

THOUGHTS ON THE CORPORATION AS A PERSON FOR PURPOSES OF CORPORATE CRIMINAL LIABILITY

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The idea that a company has an identity separate from its individual agents has gained momentum in recent decades as corporations have become more complex, as the law has developed a rights[-]claiming jurisprudence for nonhuman entities, as interdisciplinary research began exploring the dynamics of corporations, and as corporations have demanded status similar to legal persons in other areas.

—Sandra F. Sperino¹

In January 2010, the United States Supreme Court decided *Citizens United v. Federal Election Commission*,² a case involving the First Amendment to the United States Constitution and federal campaign finance law which, among other things, affirmed pre-existing caselaw that characterizes a corporation as a legal person.³ This decision is extremely important to constitutional law and federal election law. Both the majority and concurring opinions, however, also reflect arguments and analyses important

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1. Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 Ala. L. Rev. 773, 797 (2010) (footnotes omitted).

2. 130 S. Ct. 876 (2010).

3. *Id.* at 899–900.

to corporate criminal liability.⁴ This Article explores connections between *Citizens United* and corporate criminal liability in a general fashion. A recent opinion of the Tennessee Attorney General (the “TAG”),⁵ released after *Citizens United* but making no reference to it, acts as a further discussion catalyst for and illustration of the arguments advanced in this Article.

I. THE CORPORATION AS A PERSON UNDER CITIZENS UNITED

In *Citizens United*, the Court determined that political-speech protections under the First Amendment apply to corporations as well as individuals, and it found no basis to allow the government to impose political-speech limits “on certain disfavored speakers.”⁶ In explicating this finding, the Court not only cited a number of First Amendment cases to support its view (principal among them *Buckley v. Valeo*⁷ and *First National Bank v. Bellotti*⁸), but also stated quite baldly that it “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”⁹ Under the Court’s opinion in *Citizens United*, corporations are to be treated identically to individuals; absolute corporate personhood is a *fait accompli*, at least for political-speech challenges under the First Amendment.¹⁰

Nevertheless, the opinion of four justices of the Court—concurring in part, dissenting in part, and authored by Justice Stevens (the “Stevens opinion”)—labels this identical treatment rule a “conceit” and characterizes it as “not only inaccurate but

4. In fact, violating the election law at issue in *Citizens United* may give rise to criminal, as well as civil, sanctions. *Id.* at 897 (“The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.”).

5. Tenn. Att’y Gen. Op. 10-23 (Mar. 1, 2010) (available at <http://www.tn.gov/attorneygeneral/op/2010/op/op10-23.pdf>).

6. *Citizens United*, 130 S. Ct. at 899–900.

7. 424 U.S. 1 (1976).

8. 435 U.S. 765, 769 (1978) (reversing a decision which held that First Amendment rights of a corporation were limited to issues that materially affected it).

9. *Citizens United*, 130 S. Ct. at 900.

10. *Id.*

also inadequate to justify the Court's disposition of this case."¹¹ The Stevens opinion takes a less mechanistic, more analytically intricate view of the corporation-as-person, focusing on the role of policy in interpreting the political-speech rights of corporations under the First Amendment. As the Stevens opinion elaborates:

If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could "enhance the relative voice" of some (i.e., humans) over others (i.e., nonhumans). Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.¹²

After finding *Buckley* inapposite and asserting that *Bellotti* was mischaracterized and misused to support the Court's opinion,¹³ the Stevens opinion raises two final points relating to corporate personhood before moving on to other grounds for criticism. In distinguishing corporations from individuals in analyzing free-speech issues, Justice Stevens observes that "corporations have no consciences, no beliefs, no feelings, no thoughts, no de-

11. *Id.* at 930 (Stevens, J., concurring).

12. *Id.* at 947–948 (citation and footnote omitted) (emphasis in original).

