporate form grants unique legal protections to individuals to work together for a common purpose as long as the corporation follows certain rules of behavior that have become less and less defined over time. Courts struggle with the dual nature of a corporation as a single

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156 Callanan v. United States, 364 U.S. 587, 593–94 (1961).

157 *Criminal Conspiracy*, *supra* note 14, at 924.

158 *See infra* Part II.E for testimony and comments regarding Monsignor Lynn's place and duty of obedience within the hierarchy of the archdiocese in the text of this Article.

159 *Compare, e.g.*, Royal Charter to "George, Earl of Cumberland, and 215 Knights, Aldermen, and Burgesses" under the name *Governor and Company of Merchants of London trading with the East Indies,* granted by the Queen in December 1600 (loosely permitting commercial activity in the Queen's name), *with* Regulating Act of 1773, 13 Geo. 3 (Eng.) (later known as the East India Company Act of 1772) (asserting additional control over the activities and finances of the East India Company, and clarifying that "acquisition of sovereignty by the subjects of the Crown is on behalf of the Crown and not in its own right").

entity in the law—the corporation as a legal person—versus the practical nature of a corporation as a collection of individuals with a unity of purpose: the corporation as a social group.[160]

Nonetheless, it has long been settled that corporations—as legal persons—may possess the mens rea required to be guilty of crimes.[161] In 1909, the U.S. Supreme Court in *New York Central & Hudson River Railroad Co. v. United States*[162] unequivocally held that corporations as organizations could be guilty of crimes.[163] As the Court explained:

> We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted [sic] authority to act . . . and whose knowledge and purposes may well be attributed to the corporation for which the agents act.[164]

Even examining the state of commerce in 1909, the Court understood that "the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands."[165] Accordingly, "to give . . . [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a

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160 Consider, for example, the definition of a "social group" in sociology as a unit that solidifies and reinforces the identity of its members:

> A social group consists of two or more people who interact with one another and who recognize themselves as a distinct social unit. The definition is simple enough, but it has significant implications. Frequent interaction leads people to share values and beliefs. This similarity and the interaction cause them to identify with one another. Identification and attachment, in turn, stimulate more frequent and intense interaction.

Social Groups, SOC. GUIDE, http://www.sociologyguide.com/basic-concepts/Social-Groups.php.

161 In 1909, the Supreme Court's decision in *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909), settled an older debate. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 476–77 (1803). In 2013, a *New York Times* article summarized the issue this way: "Corporations, as Mitt Romney famously said, are people, too, at least under the law. They can be—and are—indicted and convicted of felonies. They often face large fines, but, unlike people, they cannot be thrown into prison." Floyd Norris, *For SAC, Indictment May Imperil Its Survival*, N.Y. TIMES, July 25, 2013, at B1.

162 212 U.S. 481 (1909).

163 The recent indictment of SAC Capital Advisors and related entities is an example of criminal charges against a corporation, but that case involved no allegations of intracorporate conspiracy. The indictment against the corporate entities was solely for wire and securities fraud. *See* Criminal Indictment at ¶¶ 1, 34–35, 37–38, United States v. S.A.C. Capital Advisors, L.P., 13 Cr. 541 (LTS) (S.D.N.Y. July 25, 2013) [hereinafter SAC Criminal Indictment], *available at* http://www.justice.gov/usao/nys/pressreleases/November13/SACPleaDocs/SAC%20Indictment%20%28Stamped%29.pdf.

164 *N.Y. Cent. & Hudson River R.R.*, 212 U.S. at 495.

165 *Id.*

crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[166]

In the 1960s and 1970s, the argument that conspiracy prosecutions in tort essentially equated to unchecked vicarious liability for business associations was debated and largely put to rest. An early discussion concluded with the direction of the law that "civil conspiracy personal and vicarious liability are theoretically distinguishable."[167] Courts had incorrectly conflated the two concepts by relying "on such old fictions of vicarious liability as: the act of one is the act of all."[168] But there is a distinction, important in conspiracy law that "each tortfeasor . . . [should be] liable for the whole harm, although the harm was brought about by several tort-feasors acting jointly."[169]

A more modern objection to prosecuting a corporation itself for criminal behavior is that the corporation, such as Arthur Anderson after the Enron scandal in 2002, might go out of existence.[170] It is a separate discussion whether it is socially desirable for criminal corporations to go out of business, or to be reformed under new management and guiding principles.

But, more practically, it must be noted that many corporations other than Arthur Anderson have been found guilty of criminal charges and, when the market has weighed a corporation's crimes, the corporations have continued to exist without outsized reputational penalties. Thus, it has not harmed the longevity of General Motors that it was convicted of criminal antitrust conspiracy in 1949.[171] In fact, the Seventh Circuit, in upholding General Motors' conspiracy conviction firmly dismissed the company's argument for reversal on the theory of corporate unity. As the court wrote, "we believe that the acquittal of the officers and agents, even if they had been the only persons through whom the corporations could have acted, should not operate without more to set aside the verdict against the corporations."[172]

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166 *Id.* at 495–96.

167 *Reason by Analogy: Agency Principles Justify Conspirators' Liability*, 12 STAN. L. REV. 476, 478 (1960).

168 *Id.* at n.9 (citing Addison v. Wilson, 37 S.W.2d 7 (Ky. Ct. App. 1931)).

169 *Id.* (citing Heydon's Case, (1613) 77 Eng. Rep. 1150 (K.B.)).

170 *See, e.g.*, Ellen Podgor, *20th Annual National Seminar on Federal Sentencing Guidelines—Corporate Plea Negotiations and Sentencing*, WHITE COLLAR CRIME PROF BLOG (May 7, 2011), http://lawprofessors.typepad.com/whitecollarcrime_blog/2011/05/25th-annual-sentencing-.html (referencing the "Arthur Anderson effect" on charging decisions).

171 United States v. Gen. Motors Corp., 26 F. Supp. 353, 365 (N.D. Ind. 1939) (overruling demurrer against criminal indictment), *aff'd*, 121 F.2d 376, 411 (7th Cir. 1941); *see also, e.g.*, Neal E. Boudette & Jeff Bennett, *U.S. Car Sales Soar to Pre-Slump Level*, WALL ST. J., Sept. 5, 2013, at A1 ("GM Chief Economist Mustafa Mohatarem said on Wednesday he expects the strong monthly sales rate to push overall U.S. sales above 15.8 million for the year.").

172 *Gen. Motors Corp.*, 121 F.2d at 411.

Fewer criminal prosecutions have been brought against corporations recently,[173] and those prosecutions that have been brought have been for misconduct of greater magnitude[174] than common in the past because of prosecutors' reluctance to trigger the dissolution of firms.[175]

In 2012, however, an arm of the banking giant UBS (formerly the United Bank of Switzerland) pled guilty to criminal charges of felony wire fraud.[176] UBS's Japanese subsidiary was the first major financial institution to be convicted of any criminal charge in the past twenty years.[177] At a total disgorgement of almost $1.5 billion, the conviction was not a mere slap on the wrist.[178] Yet, despite oft-repeated fears of imminent doom in the marketplace, UBS seems almost unaffected by the conviction.[179]

Hence the data on actual corporate convictions, when they are brought, seem to show that the market reacts proportionately, if not even with relief, to the closure that settlement brings. In January 2013,

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173 *See, e.g.*, Peter J. Henning, *UBS Settlement Minimizes Impact of Guilty Plea*, N.Y. TIMES (Dec. 20, 2012), http://dealbook.nytimes.com/2012/12/20/ubs-settlement-minimizes-impact-of-guilty-plea ("[T]he guilty plea by the UBS subsidiary is the first time an arm of major financial institution has been convicted of a crime since Drexel Burnham was more than 20 years ago.").

174 *See, e.g.*, SAC Criminal Indictment, *supra* note 163, at ¶¶ 1, 34–35, 37–38; Norris, *supra* note 161.

175 *See, e.g.*, Henning, *supra* note 173 ("This is the fear of the 'Arthur Andersen' effect, named after the accounting firm that went out of business in 2002 when it was convicted of obstruction of justice related to auditing work for Enron. Since its demise, federal prosecutors have relied primarily on deferred and nonprosecution agreements to resolve corporate criminal investigations. Even when the Justice Department obtains a guilty plea as part of the resolution of a corporate criminal investigation, it has structured the case to minimize the collateral consequences to the company from a conviction.").

176 *See* Press Release, Dep't of Justice, UBS Sec. Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-Running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012) [hereinafter LIBOR Settlement], *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1522.html.

177 *See, e.g.*, Henning, *supra* note 173.

178 *See* LIBOR Settlement, *supra* note 176 ("Together with approximately $1 billion in regulatory penalties and disgorgement—$700 million as a result of the Commodity Futures Trading Commission (CFTC) action; $259.2 million as a result of the U.K. Financial Services Authority (FSA) action; and $64.3 million as a result of the Swiss Financial Markets Authority (FINMA) action—the Justice Department's criminal penalties bring the total amount of the resolution to more than $1.5 billion.").

