TOWARDS A NEW PARADIGM FOR CORPORATE CRIMINAL LIABILITY IN BRAZIL: LESSONS FROM COMMON LAW DEVELOPMENTS

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ABSTRACT

While in several jurisdictions corporate criminal liability is accepted, in Brazil the maxim still prevails that corporations cannot commit crimes. In common law countries the attribution of criminal liability to corporations was developed more than a century ago, and the concept of corporate criminal liability has been extensively discussed. This work is an attempt to look into the common law experience and to offer a plausible basis for the introduction of corporate criminal liability in Brazil. The research is essentially theoretical; it is mostly based on relevant literature from Britain, Canada and United States, three exponents of common law jurisdictions, and on relevant literature from Brazil.

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INTRODUCTION

> A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed, than in examining the laws and customs of foreign nations. (Samuel Johnson).[1]

Large-scale corporations are the main defining force on the globe.[2] They are everywhere, in almost every aspect of our lives. Parallel to this subtle and sometimes not so subtle dominance, corporations have become dangerous criminals as well. However, because they are a special kind of entity- non-human entities - their criminal behaviour is also out of the ordinary. Corporate criminality "challenges or nags at our sense of reality."[3] It is this characteristic that makes corporate crime a problematic issue. Contemporary western law, especially criminal law, has its roots in individualistic principles, in both civil law and common law jurisdictions. The criminal law as an institution in most legal systems has excluded full consideration of collectives. The question thus arises: How should we to put a stop to corporate criminality, and, more particularly, how could we use such individualistic legal system to put a stop to them?

Different legal systems have reacted to the problem of corporate crime in their own way. While common law countries have tried to deal with corporate crime over the past century, in some countries affiliated to civil law, especially in

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[1]George Birbeckl Hill & Lawrence Fitzroy Powell, , eds., *Boswell's Life of Johnson I* (Oxford: Clarendon Press, 1934) at 89.
[2] The object of the thesis is large-scale corporations which will be referred to as "corporations."
[3] Joseph Vining, "Corporate Crime and the Religious Sensibility" (2003) 3 Punishment & Society 313 at 315.

Brazil, the maxim that corporations do not commit crime has prevailed. The endorsement of criminal liability of corporations has largely been a twentieth century judicial development, influenced by the "sweeping expansion"[4] of common law principles. Civil law countries were, and to some extent still are, reticent to embrace the idea of corporate criminal liability. Nowadays, some common law and civil law jurisdictions share the same position, but there are communities of scholars such as those of Brazil who remain unconvinced.

The goal of this work is to furnish a plausible set of arguments for the institution of corporate criminal liability in Brazil from a comparative perspective. This set of arguments will be drawn as a result from a critical assessment of different approaches to corporate criminal liability that have been used by common law countries. The relevant literature in Canada, Britain and US on corporate criminal liability, moral philosophy and organization theory grounds the approach taken in this thesis. Parallel to that, it is also a general goal of the present work to contribute to a more cogent framework of corporate criminal liability in Brazil. Questions related to the efficiency of criminal liability, moral agency, and the ability of corporations to act and have *mens rea*, which are the pillars of a theory of criminal liability, will be examined. The purpose is to offer a more comprehensive approach to the problem of corporate criminal liability in Brazil. An interdisciplinary examination of corporations and corporate behaviour will enrich the study of corporate criminal liability. This will be the starting point of a

[4] Harvey L. Pitt, and Karl A Groskaufmanis., "Minimizing Corporate Civil and Criminal Liability: A second Look at Corporate Codes of Conduct" (1990) 78 The Georgetown Law Journal 1560 at 1560.

more solid approach. Holistic theories will be critically assessed in order to discern to what extent they could or could not be imported into the Brazilian legal system.[5] My hope is that this thesis will contribute to clarity on the issue of corporate criminal liability for Brazilians or at least that it will no longer be considered as "the less familiar and more esoteric area of the law of criminal liability." [6]

This research will focus on large-scale corporations and the formation of the mental element in these types of corporations. The attribution of criminal liability for small corporations does not appear to be as complex as the attribution of such liability to large corporations. Given the size and the reduced number of employees, traditional models of criminal liability can be applied to small corporations whereas large corporations do not fit these models. Moreover, the proportion of the damage caused by large corporations surpasses the harm caused by closely held companies.

Chapter One will rely on legal history to explain the origins of the concept of corporate criminal liability and its evolution until the contemporary era. The goal of this chapter is to show that the individualistic maxim that corporations do not commit crime is not an absolute principle but simply a social creation. Law has been constantly manipulated and principles of criminal liability are no exception to that. The history of criminal liability shows that collective punishment and

[5] The materials used in the present research are current until November of 2004.
[6] Eliezer Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle" (1985) 76 Journal of Criminal Law and Criminology 285 at 294.

punishment of non-human entities were culturally accepted, and it was only after the predominance of the ideals of the Enlightenment that the individual became the only agent able to be held criminally liable. The historical analysis reinforces the notion that legal systems can and should create legal institutes to serve social needs. The acceptance of corporate criminal liability is one of these needs.

Chapter Two is an analysis of the Brazilian reality, i.e, how the Brazilian legal system has faced the problem of corporate criminality. The institution of corporate criminal liability is still considered by the majority of Brazilian scholars as incompatible with the principle that only individuals can be criminal agents. Parallel to that, the advance of the minimal penal law movement has been a strong force against the attribution of corporate criminal liability. In spite of that, there has been some effort from those advocating the doctrine and from the legislature to familiarize the Brazilian legal system with the attribution of corporate criminal liability. For example, the law of environmental crimes can be considered an advance in this area. This innovation is far from being a stamp of approval of corporate criminal liability but it is undoubtedly a sign that there is space in the Brazilian legal system for the growth of ideas of corporate criminal liability.

Chapter Three is a general overview of some important issues related to corporate criminal liability that make the case for the attribution of criminal liability to corporations in Brazil. A conceptualization of corporate crime, its cost and seriousness will clarify the image of corporate crime for the Brazilian public.

Chapter Four is an attempt to justify why criminal liability is needed and whether it can be used as an effective controlling device. The main justification to use criminal law against corporations is corporate power. Powerful institutions need to be resisted with power. Criminal law happens to carry this power, although the imbalance is obvious. It is usually argued that civil sanctions could serve the same purpose of criminal law in the case of corporate crime, but it is the very essence of criminal law that can be the antidote against corporate misconduct. The stigma attached to criminal sanctions has a powerful deterrent effect on others and on the criminal agent. Another objection to the use of criminal law is related to the proper rationale of punishing corporations. It is commonly argued that criminal law achieves utilitarian ends at best, and indeed the traditional idea of retributivism seems to have no place in the punishment of corporations. However, a more modern approach to the retributive theory will make it evident that retributivism can also be a rationale for punishing corporations. A third objection that is usually raised against the use of criminal sanctions with corporations is that fines do not deter corporate misbehaviour and can affect third parties, such as employees and consumers. Whereas the use of the fine is questionable as the ultimate sanction against corporations, there are other alternative sanctions that can be effectively applied. The objective of this chapter is to show that the use of criminal law is not only possible, but also, desirable.

Chapter Five is a critical analysis of the traditional common law theories of corporate criminal liability, agency theory, identification doctrine and aggregation

theory. These models of attributing corporate criminal liability were pioneers but have been strongly criticized for their inefficiency. An examination of these theories can offer a salutary view of the concept of corporate criminal liability for the Brazilian legal system, as it can serve as an inspiration for what needs to be done and what needs to be avoided.

In Chapter Six, a variety of understandings about corporations, their life and existence will be examined. One of the main problems of traditional models of corporate criminal liability is the lack of theoretical investigation. A more complete portrayal of corporations will give the theoretical basis for a more workable approach to corporate criminal liability. This portrayal will only be possible by looking at corporations through different eyes.

As Monks and Minow note,

> Through the centuries, corporate power has been the focus of a great deal of scholarship and debate, but each of the professions has described the phenomenon in its own language. Lawyers, economists, financial analysts, political scientists, ethicists, and managerialists are like the builders of the Tower of Babel, all working toward the same goal but unable to communicate because they speak different languages.[7]

The goal is to understand these different "languages" and create a new meaning of corporate criminal liability. From the analysis of the nature of corporations, organizational theory will help to show that a corporation is more than the sum of

[7] Robert A. Monks & Nell Minow, *Power and Accountability* (United States: Harper Business, 1991) at 13.

its parts; it is a real entity with characteristics of its own that are not derivable through simplistic exercises.

Chapter Seven will investigate whether a corporation is a moral person and, what would allow them to be subjects of criminal liability. The answers we accept, even if only tentatively, are important because our notions about the nature of corporations and their ability to be moral agents will shape our positions on crucial questions relating to the criminal liability of corporations.

In Chapter Eight, the analysis will focus on the traditional elements of criminal liability. Some elements are required for the attribution of criminal liability: the ability to act, to have intentions and to be a moral agent. The attribution of criminal liability to corporations for *mens rea* crimes is predicated upon the presence of these elements. Instead of neglecting some elements and proposing a model of corporate criminal liability under different requirements, I will argue that all these elements can be found in the corporate entity. It is critical to a plausible approach to corporate criminal liability that the mental element of the misconduct is found in the corporation itself and not in its individual members. The proper place to find corporate intention is within the corporate culture. The objective is to better understand what corporate culture is and why it is appropriate to ascribe liability based on the culture of the corporation.

In Chapter Nine, the alternative holistic models of corporate criminal liability will be assessed. To what extent an effective approach is found in these theories,

including their shortcomings and which one appears to be more appropriate to deal with corporate criminal liability. Legal scholars such as Brent Fisse, John Braithwaite, Peter French, Pamela Bucy, William Laufer and others have contributed to a new and promising paradigm of corporate criminal liability. This new perspective is the fruit of a holistic approach to studies of organizations and of the idea of corporate culture.

This work does not attempt to utter the final word on corporate criminal liability for the Brazilian legal system, but to get a better picture of corporations and whatever advances that such a picture can provide. A more plausible model does not intend to be a view, but a window. It is through this window that Brazil can start to examine corporate criminality. Most importantly, this work is an attempt to weaken the myth that criminal law cannot be used against corporations. For that to be effective, the present proposal goes beyond the limits of legal analysis in a Brazilian context.

I. HISTORICAL BACKGROUND OF THE ATTRIBUTION OF CRIMINAL LIABILITY TO CORPORATIONS

Introduction

Theories of corporate criminal liability and their associated investigations are relatively new, having been in existence for about two centuries. However, the ascription of criminal liability to collective entities had existed before any theory took shape. Since ancient times, collectivities have been held criminally liable for their behaviour. The historical background of the criminal liability of corporations has its genesis in the ascription of criminal liability to other antecedent collective entities such as clans, tribes, cities, churches, old enterprises and other groups. The attribution of criminal liability to groups had coexisted with individual liability for a long time, yet this started to shift and legal institutions became more and more centred in the individual; criminal liability was no exception to this trend.

Since the advent of liberal ideas, legal thought, and especially criminal law has been dominated by individualistic values. This process of humanization of criminal institutions was a determinant in the positions taken by different legal systems regarding the criminal liability of corporations. On the other hand, theories of corporate criminal liability have been created in common law countries in such a context, influenced and shaped by individualism. Although

these theories have represented an important step in the field of corporate criminal liability, the inherited individualism has been its major weakness. As Christopher Stone emphasizes, "[i]t is not an oversimplification to claim that the problems we face in controlling corporations today have their roots in legal history." [8] An inclusive overview of criminal accountability of corporations requires a concise analysis of the matter over time. In this chapter, the evolution of corporate criminal liability since ancient times until today will be outlined.

1.1. Ancient law

The ascription of criminal liability to groups is not the fruit of modern society, as it is usually assumed. In ancient society, the rule was the ascription of collective liability. Ancient society was not conceived as a collection of individuals but rather as an aggregation of families.[9] This peculiarity made all the difference and framed the law of that time. Law was adjusted to a system of small independent groups which were the clans or families.[10] Responsibility of all kinds was attributed taking into account this reality. The conduct of each member of the society was viewed as the conduct of the society as a whole.

> [T]he moral elevation and moral debasement of the individual appear to be confounded with, or postponed to, the merits and offences of the group to which the individual belongs. If the community sins, its guilt is much more than the sum of the offences committed by its members. [11]

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[8] Christopher D. Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (New York: Harper & Row Publishers, 1975) at 1.
[9] Sir Henry Sumner Maine, *Ancient Law,* 10th ed. (London: John Murray, 1930), at 143.
[10] *Ibid* at 142.
[11] *Ibid* at 143.

The wrongdoing was a sign that the harmony within a community, or clan, had broken down and the group was uncontrolled. As a result, the clan had the duty of maintaining the control and harmony and to impeding such rupture. The clan was responsible for the conduct of each of its members. The harm caused by a person was attached to the clan the person belonged to and not to the person herself.[12]

1.2.Roman law

In opposition to ancient law, Roman law reflected the value of individualism over collectivism. From the 4th and 3rd centuries BC, ancient Roman society witnessed a movement of internal disintegration; social groups, such as the *gentes*[13] and families, were breaking down. It was a period of individual emancipation. It is, therefore, not surprising that the scholars of that time held an individualistic view of society. However, the earliest forms of corporations were arising, and the law could not simply close its eyes to this fact. The solution found by Roman Scholars to conciliate its individualist roots to the existence of such corporate bodies was to regulate these entities without matching them up with individuals.

The earliest forms of corporations were merely civil organizations, associations of individuals.[14] The functions of these earlier organizations were different from the

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[12] F. McAuley, & J. P. McCutcheon, *Criminal Liability* (Dublin: Round Sweet & Maxwell, 2000) at 273.

[13] communities [translated by author]

[14] These associations included: municipalities (*civitas, municipium, respublica, communitas*), colleges of priests and vestal virgins, corporations of subordinate officials such as lectors and notaries (*scribae, decuriae*), industrial guilds such as smiths, bakers, potters, mining companies (*aurifodinarum,*

functions of today's corporations; they were essentially passive devices to hold property, sometimes real estate and sometimes special privileges.[15] In order to regulate these social actors that were becoming more and more part of the society, Roman scholars created the concept of "juristic persons."These collectivities were considered juristic persons, so they were invested with rights of property; however, because they were mere fictions or ideal unities, they were incapable of making a disposition (declaration of intention). They could not have intention and consequently could not commit crimes.

The individualistic view of Roman law did not impede Roman Glossators of attributing liability to collective entities. Romans did not develop a theory of collectivities or of the ability of groups to commit crimes, even though they considered the possibility of attributing criminal liability to a collective entity such as the city. According to Ulmann,

> [T]hey [Roman Glossators] were bold enough to proclaim the corporate criminal liability, without however attempting to justify it on the strength of the sources available.[16]

In effect, the maxim *societas delinquere non potest,* which reflects the view that corporations do not have the capacity to act nor to be guilty, did not prevail in Roman law. Roman law instituted rules that precisely dealt with the rights,

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agentifodinarum, salinarum, societas), revenue contractors (*vectigalium publicorum societas*), social clubs (*sodalitates, sodalitia*), and friendly societies (*tenuiorum colegia*) [translated by author].

[15] See Stone, *supra* note 1 at 11.

[16] W. Ulmann,."The Delictual Responsibility of Medieval Corporations" (1978) 64 The Law Quarterly Review 77 at 78.

obligations, accountability, infractions and punishments applicable to *ciutates*. [17] For example, it was possible to prosecute the *municipium* as the personification of the group of its citizens. [18]

1.3. Medieval law

By the end of Roman Empire, the Church had became a powerful and influential institution. It was in the Church and not in the State that the device of legal personality was first used as an instrument of political policy.[19] The medieval society was not firmly established but had a richer structure with an abundance of ordered groups such as cities, villages, ecclesiastical bodies, universities, and within them faculties and colleges. A theory was needed to meet these institutions. Pope Innocent IV, who taught that the foundation of faculties and colleges was fiction, established this theory. In 1245 he introduced the principle that corporate bodies were a fiction. He "was the father of the dogma of the purely fictitious and intellectual character of juridical persons."[20] This theory embraced the notion that "the corporate body is not in reality a person, but is made a person

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[17] *ciutates* – collectivities, entities, cities [translated by author].
[18] Aquiles Mestre, *Les personnes morales et le probleme de leur responsabilite penale,* quoted in Fausto Martins de Sanctis,*Responsabilidade Penal da Pessoa Juridica* (Sao Paulo: Saraiva, 1999), at 26.
[19] Leicester C Webb, ed., *Legal Personality and Political Pluralism* (Victoria: Melbourne University Press, 1958) at v.
[20] Gierke, 3 *Das deutches* Genossenschaftrecht at 279-285, cited in J. Dewey, 'The Historic Background of Corporate Legal Personality" (1926) 35 Yale L. J. 655 at 665.

by fiction of the law"[21] or in the case of some ecclesiastical body, by divine power.

> Le pape Innocent IV pose le principe, par une decrétale rendue au premier concile de Lyon en 1245, qu'une *universitas*[22] ne eut pas être excommuniée, car c`est un être amoral, sans âme et qui ne fait pas partie de l`Eglise. Il ira jusqu`à dire que la personne morale n`existe pas en réalité et ne constitue qu`une fiction.[23]

The development of this theory was a successful attempt by the medieval Church to bring some order into the groups under its jurisdiction and to establish the supreme authority of the papacy.[24] It appears that the doctrine that corporate bodies were *persona fictae* was intended for ecclesiastic *collegium,*[25] *universitas* or *capitulum,*[26] which could not be excommunicated, or be guilty of a delict because they had neither a body nor a will. With the presumption that corporate bodies were *personae fictae* the ecclesiastic bodies were placed in such a privileged and protective position.[27] Even the recognition of ecclesiastic bodies as moral persons was different from other groups. The ecclesiastic bodies had the status of juridical persons by divine

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[21] W.M Geldart, "Legal Personality" (1911) 27 The Law Quarterly Review 90 at 92.
[22] *universitas* in this case means corporate body, community [translated by author].
[23]M. Lizée, "De la capacité organique et des responsabilités délictuelle et pénale des personnes morales" (1995) 41 McGill Law Journal 131 at 134 [Author's translation: Pope Innocent established the principle by a decree pronounced at the first council of Lyon in 1245, in which the *universitas* did not have to be excommunicated, because it is an amoral being, without soul and it isn't part of the Church. At this point it would be to say that the legal entity doesn't exist in reality and it constitutes nothing more than a fiction].
[24]Webb *supra* note 16.
[25]*collegium* can be understood as college/board (priests) [translated by author].
[26] *Capitulum* in this case refer to a cathedral or other important religious building. [translated by author].
[27] William H. Jarvis, "Corporate Criminal Liability: Legal Agnosticism" (1961) Western Law Review 1 at 10.

disposition. Therefore, to be recognized as juristic persons, other groups needed the approval of a competent authority, i.e., the recognition by the law.[28]

However, practical need made the canonists accept the criminal liability of legal persons. After the 17th century, the Bologna Scholl began to stipulate sanctions to be imposed on communities. One of the provisions stipulated that a city that conceded asylum to criminals or that did not help to arrest criminals could be captured. The canonist at last accepted liability, but with certain conditions. The most important of these was that the community could not be responsible for the act of one individual alone; the community would be responsible only if the individual act was a consequence of the collective will, or it was a result of the will of the majority of the community members.

As a result of the recognition of responsibility, some of the sanctions were adopted. The canonists adopted fines, rights restrictions and dissolution. Apart from these sanctions, some spiritual sanctions were applicable to the individuals that were members of a group. These sanctions included interdiction of the sacraments and, if the individuals were ecclesiastic members, suspension of the exercise of religion and excommunication.

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[28]" There are two moral persons that exist by divine institution. They are the Catholic Church; established on earth by Jesus Christ, true God, and the Apostolic See, established by the same divine authority. A moral person means a juridical entity, a subject of rights, distinct from all physical or natural persons. Such a person comes into being only when constituted by public authority" [T. L. Bouscaren & A. C. Ellis, *Canon Law: A Text and Commentary* (Milwaukee: The Bruce Publishing Company, 1957) at 86)].*Can 115 § 1* - Juridical persons in the Church are either aggregates of persons or of things.*Can 117* - No aggregate of persons or of things seeking juridical personality can acquire it unless its statutes are approved by the competent authority. (The Code of Canon Law in English Translation (London: Collins Liturgical Publications, 1983) at 19-20)

In medieval English law, liability was imposed on the group instead of the person who had committed the wrongful act. The group was to be held responsible for the wrongdoing of one of its members, but it could avoid condemnation by capturing the individual wrongdoer and delivering him to the authorities.

In France, as a heritage of the canon law, the criminal responsibility of corporations was admitted in France prior to the French Revolution. Before the Revolution it was accepted that the community had factual existence and groups could commit crimes and should be punished independently of the nature of the groups.[29] In 1331, the City of Toulouse was condemned by the parliament to lose its rights of body and community, and had its patrimony confiscated. Losing the rights of body meant that Toulouse was not represented as an autonomous and concrete entity. It had no right to represent itself. Parallel to this, the denial of the right to be a community meant that it was not recognized as an independent community. Finally, by confiscating the property, the parliament was assuring that the city was not allowed to receive any advantage by the economical use of its patrimony. The same thing occurred with Bordeaux in 1558 and Montpellier in 1739.[30]

The advent of the 1670 regulation created the fundamentals that guided the French criminal law. One of these fundamentals was the criminal liability of groups. The first provision of this regulation (Title XXI, article I) announced that the criminal

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[29] This acceptance was not unanimous. According to Charondes, if the crimes were not committed through a common deliberation, there would not be any responsibility. Other authors said that because the fiction theory prevailed at that time, the liability was not admitted. [See De Sanctis *supra* note 12].

[30] João Marcello Araújo Jr., "*Societas Delinquere Potest* – Revisão da Legislação Comparada e Estado Atual da Doutrina" in Luiz Flávio Gomes, *Responsabilidade Penal da Pessoa Juridica e Medidas Provisórias e Direito Penal* (São Paulo: Revista dos Tribunais, 1999) 72 at 80.

procedure could be used against cities, villages, bodies and companies that had committed any kind of rebellion, violence or other crime. The term "body" referred to schools, religious councils and convents. The term "companies" referred to lawyers and justice officials and prosecutors' associations. In order to attribute responsibility to such collectivities, it was necessary that the conduct had been the fruit of the collective deliberation. Mestre[31] claims that the *mens rea* element assumed special importance at this point. The action *per se* was not enough; the will of the group had to be present as an essential element of the crime. In addition, the doctrine of that epoch indicated that criminal responsibility of groups did not move away or diminish the responsibility of the individual. In this way, the main author and the compliers were not allowed to escape from personal liability.

1.4. Modern French Law

If in the field of criminal law there had been room for the coexistence of individual and corporate responsibility, in the 18th century the ideals brought by the Enlightenment and the French Revolution extirpated the concept of corporate liability. One of the core principles of the French Revolution was the humanization of the institutions; consequently criminal responsibility was to be restricted to individuals. Organizations were seen with hostility. The revolution did not favour a concept that interposed any intermediary group between the State and the individuals, for these groups represented a threat to the revolution. Collective bodies other than the State were considered a danger to the sovereignty of the State. More importantly,

[31] De Sanctis, *supra* note 12 at 29.

the revolution needed money and believed it was crucial to liquidate any collective body, not only to confiscate its properties, but also to prevent its independence.

These values forever changed the face of legal institutions, for the concept of criminal liability humanization meant the attribution of liability was directly linked to human capacities and moral elements such as intention. [32]

> Laws had to account for certain capacities and rights of the individual human being. The natural capacities that were to prevail included reason, dignity, will, perfectibility, and freedom.[33]

Groups and all kinds of collectivities as unnatural persons were definitely excluded from the sphere of criminal law since they did not have the individual characteristics necessary to be responsible for their acts. This exclusion of groups from the domain of criminal law was considered a great advance in the doctrine of criminal liability.

Nonetheless, the practice and theory of collective responsibility were so deep-rooted that even after the revolution some laws were promulgated consecrating this old habit. A typical example is one French imperial law that established it was the responsibility of the state if a group of people were responsible for the death of an individual. In this case the state was obliged to compensate the family of the individual.

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[32] Josè Hurtado Pozo, "Responsabilidad Penal de Las Personas Juridicas" (1996) Anuário de Derecho Penal – asociácion peruana de Derecho Penal (3 November 2003), online: Anuário de Derecho Penal <http://www.unifr.ch/derechopenal/anuario/96.html>

[33] Stone, *supra* note 2 at 8.

The ideal brought about by the revolution influenced the Penal Code of 1810, which highlighted the principle of the individuality of punishment. In the same way, the Napoleonic legislation did not recognize any corporate responsibility. Other western countries underwent the same process of individualization of criminal law principles. Since then, the development of criminal science has taken this individualist conception, on which contemporary criminal law is grounded, for granted.

1.5. Modern English law

The early modern English law rejected the concept of collective or imputed guilt that was pervasive in medieval law. The principle of no-responsibility of legal persons prevailed. Only individuals who committed a harmful act with a guilty state of mind could be guilty of crimes. The Chief Justice of England confirmed this claim in 1701[34] when he announced that corporations could not be charged with crimes, but rather the particular members of the corporations could be indicted.

By the mid-nineteenth century, the common law rule started to shift and the ascription of criminal liability to juristic persons was becoming a reality. Initially, liability was restricted to nuisance. Later it was extended to nonfeasance, such as failure to repair roads or bridges. Some courts held, for example, that corporations that were obligated by their corporate charters to maintain public bridges or highways could be criminally charged if they failed to discharge their duties. In *Regina* v. *Birmingham and*

[34] *Anonymous Case* [1701] 12 Mod 559.

Gloucester Railway, a company was indicted for disobeying an order of the Justices, directing it to remove a bridge that had been erected over a road. [35]

Court decisions gradually started to challenge the practice of centuries.[36] These decisions were the product of social and cultural changes brought about by the Industrial Revolution. After the 19th century, industrial bodies were considered responsible for statutory crimes, and most of the possible condemnations were fines. In 1889, the British parliament introduced an imperative that the expression "person", present in all legislative texts related to criminal infringement, should be interpreted as including both individuals and collective entities. Since then, the jurisprudence began to admit the criminal responsibility of these entities even for intentional acts.

Two models of corporate liability emerged from the work of English courts: vicarious liability doctrine and the identification doctrine. These doctrines have been the dominant basis for ascribing corporate criminal liability since then. Although these doctrines challenged the position prevalent at the time they were developed, they have not represented a complete rupture with individualistic principles.

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[35] *Regina* v. *Birmingham and Gloucester Railway* (1842) 3 QB 223.
[36] L.H Leigh,The Criminal Liability of Corporations in English Law (London: Lowe & Brydone, 1969) at 16.

II. CORPORATE CRIMINAL LIABILITY IN BRAZIL

Introduction

For the Brazilian legal system, the axiom *societas deliquere non potest* is still revered.[37] Mainstream Brazilian legal thought strongly rejects the mere possibility of attributing criminal liability to juristic persons. Statutes, court decisions and the majority of legal scholars corroborate this position. However, some dissonant ideas are proving that, although the axiom has been considered sacred, it is not undisputed. For a long time the principle that juristic persons do not commit crimes has seemed to be inviolable, but recent innovative statutory provisions and academic research have produced an increasing debate that has started to question this conservative position.

The Brazilian legal scenario is puzzling. There has been a strong opposition to corporate criminal liability, especially by scholars and Courts; yet there has been an effort by the legislature and some influential scholars to introduce some changes into the legal setting. Corporate criminal liability is attacked on the same basis that it is criticized elsewhere. Questions about the need, propriety and efficiency of criminal law to punish corporations are also traditionally raised in Brazil. However, the central question today in Brazil is not one of whether corporate criminal liability is workable or not, or which

[37] The maxim can be interpreted as "corporations cannot commit crimes."

theory would be more appropriate; theories of criminal liability are not even directly addressed. It is in the fundamental conditions for the attribution of criminal liability that stronger resistance to corporate criminal liability continues. Some prominent Brazilian scholars still treat corporate criminal liability as a bizarre concept that would never fit in any coherent legal system. In addition to that, the growing influence of minimal penal law and the new interventionist movement bring more skepticism towards corporate criminal liability.

2.1.Brazilian Constitution

The Brazilian Constitution, promulgated in 1988, has two provisions that eventually deal with the issue of corporate criminal liability.[38]The first provision is article 173 § 5 which regulates crimes against the popular economy and economic order; the other provision is article 225 § 3 which regulates environmental crimes. These provisions are harshly attacked because they contradict criminal law principles that have been seen as untouchable.

> Art. 173 , δ 5° - The law, without disregarding the individual responsibility of the corporation managers, will establish the responsibility of the corporation for acts against the economic order and against the popular economy. The corporation will be affected by sanctions that are compatible with its nature.[39]

[38] "Constituição da República Federativa do Brasil 1988."
[39] [Translated by author]

> Art. 225, & 3° - The subjects and activities considered harmful to the environment will subject the infractors, individuals or legal persons, to criminal and administrative sanctions, independently of their obligation for civil damage. [40]

Article 173, § 5 declares that the law will establish the responsibility of the juristic person regardless of the individual accountability of the managers and employees for acts practised against the financial and economic order, and against the popular economy. In addition, this same article states that the juristic person will be submitted to sanctions compatible with its nature. This provision has been interpreted by scholars in both directions, for and against the imposition of criminal liability to corporations. It has been argued that because this provision uses the term "sanction" it is considering only non criminal sanctions. In this connection, it is also observed that if the legislator wanted to submit corporations to criminal law, he or she would have used the word "punishment," the proper word to refer to criminal sanctions.

Moreover, opponents of corporate criminal liability claim that the historic interpretation of this provision shows that the legislator intentionally changed the language of the provision in order to exclude the liability of juristic persons. Miguel Reale Jr., explains that the term "criminal" before the term "responsibility" was part of the original version of this provision but this version was not approved and the legislator had to exclude this expression.[41]

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[40] [Translated by author]

[41] Miguel Reale Jr., "A Responsabilidade Penal da Pesoa Juridica" , in Luiz Regis Prado, ed., *Responsabilidade Penal da Pesoa Juridica: Em Defesa do Principio da Imputacao Penal Subjetiva* (Sao Paulo: Revista dos Tribunais, 2001) 137 at 138.

On the other hand, it has been claimed in defence of the criminal liability of corporations, that the term "sanction" is used in this provision in its general meaning, including criminal sanctions. It is emphasized that the sanctions would be compatible with the juristic person's nature, except those criminal sanctions, such as imprisonment, that could not be used against corporations.[42] Because of the unclear will of the legislator, the more restricted interpretation of this stipulation prevails. The interpretation of constitutional rules has to avoid contradiction and unjustified harm, accordingly, an ambiguous dispositive article like173, δ5° has to be literally understood and interpreted in harmony with the prevailing principle that criminal sanctions cannot be imposed on corporations because they cannot commit crimes.

In another provision, article 225 § 3 of the Brazilian Federal Constitution asserts that criminal and administrative sanctions will be applied to punish offenders, whether individuals or juristic persons, who are responsible for conduct or activities that harm the environment, independently of the obligation of civil reparation.[43] Once more, semantic difficulties make the provision confusing and impede its total application. The mainstream doctrinal interpretation argues that this provision leads to the conclusion that

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[42] Juarez Cirino dos Santos, "A Responsabilidade Penal da Pessoa Juridica," online: Direito <www.direito.com.br/doutrina.ASP?=1&T=127>

[43] Art. 225, δ3. As condutas e atividades consideradas lesivas ao meio ambiente sujeitarao os infratores, pessoas fisicas ou juridicas, a sancoes penais e administrativas, independentemente da obrigacao de reparar os danos causados,

corporations cannot be criminally responsible.[44] According to this position, the legislator used two semantic different words on purpose; the word "conduct" is used to refer to individuals and consequently criminal law, and the word "activity" is used to refer to juristic persons and therefore administrative law. As a result, corporations can be held responsible for illegal activities and not for illegal conduct. On the contrary, a more flexible view concludes that the formulation of article 225 § 3 is straightforward, and that juristic persons can be criminally liable for illegal conduct that harms the environment.[45] The use of the conjunction "and" in the phrase "administrative and penal sanctions" implies similarly that the sanctions are to be applied indiscriminately to individuals and juristic persons.

In an extremely traditionalist legal scenario, the more conservative approach becomes the accepted belief. This constitutional provision has been

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[44] See e.g. Cézar Roberto Bittencourt, "Reflexões Sobre a Responsabilidade Penal da Pessoa Juridica", in Gomes, *supra* note 99 at 51; Jose Carlos de Oliveira Robaldo, in Gomes, *supra* note 99 at 96. Luiz Luisi, "Notas Sobre a Responsabilidadde Penal das Pessoas Juridicas", in Luiz Regis Prado, ed., *Responsabilidade Penal da Pesoa Juridica: Em Defesa do Principio da Imputacao Penal Subjetiva* (Sao Paulo: Revista dos Tribunais, 2001) 79; Miguel Reale Junior, "A Responsabilidade Penal da Pesoa Juridica" , in Luiz Regis Prado, ed., *Responsabilidade Penal da Pesoa Juridica: Em Defesa do Principio da Imputacao Penal Subjetiva* (Sao Paulo: Revista dos Tribunais, 2001) 137; Luiz Regis Prado, ed., *Responsabilidade Penal da Pessoa Juridica: Fundamentos e Implicacoes* , in *Responsabilidade Penal da Pesoa Juridica: Em Defesa do Principio da Imputacao Penal Subjetiva* (Sao Paulo: Revista dos Tribunais, 2001) 101; Luiz Régis Prado, *Curso de Direito Penal Brasileiro-Parte Geral,* 2ed. (Sao Paulo: Revista dos Tribunais, 2000).