13. *Id.* at 958–959 (noting that the *Bellotti* Court held that the case "ruled, in an explicit limitation on the scope of its holding, that 'our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office'").

sires.”¹⁴ The Stevens opinion also notes that it is not always easy to determine whose actions—those of which corporate constituent or constituents—the corporation’s actions reflect.¹⁵ The Stevens opinion articulates a strong bias against “the wooden application of judge-made rules”¹⁶ in classifying a corporation as a legal person.

II. CITIZENS UNITED AND CORPORATE CRIMINAL LIABILITY

“Although . . . *Citizens United v. Federal Election Commission* clearly controls the First Amendment rights of corporations, the effect of *Citizens United* on corporate criminal liability is less obvious, though equally (if not more) significant.”¹⁷ Two aspects of the *Citizens United* case resonate in a corporate criminal liability context. First, the rhetoric in the Court’s opinion and the Stevens opinion reflects the rhetoric in ongoing conversations about corporate criminal liability. Second, the Stevens opinion’s characterization of the Court’s reasoning as “wooden” is one that critics of corporate criminal liability share. This Part of the Article briefly illuminates both points.

A. A Matter of Rhetoric

Wooden or not, the Court’s opinion in *Citizens United* appears to reflexively and dogmatically treat the corporation as a person in a legal environment that could give rise to corporate criminal liability. The case does not challenge the applicability to the corporation, as a legal person, of federal campaign finance law’s criminal or civil liability provisions. Rather, the issue of corporate personhood arises in connection with the plaintiff corporation’s First Amendment challenge to a campaign finance law that is acknowledged to be applicable to corporations. Yet, the language

14. *Id.* at 972.

15. *Id.* (“It is an interesting question ‘who’ is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate.”).

16. *Id.* at 979.

17. Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, 65 U. Miami L. Rev. 1, 1–2 (2010) (footnote omitted).

of both the Court's opinion and the Stevens opinion has much to say about the criminal liability of corporations as persons.¹⁸

Troubling questions arise when corporate criminal liability is at issue. Whether corporations potentially should be charged as criminal defendants has been and continues to be an important and contentious subject in American jurisprudence.¹⁹ On one hand, corporations—as economic, social, political, and legal actors—have the capacity to commit crimes.²⁰ On the other hand, corporations cannot take criminal action independent of the actions of their agents, who are natural persons.²¹ It is the corporation's authorized agent, typically an officer or other employee, who executes contracts for the corporation, commits the corporation to liabilities and other obligations, and receives and processes the benefits inuring to the corporation. This person-within-a-person aspect of the corporate form and other aspects of corporate personhood confound many who desire to theorize corporate law and (as a result) those who theorize corporate criminal liability.²²

Key legal scholars line up on both sides of the issue.²³ Their arguments for and against corporate criminal liability are reflect-

18. The linkage between corporate free-speech rights and corporate criminal liability has been made by others. *E.g.* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 *Miss. L.J.* 483, 537–538 (2006). Others also have explored the general connection between corporate constitutional rights and corporate criminal liability. *See e.g.* Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 *Am. Bus. L.J.* 109, 113–114 (2010) (commenting, in narrating the influences on corporate criminal liability, that “[e]xpansion of corporate activities was accompanied by judicial recognition of piecemeal constitutional rights, built on a concept of a separate corporate ‘personhood.’ Nonetheless, such anthropomorphism did not immediately translate into findings of organizational criminal liability.” (footnotes omitted)).

19. *See e.g.* Christopher Slobogin, *Citizens United & Corporate & Human Crime*, 41 *Stetson L. Rev.* 127 (2011).

20. *See generally* Daniel Lipton, Student Author, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 *Va. L. Rev.* 1911, 1915 (2010) (discussing issues surrounding the political and criminal activity of corporations).

21. Charles J. Walsh & Alyssa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?* 47 *Rutgers L. Rev.* 605, 606–607 (1995).