179 *See, e.g.*, Noam Noked, *Collateral Consequences of the UBS and RBS LIBOR Settlements*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 12, 2013, 8:21 AM), http://blogs.law.harvard.edu/corpgov/2013/03/12/collateral-consequences-of-the-ubs-and-rbs-libor-settlements ("Notably, post-plea, anonymous DOJ sources were purportedly 'heartened by the lack of a negative reaction in the markets and among regulators around the world to UBS's [subsidiary's] guilty plea.'"); *see also* James B. Stewart, *For UBS, a Record of Averting Prosecution*, N.Y. TIMES, July 21, 2012, at B1 ("At UBS, a series of immunity, nonprosecution and deferred prosecution agreements in recent years—evidently the government's preferred approach to corporate crime—seems to have had scant, if any, deterrent effect. 'It's depressing,' Representative Peter Welch, Democrat of Vermont, a member of the House oversight committee, told me this week after we discussed UBS's recent transgressions.").

on the day that the oil giant BP "pleaded guilty to a series of felonies, including manslaughter, in connection with the 2010 Gulf of Mexico oil spill. . . . its stock price went up."[180]

Finally, a brief survey of conspiracy law applied outside of intracorporate conspiracy shows that courts typically require a lower threshold for provocation and impose harsher sanctions for the misbehavior of individuals working together as a social group than for the misbehavior of individuals operating on their own.

Traditionally, under common law, the threshold behavior necessary for evidence of involvement in criminal conspiracy could be found in the act of agreeing with a co-conspirator's plan.[181]

Sanctions for involvement in conspiracy are very high. Under the Clayton Act, for example, antitrust violations can be punished with treble damages.[182] Similarly, RICO,[183] which punishes individuals when the individuals are members of enterprises that commit two of at least thirty-nine crimes within a ten-year period,[184] provides for treble damages in civil actions.[185] Although Congress passed RICO to aid prosecutors in punishing mafia bosses,[186] the law quickly evolved within its first twenty years of existence to become a powerful tool against the financial elite.[187] As discussed in regard to the spread of the intracorporate conspiracy doctrine, however, RICO's ability to combat corporate conspiracy has been curtailed in recent years.[188]

Paradoxically, if there is a pattern among the crimes that are punishable by treble damages, the pattern is not that the crimes are per-se violent, but that the crimes are predominantly economic and are

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180 Norris, *supra* note 161.

181 *See, e.g.*, Mark A. Behrens & Christopher E. Appel, *The Need for Rational Boundaries in Civil Conspiracy Claims*, 31 N. ILL. U. L. REV. 37, 63 (2010) ("Because the existence of a conspiracy is often guarded and 'rarely susceptible of direct proof,' claimants have sought to prove conspiracy 'through circumstantial evidence and inferences drawn from evidence, coupled with commonsense knowledge of the behavior of persons in similar circumstances.'" (footnotes omitted)).

182 15 U.S.C. § 15(a) (2012). Additionally, the Clayton Act authorizes treble damages for violations of antitrust law under the Sherman Act. *Id.*

183 18 U.S.C. §§ 1961–1968 (2012).

184 *Id.* § 1961.

185 *Id.* § 1964.

186 Congress intended RICO to eliminate "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. NO. 91-617, at 76 (1969) (Conf. Rep.).

187 The drafter of the RICO Act, George Blakey, famously reported to TIME magazine that Congress never intended to limit the provision of RICO to the Mob: "We don't want one set of rules for people whose collars are blue or whose names end in vowels, and another set for those whose collars are white and have Ivy League diplomas." Alain L. Sanders, *Law: Showdown at Gucci*, TIME MAG. (Aug. 21, 1989), http://www.time.com/time/magazine/article/0,9171,958402-1,00.html.

188 *See* discussion of RICO doctrine application, *supra* notes 48–52, 77–82, 95–101 and accompanying text.

committed by business people primarily for business reasons. RICO has far-reaching effects to punish even relatively minor commercial crimes that are not normally associated with violence: in 1989, when RICO was its most powerful, the operator of a local gas-station chain in New York, for example, was convicted under RICO for sales-tax evasion.[189] Other crimes that provide for treble damages are similarly non-violent such as willful patent infringement[190] and trademark counterfeiting.[191]

The emphasis on heightened economic damages in crimes that do not involve physical harm to victims developed to supplement pre-existing criminal and tort prosecutions of conspiracies that were supposed to reach the behavior causing physical harm.[192] When those fundamental criminal and tort prosecutions of conspiracies—with conspiracy law's specialized reach to punish the damaging nature of collective action—are undermined by over-expansion of the intracorporate conspiracy doctrine, the branches of the law governing economic crimes stand without the trunk of their original tree.

The prosecution of Monsignor Lynn for crimes that resulted in physical harm to victims should have been at the historic trunk of the tree. The failure of the law in the *Lynn* case thus exposes the extent of the rot in the trunk of the tree inflicted by unchecked growth of the intracorporate conspiracy doctrine.

Moreover, the fundamental point must be made that, as the Monsignor Lynn case and others demonstrate, there are many crimes and torts that cannot be reached by any other type of prosecution. The uniqueness of conspiracy standards reaches behavior not touched by other areas of the law. For example, as another thought experiment in the litigation context demonstrates:

> Imagine that A is involved in a suit against B, and B and his attorney threaten suit in another court against C, one of A's witnesses, to keep C from testifying. A may not have a cause of action against B—only C would. But A, not C, is the primary victim of the conspiracy, because it is A's suit that suffers if C is too intimidated to testify.[193]

E. *Application of General Conspiracy Standards to Lynn's Case*

Given the application of general conspiracy standards to Lynn's case, Lynn should have been charged with conspiring with the

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189 *See* United States v. Porcelli, 865 F.2d 1352, 1352 (2d Cir. 1989) (affirming conviction and application of the RICO statute).

190 35 U.S.C. § 284 (2012).

191 15 U.S.C. § 1117(b) (2012).

192 *See, e.g.*, Sanders, *supra* note 187 (discussing the rationale of the drafter of RICO in extending penalties then-existing for physical crimes to harder-to-reach economic crimes).

193 Kedem, *supra* note 17, at 1824 (citations omitted).

Archdiocese itself. Lynn's actions were irrefutably taken on behalf of the Archdiocese to protect the Archdiocese with the Archdiocese's involvement. Lynn fully reported his actions to his superiors, who rewarded Lynn with twelve years of employment and a prominent position within the Archdiocese for doing his job as they saw it. In fact, the archbishop himself inadvertently revealed the existence of the list of "predator priests" to the media,[194] and he was the one who ordered all copies of the list to be shredded to keep it from being discovered in legal proceedings.[195] Lynn and the Archdiocese itself co-conspired to keep priests from being discovered and disciplined.

As Pennsylvania law requires, Lynn and the Archdiocese agreed that "they or one or more of them will engage in conduct which constitutes" a crime,[196] and Lynn's transfer of the priests was an "overt act in pursuance of such conspiracy."[197] Even Lynn's earlier compiling of the list of predator priests for the Archdiocese, given proof that the archbishop had already ordered the priests who appeared on the list to be transferred to new parishes instead of reported to authorities, might have qualified as the "overt act" for conspiracy.[198]

As the Associated Press reports, Lynn's case "shines light on the culture of obedience ingrained in Catholics, especially priests."[199] Lynn's employer designed a system that would reward loyalty and punish the outside reporting of priests' crimes. "Archdiocesan priests in Philadelphia take vows of obedience to their archbishop, and trial testimony demonstrated that Cardinal Anthony Bevilacqua treated a priest whistle-blower more harshly than some priest abusers."[200] As one defense witness testified, "[y]ou don't say no to Cardinal Bevilacqua."[201]

Cardinal Bevilacqua ordered all archdiocese officials to shred Lynn's list of thirty-five "predator priests" in 1994.[202] As one academic who studies the Church remarked, "[s]hredding documents—especially

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194 John P. Martin, *Court Filing: Bevilacqua Ordered Shredding of Memo Identifying Suspected Abusers*, PHILA. INQUIRER (Feb. 25, 2012), http://articles.philly.com/2012-02-25/news/31098596_1_church-lawyers-abuse-complaints-priests.

195 Dale, *supra* note 115, at 3.

196 18 PA. CONS. STAT. § 903(a)(1) (2014).

197 *Id.* § 903(e).

198 *See id.*; *see also, e.g.*, Commonwealth v. Murphy, 795 A.2d 1025, 1037–38 (Pa. Super. Ct. 2002) ("To sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy." (quoting Commonwealth v. Hennigan, 753 A.2d 245, 253 (Pa. Super. Ct. 2000))), *aff'd*, 844 A.2d 1228 (Pa. 2004); *see also id.* at 1038 ("This overt act need not be committed by the defendant; it need only be committed by a co-conspirator." (quoting *Hennigan*, 753 A.2d at 253)).

199 Dale, *supra* note 115, at 2.

200 *Id.*

201 *Id.* (quoting Monsignor James Beisel).