[45]See e.g. José Afonso da Silva. *Curso de Direito Constitucional Positivo,* 5th ed. (São Paulo: Revista dos Tribunais, 1989); João Marcello Araújo Jr., "*Societas delinquere potest* – Revisão da Legislação Comparada ao Estado Atual da Doutrina", in Gomes, *supra* note 99 at 46; Luiz Regis Prado ed., "Responsabilidade Penal da Pessoa Jurídica: Fundamentos e Implicações" in *Responsabilidade Penal da Pessoa Jurídica e Medidas Provisórias e Direito Penal,* 101; Celso Ribeiro Bastos & Ives Gandra Martins, *Comentários à Constituição do Brasil* (São Paulo: Saraiva, 2000); Sérgio Salomão Shecaria. *Responsabilidade Penal da Pessoa Jurídica. De acordo com a Lei nº 9.605/98* (São Paulo: Revista dos Tribunais, 1998).

infrequently used as justification to impose criminal sanctions on corporations. Corporate misconduct is still seen as an accident or a disaster, and not a crime. As an illustration, one can cite the Petrobrás and the Cataguazes disasters. In 2000, the biggest Brazilian oil refinery, Petrobras, polluted Guanabara Bay in Rio de Janeiro as a consequence of the rupture of a pipeline. It was proved that if the corporation had hired more employees to inspect the controlling machines, and if it had checked the equipment more frequently, the accident could have been avoided. In 2003, a reservoir of Cataguazes Papel Ltd. (a paper factory in Minas Gerais) exploded and spilled 320 million gallons (1.2 billion liters) of toxic materials into two rivers. It left over 600 000 people without regular water, and dozens died as a result of the contamination. Both companies were tried and condemned to compensate the victims, yet there has been no attempt to criminally prosecute them because the prevailing understanding is that the Constitution does not permit the ascription of liability to corporations.

2.2. Law 9 605/88

In spite of the controversy regarding the meaning of the Constitutional provisions on criminal liability of juristic persons, the Environmental Law (Law number 9 605), edited in 1998, was innovative and brought some constructive perspectives to this troublesome area. The Brazilian Environmental Law was the first statute to follow the interpretation of the Constitution that authorizes criminal responsibility of corporations, yet the

pioneering character of this ruling is no guarantee of immediate effect. This statute faces problems of two orders, theoretical and practical. On a theoretical level, its legitimacy is questioned. It is argued that the statute violates constitutional principles. The practical problems range from the model used as a parameter to attribute liability to juristic persons to the lack of more comprehensive stipulations about the proper procedures to be employed to the excessive number and hybrid character of types of conduct to be considered as crimes.

The validity of Law 9 503/98 as a legitimate legal instrument has been questioned, especially by those who traditionally oppose the imposition of criminal liability on corporations. It has been constantly argued that this law tries to violate the precious axiom *societas deliquere non potest* and for that reason is unconstitutional and need not to be obeyed.[46] This kind of argument only reiterates what had been previously claimed against the Constitutional provisions about criminal liability of corporations. It seems logical that such opposition would occur; however these claims are not only obsolete but also completely unsound. It is clear that the Constitution gave special power to the ordinary legislator to regulate conduct that would harm the environment; this statute is simply an exercise of this legitimate power. The opposing argument reflects a myopic view of the legal system and of the corporations. It incorporates the idea that there are immutable principles, the maxim that only

[46] Luiz Regis Prado, *Curso de Direito Penal Brasileiro- Parte Geral*, 2ed. (Sao Paulo: Revista dos Tribunais, 2000) at 181.

individuals commit crimes would be one of these principles. It is at least archaic to think of a legal system as something static, guided by principles that cannot be reinterpreted or replaced. In addition to that, if the protection of the environment is another constitutional principle, it would make no sense to understand that the constitution could not confer power to the ordinary legislator to regulate and control environmental offences.

The unsoundness of the opposition's argument does not mean that the Law 9503/98 is flawless. The more challenging provision of the Law 9605/98 is article 3, where it is asserted that fictional entities can be criminally accountable when the crime is committed by their legal or contractual representatives in the interest of the corporation. This provision faces two related problems. First, it is not clear if the legislator wanted to embrace some kind of agency or identification doctrine, i.e, to attribute criminal liability to corporations by identifying a guilty mind within its members. The statute says that the juristic person can be held liable for the conduct of its legal or contractual representatives. The expression "legal representatives" can be broadly interpreted as so to include lower echelon employees up to directors. This interpretation would lead to an attribution of liability that resembles agency theory. The same article can be interpreted in a narrower way, identifying as legal representatives only higher echelon employees. Such understanding is reminiscent of the identification theory which also targets only a small group of employees.

Regarding the proper procedures to prosecute a juristic person for crimes against the environment, Law 9503/98 is largely silent. Chapter IV of this statute has only two stipulations regarding the suitable penal procedure to be employed, and neither says anything about juristic persons. Luiz Regis Prado states that the legislator was influenced by the Anglo-American law but inspired by the French model of attributing liability to corporations. According to this author, it was right to be inspired and influenced by these two legal systems, although the legislative sin was not to adopt these examples more comprehensively. [47] The problem with the Brazilian approach to corporate criminal liability, or the Brazilian frustrated attempt to regulate corporate criminal liability, is not that it has chosen the wrong models to evolve from. That the inspiration for such liability must come, at least in part from common law legal systems, is obvious; they pioneered this concept in the 19th century after the French Revolution and from their experience it is possible to extract valuable lessons, to learn what has failed and what has succeeded. The French approach, as the first adaptation of the common law idea of corporate criminal liability to civil law, must also be considered. The problem with the Brazilian approach is that the legislature did not prepare the legal system to receive a new concept. It could have done so by examining more comprehensively how common law legal systems and France have committed to the implementation and development of corporate criminal liability.

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[47] *Ibid*. at 181.

In France, the legislature, also influenced by Anglo-American legal systems, was careful and passed an adaptation law (Law 92-1336/ 1992) simultaneously with the new penal code. It altered numerous legal texts in order to shape these other provisions in accordance with the changes brought to the new penal code. In doing so, the French legislature thus prepared the whole legal system to receive the new changes and make them applicable and efficient. The Brazilian legislature was not so cautious and, although inspired by the French model, they did not entirely observe the French adaptation process.

Chapter V of this law lays down the conduct that should be considered in crimes against the environment. The description of conduct does not distinguish between individual or collective conduct, although all persons are considered offenders. The hybrid character would not be a problem in other legal systems, yet in an extremely positivist legal system like the Brazilian, in order to be legitimate, each criminal conduct described in any statute has to state clearly who is its target, in other words, who is the potential author of the described crime.[48] The Brazilian legislator should have followed the French example where the conduct to be attributed to a moral person is distinguished from individual conduct.

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[48] Although the scenario of the Brazilian system is becoming more hybrid, the interpretation and the application of the law is still done in a traditional positivist manner. It is believed that the law, especially the statutes, have normative power. Only what is regulated by the law is believed to legal validity, if a social fact is not described by the law, it does not produce any legal consequence. Morality and law are not necessarily connected.

Although this law is restricted to environmental offences, it represents a benchmark for criminal liability of juristic persons. It is the first step in order to attempt to prosecute and punish corporations for criminal offences. If the law had been more carefully elaborated, it would represent a real change, but because of its flaws it is only an attempt. Considering the Brazilian perspectives, this effort is valuable and has to be taken as the starting point for future transformations. However, much more has to be done. As Silvina Bacigalupo states, the simple introduction in the legal system of a provision that refers to the criminal liability of a juristic person will not be the solution if the basis of such liability is not established. [49]

2.3.Brazilian doctrinal position

Scholars, as Merriman points out, are the real protagonists of the civil law tradition.[50] Their comments, called *doctrine* are a very important, living source of law. The doctrine moulds the civil law system. Legislators and judges use concepts and ideas that have been examined and developed by scholars. Renowned scholars' opinions, although they are not formal sources of law, carry significant authority. As Rene David and John Brierley stated:

> [D]octrinal writing establishes the methods by which law will be understood and statutes interpreted. There is, further, the influence that legal scholarship can exercise on the legislators themselves; often the latter merely give expression and effect to tendencies that have developed doctrinally, or enact

[49] Silvina Bacigalupo, *La Responsabilidad Penal de Las Personas Juridicas* (Barcelona: Bosch, 1998) at 30.
[50] John Henry Merrymam, *The Civil Law Tradition,* 2nd ed. *(*Stanford: Stanford University Press, 1985) at 56

> laws which have been conceived by legal writers. (…) Legal writing stimulates the legislators to action; here, then, it is only a mediate source of law. But it also plays a role in the application of enacted law; in this respect, unless reality is distorted, it is difficult to contest its status as a source of law.[51]

The prevailing posture in Brazilian scholarship is not to accept criminal liability of corporations. [52] Some scholars do not even deeply analyze the issue; they completely reject the attribution of liability to juristic persons, arguing that the institution of such liability is an attempt to destabilize the criminal system.[53] According to these scholars, the correct interpretation of the Brazilian Constitution does not lead to the conclusion that corporate criminal liability was embraced by Brazilian law.

René Ariel Dotti, one of the strongest opponents of the attribution of liability to juristic persons argues that the assumption that the Brazilian constitution instituted this atypical kind of liability leads to the conclusion that such disposition is arrogant and arbitrary. He quotes Jean Cruet to support his argument: 'Everyday we see society changing the law, but we have never seen the law changing society.' [54] In this view, the legislature would have been arrogant and arbitrary if it assumed that it could change society by legislating such an issue as corporate criminal liability. Dotti also refers to the advocates of criminal liability of corporations as adventurous abolitionists;

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[51] Rene David & John E. C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3rd ed. (London: Stevens & Sons, 1985) at 148.[David & Brierley]
[52] René Ariel Dotti, "A Incapacidade Criminal da Pesoa Juridica (Uma Perspectiva do Direito Brasileiro),"*in* Prado, Luis Régis ed., *Responasabilidade Penal da Pesoa Juridica: Em defesa do Prinicipio da Imputação Penal Subjetiva*(São Paulo: Revista dos Tribunais, 2001)141 at 144. [Dotti]
[53] *Ibid.*
[54] Dotti, *ibid.* [translated by author].

according to this author they vindicate the destruction of positive criminal law.[55] This attitude against such innovative issue as corporate criminal liability is not surprising, especially in a civil law country. More conservative scholars usually believe that law is a rigid system where formal respect to the rules is vital. Consequently, the mere assumption that corporate criminal liability could be accepted is a threat to the positive ideal of law; it is a challenge to secular legal principles.

Even with the prevalence of such preconceived ideas, the future of criminal liability of corporations in Brazil is not hopeless. There have been some voices that urge to the acceptance of corporate criminal accountability. This minority group recognizes that the statutory provisions were not successful in their endeavour, yet these statutes brought the issue of corporate criminal liability into discussion.

According to Ives Gandra Martins, one of the main supporters of the attribution of corporate criminal liability, the actual constitution broke free from the principle that had dominated the Brazilian legal system: corporations could not be criminally responsible.[56] Luis Paulo Sirvinkas adds that, by doing that, the Brazilian Constitution not only reflected the trends of modern

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[55] *Ibid*. at 148.

[56] Ives Gandra Martins cited in Sérgio Salomão Shecaria , "A Responsabilidade penal da Pesoa Juridica e Nossa Recente Legislacao," in Luiz Flávio Gomes, ed., *Responsabilidade Penal da Pessoa Juridica e Medidas Provisorias e Direiro Penal* (São Paulo: Revista dos Tribunais, 1999) 131 at 134

law but also courageously detached criminal law from orthodox principles.[57] Damásio Evangelista de Jesus, an influential criminal law scholar, switched sides. In his manual of penal law, published in 1993 he emphasized that only a human being could commit crimes. Later, in an article published in 2002 he asserted that the maxim *societas delinquere non potest* should be overridden and that social changes justify the attribution of criminal liability to corporations.[58]

2.4. Brazilian courts' position

Traditionally Brazilian courts do not legislate and have a limited interpretative function; they interpret the Statutes that are considered as the primary source of law. The judge's function in a jurisdiction like Brazil can be considered narrow, mechanical and uncreative.[59] The role of the judge is as of a guardian of the rule of law; he or she ensures that the rule of the law is respected. It is not for the civil law judge to question or criticize the law. Accordingly, the judiciary has a complementary role; the legislative enacts rules that will be protected by the judiciary. Nonetheless, it would be too early to conclude that the judiciary has no importance for the implementation of corporate criminal liability in Brazil. Today, in civil law countries, there is a growing tendency to recognize the autonomous nature of judicial legal

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[57] Luis Paulo Sirvinskas, "Pessoa Juridica e Responsabilidade Penal," online: O Neófito <http://www.neofito.com.br>

[58] De Jesus, Damásio Evangelista, *Direito Penal, vol I* (São Paulo: Saraiva, 1993) 1999; "Breves Considerações Sobre a Responsabilidade Penal das Pessoas Jurídicas", online: Complexo Jurídico Damásio de Jesus < www.damasio.com.br/novo/html/artigos/art_112 htm>.

[59] See Merryman, *supra* note 129 at 38.

interpretation and Brazil is no exception to this trend. [60] As will be discussed below, some Brazilian judges, especially those of southern states such as Santa Catarina, Rio Grande do Sul and Paraná, have been going beyond the grammatical interpretation of statutes. They try not only to fill gaps in the legislative scheme by adapting the laws to reality, but also to interpret a statute more broadly. This less orthodox posture of the judiciary can promote the concept of corporate criminal liability in Brazil if judges start to interpret the Constitution and the Environmental Law more broadly so as to include juristic persons as potential criminal agents.

Brazilian legislators were in the vanguard when they passed such legal texts as the Constitution and the Law 9605/98 admitting the possible attribution of criminal liability to juristic persons. Some Brazilian legal scholars have manifested an the acceptance of this type of liability; meanwhile, Brazilian courts have been almost inflexible. The majority of court decisions are still applying the criminal sanction to the individual and civil and administrative sanctions to the juristic person. [61] Justice Espirito Santo's opinion in an environmental crime case corroborated this reality when he stated that because a juristic person cannot commit crimes its directors should be individually responsible for the crime.[62] Justice Carvalhido in a decision of the Superior Tribunal of Justice of Sao Paulo argued that criminal responsibility can

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[60] Arnaud (A.J), *Les jurists face à la société. Du XIX siècle à nous jours* (1975) cited in David & Brierley, *supra* note 130 at 147.
[61] José Carlos de Oliveira Robaldo, "A Responsabilidade Penal da Pessoa Jurídica: Direito Penal na Contramão da História", in Luiz Flávio Gomes ed., *Responsabilidade penal da pessoa juridica e medidas provisorias de direiro penal* (São Paulo: Revista dos Tribunais, 1999) 103.
[62] TJ/ES (2 Turma) – HC – Processo: 9702230047 – TRF200050355 – 06. 09. 1997.

only and exclusively be attributed to the individual. [63]In another decision this same Justice affirmed that the attribution of criminal responsibility to a juristic person is inconceivable, and it goes against the basis of legal state and criminal law that are vital to the life of a democratic society. [64]Justice Dipp deciding for the Superior Tribunal of Justice of Pernambuco in a case about environmental crime stated that juristic persons are mere fictions and cannot be responsible for crimes.[65]

However, a dissonant position was taken by the Federal Tribunal of Santa Catarina in 2003. In a case about illegal extraction of minerals, the company that was extracting minerals without authorization was found guilty. Justice Castro stated that the company had to be punished because to attribute liability to its representative would allow the company to continue its criminal activities. According to Justice Castro, criminal liability of juristic persons is in accordance with constitutional and penal principles since it is the expression and exercise of the principle of social justice and social interest which should prevail above other principles.[66] This is still an isolated position, although it is important as the first judicial precedent for criminal liability of juristic persons. The conservative character of Brazilian courts does not indicate that this opinion will prevail, at least not immediately, yet this decision may influence future changes.

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[63] STJ/PR (6 Turma) – HC 18338 – STJ000470366 – 06/08/2002
[64] STJ/SP (6 Turma) – HC 15051 – STJ000396822 – 06/03/2001
[65] STJ/ PE (5 Turma) – HC 21644 – STJ000505979 – 29/09/2003
[66] TRF/SC (4 Turma) – Ap Crim 2002. 71. 04. 002225-0- SC- 8 T. 06.0.2003

2.5.The Minimal Penal Law movement and its consequences for corporate criminal liability in Brazil

In some civil law systems, especially in Germany, Italy, Spain and Brazil, the denial of corporate criminal liability is particularly reinforced by the followers of the guarantist-minimalist movement who advocate for the minimal application of penal law.[67] The theory of minimal penal law is a growing trend in Europe and Latin America. The minimal penal law movement has its roots in the declaration of Rights of Man and Citizens, 1789 that in article 8 stated that **"**[t]he law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offence." Minimal penal law is a theoretical movement against the demagogical and disruptive use of penal law. It argues that penal law must be used as *ultima ratio* and not as *sola* or *prima ratio*.[68] Accordingly, penal law should be resorted to when all others have proven insufficient to the solution of social imbalance. De Pinho explains that this

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[67] The minimal penal law movement is based on the ideas of German criminologist Franz von Liszt. See Franz Von Liszt, *Teoria Finalista do Direito* (São Paulo: LZN, 2003); *Tratado de Direito Penal* (São Paulo: Russell, 2003).This movement is also called abolitionist theory and the main precursor of this theory is Luigi Ferrajoli. See, Luigi Ferrajoli, *Derecho y Razón* (Madrid: Trotta, 1995). Minimal Penal Law is a growing trend in some European continental countries, especially Germany, Italy and Spain; it has also influenced some Latin American countries, including Brazil, Argentina and Chile. See G.Jakobs, *La Imputación Objetiva en Derecho Penal* (Madrid: Civitas, 1996); F. Muñoz Conde and M. García Arán *Derecho Penal. Parte General* (Valencia: Tirant Lo Blanch, 1996); Muñoz Conde, "Principios Politicos Criminales que Inspiran el Tratamiento de los Delitos Contra el Orden Socioeconomico en el Proyeto de Codigo Penal Espanol de 1994" (1995) 11 Revista Brasileira de Ciencias Criminais, 11; Claus Roxin, *Derecho Penal. Parte general. Tomo I*. (Madrid: Civitas, 1997); Claus Roxin *et al.*, *Sobre el Estado de La Teoría del Delito* (Madrid: Civitas,2000).

[68] *Ultima ratio* – last expedient; *sola ratio* – only expedient; *prima ratio* – first expedient [translated by author].

movement is a reaction to the law and order movement that was created in countries affiliated with the Anglo-Saxon legal system. [69]

The guarantist-minimalist advocates for the non-intervention of the State in the private lives of its citizens; as a result, crimes that represent more personal than social harm, such as defamation and drug use, should be regulated by administrative law. A more elaborated approach of minimal penal law is brought by Hassemer [70]who suggests the creation of an intermediary law to control what he calls modern criminality. This intermediary law would be something in between criminal and administrative law.[71] According to this position, the use of criminal law to punish corporations is not necessary, first because there is no purpose, and secondly because it is ineffective. In this viewpoint, the use of criminal law to punish corporations would be merely symbolic, and for that reason, unfair.[72]

2.6.Problems for the introduction of corporate criminal liability

Resistance to the attribution of criminal liability to corporations is mainly, but not essentially, historical. The Brazilian legal system inherited the roman-germanic belief that only individuals commit crimes. This idea has been influential for the Brazilian

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[69] Ana Cláudia B de Pinho., "Em busca de um Direito Penal Mínimo e de uma Redefinição de Papel para o Ministério Público" online: Revista de Direito Penal <http://www.direitopenal.adv.br/artigos.asp?pagina=9&id=250>.
[70]Winfried Hassemer, *Três temas de Direito Penal* (Porto Alegre: Publicação da Escola Superior do Ministério Público, 1993) 59.
[71] *Ibid.* The intermediary law, as proposed by Hassemer, would be a mix between administrative and criminal law. It would be administrative in its nature but it would be enforced like criminal law.
[72] Guilherme José Ferreira da Silva, *A Incapacidade Criminal da Pessoa Jurídica* (Belo Horizonte Brazil: Del Rey, 2003) 109.

criminal law and it has been the most important argument against corporate criminal liability. However, some other causes can be identified as crucial problems to the implementation of the concept of corporate criminal liability: the nature of the Brazilian legal system and the lack of systemized doctrinal construction.

Rigidity of the Brazilian legal system

The Brazilian legal system is rigid. Unlike common law legal systems, only statutes have the authority of law. Precedents, doctrine and customs have their places as secondary sources of the law, but they do not carry the authority of the law. The introduction of a new concept must be in statutory form and usually preceded by extensive doctrinal debate. This process is believed to give a scientific character to the law. Accordingly, for the attribution of criminal liability to corporations to be an effective legal concept, it has to come through a statutory change, as an amendment to the Constitution and/or to the Penal Code.

Lack of a systematic doctrinal construction

If on one side the rigidity of the system makes it difficult for changes to take effect, on the other side, the lack of information or interest by the legislators make it even harder for changes to occur. Despite the fact that legislators have the real power to propose or approve changes to the legal system, they form their opinions under the influence of doctrine. Consequently, the lack of information and interest by the legislators is an effect of the lack of relevant doctrinal work. The weak doctrinal construction could be attributed to a myriad of factors, but for the purpose of the

present analysis two important facts can be pointed to: 1) the relatively recent discussion about the issue of corporate criminal liability; and 2) debates centred exclusively on the nature of corporations. While in some common law countries discussions about corporate criminal liability date back more than a century, in Brazil debates on this issue have only become prominent in the last decade. The majority of the articles and books that have been written in Portuguese are not an extensive study of the issue. Rather, they represent superficial discussions centred on the problem of the nature of the juristic persons.[73]

Core issues of the attribution of criminal liability are simply ignored or neglected by Brazilian doctrine. Corporate criminal liability has not been seen by Brazilian doctrine as part of a broader context, i.e., little has been said about corporate crime and the need to use criminal law to deter corporate criminality. In addition to that, an examination of the necessary attributes to be a criminal agent has not been done. The nature of corporations is an important element for corporate criminal liability; however, alone it cannot justify this attribution. The fact that corporations are real entities does not automatically justify criminal liability. Some other elements must be considered, such as the life of corporations, their ability to be moral agents, and their ability to act and to have *mens rea*. The following chapters are intended to be a

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[73] De Sanctis and Shecaria defend the imposition of corporate criminal liability on the basis that corporations are real persons. On the other hand, Da Silva argues that corporations are fictional entities, and for this reason cannot commit crimes. [De Sanctis, Fausto Martin. *Responsabilidade Penal da Pessoa Jurídica* (São Paulo: editora Saraiva, 1999); Da Silva, Guilherme José Ferreira, *A Incapacidade Criminal da Pessoa Jurídica* (Belo Horizonte Brazil: Del Rey, 2003); Shecaria, Sérgio Salomão, *A Responsabilidade Penal da Pessoa Jurídica,* 2 ed. (São Paulo: editora Método, 2003)]

preliminary exploration of these questions as a foundation for future developments in Brazilian law.

III. CORPORATE CRIME: A FRAMEWORK

Introduction

As part of the industrial (or corporate) era, corporate criminality is inherent in contemporary society. However, theoretically, corporate crime is still an obscure territory. Corporate criminality is a complex phenomenon that has started to be discussed and analyzed quite recently in comparison to traditional crimes. Criminal law and criminology have been almost exclusively focused on individual misconduct, especially in Brazil. Corporate crime is a relatively new topic for criminologists and it is still a controversial subject for legal theorists. More qualitative and quantitative analyses of corporate crime are needed. Since the subject was brought to public attention over 50 years ago, scholars have not agreed on a proper concept for corporate crime, nor have official data on the harm and cost caused by corporate crime been gathered. It is not the purpose of this work to focus on these issues or to claim an ultimate and refined examination of corporate criminality. Still, it is important to provide a general account of corporate crime and its consequences in order to further elaborate on corporate criminal liability. What follows is rather a superficial attempt to glance at corporate crime, its seriousness and costs, as a preliminary validation of our further claim for the use of strong controlling mechanism of corporate criminality in Brazil

3.1. Conceptualizing corporate crime

Problems associated with the attribution of criminal liability to corporations are not limited to the use of criminal sanctions against corporations or to the application of criminal law

principles to corporate offenders; the very concept of corporate crime and the type of conducts that should be considered corporate crime are also problematical aspects of corporate criminal liability. Geis and Meier characterize the task of defining corporate crime as "an intellectual nightmare."[74] [2] Divergent concepts and classifications of corporate crime add more fuel to the already hot debate about corporate liability, for they can either reinforce or contravene the attribution of criminal liability to corporations. A dependable basis of corporate criminal liability relies on a proper concept and categorization of corporate crime.

The terms corporate crime, white collar crime, organizational crime and occupational crime are often used interchangeably. Although close in meaning, these expressions do not suggest the same thing.[75] Occupational crime is by far the least similar expression of this group of terms; it implies a completely different category of crimes. Occupational crimes do not refer to crimes committed by a corporate entity; instead, they refer to those crimes committed by the corporate employee not in favour of the corporation. Usually, but not necessarily, the corporation is the only victim. Examples of these crimes are embezzlement, employer theft, fraud, and misuse of company property. It is rather inappropriate to refer to the crimes committed by corporations as occupational crimes.

A more common ground can be found between the expressions corporate crime and white-collar crime. Indeed, these expressions are truly related. It was the designation white-collar crimes which brought attention to a different kind of crime ocurring in the corporate setting.

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[74] Geis and Meier cited in David O. Friedrichis,, "White Collar Crime and the Definitional Quagmire: A Provisional Solution" (1992) 4 Journal of Human Justice 6 at 6.

[75] It is worthy to note that other expressions are also used as reference to corporate crime: commercial crime, crimes of the powerful, crimes at the top, crimes of the suites, economic crime and elite deviance.

The term white-collar crime has been employed for more than half a century. It was first coined by Sutherland, who called white-collar crime the "crime committed by a person of respectability and high social status in the course of his occupation."[76] Despite its importance for criminology, this definition is too narrow and does not correspond to the reality of corporate crime. By putting too much emphasis on the individual offender and on his or her special attributes such as high social status or respectability and not on the conduct or on the harm caused by the criminal act, the term white-collar excludes or makes it hard to place non-individual conduct in the same rank of offences. Moreover, this expression does not clearly differentiate between individual intent and corporate intent. Without making any reference to the corporation, it neglects those behaviours that are influenced and triggered by corporate culture. The nomenclature is also too narrow since it restricts the criminal conduct to the actions of highly-stationed employees. Generally, white-collar crimes are associated with economic and financial crimes, and usually the offender acts to seek personal gain. This is also the meaning that the expression has in Brazil, where it is literally translated as "crimes do colarinho branco." Because of the individual connotation carried in the label white-collar crimes, the expression corporate crime is preferable since it makes it easier to understand corporations as the agents of the misconduct and consequently as the proper entities that would be held responsible for the act. Corporate crime can be understood as a category of organizational crime. Organizational crime refers to the criminal conduct and activities of a wide range of organizations. Because a corporation is a kind of organization, corporate crime

[76] Edwin H. Sutherland, *White Collar Crime* (New York: Holt, Rinehart & Winston, 1949) 9.

would be included in this broader class of crimes. Corporate crimes can be understood as criminal activities engaged in by corporations for the corporations' benefit as a whole.

The term "corporate crime" is not common among Brazilian legal scholars; in reality, there is no proper term to refer to crimes committed by corporations. However, evidence suggests that it is just a matter of time until Brazilian scholars will import from English speaking countries the term corporate crime. Russel and Weissman's book "Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust" was published in Portuguese with the title "crimes corporativos: O Poder das Grandes Empresas e o Abuso da Confiança Pública" what indicates a trend of incorporating corporate crime to the local legal vocabulary.

3.2. Classification of corporate crimes

More difficult than the search for a proper definition of corporate misbehaviour is the classification of the kinds of acts that can be considered corporate crime. The classic dispute between Sutherland and Tappan about the role of crimes that could be classified as white collar crimes can be somehow adapted to the broader territory of corporate criminality. Sutherland suggested a restricted role,[77] covering a less heterogeneous range of offences while Tappan had a broader approach. Followers[78] of Sutherland's position propose a critical or relativist conception of corporate crime; accordingly, corporate crimes would be only what legal theory

[77] Sutherland's concept is considered narrow by some authors: Pepinsky typifies such assumption in the argument that Sutherland's concept is socio economic biased. (Pepinsky, Harold, *"From White Collar Crime to Exploitation: Redefinition of a Field"*, (1974) 65 The Journal of Criminal Law and Criminology 225.) Acording to Braithwaite, Sutherland's concept has become an imprisoning framework for contemporary scholarship (Braithwaite, John, "White Collar Crime" (1985) 11 Annual Review of Sociology 1, at 3). See also, Susan Shapiro, "Collaring the Crime not the Criminal: Reconsidering the Concept of White- Collar Crime (1990) 55 American Sociological Review 346.

[78] See e.g, H. Edelhertz, *The Nature, Impact and Prosecution of White Collar Crime,* Washington, DC: National Institute for Law Enforcement and Criminal Justice; Pepinsky, H.E., 1974. "From White Collar Crime to Exploitation: Redefinition of a Field" (1974) 65 Journal of Criminal Law and Criminology 225.

describes as a crime. Corporate crimes would be conduct that is defined, prohibited and punishable.[79] On the other hand, supporters[80] of Tappan's conception consider an act to be criminal if a criminal court has officially determined that the person or entity accused of violating the law has committed a crime. In harmony with this view, corporate crimes would be any act committed by corporations that are punished by the State, regardless of whether the act is punished under administrative, civil or criminal law.[81] This broader definition of corporate crime would better suit the purpose of criminology since few harmful corporate illegalities or other wrongdoing fit Sutherland's narrow legal definition of crime.[82] However, for the purpose of criminal law and the attribution of criminal liability, corporate crime still has to fit the legal definition of crime, and for this reason, Sutherland´s view should be the basis of corporate criminal liability. Accordingly, criminal liability would be attributed to corporations only if corporations had engaged in conduct that is legally typified as a crime respecting the principle"*nullum crimen, nulla poena sine lege* " which is basic to Brazilian criminal law.[83]

Considering the existing descriptions of crimes, it is possible to divide corporate crime into two large groups: property crimes, which cause only economic damage; and violent crimes, which cause injury, sickness, or death. Property crimes can affect competitors, governments, consumers and the general public. Some examples of crimes that affect competitors include the following: espionage; arson; patent copying; bribery and corruption to influence those in new or expanding markets, such as government officials in developing economies; price-fixing to

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[79] See B. Grant Stitt, & David J Giacopassi,., "Assessing Victimization from Corporate Harms" in Michael B.Blakenship , ed., *Understanding Corporate Criminality* (New York: Garland Publishing, 1993) 57.
[80] See e.g. Shapiro, *supra* note 6.
[81] M.B. Clinard & P.C. Yeager, *Corporate Crime* (New York: Free Press, 1980) 16.
[82] Russell Mokhiber, , *Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust* (San Francisco: Sierra Club Books, 1989) 10.
[83] See art. 5°,II of the Brazilian Federal Constitution and art. 1° of the Brazilian Penal Code.

squeeze out new competitors or to rationalize competition; and mergers or takeovers in violation of anti-monopoly legislation. Crimes that affect governments include: tax evasion or avoidance; illegal campaign funds to politicians; bribing state officials in return for lucrative employment; fraudulent information to prevent, influence, or repeal legislation; exporting illegal behaviour to another state where it is not illegal; and fraudulent billing of governments. Examples of property crimes that affect consumers and general public: fraudulent advertising, misleading sales behaviour; false labelling of products; manufacture or distribution of dangerous products; and selling goods at inflated prices and increased tax bill because of corporate tax avoidance schemes.

The second group of crimes, referred to as violent crimes, is the one that generates more controversy. While most property crimes do not necessarily require proof of intent, for most violent crimes intention is an essential requisite.[84] Legal scholars disagree on whether corporations lack the ability to form an intention or not. Violent crimes might affect consumers, workers and the public. Examples of criminal conduct that can injure, cause death or diseases to consumers include: false labelling of products; and manufacture or distribution of dangerous products. The Thalidomide Scandal and the Ford Pinto case are notorious instances of corporate crime against the consumer.[85] Workers are also victims of corporate

[84] It is important to highlight that although we consider environmental crimes as part of this group, usually in most jurisdictions they are strict liability offences.

[85] Thalidomide, a non-barbiturate hypnotic, was discovered in Germany in 1954. Satisfied by clinical trials that it was a safe and effective sedative and hypnotic drug, in October 1957 they advertised it as a sedative under the trade name Contergan. Within months it was being distributed under a variety of names in numerous countries through the world, both as sedative, and, in combination with substances like aspirin, to treat minor ailments such as colds, soughs and influenza. In Britain, for two years, it was available over the counter, as well as on National Health Prescription. In Germany it was sold over the counter without prescription. In 1958 Chemie Grünenthal ran intensive advertising campaigns extolling the merits of thalidomide, with particular stress on its alleged lack of toxicity and reinforcing that the medicine was completely safe for pregnant women and nursing mothers. In mid-1959 serious reports onward that thalidomide was responsible for toxic poly-neurits-nerve damage with

criminality. Corporations usually endanger the health and lives of their employees by disrespecting or simply ignoring safety measures. The Imperial Food case illustrates how corporate crime can affect the workers. A fire in a plant run by Imperial Food in North Carolina claimed twenty-five lives. Investigation revealed that the plant had no alarms or sprinkler system and the emergency exists were locked. [86] Criminal conduct that affects the public can be exemplified by environmental offences such as air and land pollution, as well as depletion of scarce resources. Crimes that victimize the public are more difficult to assess than violent corporate actions directed toward consumers and workers. While it is clear that

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severe consequences. An increasing number of doctors and pharmacists wanted to put the drug on prescription because of these reports. Despite this fact, the sales promotion continued unabated, with advertising leaflets containing phrases such as 'non-toxic" and "completely harmless even for infants." In April 1960, in an internal memorandum, Dr. Muckter, who was responsible for developing thalidomide, stated that everything should be done to avoid prescription enforcement on the drug since a substantial amount of the company turnover comes from over-the-counter sales. At that time, tahlidominde, represented 46 per cent of Chemie Grüntenthal's total turnover. By 1961, nearly two and a half thousand cases had been reported to Chemie Grüntenthal. However, it was still possible to buy thalidomide over the counter. Shortly , the mounting speculation that thalidomide was also responsible for the unprecedent outbreak of foetal deformity in West Germany (and elsewhere) was hardening into evidence too compeling to ignore. Thalidomide was withdrawn from the market on 27 November 191. On 8 March 1962, Richardson-Merrell withdrew its application to sell the drug in the United States, but not before pre-marketing trials by 1. 270 doctors ensured that over 20 000 patients, at least 200 of them pregnant, had taken it. Thalidomide was still on sale in Canada in April 1962, and was used in Japan for a year after it had been withdrawn in most other countries.[See e.g, Harvey Teff and Colin Munro, "Thalidomide: The Legal Aftermath" (Westmead, England: Saxon House, Teakfiels Limited, 1976)] In Brazil, the withdraw occurred in 1965, four years after the withdraw in developed countries.[See online: Associação Brasileira dos Portadores da Síndrome de Talidomida< http://members.tripod.com/~abpstalidomida/historico.htm >].
The Ford Pinto case refers to a series of cases involving the explosion of Ford Pintos due to a defective fuel system and other design flaws. In May of 1968, the Ford Motor Company, based upon a recommendation by then vice-president Lee Iacocca, decided to introduce a subcompact car and produce it domestically. At that time there was strong competition for Ford in the American small-car market from Volkswagen and several Japanese companies in the 1960's. To fight the competition Ford Pinto was designed and developed on an accelerated schedule. Before production however, Ford engineers discovered a major flaw in the cars design. In nearly all rear-end crash test collisions the Pinto's fuel system would rupture extremely easily. Nevertheless, *top Ford officials decided to manufacture the car anyway.* Safety was not a major concern to Ford at the time of the development of the Pinto. The financial analysis that Ford conducted on the Pinto concluded that it was not cost-efficient to add an $11 per car cost in order to correct a flaw. In 1978 Ford was prosecuted for manslaughter after three teenagers that were passengers in a Ford Pinto died in a automobile crash[State v. Ford Motor Company, No. 5324 (Ind. Super. Ct. Sept. 3, 1978)]. It is questionable whether the defective fuel engine was the sole cause of the accident, but it certainly contributed to the deaths.[See also Daniel R Fischel and Alan O. Sykes, "Corporate Crime"(1995-1996) 24-25 The Journal of Legal Studies 319 at 337].