22. *See* Gregory A. Mark, Student Author, *The Personification of the Business Corporation in American Law*, 54 *U. Chi. L. Rev.* 1441, 1443–1447 (1987) (tracing the history of corporate personhood in theory and decisional law).

23. *See* Régis Bismuth, *Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing between International and Domestic Legal Orders*, 38 *Denv. J. Int'l L. & Policy* 203, 203 (2010) (“The intense scholarly debate

ed, to some extent, in the rhetoric of the Court's opinion and the Stevens opinion in *Citizens United*. For example, scholars who favor corporate criminal liability argue that there is no reason to treat corporations that conduct illegal activities differently from individuals who engage in those same illegal activities.²⁴ The effect on persons harmed by those activities may be the same either way. Yet those who have studied corporate criminal liability point to (among other things) the fact that a corporation does not have scruples and cannot develop *mens rea*—the state of mind required for criminal action²⁵—and the fact that (as noted above) corporate action exists because people (sometimes not easy to identify) authorize, or at least execute, that action.²⁶ Both of these matters are addressed in the Stevens opinion.²⁷ Although *Citizens United's* corporate-personhood analysis focuses on the benefits accorded to corporate action, many of the concerns are the same in analyses focused on corporate criminal liability.

concerning the content of corporate legal personality . . . has highlighted a critical dividing line on the question of the existence of a moral dimension of corporations. Indeed, they are, for some, potentially 'full-fledged moral persons,' while others consider that corporations 'lack the emotional make-up that allows natural persons to show virtues and vices.'" (footnotes omitted); Eric Colvin, *Corporate Personality and Criminal Liability*, 6 *Crim. L. Forum* 1, 1–4 (1995) (describing the two theoretical representations as nominalist and realist theories of the corporation as a legal person); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 *Harv. J.L. & Pub. Policy* 833, 851–853 (2000) (framing the two sides of the issue).

24. Cf. Taslitz, *supra* n. 18, at 538 (“[C]orporations can express through autonomous actions their indifference to, or even intentional degradation of, human worth. This independent expressive capacity, reflective of corporate choice and evil character, is what warrants corporate criminal liability.” (footnotes omitted)).

25. See e.g. Eric Engle, *Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?* 20 *St. John's J. Leg. Comment.* 287, 293–295 (2006) (“Historically, one argument against corporate criminal liability was that the corporation was only a legal person and thus incapable of forming *mens rea*[,] for the corporation has no will independent of its employees and shareholders.”); Taslitz, *supra* n. 18, at 532 (noting that under an aggregation theory of the corporation, “[t]he corporate ‘person’ is thus a fiction without an empirical reality. Notions of corporate moral culpability are therefore meaningless.”) (footnote omitted); *id.* at 544–546 (addressing different theories of corporate *mens rea*).

26. See e.g. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 *B.C. L. Rev.* 949, 986–988 (2009) (describing the ambiguous nature of the firm and corporate culture in assessing corporate legal compliance); Engle, *supra* n. 25, at 296 (“Any criminal act imputed to the corporation will in fact have been done by a natural person or persons. If the corporation is to be liable as a criminal then the wrongful act of a human must somehow be attributed to the corporation.”).

27. See *supra* nn. 14–15 and accompanying text.

B. All-or-Nothing Reasoning

The connection between the *Citizens United* opinions and corporate criminal liability involves more than mere rhetoric, however. The Stevens opinion criticizes the reasoning of the majority by twice characterizing it as “wooden.”²⁸ Indeed, the majority opinion takes a rigid, narrow, all-or-nothing approach to corporate personhood—albeit, perhaps, leaving a small opening for a later case to raise a “basis” not considered by the *Citizens United* Court for treating corporations differently from natural persons under the First Amendment.²⁹ This rigid approach to corporate personhood is again being challenged in a case just argued in front of the United States Supreme Court.³⁰

Under the Court’s view in *Citizens United*, it appears that once one concludes that a corporation is a person, it is a person for all purposes, bar none.³¹ As the Stevens opinion points out, this ignores policy underpinnings of the various laws that may use the concept of corporate personhood.³² Under criminal law, these poli-

28. See *supra* n. 16 and accompanying text.

29. 130 S. Ct. at 899–900; see also Sheyn, *supra* n. 17, at 43 (“The notion that corporations should be treated like persons under the Constitution is not new. And the majority’s opinion in *Citizens United* further substantiates the idea that corporations should be afforded the same rights as natural persons.” (footnote omitted)).