202 *Id.* at 3.

with Watergate and all this history we have of institutional malfeasance—does have a symbolic significance that goes beyond the view of the Catholic church as being closed and insular."[203] The expert concluded, "it is shocking to think what must have gone on leading up to that decision."[204]

Cardinal Bevilacqua died in January 2012,[205] but neither of his two top associates were even called to testify at Lynn's trial.[206] Within the Archdiocese, Bishop Joseph Cistone signed to confirm the shredding of the "predator priest" list.[207] Bishop Edward Cullen was Cardinal Bevilacqua's most senior aide.[208]

In evaluating the failure of the prosecutor to bring charges against the organization, a spokesman for a Catholic lay organization noted it was "obvious that here's this one man [Lynn] sitting [on trial] when there should be scores of people sitting there."[209] Expressing frustration and disappointment with the trial merely of a single employee instead of the organization as well, the spokesman concluded that "[t]he moral call to stand when you're guilty and confess seems to have been abrogated by those in power. It was, 'I'm just following orders.' . . . The organization that claims to be the moral authority in the world has given up that moral authority."[210]

III. HOW OVEREXPANSION OF THE INTRACORPORATE CONSPIRACY DOCTRINE FAILS TO COMPORT WITH THE BASIS OF AGENCY, CRIMINAL, AND TORT LAW

Ironically, the basis of responsibility for coordinated action in agency law, criminal law, and tort law not only fails to support the intracorporate conspiracy doctrine, but actually opposes its application.

A. *The Basis of Responsibility for Coordinated Action in Agency Law*

Courts proffer agency law as the basis for the presumption of corporate unity in the intracorporate conspiracy doctrine.[211]

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203 *Id.* (quoting Professor Mathew Schmalz, College of the Holy Cross Religious Studies).

204 *Id.* (same).

205 *See* NBC NEWS, *supra* note 2, at 2 (noting when Cardinal Bevilacqua died).

206 Dale, *supra* note 115, at 3.

207 *Id.* at 3.

208 *Id.*

209 *Id.*

210 *Id.* at 4.

211 *See generally, e.g.*, Harp v. King, 835 A.2d 954 (Conn. 2003) (discussing agency theory as the basis of the intracorporate conspiracy doctrine); *accord* Martin, *supra* note 13, at 409; *see also supra* Part I.B for a discussion of the spread of the intracorporate conspiracy doctrine.

Agency law, the backbone of corporate law and governance principles, comports with criminal and tort law in holding individuals liable for their behavior within groups to achieve socially undesirable outcomes. The intracorporate conspiracy doctrine, although typically proffered as a product of agency law, is actually a distortion of agency law itself when applied to torts and crimes.

Initially, in addressing the responsibilities of agents, the Restatement (Third) of the Law of Agency states that "[a]n agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment."[212]

Even though the statement of this basic rule about the agent's responsibility in agency law is right, the justification for the rule is wrong. As the Restatement explains,

> [t]he justification for this basic rule is that a person is responsible for the legal consequences of torts committed by that person. A tort committed by an agent constitutes a wrong to the tort's victim independently of the capacity in which the agent committed the tort. The injury suffered by the victim of a tort is the same regardless of whether the tortfeasor acted independently or happened to be acting as an agent or employee of another person.[213]

But the injury to the victim from individuals acting in concert within social groups against his interest is *greater* than from individuals acting alone. This is a foundation of the special nature of conspiracy law. As the U.S. Supreme Court explained, "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. . . . Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish."[214]

Recognition that the magnitude of the "injury suffered by the victim of a tort is" *not* "the same regardless of whether the tortfeasor acted independently or happened to be acting as an agent or employee of another person," can easily be seen in the award of triple damages for conspiratorial behavior.[215] The Sherman Act,[216] RICO,[217] willful patent

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212 RESTATEMENT (THIRD) OF AGENCY § 7.01 (2006).

213 *Id.* § 7.01 cmt. b; *accord* RESTATEMENT (SECOND) OF AGENCY § 348 (1958) ("[A]n agent who fraudulently makes representations, uses duress, or knowingly assists in the commission of tortious fraud or duress by his principal or by others is subject to liability in tort to the injured person although the fraud or duress occurs in a transaction on behalf of the principal.").

214 Callanan v. United States, 364 U.S. 587, 593 (1961).

215 RESTATEMENT (THIRD) OF AGENCY § 7.01 cmt. b (2006).

216 15 U.S.C. § 1 (2012).

217 18 U.S.C. § 1964 (2012).

infringement,[218] and trademark counterfeiting[219] all award triple damages to punish the collective behavior of business organizations inflicting economic damage for business reasons on their victims.

It is then a very large distortion of the Restatement (Third) of the Law of Agency principles to use agency law as the alleged foundation of the intracorporate conspiracy doctrine to absolve both the corporation and its employees of liability for the damages that they inflict through their conspiracy.

First, even using the reasoning of the Restatement itself, if the "injury suffered by the victim of a tort is the same regardless of whether the tortfeasor acted independently or happened to be acting as an agent or employee of another person," why should the tortfeasor be punished only when he or she acted alone and *not* when the "agent or employee of another person?" And why should acting for the interest of the principal as an "agent or employee of another person" insulate the wrongdoings of both parties? Most of all, if the quality of the agent's representation best fulfills the ideals of the Restatement's obligation for agents, why would the common law embrace a doctrine exactly counter to the Restatement's ideals?

Professor Pritikin does not mention the Restatement issue, but this last argument about the Restatement is related to his general objection to the agent's immunity rule.[220] To apply Professor Pritikin's language to the intracorporate conspiracy doctrine, why should conspiracy with the principal be among an agent's "privileges?" As the courts have explained in most other contexts, "the agent of a corporation, albeit a principal shareholder and officer of the corporation, 'is personally liable for a tort committed by him although he was acting for the corporation.'"[221]

This affirmation that the agent *should* be liable to a third party for his tortious conduct should hold whether or not the agent acts for his personal benefit. The Restatement is blunt on this subject: "It is also immaterial to an agent's tort liability to a third party whether the agent benefited personally from the tortious conduct."[222] So why does the intracorporate conspiracy doctrine protect the agent from conspiracy charges with his employer when he conspires with his employer whether the conspiracy was for the agent's personal benefit or not?

When a tort against a third party is committed, does it matter whether the conspiracy resulted in the benefit of the corporation, the

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218 35 U.S.C. § 284 (2012).

219 15 U.S.C. § 1117(b) (2012).

220 *See* Pritikin, *supra* note 11, at 27–29.

221 Smith v. Isaacs, 777 S.W.2d 912, 914 (Ky. 1989) (quoting Peters v. Frey, 429 S.W.2d 847, 849 (Ky. 1968)); *see also* Young v. Vista Homes, Inc., 243 S.W.3d 352, 363 (Ky. Ct. App. 2007) ("[A]n agent or corporate officer is not immune from liability for his own intentional misconduct or for negligence based upon a breach of his own duty." (citations omitted)).

222 RESTATEMENT (THIRD) OF AGENCY § 7.01 cmt. b (2006).

employee, or both when the corporation and the employee together actively conspired to commit the wrongdoing? In the case of priests and the Roman Catholic Church, would it not have even been worse for the victims of abuse if the Church and the priests themselves had conspired to abuse children, for example, instead of conspiring with its employees to hide the abuse? As applied to that hypothetical, how could courts hide behind the intracorporate conspiracy doctrine's analysis that it "is not the wrongful nature of the conspirators' action but whether the wrongful conduct was performed within the scope of the conspirators' official duties" that triggers immunity?[223]

Second, the intracorporate conspiracy doctrine's interpretation of agency law is similarly reversed in regard to the responsibilities of principals. The employer is equally responsible for the agent's torts under agency law. The Restatement (Third) of the Law of Agency explicitly asserts that "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment."[224]

How then can the intracorporate conspiracy doctrine absolve the employer of liability for torts when committed by employees when "acting within the scope of their employment?" The intracorporate conspiracy doctrine's reading of agency law's requirements is exactly backwards.

Third, there is support within the Restatement for explicitly holding both the agent and the principal individually responsible for their wrongdoing. The Restatement (Third) of the Law of Agency Section 7.01 comment b suggests that holding the principal responsible in addition to the agent is appropriate when based on the evidence of the case:

> It is consistent with encouraging responsible conduct by individuals to impose individual liability on an agent for the agent's torts although the agent's conduct may also subject the principal to liability. Moreover, an individual agent, when liable to a third party, may be available as a source of recovery when the principal on whose behalf the agent acted is not.[225]

A conspiracy case in which the agent and the principal each share the required "common intent," have a "common object of the conspiracy," and agree as to the conspiracy's "result and conduct elements,"[226] would

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223 See v. Bridgeport Roman Catholic Diocesan Corp., 20 Conn. L. Rptr. 271, 1997 WL 466498, at *12 (Super. Ct. 1997) (quoting Doe v. Bd. of Educ. of Hononegah Cmty. High Sch. Dist. #207, 833 F. Supp. 1366 (N.D. Ill. 1993)).

224 RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

225 *Id.* § 7.01 cmt. b.

