CORPORATE CRIMINAL LIABILITY UNDER THE CRIME AND POLICING BILL 2025: THE CHALLENGES AND FLAWS OF THE 'SENIOR MANAGER' REGIME

Clause 130 of the Crime and Policing Bill 2025 will extend a company's identification with the criminal wrongdoing of 'senior managers,' acting within the scope of their authority, beyond economic crimes to all (the tens of thousands of) crimes within the UK's jurisdictions. As it stands such an extension will in theory expose companies themselves to conviction for offences committed by senior managers as wide ranging as murder, rape, bigamy, and wearing an armed services uniform without HM permission. I explore the (de)merits of Clause 130, and consider the deeper theoretical issues concerning corporate criminal responsibility to which it gives rise.

1. Introduction

In English law, a fault-based crime is committed by a company only if the crime can be 'identified with,' the company (the so-called identification doctrine). At common law, fault-based crimes were identified with companies only, in effect, when they were committed by directors acting within the scope of their authority.[1] Accordingly, at common law, even when a very senior manager – perhaps the most powerful person in practice in the company - committed (say) a serious economic crime, the crime could not be attributed to the company if that manager was not a director.[2] To address this problem, section 196 of the Economic Crime and Corporate Transparency Act 2023 extended the scope of the identification doctrine to cover the conduct of what it called 'senior managers' when they engaged in economic crime, so long as when they did so they were acting within the actual or apparent scope of their authority.[3] Broadly speaking, that brings English law more into line with a number of other jurisdictions that impose liability on companies for substantive fault-based offending when the offending was engaged in by a senior corporate officer who was not a director: for example, in Canada, corporate bribery of a foreign public official is committed if it is engaged in by a 'senior officer' of the company.[4]

Section 196 focuses on the commission of serious economic crimes such as bribery, fraud and false accounting, crimes that themselves speak to (even though, in particular cases, their commission threatens to undermine) the *raison d'être* of the company as a primarily economic entity devoted to promoting shareholder value.[5] By contrast, the main purpose of clause 130 of the Crime and Policing Bill 2025 is

[1] *Tesco Supermarkets v Nattrass* [1972] AC 153 (HL); *SFO v Barclays* (2018) EWHC 3055 (QB).
[2] See *e.g. R v Redfern* [1993] Crim LR 43.
[3] For a critical review of this provision, see Jeremy Horder, 'Corporate Criminal Liability under the Economic Crime and Corporate Transparency Act 2023' (2025) 45(1) Legal Studies 1-16.
[4] Criminal Code (Canada), s.22.2, as applied to the Corruption of Foreign Public Officials Act (Canada) 1999.
[5] *BTI 2014 LLC v Sequana SA & Ors* [2022] UKSC 2.

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to extend the section 196 basis for primary (non-vicarious) corporate criminal liability to all offences in UK jurisdictions, if any such offence is committed by a senior manager acting within the scope of their authority. As currently drafted, the main provision reads as follows:

> *Criminal liability of bodies corporate and partnerships where senior manager commits offence*
>
> (1) Where a senior manager of a body corporate or partnership ("the organisation") acting within the actual or apparent scope of their authority commits an offence under the law of England and Wales, Scotland or Northern Ireland, the organisation also commits the offence…

Clause 130 goes much further than section 196, and also imports some of the weaknesses that were already ~~there~~ in the section 196 regime. Whilst clause 130 may at this stage simply be a 'place-holder' provision, awaiting amendments, should it be enacted as it stands, that would be a real concern for companies and their advisers, and ~~will~~ would raise some fundamental theoretical issues.

Clause 130 is concerned only with whether a senior manager, when committing a crime known to one of the UK's jurisdictions, was acting within the scope of their authority. There is no longer any link, of the kind forged in the 2023 Act, between economic crime and the corporate activity of senior managers of the company. For example, under clause 130, corporate liability would be incurred in the following ~~example~~scenario:

> A senior manager (X) is asked by the directors to prioritise sealing a deal that must be concluded by 1.00 pm that day. The only way to reach the hotel where the negotiations will be concluded is by speeding up the motorway, which X does. X is later convicted of a speeding offence.

In this example, traditionally, the company would not be regarded as having itself engaged in speeding, in part because X was not a director, but also in part because it has long been considered that companies cannot themselves commit driving offences.[6] However, X certainly commits the offence in a senior manager capacity, and so we can assume – the issue is addressed more fully below - that X is acting within the broad scope of their 'authority,' for the purposes of clause 130.[7] Accordingly, the 2025 Bill threatens to mire companies, some of ~~whom~~ which are responsible for the conduct of thousands of people, in detailed consideration of the adoption of obligations to safeguard against the commission by senior managers, and hence by the companies themselves, of not only driving offences but also thousands of other offences, including some trivia. Clause 130 will, for example, make the company itself liable if (i) a London-based senior manager seeking to spruce up the premises before the arrival of an important visitor, takes a

[6] *Richmond upon Thames LBC v Pinn and Wheeler* (1988) 7 LGR 659 DC.
[7] See, further, the discussion of this kind of example by Alex Sarch, in evidence to Parliament: https://publications.parliament.uk/pa/cm5901/cmpublic/CrimePolicing/memo/CPB26.htm.

carpet from reception out into the street to beat it,[8] and (ii) a senior manager, not being a member of the armed forces, dresses in a military unform to impress a client.[9] There is also the risk of absurdity. If, perhaps with the approval of the board, a senior manager goes through a ceremony of marriage with a business rival, in order to cement ties between the firms, but it transpires that the senior manager was already married, does the company itself commit bigamy through the actions of the senior manager? Such a result would be, to say the least, paradoxical, since the company itself is (*ex hypothesi*) unmarried and so unable to commit bigamy.

