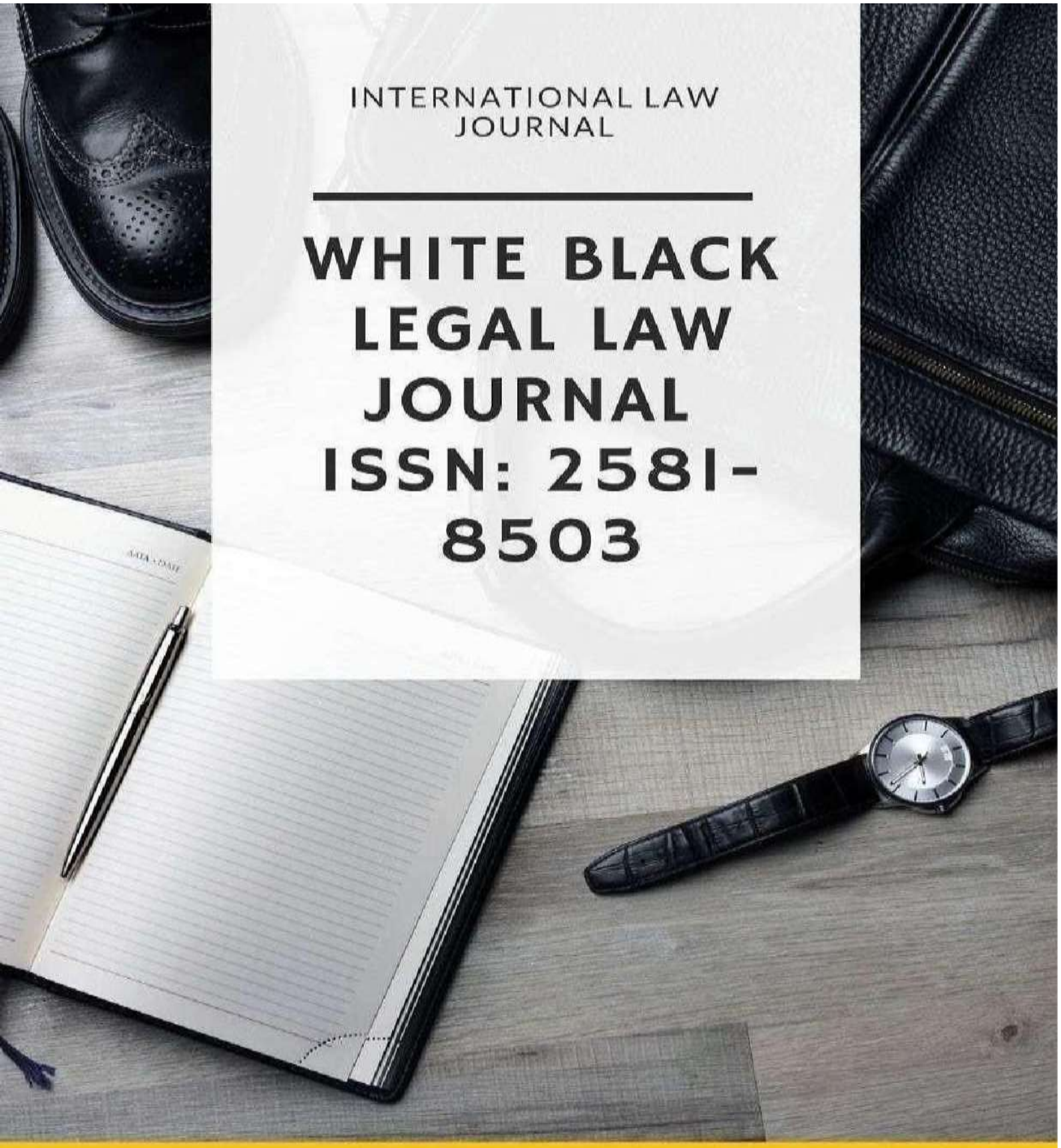

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CORPORATE CRIMINAL LIABILITY AND ATTRIBUTION OF MENS REA TO COMPANIES

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Keywords: Mens Rea, Company Law, Corporate Criminal Liabiliity