226 MODEL PENAL CODE § 5.03 and explanatory note (Proposed Official Draft 1962).

seem to more than satisfy the Restatement's basic floor for individual liability.

Fourth, in examining the way that agency law has been developed and applied in individual state laws, the intracorporate conspiracy doctrine's interpretation of the law is even more bizarre. In California, for example, Section 2343 of the Civil Code[227] provides that "[o]ne who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others . . . [including] [w]hen his acts are wrongful in their nature."[228] The Reporter's Notes to Section 7.01 of the Restatement (Third) of the Law of Agency cite similar statutory language in Montana, North Dakota, and South Dakota.[229]

To flesh out the example of California, it makes particularly little sense for the state that by statute imposes liability on each agent "to third persons as a principal" for acts that "are wrongful in their nature," to have enthusiastically embraced the intracorporate conspiracy doctrine from cases such as *Black v. Bank of America.*[230]

In *Black*, a group of six agricultural companies and two stakeholders sued a bank for civil conspiracy when the bank's employees induced the agricultural companies to continue investing in their crops under the assumption developed over seventeen years of business that the bank would float the agricultural companies loans for the harvest time.[231]

The bank missed its contractual deadline to inform the agricultural companies that the bank would not float the companies a loan that year.[232] Meanwhile, the bank employees repeatedly reassured the agricultural companies that the bank would float the companies the loan when harvest time came.[233] Those assurances from bank employees had the allegedly calculated effect of making sure that the crop would be more valuable when the agricultural companies were forced to declare bankruptcy without the promised loan and the bank foreclosed on the harvest.[234] Three of the six agricultural companies had to file bankruptcy as a direct result of the bank employees' actions,[235] and all eight entities sued the bank and its employees for civil conspiracy, including fraud, breach of the covenant of good faith and fair dealing, and the

227 CAL. CIV. CODE § 2343 (1993 & Supp. 2005).

228 RESTATEMENT (THIRD) OF AGENCY § 7.01 Reporter's Notes (2006) (quoting the California law).

229 *Id.* (citing MONT. CODE ANN. § 28-10-702(3) (2004); N.D. CENT. CODE § 3-04-02(3) (1987 & Supp. 2003); S.D. CODIFIED LAWS § 59-5-2(3) (2004)).

230 35 Cal. Rptr. 2d 725, 728 (Ct. App. 1994).

231 *Id.*

232 *Id.* at 726.

233 *Id.*

234 *Id.*

235 *Id.*

intentional infliction of emotional distress.[236] The case was dismissed under the intracorporate conspiracy doctrine without examination of the claims,[237] leaving the plaintiffs without remedy.[238]

If the agricultural companies bankrupted by the bank and its employees' actions in *Black* were able to sue the agents "as a principal" with the actual principal of the bank, then there were at least two principals in the case to impose liability upon: the bank and each of its employees who committed acts wrongful in nature.

The California courts fail to apply their state's own agency law statute when they dismiss cases on the basis of *Black*'s reasoning that there was "no entity apart from the employee with whom the employee can conspire" between the bank and its employees.[239] Each employee should be considered "as a principal" under the agency law statute in his liability to the agricultural companies. The bank is a second principal with whom the employees allegedly conspired.

And no part of agency law would protect two or more principals with independent responsibilities to a third party who together conspired against that party. In fact, as discussed more extensively in a second article,[240] this fracturing of enterprises into principals to impose independent liability on enterprises and their employees is one of the ways in which litigants have sought to impose liability when otherwise thwarted by application of the intracorporate conspiracy doctrine.

B. *The Basis of Responsibility for Coordinated Action in Criminal Law*

Much of the basis for responsibility for collective action in criminal law has been discussed in Part II of this Article above.[241] But a few more points should be added here to demonstrate the sheer perversity of the intracorporate conspiracy doctrine's interpretation of criminal law principles.

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236 *Id.*

237 *Id.* at 727 ("It has long been the rule in California that '[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.'" (quoting Wise v. S. Pac. Co., 35 Cal. Rptr. 652 (Ct. App. 1963), *as reaffirmed and modified by* Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454 (Cal. 1994))); *see also id.* at 728 ("When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee with whom the employee can conspire.").

238 *Id.* at 729.

239 *Id.* at 728.

240 *See* Nelson, *supra* note 18.

241 *See supra* Part II.D for a discussion of criminal conspiracy principles.

The weakest doctrinal leg of the intracorporate conspiracy doctrine is its protection of a corporation and the corporation's employees as a single legal entity under the principle of corporate unity. As discussed above, the law of agency utterly refutes this approach. And so does criminal law.

Each time unity arguments have been made for escaping liability for criminal acts, the arguments have been struck down. The example of a husband and wife within a marriage was discussed above.

But even *within* the intracorporate conspiracy doctrine, courts have been inconsistent on the power of corporate unity. According to a substantive criminal law treatise, "[n]o problem exists when two corporations and an officer of each are indicted, or when a corporation is indicted with one of its officers and a third party."[242] The treatise explains that "in such situations it is clear (without regard to whether the corporation and its agent are one) that there are at least two distinct participants in the conspiracy."[243]

Yet the situation in both of those case examples is far from clear. Would a jury have to make specific findings that the agents of the corporations conspired across corporate forms? Would the jury not have to delve into the degree of coordination between each principal and agent within the two corporations (supposedly protected by the intracorporate conspiracy doctrine) in order to find the corporations responsible for the conspiracy across corporate boundaries? Moreover, if the jury found a conspiracy across corporate boundaries by the corporations, would the intracorporate conspiracy doctrine be used to nullify the charges against the agents because they could not possess independent minds to join such a conspiracy? Further, what would happen if the jury found that the corporation had conspired with a third party, but that the corporation could only have acted through the agent? Would that nullify the conspiracy verdict against the corporation under the intracorporate conspiracy doctrine?[244] The complications pile up.

The court cited in the first case essentially dismissed all of these nuances. As that court explained,

> [t]he individuals aver that, *ex necessitate rei*, the acts were of the corporation. The corporations declare that, inasmuch as no corporation can commit a crime except through human instrumentality, the acts were human; but, as there was but one crime, it must be fundamentally wrong to charge both the

242 LAFAVE, *supra* note 34, § 12.4(c)(3) (footnotes omitted).

243 *Id.*

244 *Cf.* The Warton Rule's application to conspiracy, which would argue for the contrary result once a conspiracy has been established. LAFAVE, *supra* note 34, at § 12.4(c)(4) ("[W]hile it is not a conspiracy for A and B to agree to the commission of adultery involving only themselves, if C conspires with A and B for the commission of adultery by the latter two then all three are guilty of conspiracy.").

> corporation and its instrument therewith. This argument seems to depend upon the assumption that every factum set forth in the indictment is a piece of joint activity by all the defendants. This is not true. It is charged that the unlawful combination, conspiracy, or monopoly was the result of joint action, but all of the persons alleged to be jointly responsible were not necessarily all doing the same things at the same time. There is nothing inherently impossible in the corporations doing one thing and the individuals another at or about the same time, which things were utterly different; yet all, when dovetailed together, go to make up the joint product labeled by the act—combination, conspiracy, or monopoly.[245]

In addition, the substantive criminal law treatise describes as "cogently argued" the position that "the necessary plurality is present whenever two or more agents of the same corporation are involved."[246] The best articulation of this position is that

> [w]hen a corporation acts through more than one person to accomplish an antisocial end, the increased likelihood of success, potentially more serious effects of the contemplated offense, and the danger of further unlawful conduct which are the essence of conspiracy rationales are present to the same extent as if the same persons combined their resources without incorporation.[247]

Nowhere in the reasoning for that argument is a place for the intracorporate conspiracy doctrine even when a conspiracy is broader than between two agents of the same corporation. If the agents of a corporation were to bring the power of the corporate form to bear in their conspiracy, the corporation's presence would only magnify the conspirators' "likelihood of success, potentially more serious effects of the contemplated offense, and the danger of further unlawful conduct which are the essence of conspiracy rationales."[248] Such magnification of the antisocial dangers of conspiracy cannot comport with the reasoning and principles of criminal law.

Accordingly, for all of the reasons described in both this section and in the previous discussion of conspiracy principles, the intracorporate conspiracy doctrine has no place in criminal conspiracy law.

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245 United States v. MacAndrews & Forbes Co., 149 F. 823, 832 (C.C.S.D.N.Y. 1906).

246 LAFAVE, *supra* note 34, at § 12.4(c)(3).

247 *Id.* (quoting *Criminal Conspiracy*, *supra* note 14, at 953) (internal quotation marks omitted).

248 *Id.* (quoting *Criminal Conspiracy*, *supra* note 14, at 953).

C. *The Basis of Responsibility for Coordinated Action in Tort Law*

Traditional tort law comports with criminal law in holding those involved in civil conspiracies responsible for their acts in aiding and soliciting anti-social outcomes. Interestingly, the case for corporate responsibility in conspiracy seems to fit particularly well into tort in addition to the responsibility of the individual with whom the corporation is acting in concert.