I suggest that the case for convicting companies, in such cases, as opposed to the individual senior managers, is unproven. It is true that a number of jurisdictions leave open the possibility that a company may be convicted of any offence known to law within that jurisdiction.[10] Such exposure to liability is not uncommonly limited – as in France – by a stipulation that the offence must have been intended to benefit the company in some financial or strategic way (even if it did not in fact benefit the company).[11] I consider such a restriction below, but we should note that it would not prevent the conviction of the company itself in the examples given above such as the driving and bigamy examples, as in those examples the commission of the offence was intended to benefit the company.

It might be argued that if companies expect to be granted the same criminal law protections as individuals (such as the protections proved by Article 6 of the ECHR), then they should be willing to accept the same burdens as individuals, in terms of the extent of their obligations to obey the criminal law. Such an argument is over-simplistic; but to the extent that it has force, it is nonetheless insufficiently sensitive to an important fact about corporate liability. This is that, for companies as opposed to individuals, liability questions may be especially problematic, because they always involve liability for the actions of someone else. Putting aside for one moment the applicability of the convenient legal fiction that is the 'identification' doctrine,[12] the criminal liability of the abstract corporate person itself is always for something done by *another* real or corporate person, such as a director, manager, employee, agent or subsidiary company. When that fact is properly acknowledged and accommodated, important restrictions on the scope of corporate criminal

[8] Metropolitan Police ~~a~~Act 1839, s.60(3).

[9] Uniforms Act 1894, s.2. I put on one side here the possibility that the wearing of the uniform involves an intended fraud.

[10] See e.g. French Penal Code, Article 121-2, as amended by the 'Perben 2" law of 9 March 2004: 'Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives.' In 2000, French criminal records show only 200 criminal convictions of companies. Following Perben 2, by 2015, the records show 5000 such convictions: https://www.lexology.com/library/detail.aspx?g=a87d8ace-7b5e-482b-a907-9a69e20f02cd#:~:text=This%20change%20in%20liability%20is%20not%20simply%20theoretical%3B,Criminal%20corporate%20liability%20in%20France%20is%20a%20reality. (last accessed 08/05/2025).

[11] Cass Crim, 7 July 1998, n°97-81.273; Cass Crim, 28 June 2017, n°16-85.291; Cass Crim, April 11, 2012, n°10-86.974

[12] On which see G Sullivan, 'The Attribution of Liability to Limited Companies' (1996) 55(3) CLJ 515-46.

liability - absent from clause 130 - begin to make sense: not only, perhaps, a requirement that the offence have been committed 'in order the benefit the company,' but also defences principally aimed at companies. These include the defences that a company had taken all reasonable precautions and exercised all due diligence to prevent the offending, or that it had in place adequate or reasonable procedures to prevent offending of that type.[13] I now turn to consider the potential effect of clause 130 on some potentially significant cases.

2. Strict Liability Offences: Vicarious and Direct Liability

Famously, FB Sayre condemned vicarious liability as a doctrine that 'violates the most deep-rooted traditions of criminal law [and is] a conception repugnant to every instinct of the criminal jurist'.[14] Vicarious liability has nonetheless long been imposed on companies in UK cases of strict liability, and with good reason. Companies may operate through a network of contracts concluded between the abstract entity (in part constituted by directors) and employees or agents, the network being organised in such a way as to divide labour more efficiently to further the ends of the company.[15] Throughout the nineteenth century, acting principally through their employees and agents, companies were replacing individual producer-sellers in trade, and in the development of the consumer society more generally. As Charles Wilson memorably put it:

> 'Joseph Lyons' new mechanical bakery and its rivals demanded the turnover only a multiple shop system could provide. The manufacturers of machine-made boots and shoes also needed swift mass distribution of their output at the lowest cost. Hence the 500 specialised retailers of 1875 became the 5000 of 1900. Behind the new multiple tailors was a new industrial organisation replacing the bespoke tailor sitting cross-legged on his board with needle and thread in the back room of a cottage.[16]

A classic example of a case reflecting this development of the 'multiple shop system' is *Pearkes, Gunston & Tee v Ward*.[17]

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[13] For a full development of this argument, see Jeremy Horder, *A Theory of Corporate Crime* (Oxford: Oxford University Press, forthcoming), ch 1.

[14] FB Sayre, 'Criminal Responsibility for the Acts of Another' [1930] 43(5) Harvard LR 689-723, 702.

[15] The classic discussion is to be found in Ronald Coase, 'The Nature of the Firm' (1937) 4(16) Economica 386. See the discussion of the nexus-of-contracts theory in Eva Micheler, *Company Law: A Real Entity Theory* (Oxford: Oxford University Press, 2021). (2021), ch 1.

[16] Charles Wilson, 'Economy and Society in late-Victorian Britain' (1965) 18(1) The Economic History Review 183, 190. ~~Wilson goes on to say, 'The importance of the retail stores was not simply as a commercial improvement. They were in many instances unavoidably necessary if the industries whose products they were designed to sell were to work economically. Perishable goods like margarine, imported meat, milk, eggs needed the swift put-through of the multiple…at every point the retailing changes were closely connected with new or reorganised systems of mass manufacture; each indeed was a function of the other. Each called for capital, labour, enterprise, ingenuity to supply the needs of an urban people living at standards which most believed were higher and all agreed were different.'~~

[17] [1902] 2 KB 1.