I. ABSTRACT

This paper provides a critical analysis of the doctrines governing corporate criminal liability and the attribution of *mens rea* to corporations. It argues that the traditional "identification" or "alter ego" doctrine, which attributes the intent of a senior directing mind to the company, is no longer fit for purpose. This doctrine, crystallized in the UK by *Tesco v. Nattrass* and adopted in India by *Iridium India Telecom Ltd. v. Motorola Inc*., creates an "accountability gap" by making it nearly impossible to prosecute large, decentralized, multinational corporations. This paper contrasts this too narrow approach with the overbroad respondeat superior doctrine of the United States, which, while effective, is criticized for punishing faultless companies and relying on a non-transparent system of Deferred Prosecution Agreements (DPAs). It evaluates the evolution of Indian law, from *Standard Chartered Bank v. Directorate of Enforcement* (which solved the sentencing problem) to the case of *Sunil Baharti Mittal v. CBI* (which paradoxically cemented the failing Tesco doctrine). This paper concludes that the most viable path for Indian legal reform is to adopt the "failure to prevent" model, as recently expanded by the UK's *Economic Crime and Corporate Transparency Act 2023*. This model innovatively shifts the legal burden, targeting a corporation's systemic failure to implement "reasonable procedures" rather than engaging in the futile search for a single, guilty individual.

II. INTRODUCTION:

The central challenge of corporate criminal liability is philosophical before it is legal. Criminal law is built upon the foundational moral principle of *actus non facit reum, nisi mens sit rea* an act does not make one guilty unless the mind is also guilty.[1] This principle demands a

[1] 'Evolution of Corporate Criminal Liability in India' (International Journal of Law Management & Humanities, 2020) https://ijlmh.com/wp-content/uploads/Evolution-of-Corporate-Criminal-Liability-in-India.pdf

blameworthy state of mind, a concept inherently human. The corporation, however, is a legal fiction, an artificial person with, as 18th-century jurist Edward Thurlow noted, "no soul to damn and no body to kick." How can this entity possess a mind capable of the moral turpitude required for criminal guilt?[2]

This question has created a great ideological divide in modern jurisprudence. For centuries, the common law agreed with this critique, adhering to the doctrine *societas delinquere non potest*, a corporation cannot commit a crime.[3] This immunity, however, proved untenable in the face of the Industrial Revolution, as corporations grew into dominant economic forces with an undeniable capacity to inflict massive public harm.

Courts first eroded this immunity by holding corporations liable for acts of non-feasance (failing to perform a statutory duty, like maintaining a bridge) and later for misfeasance. The true challenge, however, remained offences requiring a specific *mens rea.* The 20th-century watershed moment in the United States was *New York Central & Hudson River Railroad Co. v. United States (1909)*[4]. The US Supreme Court, in a pragmatic move, imported the tort law doctrine of vicarious liability into criminal law, holding that the intent of an agent acting for the corporation's benefit could be imputed to the corporation itself.[5]

This paper argues that this US model and the primary alternative used in the UK and India the "Identification" or "alter ego" doctrine are both fundamentally broken. This failure has created a profound accountability gap, forcing a global search for a new paradigm. This paper contends that this new model, based on corporate omission, is the "Failure to Prevent" model. This innovative approach sidesteps the impossible hunt for a single guilty mind and instead focuses on a more realistic evaluation: the corporation's systemic failure to prevent the crime.[6]

[2] John C. Coffee Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) https://scholarship.law.columbia.edu/faculty_scholarship/539
[3] Cristina de Maglie, Models of Corporate Criminal Liability in Comparative Law, 4 Wash. U. Global Stud. L. REV. 547 (2005), https://openscholarship.wustl.edu/law_globalstudies/vol4/iss3/4
[4] *New York Central & Hudson River Railroad Co v United States*, 212 US 481 (1909).
[5] Sara Sun Beale, 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability' (Duke Law Faculty Scholarship, 2018) https://scholarship.law.duke.edu/faculty_scholarship/3205/
[6] Giuseppe Di Vetta and Irene Pietropaoli, 'The Future of Corporate Liability: Why the 'Failure to Prevent' Model Matters for Human Rights Due Diligence Regulation' (BIICL Blog, 10 February 2023) https://www.biicl.org/blog/114/the-future-of-corporate-liability-why-the-failure-to-prevent-model-matters-for-human-rights-due-diligence-regulation

III. MODELS OF ATTRIBUTION: A CRITICAL AND COMPARATIVE ANALYSIS

To hold a company criminally liable for an intent-based crime, a legal system must first find a way to attribute an individual's mens rea to the corporate entity. The common law world has largely diverged into three distinct models which are discussed below.