30. See Marian Wang, The ProPublica Blog, *As Citizens United Turns 1, U.S. Supreme Court Considers Corporate Personhood Again*, <http://www.propublica.org/blog/item/as-citizens-united-turns-1-u.s.-supreme-court-considers-corporate-personhoo> (Jan. 19, 2011) (discussing corporate personhood in the context of privacy in *Fed. Comm’n Comm’n v. AT&T*, 131 S. Ct. 1177 (2011)).

31. Others also have criticized this inflexible approach to corporate personhood in determining legal questions:

It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes, . . . is to make of . . . corporate personality . . . a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiry into their merits. Issues do not properly turn upon a name.

Bryant Smith, *Legal Personality*, 37 Yale L.J. 283, 298 (1928) (footnote omitted).

32. See *supra* n. 12 and accompanying text. According to Professor John Hasnas, this approach also ignores the reality of corporate criminal responsibility. In addressing why corporations are—and whether they should be—punished under criminal law, he offers the following:

A facile response sometimes given to this question is that corporations are legal persons. It is often claimed that because corporations are invested with the right to utilize the legal system as a unitary entity, they should be treated the same as all other legal persons, which means being subject to criminal punishment. But this response is a *non sequitur*. Legal personhood does not entail criminal responsibility.

cies might include promoting compliance with the rule of law and fairness of process, as well as protecting society and other guiding principles.³³ I also note that the opinion appears to ignore theoretical considerations relating to corporate personhood—including agency theory and theories of punishment. Theory, in addition to policy, is important to corporate criminal liability analyses, and critics of corporate criminal liability have bemoaned its absence in the formation and interpretation of statutory and decisional criminal law as applied to corporations. For example, commentators critical of corporate criminal liability note that the costs of corporate criminal liability are borne by employees, shareholders, suppliers, and customers (among others) who had no role in authorizing or engaging in the legally offensive activity.³⁴ Theories

Infants and the incompetent or the insane are legal persons, but are not criminally responsible for their actions. Criminal law is that portion of our law that *punishes* those who engage in wrongdoing. Hence, the criminal sanction applies not to all legal persons, but only to those who can be deserving of punishment. Whether corporations have this characteristic is precisely the question we are asking.

John Hasnas, *Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics*, 39 Loy. U. Chi. L.J. 507, 509–510 (2008) (emphasis in original).

33. See e.g. Julie R. O'Sullivan, *The Last Straw: The Department of Justice's Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DePaul L. Rev. 329, 361 (2008) (noting in the context of corporate criminal liability that the U.S. criminal justice system "prides itself on the rule of law and the fairness of its criminal justice processes"); Taslitz, *supra* n. 18, at 532 ("Criminal liability . . . holds the particular power of societal condemnation of morally culpable acts reflective of evil character.").

34. See e.g. Daniel J. H. Greenwood, *Discussing Corporate Misbehavior: The Conflicting Norms of Market, Agency, Profit and Loyalty*, 70 Brook. L. Rev. 1213, 1233 (2005) ("Unfortunately, when firms are penalized, many humans who were not in positions of authority are likely to suffer. Thus, for example, when Enron went bankrupt due to institutional wrongdoing, thousands of lower level employees lost their jobs and pensions."); Hasnas, *supra* n. 32, at 511 (distinguishing between the collateral damage normally present in criminal prosecutions and that specific to corporate criminal liability); Slobogin, *supra* n. 19, at 80 ("A common objection to corporate criminal liability . . . is that it unfairly penalizes shareholders and employees who had nothing to do with the criminal action."). Professor Julie R. O'Sullivan similarly notes in this regard that:

The stakes in corporate crime cases are often very high, measured both in terms of dollars and the effect that criminal or regulatory action can have on the livelihood and lives of countless innocent persons, including blameless employees and shareholders. Professor John Coffee summarized the "flow-through" effects of a corporate prosecution best: "[a]xiomatically, corporations do not bear the ultimate cost of the [criminal sanction]; . . . put simply, when the corporation catches a cold, someone else sneezes. This overspill of the penalty initially imposed on the corporation has at least four distinct levels, each progressively more serious": penalizing shareholders, bondholders and other creditors, employees, and even consumers.

O'Sullivan, *supra* n. 33, at 362 (quoting John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L.

of punishment also may operate differently when a corporation, rather than an individual, is penalized for a criminal offense.³⁵

Some legal controversies involving corporate personhood, like the one at issue in *Citizens United*, involve the interpretation of constitutional, statutory, or decisional law as applied in contexts of personal liability—civil or criminal. But state criminal statutes (unlike the First Amendment to the United States Constitution) may expressly employ the word “person” and define it to include corporations and other entities. Although one might assume that a legislature has thought through policy and theory in instituting statutory rules of corporate criminal liability, this may not always be so. Scholars should be concerned with the policy and theory, as well as the legal doctrine, supporting or undercutting both types of laws implicating corporate personhood.

The opinion of the TAG attached to this Article as an appendix (the “TAG opinion”) construes and applies a collection of criminal statutory provisions that both use and define the word “person.”³⁶ The statute involves the intentional prevention or obstruction of service of process by a “person,”³⁷ and the TAG opinion addresses the potential for corporations to be held responsible as offenders under this statute.³⁸ In assessing whether a corporation can commit this offense, the TAG uses general criminal law provisions from the Tennessee Code Annotated as a touchstone, noting that the criminal law in the state expressly defines “person” to include “any . . . corporation.”³⁹ In addressing the statute’s *mens rea* component—intentionality—the TAG notes another general definitional section of Tennessee’s criminal law providing that intentional action involves the “conscious objective or desire to engage in the conduct or cause the result.”⁴⁰

Interestingly, the opinion does not stop there, but continues by offering guidance on how a corporation can be found to act in-

Rev. 386, 401–402 (1981)).

35. See e.g. Hasnas, *supra* n. 32, at 510–511 (critiquing the application of deterrence, retribution, and rehabilitation theories to corporate defendants); Robson, *supra* n. 18, at 119–123 (relating justifications of punishment to potential corporate criminal liability).

36. Tenn. Att’y Gen. Op. 10-23, *supra* n. 5.

37. Tenn. Code Ann. § 39-16-602(c) (Lexis 2006).

38. Tenn. Att’y Gen. Op. 10-23, *supra* n. 5, at 1.

39. *Id.* (emphasis omitted) (citing Tenn. Code Ann. § 39-11-106(a)(27)).

40. *Id.* at 2 (citing Tenn. Code Ann. § 39-11-106(a)(18)).

tionally within the meaning of the statute.⁴¹ As a general principle of Tennessee criminal law, codified in the Tennessee Code Annotated, a corporation commits a misdemeanor offense when one of its agents, acting within the scope of the agent's employment and on behalf of the corporation, engages in conduct that constitutes the offense.⁴² Thus, the Tennessee legislature has determined that agency law liability concepts effectively attach to state criminal law actions classified as misdemeanors.