In *Pearkes*, the appellant company was a grocer and provision merchant registered in the City of London, but with sales outlets in other locations, including Richmond, London. It was at this outlet in Richmond that, contrary to section 6 of the Sale of Food and Drugs Act 1875, one of the appellant's shop workers sold, 'to the prejudice of the purchaser', butter that was not of 'the nature, substance, and quality…demanded by such purchaser'. The appellants claimed that a company could not be convicted of the offence, but the conviction was upheld. For Lord Alverstone CJ:

> This question, in my opinion, depends upon very much the same considerations as those which arise in an ordinary civil action when it is sought to make a person responsible for the acts of his servants… the protective object of the section and the necessary ingredients of the offence all seem to point to the conclusion that a corporation is placed in the same position as an individual, provided the sale is made on its behalf.[18]

A system of liability that allowed companies to hide behind the harmful or wrongful actions of their employees and agents, on the basis that the companies did not 'themselves' perform or authorise the actions, would substantially have reduced the power of the criminal law to have a positive compliance impact on corporate behaviour at a strategic level. It would also have damaged its moral integrity, by forcing prosecutors to focus only on the wrongdoing of hapless employees.[19] A company's argument that it did not 'itself' commit the offence also overlooks the different lives that a company has in the world. It does not only exist as an abstract entity registered at Companies House. As indicated above, it is also, amongst other things, a 'concrete legal entity,' comprised of a network of directorial powers and duties alongside contracts binding employees (amongst others) to the abstract entity in order to fulfil its purposes.[20] Although its liability is conceived of as being vicarious in nature, it was in its capacity as a 'concrete legal entity,' in this sense, that the company can itself be said to have committed the crime in *Pearkes, Gunston & Tee v Ward*: in that respect, as Alverstone CJ puts it in the passage just cited, 'a corporation is placed in the same position as an individual'.

What is the impact of clause 130 on the doctrine of vicarious liability as it applies to strict liability offences? Taken literally, clause 130 will make a company directly liable for a crime of strict liability as the actual perpetrator in the broadly

[18] Ibid., 9.

[19] We should note that, in some instances, it may be purely a matter of chance whether it is the employee or the shop owner-director who served a particular customer, in circumstances amounting to an offence: see e.g. *Shah v Harrow* BC [2000] 1 WLR 83. Why should the owner-director escape liability in such cases, when the employee is only doing not only what they are required by the owner-director to do, but exactly what the owner-director would have done had their places been exchanged?

[20] For explanation of the distinction between conceptions of the company as an abstract legal entity, a concrete legal entity, a real entity, and an entity led by a supreme executive authority, see Jeremy Horder, n. 13 above, ch 1.2.

traditional common law sense, as amended by section 196 of the 2023 Act. In such a finding of liability, the corporate 'perpetrator' is understood as an entity that itself acts through persons - themselves acting within the scope of their powers - having high executive authority. Although it is admittedly not entirely clear, it appears to follow that the doctrine of vicarious liability, reliant on the concept of a company as a concrete legal entity (as explained above), will no longer play a role in establishing liability such cases. For example, if the shop worker who made the offending sale in *Pearkes, Gunston & Tee v Ward* was successfully alleged by the prosecution to be a 'senior manager' of the firm's Richmond outlet, the firm would commit the substantive offence through being identified with offending conduct engaged in by a high managerial agent, and would not become responsible vicariously for the conduct of an employee. The difference might look like nothing more than a lawyer's doctrinal quibble. However, theoretical confusion abounds. Senior managers may themselves be mere employees, just like some other less senior personnel, working under and accountable to directors. Corporate liability for the criminal conduct of such senior managers must thus in truth be vicarious, if any form of liability is vicarious, because a 'company' – the abstract entity – need only (*inter alia*) have one or more directors in order validly to constitute itself and play a legal part in the world:[21] whether or not it employs people is, to that end, quite irrelevant. Yet, section 196 of the 2023 Act, and clause 130 of the 2025 Bill, ask us to accept that the crimes of senior managers – persons who make no appearance in the Companies Act 2006, in its definition of validly constituted companies - are the crimes *of*, and not just the crimes attributed vicariously to, the abstract legal entity.

Beyond this theoretical point, clause 130 opens up the possibility of appeals on unmeritorious technicalities. For example, the distinction between 'senior' and 'junior' managers is itself not without difficulty, and may be particularly unclear in cases involving companies - typically family firms - with relatively informal non-hierarchical and non-bureaucratic structures,[22] a point I return to below. Consider cases in which it is simply unclear whether or not the person who committed the offence was a 'senior' manager at the relevant time. Will that leave the prosecution in 'no man's land,' having no firm legal basis to claim either that the company itself can be identified with the commission of the offence (the individual in question being a senior manager), or that the company is guilty through the doctrine of vicarious liability (the individual in question being a junior manager)? Or, alternatively, in such a case, will it be procedurally sufficient that the charge is so phrased as to encompass both possibilities?

3. Direct Liability Based on Acting Within the Scope of Authority

[21] By virtue of section 154 of the Companies Act 2006, a company must have at least one director (who must be a natural person).

[22] See the discussion in Jeremy Horder, n. 3 above, 7-10.