A. The Identification Doctrine (Alter Ego): The UK and its Progeny

The Identification Doctrine, or "alter ego" theory, is the primary model used in the United Kingdom and, by judicial import, in India. This is not vicarious liability; it establishes primary liability. It holds that the directing mind and will of a key individual their *mens rea* and *actus reus* is not merely imputed to the company; it is the company's own act and intent.

The doctrine was crystallized for criminal law in *Tesco Supermarkets Ltd v Nattrass (1972)*[7]. Tesco was prosecuted for falsely advertising a product at a lower price, a mistake made by a local store manager. The House of Lords ruled in Tesco's favor, holding that the store manager was not the directing mind and will or "alter ego" of the company. He was another person for whose fault the company was not responsible.[8] The directing mind was the insulated Board of Directors and senior officers who had autonomous control over the company.

The Tesco test is now widely seen as the primary reason for the systemic failure to prosecute large corporations for economic crimes in the UK and, by extension, in India. The doctrine is simply too narrow.[9] In modern, complex, and decentralized multinational corporations, decision-making is diffused. The very directing mind the law seeks is often insulated from the day-to-day operations where crimes like fraud occur.[10]

This failure was perfectly illustrated in *SFO v Barclays (2018)*[11], where the UK High Court ruled that even the CEO and CFO could not be considered the directing mind for

[7] *Tesco Supermarkets Ltd v. Nattrass* [1972] A.C. 153)
[8] 'Establishing Corporate Due Diligence: Insights from Tesco Supermarkets Ltd v. Nattrass' (Casemine, 2024) https://www.casemine.com/commentary/uk/establishing-corporate-due-diligence:-insights-from-tesco-supermarkets-ltd-v.-nattrass/view
[9] 'Corporate criminal liability in the UK – a new era is coming, isn't it?' (BCLP Law, 17 June 2022)(https://www.bclplaw.com/en-US/events-insights-news/corporate-criminal-liability-in-the-uk-a-new-era-is-coming-isnt-it.html)
[10] 'The seminal authority on the due diligence defence' (Consumer Crime, 2023) https://www.consumercrime.co.uk/site.aspx?i=ar3543
[11] *Serious Fraud Office v Barclays Plc*, [2018] EWHC 3055 (QB)

the specific actions, as full autonomous power had not been delegated to them. This case proved the doctrine was not fit for purpose. The Tesco rule, by limiting liability to a tiny group of senior-most individuals, creates a perverse incentive[12]: the more complex and decentralized a company's structure, the safer it is from criminal prosecution.[13]

B. The Vicarious Liability Doctrine (Respondeat Superior): The US Model

The United States federal system employs a radically different and far broader model, *respondeat superior*, or let the master answer. This doctrine, imported from tort law, establishes vicarious liability. A corporation is held criminally liable for the acts of its agents, provided the agent (1) commits a crime, (2) within the scope of their employment, and (3) with an intent, at least in part, to benefit the corporation.[14]

The primary criticism of the US model is that it is overbroad. The standard is so wide that it is seen as unjust, effectively imposing strict liability and punishing faultless corporations. A corporation that has spent millions on a robust compliance program can still be held criminally liable for the actions of a single rogue employee who violated those policies. [15]This detaches criminal liability from moral culpability, as seen in the corporate death of the accounting firm Arthur Andersen, whose conviction was based on the actions of a few individuals.[16]

In practice, this overbreadth is not a legal standard but a regulatory tool. The system is managed by prosecutorial discretion and incentives. The Department of Justice (DOJ) guidelines direct prosecutors to evaluate true corporate culpability, including the adequacy and effectiveness of the corporation's compliance program.[17] This is formalized in the U.S. Sentencing Guidelines, which use a carrot and stick

[12] Law Commission, 'Corporate Criminal Liability: An Options Paper' (10 June 2022) https://corporatejusticecoalition.org/wp-content/uploads/2022/07/Corporate-Criminal-Liability-Options-Paper_LC.pdf