[86] Stephen E. Brown & Chau-Pu Chiang, "Defining Corporate Crime: A Critique of Traditional Parameters" in Michael B. Blakenship, ed., "Understanding Corporate Criminality: Challenges and Issues" in *Understanding Corporate Crime* (New York: Garland Publishing, 1993) 29 at 43.

environmental pollution causes many health problems and deaths, it is difficult to establish the causal connection between specific illnesses and deaths and decisions by corporations to engage in illegal pollution.

3.3.Seriousness of corporate crime

Unrestricted corporate power generates immeasurable social damage. Since corporations are more influential than individuals, it has been shown that corporations are capable of doing greater harm than persons acting in their individual capacities.[87] In a study conducted by Edwin Sutherland in 1949, it was found, among other things, that what he called "white-collar crimes" were as serious as the top street crimes and produced more harm than individual crimes. Although the panorama has changed since the study was done, and more empirical research is needed, it is not difficult to perceive that the problems pointed out by Sutherland persist today in a much larger proportion.[88]

Even though it may be impossible to determine precisely how many people are killed and injured as a result of corporate crime, as Coleman points out, claims that this kind of offence is harmless or nonviolent cannot be taken seriously.[89] Because of matters of scale, corporations often possess the potential to harm more people.[90] The Bhopal tragedy in India is an

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[87] Charles J. Walsh and Alicia Pyrich, "Corporate Compliance Programs as a Defence to Criminal Liability: Can a Corporation Save its Soul?" (1995) 47 Rutgers Law Review 605, 639.
[88] Sutherland, *supra* note 4. Despite its age this research still is a reference for today's commentators. See e.g. John Braithwaite, "Challenging Just Deserts: Punishing White-Collar Criminals" (1982) 73 The Journal of Criminal Law and Criminology 723; Bruce Coleman, "Is Corporate Criminal Liability Really Necessary?" (1975) 29 Southwestern Law Journal 908. Charles J. Walsh and Alicia Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?" (1995) 47 *Rutgers Law Review* 605;
[89] James W. Coleman, *The Criminal Elite: The Sociology of White Collar Crime* (New York: St. Martin's Press, 1985) 7
[90] M. Levi cited in Valerie P. Hans, "Attitudes Toward Corporate Responsibility: A Psycholegal Perspective" (1990) 69 Nebraska Law Review 159, 170.

illustration of the greater potential of corporations to harm people.[91] Mega power triggers mega crimes that result in mega harm.

Corporate crimes are not just physically or financially harmful; they also break the moral support of a society. As F. Meier and J.F. Short add, corporate crime threatens the trust that is basic to community life. [92] Crimes committed by corporations trigger a general disillusionment. If the impunity of the powerful prevails, there is no hope for the powerless. It is perceived that the rules do not work for everybody. This feeling can erode a community. By virtually any criterion, then, corporate crime is the most serious crime problem.[93]

3.4. Transnational corporate crime

A peculiar and noteworthy characteristic of corporate criminals is their ability to commit crimes across the limits of national borders. This peculiarity is especially important for corporate crime control in Brazil. Corporate crimes are becoming more and more part of the international setting. This is mainly due to the phenomenon of globalization. With the rising of a new economic paradigm, corporations have found in developing countries the perfect place to commit illegalities. These kinds of crimes are called transnational crimes, and most of them occur in developing countries.[94] Developing countries are particularly vulnerable to corporate criminality as they usually lack proper regulation and infrastructure to control the activities of

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[91] See e.g., "Bhopal: Absolutely Liable", *Economist*, vol. 308, Issue 560, July 23 1988; "The Ghosts of Bhopal", Economist, vol. 310, Issue 590, Feb. 18 1989.
[92] Mokhiber,*supra* 11 at 16.
[93] Coleman, s*upra* note 18 at 7.
[94] Michael J.Gilbert & Steve Russel, "Globalization of Criminal Justice in the Corporate Context" (2002) 38 Crime, Law and Social Change 211.

corporations. Developed nations tend to be tougher on corporate criminality whereas developing countries cannot afford to fight against corporations and risk to losing the economic “advantages” that corporations bring, such as more employment and support of social projects. Corporate attitudes like that are not only criminal, but also immoral, and for this reason alone criminal conduct of corporations should deserve particular attention and tougher control and sanctioning.

The Shell case in Brazil is an example of this kind of criminal behaviour of corporations. In the seventies, the production of aldrin, diedrin and endrin by Shell Chemical Company was banned in the US, when it was detected that these organochlorine pesticides were carcinogenic and related to DDT. In 1977, a subsidiary of Shell Chemical in Brasil, the “Shell Química do Brasil,” started to produce these same pesticides - aldrin, dieldrin and endrin, three of the 12 P0Ps condemned by the Stockholm convention - at the Recanto plant, in a residential area of the city of Paulínia in the state of São Paulo.The sale of these agricultural toxins was banned in Brazil in 1985, but production for export continued until 1990.In 1993, when Shell was selling various of its unites to Cyanamid, an environmental inspection was conducted in the Recanto plant. The inspection reported not only contamination of the land and of the river Atibaia but also a toxicological exam showed that 80 percent of the residents of the nearby area presented varying degrees of chronic diseases because of the

contamination of the area. Shell faces a lawsuit, but still has not been held criminally responsible. [95]

Gilbert and Russell advert to the harm that transnational crimes inflict on developing countries, and in their seminal work, "Globalization of Criminal Justice in the Corporate Context" they call for an international control of corporate crime as a matter of global justice. There is no doubt that the only way to control corporate criminality, especially transnational criminality, is to deal with such issues globally. However, for this to happen, a large number of countries, specially developing countries like Brazil, need to be aware of corporate crime and, most importantly, aware of the effectiveness of criminal law to control such deviance.

3.5. Cost of corporate crime

There are no official data on corporate crime in common law jurisdictions; governmental agencies do not bother to collect statistics on such issues. This is not different in Brazil. The lack of information on corporate criminality would be understandable in developing countries where commonly any data are very difficult to obtain and where, in most of the cases, corporations cannot be criminally liable; however, this is also a reality in developed nations. Unofficial research has shown that corporate crimes are not only more harmful than street crimes but also more costly.[96] The economic cost of white-collar crime is vastly greater than

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[95] Victims of the contamination are suing Shell in Brazil. See Mario Osaya, "Shell Group may face lawsuit in Brazil", online: Terramérica, Medio Ambiente y Dessarolo, < http://www.tierramerica.net/2001/0826/iarticulo.shtml>.

[96] This type of data are published by public interest organizations, like citizenworks, directed by Ralph Nader., online: Citizenworks <http://www.citizenworks.org>

the economic cost of street crime.[97] The costs of corporate crime cannot be quantified, but it is estimated that in the Unites States it costs $ 1.5 trillion annually.[98] Lee Drutman, in an article published in Los Angeles Times in 2003 reports that:

> [U]sing conservative numbers, issued by the U.S. Chamber of Commerce, for instance, criminologist Jeffrey Reiman, a professor at American University, estimated that the total cost of white-collar crime in 1997 was $338 billion. The actual cost is probably much greater. For instance, the General Accounting Office, the investigative arm of Congress, estimates that health-care fraud alone costs up to $100 billion each year. Another estimate suggests that the annual cost of antitrust or trade violations is at least $250 billion. By comparison, the FBI estimated that in 2002, the nation's total loss from robbery, burglary, larceny-theft, motor vehicle theft and arson was almost $18 billion. That's less than a third of the estimated $60 billion Enron alone cost investors, pensioners and employees.[99]

Even with no official data, it is not very complicated to reach the conclusion that corporate crime is more costly and causes more damage than individual. It is a simple matter of proportion. Corporations have more power, have fewer limits, and the results of their actions are larger, both negatively and positively. It is also clear that the more we know about corporate crime and how to control it, the less likely crimes would occur. Nonetheless, it does not seem that corporate crime will become an official issue, at least not until corporations are challenged by effective policies and sanctions.

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[97] Coleman, *supra* note 17 at 7.
[98] Unknown, "Cost of Corporate Crime: $ 1.5 Trillion Annually," online: The Foundation for Tax Payers and Consumers Rights <http://www.consumerwatchdog.org/corporate/fs/fs003284.php3>
[99] Lee Drutman, "Corporate Crime Acts Like a Thief in the Night" *Los Angeles Times* (4 November 2003) B.13.

IV- CONTROLLING CORPORATE CRIME: THE NEED OF CRIMINAL SANCTIONS

Introduction

The harm caused by corporations can be measured by the power that they have. One way to control their power and to reduce the harm that they cause is by controlling their misbehaviour through effective sanctions. The role of criminal law is to bring corporate power to face criminal conviction for wrongdoing by making society aware of their crimes and by properly deterring them from committing crimes. The present criminal law has made attempts to effectively punish corporate wrongdoing, but the issue is still controversial and needs to be deeply analysed. It is necessary to employ a wider view of criminal law and of corporations in order to reconstruct criminal law and not to overlook its potential to be a better means of corporate punishment. Criminal law can actually contribute to the rearrangement of the chaotic social unbalance.

4.1. Criminal sanctions and their role in controlling corporate crime

The rationales for imposing criminal sanctions are the touchstone of criminal law. Philosophers, sociologists and legal scholars have continually questioned the use and efficacy of criminal sanctions. Why and how we should punish are everlasting uncertainties. Every answer is an attempt to place punishment as a reasonable device that is functional for a certain time frame. When the offender is a corporation, the

difficulties of answering these core questions are larger and, for some commentators, they are insuperable. The use of criminal law to control corporate misbehaviour is an easy target for strong opposition. As Brickey points out, "one detects a current sense of uneasiness regarding the appropriate role and scope of corporate criminal liability."[100] The efficiency and utility of criminal sanctions against corporate entities are disbelieved and constantly attacked by an extensive number of critics.

Some critics argue that corporate criminal liability serves no purpose. Their supporting arguments are numerous and diverse; they range from the inadequacy of criminal law principles to the inefficiency of the existing criminal law sanctions to deter corporate misbehaviour. It is believed that the only justifiable rationale to impose criminal sanctions against corporations is deterrence, but criminal sanctions are ill suited for this aim. The critique comes from two different fronts; one stream alleges that corporations are not susceptible to deterrence while another stream believes that they are but there is no need to use the criminal law apparatus. The former position believes that monetary penalties are the only sanctions that can be used, and monetary penalties do not deter corporations. The latter position maintains that civil liability covers many of the features that criminal liability does.

At first sight, these challenging arguments might sound convincing, but they cry for a re-evaluation. The reasons for not accepting the opposite views are twofold: this sort of comparison between civil and criminal law is undoubtedly oversimplistic, and

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[100] Kathleen F.Brickey, "Corporate Criminal Accountability: A Brief History and Observation" (1983) 60 Washington University Law Quarterly 393 at 394.

regarding corporate crime, criminal law cannot be seen through a traditional panorama. It requires going beyond traditional theories of deterrence and punishment.[101] These theories must adapt to a new reality. It is pertinent to analyze the differing arguments, to question whether 1) the conventional rationales for criminal enforcement can be used to justify imposition of criminal penalties on corporations; 2) the criminal stigma is socially desirable; and 3) the options of criminal sanctions are efficient.

4.1.1. Retributivism as a sound principle for punishing corporations

Deterrence might be the main goal of corporate punishment, but it is not the only one. Although discussions about the efficacy of criminal liability are mostly restricted to an analysis of their deterrent effect, some arguments can be made for their retributive character. The restorative and communicative character of criminal sanctions is as important as deterrence. Recognizing the fact that criminal sanctions imposed on corporations also carry a retributive function is a crucial step to break from the old conception that corporations have no personality.

Retribution has been widely criticized as a justifiable rationale for imposing criminal sanctions to corporations. The argument that the incorporeal nature of corporations immunizes them from retributive justifications for criminal liability and punishment is commonplace. The crux of this reasoning arises from the assumption that it is

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[101] Gross cited in Gilbert Geis & Ezra Stotland, eds., *White Collar Crime: Theory and Research* (London: Sage Publications, 1980) at 73.

impossible to attach blame to a corporate body[102] because a corporation is not a person, it has no mind and it lacks the capacity to suffer moral condemnation. [103] In addition, it is stated that no retributivist parameter to impose punishment can be established because there is no balance between society and a corporate offender.

These arguments are far from being persuasive and just reveal a narrow and orthodox view of criminal law and of the corporate entity itself. Kantian's traditional retributivist ideas are taken for granted to justify this opposition. The pure Kantian retributive theory might be problematic when used to explain the use of criminal sanctions to punish corporations because it is essentially individualistic. It is built on concepts such as dignity and rational choice, notions that by their nature belong exclusively to individuals. According to the Kantian retributive approach, only people are free agents capable of making decisions; only people are rational agents, and if they do wrong, they deserve mistreatment. By punishing these offenders, society would be paying them pack for what they did. Thus, anthropomorphization would be the only way to attribute moral characteristics to an incorporeal entity. By doing that, corporations would still lack a personality of their own.

The view that corporations are not persons and cannot be subjects of blame loses its meaning when facing a broader approach of corporate identity. The moral element that lies behind corporations' misbehaviour might be different from the moral

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[102] Comments, "The Economic Inefficiency of Corporate Criminal Liability" (1982) 73 The Journal of Criminal Law & Criminology 582 at 583-85 (asserting that retributive theory is inapplicable in corporate context because corporations cannot be morally blameworthy).

[103] *Ibid.* at 584. See also Daniel R Fischel and Alan O. Sykes, "Corporate Crime", (1996) 24-25 The Journal of Legal Studies 319 at 323 ;Comments, Criminal Sanctions for Corporate Illegality, (1978) 69 Journal of Criminal Law and Criminology 40 at 41-42 .

element that elicits individual misconduct, but it is still a moral element. Corporations are living organisms that create their own ways of working, acting and making choices. The board of directors, managers and other employees are, at the same time, distinct from the corporation, yet also highly influenced by and part of the culture that is inherent in each corporate environment. Corporations have their own identity, separate from their members, and this fact alone makes it possible to attach blame and censure to them.

A corporation can be considered as similarly situated as an individual. It has a discrete identity within a community and expressive potential, that is to say, it objectively can be viewed as having an identity apart from its owners, managers, and employees to which expressive conduct can be ascribed. The identity of the corporation is also an important factor to attribute criminal responsibility under retributive principles.

The "just desert" theory, a variant of the traditional retributive approach is also apt to justify the imposition of criminal punishment on corporations. This theory is based on the idea that the justification of punishment is to be found in its intrinsic character as a deserved response to crime. It asserts that the punishment should fit the crime, i.e, there has to be proportionality between the gravity of the offence and the culpability of the offender. This account of retributivism would have a particular effect on corporate punishment. Considering that corporate crime can be much more serious

than street crimes, according to this r[104]ationale, the punishment of corporations would consequently be harsher.

If deterrence can never be regarded as the sole justification for criminal liability, it should not be seen as the only rational of corporate criminal liability.[105] Naturally, of course, one does not need to limit the alternative justifications of punishment to purely retributive or purely utilitarian perspectives.[106] Corporations, like individuals, deserve and should be morally condemned when they violate others' rights. They are able to know what is and what is not a morally appropriate behaviour. Even in the corporate context, moral condemnation remains a valid aim of the criminal law.[107]

4.1.2. Denunciation as an aim of corporate punishment

Criminal punishment also has a communicative aspect and therefore a symbolic significance. [108]
It carries an important meaning not only for the offender but also for the society: it communicates to offenders the censure or condemnation that they deserve for their

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[104] See Andrew Von Hirsch, "Doing Justice: The Principle of Commensurate Deserts" in Hyman Gross and Andrew Von Hirsch (editors), *Sentencing* (New York: Oxford University Press, 1981), at 243-256.
[105] See Charles Walsh & Alicia Pyrich "Corporate Compliance Programs as a Defence to Criminal Liability: Can a Corporation Save its Soul?" (1995) 47 Rutgers Law Review 605 at 638 (Arguing that deterrence is not the sole aim of criminal sanctions- there is also a retributive aspect); Lawrence Friedman, "In Defence of Corporate Criminal Liability" (1999) 23 Harvard Journal of Law & Public Policy 833 at 841 (Retribution, too, has long been seen as providing normative support for criminal liability regimes).
[106]Thomas, Charles W. & Hepburn, John R, *Crime, Criminal Law and Criminology* (Dubuque, Iwoa: WM. C. Brown Company Publishers, 1983) 426.
[107] Friedman, *supra* note 6 at 834.
[108]See e.g. N. D. Walker, "The Ultimate Jusitification: Varieties of the Expressive Theory of Punishment" in Crime, Proof and Punishment: Essays in Memory of Rupert Cross (London: Butterworths, 1981) at 109-121; Bernard E. Harcourt, "Joel Feinberg on Crime and Punishment: Exploring the Relationship Between *The Moral Limits of Criminal Law* and *The Expressive Function of Punishment*".

crimes; and, it makes it clear to society what are its values and that its values are being protected.

The expressive character of the punishment has a special implication for corporations. The symbolism that the imposition of a criminal sanction carries as an expression of society attitudes of resentment and indignation can be powerful enough to provoke a change in the corporation's attitude.

a) Desirability of criminal stigma

Criminal stigma is one of the most powerful effects of criminal law. It is said to be an effect and a sanction. As an effect, it is attached to other criminal sanctions and, as a sanction, it intends to attack the image of the corporation, the inner and public image. For those who challenge corporate criminal liability, criminal penalties imposed on corporations are believed to carry no or very little stigma because corporations as inorganic entities cannot be the subject of blame.[109] In addition, it is said that stigmatization can cause some collateral effects; nevertheless, these consequences are not enough to represent a threat or even a real punishment because this reputational loss would refer just to the reluctance of others, such as customers and workers, to deal with the corporations in the future.[110] Those arguments, however, miss the central point that corporations are not inorganic entities and they do have an internal "moral" code. They do care about their image, and as a result criminal stigma can be a useful tool to control their behaviour.

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[109] Richard A. Posner., *Economic Analysis of Law*, 4th ed. (Boston: Little Brown, 1992) 422.
[110] V.S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?" (1996) 109 Harvard Law Review 1477 at 1500.

Brent Fisse[111] mentions that three reasons underlie the rivals' arguments against the stigmatizing effect of criminal penalties on corporations: corporations are not appropriate subjects of blame, corporate crimes are not unwanted, and corporations cannot feel stigmatized by punishment. Fisse opposes these propositions, arguing that when society blame corporations, it is condemning the fact that people within the organization collectively have failed to avoid the offence to which corporate blame is attached. He also states that corporate offences can be unwanted in the same way that individual crimes are unwanted, and even to a passionate degree. Finally he concludes that business corporations typically attach considerable importance to having a good public image. For that reason, corporations are more likely to react positively to criminal stigma by attempting to repair their images and regain public confidence.

The primary factor governing the efficacy of the stigma as a sanction is public awareness of the fact that a conviction has been registered. Kramer refers to *moral opprobrium;* according to his postulates, "the *moral opprobrium*" of society increases when a corporation is stigmatized by the imposition of a criminal penalty.[112] When *moral opprobrium* is employed with respect to a human being, it has meaning in terms of his or her prestige as a neighbour, an employer, an employee or one in whom to place one's trust. When it is employed in relation to a corporation, *moral opprobrium* has meaning in the terms of corporate image. It appears that a stained corporate image may result from criminal conviction, and that may trigger a variety

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[111] Brent Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 Southern California Law Review 1141 at 1147-1154.
[112] Notes and Comments, "Increasing Community control over Corporate Crime – A Problem in the Law of Sanctions", (1961- 1962) 71 Yale Law Journal 281 at 287, n. 35.

of undesirable outcomes, such as the loss of present or future customers, stockholders and employees, or a public clamour for closer government regulation.

Criminal stigma works together with other penalties, especially fines. If the fine alone seeks only economic effects, criminal stigma adds non-financial values that must be targets of corporate punishment as well. The profit loss can be a consequence of stigmatization, but it is certainly not its main objective. In harmony with Leigh`s conclusion that "It has been argued that the fine (…) must not be viewed in isolation. The social stigma associated with conviction must also be taken into account. [113] There is no reason to believe that criminal stigmatization would not affect corporations. Society views corporations as capable of committing unwanted or morally offensive acts. Corporations can be held responsible and can be stigmatized as responsible agents. Therefore, criminal stigma deserves serious consideration as a device to deter corporations.

As stated previously, corporate punishment and corporate responsibility are intrinsically correlated issues. The benchmark for the development of these fields is the nature of corporate entities, i.e., whether corporations are a reality or a fiction. It is sufficient to say that corporations as a reality, have moral values, image, and intention. Subsequently, corporations can be stigmatized and can be held responsible for their own criminal conduct. This echoes the main assumption of the present work:

[113]L. H. Leigh, *The Criminal liability of Corporations in English Law* (London: Lowe & Brydone, 1969) at 159.

that corporations are blameworthy agents, and can, on a compelling basis, be responsible for their acts. [114]

4.2. Criminal sanctions as potential restraints

The imposition of an effective sanction to a corporate offender is crucial to the institution of corporate criminal liability. The attribution of criminal liability would be in vain if the sanctioning mechanism available were not able to deter and to punish the corporate offender. Criminal fines lead the list of sanctions available, but other options are workable, such as publicity, equity fines and probation. Although monetary deprivation is a significant restraint factor, the most important deterrent aspect of criminal sanctions is stigmatization. The stigma that accompanies each criminal sanction is the ultimate deterrent against corporate crime.

4.2.1. Criminal fines

Criminal fines have traditionally been the penalty used against corporations. This is due to the deep-rooted belief that corporations are no more than profit-seeking entities and the only way to effectively punish them is to directly affect their takings. Theoretically, this systematic reasoning that underlies the imposition of criminal fines on corporations seems to be plain, yet when it comes into practice, the facts do not correspond to this idyllic construction. Opponents of corporate criminal liability

[114] A more compelling approach is delineated on chapter 8, where the question of corporations as moral persons is scrutinized.

argue that there is no need for criminal fines if civil monetary penalties have the same function. It is also largely said that, as presently administered, corporate fines lack credibility as profit-diminishing sanctions because they fail to penalize corporate offenders to the maximum extent possible[115] and higher fines would produce overdeterrence that generates overspill and extortion. Some points must be addressed. First, corporations are primarily, but not exclusively, profit-seeking entities. Thus, civil fines would not be suited to deal with the other non-financial values of corporate conduct. In order to better punish corporations, the aim of fine must be reconsidered. Secondly, a fact to be considered is that certainty of punishment has a more deterrent effect than severity of punishment. Thirdly, the argument that criminal fines can cause overdeterrence and overspill is valid but mostly shortsighted.

The most important reflection to be done when dealing with criminal fines as a corporation's punishment is that their aim is not exclusively to diminish the profit of the corporate offender. Although criminal fines ostensibly deal with monetary values, it does not mean that other values are not at stake. Non-financial values must be considered as a goal of criminal fines. As Braithwaite states, "while a great deal of crime is committed for the sake of corporate profit, a great deal is not."[116]Criminal fines can compensate, punish, deter and reeducate the offender. More important than the financial loss that they implicate is the message that they send to the offender and to the community.

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[115] "Criminal fine as presently administered is totally ineffective as profit diminishing sanction" [Notes and Comments, *supra* note 12 at 285].
[116] John Braithwaite, "Corporate Crime in the Pharmaceutical Industry" (London: Routledge Kegan Paul plc, 1984) at 331.

Because of this comprehensive role, criminal fines are preferable to civil fines in order to punish corporate misconduct. Criminal sanctions add an extra factor for cost benefit analyses: they present social and economic aspects not found in civil penalties.[117] Criminal penalties are perceived as being greater deterrents than civil fines because criminal prosecutions and penalties carry a social stigma; it is this idiosyncrasy that distinguishes criminal and civil penalties.

Critics speculate that if the cost of the fine is too low, it does not prevent corporate misbehaviour. It is believed that in a great number of cases, the punishment would appear as nothing, compared with the profit of the crime. If the cost of the fine does not affect the "pocket" of the corporation, criminality will still persist as the better choice. When the punishment is established which reaches only to a certain fixed point, the advantage of the crime may surpass the threat of the fine. It is generally accepted that small fines imposed on corporations can be as little more than "fees for licenses to engage in illegal activities."[118]

On the other hand, it is generally thought that severe penalties are not unsusceptible to failure and also produce serious problems. It is assumed that high fines that are disproportional to the harm caused don't serve the deterrent purpose as well. As Fischel ascertains, "[S]anctions uncalibrated to the level of harm can have a quite pernicious effect when the target of a sanction is a corporation."[119] It is thought that

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[117] Walsh & Pyrich, *supra* note 6 at 635.
[118] Developments, "Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions" (1979) 92 Harvard Law Review 1226 at 1366.
[119] *Ibid.* at 323.

costly fines may not impede corporate misbehaviour. This situation can cause overdeterrence and, consequently, it can result in harmful effects; it can affect third parties such as employees and most likely the consumer.

At least two consequences are caused by overdeterrence: overspill and extortion. The first effect is said to be caused by the tendency for corporate penalties to fall most heavily on the least culpable. It is believed that the costs of a high fine have a propensity to spill over onto parties who cannot be considered blameworthy. This effect is explained by the analogy: "when the corporation catches a cold, someone else sneezes".[120] The parties that might be affected by the fine are the stockholders, bondholders and other creditors, lower echelon employees and the consumers. Stockholders and bondholders can suffer a reduction in the value of their dividends and securities. The work force of lower echelon employees might be the first affected group within the corporation. When the fine is enough to threaten the solvency of the company or at least to cause the shut down of a production line, the immediate response can be a cost-cutting operation through layoffs of lower echelon employees. The consumers may seem to be the most remote party, but they might also suffer the

[120] Coffee gives an example of how the value of the fine is an important standard: "For example, if a corporation having $10 million of wealth were faced with an opportunity to gain $ 1 million through some criminal act or omission, such conduct could not logically be deterred by monetary penalties directed at the corporation if the risk of apprehension were below 10%. That is, if the likelihood of apprehension were 8%, the necessary penalty would have to be $12.5 million (i.e., $ 1 million times 12.5, the reciprocal of 8%). Yet such a fine exceeds the corporation's ability to pay. In short, our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources [Coffee Jr., John C, "No Soul to Damn: No Body to Kick': An Unscalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Michigan Law Review 386 at 401].

consequences of a high costly fine. For example, the excess of the fine can be recovered from the consumers in the form of high prices.

The second effect, extortion, is assumed to be the reflection of the impact of large fines on the innocent corporation. The corporation, when faced with a gigantic fine, may have little choice but to settle and to surrender its opportunity to go to trial on the merits of its case. In short, an innocent corporation may be driven to settle. From the economic point of view, the rational choice for the innocent corporation charged with a violation depends very much on the possible sanction.[121] Yet, there is a safeguard for this. It would be improper for a judge to accept a guilty plea if the case cannot be proved, and it is unethical for a defence lawyer to enter a guilty plea for a client if the client is innocent. However, in a case where the facts are sufficiently unclear such that there might have been a reasonable doubt about guilt, a corporation might choose not to contest this case had it gone to trial, and in this situation, it is not a completely innocent corporation.

There is no doubt that high fines generate problems and might not be optimally efficient; however, the critique is limited, especially when one considers the connection between overdeterrence and shareholders and consumers. When the shareholders pay for the shares, the potential fines are reflected in the price that they pay. When corporations make profits from offences, which are not discovered, shareholders will directly benefit. Shareholders must bear the responsibility for their

[121] *Ibid.* at 402.

risks in return for the right to eject management whom they find unsatisfactory.[122] It is not convincing to say that consumers would be directly affected by high fines. In highly competitive industries, a company cannot afford to put up prices in such an arbitrary fashion lest it lose sales to its competitors. In the case of oligopolies, corporations have to absorb the cost of fines because they do not directly control the price of their products.

The arguments against the use of fines to punish corporations are unsound; they overlook the fact that certainty of punishment has a more deterrent effect than severity. The exclusive focus on the size of penalties is the result of a reductionist view of criminal sanctions, particularly criminal fines. Especially with corporations, this is a recurring argument, because of misconceptions about the nature and role of corporate entities. The likelihood that a corporation might be caught, made criminally accountable and be convicted is a bigger threat than the imposition of a high fine. What a fine represents is a more potent restraint than its value.

Nevertheless, it is also a mistake to infer that the size of the fine is of no deterrence. High fines per se do not deter if they will not likely be imposed. On the other hand, small fines might not be a threat even when they will be certainly imposed. It has to be equilibrium, a point where the certainty and the amount to be paid work together as an effective restraint. It is tricky and intricate to calculate a fine which is both fair and effective. The objectives that are being pursued by the fine and an objective method of calculating fines are points that must be considered. As Chesterman

[122] Braithwaite, *supra* note 16 at 332.

observes, "any pecuniary penalty, therefore, must balance the need to appear "substantial' against the concern that it cannot be so large as to do any real damage to the company.[123]"

Each jurisdiction has established its own parameters to calculate a fine imposed on a company. In France, the fine is calculated as a multiple of the individual fine for the same offence. In contrast, in Switzerland maximum fines are stipulated, and in Canada and Denmark there is no maximum limit.[124] The methods to better calculate a fine thus must be improved; this echoes the criticism of Gunter Heine: "the law should more accurately define the intention of the penalty, and make explicit its underlying policy on deterrence and compliance."[125]

Criminal fines are not unflawed; as with the whole field of corporate criminal liability they still need to be developed. If in some part they seem unsuitable for this end, on the other hand they can be adequate and efficient. Even the commentators who admit the ineffectiveness of criminal fines as a profit diminishing sanction, still call for its retention.[126] Taking into account its deficiency, a helpful solution would be to combine it with other sanctions. Exclusive reliance on the fine is too simple and restricts its potentiality to deter corporate crime. Equity fines and other alternative sanctions seem to be valuable options.

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[123] Chesterman, Simon, "The Corporate Veil, Crime and Punishment" (1994) 19 Melbourne University Law Review 1064 at 1073.
[124] Heine, Gunter "Sanctions in the Field of Corporate Criminal Liability" in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998*, 237 at 242.
[125] *Ibid.* at *244.*
[126] Notes and Comments, *supra* note 12 at 287, n. 17.

4.2.2. Alternative sanctions

After the dissipating effect of the applicability of criminal fines has been evaluated, it must be determined whether or not any criminal sanction, regardless of its nature – monetary or nonmonetary - can be effectively directed against corporations. As Fisse brilliantly states,

> [T]the question whether corporations can be punished in a just and effective way cannot be answered with certainty given the primitive state of existing knowledge. It is flat-earth thinking, however, to suppose that the range of options begins and ends with fines.[127]

A better approach would be to refine the idea of the corporation as a person. Corporations must be seen holistically, not just as profit seeking entities. This is the spinal cord for developments in the arena of corporate criminal liability. Some suggested sanctions are equity fines, formal publicity and probation.[128] It is not the scope of the present work to deeply analyze the issue of punishment and question what the optimal sanction would be; for this reason, the basic features of these three proposals will be briefly outlined.

The equity fine is formulated to reshape severe penalties. The logic behind this sanction is the following: if a severe fine needs to be imposed in order to control

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[127] Fisse, *supra* note 11 at 1242.

[128] Other penalties are also suggested: corporate rehabilitation, corporate quarantine, liberal construction of existing statutes and regulation, disqualification, behavioural sanctions, etc…[Comments, *supra* note 45 at 56]; Fisse also brings out community service, redress facilitation and managerial intervention as other options to existing penalties [Fisse, *supra* note 11 at 1234].

corporate misbehaviour, the fine should be imposed not in cash, but in the "equity securities of corporations."[129] As Coffee explains,

> [T]he convicted corporations should be required to authorize and issue such a number of shares to the state's crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity. The fund should then be able to liquidate the securities in whatever manner maximizes its return.[130]

It is argued that an equity fine will not cause the company to suffer a cash crisis and that the burden will fall primarily on shareholders rather than employees, consumers or creditors because it is not paid out of liquid assets. The shareholder wealth is diluted, so the owners of a company might be encouraged to exercise control over management, producing a rehabilitative effect. "The equity fine simply subdivides the corporate pie into more and smaller pieces, and then redistributes a limited number of the pieces."[131]

Regarding adverse publicity, there is no question that it produces harmful effects for a corporation. Corporations tend to take their public images very seriously. They cannot escape the incalculable effects which a conviction may have on the public attitude toward them. This publicity can be spread by the media and also by a government agency. The former can sometimes be based on unclear facts and might not be impartial in all cases, but still demonstrates that publicity can directly affect a corporation. The latter is a more trustful source and for that may gain public

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[129] Coffee, *supra* note 20 at 413.
[130] *Ibid.*
[131] *Ibid.* at 416.

confidence and reaction more easily. Formal publicity emanating from an administrative or judicial source has considerable credibility.