The current test for whether a strict liability offence committed by an employee can be attributed vicariously to a company is whether or not the employee committed the offence 'in the course of their employment,' a long-standing, tried and trusted test.[23] By contrast, the test under section 196 of the 2023 Act – and under clause 130 of the 2025 Bill - for whether an offence has been committed by a company itself (whether or not an offence of strict liability), through the conduct of a senior manager, is a different test. It is a test relatively new to the criminal law.[24] It is the test of whether the senior manager acted 'within the actual or apparent scope of their authority.' This is a test plucked from the law of agency, the role of which has hitherto been to determine when the conduct of an agent in relation to a third party binds the principal as a matter of private law.[25] Consequently, it is now unclear whether all forms of criminal conduct on the part of senior managers - in particular conduct that would have rendered a company liable through the doctrine of vicarious liability - still have that effect under the test imposed by clause 130 to determine when the company itself commits the substantive offence.

For example, consider the doctrine of 'apparent authority.' Broadly speaking, this doctrine was devised in order to prevent a situation in which third parties who reasonably relied on what appeared to be an agent's authority when contracting, are unable to enforce bargains against the principal when it turned out that the agent did not have the principal's actual (express or implied authority) to strike the bargains in question. As Lord Denning put it in *Hely-Hutchinson v Brayhead Ltd*:[26]

> [S]ometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation.[27]

The law of agency, through the doctrine of ostensible (apparent) authority, seeks to protect the interests of *bona fide* third parties to transactions conducted by agents, by (broadly speaking) making a deviation from the express terms of the agency a matter to be resolved between the principal and the agent, rather than impacting

[23] *Mousell Bros. v London and North-Western Railway* [1917] 2 KB 836.
[24] It my have been derived from restrictions placed on the scope of the identification doctrine in *SFO v Barclays* (2018) EWHC 3055 (QB) that are expressed in terms of the scope of someone's authority.
[25] For a recent exposition of the relevant principles, see *Law Debenture Trust Corporation v Ukraine* [2023] UKSC 11.
[26] [1968] 1 QB 549.
[27] Ibid., 583, cited with approval in The *Law Debenture Trust Corporation plc (Respondent) v Ukraine* [2023] UKSC 11, para 41.

the legal position of the third party. Following the rule in *Turquand's case*,[28] the risk of loss stemming from an employee or agent acting on apparent authority, but not on actual authority, should ordinarily fall on the company and not on the party seeking to deal with the company through the latter's employees or agents. That all makes perfect sense, as a matter of private law; but what conceivable relevance can the reliance or expectations of third parties, in relation to the principal-agent relationship, possibly have to do with the question of whether a company commits a criminal offence through the action of one of its senior managers? Many financial crimes, such as bribery and fraud, are defined in the inchoate mode, and so do not anticipate or require proof of the involvement of third parties.

In explaining the scope of the provisions of section 196 – and hence of clause 130 of the 2025 Bill - the government suggested in its notes for guidance that:

> The senior manager must be acting within the actual or apparent scope of their authority. This does not mean that the senior manager must have been authorised to carry out a criminal offence. It would be enough that the act was of a type that the senior manager was authorised to undertake or which would ordinarily be undertaken by a person in that position. For instance, if a Chief Financial Officer commits fraud by deliberately making false statements about a company's financial position, the company would be liable since the act of making statements about the company's financial position is within the scope of that person's authority.[29]

When we are concerned with someone acting in a role familiar in nature throughout the corporate world, such as 'Chief Financial Officer,' or 'managing director,' this understanding of apparent authority may work well enough. However, it is now to be applied to the protean concept of 'senior manager,' a role that may vary from an unpaid spouse taking bookings and doing accounts for a business run by their sole director spouse, to a captain of industry in effective control of a multi-national corporation. That puts pressure on the way in which the guidance makes whether or not a senior manager is engaged in a 'type' of conduct that was authorised (even if a particular act-token of that type was not authorised) a pivotal notion. The designation of a class of acts as belonging to a 'type' may involve a significant element of value judgement, and in the view of some distinguished commentators will lack adequate determinacy.[30]

Many employment contracts – particularly those involving more senior staff - are dynamic, with their terms and conditions evolving from the original agreement in order to reflect current (rather than historical) expectations, and there

[28] *Royal British Bank v Turquand* (1856) 6 E&B 327.

[29] https://www.legislation.gov.uk/ukpga/2023/56/notes/division/11/index.htm (last accessed 16/04/2025).

[30] See Michael Moore, 'Foreseeing Harm Opaquely,' in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), ch 2.

is commonly some 'incompleteness by design'.[31] Formal contracts for managers are commonly open-ended, in that they are sustained in large measure by the use of discretion and the reposing of trust.[32] Where key employment or services tasks are difficult to specify directly, and when a basket of activities is needed, then an employment or services contract will avoid making duties (and hence incentives) focus narrowly on detailed specification of any given task or role. A manager's employment or services contract may have some formalities, such as hours of work, end date, and so on, but many of the most important duties and obligations may not be specified explicitly. Accordingly, it remains to be seen whether the key notion of a 'type' of conduct engaged in by senior managers provides the requisite degree of certainty and predictability, appropriate for criminal cases, when considering whether such managers are acting within the scope of their authority.