Nothing in this reasoning seems remarkable. In fact, the reasoning of the TAG is clear, simple, and (from the perspective of one who is unfamiliar with the application of the statute in practice) an accurate and complete summation of the relevant law. At first blush, the TAG's reasoning might even be described as, in the words of the Stevens opinion, wooden. Yet, there are signs in the language of the TAG opinion indicating that the TAG understands (and perhaps even agrees with) the points made in the Stevens opinion regarding the extent to which corporate personhood is or should be universal and the extent to which a corporation can have a state of mind. For example, in expressing its opinion, the TAG appears to indicate that it may be unclear when a corporation, as opposed to an individual, is taking unlawful action (consciously preventing or obstructing the service of process) under the statute. The TAG couches its opinion with the words "under the proper circumstances"⁴³ and notes that a corporation "*may* be subject to criminal prosecution."⁴⁴ This language leaves room for legal interpretation and the application of a policy-oriented or theory-based analysis (and also allows for prosecutorial discretion).

Moreover, the TAG indicates there is some room for elucidation in the prosecution and punishment of a corporation under the statute based on the actions of the corporation's agent. It shows this by stating:

41. *Id.*

42. *Id.* (citing Tenn. Code Ann. § 39-11-404(a)(3)(A)).

43. *Id.* Curiously, the TAG's summary opinion on this matter—found earlier in the TAG opinion—does not include this caveat, but (perhaps more curiously) the same words—"under the proper circumstances"—are used to qualify the opinion that the legal definition of a "person" for purposes of the obstruction statute includes a "corporation." *Id.* at 1. It is unclear whether the TAG is indicating in this phrasing that a corporation is not always a person for purposes of the obstruction statute.

44. *Id.* at 2 (emphasis added).

[A] corporation *could* be committing an offense under Tennessee Code Annotated 39-16-602(c) when an agent of the corporation, acting within the scope of his employment and on behalf of the corporation, intentionally prevents or obstructs a legal process server in serving or attempting to serve process.⁴⁵

This choice of wording may signify that common law defenses to a principal's liability for its agent's acts may apply in criminal actions under the statute. It also appears to allow for arguments rooted in policy and theory.

Finally, it is important to note that this agency-law-based statutory provision only applies to misdemeanor offenses, indicating the possibility that the Tennessee legislature already engaged in conscious line-drawing in the area of corporate criminal liability based on the nature of the offense and the related punishments. There is other evidence in the Tennessee statute that the legislature has considered the nature of corporate personhood in a criminal liability context. The three other circumstances in which the statute provides for corporate criminal liability are when the conduct constituting the offense:

- “consists of an intentional failure to discharge a specific duty imposed upon corporations by criminal law”;
- “is engaged in, authorized, commanded[,] or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of the agent's employment on behalf of the corporation”; or
- “is engaged in by an agent of the corporation acting within the scope of the agent's employment and on behalf of the corporation, and . . . [t]he offense is one defined by statute which indicates a legislative intent to impose criminal liability on a corporation.”⁴⁶

The criminal law also provides that “[a] person is criminally liable for conduct constituting an offense that the person performs or causes to be performed in the name of or on behalf of a corpora-

45. *Id.* (emphasis added).

46. Tenn. Code Ann. § 39-11-404(a)(1)–(2), (3)(B). Both “agent” and “high managerial agent” are defined in the statute. *Id.* at § 39-11-404(b)(1)–(2).

tion to the same extent as if the conduct were performed in the person's own name or behalf."⁴⁷ Additionally, the law includes an express affirmative defense to corporate liability when "the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission," unless the law defining the offense is contrary.⁴⁸

The very fact that Tennessee law expressly and directly addresses matters of corporate criminal liability is evidence that the legislature has thought through at least some of the relevant issues arising under policy and theory, as well as applicable legal doctrine from outside the criminal law. Moreover, the Sentencing Commission Comments appended to Tennessee Code Annotated Section 39-11-404 indicate that specific policy considerations are at issue.⁴⁹ These Comments note that "[t]he commission recognizes the need to control and punish corporate involvement in economic offenses, including tax and security fraud, pollution, corporate support of pornography, gambling[,] and other offenses."⁵⁰ A policy-oriented notation also is appended to Section 39-11-406: "This section is provided to encourage due diligence on the part of corporate personnel to prevent criminal conduct by employees."⁵¹

The Model Penal Code addresses corporate criminal liability in a manner similar to that used under Tennessee law. As a result, the Model Penal Code provisions also appear to leave room for interpretation and the introduction of policy and theory to ascertain and impose corporate criminal liability.