Under the proposal of formal publicity, corporations would be required to give some sort of notice of a criminal conviction to the general public, or at least to those who might be financially interested. The notice could take the form of advertisements in appropriate media, or required clauses in contracts and other corporate documents.[132] As Dunford highlights, "the aim of exacting a formal publicity sanction must be more than simply to inflict monetary loss, for that can be done by the fine."[133] The objective of formal publicity is beyond profit grounds. It aims to make public the tarnished image of the corporation. Yet, in spite of this fact, the financial damage to a corporation for injury to its corporate reputation can exceed the economic loss from fines. This proposition might not seem very sound at first sight, but it is really compelling when one thinks about the reaction of consumers and investors and even about the inner reaction of the corporation to this kind of exposure.

Media publicity is not the only kind of publicity that works. Other types have been applied here and there but have lagged behind the aims of these proposals. The data show that it is an important step in corporate criminal liability. The greater hope for effective deterrence is the adverse publicity that accompanies the punishing of a corporation rather than the punishment per se.[134]

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[132] Comments, *supra* note 5 at 52.
[133] Louise Dunford and Ann Ridley, "No soul to be damned, No Body to be Kicked: Responsibility, Blame and Corporate Punishment" (1996) 24 International Journal of The Sociology of Law 1 at 14.
[134] Braithwaite, *supra* note 16 at 333.

> [I]n a recent empirical study of the impact of adverse publicity crises on seventeen major corporations, loss of corporate prestige, as distinct from financial loss, was found to be a significant concern of executives in all but two cases.[135]

Finally, probation can also be added to the group of effective sanctioning against corporations. Customarily, probation is a soft sentencing option, a disposition in lieu of a punitive sentence. As a criminal "penalty," probation acquires a more punitive feature as an injunctive punitive order and deviates from its original goals. The terms of probation may require, for example, reduced fines to be paid to the federal treasury and the corporation to make restitution to the injured parties. In some circumstances, it may entail performance of community services by donating funds or providing services. Also, probation can involve organizational reform orders as managerial intervention that would require preventive policies or procedures to be modified or introduced to guard against repetition of an offence. Probation is mostly a rehabilitative device but still produces to a lesser extent deterrent and retributive effects. It is a way to uphold the conviction of the corporate criminal without holding the stigmatizing effect of it. Although probation does not engage directly in the profit-diminishing goal, some financial loss might be detected if the corporation needs to undertake measures to obey the probation order.

In Canada, section 732. 1 (3.1) of the Criminal Code deals with probation orders and lists a number of additional conditions that a court may prescribe following the conviction of the corporate offender. These conditions include among others, to make restitution to a person for any loss or damage that they suffered as a result of the

[135] Fisse, *supra* note 11 at 1153.

offence; and/or to establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence. The same statute also prescribes sentencing guidelines for corporate offenders in section 718.21. This section specifies a number of factors that should be taken into consideration when a court imposes sentence on a corporation, some of these factors are related to the conduct of the corporation after the commission of the offence like any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence and any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.[136]

There is no ideal sanction that can be securely used for punishing corporations; all sanctions have their flaws. But, the imperfections of the existing sanctions do not mean that they are not effective. It is not true that no sanction is better than a deficient sanction. The sanction should be chosen in each specific case.

Criminal law has been under attack when it comes to its appropriateness and efficiency to control corporate criminality. In order to justify corporate criminal liability it is important to deconstruct the notion that any legal device must be totally appropriate and effective. The search for an ultimate solution for the problem of corporate criminal liability has been the greatest impediment for hopeful advances in this area. Once the idea of a perfect solution is discarded, criminal law appears to be more adequate. The claims that corporations cannot be punished because of the inadequacy or inefficiency of criminal law lose their credibility if it is accepted that

[136] Canadian Criminal Code, Sections 732. 1 (3.1) & 718. 21.

partial satisfaction and efficiency are better than nothing. Civil and administrative law can and should replace criminal law in many areas. The minimal penal law theory seems to be an optimal solution for the problem of the excessive use of criminal law. However, in the case of corporate crime, neither civil nor administrative law seems to offer a better solution than criminal law. In addition, the argument that criminal law would be excessively used has no merit. Because corporate crime is not minimal, it has serious consequences and for that reason argues for strong legal control, that only criminal law can offer.

V. ASSESSING COMMON LAW THEORIES OF CORPORATE CRIMINAL LIABILITY

Introduction

The endorsement of criminal liability of corporations has largely been a twentieth century judicial development, influenced by the "sweeping expansion"[137] of common law principles. The majority of theories of corporate criminal liability are typical of common law developments, they have been constructed on a case-by-case basis. Despite their importance, these theories have proved to be ineffective, for their lack of strong theoretical basis and their individualistic roots. Examples of these models are the agency theory and, in a more elaborate form, identification and aggregation theories.

5.1. Agency Doctrine

The agency theory was first developed in tort law and gradually "was carried over into the criminal arena."[138] According to this theory, the corporation is liable for the intents and acts of its employees. Vicarious liability (or *respondeat superior*) is commonly employed in the United States. In other jurisdictions, this theory is restrictively established in relation to some strict liability and hybrid offences that deal with matters such as pollution, food, drugs, health and safety at work but not to *mens rea* offences.

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[137] Harvey L. Pitt, and Karl A Groskaufmanis., "Minimizing Corporate Civil and Criminal Liability: A second Look at Corporate Codes of Conduct" (1990) 78 The Georgetown Law Journal 1560 at 1560.
[138] Nicolette Parisi, "Theories of Corporate Criminal Liability (or Corporations Don't Commit Crimes, People Commit Crimes)" in Hellen Hochstedler, ed., *Corporations as Criminals - Perspectives in criminal justice 6* (New York: Sage Publications, 1984) 41 at 44.

The agency theory is based on the premise that criminal violations normally entail two elements, *actus reus* and *mens rea*. Since corporations are considered to be purely incorporeal legal entities, they do not posses any mental state and the only way to impute intent to a corporation is to consider the state of mind of its employees. The theory encompasses a simple and logical method of attributing liability to a corporate offender: if corporations do not have intention, someone within the corporations must have it and the intention of this individual as part of the corporation is the intention of the corporation itself.

Courts in the United States, where the theory is widely used, have developed a three-part test to determine whether a corporation will be held vicariously liable for the acts of its employees. First, the employee must be acting within the scope and course of her employment.[139] Secondly, the employee must be acting, at least in part, for the benefit of the corporation, yet it is irrelevant whether the company actually receives the benefit or whether the activity might even have been expressly prohibited. Thirdly, the act and intent must be imputed to the corporation.[140]

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[139] See *N.Y. Cent. & Hudson River R.R. Co.* v *United States*, 212 U.S. 481, 491-495 (1909) (finding corporation liable because it acts only through its agents or employees whose knowledge and purpose may be attributed to the corporation); *United States* v. *Photogrammetric Data Serv*., 259 F 3d 229, 242 (4th Cir. 2001) (holding that a corporation can act through the conduct of its agents).

[140] *See In re Hellenic Inc.*, 252 F.3d 391, 396(5th Cir. 2001) (stating that the imputation of knowledge is a creature of necessity); *United States* v. *One Parcel of Land*, 965 F. 2d 311, 316 (7th Cir. 1992) (stating agent's knowledge of illegal act may be imputed to corporation if agent was "acting as authorized and motivated at least in part by an intent to benefit the corporation" (citing *Zero* v. *United States*, 459 U.S. 991 (1982)).

Scope of Employment

The requirement that an employee must be acting within the scope of his or her employment is met if the employee has actual or apparent authority to engage in the act in question.[141] Actual authority exists when a corporation knowingly and intentionally authorizes an employee to act on its behalf. [142] In *New York Central Railroad*,[143] the first Supreme Court case holding a corporation criminally liable, the corporation was convicted of violating the Elkins Act where a general and an assistant traffic manager paid rebates for shipments of sugar. The agents acted within the scope of actual authority because they were authorized to set up freight rates. Therefore, they acted within the scope of authority conferred upon them by the corporation. In *United States* v. *Investment Enters., Inc*., the company was convicted of violating obscenity laws where the corporation's president conspired to transport obscene videos in interstate commerce. The president's unlawful acts could be imputed to the corporation because he was an "undisputedly authorized agent."[144]

A corporation's liability can be extended to acts performed within the agent's apparent authority. Apparent authority is defined as the authority that has not been

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[141] See *United States* v. *Investment Enter Inc.,* 10 F. 3d 263, 266 (5th Cir.1993) (stating that a corporation is criminally liable for the unalwful acts of its agents, provided that the conduct is within the scope of the agent's authority, whether actual or apparent); *Meyers* v. *Bennet Law Offices*, 238 F. 3d 1068, 1073 (9th Cir 2001) (rejecting fact that employee acted outside scope of authority because employee had at least apparent authority to take actions).

[142] *See New Hampshire* v. *Zeta Chi Fraternity*, 696 A. 2d 530, 535 (N.H. 1997) (stating actual authority exists when "the principle explicitly manifests its authorization for the agent to act") (citations omitted).

[143] *N.Y. Cent. & Hudson River R.R. Co,* supra note 3 at 481-489.

[144] *Investment Enters., Inc*., supra note 5 at 266.

expressly agreed but can be understood by a third party from the context of the agent's acts. It is the

> [A]uthority which an outsider could reasonably assume that an agent would have judging from his position within the company, and the responsibility previously entrusted to him, and the circumstances surrounding his past conduct. [145]

The question of whether an employee acted in the scope of his or her authority is differently determined by each source of law and factual framework. Federal courts have constantly held that a corporation may be liable for the actions of its agents regardless of the agent's position within the corporation.[146] These Courts have found that an employee's act can bind the corporation even where the corporation has implemented policies prohibiting the behaviour. When an employee's conduct is contrary to the company's compliance policies and specific directives, the company can still be held liable. [147] The company can prove that it has established corporate policies in an effort to reduce crime, but this does not prevent a court from finding it criminally liable. The existence of an effective compliance policy will not provide an

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[145] See *United States* v. *Bi-Co Pavers, Inc.*, 741 F. 2d 730, 737 (5th Cir. 1984) (stating apparent authority is authority "which outsiders would normally assume the agent to have, judging from his position with the company and the circumstances surrounding his past conduct" (quoting Cont'l *Baking Co.* v. *United States*, 281 F. 2d 137, 151 (6th Cir. 1960)).

[146] *See In re Hellenic Inc*., *supra* note 4 at 395 (recognizing that although courts generally agree that the actions of high managerial officials may be imputed to corporations, courts are not in agreement with respect to actions of lower level employees; decisions in such cases should be based on scope of employee's responsibilities rather than his official rank within company).

[147] See *United States v. Portac Inc.*, 869 F 2d 1298 (9th Cir. 1989) (affirming company's conviction although supervisor of agent who committed infraction had expressly told agent that company did not permit violations of law) (citing United States v. Hilton Hotels Corp., 467 F. 2d 1000, 1004 (9th Cir. 1792)); *United States* v. *Automated Med. Labs., Inc.*, 770 F. 2d 399, 407 (4th Cir. 1985) ('The fact that many of [employees'] actions were unlawful and contrary to corporate policy does not absolve [defendant] of legal responsibility for their acts").

absolute defence from criminal liability,[148] but the company may qualify for a reduced penalty.

The concept of "scope of employment" is common and has broad interpretations; thus, courts have held that even non-employees conduct can be attributed to be as the corporation's action. In *United States v. Parfait Powder*, it was held that independent contractors might act for the benefit of the corporation thereby exposing it to criminal liability.[149]

Many states have adopted specific legislative strategy to deal with corporations that requires criminal acts be committed by "high managerial agents" in order to trigger liability.[150] This position closely resembles the identification theory. In some states, however, the rule is that the actions taken by a corporation's agents need not have been ratified by the corporation's directors, officers, or other high managerial agents in order to be chargeable to the corporation.[151]

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[148] Dan K. Webb et al., "Understanding and Avoiding Corporate and Executive Criminal Liability," (1994) 49 Bus Law 617 at 624 cited in Matthew E. Beck & Matthew E. O'Brien, "Corporate Criminal Liability (annual white collar crime survey)" (2000) 37 American Law Review 261 at 268, n.37.

[149] See *United States* v. *Parfait Powder Puff Co*., 163 F.2d 1008, 1009-1010 (7th Cir. 1947) (affirming conviction of company for violations of Federal Food, Drug and Cosmetic Act committed by its independent contractor),the defendant entered into an independent contractor agreement in which the contractor would manufacture and distribute the defendant's cosmetic products. Unbeknownst to the defendant, the contractor used ingredients that had not been approved under the Food, Drug and Cosmetic Act. The defendant argued that since the contractor, and not the defendant company had committed the crime, the defendant corporation should not be liable. The Seventh Circuit rejected these arguments stating that these were the risks the corporation bore when it assigned manufacturing and distribution responsibilities to the contractor.

[150]Some States that have adopted this standard: Arizona, Tennessee, Utah, Iowa, Texas, Arkansas, Ohio, Washington.

[151] *Zeta Chi Fraternity* supra note 6 at 535 ("The criminal conduct need not have been 'performed, authorized, ratified, adopted or tolerated by the corporation['s] directors, officers or other 'high managerial agents' in order to be chargeable to the corporation." (quoting Com. V. L.A.L. Corp., 511 N.E. 2d 599, 601 (Mass. 1987)).

A stricter standard can be found in the Model Penal Code. The Code requires, as an additional element that the commission of the offence be

> [A]uthorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.[152]

By differentiating the ascription of liability based on the actions of agents and based on the actions of high managerial agents, the Code directly distinguishes between the ability of managerial employees and lower employees to understand and prevent crime.[153]

Benefiting the Corporation

The second element of corporate criminal liability according to the theory of vicarious liability is that the act benefits the company. The benefit need not be real, yet potential. As Hall points out, "for this requirement, the corporation need not actually receive a benefit; the employee's mere intention to bestow a benefit suffices."[154] It is not necessary that the employee be primarily concerned with benefiting the corporation since many employees act primarily for their own personal

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[152] US Model Penal Code [sections] 2.07 (1) (c) (1962).
[153] Model Penal Code § 2.07 (1) (c) (1962) and § 2.07 (4 (b (1962).
[154] Joseph Hall "Corporate Criminal Liability (Thirteenth Survey of White Collar Crime)" (1998) 35 American Criminal Law Review 549 at 554. See *Zero* v. *United States*, 689 F. 2d 238, 242 (1st Cir. 1982) (holding that employee must have been "motivated at least in part by an intent to benefit the corporation"; *United States* v. *Automated Med. Labs., supra* note 11 at 407 ("[W]hether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation).

gain.[155] Although the corporation did not actually gain from the action[156] or the agent violated a company policy,[157] liability may still be imputed to a corporation.

5.2 Identification Theory

The doctrine of identification is the traditional method by which companies are held liable in most countries under the principles of the common law.[158] The limitations of the agency theory led to the construction of a direct liability theory. This theory was developed as an attempt to overcome the problem of imposing primary, as opposed to vicarious, corporate criminal liability for offences that insisted on proof of criminal fault.[159] In *Lennard's Carrying Co Ltd* v. *Asiatic Petroleum Co Ltd,*[160] Viscount

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[155] *City of Vernon* v. *Southern Cal. Edison Co.,* 955 F. 2d 1361, 1369 (9th Cir. 1992); *United States* v. *Bainbridge Mgmt*., 2002 U.S. Dist. Lexis 16686 at *15 (N.D. III Sept. 5, 2002) ("To impute liability a[n] agent must have intended to benefit the corporation or partnership, not merely his own interests.").

[156] Automated Med Labs., supra note 11 at 407 ("[I]t is not necessary for an agent's actions to have actually benefited the corporate entity." (citing Old Monastery Co. v. United States, 147 F. 2d 905 (4th Cir. 1945)).

[157] *Portac Inc., supra* note 11 at 1293 (9th Cir. 1989) (affirming company's conviction although supervisor of agent who committed infraction had expressly told agent company did not permit violations of law (citing *United States* v. *Hilton Hotels Corp*., 467 F. 2d 1000, 1007 (9th Cir. 1972)); *Automated Med. Labs.,* supra note 11 at 407 (holding company liable for acts of its employees despite the fact many of acts were contrary to company policy).

[158] See e.g. *Tesco Supermarket* v. *Nastrass* [1971] 2WLR 1166: England; *Hamilton* v. *Whitehead* (1988) 166 C.L.R. 121: Australia; *Canadian Dredge Dock Co Ltd* v *The Queen* (1985) 19 D. L.R (4th) 314: Canada; *Nordik Industries Ltd* v *Regional Controller of Inland Revenue* (1976) 1 N.Z.L.R 194: New Zealand.

[159] Matthew Goode, "Corporate Criminal Liability," online: < http://www.aic.gov.au/publications/proceedings/26/gppde.pdf>

[160] *Lennard's Carrying Co Ltd* v. *Asiatic Petroleum Co Ltd* [1915] AC 705. Lennard's Carrying Company, Limited was the owner of a steamship. This ship was loaded with benzene. The Asiatic Petroleum Company, Ltd was the purchaser of this cargo. Whilst in the course of her voyage from Novrossik to Rotterdam the ship and her cargo were destroyed by fire. The Asiatic Petroleum company brought an action against the owners of the Steamship for damages for loss of the cargo. The managing director of Lennard's Carrying Company was the registered managing owner and took an active part in the management of the ship on behalf of the owners. He knew or had the means of knowing of the defective condition of the boilers, but he gave no special instructions to the captain or the chief engineer regarding their supervision and took no steps to prevent the ship putting to sea with her boilers in an unseaworthy condition. The Court of Appeal held that the owners had failed to discharge the onus which lay upon them of proving that the loss happened without their actual fault or privity.

Haldane fashioned a model of primary corporate criminal liability for offences that require *mens rea* that would later be known as the identification theory. In the light of Haldane's judgment:

> [A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody, who for some purposes may be called an agent, but who is really the directing mind and will of the corporation; the very ego and centre of the personality of the corporation.[161]

As in the agency theory, the identification theory relies on an individual to attribute liability to a corporation. However, while the former doctrine simply imitates tort principles, the latter adjusts these principles to the reality of corporate misconduct. Furthermore, the identification theory introduces the personification of the corporate body. According to this theory, the solution for the problem of attributing fault to a corporation for offences that require intention was to merge the individual within the corporation with the corporation itself. Unlike the agency theory, the individual employee is assumed to be acting as the company and not for the company. The theory de-emphasized the need for the development of vicarious liability. The agency theory has now been considered as unjust and lacking in defensible penal rationale.[162]

Guilty mind

The main underlying principle of the identification theory is the detection of the guilty mind, the recognition of the individual who will be identified as the company

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The Steamship company appealed but the Court of Appeal decision was affirmed by the House of the Lords.

[161] *Lennard* at 713.

[162] See Goode, *supra* note 24.

itself, who will be the company's very ego, vital organ, or mind. *Tesco Supermarket* v. *Nastrass,*[163] is the leading authority in this area. Tesco Supermarket was a large chain store which was charged with an offence against the Trade Descriptions Act 1968[164] by selling goods to consumers at a price different than had been announced. The prosecution concerned the advertisement of soap powder at a reduced price. A shop assistant had mistakenly placed normally priced soap powder on the shelf. The manager had failed to ensure that the powder was available at the advertised price. There was a defence of due diligence which could be pleaded by the company, unless the manager's lack of due diligence could be attributed to the company.[165] The question was whether the manager of the store could be identified with the company via the common law doctrine, or in other words, what natural person or persons are to be treated as being the corporation itself.

The House of Lords held that the manager was not a person of sufficiently important stature within the corporate structure to be identified as the company for this purpose, and since there had been due diligence at the level of top management, the company could use the defence. The metaphor used by Lord Denning in an earlier case was a reference in this decision:

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[163] *Tesco Supermarket* v. *Nastrass* [1971] 2WLR 1166. [*Tesco*]

[164] Trade Descriptions Act 1968, s. 20 (1): "Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of,…any director, manager, secretary or other similar officer of the body corporate, …he as well as the body corporate shall be guilty of that offence…"

[165] Trade Descriptions Act 1968, s. 24 (1):"In any proceedings for an offence under this Act it shall…be a defence for the person charged to prove-(a) that the commission of the offence was due to…the act or default of another person,…and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence..."

> A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[166]

The manager of the store was not considered as the mind of the store. Instead, he was regarded as a servant, the hands of the store. In order to give some guidance for the problem of who is to be considered as the corporation itself for the purposes of imputing liability, some standards were articulated in *Tesco Supermarket* v. *Nastrass*. Lord Reid stated that,

> [N]ormally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company.[167]

Viscount Dilhorne explained that in his view "a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company"[168] would be the directing mind and will of the company. Lord Pearson underscored this reasoning adding that the constitution of the company concerned should be taken into account in order to indicate if the person is in a position of being identifiable with the company.[169]

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[166] *Tesco, supra* note 57at 1177, quoting Denning L.J, in *H.L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159 at 172.
[167] *Ibid.*
[168] *Ibid* at 1192.
[169] *Ibid* at 1195.

Tesco's criterion is still the most frequently used for determining whose corporate agent can be identified as the embodiment of the corporation itself. According to these established pattern, the guilty mind, the "ego" or 'brain" of the company must be a "vital" organ of the company, an individual who is sufficiently senior within the corporate structure to represent, metaphorically, the mind of the company. Generally, the guilty mind can be identified with the board of directors, the top officers of the corporation, those who are delegated responsibility, and those that have duties of such responsibility that their conduct may fairly be assumed to represent the policy of the corporation.

The array of personnel whose acts can be imputed to the company varies from jurisdiction to jurisdiction. Australian courts have shown a marked tendency to apply *Tesco* principles. Some American states and the American Model Penal Code also accept this approach.[170] In England, where the principles were molded, the *Tesco* standard is strictly followed, yet it can be shaped differently in every situation. For example, in *Meridian Global Fund Management Asia Ltd* v *Securities Commission,*[171] Lord Hoffman[172] stated that in each case the court had to fashion a special rule of attribution for the particular substantive rule.[173]Canadian courts adopted a broader view of the

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[170] American Model Penal Code § 2.07(4) (Proposed Official Draft 1962) stating that the corporation's agent is a "senior managerial agent."
[171] *Meridian Global Fund Management Asia Ltd* v *Securities Commission* [1995] 2 AC 500 PC
[172] Lord Hoffman cited in Grantham, Ross," Corporate Knowledge: Identification or Attribution," (1996) 59 The Modern Law Review at 733.
[173] Although Clarkson refers to Lord Hoffman decision as an ameliorated identification doctrine, Ross Grantham considers that Lord Hoffman rejected the identification approach, and suggested that principles of agency are but one aspect of the true principle upon which a company is bound, that of

Tesco principles and stretched the set of personnel that can be identified with the company itself.[174] The wider Canadian position can be contrasted with the restricted English application of the doctrine of identification, established in *Tesco.* In *Canadian Dredge & Dock*[175] the distinctive posture is clearly defended in a comparative ground: "The application of identification rule in *Tesco, supra,* may not accord with the realities of life in our country."[176] Then it is said that the simple size of Canada means that corporations may be widespread, and consequently may have a decentralized control, which implies that the directing minds and will can be found in different geographic locations. Estey J. stated that:

> This must be a particularly so in a country such as Canada where corporate operations are frequently geographically widespread. The transportation companies, for example, must of necessity operate by the delegation and subdelegation of authority from the corporate centre: by the division and subdivision of the corporate brain; and by decentralizing by delegation the guiding forces in the corporate undertaking.[177]

Bill C-45, enacted on November 7th 2003, extends the concept of directing mind; it uses the expression "senior officers" to include everyone who has an important role in setting policy or managing an important part of the organization's activities.[178]For crimes of negligence, the bill proposes a departure from the concept of directing mind when it states that mental element of the offence will be attributable to corporations

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attribution (see CVM Clarkson, *Corporate Culpability*, online: < cmvc1@leicester.ac.uk>, and Ross Grantham, *Corporate Knowledge: Identification or Attribution,* 59 The Modern Law Review 1996)
[174] See e.g., *R. v. Canadian Dredge & Dock Ltd.* (1985) 10 CCC (3d) 1 (S.C.C.).
[175] *Canadian Dredge and Dock*, *supra* note 35.
[176] *Ibid* at 313.
[177] *Ibid* at 312-313.
[178] S.C. 2003, c. 21, s. 2, now ss. 22.1 and 22.2 of the *Criminal Code*, R.S.C. 1985, c. 46.

and other organizations through the aggregate fault of the organization's "senior officers" (which will include those members of management with operational , as well as policy-making, authority).[179]

5.3. Aggregation theory

Over the past decades the corporation's internal structures have been altered and expanded. Large modern corporations are no longer set up with a clear, pyramid-like hierarchal structure of authority and power. On the contrary, modern corporations have multiple power centers that share in controlling the organization and setting its policy. The complexity of this new setting has created some challenges for the imposition of criminal liability to corporations under the traditional approaches. Sometimes power and influence are extremely diffused in the corporation context so that it is almost impossible to isolate the responsible individual whose intention could be attributed to the corporation itself. The aggregation or collective knowledge doctrine was developed as a response to this puzzling scenario.

The aggregation theory is grounded in an analogy to tort law in the same way as the agency and identification doctrine. Under the aggregation theory, the corporation aggregates the composite knowledge of different officers in order to determine liability. The company aggregates all the acts and mental elements of the important or

[179] *Ibid.* Section 22.1 (b)

relevant persons within the company to establish whether *in toto* they would amount to a crime if they had all been committed by one person.[180] According to Celia Wells, "aggregation of employees' knowledge means that corporate culpability does not have to be contingent on one individual employee's satisfying the relevant culpability criterion."[181]

The theory of aggregation is a result of the work of American Federal Courts. The leading case is *United States* v. *Bank of New England,*[182] where the bank was found guilty of having failed to file CTRs (currency transactions reports)[183] for cash withdrawals higher than $10, 000. The client made thirty-one withdrawals on separate occasions between May 1983 and July 1984. Each time, he used several checks, each for a sum lower than the required total, none of which amounted to $10, 000. Each check was reported separately as a singular item on the Bank's settlement sheets. Once the checks were processed the client would receive in a single transfer from the teller, one lump sum of cash which always amounted to over $10,000. On each of the charged occasions, the cash was withdrawn from one account. The Bank did not file CTRs on any of these transactions. Each group of checks was presented to a different teller at different times.

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[180] Clarkson, *supra* note 67.
[181] Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001) at 156.
[182] *United States* v *Bank of New England.* (1987) 821 F. 2d 844 (1st Cir.), *cert. Denied,* 484 U.S. 943.
[183] The Currency Transaction Reporting Act (31 C. F. R § 103.22 91986) requires banks to file Currency Transaction Reports within fifteen days of customer currency transactions exceeding $10,000.

In this case, the question was if any knowledge and will could be attributed to the corporate entity. The trial judge found that the collective knowledge model was entirely appropriate in such context, and stated as much:

> In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of all the knowledge of all its employees. That is, the bank's knowledge is the totality of what all of the employees knew within the scope of their employment. So, if employee A knows of one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the banks know them all. So, if you find that an employee within the scope of his employment knew that the [reports] had to be filed, even if multiple checks are used, the bank is deemed to know it if each of the several employees knew a part of the requirement and the sum of what the separate employees knew amounted to the knowledge that such a requirement existed.[184]

The partisans of collective knowledge explain that the difficulty of proving knowledge and wilfulness in a compartmentalized structure such as a corporation should not be an impediment to the formation of the corporation's knowledge as a whole. According to these positions, it is not essential that one part be aware of the intention and act of the other part for the formation of aggregate knowledge. In *Bank of New England,* it was explained that:

> Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.[185]

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[184] *Bank of New England* at 855.
[185] *Ibid* at 856.

This theory appears to combine the *respondeat superior* (vicarious liability) principle with one of "presumed or deemed knowledge."[186] Even if no employee or agent has the requisite knowledge to satisfy a statutory requirement needed to be guilty of a crime, the aggregate knowledge and actions of several agents, imputed to the corporate executive, could satisfy the elements of the criminal offence.

In spite of the wide interpretation of the aggregation theory employed in *Bank of New England* decision, American courts have been careful with the application of this ruling. Some federal courts have had a narrower understanding, and distinguished collective knowledge from collective intent or collective recklessness. According to this version, the attribution of *mens rea* or intent or recklessness to a corporation necessarily depends on the full development of this culpable state of mind in one of the corporation's employees. Contrary to the *Bank of New England* decision, American courts understand that a corporation could not be deemed to have a culpable state of mind when that state of mind is not possessed by a single employee. In *Inland Freight Lines*[187] it was clarified that corporate collective knowledge and collective criminal intent do not necessarily have the same meaning.

The idea of aggregate knowledge is fundamental to the notion of corporate fault; it represents a departure from the paradigm that intention must come from a single individual. However, as to be expected, the rupture with old concepts is not brusque,

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[186] Ronald L Dixon, "Corporate Criminal Liability" in Margaret. P Spencer and & Ronald R Sims, eds, *Corporate Misconduct* (Westport, US: Quorum books, 1995) 41 at 52.
[187] *Inland Freight Lines* v. *United States*, 191 F. 2d 313 (10th cir. 1951) at 315-316. This case involved the Commerce Act's prohibition against maintaining false time logs for the drivers.

which is the reason why individualism is still present in the collective knowledge theory. Corporate fault is the fault of the group and not of the corporation itself. This fact does not take merit away from the aggregation theory. Common law theories have been the necessary bridge between the individualistic and organizational approaches. They are bringing back to life principles of criminal law that have prevailed before the prevalence of the principle that only individuals commit crimes. In all of these theories, corporate fault is still traced back to an individual or a group of individual, yet they allow the attribution of criminal liability to corporations.

VI. THE NATURE OF CORPORATIONS: CORPORATIONS AS REAL AND AUTONOMOUS ENTITIES

Introduction

Different theories about the nature of corporations have been determinants of the position taken by theorists of corporate criminal liability.[188] As Brummer notes, "a theorist's view of the nature of the corporation often disposes him or her to advocate a particular kind of theory of corporate responsibility."[189]Theories of corporate criminal liability are an extension and a reflection of values and concepts developed by studies on corporate life and behaviour. Before the discussion of the theories of corporate criminal liability, an incursion to some ideas on the nature of corporations is in order. This chapter will succinctly describe a few models proposed in different disciplines such as law, economics, and sociology. In spite of the fact that each of these disciplines approaches the issue of corporate life and behaviour in its own way, a combined analysis converges to create a more compelling image of the corporation.

6.1. Theories of Legal Personality

Theories of legal personality were created to solve problems of property and rights in civil law. Because organizations were growing in number and influence, the Romans

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[188] David Millon highlights that theorizing about "what corporations are" has in fact occupied a great deal of home-grown mental energy and has played an important role in arguments about concrete questions of corporate criminal liability [David Millon., "Theories of The Corporation" (1990) Duke Law Journal 201, 201).

[189]James J. Brummer, *Corporate Responsibility and Legitimacy: An Interdisciplinary Analysis* (New York: Greenwood Press, 1991) 71.

had to create legal theories to regulate these groups. Leicester observes that "[t]he idea that a social group can have a personality, albeit a special sort of personality, is one of the great organizing devices of legal art." [190] However, theories of legal personality are often considered irrelevant to modern legal debate.[191] Theories of corporate criminal liability do not show an explicit or consistent commitment to one particular theory of legal personality; they have developed with little or no attention to debates about the legal personality of corporations. Despite this independence of theories of corporate liability from theories of legal personality, it would be somehow precipitous to reject the influence of the former in the development of the latter. Whether we regard a corporation as a fiction or a reality has clear implications for the theory of legal liability to be adopted.

The very substance of the corporate body is controversial, with the ensuing debate generating a variety of principles and theories. According to W. H. Jarvis, "it would be difficult to find any area of legal speculation that has given rise to as much analytical jurisprudence as that of corporate personality."[192] As a result, theories of corporate personality are numerous and diverse.[193] The differences among some of

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[190] Leicester C. Webb, ed., *Legal Personality and Political Pluralism* (Victoria: Melbourne University Press, 1958), v.

[191] "According to Dewey and Hart, this is a question which is irrelevant in the day to day solution of practical problems." (L.H. Leigh, *The Criminal Liability of Corporations in English Law* (London: Lowe & Brydone, 1969) at 6. Bonham and Soberman, also call attention to the fact that legal theories of personality can not interpret adequately the phenomenon of juristic personality (D. Bonham & D. A. Soberman, "The Nature of Corporate Personality" in Jacob Ziegel, ed., *Studies in Canadian Company Law,* v. 1 (Toronto: Butterworths, 1967) 3 at 15.

[192] W. H Jarvis, "Corporate Criminal Liability: Legal Agnosticism" (1961) Western Law Review 1 at 9.

[193] Wolff affirmed that the number of theories was assessed at 1938 at 16 [Martin Wolff, "On the Nature of Legal Persons" (1938) 54 Law Q. Rev. 494, at 494)].

these theories sometimes are a matter of degree rather than substance; [194] hence, the analysis will be restricted to two major groups of theories that have attracted the most attention: fiction and reality theories.

6.1.1. Fiction theory

Fiction theory is a creation of Roman law, advocated by German scholars of the 19th Century, and still prevails today.[195] According to this theory, legal entities are considered abstractions; they are "artificial beings, invisible and intangible." [196] In harmony with the fiction theory "just human beings can be subjects of legal relations, but a legal entity can be treated as a person through abstract means,"[197] to facilitate certain functions. Legal personality is attributed merely for legal and business convenience.

This theory asserts that legal entities are creations of the law, and possess only those properties conferred by the law. In this view, corporations, as legal entities, are considered to be constructs of law and not natural phenomena. [198] The fiction theory

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[194] A similar observation is made by Bonham and Soberman, the authors state that the theories of corporate personality have been refined into numerous sub-theories but none of the sub-theories really illuminates the subject and all of them inevitably led back to either of the two main opposing theories, but mainly to the fiction theory (Bonham and Soberman, *supra* note 5 at 7).

[195] According to Savigny, Roman lawyers were the creators and strict adherents of the fiction theory; Sailleiles argues that fiction theory was essentially an invention of modern times. See Frederick Hallis, *Corporate Personality: A Study in Jurisprudence* (London: Oxford University Press London-Humphrey Milford, 1930) at 3.