In that regard, the guidance tells us little about what is to happen in two situations. First there is the situation in which a senior manager's act runs directly contrary to the instructions of company directors, even when the act is still of one a type that the manager has authorisation to engage in. It has long been settled, in both the UK and the USA, that an employee – whether or not a senior manager - may still be acting 'in the course of employment' (for the purposes of the doctrine of vicarious liability) when the employee was acting contrary to instructions.[33] Suppose that I insist that an employee, X, follow a procedure to ensure that produce is fresh when purchased by customers. However, the employee subsequently deliberately ignores my instructions and as a result sells produce that is not (as was promised) fresh. In such a case, there is no doubt that X still acts 'in the course of employment' when selling the produce (and, in most cases, such a sale is still intended by the employee to benefit the company).[34] Will the position be the same when the employee was a senior manager and hence the question is whether the act was clothed in actual or apparent authority? In either case, of course, a question arises about the appropriateness of convicting the company of an offence a director (or high managerial agent) specifically instructed an employee not to commit. That question is important, whatever the position might be in private law with regard to the firm's liability to pay damages for defective products or harm caused. It is arguable that a better approach would be to regard the in-principle offence potentially committed by the company in such a case as the failure-to-prevent the (strict liability) offence. On that view, the instructions given to the employee not to commit the offence would fall to considered as part of the

[31] See e.g. Hugh Collins, 'Employment as a Relational Contract' (2021) 137 LQR 426.
[32] Se the discussion in Bengt Holmstrom and Paul Milgrom, 'Multitask Principal-Agent Analysis: Incentive Contracts, Asset Ownership and Job Design' (1991) 7 Journal of Law, Economics and Organisation 24-52.
[33] *Coppen v Moore (No 2)* [1898] 2 QB 306; *United States v Hilton Hotels Corp*, 467 F2d 1000 (9th Cir 1972).
[34] *Coppen v Moore (No 2)* [1898] 2 QB 306.

broader question of whether the firm had in place adequate procedures to prevent wrongdoing of the relevant kind.[35]

Secondly, there is the situation in which a senior manager uses an entrusted power for private gain or benefit. There is high authority in the case law on agency for the view that when an agent acts purely self-interestedly, thereby abusing an entrusted power, the agent lacks authority when so acting even when the relevant act is clearly of a type authorised by the principal.[36] However, in the context of failure-to-prevent offences, the law is currently inconsistent. The offences of failure to prevent bribery, and of failure to prevent fraud, by implication exclude corporate liability when the offence has a purely self-seeking motive, because they require an intention respectively to obtain or retain business (or an advantage in the conduct of business), or simply a benefit, for the company.[37] By contrast, a company may be found guilty of failing to prevent the facilitation of tax evasion, when an associated person engages in the latter when acting 'in the capacity of' a person associated with the company, whether or not – when the associated person so acts – they use their corporate capacity to benefit the company or themselves.[38] The issue is one of foundational importance. When someone (D) uses their position within a company to commit crime to further their own ends, whether or not at the expense of an unwitting third party, it is arguable that the corporate context of the crime is merely an opportunistic setting in which the crime takes place: crucially, the crime is not engaged in as a purported manifestation of corporate purpose. In such cases, when a *bona fide* third party – dealing with the company through the wrongdoer - suffers loss, it may perhaps be appropriate in tort or contract to shift that loss to the company.[39] Even so, it cannot be right to say that the company is appropriately or fairly labelled as a criminal offender, in virtue of D's conduct.[40] When fault-based offences are in issue, the fair labelling of the company as a criminal - in relation to the commission of the offences themselves - should be linked to the use by the wrongdoer of their corporate capacity to seek to further the ends of the company. I return to this issue in section 5 below.

4. Corporate Liability for Homicide

[35] See the argument in Jeremy Horder, n. 13 above, ch 1. There is a further possibility, which is that if the act of the employee regarded as a free, deliberate and informed act, unaccompanied by any intention to benefit the company, the company should not be liable for committing or for failing to prevent the offence, even if it is a strict liability offence.

[36] *Midland Bank v Reckitt* [1932] AC 1 (HL). In this case, the agent exercised a power of attorney to benefit himself.

[37] Bribery Act 2010, s. 7; Economic Crime and Corporate Transparency Act 2023, s. 199.

[38] Criminal Finances Act 2017, ss. 45 & 46. See the discussion in Karl Laird, 'The Criminal Finances Act 2017: An Introduction' [2017] Crim LR 915-39.

[39] *Lloyd v Grace, Smith & Co* [1912] AC 716 (HL).

[40] That still (rightly) leaves open the possibility that evidence of an offence committed self-interestedly by an associated person in a corporate context, is evidence of a failure by the company to ensure that a place of work is safe, contrary to the Health and Safety at Work Act 1974: see the discussion of the sexual offence example below.

It has traditionally been accepted that a company cannot be convicted of an offence carrying a mandatory sentence of imprisonment.[41] Accordingly, a company cannot be convicted of murder, for the simple reason that the mandatory life sentence of imprisonment cannot be given a punitive meaning in the case of a company. The passing of such a sentence on a company would hence be purely symbolic.[42] Alan Norrie, though, has raised the very real possibility that a company might possess and (omit to) act with the fault element for murder;[43] and under clause 130 as it stands, it now appears that companies will face conviction for murder, if that offence is committed by a senior manager acting with actual or apparent authority. It is not impossible that such a situation could arise:

> S, a senior manager at defence company, C, has strict instructions to ensure trespassers do not in any circumstances approach the weapons manufacturing area of C Company's plant. Protestors break into the plant, bent on taking over the weapons manufacturing area. During an altercation with the protestors, S intentionally beats a protestor, V, to death to prevent V entering the area.