[13] Rabah Kherbane, 'Corporate Crime' (25 Bedford Row, 2018) (https://www.25bedfordrow.com/cms/document/Corporate_Crime___Rabah_Kherbane.pdf)

[14] Bucy, Pamela H., "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" (1991). Minnesota Law Review. 2048. https://scholarship.law.umn.edu/mlr/2048

[15] Caring About Corporate "Due Care": Why Criminal Respondeat Superior Liability Outreaches Its Justification https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2020/03/57-2-caring-about-corporate-due-care-why-criminal-respondeat-superior-liability-outreaches-its-justification.pdf

[16] 'US vs. UK Deferred Prosecution Agreements' (Vistra, 21 June 2017) https://www.vistra.com/insights/us-vs-uk-deferred-prosecution-agreements-some-history-and-key-differences

[17] The Development and Evolution of the U.S. Law of Corporate Criminal Liability, **https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5910&context=faculty_scholarship**

philosophy:[18] a corporation's culpability score is massively reduced if it had an effective compliance and ethics program. This leverage is used to force corporations into Deferred Prosecution Agreements (DPAs), which impose fines and internal reforms. This solution, however, is heavily criticized as a shadow system of adjudication non-transparent sweetheart deals that "circumvent the safeguards of the criminal process" and lack meaningful judicial review.[19]

C. The Aggregation Doctrine

A supplementary doctrine, developed by US courts, is the aggregation or collective knowledge model. This model addresses a specific corporate defense: what happens if mens rea is fragmented across multiple employees, such that no single individual is guilty? *In United States v. Bank of New England*[20], the bank was charged with intentionally failing to file reports. No single employee knew all the pieces of the violation. The court upheld an instruction that the bank's knowledge is the totality of what all the employees knew. A corporation, the court reasoned, cannot knowingly avoid knowledge by compartmentalizing information. This doctrine is a powerful tool against the diffusion of liability defense and represents an attempt to create a genuinely corporate form of *mens rea*.[21]

IV. THE INDIAN LANDSCAPE: AN UNSETTLED ALTER EGO

Indian jurisprudence on corporate criminal liability has evolved significantly, first overcoming the practical hurdle of sentencing, and second, adopting a doctrinal model for attribution that has, unfortunately, led the law into an accountability gap.

A. Overcoming the Sanction Hurdle

For decades, the primary challenge in India was procedural. Many key offences in the pervious Indian Penal Code (IPC) as well as the new Bharatiya Nagarika Sanhita (BNS) and other statutes prescribe a mandatory sentence of imprisonment and fine. Since a

[18] US Sentencing Commission, 'Thirty Years of Organizational Sentencing: The U.S. Organizational Sentencing Guidelines' (August 2022) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf

[19] 'DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions by Gordon Bourjaily', https://journals.law.harvard.edu/jol/wp-content/uploads/sites/86/2015/10/HLL201_crop.pdf

[20] *United States v Bank of New England NA*, 821 F 2d 844 (1st Cir 1987)

[21] 'Corporate Collective Knowledge Doctrine' (Freeman Law) https://freemanlaw.com/collective-knowledge-doctrine/

corporation has no body to kick, this created a logical impasse.[22]

In *Assistant Commissioner v. Velliappa Textiles Ltd.*[23], a majority of the Supreme Court held that where a mandatory custodial sentence is prescribed, a company cannot be prosecuted for that offence. The court reasoned that it could not sever the imprisonment part from the fine part. This decision effectively granted corporations immunity from numerous *mens rea* offences.

Just two years later, a larger Constitutional Bench of the Supreme Court explicitly overruled this view in *Standard Chartered Bank v. Directorate of Enforcement*[24]. The Court held that the impossibility of imposing one part of the punishment (imprisonment) does not absolve the corporation from liability. The court has the discretion to impose the fine as the sole penalty. This landmark judgment opened the door for the criminal prosecution of corporations for any offence, regardless of the prescribed punishment.

B. Adopting the Directing Mind

Standard Chartered solved the punishment problem but not the attribution problem. The old IPC (Section 11) and new BNS (Section 2) defines ‘person’ to include a company but is explicitly lacks on how to attribute *mens rea* (like cheating or conspiracy) to it.

The Supreme Court filled this gap in *Iridium India Telecom Ltd v. Motorola Inc*[25]., which is India's effective adoption of Tesco. The Court formally adopted the English identification or alter ego doctrine, ruling that the criminal intent of the alter ego of the company that is, the person or group of people who guide the business's affairs will be imputed to the corporation.