[196] Jarvis, *supra* note 6 at 11.

[197] F. M. Sanctis, *Responsabilidade Penal da Pessoa Jurídica* (São Paulo, Brazil1: Saraiva, 1999) at 8.

[198] Harry Glasbeek, "Wealth by Stealth" (Toronto: Between the Lines, 2002) at 7.

does not assert that the law recognizes pre-legally existing persons, "it maintains that the law creates all of its own subjects."[199]

The view that corporations are not real entities has serious implications for the attribution of liability. This very notion that corporations are not real entities lies behind attacks to corporate personhood and corporate criminal liability. For the asserters of this anti-corporate criminal liability position, corporations could never be held criminally liable because they are merely artifices created by law. In addition, it can be argued that as non-humans, mere fictions, corporations can not have a state of mind, nor can they carry out an act.[200] "It [a corporation] cannot act; it cannot think. It can only do so when some real people, with flesh and blood and a mind, do so on its behalf."[201] The fictionist argument makes it easy for corporations to evade criminal liability. Celia Wells concludes that fiction theory can be an accomplice in the corporation's lack of accountability.[202]

6.1.2. Reality theory

Reality theory emerged as a reaction of sociological jurisprudence to the rigid and positivistic notion of *persona ficta* offered by the fiction theory. The reality theory resides in Germanic legal tradition; it was developed in the first half of the nineteenth century in order to influence some imminent modifications to the German Civil Code.

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[199]Peter A. French,. *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984) at 35.
[200] See eg. Glasbeek *supra* note 12;
[201] Glasbeek , *ibid* at 12.
[202] Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001) at 83.

The basic assumption of the reality theory is that corporate bodies are real persons as opposed to the notion espoused by the fictionists that corporate bodies are legal creations. According to the reality theory, the law merely recognizes the existence of corporate bodies rather than creating the corporate entities.[203] The crucial point in the reality theory of legal personality is that juristic persons come to be the result, not of a creative act of the legislator, but of a living force of historical or social action.

This theory admittedly encompasses a view at least superficially more open to corporate criminal liability because it recognizes the existence of a corporate will. This same view is shared by supporters of corporate criminal liability in civil law jurisdictions,[204] and it is implicit in at least two common law theories of corporate criminal liability, i.e. identification theory and aggregation doctrine. Gierke, the father of reality theory, states that "a *universitas* [or corporate body]…is a living organism and a real person, with body and members and will of its own. Itself can will, itself can act…it is a group-person, and its will is a group-will."[205] However, the mere defence of a collective will does not take the realistic approach much further than the fiction theory. When the realistic theory asserts that juristic persons are not fictions, but real persons, alive and active, independent from its members, it seems to

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[203] Eliezer Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle" (1985) 76 Journal of Criminal Law and Criminology 285 at 295.
[204] Guilherme José Ferreira da Silva, Incapacidade Criminal da Pessoa Juridica (Belo Horizonte, Brazil: Del Rey, 2003) at 40.
[205] Gierke, *Political Theories of the Middle Age* (1908) xxvi (translated and prefaced by Maitland) cited in John Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale Law Journal 655 at 658.

be breaking free from an orthodox individualistic view.[206] Indeed, it denies the ontological individualism carried by the fiction theory, but is still rooted in another form of individualism – methodological individualism.[207] As a result, the mental state of the corporation is deemed to be reduced to the mental state of its members; the corporation's mental state is nothing more than the grouping of individual's mental states.

6.2. Economic models of the firm

Theories of economic organizations are grouped to explain the economic behaviour of organizations; studies focus on such issues as competition, maximum corporate growth under uncertainty, and efficient forms of organizations.[208] These theories are driven almost exclusively by market-relationships; however, some of these approaches can be significantly stretched to also embrace some aspects of the non-market social relationships and to have some impact on the ascription of criminal liability to corporations. Three important notions will be briefly considered: the

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[206] A. Mestre, *Las Personas Morales Y Su Responsabilidad Penal.* (Madrid: Gongora, 1930) at 40 cited in Sheila J. S de Sales, "Anotações Sobre o Princípio *societas delinquere non potest* no Direito Penal Moderno: Um Retrocesso Prático em Nome da Política Criminal?" in Luiz Régis Prado, ed. , *Responasabilidade Penal da Pessoa Jurídica: Em Defesa do Princípio da Imputação Penal Subjetiva"*(São Paulo: Revista dos Tribunais, 2002) 197 at 202.[translated by author].

[207] "methodological individualism, also called explanatory reductionism, according to which all laws of the "whole" (or more complex situations) can be deduced from a combination of the laws of the simpler or simplest situation (s) and either some composition laws or laws of coexistence (depending on whether or not there is descriptive emergence). Methodological individualists need not deny that there may be significant lawful connections among properties of the "whole" but must insist that all such properties are either definable through, or connected by laws of coexistence with, properties of the 'parts'" [Robert Audi, ed., The Cambridge Dictionary of Philosophy, 2nd ed. (Cambridge, UK: The Cambridge University Press, 1999) at 566].

[208]Brent Fisse and John Braithwaite, *Corporations*, *Crime and Accountability* (Cambridge: Cambridge University Press, 1993) at 60. [Fisse and Braithwaite, "Corporations"].

rational actor theory, the agency of the firm theory, and the concept of bounded rationality.

6.2.1. Rational actor model

In economics, the rational actor model describes both human and non-human behaviour. The word rational is understood here as having strictly a mathematical meaning; it denotes that making a choice is equivalent to solving mathematical optimization problems. Under the rational actor standard, corporations and individuals are not all that different: it is argued that corporations self-consciously attempt to pursue values just as human agents do.[209] The corporation is considered to be a set of feasible production plans directed to achieve a well-specified goal - profit maximizing - with respect to which it reaches optimal decisions. The corporation will mechanically carry out the owner's will, and it will serve his/her interest, which is, the maximization of profit.[210] It is assumed that corporate behaviour is determined and controlled by the price mechanism. Corporate actions are uniquely determined by the market conditions in conjunction with the market production frontier.[211]

The rational actor conception does recognize that corporations can have intentions, and consequently that corporations can be subjects of corporate liability. Corporate intention is to be found in the corporate policies that are designed to maximize profit.

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[209] Thomas Donaldson, *Corporations and Morality* (New Jersey: Prentice Hall, 1982) at 27.
[210] Meir Dan-Cohen, *Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society* (Los Angeles: University of California Press, 1986) at 17.
[211] *Ibid.*

However, the model of a unitary rational actor is unrealistic because it accords a very limited role to the significance of social structure or social relations. It portrays corporations akin to mechanistic human decision-makers rather than to a complex organism, composed of many individuals, many products, many decisions, many values, and many goals.[212] The analogy to human beings offers a limited and distorted picture of the corporation and corporate behaviour.

6.2.2. Agency theory of the firm

The separation of ownership and control of large-scale organizations has greatly influenced economic theory. The agency theory of the firm was created in this new context. The agency theory of the firm depicts the corporation as a fiction, a nexus or web of contracts.[213] In contrast to the idea of rational actor, the agency theory does not consider the organization an individual. Jensen and Meckling define this theory as: "a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals (some of whom may "represent" the organizations) are brought into equilibrium within a framework of contractual relations."[214] This theory draws attention to the fact that contractual relations with employees, suppliers, customers, creditors, and others are an essential aspect of the

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[212] Byrne and Hoffman, *Efficient Corporate Harm*, cited in Fisse and Braithwaite, *supra* note 22 at 74.
[213] Brent Fisse and John Braithwaite, *ibid* at 75.
[214] Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305 at 311.

firm.[215] As a result, the organization's behaviour would be the product of a complex equilibrium of all these contractual relations - like the behaviour of a market.[216]

One important aspect of the agency theory of the firm is that it takes a more practical view of the role of individuals within organizations. Whereas the utilitarianism of the rational actor theory fails to take into account the distinction between individuals, the contractarian viewpoint emphasizes this distinction. It recognizes that the interests of the owner and those of the manager might differ and might even be conflicting. The goal of the owner is wealth maximization. Therefore, for the owner, benefits or costs are primarily relevant in financial terms. For the agent, benefits or costs are relevant in both financial and nonfinancial terms.[217] It is argued that because the manager deals with the day-to-day operations of the firm, she or he also is presumed to have information about the firm's profitability that the owner's lack.[218] The manager will have other goals in mind beyond the owner's goals.

> We define an agency relationship as a contract under which one or more persons (the principal (s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent. If both parties to the relationship are utility maximizers there is good reason to believe that the agent will not always act in the best interests of the principal.[219]

Granted this strength, the agency model has a very myopic view of the nature of the corporation. Under this standard, corporations cannot be considered responsible

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[215] *Ibid.* at 310.
[216] *Ibid.* at 311.
[217] Peter Mukherji and Jisong Cui, "Inside the Firm: Socioeconomic versus agency perspectives on Firm Competitiveness" (1999) 28 Journal of Socio Economic 295 at 296.
[218] Oliver Hart, "An Economist's Perspective on the Theory of the Firm" (1989) 89 Columbia Law Review 1757 at 1759.
[219] Jensen and Meckling, *supra* note 28 at 308.

agents because they are portrayed as fictions, simple tools to serve individual ends. Corporation action and corporate responsibility are reducible to its members. In addition to that, the exclusive focus on the contractarian nature of the firm, gives a unilateral and an imperfect view of corporate life. It is assumed that the agents will act according to their desires or preferences. In the end, the agency model has the same error as rational actor theory: it does not take into account sociological aspects of the organization.

6.2.3. Bounded Rationality

The concept of bounded rationality is an alternative approach to the neoclassical notion of rationality advocated in the rational actor model. Bounded rationality recognizes the limits that are imposed upon rationality by system complexity.[220] Dequech defines bounded rationality as an expression "used to denote the type of rationality that people (or organizations) resort to when the environment in which they operate is too complex relative to their limited mental abilities."[221] Accordingly,it is argued that rationality does not determine behaviour:

> [W]ithin the area of rationality behaviour is perfectly flexible and adaptable to abilities, goals, and knowledge. Instead, behaviour is determined by the irrational and nonrational elements that bound the area of rationality. The area of rationality is the area of adaptability to these nonrational elements.[222]

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[220] Herbert Simon "Barriers and Bounds to Rationality" (2000) 11 Structural Change and Economic Dynamics 243 at 244.
[221] David Dequech, "Bounded Rationality, Institutions and Uncertainty" (2001) 35 Journal of Economic Issues 911 at 912.
[222]Herbert Simon cited in Augier Mie, " Simon Says: Bounded Rationality Matters" online: SAGE Publications <http://jmi.sagepub.com/cgi/reprint/10/3/268.pdf >

The notion of bounded rationality is considered to be constructed through the following assumptions. The first assumption is that people or organizations often pursue multiple objectives, which may be conflicting. This assumption rejects the neoclassical idea that organizations pursue only one single goal that is profit-maximatizion. Another important assumption is that the alternatives from which to choose in order to pursue the objectives are not previously given to the agent, who thus needs to adopt a process for generating alternatives. Then, the decision maker adopts a satisfying rather than an optimizing strategy, searching for the solutions that are good enough or satisfactory given certain aspiration levels.[223]

The theory of bounded rationality is an important contribution to the field of economic behaviour of corporations and ultimately to the issue of corporate liability. The recognition that corporations are complex systems and that this complexity influences corporate behaviour is a step forward to a more realistic approach to corporate life. However, the bounded rationality concept fails to provide an adequate explanation of corporate behaviour. It shares the same narrow view as the agency theory. It overemphasizes the decision-making process and, as result, the intention of the corporation would be found in this process, and the key individuals that take part in the decision-making would be responsible for the corporate behaviour.

[223] Dequech, *supra* note 35 at 912.

6.3. Organizational theory models

Organizational theory is the fruit of observations about organizational life and behaviour made mainly by sociologists, administrative theorists, and philosophers. As Dan-Cohen synthesizes, "organization theory is an important repository of systematic observations about organizations."[224] Various metaphors or models have appeared in this field to describe organizations.[225] For the purpose of the present analysis, four main metaphors will be summarized: the machine metaphor, the organic metaphor, the brain metaphor, and the collage metaphor.[226]

6.3.1. Organizations as machines

Organizations as machines or organizations as tools of management are metaphors used to picture what is currently known as the bureaucratic model of organizations. According to this view, corporations should be looked upon simply as private

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[224] Dan-Cohen, *supra* note 25 at 21.

[225] Although organizational theorists make use of a wide range of metaphors to define organizations, it is important to advert to the danger of a strictly metaphoric understanding. Mary Jo Hatch observes that "because metaphor depends upon identification of the similarities between non-identical things, when you use metaphor to understand one thing in terms of another, you de-emphasize or even ignore the often considerable differences between them. Thus, it is easy to get carried away with a new perspective, overextending the metaphor by taking it to ridiculous extremes." [Mary Jo. Hatch, Organization Theory: Modern, Symbolic, and Postmodern Perspectives (London: Oxford University Press, 1997) at 55]. However, the limitations of metaphors do not make the metaphorical knowledge less important. Gareth Morgan argues that in recent years organizational theorists have come to recognize the importance of metaphors and realized that viewing organizations on the basis of new metaphors makes it possible to understand them in new ways adding rich and creative dimensions to organization theory [Morgan, Gareth, "Paradigms, Metaphors, Puzzling and Problem Solving in Organization Theory" (1980) 25 Administrative Science Quarterly 605, at 615). [Morgan, "Paradigms"].

[226] Some other metaphors have been developed: the metaphor of organizations as theaters, the metaphor of organizations as political arenas, the cybernetic metaphor, the metaphor of loosely coupled system and the population ecology system metaphor. Ssee e.g. Morgan, *ibid* at 615-616; and, Linda Smircich,, "Concepts of Culture and Organizational Analysis" (1983) 28 Administrative Science Quarterly 339 at 340.

instruments that are created to serve economic and social purposes.[227] In order to achieve these purposes, organizations are expected to operate with mechanical precision in the same way as machines do. Organizations are designed as machines and their employees are in essence expected to behave as if they were parts of machines. Hence, this metaphor employs a static viewpoint; it is an analysis of organizations as closed and self-contained systems, whose dominant characteristic is that it ignores the environment.[228]

In the light of the machine metaphor, the concept of corporations as members of the class of formal organization was developed. As formal organizations, corporations are believed to be planned units, deliberately structured for the purpose of attaining specific goals.[229] Because corporations are considered goal-pursuing machines, the rationality of corporations would be purposeful. In this view, corporations could not be moral agents; like machines they would act mechanically and exist to achieve their goals without evaluating their actions or goals. Corporations would be seen as mere instruments or tools, and should not be treated as distinct agents that can act on behalf of themselves.[230] The only moral agents in such a context would be some key individuals, responsible for decision-making processes, not those who would operate and control the mindless machine.

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[227]Brummer, *supra* note 3 at 63.
[228] Stephen P Robbins, *Organization Theory: The Structure and Design of Organizations* (New Jersey: Prentice Hall Inc., 1983) at 10.
[229] Donaldson, *supra* note 23 at 23.
[230] Brummer, *supra* note 3 at 63.

6.3.2. Organizations as organisms or systems

The term organism, as Morgan highlights, has come to refer to any systems of mutually connected and dependent parts constituted to share a common life and focuses attention upon the nature of life activity.[231] Whereas in the machine metaphor the concept of organization is a closed and static structure, in the organism metaphor the organization is a living entity in constant flux and change, interacting with its environment in an attempt to satisfy its needs.[232] Organicism contends that the whole is greater than the sum of the parts.[233]

The organicism perspective has influenced other significant models such as the teleological, nonreductivist, interdependence, systems and population-ecology models.[234] This approach builds on the principle that organizations, like organisms, are "open" to their environment and must attain a proper relation with that environment if they are to survive.[235] The unique characteristic of this perspective is the recognition of the implications of the environment for organizational life. According to this perspective, organizations are directly and continually influenced

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[231] Morgan, "Paradigms," *supra* note 39 at 614.
[232] *Ibid.*
[233] "Organicism is a theory that applies the notion of an organic unity, especially to things that are not literally organisms. G. E Moore proposes a principle of organic unities, concerning intrinsic value: the (intrinsic) value of a whole need not be equivalent to the sum of the (intrinsic) values of its parts. Moore applies the principle in arguing that there is no systematic relation between the intrinsic value of an element of a complex whole and the difference that the presence of that element makes to the value of the whole." [Audi, *supra* note 21 at 636].
[234] Brummer, *supra* note 3 at 65-66.
[235] Gareth Morgan, *Images of Organization* (London: SAGE Publications, 1986) at 45. [Morgan, "Images"].

by their external environment through legislation, market forces, technological developments, and so on.[236]

In the same way as the machine metaphor, the organic perspective is based on the notion that the purposes of the parts are largely determined by the functions they assume in the whole, like a role-play. However, the advocates of the organic model do not grant that the functions that the members assume are so impersonal that this disqualifies the assignment of individual responsibility.[237] Because the organicists believe in the interrelationship of the parts, they assert that the individual members also contribute to the whole. Nonetheless, as Brummer explains, for the advocates of the organic model, collective responsibility is something over and above the responsibilities of individuals within the organization.[238]

6.3.3. Organization as brains

Under this perspective, organizations are portrayed as centers of information gathering and processing, intelligent decision-making, and self-correction.[239] Being centers of information gathering and processing means that corporations can receive information from their members and from the external environment and also distribute information internally and externally. It is also conceived that corporations are intelligent decision makers.

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[236] Arthur G. Bedeian, *Organizations: Theory and Analysis*, 2nd ed. (Chicago: The Dryden Press, 1983) at 4.
[237] Brummer, *supra* note 3 at 67.
[238] *Ibid.*
[239] *Ibid.*

One important feature of the brain metaphor is the assertion that brain-like organizations would have the ability of self-correction. The ability of self-correction is better explained by the holograph metaphor. Holography demonstrates in a very concrete way that it is possible to create processes where the whole can be encoded in all the parts, so that each and every part represents the whole; [240] as a result, each part is able to do the activities of other parts, reflecting the whole.

The advocates of the brain-like metaphor do not all agree that corporations are distinct moral agents. Goodpaster advocates that corporations are distinct from their agents, and have distinct moral agency.[241] French shares this same position, asserting that corporations are both the holders and administrators of moral rights, and consequently they can act in behalf of their rights in ways not reducible to the actions of their members.[242] Patricia Werhane considers corporations dependent moral agents. According to this view, corporations manifest distinct intentional actions, but this collective intent is dependent upon the separate intentions of their members.[243]

6.3.4. Organizations as collage

The collage metaphor for organizations is the fruit of postmodern thinking; it holds multiple perspectives and uses parts of different theories to form a new work worthy

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[240] Morgan, "Images," *supra* note 49 at 80.
[241] Kenneth E Goodpaster., "The Concept of Corporate Responsibility," in Tom Regan, ed., *Just Business: New Introductory Essays in Business Ethics* (New York: Random House, 1984) 292 at 301.
[242] French, "Collective," *supra* note 13 at 38.
[243] Patricia Werhane, *Persons, Rights and Corporations* (Englewood Cliffs, N.J.: Prentice-Hall, 1985) at 56.

of display in its own right. The art of collage, from which this metaphor comes from, consists of the ability to put together bits of materials and to form a new entity worthy of having a life of its own. When organizational theorists construct their collage model, they use pieces of old theories along with the knowledge and experience they have collected in their lifetimes to create a new theory.[244]

The collage metaphor cannot be conceived as a completely new metaphor, yet it is not a repetition of the theories used. It can be viewed more as an interpretative and creative tool than a model in itself. This metaphor attempts to harmonize multiple views in order to set an image of the corporation closer to its reality. It is therefore not surprising that this view reintroduces interest in contradiction, ambiguity**,** and paradox. [245]

The collage metaphor offers a fresh perspective on organizational theory, and a viable way out from the impaired view trap. As a post-modern approach, it does not advocate a grand discourse to replace old theories, yet it is argued that the possibility of employing "more eyes, different eyes"[246] to understand the reality of corporations is needed. Morgan reinforces the importance of pluralism, employed by the collage metaphor, when he claims that "conscious and wide-ranging theoretical pluralism rather than an attempt to forge a synthesis upon narrow grounds emerges as an

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[244] Hatch, *supra* note 39 at 54.
[245] *Ibid.*
[246] Friedrich Nietzsche, quoted in J. Rachels, "Nietzsche and The Objectivity of Morals", in N. Scott Arnold, Theodore M. Benditt and George Graham, eds, Philosophy Then and Now (Malden, Mass.: Blackwell Publishers, 1998) at 385.

appropriate aim. Different metaphors can constitute and capture the nature of organization."[247]

6.4. Corporations: a metaphor

Each model or theory constructed to explain the nature of corporations contributes uniquely to an image of the corporation, which might vary from an individualistic to an extremely holistic portrayal of the corporation. For that reason, it seems logical to assume that the perspectives on the nature of the organization are to some extent subtle reproductions or mere extensions of the old debate between individualism versus collectivism. Legal theories of personality, economic theories of the firm, and organizational theories, gravitate around this same debate. The individualistic principles advocated in the legal fiction theory are replicated somehow in agency theory of the firm and in the machine metaphor. A more realistic approach, still founded in methodological individualism, can be found in the reality theory, the rational actor theory, and brain-like metaphor. Finally, the metaphors of the organization as an organism and as a collage take a more holistic approach. Simply put, there are three main portrayals of the corporation: (1) as an abstraction that has human features; (2) as a collection of individuals; or (3) as a system. The picture chosen will determine the fate of corporate liability. If corporations are abstractions, there is no place for corporate liability. As a collection of individuals, corporations can have *mens rea*, but the mental state will be reducible to the individuals. Because each model was created in different contexts and by different perspectives, they don't

[247] Morgan, "Paradigms," *supra* note 39 at 612.

all overlap, but by some means they are complementary. A more compelling image of the corporation will be the one that encapsulates and harmonizes the different views. The image of the corporation as a system offers a more palatable view as the mental state can be found in corporate culture. Nonetheless, this metaphor must be interpreted more broadly as to comprehend parts of other viewpoints. The combination of the organic metaphor and the collage approach offers a sound starting point for the allocation of corporate *mens rea,* and consequently, it generates more sound models of ascribing liability to corporations.

VII. CORPORATIONS AS MORALLY RESPONSIBLE AGENTS

Introduction

Responsibility has numerous facets and shades. The variety of meanings makes it impossible to give a definition of responsibility. Ordinarily, responsibility is attributed to an agent (usually a person) due to a behaviour or misbehaviour. To ascribe responsibility is for some person to identify another person as the cause of a harmful or untoward event, because of some action that was performed by that other person, and in light of the fact that the person identified occupied a certain type of position, role or station and cannot support an acceptable defence, justification, or excuse for the action.[248] A general concept, such as the one given by Marek Järvik, corroborates the link between responsibility and behaviour: "responsibility is a phenomenon closely connected with behaviour or its consequences." [249] Ascription of responsibility has at least two distinct senses, causal and moral.[250] In the causal

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[248] Peter A. French, ed., "A World without Responsibility" in *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991) 2.

[249] Marek Järvik, "How to Understand Moral Responsibility?" (2003) 7 Trames 147.

[250] Wolf talks about a third kind of responsibility, a kind that she calls 'practical responsibility'. According to her, "We use the practical sense of responsibility when our claim that an agent is responsible for an action is intended to announce that the agent assumes the risks associated with that action. In other words, the agent is considered the appropriate bearer of damages, should they result from the action, as well as the appropriate reaper of the action's possible benefits. The practical sense of responsibility is easily confused with the moral sense, since it is easy to confuse damages with punishment and benefits with morally deserved rewards." [Susan Wolf, "The Legal and Moral Responsibility of Organizations" in J. R Pennock and J. W. Chapman (eds.) *Criminal Justice* 27 Nomos XXVII, 267. at 276]

sense, or in what Cooper calls "causally operative,"[251] responsibility is attributed merely in relation to a primary cause of an event. When the connection between the agent and the event goes beyond mere causality, responsibility is attributed in the moral sense. The moral sense is central to the analysis of criminal liability and social responsibility.

7.1. Causal responsibility

Causal responsibility is the minimal form of agency, a necessary but not a sufficient condition for the ascription of criminal liability. Even an individualist would accept that corporations are causally responsible for wrongdoings. Whereas causality is sufficient to justify corporate responsibility for civil wrongs and statutory offences, it is not sufficient to justify criminal liability for *mens rea* offences, which are the vast majority of criminal law offences in both legal systems, civil and common law. At least two factors can render causal agency unsatisfactory for ascriptions of criminal liability: its generality and externality. While causal agency can be ascribed to all sorts of "agents," events, things, non-human animals and to irrational underdeveloped humans, "[i]t does not signal a class of things that might properly be described as moral agents, or members of a moral community." [252] In addition, the evaluation of causal agency is conditioned exclusively by external elements and it does not allow a moral assessment of the wrongdoer.

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[251] David E. Cooper, "Collective Responsibility," reprinted in French, Peter A., *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991) 255 at 255.
[252] Marina A. L. Oshana, "Ascriptions of Responsibility" (1997) 34 American Philosophical Quarterly 71 at 72-73.

7.2. Moral responsibility

Whereas the ascription of causal responsibility seems to be unproblematic, ascriptions of moral responsibility are more complex. Generally speaking, when we describe someone or something as a morally responsible agent, we mean that we recognize such an agent as bearing characteristics of the sort that allow membership in the moral community. Historically in the western tradition there has been two main approaches to the analysis of moral responsibility, merit-based and consequentialist. According to the merit based view, an agent is held morally responsible only if it is deserved. The consequentialist view sustains that moral responsibility is ascribed only if it is likely to lead to a desired change in the agent.

In the last 50 years, revisionists' alternatives to the merit-based view have prevailed, especially the reactive-attitude concept of responsibility advocated by Strawson. According to the merit-based interpretation of responsibility, an agent is morally responsible for certain behaviour if this behaviour elicits a particular kind of response from others, or what is called reactive attitudes.[253] In harmony with this understanding, Cooper argues that when used in its moral sense, responsibility is

[253] See e.g, John Martin Fischer, "Recent Work on Moral Responsibility" (1999) 110 Ethics 93; and, John Martin Fischer and Mark Ravizza, Responsibility and Control: A Theory of Moral Responsibility (England: Cambridge University Press, 1998) at 6. Marina Oshana argues a different position, the accountability approach. She also stresses the social dimension of moral responsibility; however, according to her accountability precedes reactive attitude. A person is considered an appropriate subject of the reactive attitudes because the person is responsible. [Oshana, *ibid*].

related to attitudes of blame, reward and punishment. [254] Also, in Susan Wolf's words,

> To claim that an agent is morally responsible is to claim that he or she is liable to deep blame or praise, that he or she is capable of being guilty or heroic, that he or she is capable of deserving credit or discredit for what he or she does.[255]

At first sight, there is nothing extraordinary in attributing blame, or, responsibility to corporations. On the contrary, corporations seem to be already labelled as moral agents since they are popularly blamed and held responsible for their wrongdoings. There is no doubt that from the public perspective corporations are morally judged. In the face of corporate wrongdoing, it is not unusual to have public manifestations of disapproval of the corporation. Also, at the other extreme, when corporations do good actions, corporations are often praised for such deeds. As Christopher Meyers has noted, "our society does at least partially respect a corporation's status in the moral community."[256] However, when it comes to business ethics and criminal law, the ascription of responsibility to corporations is not so straightforward.[257] Theories of moral responsibility are focused on the individual human being, which restricts the entry in the moral community of any entity that is not a person.

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[254] Cooper, *supra* note 4 at 255.
[255] Wolf *supra* note 3 at 276.
[256] Christopher Meyers, "The Corporation, Its Members, and Moral Accountability" in Thomas I. White, *Business Ethics: A Philosophical Reader* (Toronto: Maxwell MacMillan Canada, 1993) 251 at 255.
[257] "[t]he prima facie case for counting corporations as moral agents is remarkably strong. It may even appear odd to question corporate moral agency since both ordinary discourse and the legal tradition seem to have such status already" [Thomas Donaldson, *Corporations and Morality* (New Jersey: Prentice Hall, 1982) at 20].

> It has often been thought that moral status should be tied to the condition of "personhood." The idea has been either that only persons are moral patients or that only persons possess a special moral status that makes them (morally) more important than nonpersons.[258]

If criminal liability is going to be ascribed to the corporate body, the criminal liability theory must find a way out of this individualistic "entrapment." The use of the doctrine of vicarious liability is an exception to the moral agency principle; it attributes criminal liability to corporations with no preoccupation with the finding of corporate intentionality. The identification theory creates an artificial device through which it is assumed that the moral status of the corporation is the same that as of the individual member. Lederman calls this process "imitation."[259] In fact, by personifying the corporation, the moral responsibility to the corporate body is mirrored, or "imitates" the moral responsibility of the individual member. The aggregate theory also avoids the problem of corporate moral agency by assuming that the corporation is a moral agent because its members are.

7.2.1. Criteria for moral agency

There are some conditions that an agent has to have in order to be part of the moral community. Accounts of responsible agency require that a responsible agent satisfy certain epistemic conditions and certain conditions of control.[260] The epistemic conditions can be generally described as rationality, i.e., the responsible agent is self-

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[258] Robert Audi, ed. The Cambridge Dictionary of Philosophy, 2nd ed. (Cambridge, UK: Cambridge University Press, 1999) at 590.
[259] Eliezer Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity" (2000) 4 Buffalo Criminal Law Review 641 at 655.
[260] Fischer, *supra* note 6 at 698-99. This conditions are based on the Aristotelian model of moral responsibility.

aware, is able to weigh the reasons for the act, is cognizant of and is able to act within established moral guidelines, and is responsive to reasons to adjust or amend his behaviour in light of these guidelines.[261] In sum, to be blameworthy, the agent must be capable of reasoning and of distinguishing between right and wrong. The conditions of control or "alternative possibilities control" guarantee that the agent acts freely and has authority over his acts. Although each theory of moral agency sets its own requirements, the majority mirror these basic assumptions: rationality and autonomy. These conditions have been established to focus on human beings. The assumption is that

> [I]f we are to have any assurance that our moral judgments are legitimate, we must apply them to subjects who are capable of forming beliefs, having desires and adjusting their behaviour in light of their beliefs and desires.[262]

It is due to this anthropomorphic bias that moral status is constantly denied to corporations. The conditions might change, but most of them are tailored to individuals. Even though the use of words such as rationality, belief and desire only demonstrate that corporations are not welcome to the moral community, these individual criteria can and should be guides to ascriptions of moral responsibility; however, they must not be understood as the paradigm of moral status. Different entities have different moral status.

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[261] Oshana, *supra* note 5 at 73.
[262] Edmund Wall, "The Problem of Group Agency" (2000) XXXI The Philosophy Forum 187 at 196.

7.2.2. Perspectives on corporate moral responsibility

a) Corporations are not moral agents

The view that corporations cannot be conceived as moral agents is coherent with the prevailing notion that only rational and autonomous human beings can be subjects of moral evaluation and can be able to engage in morally wrong behaviour. In other words, only rational and autonomous human beings are moral agents. [263] This perspective leads to at least two different conclusions: 1) corporations are not and could never be considered moral agents and 2) that for functional reasons the moral status of the individuals can be transferred or considered as that of the corporation. These functional reasons could be for example, the need to punish corporations for offences that require proof of mental state (agency).The former position has been strongly advocated by opponents of corporate criminal liability, especially in civil law countries. The former hypothesis, less orthodox than the latter, is the basis for the identification and aggregation theories. Although these two outcomes are interpretations of the same premise (that only individual human beings are intentional agents), they lead to distinct solutions for the problem of corporate criminal liability.

The more orthodox interpretation of the Kantian ideal of rational and autonomous man as the exclusive member of the moral community is advocated by scholars such as Velazques,

[263] See e.g., John Ladd, "Corporate Mythology and Individual Responsibility" in Thomas I. White, *Business Ethics: A Philosophical Reader* (Toronto: Maxwell MacMillan Canada, 1993) 236; "Morality and the Ideal of Rationality in Formal Organizations" (1970) 54 The Monist 488; and, Patricia Werhane, Patricia H., *Persons, Rights and Corporations* (Englewood Cliffs, NJ: Prentice Hall, Inc., 1985).

Corlett, Mander and Rescher, as well as by the majority of civil law scholars. [264] Whereas corporations are portrayed as a fiction or as real entities (the machine-like type) they are always considered dependent on their individual members, with no autonomous or separate existence. In both cases, corporations would lack the requirements to be a moral agent, i.e., rationality, autonomy and ability to be part of a moral relationship.