In such a case, the point under clause 130 will not be whether S had specific authority to murder V; clearly S did not. The point will be that S was acting more broadly within the scope of what S was authorised to do, namely take action to keep out trespassers (the relevant 'act-type').[44] In Honduras, a corporate executive of a firm awarded a contract in relation to the building of the Agua Zarca hydro-electric dam was found guilty in 2016 of conspiring to murder an activist who was opposed to the building of the dam, and killed by hitmen hired by the executive.[45] If a case of this kind occurred in the UK, it is conceivable that such an act might in some circumstances fall within the actual or apparent scope of an executive's authority, implicating the company itself. Parliament must therefore decide what is to happen in such cases. Should the traditional corporate exemption for murder be maintained, by a 'carve out' in clause 130? Alternatively, is there a need for a special punishment, over and above making provision for an unlimited fine, to mark the seriousness of such cases?

Perhaps more significantly, clause 130 creates a lack of certainty between the scope for convicting a company of (involuntary) manslaughter, and the scope for convicting it of corporate manslaughter contrary to the Corporate Manslaughter and Corporate Homicide Act 2007. Under section 1(3) of the 2007 Act, a company

[41] *Hawke v Hulton & Co* [1909] 2 KB 93.
[42] In *Fidelity Industries v State* (2004) 03 MAD CK 0179, the High Court of Madras declared that it had the inherent power to punish companies by way of a fine in such cases, but it seems unlikely that a UK court would follow suit.
[43] Alan Norrie, 'Legal and Social Murder: What's the Difference?' [2018] Crim LR 531-42.
[44] On this point about the scope of 'actual or apparent authority' in private law, see *Law Debenture Trust Corporation v Ukraine* [2023] UKSC 11.
[45] https://www.bbc.co.uk/news/world-latin-america-57725007; https://globalwitness.org/en/campaigns/land-and-environmental-defenders/remembering-berta-caceres-seven-years-on-the-fight-for-justice-continues/ (both last accessed 15th May 2025).

is only to be convicted of corporate manslaughter if, amongst other things, 'the way in which its activities are managed or organised by its senior management is a substantial element in the [gross] breach [of a duty of care]'. As currently drafted, clause 130 by-passes this restriction on the scope of corporate liability for manslaughter, when the offence is committed by a senior manager:

> S, a senior manager at a well-run and safety-conscious ferry company, C, is responsible for closing the bow doors of the ferry at the appropriate time. Tired and intoxicated, S does not look at what he is doing and presses the wrong button before falling asleep and hence failing to hear warning sirens when the bow doors do not open. The ferry capsizes, with great loss of life.

In this example, S's blameworthy conduct is not really a manifestation of 'the way in which [the company's] activities are managed or organised by its senior management,' for the purposes of section 1(3) of the 2007 Act. It is instead simply a monumental individual blunder, respecting which S could undoubtedly face individual manslaughter charges; but if that is so, then clause 130 implicates C Company in manslaughter. Following the same line of argument applicable to the previous example, the fact that S was not authorised to press the wrong button (or to be drunk on duty) will not make their responsibility for attempting to close the bow doors unauthorised, and thus there is no escape for the company in any claim that S did not have 'authorisation' to do as they did. So, some amendment of clause 130 will be necessary to create policy consistency with the 2007 Act: why should a lethal blunder by a senior manager implicate a company, whatever the state of its organisational and management practices, when an identical blunder by a junior manager would not have that effect?

5. Sexual Offences: Private Motive and Intent to Benefit a Company

It has traditionally been supposed that sexual offences involving any kind of intimate physical connection between persons cannot be committed by a company.[46] That is so, even though a company can be convicted in cases that do not necessarily involve such a connection, such as the taking of indecent photographs of children.[47] Clause 130, as currently drafted, sweeps away any such distinctions. That might be significant in some instances:

> S, is a doctor and senior practice manager at a private medical company, C. S has been unnecessarily handling patients' intimate areas in the course of routine examinations, re-assuring the patients by falsely claiming that this conduct is a necessary part of the examination when it is not.

[46] Amanda Pinto QC and Martin Evans, *Corporate Criminal Liability*, 2nd edition (London: Sweet & Maxwell, 2008), 1.1.

[47] Protection of Children Act 1978, s. 3.

In this example, if S is guilty of sexual assault, then, other things being equal, clause 130 will render C company guilty of that crime. Was S acting with 'actual or apparent authority' in committing sexual assault? Such examples raise doubts about the usefulness of that test, even though S quite clearly commits the offences in the course of his employment. As indicated above, under French law, a senior manager acting for their own private benefit and not on behalf of the company, will not engage the company in liability for the offence.[48] By contrast, in terms of the aforementioned government guidance on the meaning of the phrase 'actual or apparent authority,' it would seem that we should ask whether the assault (in itself, unauthorised) was an act-token falling within a class of act-types that were authorised, such as 'examinations of the patient.' Were the sexual assaults really part and parcel of the examinations of the patient (and hence a token of that type of conduct), or were they something – a separate type of conduct - very different, that happened under the cover of the examinations? The medical profession might be surprised to discover that sexually assaulting patients is regarded in law as not merely something that may occur in the course of a medical professional's employment, but as a species of conduct that may fall within the genus 'examining patients.'

Be that as it may, let us assume that S was acting with the scope of his actual or apparent authority, with the result that the company becomes a sex offender as well. Opinions will differ as the propriety of such an outcome, in labelling (or common sense) terms. Two points are worth making. First, as indicated above, clause 130 creates an arbitrary distinction, in point of corporate liability for the offence, between cases in which a senior manager commits the offence, and cases in which it is committed by a more junior employee. In the latter cases, the company will not be liable, in part because a company cannot be vicariously liable for a fault-based offence,[49] and in part because the traditional thinking that companies cannot commit intimate sex crimes will still be applicable when the offence is committed by someone other than a senior manager. From a victim's point of view, that outcome wrongly gives the impression that the violation of their body matters less, in law, when it is committed by a more junior employee.