- (1) A corporation *may* be convicted of the commission of an offense if:
 - (a) the offense is a violation or the offense is defined by a statute other than the Code *in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the*

47. *Id.* at § 39-11-405.

48. *Id.* at § 39-11-406.

49. *Id.* at § 39-11-404 (explaining in the Sentencing Commission Comments the need to "control and punish" corporate involvement in crimes).

50. *Id.*

51. *Id.* at § 39-11-406 (encouraging "due diligence" of corporate personnel).

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corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or

- (b) *the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or*
- (c) *the commission of the offense was authorized, requested, commanded, performed[,] or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.*⁵²

Under general provisions of Tennessee criminal law and these Model Penal Code provisions, although a specific provision of criminal law may proscribe action by a “person,” the mere establishment of corporate personhood is not determinative of corporate criminal liability. Rather, even if a corporation is a person, the liability of the corporation and its agents is determined under standards established in the general criminal law provisions, encouraging inquiries into applicable policy, agency relationships, and the theory and application of legal duties of business entities and their managers. This general corporate law allows courts to avoid a wooden application of corporate personhood in the criminal liability context.

52. Model Penal Code § 2.07(1) (ALI 1985) (emphasis added). In addition, under Model Penal Code Section 2.07(5):

[i]n any prosecution of a corporation . . . for the commission of an offense included within the terms of Subsection (1)(a) . . . of this Section, . . . , it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

This defense is consistent with the one in Tennessee Code Annotated Section 39-11-406, and the legal accountability provisions in Model Penal Code Section 2.07(6) parallel those in the Tennessee statute. See *supra* nn. 46–51 and accompanying text.

III. CONCLUSION

The rhetoric in the *Citizens United* opinions and the critique of the Court's opinion offered in the Stevens concurrence, when applied to an analysis of the TAG opinion, reflect elements of the debate on corporate criminal liability. Despite their different origins and objectives, these opinions are linked by their focus on corporate personhood. The Court's opinion in *Citizens United* leaves little room for doubt: a corporation is a person, pure and simple. If the Court applies this all-or-nothing reasoning in the context of corporate criminal liability (which appears likely given the Court's rhetoric, especially with Justice Stevens' departure from the Court), the acceptance of policy-based and theory-oriented arguments against corporate criminal liability are improbable.⁵³

But, the Stevens opinion and the TAG opinion suggest a more nuanced approach to questions of corporate criminal liability—an approach that has strong appeal because it allows for balancing both a corporation's role as a legal actor and the person-within-a-person nature of the corporate form. This approach considers agency law principles, underlying policy, and related theories in determining the effect (if not the existence) of corporate personhood on a situational basis (case-by-case, offense-by-offense, or by other justified demarcation lines) in matters of criminal law. Given that:

- corporations and the entities and individuals that comprise them may be legal actors;
- the state of mind of a corporation may be difficult to determine (if, indeed, one exists);
- the lines between and among corporate action and the action of corporate constituents may be unclear;
- corporate criminal liability has the capacity to shift costs to corporate constituents who had no role in authorizing or carrying out the alleged or actual illegal activity; and

53. See Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Leg. Stud. 319, 321–322 (1996) (outlining “[t]he naive argument for corporate criminal liability”).

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- theories of punishment (e.g., retribution, general deterrence, specific deterrence, rehabilitation, incapacitation) may not operate in practice the same for corporations as they do for individuals,

both courts and legislatures would be wise to consider applicable agency law, policy, and theory when determining corporate liability in the criminal context.