Ladd supports the view that corporations are not real by comparing corporations to Greek myths. "[T]here are striking resemblances between the belief that corporations are real persons and the Greek mythology that took Apollo to be a real person. (Both are immortals!)." [265] With regard to the attribution of moral responsibility, which he refers to as "the fixation of responsibility argument", he considers it unnecessary, since vicarious liability and civil law can be effective.[266] Under this approach, corporations join the group of the disqualified for moral agency (e.g., animals, corporations, infants, and the insane) from being the kinds of agent that are capable of being morally responsible. [267]

For H. L. Hart, corporations are morally neutral entities. In this view, Hart states that they are engaged in productive activities that only harm persons, their property and the environment incidentally. As corporations are programmed to act in certain ways,

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[264] Against corporate moral responsibility: Manuel G., "Why Corporations Are Not Morally Responsible for Anything They Do?" (1983) 3 Business and Professional Ethics Journal 1;Corlett, J. A, "Collective Moral Responsibility" (2001) 32 Journal of Social Philosophy 573; J. Mander, "The Myth of Corporate Conscience" (1992) Business and Society Review 81; and, N.Rescher, "Corporate Responsibility" (1998) 29 Journal of Social Philosophy 46.
[265] John Ladd, "Corporativism," reprinted in French, Peter A., *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991) 305, 309.
[266] *Ibid* at 307.
[267] Michael Moore, "The Moral and Metaphysical Sources of the Criminal Law" in J. Roland Penncok, ed., *Criminal Justice: Nomos XXVII* (New York: New York University Press, 1985) 11 at 12-13.

their wrongful acts are not committed with *mens rea*[268] To attribute moral responsibility to corporations in this case would be what Horowitz calls " ethical group fetishism" since there is no such thing as group morality, or group agency, but only individual mental states. [269] In the end, both lines of argument would converge to the conclusion that it is not only impossible to conceive of a corporation as a moral agent, but also unnecessary. In this sense, Keeley affirms the suggestion that organizations be considered moral persons is an unhelpful development in moral philosophy.[270]

It is central to this viewpoint that corporations also lack autonomy, either because they are designed for specific purposes or because their goals are limited to the goals to the individual members. Either way they lack the capacity to choose their actions. Essentially, corporations are limited to be profit-driven entities, with no choice besides this. According to Friedman, there is but one social responsibility for corporate executives: they must make as much money as possible for their shareholders. This is a moral imperative. Executives who choose social and environmental goals over profit - who try to act morally - are, in fact, immoral.[271] Debora Spar reiterates, "[C]orporations are not institutions that are set up to be moral entities…They are institutions which have really only one mission, and that is to

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[268] Harry Glasbeek, "Wealth by Stealth" (Toronto: Between the Lines, 2002) at 156.
[269] Amir Horowitz, "Ronald Dworkin's Group Fetishism" (2002) 5 Journal of Markets & Morality, online: < http://www.acton.org/print.php>
[270] Michael Keeley, "Organizations as Non Persons" (1981) 15 Journal of Value Inquiry 149, 149.
[271] Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Penguin Canada, 2004) at 34.

increase shareholder value."[272] Joel Bakan calls corporations "psychopathic creatures." According to him,

> [T]he corporation can neither recognize nor act upon moral reasons to refrain from harming others. Nothing in its legal makeup limits what it can do to others in pursuit of its selfish ends, and it is compelled to cause harm when the benefits of doing so outweigh the costs. Only pragmatic concern for its own interest and the laws of the land constrain the corporation's predatory instincts, and often that is not enough to stop it from destroying lives, damaging communities, and endangering the planet as a whole.[273]

Opponents of corporate moral agency also deny that corporations have any moral obligations. In harmony with this, it is said that "[o]nly people have moral obligations (…) Corporations can no more be said to have moral obligations than does a building, an organization chart, or a contract."[274] Or, as Ladd explains, "[T]hey cannot have moral responsibilities in the sense of having obligations towards those affected by their actions because of the power they possess."[275]

William Horoz also rejects the idea that corporations can be part of a moral relationship; however, he emphasizes the lack of special feelings, in this case, guilt. He assert the thesis that the notion of moral responsibility connects more tightly with the notion of guilt than with the notion of shame. The reason why corporations cannot be morally responsible is that they would never have the sense or belief that they are in fact responsible.[276]

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[272] Spar quoted in Bakan, *ibid* at 35.
[273] *Ibid* at 60.
[274]Frank F. Easterbrrok. and Daniel Fischel cited in Bakan, *ibid* at 60.
[275] John Ladd, "Corporate Mythology" *supra* note 16 at 242.
[276] "In fact, the notion of moral responsibility connects more tightly with the notion of guilt than with the notion of shame. In many cultures shame can attach to one because of what some member of one's

According to the prevalent Strawsonian view of moral responsibility, which is focused on 'reactive attitudes,' someone is morally responsible only if she is an appropriate candidate for the reactive attitudes of others. A more orthodox interpretation of moral responsibility refutes the idea that corporations can be target of reactive attitudes. As Fischer and Ravizza advocate, "[W]e do not have attitudes such as resentment or love toward them; rather, we view them from a more detached and uninvolved – a more objective - perspective."[277]

Proponents of the identification and aggregation theories have provided a less conventional reading of the principles of moral responsibility that have allowed the acceptance of corporations in the moral community. However, it is believed that the moral status conferred on corporations is only apparent; in the end, the conditions that allow corporate membership in the moral community are those of the individual members. It is still asserted that it is legitimate to pass moral judgments on an action if, and only if, it is performed by an individual.[278] It is assumed that it is logically impossible for an entity such as a corporation to have intentions that were not first owned entirely by employees or agents of the corporation. Accordingly, just as the actions of an organization are a function of the actions of the individual members, the

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family – or government- has done, and not because of anything one has done oneself; and in such cases the feeling of shame need not (although it may) involve some obscure, irrational feeling that one is somehow responsible for the behaviour of one's family or government. There is no doubt that people can feel guilty (or can believe they feel guilty) about things for which they are not responsible, let alone morally responsible. But it is much less obvious that they can do without any sense or belief that they are in fact responsible.(William Horosz, The Crisis of Responsibility (Norman Oklahoma: University of Oklahoma Press, 1975) 9.

[277] Fischer & Ravizza, *supra* note 6 at 6.

[278] R. S. Downie, "Responsibility and Social Roles" in Peter A. French , ed., *Individual and Collective Responsibility* (Rochester, Vermont: Schenkman Books, 1998) 117 at 177-118.

responsibility of the organization is a function of the responsibility of the members. As Susan Wolf explains (although she does not support this position):

> If an organization has done something for which it deserves blame, then some of its members have done something for which it deserves blame. If an organization has done something for which it deserves praise, then some of its members have done something for which it deserves praise. [279]

The identification theory is a true invitation for a membership in the selected club of moral agents; it is, indeed, relatively successful, but paradoxically it maintains the restricted patterns of moral responsibility since it creates an artifice through which the moral status of the individual is believed to be the moral status of the corporation.

b) Corporate Personhood

The idea of full corporate personhood was first developed by Peter French as the core argument of his model for corporate criminal liability, "the responsive adjustment model." Although this approach has been the target of strong critique, it has also attracted a few sympathizers such as Goodpaster, David Ozar and Shridar.[280] According to this view, corporations are believed to be analogous to individuals. With no meaningful distinction between corporate and human personhood, corporations are viewed as full-fledged moral agents who may intend and behave

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[279] Susan Wolf *supra* note 3 at 269.

[280] David Ozar, "The Moral Responsibility of Corporations," in Thomas Donaldson and Patricia H. Werhane (eds.), *Ethical Issues in Business* (Englewood Cliffs, NJ: Prentice-Hall, 1979) 294; Kenneth E. Goodpaster, "The Concept of Corporate Responsibility" in Tom Regan, ed., *Just Business: New Introductory Essays in Business Ethics* (New York: Random House, 1984) 10 ["Concept"]; Kenneth E. Goodpaster, "Morality as a System of Categorical Imperatives" (1981) 15 The Journal of Value Inquiry 179; and, B. S. Shridhar, and Artegal Camburn, "Stages of Moral Development of Corporations" (1993) 12 Journal of Business Ethics 727.

independently of their members, yet like their members.[281] The rationale behind the anthropomorphization is that corporations are made up of individuals and develop some human qualities.[282]

Corporations are believed to be rational, autonomous agents with a unified conscience in the same Kantian mold that individuals are said to be. Furthermore, in keeping with this view, rationality would suffice to permit ascriptions of corporate moral responsibility. Peter French argues the view that to be a methaphysical person is only to be a moral one. In his words, " to understand what it is to be accountable, one must understand what it is to be an intentional or a rational agent and vice-versa."[283]

Goodpaster uses concepts that carry deep humanistic meanings to assert his ideas. He explains that the main components of morality are rationality and respect,[284]and that these components are manifested in the four main elements of moral responsibility: perception, reasoning, coordination and implementation.[285] He attempts to explain how all of these elements are manifested in the corporation and how they contribute to morally responsible decision-making.[286] The central point of his argument is the development of what he calls "the principle of moral projection." This principle states that we can and should expect no more and no less of our institutions (taken as moral units) than we expect of ourselves (as

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[281] William S. Laufer "Corporate Bodies and Guilty Minds" (1994) Emory Law Journal 647 at 677.
[282] Goodpaster, "Concept, "*supra* note 33 at 305.
[283] Peter A. French.ed., *Individual and Collective Responsibility,* 2nd ed. (Rochester, Vermont: Schenkman Books, 1998) 32.
[284] "We have seen that the underlying spirit of the concept [of moral responsibility] is rationality combined with respect for others." [Goodpaster, "Concept," *supra* note 33 at 304].
[285] Goodpaster, "Concept,"*supra* note 33 at 301.
[286] *Ibid* at 307-310

individuals). To sum up, the concept of corporate responsibility could then be seen as the moral projection of the concept of responsibility in its ordinary (individual) sense. [287]

The advantage of full corporate moral personhood is that it makes it easy for corporations to be accepted in the moral community, since corporations are said to be like the same rational beings that are already members of the community. Causality, intentionality, ability to be a part in a moral relationship and individuality comes into the package offered to the members of the moral community, and being a new member, corporations would have all of them.

The decision-making process plays an important role in defining the intentional element for the fully moral personhood approach; it is believed that the proper place for the allocation of *mens rea* is within the decision making structures.[288] Decision-making might become implicit, in the form of informal rules, or more explicit, through formal provisions that will guide the process of decision-making.[289] Informally, corporate internationality could be found in the "understood but unwritten set of values or principles that make up the 'culture' of a corporation."[290] Formally, on the other hand, corporate intentionality would come in formal rules such as corporate ethical codes, guidelines for internal compliance, specific

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[287] *Ibid* at 306.
[288] Except for Shridar that explicitly refers to the allocation of intentionality in the culture of corporation, all other models assume that the moral agency is to be found or determined by the decision-making process of organizations.
[289] See e.g. Goodpaster, "Concept," *supra* note 33 at 308.
[290] *Ibid.*

corporate incentives and others.[291] More generally, French says that corporations intentionality is to be found in the set of operating policies:

> By policies what is meant are rather broad, general principles that describe what the corporation believes about its enterprise and the way it intends to operate. Policies contain basic belief and goal statements regarding both the what and the how of corporate life, but they are not detailed statements of appropriate methods.[292]

c) Objectivist account of moral responsibility

It is a basic principle of responsibility that the agent also be an intentional one, or to be consistent with the terminology used here, that the agent be a moral one. Nonetheless, exceptions to this principle are not uncommon. In our daily life, we do attribute responsibility for unintentional action and this attitude is not strange to criminal law as well. As Mackie puts it, there is a tendency for the law to move closer to the intentionality principle, or as he calls it, the "straight rule." However, he adds "there is also a contrary tendency to add to the list of offences for which there is strict liability, where someone is held responsible for actions for results he did not intend (…)."[293]It is based on this 'contrary tendency' that some scholars have encountered a tangential solution to deal with the attribution of moral responsibility.

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[291] *Ibid.*
[292] French, "Individualism," *supra* note 36 at 58.
[293] J. L. Mackie, "The Straight Rule of Responsibility" reprinted in Peter French, ibid, at 125.

The essence of an objective account of moral agency is that "actions have a real and objective moral quality."[294]Consequently, judgments of responsibility do not depend on incursions into the agent's intention. The morality (or immorality) of the behaviour is conceptually linked to the commission of certain acts. Moral agency or intentionality is not conceived "as some mysterious inner dimension of experience that exists independently from acting in the external world."[295] Hence, the problem of establishing the moral quality of an action is thought of by the objectivist as being a problem of fact.

Even though "orthodox subjectivism" is the dominant approach to moral and criminal responsibility, objective standards of responsibility are evident in the use of strict liability for criminal offences, where mere negligent conduct is enough to establish criminal liability. In these cases, the agent is held criminally liable for being negligent. The main concern behind the use of objective standards is purely utilitarian: the creation of optimal liability and sanctioning regimes. Fisse and Braithwaite, Kevin Gibson, Denis Thompson and Larry May are supporters of the use of the objective responsibility regime with corporate wrongdoing.[296]

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[294] Ted Trainer, *The Nature of Morality*: *An Introduction to the Subjectivist Perspective* (Aldershot, England: Avebury, 1991) at 2.
[295] George Fletcher, *Rethinking Criminal Law* (Toronto: Little, Brown and Company, 1978) 117.
[296] Brent Fisse& John Braithwaite, *Corporations*, *Crime and Accountability* (Cambridge: Cambridge University Press,1993); Kevin Gibson, "Fictitious Persons and Real Responsibilities" (1995) 14 Journal of Business Ethics 761; Denis F. Thompson, "Criminal Responsibility in Government" in J. R Pennock and J. W. Chapman (eds.) *Criminal Justice* 27 Nomos XXVII, 201; Larry May, *The Morality of Groups* (Notre Dame, Indiana: Notre Dame University Press, 1987), and"Vicarious Agency and Corporate Responsibility," reprinted in French, Peter A., *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991) 313.

The holistic model proposed by Fisse and Braithwaite suggests that corporations could be held criminally liable for their failure to react to a imposed duty, to its negligence to observe what has been imposed. There would be no need to find a intent or an intender since the failure to do what was imposed is enough to justify the imposition of liability. This failure would symbolize corporate culture, in such case a culture of negligence. The corporation would be considered morally responsible if it is shown that its culture had allowed or condoned a negligent behaviour that has caused harmful consequences. [297]

The advantage of the objective approach is that liability can be easily ascribed to corporations since the proof of an unlawful act would suffice to attribute liability. Larry May justifies his position arguing that sufficient conditions for negligent fault are much easier to establish than sufficient conditions for intentional fault when groups are said to act. And, indeed, to establish responsibility on the basis of an act is less complicated than to establish it in relation to a mental state. Another point that is usually raised in favour of the use of objective standard of liability is that "corporations rarely, if ever, act maliciously." [298]

Without the need to prove intent, there are fewer conditions of responsibility to be satisfied. It would still be important to prove causality, but there is no need to track in other conditions for moral responsibility such as rationality, autonomy and reactive attitudes. As Gibson puts it,

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[297] This is also Gibson's position , *ibid* at 765.
[298] Michael Rustad cited in Russel Mokhiber & Robert Weissman, *Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust* (San Francisco: Sierra Club Books, 1989) at 4.

The key difference is that in terms of moral accountability we only have to find an entity which has a set of norms, and not necessarily one which has the ability to formulate intentions and carry them out.[299]

d) Distinctiveness of corporate moral agency

At first sight, it seems that the fate of corporate moral agency is to be taken to extremes: either corporations have no moral status whatsoever, or their moral agency is conceived as being just like individual agency. This does not include the tangential option of disregarding moral agency. All these views offer at best an incomplete analysis of the corporate reality and of conditions of moral agency. Corporations are members of the moral community: they are a special kind of member. Since corporations and individuals are ontologically different, it does not make sense to require that corporations have the same moral status as individuals do. This belief is reflected in the work of authors such as Paine, Tollefson, Metzger and Thompson, Donaldson and Wilmot. [300]

We might call this approach to corporate moral agency, moderate, as opposed to the individualistic view of moral responsibility and to the view that anthropomorphizes corporations. For this moderate approach, moral agency is considered important for ascriptions of responsibility, which also excludes the exclusive objective approach. Indeed, the idea that corporations are in a category all their own is not alone as an exception to the principle that only human beings are moral agents; a similar debate is

[299] Gibson, *supra* note 49 at 764.
[300] L.S Paine, "Managing for Organizational Integrity" (1994) 72 Harvard Business Review 106; and D. Tollefson, "Organizations as True Believers" (2002) 33 Journal of Social Philosophy 395.

held with regard to artificial entities. [301] By the same token, advocates of animal liberation argue that animals have a moral status and that humanism is analogous to theories that illegitimately base moral status on race, gender, or social class.[302] Whether or not these other claims are sustainable is not what matters here, but the simple fact that the "humanity" of moral agency is being questioned from other perspectives is a sign that the exclusivity of human beings as moral agents is not an absolute truth.

Despite the differences, the perspective that corporations are a different kind of moral agent shares the same basic premise as that of full corporate personhood. Corporations are believed to be able to behave autonomously and intentionally. Corporations are not an aggregation of individuals with no moral capacities of their own. What differentiates these two approaches is their proximity with the human being model of moral agent. While the moral personhood theory identifies corporations with individuals, the intermediary perspective respects the differences between corporations and individuals.

There is no reason to maintain that corporations ought to fulfill all the requirements of moral agency. Individuals do not fulfill them completely, yet they are still considered moral agents. Donaldson argues that only two conditions would be

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[301] This model of attribution of moral agency is not the only one. For example, Luciano Floridi and J. W Sanders proposed the method of abstraction to extent ascriptions of moral responsibility to artificial entities. The method of abstraction avoids such questions as whether artificial agents have mental states, feelings or emotions and so on, by focusing on 'mind-less morality.' The guidelines for agenthood would be interactivity, adaptability and autonomy. See e.g., Luciano Floridi & J.W. Sanders, "On the Morality of Artificial Agents." (2004) 14 Minds & Machines 349.

[302] Audi, *supra* note 11 at 591.

necessary to configure the moral agency of corporations: (1) The capacity to use moral reasons in decision-making; (2) The capacity of the decision-making process to control not only overt corporate acts, but also the structure of policies and rules.[303] He lays down two important requirements, rationality and autonomy. The use of the word rationality is problematic since there is no decision that is completely rational. In the case of corporations, cognitive abilities would better describe the ability of the entity to weigh and be guided by values. If autonomy is understood in a more relativistic way, there is no problem to require this condition from corporations. It would be critical however, to add another condition, the ability to generate reactive attitudes. This last condition seems to have a special place in the case of corporate moral status.

Erick Richardson starts his analysis of corporate moral agency by stating that the dilemma as to whether or not corporations should be considered as moral agents as human individuals is false. He opts for an alternative explanation that lies in between the fully-fledged moral person and non-moral person model.[304] The notion of a false dilemma is very insightful since there is no need to choose between the two choices available if a third substitute for these alternatives is available. The third option is to treat corporations as limited moral agents. G.J. Warnock notes that the fact that moral agency is exclusively attributed to human beings is merely a contingency. Humanity is not a condition of moral status. Some characteristics that human beings happen to

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[303] Donaldson, *supra* note 10 at 30.
[304]Erick Richardson," When I Was a Child I Thought Like a Child: Corporations as Morally Equivalent to Children" (2001) 32 Journal of Philosophy 18 at 33-34.

have enable them to be qualified as moral agents. Consequently, if we prove these very characteristics are not absolute and we can find something similar in non-human entities, there is nothing that impedes these entities from also being part of the moral community.[305]

A primary objection to corporate moral agency is that corporations do not think and they are not able to weigh their reasons. Moreover, in reality, corporations do not have minds and do not think, yet they are not impaired in making moral judgements or reasoning in making choices. While they do not think, they have cognitive capacities, capacities to be sensitive and responsive to complex reasons for and against various actions. As culture producing and culture propagating entities, they do develop different levels of sophistication in justifying and rationalizing organizational action.[306] This is not to say that they develop a monolithic thinking; on the contrary, as open systems there is a lot of contradiction in corporations. In fact, this is the same for human beings as well, and they are still considered moral agents. What is primordial here is to accept that corporations develop values and reasoning to explain their behaviour that are shared by its members. [307]

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[305] But it is, one would think, a purely contingent matter that the only beings we know to exist who clearly satisfy this condition, or at any rate the only ones we commonly come across, are human beings, biped mammalian inhabitants of our planet, If there had been other sorts of animals on this planet, or if there were other beings elsewhere, who were rational in this somewhat minimal but essential sense, then they would have been, or would be, potential moral agents, notwithstanding the fact that they happened not to be human.[G.J. Warnock, *The Object of Morality* (London: Methuen, 1971) 13].

[306] Shridhar & Camburn, *supra* note 49 at 731.

[307] *Ibid* at 731.

Another important condition for moral responsibility ascriptions is autonomy, i.e., that the agent has the ability to have moral control of the acts. The autonomy principle should not be taken for granted since it is more an allusion to the ideal Kantian human being than a reality. Whether individuals have the freedom to choose their acts is highly controversial, even though individuals are still held responsible for their actions. There is no reason to require that corporations meet a condition that even individuals do not meet completely. Corporations are not free to choose their conduct, i.e, corporations are also subjected to internal and external influence. While they do follow specific and pre-determined goals, they are able to choose how to achieve the goals. And moral judgments are applied in such decisions. Donaldson and Wilmot advocate that corporations do not have the same autonomy that individuals are believed to have, but they have a second-order autonomy available.[308]

Finally, the allegation that corporations do not trigger reactive attitudes is not convincing. The ability to elicit a reaction in others is less controversial than opponents of corporate moral agency suppose. Almost everyone has experienced some kind of reactive attitude against corporations. Despite the fact that they are not human, people do have feelings about them. People's reaction against Wal Mart because of its policies of minimum wages for employees is well documented. In the Thalidomide case, an angry reaction against Chemie Grunenthal was instinctive. Or, as Denis Thompson illustrates, when people have blamed Hooker Chemical for dumping hazardous chemical waste at Love Canal or the Niagara Falls Board of

[308] Stephen Wilmot, "Corporate Moral Responsibility: What Can We Infer from Our Understanding of Organizations?" (2001) 30 Journal of Business Ethics 161 at 165; and, Donaldson, supra note 10 at 31.

Education for permitting a school to be built on the site, we are partly condemning past and present officials of the corporation and the board. [309] Every corporate misconduct, like human misconduct, will trigger a reaction in others. The fact of being a human being might even be a good thing, since we usually associate corporate crime with greed what is usually conceived in an immoral category per se.

[309] Denis F.Thompson, "Criminal Responsibility in Government" in J. R Pennock and J. W. Chapman (eds.) *Criminal Justice* 27 Nomos XXVII, 201 at 212.

VIII. CORPORATE CULTURE: THE PLACE OF THE MENTAL ELEMENT

Introduction

Problems associated with the attribution of criminal liability to corporations are not merely confined to uncertainties about the potential effectiveness of criminal law as a device to control corporate misbehaviour; another controversial aspect of corporate criminal liability is the allocation of the mental element of the criminal offence. According to the classical notion of criminal law, both *actus reus* and *mens rea* are essential requisites in order to attribute liability to an agent. If a corporation is to be held liable for its criminal conduct, the corporation must be a responsible actor and a fit subject for the applicable penal sanction. Whether a corporation can or can not be a responsible actor is the touchstone of theories of corporate criminal liability. As Fergunson comments, "the central issue that arises in attaching criminal liability to a corporation is the theoretical difficulty of attributing a culpable mental state (or *mens rea*) – a required element of most criminal offences – to non-human, artificial entities."[310]

Differences among theories of corporate liability are the result of conflicting views of the proper place or person to locate the subjective element or *mens rea* of the offence. The principle that corporate *mens rea* should be found within the individual members

[310]Gerry Fergunson, "Corruption and Corporate Criminal Liability" in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998* (Freiburg: edition inscrim, 1999) 153 at 153.

of the corporation coexists with a distinct standard which argues that *mens rea* can legitimately be found in the corporation itself. Contrasting with these two trends, the orthodox position that there can be no such thing as corporate *mens rea* is still very alive in civil law jurisdictions and somehow resurrected in common law systems. [311] Holistic models of corporate criminal liability maintain that corporations have an independent will that can be found in their culture. A more compelling approach to corporate criminal liability should take into account not only the influence of corporate culture in the decision-making process; it is essential for a sound approach to be based on corporate culture as an active and independent power that creates and shape the corporate will.

8.1. Corporate action

From the two elements required to characterize criminal conduct,[312] *actus reus* and *mens rea,* the physical and the mental elements, it is to the mental element that critics raise their eyebrows. The act element in corporate misconduct does not generate any substantial debate. One could think that this might be either because the corporation's ability to act is not questionable or it is assumed that corporations cannot act at all. Although the first assumption is the correct one, it is worthwhile to outline some aspects of corporations' ability to act.

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[311] It is commonly stated that the assumption that corporations can have *mens rea* abounds in irrationality [John Andrews, "Reform in the Law of Corporate Liability" (1973) Criminal Law Review 91at 91]

[312] Civil law tradition adopts a tripartide structure of the offence where the element culpability is added to the physical and mental elements.

A common argument against corporate action is that they do not fulfill the *actus reus* requirement because they can only act when some real people, with flesh and blood and a mind, do so on their behalf.[313] It is obvious that to say that a corporation acts is to say that in this action there is a human being involved, or that it is a human act. In fact, the traditional ascription of criminal liability is rooted in authorship, i.e., responsibility can only be ascribed to the author of the action, the person who has performed or caused the act. And, as Sistare puts it "[I]f sacrosanct, this [act] doctrine should preclude liability for the conduct of others."[314] However, this is not the case, because the principle of authorship is not sacrosanct. Criminal liability has been ascribed in situations where the act of one person is attributed as the act of another person, as in the case of criminal liability for negligence, strict liability offences or vicarious liability offences. Thus, ascriptions of criminal liability to corporations do not infringe principles of criminal law because corporation can be held responsible for the acts of their members. It can be said that "corporations have the peculiar property of only being able to act vicariously."[315] Since corporations are not like individuals, their ability to act does not need to be similar to individual ability to act.

Not all actions of the corporate members can be attributed to the corporation for the purpose of criminal liability. It is critical that some features be identified in the action, like the influence of corporate culture and the relationship between the author of the action and the corporation. The action must be performed in virtue of practices,

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[313] Harry Glasbeek, *Wealth by Stealth* (Toronto: Between the Lines, 2002) at 12.
[314] C. T. Sistare, *Responsibility and Criminal Liability* (London: Kluwer Academic Publishers, 1989) at 45.
[315] Larry May, "Vicarious Agency and Corporate Responsibility," reprinted in French, Peter A., *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991) 313 at 313.

regulations or customs of the entity, in other words, that the act be a result of the culture of the corporation. In Cooper's words, "[I]f we are to blame a group for actions performed by members of it, this must be in virtue of some practice, mores, rules, or "way of life" which characterizes the group. [316] In addition to that, there must exist a relationship between the author of the act and the corporation. Laufer proposes a test to determine the reasonableness of attributing an action to the corporate entity that is based on the strength of the relationship between the agent and the corporation. This test is similar to the test used in the identification theory. Consequently, it generates the same problem: it restricts the acts for which the corporation could be held responsible. There is no need to create new requirements to attribute the act of the individual to the corporation in the case of criminal liability. Since corporations can only act through their employees, it is reasonable to apply the same principle as for vicarious liability theory, i.e., that the agent has acted in the scope of his or her authority.

8.2. Corporate mens rea

Ascriptions of criminal liability require that the agent had acted intending to do wrong, or in a reckless or negligent way. The maxim *actus non facit reum nisi mens sit rea* which can be translated as an act is not criminal in the absence of a guilty mind is a distinctive feature of criminal law. There are only few exceptions to this principle, usually statutory offences and often in the field of regulatory offences. It prevails in both common law and civil law legal systems that to characterize an offence, *mens rea*

[316] David Cooper, "Responsibility and the 'System'"" in French. Peter A., ed., *Individual and Collective Responsibility* (Vermont: Schenkman Books, 1998) 133 at 139.

must be present and contemporanous to the *actus reus.* Accordingly, in order to attribute criminal liability to a corporate entity corporate *mens rea* must be found.

Mens rea is usually characterized as a guilty mind or psychological element of the offence. This individualistic flavour of the concept *mens rea* can be traced to the origins of the word *mens*, which means mind and it has been reinforced by the individualistic tone of modern criminal law. As well, this very traditional conception of *mens rea* results in most of the problems of attributing criminal liability to corporations. A common argument against corporate criminal liability is that corporations do not have minds and consequently would never fullfill the *mens rea* requirement. Indeed, corporations do not have minds, and need not have them. Starting from this premise, theorists such as French, Fisse, Braithwaite and Bucy developed the notion that the mental element of corporate misconduct can be found in the corporation culture.[317] The culture of the corporation would be the cognitive element where it is possible to find the *mens rea* of the corporation.

8.3. Corporate culture

Hatch states that "organizational culture is probably the most difficult of all organizational concepts to define."[318]Corporate or organizational culture is a relatively new concept. The acceptance of culture as a social variable was imported from

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[317] See chapter 9.

[318] Mary Jo Hatch, *Organizational Theory: Modern, Symbolic and Postmodern Perspectives* (London: Oxford University Press, 1997) at 202. It is also reminded by Thompson and Luthans: "There is considerable disagreement about the definition of organizational culture." ["Organizational Culture: A Behavioural Perspective" in Benjamin Schneider, ed., *Organizational Climate and Culture* (Oxford: Jossey-Bass Publishers, 1990) 319 at 320].

anthropology and has become prominent in organizational studies literature since 1970.[319] In the following decade the idea of corporate culture was introduced in the field of corporate criminal liability studies by Brent Fisse and since then it has influenced various alternative approaches.[320] The belief that corporations can have a supraindividual property challenges the prevailing notion that all group macroscopic concepts are in principle definable in terms of individual behaviour and allows a shift in the focus in the search for a guilty mind, from the individual members to the corporation itself.

Anthropologists define culture in many ways. Generally, culture could be described as a way of life of a group of people, "a complex whole which includes knowledge, belief, art, law, morals, customs and any capabilities and habits acquired by a …[person] as a member of society."[321] In organizational studies, culture is usually said to represent what is popularly known as "the way things are done around here."

The concept of culture given by John van Maanen comprises all aspects of culture that are relevant to the allocation of *mens rea:*

> Culture refers to the knowledge members of a given group are thought to more or less share; knowledge of the sort that is said to inform, embed, shape, and account for the routine and not-so-routine activities

[319] Neal M. Ashkanasy, Lyndelle E. Broadfoot & Sarah Falkus, "Questionnaire Measures of Organizational Culture" in Neal M. Ashkanasy, Celeste P. M. Wilderom, & Mark F. Peterson, eds., *Handbook of Organizational Culture & Climate* (London: Sage Publications, 2004) 131at 131. Although it has become prominent in the seventies, it is possible to find references to organizational culture as early as 1952. See also Hatch, *ibid* at 205.

[320] See Brent Fisse & John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney Law Review 469.

[321] J. W. Symgton, "Learn Latin America's Culture," in New York Times (September 23, 1983) cited in Nancy J. Adler, *International Dimensions of Organizational Behaviour*, 3rd ed. (Cincinnati, Ohio: South Western College Publishing, 1997) at 14.

> of the members of the culture…A culture is expressed (or constituted) only through the actions and words of its members and must be interpreted by, not given to, a fieldworker…Culture is not itself visible, but is made visible only through its representation.[322]

The theory developed by Edgar Schein has become an influential paradigm to understand organizational culture.[323] According to this model, corporate culture would occur on three levels: artefacts, values and norms. On the surface, we would find artefacts, the most accessible element of a culture. Gagliard defines artefacts as follow:

> [T]he visible expressions of a culture, including therewith (as well as objects and the physical arrangements) patterns of behaviour (such as rituals) on the one hand, and, on the other, abstract productions or mental representations (such as stories).[324]

Symbols or artefacts are considered important means of communicating corporate culture because they "enable us to take aim directly at the heart of culture." [325] Symbols would reveal what is tacitly known and yet not clearly communicated by an organization's members.

Underneath artefacts would lie values and behavioural norms. Although closely associated, values and norms are different cultural concepts. Values are key

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[322] John van Maanen cited in Hatch, *supra* note 8 at 205.
[323] See Hatch, *supra* note 8 at 210. A different classification is given by Sales & Mirvis, who consider three realms of culture: human action or behaviour that represents the surface of the realm; in the second realm there are values; and, in the third realm is philosophy. Philosophy, according to the authors would be "the overarching paradigm that provides a map for action and a means forinterpreting and evaluating its consequences, philosophy links behaviour and values." [Amy L. Sales & Philip H. Mirvis, "Feeling the Elephant: Culture Consequences of a Corporate Acquisition and Buy-Back" in Benjamin Schneider, ed., *Organizational Climate and Culture* (Oxford: Jossey-Bass Publishers, 1990) 345 at 348-349].
[324] Pasquale Gagliardi, ed., Symbols and Artefacts, Views of the Corporate Landscape – de Gruyter Studies in Organization 24 (Berlin: Walter de Gruyter, 1990) at VII.
[325] Gagliardi cited in Anat Rafaeli & Monica Worline, "Symbols in Organizational Culture" in Ashkanasy, Neal M., Wilderom, Celeste P.M & Peterson, Mark F., eds., *Handbook of Organizational Culture & Climate* (London: Sage Publications,2004) 71 at 76.

determinants of attitudes, which in turn affect work-related (and all other) behaviour. They affect the decision-making process and serve as parameters for individual behaviour. [326] Norms of behaviour or rules would be the series of formal rules, written or unwritten, which are primarily created by individuals, but become structures standing over and above people.

> By formal rules, we refer to those expectations and requirements, either written or unwritten, that are routinely associated with the pursuit of organizational purposes, activities, or goals that are perceived as legitimate or "normal." [327]

Yet, this picture of a rational and coherent series of formal rules is not compatible with the reality of corporations. Mills and Mills advert to the parallel existence of informal rules, which develop alongside and sometimes contradict formal rules.[328] Finally, at the core of the corporation's culture we would find beliefs and assumptions. Beliefs or assumptions are the hidden, deepest and most subjective element of culture that are not directly knowable even to some of the corporations members.

When applied in criminal law, corporate culture does not necessarily reflect all the nuances that are important for managerial studies. The connection between culture and productivity is not a primary concern for ascriptions of corporate liability. For criminal law the question of whether a culture is "bad" or "good" comes prior to the question of

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[326]Richard W. Stackman, Craig C. Pinder & Patrick E. Connor, "Values Lost" in Ashkanasy, Neal M., Wilderom, Celeste P.M & Peterson, Mark F., eds., *Handbook of Organizational Culture & Climate* (London: Sage Publications,2004) 37 at 38.

[327] Jean C. Helms Mills & Albert J. Mills, "Rules, Sensemaking, Formative Contexts, and Discourse in the Gendering of Organizational Culture" in Neal M. Ashkanasy, Celest P. M Wilderom & Mark F. Peterson, eds., *Handbook of Organizational Culture & Climate* (London: Sage Publications,2004) 55 at 59.

[328] *Ibid* at 60.

whether it is "strong" or "weak." As opposed to managerial studies, for the ascription of criminal liability it is the moral aspect of the corporate culture that matters. Managerial studies focus on the relationship between corporate culture and productivity; the moral aspect of corporate culture is neglected.

Not all alternative models of corporate criminal liability share the same basis for allocating *mens rea* in the corporate culture. Reactive Corporate fault and Constructive fault models rely on the notion of culture as a whole. In the Principle of Responsive Adjustment, French applies the rules of behaviour approach to assess corporate *mens rea.* The corporate ethos approach focuses on values as the appropriate vehicle to find *mens rea.* When legal scholars talk about corporate culture, they usually refer to the culture as a whole and have not chosen a specific manifestation of culture to be the proper place for the allocation of *mens rea.* In the end, however, all converge in the conclusion that organizational culture is a property of the corporation and it influences corporate behaviour. It does not matter which explanation for culture is used. What is important is to recognize that corporate culture is the cognitive element of the corporation. It is not reducible to individuals and that pertains to both observable and ideational aspects of organizational behaviour.[329]

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[329] Richard E Kopelman., Brief, Arthur P & Guzzo, Richard A., "The Role of Climate and Culture in Productivity" in Schneider, Benjamin, ed. *Organizational Climate and Culture* (Oxford: Jossey-Bass Publishers, 1990) 282.