Secondly, if there is a wrong committed by the company in the example given, it could perhaps best be described as 'failing to prevent' sexual assault by an employee, rather than as 'sexual assault,' although – a point pursued below – the absence of any intent on S's part to benefit the company through the offending also casts the fairness of that solution into doubt. Seeing the wrong as the failure to prevent the assaults at least makes the status of the employee who committed the crime legally insignificant, vindicating the rights of victims, because failure-to-prevent offences are not limited to cases in which the predicate offence is committed by someone with some kind of managerial status. Further, if the typical

[48] See n. 10 above.
[49] *R v St Regis Paper Company* [2011] EWCA Crim 2527.

model for failure-to-prevent offences were to be followed, seeing the company's wrong as a failure to prevent the crime will bring into focus the adequacy of safeguarding procedures that the company had in place to prevent such conduct. However, no change is made by clause 130 to the scope of failure-to-prevent crimes, which remain confined in their application to economic criminality aimed at benefitting the company.[50]

This brings me naturally on to an examination of the fact that (a point raised above), clause 130, like the existing section 196 of the 2023 Act, does not currently require that the offence committed by the senior manager be committed in order to benefit the company commercially, if the company is to be implicated. There appears to be an assumption that if the senior manager was acting within the scope of their authority, then they would *ipso facto* have been acting to benefit the company; but such an assumption is false, as illustrated by the sexual assault example just given. Whilst, in that example, it is right that C Company fully compensates the victims,[51] and that S is convicted of sexual assault, C Company would not be fairly labelled as a sex offender or (given S's purely self-seeking motive) as having criminally failed to prevent the offence.[52] That is because, as suggested earlier, S's criminal conduct is not engaged in by S as a manifestation of corporate purpose, even if it may have been so understood by the victim. Any corporate setting may expose associated persons to opportunities and temptations to commit crime to benefit themselves. Where such crimes take the form of purely self-serving offending, through a free, deliberate and informed act on the part of an associated person, it is unfair to implicate the company in that offending, whether through conviction for the substantive offence or for failing to prevent it. It is only when a crime, committed through a free, deliberate and informed act, is intended to benefit the company that the company's association with that crime becomes sufficiently substantial as to justify criminalisation (at least) for having failed to prevent its occurrence.

It is, no doubt, these kinds of considerations that have led some legislatures, such as France, to confine corporate crime to instances in which the associated person commits the crime to benefit the organisation;[53] but such a general restriction involves a basic error. Such a restriction necessarily excludes crimes of strict liability or negligence-based crimes being attributed to the company, because such crimes are not typically committed by associated persons 'in order to' do anything. Instead, such crimes occur (in a broad sense) by accident, but through an accident the occurrence of which is, over time, a realistic risk of the company's continuing operation as a concrete legal or real entity.[54] That being so, such

[50] Economic Crime and Corporate Transparency Act 2023, s. 199.
[51] See *Lister v Hesley Hall Ltd* [2001] UKHL 22.
[52] In such circumstances, C Company may commit an offence contrary to the Health and Safety at Work Act 1974, by failing to ensure the safety of patients, in so far as reasonably practicable, but that is all it is fair and proportionate to hold it accountable for in such cases.
[53] See text at n. 10 above.
[54] See the discussion above, text following n. 19.

accidents – accidents, in a very real sense, waiting to happen - are fairly attributable to companies in criminal law.[55] There is, thus, a reasonably clear choice confronting reformers. One can stick with the traditional distinction between strict (or negligence-based) liability crimes, implicating the company through vicarious liability, and fault-based crimes for which some form – whether or not modified and extended – of the identification doctrine is needed for both substantive and failure-to-prevent forms of offending. In that case, reformers would do well to ensure that clause 130 reflects that distinction. Alternatively, one could take a different path, by making the failure-to-prevent model (with an intention-to-benefit restriction only for fault-based manifestations of crimes) a model capable of application to *all* crimes, whether or not fault-based.[56] A strict liability or negligence-based crime is a crime that a company is perfectly capable of (more or less culpably) failing to prevent. The use of the traditional model of vicarious liability to capture a company's involvement in such crimes is arguably both descriptively and morally inferior to seeing that involvement in terms of the company's failure to prevent the crimes.

6. The Range of Offences and Compliance Obligations

Clause 130 exposes companies to primary liability – through the identification doctrine - for tens of thousands of offences currently in force in UK law, when they are committed by senior managers acting within the scope of their authority. To some extent, that is not as dramatic a result as it seems. Most of these crimes are ones of strict liability, and many such crimes – when committed by ordinary employees - already entail corporate criminal liability through the doctrine of vicarious liability. Having said that, clause 130 will in due course reveal the extent to which corporate liability now extends beyond traditional boundaries, posing challenges for companies trying ~~the~~ to determine the scope of their compliance obligations. As indicated above,[57] following the 2004 extension in France of in-principle corporate liability to all crimes, committed on the company's behalf, whereas French criminal records show only 200 criminal convictions of companies in the year 2000, by 2015, the records show 5000 such convictions. As we have seen,[58] for example, a company may now be exposed by clause 130 to conviction for driving offences – and may hence face being banned from driving – if those

[55] I take it that this explanation is a version or interpretation of the justification given by Celia Wells for attributing strict liability crimes to companies, through the doctrine of vicarious liability: see Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed (Oxford: Oxford University Press, 2001). An analogy from individual conduct might run like this. If I leave my computer running continuously, there may be a risk of it overheating sometime. If, at some point, it then does overheat then I have some moral responsibility for the overheating, even if it's exact cause cannot be ascertained, because I left the computer running and there was thus always a risk over time that this might happen. By contrast, if when I simply turn on a computer, it then immediately overheats, whilst I cause this outcome to occur, my moral responsibility is far less clear.