According to the Restatement (Second) of the Law of Torts, entities are liable for the harm that they inflict upon third parties when they act in concert. The definition of acting in concert for tort liability is that the legal person:

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person. [249]

Note, as previously mentioned, how closely this liability for acting in concert matches the definition of liability for conspiracy under the criminal law. The mirroring of criminal law is particularly apparent in the comment on clause (a), in which the Restatement clarifies that:

> Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. Whenever two or more persons commit tortious acts in concert, each becomes subject to liability for the acts of the others, as well as for his own acts.[250]

Immediately, the same comment to the Restatement of Torts makes the logical tie to agency law as well. The Restatement continues that "[t]he theory of the early common law was that there was a mutual agency of each to act for the others, which made all liable for the tortious acts of any one."[251]

Regarding encouragement or assistance in the coordination of torts under section b of the Restatement's definition, the comments to clause

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249 RESTATEMENT (SECOND) OF THE LAW OF TORTS § 876 (1979) ("Persons Acting in Concert").

250 *Id.* § 876 cmt. a.

251 *Id.*

(b) bluntly explain that

> [i]f the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act. This is true both when the act done is an intended trespass [a more serious act] and when it is merely a negligent act.[252]

As in the criminal law, lack of knowledge of the wrongfulness of the act is not a defense in tort. As the Restatement provides, "[t]he rule applies whether or not the other knows his act is tortious. It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act."[253]

In regard to a corporation, which would be "directing or permitting [the] conduct of another" in the form of its employee, the most recent Restatement of Torts dedicated a new section to governing this behavior. In Section 877, entitled "Directing or Permitting Conduct of Another," the Restatement (Second) of the Law of Torts advocates liability for "harm resulting to a third person from the tortious conduct of another" when that entity:

> (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or
>
> (b) conducts an activity with the aid of the other and is negligent in employing him, or
>
> (c) permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously, or
>
> (d) controls, or has a duty to use care to control, the conduct of the other, who is likely to do harm if not controlled, and fails to exercise care in the control, or
>
> (e) has a duty to provide protection for, or to have care used for the protection of, third persons or their property and confides the performance of the duty to the other, who causes or fails to avert the harm by failing to perform the duty.[254]

Specifically in contrast to the intracorporate conspiracy doctrine's protection of conduct within the scope of employment, the corporation's "orders" to its agent and the corporation's "control" of the agent's conduct makes the corporation liable for the employee's actions. Thus, the intracorporate conspiracy doctrine's safe harbor provision for

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252 *Id.* § 876 cmt. d (citations omitted) (commenting on clause b).
253 *Id.* (citation omitted) (same).
254 *Id.* § 877.

actions taken within the scope of employment is precisely contrary to the Restatement of Torts.

Moreover, the Restatement's language emphasizes that it is the method of control that a corporation exercises over its employee that makes the corporation liable for the harm to third persons from the combined tortious conduct. Four out of the five subsections of Section 877 start their definitions with, and hinge their imposition of liability upon, the description of the active control that the corporation has over its employee's action. Thus, the corporation should be liable for its conspiracy with its employee when the corporation "orders or induces the conduct";[255] "conducts an activity with the aid of the other";[256] "permits the other to act upon his premises or with his instrumentalities";[257] and "controls, or has a duty to use care to control, the conduct of the other."[258]

The last subsection hinges liability for corporate action on its duties to a third person harmed by the combined tort of the employer and employee.[259] This suggestion of independent duties to a third person is another way in which corporations may be held liable for their coordinated actions with employees. Corporations have established duties in the law to their shareholders, but there is room for additional development in the law on the duties of corporate citizens to their fellow corporeal citizens. Duties not to pollute[260] and others have been promulgated by statute, but the law is in flux on the definition of corporate social duties. The law now incorrectly expands the personal duties of corporate officers[261] while leaving the duties of corporations to third persons inchoate or too tightly circumscribed. Additional development of these ideas is the subject of further articles.[262]

In sum, after this survey of the law on tort, the basic rule for a corporation's conspiracy with its employees should be liability due to

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255 *Id.* § 877(a).

256 *Id.* § 877(b).

257 *Id.* § 877(c).

258 *Id.* § 877(d).

259 *Id.* § 877 cmt. d.

260 *See, e.g.*, 42 U.S.C. § 9607 (2012) (corresponds to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), ch. 103, § 107, Pub. L. 96-510, 94 Stat. 2767 (1980)), specifying that both the "operator" of a facility as well as the facility's "owner" are subject to liability); *accord* RESTATEMENT (THIRD) OF AGENCY § 7.01 cmt. c (2006) (noting that although [s]ome statutes explicitly impose liability only on principals or employers," other statutes "explicitly address when an individual actor is subject to liability for conduct that violates the statute" (citing CERCLA in the second category)).

261 *See, e.g.*, Petrin, *supra* note 15, at 1663 (noting in the tort context that "current approaches neglect the separate corporate personality of the corporation, unduly shift the risk of doing business to directors and officers, and undermine the heightened liability protections provided by corporate law").

262 *See* Nelson, *supra* note 18; *see also* J.S. Nelson, *Faulty Liability Frameworks for Organizational Employees* (on file with author).

the control and direction of the corporation in the wrongdoing. Furthermore, there should be a lower threshold for corporate liability for these actions in tort, as opposed to in criminal law, because tort adopts lower penalties and a lower burden of proof for application.

IV. POTENTIAL CRACKS IN THE WALL OF THE INTRACORPORATE CONSPIRACY DOCTRINE

As this Article argues, the intracorporate conspiracy doctrine should be rolled back to its proper limited place in antitrust and sovereign immunity cases. Recent movements within the Delaware Court of Chancery and other courts' decisions point the way for this roll-back to happen. Political fall-out from the silenced intracorporate conspiracy case in Connecticut should fuel the movement as well.

A. *The Delaware Court of Chancery on Scienter*

A small crack in the wall of the intracorporate conspiracy doctrine may be starting to appear in the Delaware Court of Chancery. The strongest statement on intracorporate conspiracy claims from the Chancery Court is that

> this state's acceptance of claims for aiding and abetting breaches of fiduciary duty brought against parent corporations and their affiliates, including subsidiaries, belies any outright rejection of the proposition that wholly-owned and/or commonly-controlled entities cannot be held responsible for each other's acts when those acts result from concerted unlawful activity.[263]

In *Allied Capital Corp. v. GC-Sun Holdings, L.P.*,[264] the Chancery Court examined an alleged civil conspiracy between a parent company and its subsidiary to improperly drain the assets of the subsidiary to avoid paying a debt. The holder of the promissory note, Allied Capital Corporation, sued the insolvent debtor, GC-Sun Holdings, L.P., and associated entities, for improperly subordinating Allied Capital's note to a new equity investment made by an affiliate formed for the specific purpose of making that investment.[265] Allied Capital's causes of action included "breach of contract, breach of the implied covenant of good

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263 Allied Capital Corp. v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1039 (Del. Ch. 2006).

264 *Id.* at 1025 (involving civil conspiracy on the basis that "the parent and the newly formed affiliate allegedly schemed with the first-tier subsidiary to implement a transaction that would render the first-tier subsidiary insolvent and unable to pay its bills by enabling the newly formed affiliate to dilute the first-tier subsidiary's indirect equity ownership of the third-tier subsidiary").

265 *Id.* at 1023.

faith, tortious interference with contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent conveyance, civil conspiracy, and unjust enrichment."[266]

GC-Sun Holdings depended in part on the reasoning of the intracorporate conspiracy doctrine that a parent and its subsidiary were one and the same entity that could not conspire.[267] The Chancery Court objected to the intracorporate conspiracy doctrine as a rule of law. The *Allied Capital* court explained:

> To preclude a conspiracy claim on the argument that the parent and the subsidiaries were one and the same person with identical objectives, and could not, as a matter of law, conspire, is not immediately convincing—especially when the parent is not offering to make the injured creditor whole using any of its assets or those held by the affiliates involved in the challenged transaction. The state of the briefing is such that I cannot confidently say that Delaware law should embrace a black-letter rule that wholly-owned affiliates of a parent entity cannot conspire with a parent. In other circumstances involving similar considerations—i.e., the questions of whether a parent can tortiously interfere with the contracts of its subsidiary or can aid and abet breaches of fiduciary duty by a subsidiary—our courts have refused to hold that the mere fact of common ownership requires treating the commonly-owned entities as a single legal person. Rather, to ensure that such entities may engage in the expected legitimate collaboration, without subjecting each other to joint and several responsibility for any action taken after collaboration, our law has set a high bar that permits such claims to proceed only when facts are pled that suggest that the parent acted with scienter, in the sense that it knowingly assisted the affiliate in committing a wrongful act against another. Facts of that type have been pled here.[268]

Importantly, the *Allied Capital* court permitted the examination of evidence regarding scienter on the part of a parent and its wholly-owned affiliate. Allowing evidence of scienter, and thus suggesting that scienter has weight in a conspiracy case against a parent and wholly-owned affiliate, breaks down the intracorporate conspiracy doctrine's absolute prohibition against considering these conspiracy claims. If scienter evidence did prove that the parent "knowingly assisted the affiliate in committing a wrongful act against another,"[269] the courts must be implying the existence of two minds between the parent and wholly-owned affiliate in order to sustain these conspiracy claims.