IX. HOLISTIC MODELS FOR THE ATRIBUTION OF CRIMINAL LIABILITY TO CORPORATIONS

Introduction

The majority of theories of corporate criminal liability are typical of common law developments. The traditional theories have been constructed on a case-by-case basis. They simply suggest the transferring of civil law principles into the criminal law; they were not originally created to the criminal area, they are civil in nature. Also, they rely on the individual to attribute liability to a company. Examples of these restrictive models are the agency theory and, in a more elaborate form, identification and aggregation theories.

The literature points to advancement with regards to the mainstream common law standards of attributing criminal liability to corporate entities. These new developments propose a new conceptual paradigm for identifying and proving corporate intent. According to these models, the *mens rea* of the corporate offender can be found in the corporate structure itself.

These innovative archetypes to attribute corporate criminal liability recognize that the realities of complex corporate organization and the dynamic of organizational processes, structures, goals, cultures and hierarchies shape and differentiate each corporation. For this reason, each corporate entity is believed to have a distinct and

identifiable personality independent of specific individuals who control or work for the organization.

Due to the evidence that corporations have their own identity and personality, the inappropriateness of the derivative forms of attribution of criminal liability appears to be axiomatic. In keeping with this reality, the holistic models not only contradict the traditional theories, but intend to construct a more compelling method of attributing criminal liability to corporations. This rationale is employed in the Australian Criminal Code Act, and it is proposed in relation to a corporate manslaughter offence in England.[330]

Generically, the alternative models of corporate criminal liability propose a method to ascribe criminal liability to corporations by taking into account the corporate life, its organization, and its culture. Because the subject of corporate criminal liability is dynamic and has been widely discussed, it is very difficult to label all these proposed methods. Some propositions present only small variations and do not substantially differ from the main models. This chapter summarizes five core doctrines which are based on a holistic view of the corporation. These doctrines are: proactive fault, reactive corporate fault, responsive adjustment, corporate ethos and constructive corporate liability.[331] Prior to the analysis of these doctrines, it is important to clarify

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[330]Section 12 of Australian Criminal act; Clause 4, draft involuntary homicide bill, Law Comission Report 239 (1996)

[331] Denis Thompson also proposes a model of ascribing liability that resembles the holistic model. However, because in the end this model reflects much more an individualistic approach, it does not deserve to be included in the category of holistic models. Yet, this singular approach is worthy of note. The author recognizes that there is something beyond the individuals in a corporate setting, he describes corporate culture as a group of routinized and specialized behaviour that is not reducible to

what holism is and why this concept have being employed in corporate criminal liability.

9.1. Holism

A series of models have been proposed by common law scholars as an alternative to the existing theories of corporate criminal liability. Celia Wells refers to this widening form of attributing primary liability to corporation as holism; she explains that although anthropomorphic image infusing is unhelpful if it is taken to imply that the mind cannot be responsible for the body, this psychological metaphor could be used as the basis for a form of liability which better reflects the reality of the corporate organization [332]The expression holism, borrowed from physics, seems to comfortably

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individuals. Thompson argues that 'the very characteristics of organizations [specialization and routinization] that make it difficult to hold individuals criminally responsible for isolated crime make it possible to hold them responsible for reiterated crime." According to this position, the holistic claim does not seem warranted. "The mistake the structuralists make is to take an overly static view of organizational behaviour, looking at only one crime at a time. If we adopt a more historical perspective, routinization and specialization can actually aid the ascription of personal responsibility. Because organizations develop routines, their mistakes recur in predictable ways; their designs may not be dark but their crimes are reiterated. The patterns of pathology known to theorists of organizations can be, and often are, as well known to those who work in organization. Higher officials may not be aware of specific crimes in their organization, but they know, or should know, that certain structural conditions (such as discretion in enforcing overly strict standards) give rise to organizational corruption. Individuals who could be expected to know about these conditions and take steps to correct them could be morally blameworthy and in some cases properly subject to criminal sanctions." Thompson simply transfers the duty to deter criminal behaviour from the state to higher echelon employees. These employees should be criminally responsible as opposed to the corporation because they would have failed to predict the criminal behaviour that could be predicted by the observation of routine zed and specialized activities of the corporation. (Denis F. Thompson, "Criminal Responsibility in Government" in J. R Pennock and J. W. Chapman, eds., *Criminal Justice* 27 Nomos XXVII, 201.)

[332] Celia Wells,*Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001) at 156-157. Celia Wells however identifies the aggregation doctrine as a holistic model, what can be misleading. The aggregation doctrine may have some holistic character when it attempts to view corporations as a whole, but it is still reductionist when it assumes that the whole is the sum of its

fit these set of theories that advocates that the corporation will is a whole and not exclusively reducible and determined by that of its members. For holistic theories of corporate criminal liability, we want to refer to this set of theories that has evolved as a critique of traditional theories of corporate criminal liability. They are founded on holistic principles and have also proposed that the will of the corporation does not need to be found in an individual mind but in the corporation's complexity and life.

The holistic approach represents a departure from a narrow perspective to a more comprehensive one, one which recognizes that corporations are supra-entities not reducible to individuals. The traditional theories of corporate criminal liability are accompanied by the view that every group is, in principle, definable in terms of individual behaviour.[333] In other terms, the corporation seems to break down into a small system or an individual, which implies that corporations are in the end reducible to individuals. As Floyd emphasizes,

> A 'whole' is said to be different from its 'parts' or even from their summation. Yet, since it is made up *only* of these parts and cannot exist without them, the whole cannot be sharply and unambiguously distinguished as a 'thing' from the 'thing' that are its parts except by a purely intellectual artifice.[334]

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parts and has no independent existence. For that reason, I prefer not to include the aggregation doctrine as part of the holistic models but as an adjacent to these approaches.

[333] May Brodbeck, ed., "Methodological Individualisms: Definition and Reduction" in *Readings in the Philosophy of the Social Sciences* (New York: The Macmillan Company, 1968) 280 at 286.
[334] Floyd Allport, "Legal Complexities of Group Activity" in Braybrooke, David, ed., *Philosophical Problems of the Social Sciences* (London: Collier-MacMillan Ltd, 1965) 27 at 31.

In this way, it would be inconceivable that supraindividual group properties could be meaningfully attributed to things or events.[335] The influence of holistic ideas that originated in physics and influenced a wide number of social sciences, including psychology, sociology, philosophy and law, made it possible to transcend an orthodox individualistic view and to offer alternatives more harmonized with the reality of organizations.

The acceptance that corporations are not merely an aggregation of individuals made it possible for holistic theories of corporate criminality to revolutionize this long-time honored belief of criminal law and to step into a new dimension of perceptions about corporate criminal liability. The models proposed by Fisse, French, Bucy and Laufer are not impeccable and they need not to be; the great merit of these models, however, is not in what they might achieve in practical or theoretical terms but in what they have questioned and articulated.

[335] Brodeck, *supra* note 47 at 286.

9.2. Holistic models

9.2.1. Reactive Corporate Fault Model[336]

The notion of reactive corporate fault proposed by Brent Fisse and John Braithwaite is the best-known cultural or organizational approach.[337] As with the collective knowledge theory, this model was developed to face the modern and complex corporate structures that are neglected by the traditional theories. Instead of extending the notion of vicarious and identification theory, the reactive corporate fault model proposes a rupture from the restrictive individualistic and derivative character of those theories. The reactive corporate fault model was fashioned to be "responsive of non-prosecution of corporate managers"[338]and resulted from the application of the existent theories by focusing on the search for the corporate intent.

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[336] Laufer refers to a similar model called Proactive Model or Proactive Corporate Fault (PCF) .This model was first proposed in Developments in the Law – Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions (1979) 92 Harv. Law Review 1227. Later it was discussed in relation to reactive corporate fault or reactive corporate *mens rea* in Brent Fisse, Restructuring Corporate Law: Deterrence, Retribution, Fault and Sanctions (1983) 56 S. Cal. L. Rev 1141 at 1200. Most recently, PCF was incorporated into the federal sentencing guidelines for organizations. According to PCF standard, corporations are liable when they fail to make reasonable efforts to implement policies and practices that prevent crime. This same basis of attributing liability to corporations is advocated by RCF model, however, Proactive fault is assessed as fault prior to the commission of the offence and Reactive fault is assessed thereafter. Evidence of reasonable efforts to prevent crime commission would come from: (1) the development and implementation of safeguards to prevent crime commission, and (2) the delivery of clear and convincing prohibitions of criminal behaviour. In order to avoid a finding of proactive fault, senior executives and top management would order outside audits, compliance reports, and engage in or supervise periodic internal assessments. [336] [William S. Laufer, "Corporate Bodies and Guilty Minds" (1994) Emory Law Journal 647 at 665]["Corporate Bodies"]

[337] The theory of corporate blameworthiness and consequently the construction of the notion of reactive corporate fault was first elaborated in Brent Fisse and John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism*, *Collectivism and Accountability* (1988) 11 Sydney Law Review 469.

[338] Brent Fisse & John Braithwaite, *Corporations*, *Crime and Accountability* (Cambridge: Cambridge University Press,1993) at 158.

Under corporate reactive fault, corporations make themselves responsible for investigating and reporting on internal discipline following an offence, and also enforcing that responsibility. If the *actus reus* of an offence has been committed by or on behalf of a company, a court should be empowered to order the company to conduct its own investigation to ascertain who was responsible. The corporation would investigate the offence, carry out the appropriate disciplinary proceedings against the individuals or sector of the company directly responsible, and it would return a detailed and satisfactory compliance report to the court. The burden of the investigation would be placed on the corporation. Also, the corporation would have the responsibility to take appropriate disciplinary measures and corrective steps to ensure the wrongdoing does not reoccur.

According to Fisse and Braithwaite, reactive corporate fault may be broadly defined as unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the *actus reus* of an offence by personnel acting on behalf of the organization.[339] If the company takes appropriate measures, no criminal liability will be imposed. Criminal liability will only be imposed on the company if it fails to comply adequately with the court order.

Under this model, the culpability of the company will not be assessed at the time of the crime. The liability of the company will be attributed when the company fails to react appropriately to the wrongdoing or when it fails to respond satisfactorily to the

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[339] Brent Fisse and John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism*, *Collectivism and Accountability* (1988) 11 Sydney Law Review 469 at 505.

commission of the external elements of an offence such as where no action is taken to rectify the situation.[340] The corporation would be vicariously responsible for the external elements of the offence committed by its employee, but not for the internal elements (*mens rea*). The internal element would be found in the corporation policy of non-compliance or a failure to take reasonable precautions and to exercise due diligence.[341]

This model has a "dual corporate and individual focus."[342] It does not advocate the abandonment of criminal prosecution of individuals responsible for corporate crime. Rather, it accepts that individuals have responsibilities parallel to collective responsibilities. One of the strategies of the reactive fault approach is to

> maximize the allocation of responsibility to all who are responsible, be the individuals, subunits of corporation, corporation, parent corporations, industry associations, gatekeepers such as accountants and indeed regulatory agencies themselves.[343]

Due to the possibility of corporate distrust, Fisse and Braithwaite propose some measures that can maximize a corporation's agreement to rearrange its internal discipline. These measures can be grouped into three steps: the first is to provide an array of sanctions that offer a powerful disincentive against corporate non-compliance with the terms of an internal discipline order; the second is to designate individual representatives of the company as parties responsible for complying with the terms of

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[340] Brent Fisse, *Recent Developments in Corporate Criminal Law and Corporate Liability To Monetary Penalties,* (1990) 13 UNSW Law Journal 1 at 14.
[341] Brent Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 Sydney Law Review 277 at 279
[342] Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press,1993) at 164.
[343] *Ibid* at 163.

the internal discipline order; and, the third is to provide mechanisms for monitoring compliance, again as part of the order that requires internal disciplinary action to be taken.[344]

The proposed sanctions that corporations would face if they fail to undertake internal disciplinary action would observe a pyramidal enforcement list from informal methods of promoting compliance and civil monetary penalties (corporate and individual), to a higher degree of criminal liability (individual and corporate) including community service, fines and probation authorized for individual offenders, adverse publicity orders, community service, fines and probation for corporate offenders; finally, at the top of the pyramids would be escalated criminal liability (individual and corporate), with jail authorized for individual offenders, and liquidation (corporate capital punishment), punitive injunctions, and adverse publicity orders for corporate offenders.[345]

a) Critique of the reactive corporate fault model

Neglecting the mental element

The Proactive Corporate Fault Model (PCF) and Reactive Corporate Fault (RCF) overlook the need of a mental state associated with the criminal act and exclusively endorse the criterion of negligence. Both patterns of corporate criminal liability refer to the failure of the corporation to respond adequately to a duty to care. According to the Proactive Corporate Fault Model, criminal liability will be ascribed when corporate

[344] *Ibid.*
[345] *Ibid* at 141.

practices and procedures were inadequate to prevent the criminal act. Reactive corporate fault is based on the same premise; however, it reallocates the focus of liability from fault prior to the time of the *actus reus* to fault in reaction to the *actus reus*. The failure to react is not evidence of a mental state in relation to the offence.[346]

The commission of an offence for failing to react correctly after the occurrence of some event, while conceivable, does not settle the question of whether the commission of an initial *actus reus* in itself constitutes an offence. This can only depend on whether this is some fault prior to or concurrent with the commission of this *actus reus*. To view the matter otherwise would amount to allowing the corporation a free ride or a "free *actus reus*". At most, reactive corporate fault can serve as proof of intention, recklessness or negligence at the time of the occurrence of a second *actus reus*.[347]

Temporal fallacy

According to the RCF model, the liability of the corporation would be determined on the basis of a failure to react and not on the basis of an act, i.e., when a corporation commits a crime, liability is not determined by this criminal act; liability can be ascribed if the corporation fail to accept and take on corrective measures after the crime. The rationale for this expedient is that the ascription of the corporation's liability solely on the basis of attitudes prior to or contemporaneous with the commission of the *actus reus* might obscure the fact that sometimes inappropriate reactions of companies

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[346] See e.g, William S. Laufer and Alan Strudler, "Corporate Intentionality, Desert, and Variants of Vicarious Liability" (2000) 37 American Criminal Law Review 1285, online:<http://web1.infotrac.galegroup.com/itw/infomark/895/658/44940293w1/purl=rcl_EAIM_0>.
[347] Anne Marie Boisvert, "Corporate Criminal Liability – A Discussion Paper," online: <http://www.law.ualberta.ca/alri/ulc/99pro/ecrliab.htm>

after they have done something harmful are also blameworthy conduct that is condemned by public opinion. In keeping with this reasoning, it makes complete sense to hold companies liable in the event that they fail to undertake remedial measures once the *actus reus* of an offence has been committed.

While for a purely utilitarian approach the RFC expedient of attributing liability might make sense, at least in a theoretical level; it does not accord with retributive nor expressive theories of punishment. The imposition of a sanction for a crime in virtue of the lack of or inappropriateness of reaction after the commission of this crime would not be "deserved." The blame would be attached to the crime not considering the crime but what happened after it. It is a primary requirement of justice and social order that crimes be punished, and the RFC does not meet this requirement; it leaves the original criminal conduct unpunished. The symbolic function of the punishment would also lose its significance. In fact, the "social reprobation" would simply be ignored. The RFC model constructs a parallel system of "irresponsibility" for corporations by allowing them to commit crimes and not to be directly liable for them.

Fundamental principles of criminal law, principles of contemporaneity or concurrence, require that the *mens rea* and *actus reus* of an offence coincide in time. The reactive corporate fault violates these postulates overtly. The failure to react after the commission of a wrongdoing might have harmful consequences that sometimes can be even worse than the consequences of the first act; however, there is no justification to conclude that an initial *actus reus* does not need to or cannot be reprimanded. As

Boisvert points out, natural persons do not enjoy that advantage.[348] There is no sound basis for determining the liability of a corporation by considering its behaviour after an offence. The inquiry must focus on intents and acts that are contemporaneous, on culpable mental states that are concurrent to illegal acts. It should be kept in mind that the commission of an initial *actus reus* may have devastating consequences that might prove it necessary to punish without awaiting the occurrence of a second event.[349]

9.2.2. Principle of Responsive Adjustment

While Fisse's and Braithwaite's model of Reactive Corporate Fault is to some extent attached to theories of organization, French makes his arguments for the Responsive Adjustment Model mainly on philosophical grounds, arguing that corporations can be primarilyly liable because they are fully fledged moral persons. These two models of attributing liability to corporate offenders can be seen more as an expansion of each other than two diverse assumptions.

In line with the principle of responsive adjustment, the intention of the corporation is to be found in what French calls CID structure (corporate internal decision structure). The CID structure is made up of an organizational or responsibility flowchart and two types of corporate decision recognition rules-procedural rules and policies.[350] Every corporation would have an internal decision structure, that would make the task of

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[348] *Ibid.*
[349] *Ibid.*
[350] Peter A. French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984) at 48. [Corporate Responsibility]

finding corporate mental state easy.[351] The CID would allow identification of what is "the" corporate agency and the reasons for corporations doing what they do. French asserts that when operative and properly activated, the CID structure synthesizes the intentions and acts of various biological persons into a corporate decision.[352]

The organizational chart, one element of the CID Structure, would provide the "grammar" of corporate decision-making, or internal recognition of rules.[353] This chart would be the link between the act performed and the corporate reasons for the performance of the act. From the analysis of the chart it would be possible to determine whether or not the act was in accordance with corporate reasons. If the act is inconsistent with organizational structure or established procedure, it will not be considered the corporation's act.

It could be argued that a corporation, specially a small, closely held one, would choose not to have a chart or a decision structure. While a small corporation can choose not to have a chart, and in most of the cases it does not have an organizational chart, it cannot choose not to have a decision structure. In every corporation, there is a hierarchy and consequently a procedure for the decisions. This is the truth for both small and large corporations; however, it is unlikely that a large corporation will not have an organizational chart or a similar document.

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[351] *Ibid* at 41.
[352] *Ibid*
[353] *Ibid* at 43.

Corporate compliance is an important feature of this approach, according to the principle of responsive adjustment, "the causally responsible party for an untoward event should adopt specific courses of future action calculated to prevent repetitions."[354] The corporations should take the initiative to respond to the event that it has caused by adopting new behaviour, or in other words, by making adjustments to its internal system. The metaphysical foundation of PRA can be reflected in Bradley's idea: "In morality the past is real because it is present in the will."[355] French explains that the PRA model is especially applicable to corporations and that it requires that corporations have the structural capacity to innovate. PRA requires that habits that produce morally disvalued events be broken and replaced by behaviour (or procedures) that do not have such effects.[356] The PRA is not concerned with the reason for corporate morality or immorality, but with the designation of rational reasons for making the morally recommended adjustments.

a) Critique of the responsive adjustment model

Myopic view of the decision making process

One of the central points of French's model is the assumption that corporate *mens rea* can be identified within the decision-making process and does not need to be linked to any singular individual. To this stage of the argument, many people would agree with this view. When French goes further and compares the decision-making process with a

[354] *Ibid* at 156.
[355] F.H.Bradley, *Ethical Studies* (Oxford: Oxford University Press, 1962) at 46, cited by French, *ibid.*
[356] *Ibid* at 168.

rational individual mind and concludes for this reason corporations can be fully moral persons, he commits two important mistakes. First, he suggests that the decision-making process, or what he calls CID structure, is linear and pure. This assumption ignores the informal structure of the corporation and the complexity and "impurity" of decision-making process. As Professor Dan-Cohen puts it: this view exaggerates the unity of the corporation.[357] There is no unity in the corporation as a whole that could render it rational. Indeed, the very concept of rationality is questionable. As a consequence of this live and complex structure of the corporation, there is a range of factors that crucially influence all forms of judgment in the decision making process.[358] Secondly, French considers the corporation analogous to an individual for the purpose of justifying the corporation moral agency. This analogy is not only unnecessary but paradoxically individualistic. Taking the individual as the fundamental premise and mirror is to automatically reinforce his or her importance for the formulation of a theory of corporate liability.

9.2.3. Corporate Ethos Model

Pamela Bucy, the main advocate of this theory, explains that the term "corporate ethos" is not equivalent to corporate culture or corporate personality.[359] Nonetheless, the

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[357] Meir Dan-Cohen, *Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society* (Los Angeles: University of California Press, 1986) at 38.

[358] David Weeks & Sam Whimster, "Contested Decision Making: A Socio-Organizational Perspective," in Wright, George, ed., *Behavioural Decision Making* (New York: Plenum Press, 1985) 167 at 174.

[359] Pamela Bucy explains that the terms corporate culture or corporate personality have specialized meanings within their originating disciplines of anthropology and psychology, respectively, that may prove limiting. (Pamela H. Bucy, "Corporate Ethos: A Standard for Imposing Corporate Liability" (1991) 75 Minnesota Law Review 1095, 1121 at note 98)

corporate ethos standard can be placed in the same category as corporate criminal liability theories based on the idea of corporate culture. This approach has a charming dialectical tone, assuming that each corporate entity has a distinct and identifiable ethos that can be translated into intention. The notion of corporate ethos is based on the Aristotelian concept of ethos or "characteristic spirit." It is said to be

> [T]he abstract, and intangible, character of a corporation separate from the substance of what it actually does, whether manufacturing, retailing, finance or other activity.[360]

Under this standard, the government can convict the corporation only if it proves that the corporate structure encouraged agents to commit the criminal act and that the criminal act was committed by a corporate agent. Bucy clarifies, however, that to apply this standard it is not necessary to ascertain the overall and complete ethos of an organization,[361] but only the ethos that is relevant to the criminal behaviour in question.

Laufer argues that PCF, RCF, and CE (Corporate ethos) models "all but abandon the requirement for finding a *mens rea*, or a mental state associated with corporate acts."[362] Although Laufer's assumption is true with regard to the PCF and RCF models, it is not so credible in relation to the Responsive Adjustment and Corporate Ethos. This might be the reason why Laufer does not endeavour to make a case against the viability of these later models for finding a mental state for the corporate offence. These same critiques cannot be extended to Responsive Adjustment and Corporate Ethos since these models advocate that the mental state of a corporate crime is to be found

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[360] *Ibid* at 1123.
[361] *Ibid* at 1127.
[362] William S. Laufer, "Corporate Bodies and Guilty Minds" (1994) Emory Law Journal 647 at 669.

somehow in the corporation itself and must be connected to the offence and not to the failure to avoid the offence or the failure to respond to the duties imposed after the offence. The notion of corporate identity and corporate internal decision structure brought in respectively by Bucy and French offer a salutary basis to argue for the concept of corporate *mens rea* that respects the criminal law premise that the mental state of the conduct be concomitant to the act.

a) Critique of Corporate Ethos

Single criterion of culpability

The corporate ethos model embraces the notion of corporate culture and rightly associates it with the mental state of the corporation. Bucy tries to clarify what corporate culture is and why it can be considered a proper locus for corporate mental states, yet, the analysis proposed by Bucy is too general and lacks an important point: the differentiation of different degrees of culpability. The fact that the culpable mental state can be found within corporate culture and structure does not give any clue about the degree of culpability; thus, it is inappropriate to identify and differentiate purpose, knowledge, recklessness and negligence. In addition to that, Bucy's model does not indicate how to determine the ethos that is relevant to the criminal act in question.

9.2.4. Constructive model of corporate liability

William Laufer proposes, in a similar vein to the previous suggestions, a constructive model of corporate liability.[363] This model is also grounded on the foundation that corporations are and must be considered as separate entities, with a life and existence independent from their members, hence, the reason why it is possible to ascribe criminal liability to corporations on a more compelling basis. However, this model seems to take a singular pathway, by giving special attention to the relationship between the agent who acts, the corporation and the parties to the offences. In addition, it addresses two important points that were neglected by previous models: the contemporaneity of the mental state and the act and the criteria of culpability.

The Constructive Corporate Fault model claims that the attribution of the act element of the offence to the corporation does not need to be vicariously linked to the corporation. This model abandons the use of the doctrine of *respondeat superior* employed by the other models. In harmony with Laufer, the previous models do not differentiate between primary action (corporate action) and secondary action (individual action); they connect the secondary action with the primary intent, which is the intent of the corporation. In order to determine whether the act is primary or secondary, an objective test is proposed. The test to assess the "scale of the action" is called the "reasonableness

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[363] See Laufer, *supra* note 17; "Corporate Liability, Risk Shifting, and the Paradox of Compliance" (1999) 52 Vanderbilt Law Review 1343 ; "Why Personhood doesn't matter: Corporate Criminal Liability and Sanctions" (1991) 18 American Journal of Criminal Law 263; and, "Corporate Intentionality, Desert, and Variants of Vicarious Liability" (2000) 37 American Criminal Law Review 1285, online:<http://web1.infotrac.galegroup.com/itw/infomark/895/658/44940293w1/purl=rcl_EAIM_0> ["Corporate Intentionality"].

test."[364] Given the size, complexity, formality, functionality, decision making process, and structure of the corporate organization, it would be reasonable to conclude that the agents' acts are the actions of the corporation. Laufer explains that both "ownership" and "authorship" are critical terms for the proposed models. The former reflects the connectedness between an agent's acts or intents and the organization's. The latter reflects an action or intention that is not attributable to any single agent or group, but rather comes from the organization. Such actions and intentions will almost always be derivative of individual or group action.[365]

> It is this very relationship that lies at the heart of the reasonableness test. The stronger the agent-entity relationship, the more reasonable it is to consider an agent's action to be a construction of the corporation's.[366]

According to CCF, corporate action may be found in:

> (1) agents whose actions and intentions are related to each other in such a way that they assume the characteristics of the corporate form; (2) agents whose status in the organization is such that their actions and intention are those of the organization; and (3) aspects of the organization, such as policies, goals and practices, that reflect not merely the sum total of individual agent's intentions, but instead attributes and conditions of the corporation that make it possible for these agents to cooperate and collaborate in legally problematic ways.[367]

The reasonableness test would avoid the problem of different temporal frameworks between the mental element and the act since both elements would have to come from a single agent, the corporation. The same standard should be used as a criterion to determine the degree of culpability. Laufer argues that previous models do not reflect a

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[364] *Ibid* at 687.
[365] *Ibid* at 682. footnote 132.
[366] *Ibid* at 687.
[367] Laufer, "Corporate Intentionality," *supra* note 17 at 1285.

range of mental states of the corporation. In response to this problem, he proposes objective criteria for reasonable judgments.[368] The constructive culpability model would evaluate facts and circumstances with reference to nonsubjective standards and subjective evidence. This model allows the evaluation of corporate purpose, knowledge, recklessness and negligence. Following the example of the Australian Criminal code, Laufer defines different mental states. In line with the constructive culpability standard, the corporation will act purposively, "if its object or goal is to engage in conduct or cause a result and, if the offence involves attendant circumstances, there is an awareness of such circumstances, or a belief that they exist."[369] The corporation will act knowingly if "there is an awareness that conduct exists of a certain nature, or there is an awareness that it is practically certain that its conduct will cause a result."[370]The corporation will act recklessly if "there is a knowing disregard of a substantial and unjustifiable risk that a material element of the offence exists or will result."[371] Finally, the corporation will act negligently if "it should be aware of a substantial and unjustifiable risk that the material element of the offence exists or will result."[372]

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[368] Laufer, "Corporate Bodies," *supra* note 5 at 698. Laufer carefully differentiates purely objective standards of culpability from reasonableness judgments as objective criteria. He explains that "purely objective standards are difficult to justify and have been ignored in relation to corporate culpability for at least two reasons. First, criminal law would be weakened by moving away from requiring proof of a culpable state of mind, it would strip the law from its moral meaning and render it indistinguishable from civil law. Second, anything short of requiring proof of a subjective mental state must result in strict liability.

[369] *Ibid* at 725.

[370] *Ibid.*

[371] *Ibid.*

[372] *Ibid.*

Moreover, Laufer attempts to put forward some evidentiary guidance by listing examples of evidence required for each degree of corporate mental state. Some examples of evidence of purpose would range from desire to commit an illegality to endorsement of a violation; signs of corporate knowledge could be noticed in the existence of a tolerated, permitted or consented illegality; corporate recklessness would be evident in some deliberate inattention to risks of harm; in its turn, negligence could be traced to inadequate management control, the failure to make reasonable efforts to take reasonable precautions and the unreasonableness of corporate practices and procedures.

a) Critique of the constructive corporate liability model

William Laufer's proposal, without a doubt, is a signal improvement in the whole set of the holistic models. It fills some lacunae left by other approaches and raises fundamental issues, such as the need for a spectrum of mental states for the assessment of culpability and the possibility of incorporating some objective criteria in order to determine such mental states.[373] Still, this model also has its flaws. The central problem of the Constructive Corporate Liability model lies in the use of what is called the "reasonableness test.' This test is suggested in order to identify which action is to be attributed to the corporation. The parameter that is taken into account by this test is the relationship between the agent and the entity. This relationship "lies at the very heart of

[373] These two developments integrated the proposal of a more sound model of corporate criminal liability that is going to be developed in the next chapter.

the reasonableness test."[374] In harmony with this test, "the stronger the agent-entity relationship, the more reasonable is to consider an agent's action to be a construction of the corporation's."[375] It is assumed that when this relationship increases the actions become more impersonal and can safely be attributed to the corporation. On the other hand, when this relationship is remote, the actions become less impersonal and could not be considered as corporate actions.

The reasonableness test seems to be an adaptation of the same test to assess the guilty mind in identification theory, yet it replaces the mental element by an objective element. By channeling the number of actions that can be attributed to corporations, it is clear that the constructive liability model will incur the same problem as the identification theory: an act will rarely be found to be attributed to the corporation. In addition, if the only paradigm for the attribution of responsibility to the corporation is the relationship between the corporation and the employee, the mere degree of the relationship will suffice to ascribe responsibility to the corporation, even if the individual had acted with no influence or contrary to the culture of the corporation.

9.2.5. Opting for holistic models of corporate criminal liability

The holistic approach to corporate criminal liability cannot be seem as an isolated legal trend, but on the contrary, as part of a general panorama that includes models and theories of other fields like economics, organizational theories e moral philosophy that challenge the individualistic view of corporations. This whole

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[374] Laufer, *supra* note 5 at 687.
[375] *Ibid.*

panorama gives more substance to the defence of a model of attributing criminal liability that denies the need of linking the corporate entity to an individual. This theoretical background that the holistic approach has is what differentiate it from prior models of corporate criminal liability. However, the more solid theoretical basis of the holistic approach are not the only positive point, they also can be more effective since they do not allow corporations to escape liability by hiding in its structure and bureaucracy an individual guilty mind.

The holistic theories are the foundation of what is needed to justify the attribution of criminal liability to corporations without using artificial and individual devices. Yet, these theories also have problems. They have gradually developed the idea that corporations can be held liable for their conduct and based on their on mental state. The first proposal to transcend the individual barrier was to limit corporate criminal liability based on corporate mental state for crimes that do not require proof of mental state. This is the reactive corporate fault model. This model has the value of being the first concrete alternative proposed against the individualistic-based theories. This idea was refined in the principle of responsive adjustment model, where it is defended that corporations can be held liable for crimes that require proof of intent and that the corporate mental state can be found in the corporate internal decision structure. This model amplifies the roll of crimes for which corporations can be criminally responsible, yet, it is based on the idea of corporations as rational entities, and this rational element is what makes this model theoretically unsound. Corporate ethos and the constructive model of corporate criminal liability are also built on the idea that corporations can

have a mental state that does not need to be found in its individual members. The Corporate ethos better expresses de idea of corporate culture and its values. The Constructive model of corporate criminal liability approach the problem of corporate criminal liability and corporate *mens rea* from a practical perspective. It is based on the assumptions of corporate *mens rea* and corporate culture that were defended in the other holistic models, but it goes further buy offering practical insights into the problem of degrees of culpability. This is why the holistic approaches cannot be seem separately but rather as a gradual evolution of the concept of corporate criminal liability. The constructive model of corporate criminal liability does not focus on the debate whether the mental state of corporations are to be found in the corporations or in their members, it does start from the assumption that corporations can have a corporate *mens rea* and applies this notion into practice, it gives effectiveness to the concept of corporate *mens rea*. The constructive model of corporate criminal liability gives important guidance as how to assess different degrees of corporate criminal liability. This is an important advance in the theory of corporate criminal liability.

CONCLUSION

THE POSSIBILITY OF ATTRIBUTING CRIMINAL LIABILITY TO CORPORATIONS IN BRAZIL

The common law experience with corporate criminal liability can and should influence the introduction of the concept of corporate criminal liability in the Brazilian legal system. European civil law countries like Denmark and France have adopted the common law model of identification doctrine as a ground theory for the ascription of criminal liability to corporations. Nonetheless, it is important to look at the whole picture of corporate criminal liability. There has to be an analytical view of the common law experience and not merely an adaptation of the traditional theories. The success of the introduction of a completely new concept in the Brazilian legal scenario is conditioned to the existence of a solid theoretical background. It is in the hands of Brazilian legal scholars to develop theoretical constructions that will support the attribution of criminal liability to corporations and trigger structural and legislative changes in the legal system.

1- The importance of common law experience for the Brazilian legal system

The contemporary concept of corporate criminal liability was created and developed by common law courts and this issue has also been the object of study of many common law scholars. Thus, the common law experience with corporate criminal liability can serve as a pragmatic and theoretical source for the work of Brazilian

scholars and legislators. Indeed, common law theories of corporate criminal liability have already been adopted in France, Denmark and other civil law jurisdictions.

2- The need for a critical approach to the common law experience with corporate criminal liability.