[56] For this argument, see Jeremy Horder, n. 13 above, ch 1.

[57] See n. 10.

[58] See the example in the text before n. 6.

offences were committed by a senior manager acting with authority.[59] Accordingly, a new set of corporate compliance concerns in relation to the driving standards observed by senior managers have been generated, where there were none before.

Another example of enhanced compliance obligations necessitated by clause 130 involves the activities of security personnel ('bouncers') outside pubs and clubs. The Private Security Industry Act 2001 requires that the employer ensure such persons are properly licenced; but clause 130 takes the employer's compliance obligations much further. Suppose that an employer's senior managing security officer, whether properly licenced or not, commits a violent offence by using disproportionate force in (say) preventing an uninvited guest from entering the premises. Clearly, security personnel have authority to resist entry by would-be trespassers: such conduct is of a 'type' in which they are permitted – indeed, required – to engage. So, if the officer is regarded by the court as one of the employer's 'senior managers,' then the employer will also commit that violent offence. Whilst it might be expected that employers would ordinarily issue guidance to security employees about the use of force, there is now more at stake for the company, in terms of its exposure to liability, and so a greater incentive to do more in terms of compliance. That may seem to many people to be no bad thing, even if it is true that, as the National Audit Office has estimated, the annual cost of regulatory compliance for UK businesses generally is already between £70 and £100 billion.[60] However, the 'blunt force trauma' involved in the threat of conviction for substantive offences – which inevitably apply somewhat haphazardly across industries, varying arbitrarily in point of seriousness - lacks sophistication as a way to improve the quality and consistency of regulatory compliance. Accordingly, introducing such a threat will do little or nothing to encourage commitment to or positive attitudes towards the values that compliance is meant to protect and promote.[61]

Companies are by now accustomed to being regulated in many domains of their activity, and to facing liability for offences and regulatory penalties attached to regulatory failures on their part. As long ago as 1906, no less a figure than FW Maitland had noted that:

> Year by year the subordinate government of England is becoming more and more important […] We are becoming a much-governed nation, governed by all manner of councils and boards and officers, central and local, high and

[59] Clause 130 ~~will~~ would overturn the decision in *Richmond upon Thames LBC v Pinn and Wheeler* (1988) 7 LGR 659 DC, referred to in n. 6 above.

[60] National Audit Office, *A Short Guide to Regulation* (2017), https://www.nao.org.uk/wp-content/uploads/2017/09/A-Short-Guide-to-Regulation.pdf., 4. In citing this figure, I naturally do not under-estimate the difficulty and controversy involved in decision what is, and is not, a 'compliance cost'.

[61] See Jeremy Horder, n. 13 above, ch 4.

low, exercising the powers which have been committed to them by modern statutes.[62]

However, companies have traditionally been shielded from prosecution, in many instances, for the kinds of serious fault-based wrongdoing that regulation is designed to reduce or prevent. For example, whilst financial regulation of companies, and its associated penalty regime, is designed in part to reduce the incidence of serious fraud committed by company employees,[63] the company itself has not hitherto faced prosecution for that offence if and when it is committed only by an employee. That position has now changed with respect to the conduct of a 'senior manager' acting within the scope of their authority. It is certainly possible to justify this change in relation financial crimes. However, the change is far more controversial when it covers (i) any fault-based crime (such as a sexual or violent offence), whether or not engaged in for self-serving reasons, and (ii) any offence, whether or not fault based (such as a driving offence) that hitherto has been regarded as an offence that only a human individual can commit.

7. Conclusion

The 2025 Bill embodies a problematic general principle that companies should in principle face liability for any offence known to a UK jurisdiction, but then limits the reach of the principle through the use of an equally problematic restriction: the offences in question must have been committed by senior managers acting 'within the actual or apparent scope of their authority.' In so far as the general principle is sound, then it would be best put into effect by the creation of a broad corporate 'failure-to-prevent' offence (with an 'adequate or reasonable procedures' defence) committed by the company when any of its associated persons commits a relevant substantive offence. This failure-to-prevent offence would then be made subject to a limitation that when the substantive offence committed by the associated person is the manifestation of a free, deliberate and informed act, the company will not in principle be liable unless the offence was committed with an intention to benefit the company commercially. Notably, that leaves open the possibility in some cases (such as cases involving sexual offences) that, even where an associated person intentionally committed a crime for self-serving reasons, absolving the company from criminal responsibility for committing or failing to prevent the crime itself, the company may still face criminal proceedings for failing to ensure that the place of work was – so far as reasonably practicable- safe for people dealing with the associated person.

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[62] Frederic W Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1906), at 501.

[63] See, for example, Principle 3 of Financial Conduct Authority rules: 'A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems': https://www.handbook.fca.org.uk/handbook/PRIN.pdf#:~:text=Similarly%2C%20under%20Principle%203%20%28Management%20and%20control%29%20a,organise%20and%20control%20its%20affairs%20responsibly%20or%20effectively, 2.1.1.