As Professor Julie R. O'Sullivan notes, "It must be acknowledged, although it almost never is, that . . . not every theory of corporate liability is sound."⁵⁴ This Article identifies and minimally illustrates a desired approach to corporate criminal liability that shows some sensitivity to issues of policy and theory, using Tennessee law as an example. It will remain for others to take on the very difficult task of implementing the suggested approach in specific cases alleging criminal law violations.

54. O'Sullivan, *supra* n. 33, at 362 (emphasis omitted).

APPENDIX

**STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
P.O. BOX 20207
NASHVILLE, TENNESSEE 37202**

March 1, 2010
Opinion No. 10-23

**CORPORATE CRIMINAL RESPONSIBILITY UNDER TENNESSEE
CODE ANNOTATED SECTION 39-16602(C)**

QUESTIONS:

1. Does the word “person” in Tennessee Code Annotated section 39-16-602(c) include a corporation, business, or legal entity?
2. If so, and such a “person” refused to allow a sheriff or private process server onto its property to execute service, or refused to accept process executed upon the “person,” would that conduct constitute “preventing or obstructing” service as prohibited by subsection (c)?
3. If not, why, and how should the statute be modified in order to cover that conduct?

OPINIONS:

1. Under the proper circumstances, the statutory definition of “person” may include corporations, businesses, and other legal entities for all criminal offenses in Title 39.
2. Yes. It is an offense for any corporation, business, or other legal entity included in the definition of “person” to intentionally prevent or obstruct service of process.

3. The answer to the first two questions obviates the need to answer the third question.

ANALYSIS:

1. Tennessee Code Annotated section 39-11-103 states that “[e]very person, whether an inhabitant of this or any other state or country, is liable to punishment by the laws of this state, for an offense committed in this state, except where it is by law cognizable exclusively in the courts of the United States.” As defined in Title 39, “[p]erson’ includes the singular and the plural and means and includes any individual, *firm, partnership, copartnership, association, corporation, governmental subdivision or agency, or other organization or other legal entity, or any agent or servant thereof.*” Tenn. Code Ann. § 39-11-106(a)(27) (emphasis added). Accordingly, “person” as used in Tennessee Code Annotated section 39-16-602(c) would not be limited to an individual but would include a corporation or other legal entity.
2. Under Tennessee Code Annotated section 39-16-602(c), “[i]t is an offense for a person to *intentionally prevent or obstruct* an officer of the state or any other person known to be a civil process server in serving, or attempting to serve or execute, any legal writ or process.” (Emphasis added). A person acts intentionally “when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” Tenn. Code Ann. § 39-11-106(18). The terms “prevent” and “obstruct,” however, are not defined by the statute. But, “prevent” generally means “[t]o keep from happening,” and “obstruct” means “[t]o impede, retard, or interfere with.” *The American Heritage College Dictionary* 859, 982 (2d ed. 1985).

Therefore, it is the opinion of this office that, under the proper circumstances, a corporation or other legal entity consciously impeding an officer of the state or civil process server serving or attempting to serve process, or consciously keeping such process from being served, would be committing an offense under Tennessee Code Annotated section 39-16-602(c) and may be subject to criminal prosecution.

It should be further noted that pursuant to Tennessee Code Annotated section 39-11-404(a)(3)(A), a corporation commits an offense when the conduct constituting the offense is engaged in by an agent of the corporation acting within the scope of the agent's employment and on behalf of the corporation, and the offense is a misdemeanor. A violation of Tennessee Code Annotated section 39-16-602(c) is a Class A or B misdemeanor, depending on the circumstances. Therefore, a corporation could be committing an offense under Tennessee Code Annotated 39-16-602(c) when an agent of the corporation, acting within the scope of his employment and on behalf of the corporation, intentionally prevents or obstructs a legal process server in serving or attempting to serve process.

3. The answer to the first two questions obviates the need to answer the third question.

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