This was clarified in *Sunil Bharti Mittal v. CBI*[26], a case arising from the 2G Spectrum scam. The Supreme Court struck down the trial court's reverse attribution, which had automatically summoned directors because their companies were accused. The Court held that directors are not automatically liable for the company's acts, unless a statute explicitly provides for it or there is clear personal evidence of their intent. In doing so, the Court re-affirmed and cemented the Iridium (i.e., Tesco) "alter ego" doctrine as the

[22] Multidimensional Aspects of Corporate Criminal Liability: An Indian Perspective by Arti Aneja, http://docs.manupatra.in/newsline/articles/Upload/6F57BFED-0D8F-433E-983B-F4E638B4E115.pdf
[23] *Assistant Commissioner v. Velliappa Textiles Ltd.* [MANU/SC/0721/2003]
[24] *Standard Chartered Bank v. Directorate of Enforcement* [MANU/SC/8069/2006]
[25] *Iridium India Telecom Ltd v Motorola Inc* [MANU/SC/0928/2010]
[26] *Sunil Bharti Mittal v CBI* [MANU/SC/0016/2015]

only path for forward attribution (holding the company liable) for IPC offences.

C. The Untenable Status Quo in India

The *Sunil Bharti Mittal* judgment, while rightly protecting directors from automatic prosecution, creates a deep paradox. By cementing the Tesco "alter ego" doctrine, India has locked itself into a model at the precise historical moment that the UK, its source jurisdiction, was publicly declaring it not fit for purpose following the Barclays failure. This has created a massive accountability gap in India. The doctrine is fundamentally unsuited for prosecuting the large, complex, and decentralized conglomerates involved in major scandals (e.g., Satyam, PNB), as prosecutors face the impossible task of proving a single, insulated directing mind was personally culpable. Even the powerful anti-fraud provision, Section 447 of the Companies Act, 2013, does not solve this.[27] Section 447[28] is framed around the individual who commits the fraud. To hold the company liable under it, a prosecutor must still use the failing Iridium/Mittal "alter ego" doctrine, falling right back into the Tesco trap.

V. THE NEW ACCOUNTABILITY: FAILURE TO PREVENT AND POLICY FOR INDIA

The manifest failure of the Tesco doctrine forced the UK to innovate, creating a new model of liability that sidesteps the *mens rea* problem entirely.

A. The UK's Legislative Revolution: A New Model

The revolutionary blueprint was Section 7 of the UK Bribery Act 2010. It created a new, novel corporate offence: failure of a commercial organisation to prevent bribery. This is an offence of omission, which is one of strict liability. The brilliance of this model is its burden-shifting defence. The prosecutor only needs to prove that an associated person (a broad term) committed bribery to benefit the company. The burden of proof then shifts to the corporation. The only defence is for the company to prove it had "adequate procedures" in place to prevent such conduct. This single provision

[27] 'Investigating Regulatory Failures in Addressing White-Collar Crime' (ResearchGate, July 2024) https://www.researchgate.net/publication/382150738_Investigating_Regulatory_Failures_in_Addressing_White-Collar_Crime

[28] Companies Act 2013, s 447

forced a revolution in corporate compliance culture.[29] This successful model was recently expanded by the Economic Crime and Corporate Transparency Act (ECCTA) 2023. This Act made two critical changes:

Evolution (Fixing Tesco): It reformed the identification doctrine for economic crimes, replacing the "directing mind" with the broader category of "senior manager".

Revolution (Copying the Bribery Act): It created a new strict liability offence of "Failure to Prevent Fraud" (FTPF).[30]

This new offence applies only to large organisations and covers a range of base fraud offences (e.g., false representation, false accounting, fraudulent trading) committed by an associated person.[31] The only defence is for the company to prove it had reasonable fraud prevention procedures in place. The UK government's guidance on these "reasonable procedures" is based on Six Principles:[32]

- Top-Level Commitment
- Risk Assessment
- Proportionate Risk-Based Prevention Procedures
- Due diligence
- Communication (including training)
- Monitoring & Review.