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266 *Id.* at 1023–24.
267 *Id.* at 1025.
268 *Id.* at 1025–26.
269 *Id.* at 1026.

As a matter of incentives and policy, the *Allied Capital* court's approach thus puts the emphasis back on the parent and its wholly-owned affiliate to avoid knowingly committing wrong-doing in order to enjoy immunity against conspiracy.

To reach its finding, the *Allied Capital* court relied in part on another Chancery Court case that had permitted separate examination of a parent company and its subsidiary. In *Shearin v. E.F. Hutton Group, Inc.*,[270] the Chancery Court would permit the claim of tortious interference with contract when "the gist of a well-pleaded complaint for interference by a corporation of a contract of its affiliate is a claim that the 'interfering' party was not pursuing in good faith the legitimate profit seeking activities of the affiliated enterprises."[271]

According to the *Shearin* court, the essence of the limited single-entity privilege between parent and subsidiary "arises when the parent pursues lawful action in the good faith pursuit of its profit making activities."[272] Thus, when the parent steps outside this good faith pursuit of its profit-making activities, it may lose the single-entity privilege with its subsidiary. "[F]acts that would make the 'interference' improper" could be pled through "allegations that the interference was motivated by some malicious or other bad faith purpose."[273] The court stated that this standard must be high. Because tortious interference with contract dances on the edge of both contract and torts, the court did not want to overly discourage efficient breach.[274]

Following this reasoning, criminal law, in addition to the court's stated exception for tort, lies even farther from the heart of the rationale

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270 652 A.2d 578 (Del. Ch. 1994).

271 *Id.* at 591.

272 *Id.* at 590.

273 *Id.* at 590–91 ("The allegations of the complaint, if believed, establish that Hutton Inc. is an affiliated entity of Hutton Trust, the party alleged to have breached its contract. In these circumstances, the burden should fall on the plaintiff to plead and prove that the privilege among affiliates to discuss and recommend action is not applicable or, stated affirmatively, to allege facts that would make the 'interference' improper. Such a showing would, for example, be satisfied by allegations that the interference was motivated by some malicious or other bad faith purpose." (citation omitted)); *see also id.* at 591 (stating, in more forceful wording, that "there can be no non-contractual liability to the affiliated corporation, which is privileged to consult and counsel with its affiliates, unless the plaintiff pleads and proves that the affiliate sought not to achieve permissible financial goals but sought maliciously or in bad faith to injure plaintiff"); *accord Allied Capital Corp.*, 910 A.2d at 1039 (describing the *Shearin* case as establishing that "plaintiffs could only hold a parent corporation liable for tortious interference under a stringent bad faith standard").

274 *Shearin*, 652 A.2d at 589 ("The tort of interference with contractual relations is intended to protect a promisee's economic interest in the performance of a contract by making actionable 'improper' intentional interference with the promisor's performance. Such protection is, in our competitive market economy, itself somewhat problematic. Plainly, this form of liability may have the effect of chilling third parties from vigorously competing for business in any marketplace in which existing contracts obtain. Mindful of this risk, courts have tended to narrowly circumscribe the scope of this tort." (footnote and citation omitted)).

of protecting these areas of alleged conspiracy from inquiry. The stated rationale to avoid overly discouraging efficient breach of contract has the very least purchase when discussing the type of harms to persons and property that result from violations of the criminal law. These cases from the Delaware Courts of Chancery, one of the nation's leading authorities on corporate law, should embolden courts around the country to re-examine their current interpretation and application of the intracorporate conspiracy doctrine.

B. *The Exceptionalism of Antitrust and Sovereign Immunity Contexts*

The proper interpretation of the intracorporate conspiracy doctrine should be that it operates as a logical defense only in the context of antitrust and sovereign immunity cases. Antitrust law already assumes coordination within a corporate form for market advantage. The threat addressed in antitrust law is that the coordination of actions across corporations harms the consumer because coordination among corporations realigns the marketplace of corporate forms competing against each other in ways that the consumer cannot anticipate. In antitrust law, the consumer already expects that a company is planning to charge the highest price possible for its goods in the market. What the consumer does not expect is that more than one unrelated corporation would coordinate efforts to increase prices and to leave the consumer fewer other options for competitive goods in the marketplace.

Antitrust harms are thus very different in ability to anticipate and to curtail than the harms that victims of conspiracies within corporations suffer from the actions that corporate officers take within the company on the company's behalf.[275] Even the Delaware Court of Chancery has recognized that the rationale for the immunity of agents from conspiracy claims is most appropriate for "certain purposes—for example, claims of tort or antitrust violations brought against a corporation and its officers."[276]

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275 *See also* Kathleen F. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 438–40 (1983) ("The incongruity of these rules is attributable to the disparate policy considerations that shaped them."); Pritikin, *supra* note 11, at 4–5 ("[T]he single legal actor theory—the fiction that the agent's acts are those of the principal, and thus that the 'plurality' element of conspiracy is absent—arose where policy considerations regarding the underlying offense supported its application. The fiction is accepted in the antitrust context, on the rationale that proscribing certain intracorporate combinations that restrain trade could chill legitimate business conduct. However, the same fiction is rejected in the context of criminal conspiracy, on the rationale that the increased danger arising from a group of criminal actors that justifies punishing conspiracy generally exists even where the conspirators are all agents and employees of a single entity.").

276 Sample v. Morgan, 935 A.2d 1046, 1061 (Del. Ch. 2007).

In the 2000 case of *SEECO, Inc. v. Hales*,[277] the Arkansas Supreme Court even distinguished between the way that firms act in antitrust under Section 1 of the Sherman Act,[278] with the way that two companies in separate spheres had acted even though they were owned by the same holding company. A gas producer and a public utility owned by the same holding company could not use the intracorporate conspiracy doctrine exception outside of antitrust because "[t]he appellants' contention that they acted independently of each other in [c]ontract . . . concessions and in the price freeze seems at odds with their argument of an interdependent corporate family."[279]

The gas producer and public utility could not have the argument both ways. The companies had argued to avoid liability to owners of royalties from gas leases for contracts between the companies stemming from a relationship described as "fraught with conflicts of interest."[280] As the court concluded, "[i]t seems logical to us that if the corporate subsidiaries were separate enough to contract with each other, as the appellants maintain, they were sufficiently separate to engage in a civil conspiracy."[281]

Sovereign immunity could be seen as a variant of antitrust theories because it is the public equivalent of a unified body uniquely responding to pressure within the marketplace.[282] A key critique of limited shareholder liability in the corporate world has been that the costs of corporate misbehavior "are most pronounced in the tort context because potential tort victims rarely can protect themselves by monitoring corporate activities or bargaining with corporate actors."[283] But potential tort victims can vote and influence the government in a way unique among citizen interactions with large entities.

Moreover, the fundamental argument in conspiracy law against the danger of collective action unchecked by having the goal of public good does not necessarily apply to the government. This is one of those situations in which, as the survey on the basis of corporate conspiracy identified, "[s]ociety is benefited by viewing a corporation as a single

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277 22 S.W.3d 157 (Ark. 2000).

278 *Id.* at 173 (describing the intracorporate conspiracy doctrine as "applied primarily in the area of antitrust litigation and provides that a parent company and its wholly-owned subsidiaries cannot conspire with each other for purposes of § 1 of the Sherman Act" (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984))).

279 *Id.*

280 *Id.* at 162 (quoting the Arkansas Public Service Commission).

281 *Id.* at 173.

282 *Cf., e.g.*, Horwitz, *supra* note 8, at 143 (noting, in discussion of civil rights applications, that "[b]y the mid-1980s, many courts extended the intracorporate conspiracy doctrine to cover the acts of agents of municipal entities. . . . [due to] similarities between public and private educational institutions").

283 Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 331 (2004).

legal entity only when it acts for proper ends."[284] Not all collective action is bad: only collective action with improper ends—in the case of corporations, often set from the top. There are already other public checks and balances in place to reveal and punish improper government action.

Finally, when the purpose of government is ostensibly to perform only social good, the most likely abuses are in the behavior of rogue agents, and that exception is already built into the intracorporate conspiracy doctrine.[285] This is similar to existing principles in litigation against sovereign entities of suit for behavior in "official capacity"[286] versus in an employee's individual role.

For example, the U.S. Court of Appeals for the Third Circuit's test for application of the intracorporate conspiracy doctrine in civil rights litigation is if "the officer is acting in a personal, as opposed to official, capacity."[287] Under the intracorporate conspiracy doctrine, immunity applies as long as the agent is not "acting in a purely personal . . . capacity"[288]—the same test as in sovereign immunity cases.[289]

Accordingly, the law on corporate conspiracy already conforms to and largely incorporates the "official capacity" versus "personal capacity" distinction in sovereign-immunity related prosecutions. As courts have recognized in litigating both the intracorporate conspiracy doctrine and sovereign immunity, merely suing individuals in their

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284 *Criminal Conspiracy*, *supra* note 14, at 953.