The "Failure to Prevent" (FTP) model is a powerful synthesis of the two failed 20th-century systems. It avoids the "too narrow" trap of the Tesco "alter ego" model. It also avoids the too broad and unjust trap of the US respondeat superior model. It cleverly borrows the central goal of the US managed system incentivizing compliance but rejects the US system's problematic shadow justice of DPAs. Instead, it makes compliance a substantive, statutory defence to be argued transparently in a court of law.[33]

[29] The Future of Corporate Liability: Why the 'Failure to Prevent' Model Matters for Human Rights Due Diligence Regulation https://www.biicl.org/blog/114/the-future-of-corporate-liability-why-the-failure-to-prevent-model-matters-for-human-rights-due-diligence-regulation?cookiesset=1&ts=1761846632

[30] 'Extraterritorial Impact of New UK Corporate Criminal Liability Laws'; https://www.gibsondunn.com/extraterritorial-impact-of-new-uk-corporate-criminal-liability-laws/

[31] 'New UK Corporate Offense of "Failure to Prevent Fraud" Under Economic Crime and Corporate Transparency Act 2023: What Companies Need to Be Ready' https://www.pillsburylaw.com/en/news-and-insights/uk-corporate-offense-failure-to-prevent-fraud-economic-crime-corporate-transparency-act-2023.html

[32] 'Failure to prevent fraud under the UK's Economic Crime and Corporate Transparency Act', https://www.pinsentmasons.com/out-law/guides/corporate-crime-risk-economic-crime-and-corporate-transparency-act

[33] 'New UK Corporate Offense of "Failure to Prevent Fraud" Under Economic Crime and Corporate Transparency Act 2023: What Companies Need to Be Ready' https://www.pillsburylaw.com/en/news-and-insights/uk-corporate-offense-failure-to-prevent-fraud-economic-crime-corporate-transparency-act-2023.html

Most profoundly, the FTP model redefines corporate *mens rea*. Fault is no longer the commission of a crime by a "guilty mind." It is the omission of the corporation to build a system and culture to prevent it. It finally allows the law to prosecute a guilty system rather than a single guilty individual.

B. Comparative Models of Corporate Criminal Liability

Feature	Identification ('Alter Ego') (Traditional UK / India)	Vicarious Liability ('Respondeat Superior') (United States)	'Failure to Prevent' Model (Modern UK)
Basis of Liability	Primary Liability. Act/Intent of a "directing mind and will" is deemed to be the act/intent of the company.41	Vicarious Liability. Act/Intent of any employee in the scope of employment is imputed to the company.	Strict Liability (of Omission). Corporation fails to prevent an associated person from committing a "base" offence.
Prosecutorial Burden	Very High. Must prove: (1) a base crime was committed, (2) by a person who was the alter ego, and (3) that person had the requisite mens rea.	Low. Must prove: (1) a crime was committed, (2) by an employee, (3) within the scope of employment, and (4) with any intent to benefit the company.	Moderate. Must prove: (1) a base crime (e.g., fraud) was committed, (2) by an "associated person," (3) intending to benefit the corporation.
Primary Defence	He was not the directing mind. (The Tesco defence)	Very Limited. "Not in scope of employment" or "No intent to benefit." (Compliance is not a defence to liability, only to sentencing)	"We had reasonable/adequate procedures." (Burden of proof shifts to the corporation to prove its compliance was effective)
Core	Ineffective. Fails to prosecute large, decentralized	Overbroad. Punishes "faultless" companies. Relies on non-	Compliance Burden. Creates significant compliance costs and

Problem	companies. Creates "perverse incentive" for complex structures.	transparent prosecutorial discretion and DPAs.	legal uncertainty over what is "reasonable."

VI. CONCLUSION

India's current legal framework for corporate criminal liability is untenable. While the Supreme Court commendably solved the sentencing impasse in Standard Chartered, its subsequent adoption of the Tesco doctrine in Iridium and its reinforcement in *Sunil Bharti Mittal* has led the law into a *jurisprudential cul-de-sac*.

India is now locked into an "alter ego" model that was declared a failure in its own home jurisdiction. This doctrine has created a massive accountability gap, protecting the largest and most complex corporations, which pose the greatest systemic risk, while remaining effective only against small-scale businesses where the "directing mind" is obvious. The litany of major corporate scandals in India highlights the inability of the current legal framework to deliver meaningful accountability and justice.