285 *See* 16 AM. JUR. 2D *Conspiracy* § 56 ("For a claim of intracorporate conspiracy to be actionable, the complaint must allege that the corporate officials, employees, or other agents acted outside the scope of their employment and engaged in conspiratorial conduct to further their own personal purposes and not those of the corporation.").

286 Officers may be sued under 42 U.S.C. § 1983 (2006) in their official capacities only for prospective or injunctive relief. *Ex Parte* Young, 209 U.S. 123 (1908). This is essentially a suit against the government entity itself. Hafer v. Melo, 502 U.S. 21, 25, 30 (1991); Kentucky v. Graham, 473 U.S. 159, 166 (1985). Government employees may be sued for damages, declaratory or injunctive relief in their individual capacities when they act outside their official roles. *See Hafer*, 502 U.S. 21; *Graham*, 473 U.S. 159. Suits against government employees in their individual capacities are not suits against the government. *See Hafer*, 502 U.S. 21; *Graham*, 473 U.S. 159.

287 Heffernan v. Hunter, 189 F.3d 405, 412 (3d Cir. 1999) (citation and internal quotation marks omitted).

288 Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003).

289 There is an interesting discussion of how the principles of the intracorporate conspiracy doctrine and sovereign immunity are intertwined in Carter, *supra* note 9, at 1172, although the analysis in that article ultimately goes in a different direction. Carter notes that the application of the intracorporate conspiracy doctrine on top of the framework of qualified immunity for government officials means that the only actions that the intracorporate conspiracy doctrine would protect are "clearly improper acts by officials." *Id.* But Carter does acknowledge that application of the intracorporate conspiracy doctrine in the area of absolute immunity from civil liability to officials acting in their official capacities would have little impact. *Id.* at 1172–73. Legislators, for example, already have absolute immunity for civil damages as long as they are carrying out their official functions, as do judges and certain members of the executive branch. *Id.* at 1173.

individual capacities is not "enough to make them persons separate from the corporation in legal contemplation."[290] Conversely, a Texas appellate court, for example, has held that the intracorporate conspiracy doctrine could not bar a conspiracy suit against sheriff's deputies properly sued in their individual capacities.[291]

C. *Political Fall-Out from the Connecticut Church Sex Abuse Cover-Up*

Finally, the political damage that covering up the sexual abuse by priests across the country has done to the Roman Catholic Church should further expose the negative effects of the intracorporate conspiracy doctrine and fuel calls for its reform. The facts and subsequent history of the 1997 Connecticut case mentioned earlier illustrate this need.

In the Connecticut case, employees of the Roman Catholic Church were alleged—very much like Lynn—to have covered up the sexual misconduct of a priest, enabling him to continue to abuse children entrusted to the Church's care by virtue of his office.[292] When sued for civil conspiracy by the victims, the employees' defense was that they were acting in the best interest of the corporation.[293]

The Connecticut court found that the test for whether an agent is acting within the scope of his duties "is not the wrongful nature of the conspirators' action but whether the wrongful conduct was performed within the scope of the conspirators' official duties."[294] If the wrongful conduct was performed within the scope of the conspirators' official duties, the effect of applying the intracorporate conspiracy doctrine is to find that there was no conspiracy. Because covering up the priest's sex abuse was in the best interest of the corporate organization, the court found that the employees were all acting on behalf of the corporation.[295] The court never reached the issue of whether the employees' actions rose to the level of a civil conspiracy. Under the intracorporate

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290 Johnson v. City of Bridgeport, No. CV 95321129, 1999 WL 391344 (Conn. Super. Ct. June 3, 1999); *cf.* Renner v. Wurdeman, 434 N.W.2d 536 (Neb. 1989) (holding that the sole shareholder of a corporation had acted "in his individual capacity" sufficiently outside of his corporate duties that he could be personally liable for tortious interference—but not for a conspiracy case).

291 Moore v. Novark, No. 14-93-00794-CV, 1995 WL 571854 (Tex. App. Sept. 28, 1995).

292 See v. Bridgeport Roman Catholic Diocesan Corp., 20 Conn. L. Rptr. 271, 1997 WL 466498 (Super. Ct. 1997).

293 *Id.* at *10.

294 *Id.* at *12 (quoting Doe v. Bd. of Educ. of Hononegah Cmty. High Sch. Dist. #207, 833 F. Supp. 1366 (N.D. Ill. 1993)) (internal quotation marks omitted).

295 *Id.*

conspiracy doctrine, it was a tautology that no conspiracy could be possible.[296]

This cursory case is interesting not only for how it documents the way that the intracorporate conspiracy doctrine protects enterprises from inquiry into conspiracies, but also for the subsequent history of its allegations. The full extent of the Bridgeport Diocese's wrongdoings—if current public knowledge is indeed complete—only came to light in December 2009, twelve years after the 1997 case. It took twelve years, the combined resources of four major newspapers, an act displaying public condemnation of the Roman Catholic Church by members of the state legislature, and finally a decision by the U.S. Supreme Court to release the documents that could have become the basis of the intracorporate conspiracy claim in 1997. There is still no conspiracy suit or any criminal charge against the Diocese.

In 2001, the Bridgeport Diocese confidentially settled twenty-three lawsuits[297] for sexual abuse involving six priests. The Diocese then had all 12,675 pages of material[298] regarding its handling of the priests sealed by court order. That material included three depositions of then-Bishop of Bridgeport Edward Egan.[299]

In 2002, newly-installed Archbishop of New York Egan apologized for the sex scandal. His public letter at the time stated that "[i]f in hindsight we also discover that mistakes may have been made as regards prompt removal of priests and assistance to victims, I am deeply sorry."[300] Once retired as a Cardinal in 2012, however, Egan retracted his apology to victims. According to press reports, Cardinal Egan stated that "I never should have said that," and "I don't think we did anything wrong."[301]

Cardinal Egan flatly denied that any sex abuse had ever taken place during his tenure in Bridgeport—reiterating that there had never been "even one known case" involving the sexual abuse of a minor.[302] Additionally, he asserted that "even now, the church in Connecticut had no obligation to report sexual abuse accusations to the authorities."[303]

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296 *Id.*

297 *See* Rosado v. Bridgeport Roman Catholic Diocesan Corp., 970 A.2d 656, 661 (Conn.), *cert. denied sub nom.* Bridgeport Roman Catholic Diocesan Corp. v. N.Y. Times Co., 558 U.S. 991 (2009).

298 *Id.* at n.6.

299 *See, e.g.*, Eric Rich & Elizabeth Hamilton, *A Defensive, Dismissive Tone*, HARTFORD COURANT (Mar. 17, 2002), http://www.courant.com/news/priest-abuse/hc-egan.artmar17,0,7858822.story (describing the contents of at least three separate depositions by then-Bishop Egan).

300 Newman, *supra* note 144.

301 *Id.*

302 *Id.*

303 *Id.*

The New York Times notes, however, that the law has required reporting such cases to authorities since the 1970s.[304]

In the same 2012 interview, Cardinal Egan "described the Bridgeport diocese's handling of sex-abuse cases as 'incredibly good.'"[305]

In reviewing the story, the media reported that "dozens" of victims came forward to publicly report abuse from 1988 to 2000, the years that Egan was Bishop of Bridgeport.[306] In addition, "[o]ne priest checked himself out of a psychiatric center and continued to receive a stipend from the diocese after he had been accused by a dozen parishioners of abuses involving anal sex and beatings."[307]

In April 2002, four newspapers—*The New York Times*, *The Hartford Courant*, *The Boston Globe*, and *The Washington Post*—filed an emergency appeal to have the documents from the twenty-three court cases preserved and unsealed.[308] The Bridgeport Diocese fought the case for seven years.

In March 2002, leaked documents revealed that the Diocese had maintained a policy of "deliberately shuffl[ing] pedophile priests among parishes to give them a 'fresh start,'" and of "destroying records of complaints against some priests."[309] Then-Bishop Egan had personally appointed Reverend Charles Carr parochial vicar of Saint Andrew Parish in Bridgeport in 1991, where Carr was

> allowed to minister to children, despite ongoing complaints about pedophilia that had forced Carr into treatment at Hartford's Institute for Living for evaluation at least twice. When the first lawsuit against the diocese in connection to Carr was served in 1995, Egan suspended Carr and placed him on an indefinite leave of absence.[310]

Additionally, then-Bishop Egan had failed to report to authorities a "sexual relationship between a 15-year-old member of a church youth group and a priest, even after the teenager became pregnant with the priest's child in 1989, two months after her 16th birthday."[311]

In November 2005, the Connecticut Supreme Court ruled that the newspapers had standing to intervene and to argue against the documents being destroyed.[312] In December 2006, a Connecticut

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304 *Id.*

305 *Id.*

306 *Id.*

307 *Id.*

308 Rosa Ciccio & Tina Bachetti, *Timeline: Roman Catholic Diocese of Bridgeport Priest Abuse Case*, HARTFORD COURANT (Dec. 1, 2009), http://articles.courant.com/2009-12-01/news/hc-bridgeport-priest-abuse-timeline-full-text_1_diocese-officials-father-laurence-brett-bridgeport-diocese.

309 *Id.*

310 *Id.*

311 *Id.*

312 *Id.*

Superior Court judge held that the public had the right to view the sealed documents because the purpose for which the documents were sealed in the original lawsuits no longer pertained.[313]

In March 2009, in a sign of frustration with the Church, a bill was introduced into the Connecticut State Legislature that would have required that control of the local Roman Catholic Church be handed over to boards of citizen overseers.[314]

In June 2009, the Connecticut Supreme Court upheld the Superior Court's order that the documents should be released to the public.[315]

In August 2009, U.S. Supreme Court Justice Ruth Bader Ginsburg denied the Diocese's emergency request to keep the documents under seal.[316] As confirmed by the Supreme Court's electronic docket entries and filing rules, a few days after Justice Ginsburg's decision, "attorneys for the diocese specifically asked U.S. Supreme Court Justice Antonin Scalia, a conservative Catholic and the father of a priest, to look at their case and to reconsider their request to have the stay continued."[317]

In October 2009, the U.S. Supreme Court as a whole ruled against the Diocese's request to keep the documents under seal.[318]

Only by final court order in December 2009,[319] twelve years after the failed 1997 intracorporate conspiracy case against it, did the Diocese of Bridgeport finally release the sealed documents.

The Bridgeport Diocese was ultimately forced to reveal the information about its institutional involvement in the sex abuse cases

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313 *Id.*

314 *An Act Modifying Corporate Laws Relating to Certain Religious Corporations*, Comm. on Judiciary, Bill No. 1098, 2009–2011 Gen. Assemb., Jan. Sess. (Conn. 2009), *available at* http://www.cga.ct.gov/2009/TOB/s/pdf/2009SB-01098-R00-SB.pdf.

315 Rosado v. Bridgeport Roman Catholic Diocesan Corp., 970 A.2d 656 (2009), *cert. denied sub nom.* Bridgeport Roman Catholic Diocesan Corp. v. N.Y. Times Co., 558 U.S. 991 (2009).

316 *Docket:* Bridgeport Roman Catholic Diocesan Corp. v. N.Y. Times Co., SUP. CT. U.S., http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09a140.htm (last visited Dec. 12, 2014) [hereinafter Supreme Court Bridgeport Diocesan Corp. Docket].

317 Miranda Hale, *The Catholic Diocese of Bridgeport Must Not Be Allowed to Hide Behind the First Amendment*, EXAMINER.COM (Sept. 1, 2009, 4:24 PM), http://www.examiner.com/article/the-catholic-diocese-of-bridgeport-must-not-be-allowed-to-hide-behind-the-first-amendment; *accord* Supreme Court Bridgeport Diocesan Corp. Docket, *supra* note 316 (displaying entries on Aug. 25, 2009 that "Application (09A140) denied by Justice Ginsburg" and on Aug. 28, 2009 that "Application (09A140) refiled and submitted to Justice Scalia"); PUB. INFO. OFFICE, SUPREME COURT OF THE U.S., A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 2–4 (2014), *available at* http://www.supremecourt.gov/publicinfo/reportersguide.pdf ("Applications are addressed to a specific Justice [first], according to federal judicial circuit. . . . If a Justice acts alone to deny an application, a petitioner may renew the application to any other Justice of his or her choice.").

318 Paul Vitello, *Bridgeport Diocese Loses Bid to Keep Sex-Abuse Records Sealed*, N.Y. TIMES, Oct. 6, 2009, at A28; *accord* Supreme Court Bridgeport Diocesan Corp. Docket, *supra* note 316 (displaying entry on Oct. 5, 2009 that "Application (09A140) [was] denied by the Court").

319 Rory Eastburg, *Bridgeport Diocese Releases Abuse Documents*, REP. COMMITTEE FOR FREEDOM PRESS (Dec. 2, 2009), http://www.rcfp.org/browse-media-law-resources/news/bridgeport-diocese-releases-abuse-documents.

because four major newspapers took the rare move of fighting against every effort of the Diocese to suppress the documents and then-Bishop Egan's involvement in the cover-up for seven years. The newspapers expended their scarce capital in this day of shrinking journalistic budgets to reveal the documents because this story would receive intense public interest. Ironically, however, there is still no criminal case against the Diocese.

Most astonishingly, none of the extensive news coverage over those additional twelve years has connected these facts to the original 1997 case defeated by application of the intracorporate conspiracy doctrine that would have revealed the Diocese's wrongdoing long beforehand and in a much more efficient way. This Article sheds light on the doctrine making such cover-ups possible, and it should motivate courts and legislatures across the country to rethink the doctrine's place in the unlegislated common law.

CONCLUSION

The intracorporate conspiracy doctrine is so powerful as a legal defense, and its incentives are so perverse outside of antitrust and sovereign immunity, because application of the intracorporate conspiracy doctrine is rooted solely in how well the agent carries out the interest of the principal. This same quality of relationship and commonality of purpose, of course, mirrors the test for the "common interest" between co-conspirators that is at the heart of conspiracy law and concerns.

The more tightly bound the two minds are for the purposes of charging conspiracy and finding conspiratorial acts, the more the intracorporate conspiracy doctrine applies to provide immunity to those acts. Even more perversely, the intracorporate conspiracy doctrine, because its analysis is limited to the formal commonality of interest between the principal and agent, fails to permit consideration of the actual criminal lawfulness, much less the public policy implications, of the principal and agent's joint action.

The results of the doctrine's analysis thus provide exactly the wrong public policy outcomes when there are serious damages from conspiracies. If the wrongful conduct is performed within the scope of the conspirators' duties, the effect of applying the doctrine of intracorporate conspiracy doctrine is to find that there was no conspiracy; and, therefore, the wrongful conduct performed in furtherance of the alleged conspiracy escapes unexamined and unpunished. As both the Monsignor Lynn case and the Bridgeport Diocese case illustrate, for example, because covering up a priest's sex abuse is in the best interest of the corporation, courts find that

employees are acting on behalf of their principal, and thus that no conspiracy is possible.[320]

This Article challenges the conventional position that commentators and courts have taken in applying the intracorporate conspiracy doctrine so broadly. It argues not merely that the courts should privilege certain civil rights suits from application of the doctrine but, more sweepingly, that they should reverse the doctrine's expansion. What the majority of courts and commentators have missed is that, in fact, the intracorporate conspiracy doctrine is not properly based in either agency theory or in tort liability. And the doctrine is most certainly not based in proper application of criminal law. Yet the intracorporate conspiracy doctrine has grown from a single application in antitrust theory to swallow other fields of corporate responsibility to which the doctrine is ill-suited. Courts should halt and reverse the expansion of this doctrine that creates perverse incentives for the employees of corporations to act in disregard of the public interest and their individual judgments about social value.

Ultimately, by attacking the root of the intracorporate conspiracy doctrine directly, this Article relieves the need to dance around the intracorporate conspiracy doctrine in efforts to hold individuals who work for corporations at all levels individually responsible for the negative impacts of corporate conspiracies. In the absence of a direct attack on the intracorporate conspiracy doctrine, practical public objection against application of the intracorporate conspiracy doctrine and its perverse incentives has been taking shape in the growth of doctrines such as piercing the corporate veil,[321] which completely vacates the protection of the corporate form, and responsible corporate officer doctrine,[322] which more strenuously holds top corporate officers responsible for the actions of their corporations. These efforts, however, even when they are successful, impact only the top officers and sometimes directors of corporations. But "following orders"[323] should

320 See v. Bridgeport Roman Catholic Diocesan Corp., 20 Conn. L. Rptr. 271, 1997 WL 466498 (Super. Ct. 1997).

321 *See, e.g.*, Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 637 (2005) (arguing that piercing the corporate veil doctrine "neither guide[s] good decision-making nor produce[s] consistent or defensible results").

322 *See, e.g.*, Martin Petrin, *Circumscribing the 'Prosecutor's Ticket to Tag the Elite'—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 284 (2012).

323 *See Report of the International Law Commission to the General Assembly: Principles of International Law Recognized in the Charter of the Nuïrnberg Tribunal and in the Judgment of the Tribunal*, U.N. GAOR Supp. No. 12, U.N. Doc. A/1316 (1950), *reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 374, ¶ 97, U.N. Doc. A/CN.4/SER.A/1950/Add.1, *available at* http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf ("The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.").

never be an absolution of personal responsibility for any member in the hierarchy of a social group.

As the Nuremberg trials famously taught the world,[324] for human beings to operate responsibly in social groups, each individual in the group must be responsible for his own actions. This is exactly the objection of lay Church and other groups to prosecuting only Monsignor Lynn instead of also the Archdiocese itself for hiding predator priests. And this is the objection to the intracorporate conspiracy doctrine swallowing the penalties that should otherwise be in place for the coordinated harms that employers and their employees inflict in tort and criminal law.

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324 *Id.*