It does not seem that the Brazilian legal system will accept corporate criminal liability in the near future. Discussions about this theme are in its infancy in Brazil, but a change is inevitable. The increasing control over corporations in developed countries has made corporations changed their targets and this has transformed undeveloped and corrupt countries like Brazil in a free territory for this type of criminals. But, a contra sense of that is that corporate criminality is becoming a concrete reality in Brazil and the Brazilian law will have to react to that. Because of the European influence, and in this case especially because of the French influence, it seems that Brazil will likely follow the French example by adopting the identification theory. This would be quite problematic. The traditional theories of corporate criminal liability have shown to be ineffective. The prevailing theory, the identification doctrine, is problematic and rooted in individualistic ideas. It has a simple palliative effect at most. The search for the guilty mind is in the majority of the situations unfruitful and in the end no liability is attributed to the corporation. In addition to that, the identification theory does not incorporate a holistic view of the corporate entity, which better explains the reality of corporations and corporate misconduct. It

is important that the Brazilian legislator be aware of the limitations of the traditional law theories and be acquainted with what has been proposed as a solution and alternative to these limitations in order to avoid taking a problematic and flawed position.

3- The role of doctrine (legal scholars) in the introduction and development of the concept of corporate criminal liability in Brazil.

Corporate criminal liability will only be effective in Brazil when incorporated in the Statutes, especially the Brazilian Constitution and the Criminal Code. But, no legislative change will occur without an exhaustive doctrinaire debate. Relevant statutory amendments are the concretization of what had been already analysed and constructed by legal scholars. In Brazil the growth of the concept of corporate criminal liability is conditioned to the maturation of the idea in doctrinal debates. Brazilian scholars must trigger these changes by developing theories and models and more importantly, by bringing into discussion all aspects related to corporate criminal liability; this implies debates that range from conceptual to practical concerns. It is important that legal scholars address basic questions such as the concept of corporate crime and the need to use criminal law to control corporate crime. Parallel to that, there has to be a structural change in the legal system to receive the concept of corporate criminal liability. Legal scholars can contribute to that by remodelling the traditional theory of crime and introducing new aspects of the corporation as a real and complex person able to have *mens rea*, to be a moral agent and consequently to be criminally liable for its acts.

a) Definition of corporate crime

The expression corporate crime is not common in Brazil. It is important that more scholars use this expression and that it be differentiated from "white collar crimes" that are not only related to the individual action but also have a purely economic connotation, and exclude other violent crimes.

b) Redefining the role of criminal law in the Brazilian legal system

Once the concept of corporate crime is introduced in the legal system, the viability of using criminal law to control corporate crime will be questioned. It is important that this issue be integrated in the current discussions about the general role of criminal law.

c) Extending the concept of persons in the Brazilian legal system

The concept of persons should be modified in order to include a broader definition of legal person so as to understand corporations as real and complex entities. Thinking about corporate criminal liability in Brazil has been afflicted by an oversimplified view of corporations. Currently, the fiction theory prevails in both the civil and criminal law fields. The fiction theory denies the possibility of attributing corporate criminal liability to corporations. In addition to that, it would be essential to import the idea that organizations are complex organism not identifiable with an individual member.

Organizational theories, especially the idea of corporations as a metaphor would serve as theoretical basis for this broader definition. Organizational studies have

shown that corporations are not merely an aggregation of individuals as portrayed by current theories of corporate criminal liability. A new corporate image must be incorporated into criminal law. This can only be achieved if legal scholars cross the border between law and organizational studies and face the reality of corporations more closely, however complex and disturbing that may be, or sometimes at odds with their personal preconceptions and biases.

d) Adaptation of criminal law theory

There is no need to change the prevailing definitions of act or mental element, since they can be applied to corporations. But they need to be interpreted extensively as to include the corporation's peculiar way of acting and of having *mens rea.* For the allocation of the mental state, it is vital that the concept of corporate culture also be introduced in the criminal law theory as a different place to find intention. Another aspect of criminal liability that has to be reshaped is the issue of moral agency. A more comprehensive theory of crime has to embrace the notion that corporations are also moral agents.

e) Laufer's approach as the basis for a Brazilian theory of corporate criminal liability

A new paradigm of the corporation's nature, moral agency, and *mens rea* allows legal systems to accept corporate criminal liability. No model of corporate criminal liability will be efficient if it is not based on a portrayal of corporations as an open system or organism, with a distinctive type of moral responsibility and with a culture

in which to allocate the mental element of the offence. The holistic approach can be a more efficient way to attribute corporate criminal liability to corporations. It is theoretically better structured than the other proposals; it does not use artificial expedients to attribute liability what facilitates the allocation of the mental state. Among all the holistic approaches analyzed here, Laufer's proposal seems to be the best source for a Brazilian model of corporate criminal liability. The responsive adjustment model is an expansion of the other models but more theoretically founded. It is this theoretical background that allows Laufer to propose objective criteria to assess different degrees of mental state, what configures a real practical improvement on the precedent models.

It is therefore appropriate for Brazilian scholars to base their proposals in the holistic approaches, especially in the responsive adjustment as opposed to the identification theory. Although the identification theory is by far the most popular model of attributing corporate criminal liability, it is not in harmony with studies on large organizations like corporations. The identification theory is an artificial device created to allow the use of criminal law against corporations, but it is superficial, it neglects important features of corporations. This other corporate features like their nature, their structures, their decision-making process and their culture, have a strong impact on theories about corporate criminal liability. The responsive adjustment model, as a holistic model, takes into account these elements of the corporation and it is this whole view of the corporations that makes it more concrete.

The inclusion of a new paradigm in the Brazilian legal systems is more complex than the mere legislative change. The frustrated constitutional attempt to accept the attribution of criminal liability to corporations has been evidence that an statute to be applied and to be effective must be in accord with the legal system. Corporate criminal liability has to be part of the Brazilian legal scenario before it becomes a true legal concept. For the seeds of corporate criminal liability to grow in Brazil, they must come in the form of legal doctrine, legal research. For this reason theory has an essential role. Since corporate criminal liability has been already applied and studied in other legal systems, the task of built a theoretical background for the institution of corporate criminal liability becomes more concrete. The Brazilian legal scholars do not need to speculate about the effectiveness of certain models, foreign experience have already shown their problems. It would be unproductive to propose a model that has revealed to be not workable. Brazilian scholars should include in their analyses a holistic perspective of corporations. Basic concepts still need to be mature in the Brazilian legal system before the holistic models can be accepted. Corporations are only a shadow for Brazilian scholars, it is important that they acquire a more realistic face; the more it is know about corporations, the more sound a model of attributing criminal liability will be. In this case, theory serves not as a justification but also has the advantage of anticipating practical problems and to offer solutions that are based on preceding problems.

BIBLIOGRAPHY

Adizes, Ichak, Corporate Lifecycles: How and Why Corporations Grow and Die and What to do About It (Englewood Cliffs, NJ: Prentice Hall, Inc., 1988)

Alwarth, Heiner, "Establishing a Basis for Criminal Responsibility of Collective Entities", in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998,*144.

Allport, Floyd, "Legal Complexities of Group Activity" in Braybrooke, David, ed., *Philosophical Problems of the Social Sciences* (London: Collier-MacMillan Ltd, 1965) 27.

Andenaes, Johannes, " The Morality of Deterrence" in Hyman Gross and Andrew von Hirsch, eds., *Sentencing* (Oxford: Oxford University Press, 1981) at 191.

Andrews, John, "Reform in the Law of Corporate Liability" (1973) Criminal Law Review 91.

Anonymous, The Code of Canon Law in English translation (London: Collins Liturgical Publications, 1983)

Anonymous, "Collective Moral Responsibility" online: The Internet Encyclopedia of Philosophy < http://www.iep.utm.edu/c/collecti.htm>

Anonymous, "Corporate Criminal Liability" (1973-1974) 68 Northwestern University Law Review 872.

Anonymous, "Criminal Liability of Corporations for Acts of their Agents" (1946-1947) 60 Harvard Law Review 283.

Anonymous, "Rational Choice Theory as a Method of Inquiry," online: <http://home.uchicago.edu/~lfmedina/Lect1.pdf>

Araújo Junior, Joao Marcello, "Societas Delinquere Potest – Revisao da Legislacao Comparada e Estado Atual da Doutrina" in Gomes, Luiz Flavio, ed., *Responsabilidade Penal da Pessoa Juridica e Medidas Provisorias e Direito Penal* (Sao Paulo: Revista dos Tribunais, 1999) 72.

Arens, Richard & Lasswell, Harold D., *In Defense of Public Order: The Emerging Field of Sanction Law* (New York: Columbia University Press, 1961).

Argyris, Chris & Schön, Donald A., Organizatonal Learning: A Theory of Action Perspective (Don Mills, Ontario: Addison-Wesley Publishing Company, 1978)

Arnott, Dave, *Corporate Cults: The Insidious Lure of the All-Consuming Organization* (New York: American Management Association, 2000).

Ashkanasy, Neal M., Wilderom, Celeste P.M & Peterson, Mark F., eds., *Handbook of Organizational Culture & Climate* (London: Sage Publications,2004)

Audi, Robert, ed. The Cambridge Dictionary of Philosophy, 2nd ed. (Cambridge, UK: Cambridge University Press, 1999).

Ball, Harry V. and Friedman, Lawrence, "The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View" (1964-1965) 17 Stanford Law Review 197.

Bajkowski, Sean and Thompson, Kimberly R., "Corporate criminal liability (Twelfth Survey of White Collar Crime)" (1997) 34 American Criminal Law Review 445.

Bakan, Joel, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Penguin Canada, 2004).

Barley, Stephen R., "Semiotics and the Study of Occupational and Organizational Cultures" (1983) 28 Administrative Science Quarterly 393.

Baucus, Melissa S. & Baucus, David A. "An Emprirical Examination of Longer-Term Financial Consequences of Illegal Corporate Behavior" (1997) 40 Academy of Management Journal 129, 130.

Baucus, Melissa S. & Near, Janet P., "Can Illegal Organizational Behavior Be Predicted? An Event History Analysis" (1991) 34 The Academy of Management Journal 9.

Bayles, Michael D., "Character, Purpose, and Criminal Responsibility" (1982) 1 Law and Philosophy 5.

Beauchamp, Tom L., "Hume on the Nonhuman Animal" (1999) 24 Journal of Medicine & Philosophy 322.

Beck, Matthew E. & O'Brien Matthew E., "Corporate Criminal Liability (annual white collar crime survey)" (2000) 37 American Law Review 261.

Becker, Gary S., "Crime and Punishment: An economic Approach" (1968) 76 Journal of Political Economy 169.

Bentham, Jeremy, "The Rationale of Punishment, Book I: General Principles, Chapter VI: Measure of Punishment," online: <http://www.la.utexas.edu/labyrinth/rp/index.html>

Bishop, John D., "The Moral Responsibility of Corporate Executives for Disasters" in White, Thomas I., *Business Ethics: A Philosophical Reader* (Toronto: Maxwell MacMillan Canada, 1993) 261.

Bittencourt, Cezar Roberto, "Reflexões Sobre a Responsabilidade Penal da Pessoa Juridica", in Gomes, Luiz Flavio ed., *Responsabilidade Penal da Pessoa Jurídica e Medidas Provisórias e Direiro Penal* (São Paulo: Revista dos Tribunais, 1999) at 51.

Blakenship, Michael B., ed., *Understanding Corporate Criminality* (New York: Garland Publishing, 1993).

Boisvert, Anne Marie, "Corporate Criminal Liability – A Discussion Paper," online: <http://www.law.ualberta.ca/alri/ulc/99pro/ecrliab.htm>

Bonham, David H. & Soberman, Daniel A., *The Nature of Corporate Personality* by Jacob Ziegel (Toronto: Butterworths, 1967).

Boucock, Cary, *In the Grip of Freedom - Law and Modernity in Max Weber* (Toronto: University of Toronto Press, 2000).

Bradshaw, Thornton & Vogel, David, eds., *Corporations and Their Critics: Issues and Answers to the Problems of Corporate Social Responsibility* (United States: McGraw-Hill Book Company, 1981)

Braithwaite, John, "Challenging Just Deserts: Punishing White-Collar Criminals" (1982) 73 The Journal of Criminal Law and Criminology 723.

Braithwaite, John, "Corporate Crime in the Pharmaceutical Industry" (London: Routledge Kegan Paul plc, 1984)

Braithwaite, John, "White Collar Crime" (1985) 11 Annual Review of Sociology 1.

Brickey, Kathleen F., "Close Corporations and the Criminal Law: On 'Mom and Pop' and a Curious Rule" (1993) 71 Washington University Law Quarterly 189.

Brickey, Kathleen F., "Corporate Criminal Accountability: A Brief History and Observation" (1982-1983) 60 Washington University Law Quarterly 393.

Brief, Tania & McSweeny, Terrel, "Corporate Criminal Liability" (2003) 40 American Criminal Law Review 338.

Brodbeck, May, ed., "Methodological Individualisms: Definition and Reduction" in *Readings in the Philosophy of the Social Sciences* (New York: The Macmillan Company, 1968) 280.

Brown, H.Lowell, "Vicarious Liability of Corporations for the Acts of their Employees and Agents (1995) 41 Loyola Law Review 279.

Brown, J. Douglas, *The Human Nature of Organizations* (New York: AMACON, 1973).

Brummer, James J., Corporate Responsibility and Legitimacy; An Interdisciplinary Analysis (New York: Greenwood Press, 1991)

Brunsson, Nils, *The Organization of Hypocrisy – Talk, Decisions and Actions in Organizations*, trans. by Nancy Adler (New York: John Wiley & Sons, 1989)

Bucy , Pamela H, "Corporate Ethos: A Standard for Imposing Corporate Liability" (1991) 75 Minnesota Law Review 1095.

Cabette, Eduardo Luiz Santos, "Responsabilidade Penal das Pessoas Juridicas: Breve Estudo Critico," online: http://www.ambito-juridico.com.br/aj/dp0048.htm

Canfield, George F., "Corporate Responsibility for Crime" (1914) 14 Columbia Law Review 469.

Cannon, Tom, *Corporate Responsibility* (London: Pitman Publishing, 1992)

Caroline, Michael W, "Corporate Criminality and the Courts: Where Are They Going?" (1984) 27 Criminal Law Quarterly 237.

Castro, Renato de Lima, "Responsabilidade Penal da Pessoa Juridica na Lei Ambiental Brasileira," online: http://www.jusnavigandi/artigos/resposnabilidade criminal/ pessoa juridica.htm.

Cherns, Abert, "Culture and Values: The Reciprocal Influence between Applied Social Science and its Cultural and Historical Context," in Nigel Nicholson & Toby D. Wall, eds., *The Theory and Practice of Organizational Psychology* (London: Academic Press, 1982) 19.

Chesterman, Simon, "The Corporate Veil, Crime and Punishment" (1994) 19 Melbourne University Law Review 1064.

Ciborra, Claudio U. & Lanzarra, Giovan Francesco, "Designing Dynamic Artifacts: Computer Systems as Formative Contexts" in Pasquale Gagliardi, ed., *Symbols and Artifacts, Views of the Corporate Landscape – de Gruyter Studies in Organization 24* (Berlin: Walter de Gruyter, 1990) 147.

Clarkson, CVM, "Corporate Culpability", online: cmvc1@leicester.ac.uk

Clarkson, CVM, "Kicking Corporate Bodies and Damning Their Souls" (1996) 59 The Modern Law Review 557.

Clinard, Marshall B. & Yeager, Peter C., *Corporate Crime* (New York: The Free Press, 1980)

Clinard, Marshal B., *Corporate Ethics and Crime* (London: Sage Publications, 1983)

Clinard, Marshal B., *Corporate Corruption: The Abuse of Power* (New York, Praeger Publishers, 1990)

Coffee Jr., John C, "No Soul to Damn: No Body to Kick': An Unscalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Michigan Law Review 386.

Coleman, Bruce, "Is Corporate Criminal Liability Really Necessary?" (1975) 29 Southwestern Law Journal 908.

Coleman, James W., *The Criminal Elite: The Sociology of White Collar Crime* (New York: St. Martin's Press, 1985)

Colvin, Eric, *Corporate Personality and Criminal Liability*, (1995) 6 Criminal Law Forum 1.

Combs, Eugene ed., *Modernity and Responsibility: Essays for George Grant* (Toronto: University of Toronto Press, 1983) 74.

Comments, Criminal Sanctions for Corporate Illegality, (1978) 69 Journal of Criminal Law and Criminology 40.

Comments, "Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions" (1979) 92 Harvard Law Review 1227.

Comments, "The Economic Inefficiency of Corporate Criminal Liability" (1982) 73 The Journal of Criminal Law & Criminology 582.

Cooper, David, "Responsibility and the 'System'" in French. Peter A., ed., *Individual and Collective Responsibility* (Rochester, Vermont: Schenkman Books, 1998) 133.

Cooper, David E., "Collective Responsibility," reprinted in French, Peter A., *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991) 255.

Corlett, J. A, "Collective Moral Responsibility" (2001) 32 Journal of Social Philosophy 573.

Dan-Cohen, Meir, *Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society* (Los Angeles: University of California Press, 1986).

Dannecker, Gerhard, « La Responsabilité Pénale dans L'Enterprise Vers un Espace Judiciaire Européen Unifié? Les Propositions « Espace Judiciaire Européen » confrontées à la situation en Allemagne » in Delmas-Marty, Mireille, ed. *La Responsabilité Pénale dans L'Enterprise Vers un Espace Judiciaire Européen Unifié?* (Paris : Dalloz, 1997) 275.

Da Silva, Guilherme José Ferreira, A Incapacidade Criminal da Pessoa Jurídica (Belo Horizonte Brazil: Del Rey, 2003).

Davies, Margaret, *Asking the Law Question* (Sydney : Law Book Co. ; London : Sweet & Maxwell ; Holmes Beach, Fla. : W.W. Gaunt & Sons [distributor], 1994)

Deal, Terence E and Kennedy, Allan A., Corporate Cultures (Massachusetts: Addison-Wesley Publishing Company, Inc., 1982)

Delaney, John, "Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective" (1978) 6 Hofstra Law Review 831.

DeMott, Deborah, "Organizational Incentives to Care About the Law" (1997) 60 Law and Contemporary Problems 39.

Denison, Daniel R., *Corporate Culture and Organizational Effectiveness* (New York: John Wiley & Sons, 1990)

Developments, "Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions" (1979) 92 Harvard Law Review 1226.

Dewey, John, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale Law Journal 655.

Derham, D. P, "Theories of Legal Personality" in L.C. Webb, ed., *Legal Personality and Political Pluralism* (Australia: Melbourne University Press, 1958).

Department of Justice of Canada, "Corporate criminal Liability – Discussion Paper" (12 March 2004) online:<http://canada.justice.gc.ca/en/dept/pub/ccl_rpm/discussion/issues.html>

De Sanctis, Fausto Martin. *Responsabilidade Penal da Pessoa Jurídica* (São Paulo: editora Saraiva, 1999).

Dewey, John, 'The Historic Background of Corporate Legal Personality" (1926) 35 Yale Law Journal 655.

Dixon, Ronald L."Corporate Criminal Liability", in Spencer, Margaret. P and Sims & Ronald R, eds, *Corporate Misconduct* (Westport, US: Quorum books, 1995), 41.

Donaldson, Gordon and Lorsch, Jay W., *Decision Making at The Top – The Shaping of Strategic Direction* (New York: Basic Books Inc., 1983)

Donaldson, Thomas, *Corporations and Morality* (New Jersey: Prentice Hall, 1982)

Dotti, René Ariel, "A Incapacidade Criminal da Pesoa Juridica (Uma Perspectiva do Direito Brasileiro)", in Prado, Luis Régis ed., *Responasabilidade Penal da Pesoa Juridica: Em defesa do Prinicipio da Imputação Penal Subjetiva*(São Paulo: Revista dos Tribunais, 2001) 141.

Dougherty, Deborah & Kunda, Gideon, "Photograph Analysis: A Method to Capture Organizational Belief Systems" in Pasquale Gagliardi, ed., *Symbols and Artifacts, Views of the Corporate Landscape – de Gruyter Studies in Organization 24* (Berlin: Walter de Gruyter, 1990) 185.

Dougherty, Judge P, "The Concept of Person in American Legal Theory, " online: http://www.worldandi.com/public/1986/december/mt11.cfm

Downie, R.S "Responsibility and Social Roles" in French. Peter A., ed., 2nd ed *Individual and Collective Responsibility* (Rochester, Vermont: Schenkman Books, 1998) 117.

Drayton, William, "Economic Law Enforcement, (1980) 4 Harvard Environmental Law Review 1.

Duff, Antony, ed., "Principle and Contradiction in the Criminal Law" in *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998) 156.

Duncan, W D & Traves, Samatha J, *Due Diligence.* (North Ryde: LBC Information Services, 1995).

Dunford, Louise and Ridley, Ann, "No soul to be damned, No Body to be Kicked: Responsibility, Blame and Corporate Punishment" (1996) 24 International Journal of The Sociology of Law 1.

Dunn, Craig, "Are Corporations Inherently Wicked?" (1991) 34 Business Horizon 3.

Durant, Will, *The Story of Civilization: Part III, Caesar and Christ- A History of Roman Civilization and of Christianity from their beginnings to A.D. 325"* (New York: Simon and Schuster, 1944)

Edgerton, Henry W, "Corporate Criminal Responsibility" (1926-1927) 36 Yale Law Journal 827.

Elkins, James R, "Corporations and the criminal Law: An Uneasy Alliance" (1976-1977) 65 Kentucky Law Journal 73.

Erlich, Gerd. W, *Changing Law in a Changing Community: Eleven Lectures to Introduce the Study of Law* (Boston: University Press of America, 1983).

Ermann, M. David & Lundman, Richard J, "Deviant Acts by Complex Organizations: Deviance and Social Control at the Organizational Level of Analysis" (1978) 19 The Sociological Quarterly 55.

Estes, Ralph, *Tyranny of the Bottom Line: Why Corporations Make Good People Do Bad Things* (San Francisco: Berret-Koehler Publishers, 1996)

Esheleman, Andrew, "Moral Responsibility," online: <http://plato.stanford.edu/entries/moral-responsibility/>

Falsey, Thomas, Corporate Philosophies and Mission Statements (New York: Quorum Books, 1984)

Fauconnet, Paul, *La Responsabilité* (Paris: Librarie Félix Alcan, 1920)

Fausto Martins de Sanctis, *Responsabilidade Penal da Pessoa Juridica*, (São Paulo: Saraiva, 1999).

Feinberg, Joel, "Collective Responsibility" in French. Peter A., ed., *Individual and Collective Responsibility* (Rochester, Vermont: Schenkman Books, 1998) 51.

Feinberg, Joel, *Doing and Deserving- Essays in the Theory of Responsibility* (New Jersey: Princeton University Press, 1970)

Feinberg, Joel," The Expressive Function of Punishment" in Hyman Gross and Andrew von Hirsch, eds., *Sentencing* (Oxford: Oxford University Press, 1981) 23.

Ferrajoli, Luigi, Derecho y Razón: Teoría del Garantismo Penal, trans. by Perfecto A. Ibanez et. Al, 6th ed. (Madrid, Spain: editorial Trotta S.A, 2004)

Field, Stwart & Jorg Nico, *Corporate Liability and Manslaughter: should we be going Dutch?* (1991) Criminal Law Review 156.

Findlay, Mark, *Problems for the Criminal Law* (Melbourne: Oxford University Press, 2001)

Finkelstein, Claire, "The Irrelevance of the Intended to prima facie culpability: Comment on Moore" (1996) 76 University of Boston Law Review 335.

Finn, Cynthia H., "The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine" (1996) 46 American University Law Review 543.

Fischel, Daniel R., "The Corporate governance Movement" (1982) 35 Vanderbilt Law Review 1259.

Fischel, Daniel R and Sykes, Alan O, "Corporate Crime", (1995-1996) 24-25 The Journal of Legal Studies 319.

Fischer, John Martin, "Recent Work on Moral Responsibility" (1999) 110 Ethics 93.

Fischer, John Martin & Ravizza, Mark, *Responsibility and Control: A Theory of Moral Responsibility* (England: Cambridge University Press, 1998) 6.

Fisse, Brent, "Corporate Criminal Responsibility" (1991) 15 Criminal law Journal 167.

Fisse, Brent & Braithwaite, John , *Corporations*, *Crime and Accountability* (Cambridge: Cambridge University Press,1993).

Fisse, Brent, "Recent Developments in Corporate Criminal Law and Corporate Liability To Monetary Penalties" (1990) 13 UNSW Law Journal 1.

Fisse, Brent, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 Southern California Law Review 1141.

Fisse, Brent and Braithwaite, John, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney Law Review 469.

Fisse, Brent, "The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 Sydney Law Review 277.

Fisse, Brent and Braithwaite, John, *The Impact of Publicity on Corporate Offenders* (Albany: State University of New York Press, 1983).

Fletcher, George P., *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998).

Fletcher, George P., *Rethinking Criminal Law* (Toronto: Little, Brown and Company, 1978).

Fletcher, George P., "The Theory of Criminal Negligence: A Comparative Analysis" (1971) 119 University of Pennsylvania Law Review 401.

Foerschler, Ann, "Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct" (1990) 78 California Law Review 1278.

Forer, Lois G., *A Rage to Punish* (London: W.W. Norton & Company, 1994).

French, Peter A., *Collective and Corporate Responsibility*, 2ed. (New York: Columbia University Press, 1984).

French, Peter A., et. Al, *Corporations in the Moral Community* (Orlando: Harcourt Brace Jovanovich College Publishers, 1992)

French. Peter A., ed., *Individual and Collective Responsibility,* 2nd ed. (Rochester, Vermont: Schenkman Books, 1998)

French, Peter A, "Integrity, Intentions, and Corporations" (1996) 34 American Business Law Journal 141. online: http://web5.infotrac.galegroup.com/itw/i…-A1947007&dyn=3!ar_fm?sw_aep=usaskmain.

French, Peter A, Responsibility Matters (Lawrence, Kansas: University Press of Kansas, 1992)

French, Peter A., "The Corporation as a Moral Person" (1979) 16 American Philosophical Quarterly 207.

French, Peter A., *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991).

Friedlander, Steven L., "Using Prior Corporate Convictions to Impeach" (1990) 78 California Law Review 1313.

Friedman, Howard M., "Some reflections on the Corporation as Criminal Defendant" (1979-1980) 55 Notre Dame Law Review 173.

Friedman, Lawrence M. *A History of American Law* 2nd ed. (New York: Simon & Schuster, Inc., 1985)

Friedman, Lawrence, "In Defense of Corporate Criminal Liability" (1999) 23 Harvard Journal of Law & Public Policy 833.

Friedrichis, David O, "White Collar Crime and the Definitional Quagmire: A Provisional Solution" (1992) 4 Journal of Human Justice 5.

Frost, Peter J. et al., *Organizational Culture* (Newbury Park, CA: SAGE Publications, 1989)

Gadon, Herman, "Termination-at-Will: A Test of Morality in Organizations" (1984) 2 The International Journal of Applied Philosophy 23.

Gagliardi, Pasquale, ed., "Artifacts as Pathways and Remains of Organizational Life" in *Symbols and Artifacts, Views of the Corporate Landscape – de Gruyter Studies in Organization 24* (Berlin: Walter de Gruyter, 1990) 3.

Gardner, John, "On the General Part of the Criminal Law" in Duff, R.A, ed., *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998) 204.

Geis, Gilbert & Stotland, Ezra, eds., White Collar Crime: Theory and Research (London: Sage Publications, 1980)

Geldart, W.M, "Legal Personality" (1911) 27 The Law Quarterly Review 90.

Gellner, Ernest, "Holism Versus Individualism" in May Brodbeck, *Readings in the Philosophy of the Social Sciences* (New York: The Macmillan Company, 1968) 254.

Gibson, Kevin, "Fictitious Persons and Real Responsibilities" (1995) 14 Journal of Business Ethics 761.

Gilbert, Michael J. & Russel, Steve, "Globalization of Criminal Justice in the Corporate Context" (2002) 38 Crime, Law and Social Change 211.

Gobert, James, "Corporate Criminality: Four Models of Fault" (1994) 14 Legal Studies 393.

Gobert, James, "Corporate Criminality: New Crimes for the Times", 1994 Criminal Law Review 94, 722.

Gobert, James & Mugnai, Emilia, " Coping with Corporate Criminality _ Some Lessons from Italy", (2002) Criminal Law Review 619.

Goetz, David, "Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organizations)" 17 March 2004 <http:www.parl.gc.ca/37/2/parlbus/chambus/house/bills/summaries/c45-e.htm>

Goldman, Alan H. "Deterrence Theory: Its Moral Problems" in Andrew Von Hirsch and Andrew Ashworth eds., *Principled Sentencing* (Edinburgh: Edinburgh University Press, 1992) 93.

Gomes, Luiz Flávio, ed., *Responsabilidade Penal da Pessoa Juridica e Medidas Provisórias e Direito Penal* (São Paulo: Revista dos Tribunais, 1999)

Goode, Matthew, "Corporate Criminal Liability," online: http://www.aic.gov.au/publications/proceedings/26/gppde.pdf>

Goodin, Robert E, "Responsibilities", (1986) 36 n. 142 The Philosophical Quarterly 50

Goodpaster, Kenneth E., "The Concept of Corporate Responsibility" in Tom Regan, ed., *Just Business: New Introductory Essays in Business Ethics* (New York: Random House, 1984) 10.

Goodpaster. Kenneth E, "Morality as a System of Categorical Imperatives" (1981) 15 The Journal of Value Inquiry 179.

Gowri, A, "When Responsibility Can't Do It" (2004) 54 Journal of Business Ethics 33.

Glasbeek, Harry, *Wealth by Stealth* (Toronto: Between the Lines, 2002).

Grabosky, P.N & Braithwaite, J B & Wilson, PR, " The Myth of Community Tolerance Toward White-Collar Crime" (1987) 20 Australian and New Zealand Journal of Criminology 33.

Grantham, Ross, "Corporate Knowledge: Identification or Attribution" (1996) 59 The Modern Law Review 732.

Graves, Desmond, *Auditing and Changing the Culture of Organizations* (London: Frances Pinter, 1986)

Gross, Hyman, " Proportional Punishment and Justifiable Sentences" in Hyman Gross and Andrew von Hirsch, eds., *Sentencing* (Oxford: Oxford University Press, 1981) 272.

Haines, Fiona. *Corporate Regulation: Beyond Punish or Persuade* (Oxford: Clarendon Press, 1997)

Hall, Joseph S. *Corporate Criminal Liability (Thirteenth Survey of White Collar Crime),* (1998) 35 American Criminal Law Review 549.

Hallis, Frederick. *Corporate Personality: A Study in Jurisprudence* (London: Oxford University Press London- Humphrey Milford, 1930)

Hanna, Don, "Corporate Criminal Liability", (1989) 31 Criminal Law Quarterly 452.

Hans, Valerie P, "Attitudes Toward Corporate Responsibility: A Psycholegal Perspective" (1990) 69 Nebraska Law Review 159.

Hans, Valerie P. & Ermann, David M., "Responses to Corporate Versus Individual Wrongdoing" (1989) 13 Law and Human Behaviour 151.

Hans, Valerie, *The Jury's Response To Business and Corporate Wrongdoing,* 1989 Business and Corporate Wrongdoing 52, 177

Haslam S. Alexander, Psychology in Organizations (London: SAGE Publications Ltd, 2001)

Hart, H. L. A, "Definition and Theory in jurisprudence" (1954) 70 The Law Quartely Review 37.

Hassemer, Winfried, *Três temas de Direito Penal* (Porto Alegre: Publicação da Escola Superior do Ministério Público, 1993) 59.

Hassemer, Winfried, *Persona, Mundo y Responsabilidad*, trans. by Francisco Muñoz Conde y Maria del Mar Díaz Pita (Valencia, Spain: Tirant lo Blanch, 1999)

Hatch, Mary Jo, *Organizational Theory: Modern, Symbolic and Postmodern Perspectives* (London: Oxford University Press, 1997).

Heine, Gunter, "La Responsabilidad Penal de las Empresas: Evolucion Internacional y Consecuencia Nacionales" (1996) Anuario de Derecho Penal – asociacion peruana de Derecho Penal, online: http://www.unifr.ch/derechopenal/anuario/96.html

Heine, Gunter "Sanctions in the Field of Corporate Criminal Liability" in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998,* 238.

Held, Virginia, "Moral Responsibility and Collective Action" in French. Peter A., ed., *Individual and Collective Responsibility* (Rochester, Vermont: Schenkman Books, 1998) 151.

Hickson, David J. et al., "Comparing 150 Decision Processes" in Johannes Pennings and Associates, *Organizational Strategy and Change: New Views on Formulating and Implementing Strategic Decisions* (San Francisco, CA: Jossey-Bass Inc., 1985) 114.

Hindess, Barry, *Choice, Rationality and Social Theory* (London: Unwin Hyman Ltd, 1988)

Horder, Jeremy, "Criminal Law: Between Determinism, Liberalism, and Criminal Justice", (1996) 49 Current Legal Problems 159.

Horder, Jeremy, *Cognition, Emotion, and Criminal Culpability.* (1990) 106 The Law Quartely Review 469.

Horowitz, Amir, "Ronald Dworkin's Group Fetishism" (2002) 5 Journal of Markets & Morality, online: < http://www.acton.org/print.php>

Horwitz, Morton J., "*Santa Clara* Revisited: The Development of Corporate Theory" (1985-86) 88 Western Virginia Law Review 173.

Huff, Kevin B, "The role of corporate compliance programs in determining corporate Criminal Liability: A Suggested Approach" (1996) 96 Columbia Law Review 1253.

Jacobs, Francis G., *Criminal Responsibility* (London: Weidenfeld and Nicolson, 1971).

Järvik,Marek, "How to Understand Moral Responsibility?" (2003) 7 Trames 147.

Jarvis, William H, "Corporate Criminal Liability: Legal Agnosticism" (1961) Western Law Review 1.

Kadish, Sanford H., "Some Observations on The Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30 The University of Chicago Law Review 423.

Kan, Steven S, "Corporal Punishments and Optimal Incapacitation" (1995-1996) 24-25 The Journal of Legal Studies 121.

Keeley, Michael, "Organizations as Non Persons" (1981) 15 Journal of Value Inquiry 149.

Khanna, V.S, "Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea (1999) 79 B.U. L Review 355.

Khanna, V.S, "Corporate Criminal Liability: What purpose does it serve?" (1996) 109 Harvard Law Review 1477.

Khanna, V.S, "Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?" (2000) 37 American Criminal Law Review 1239.

Kopelman, Richard E., Brief, Arthur P & Guzzo, Richard A., "The Role of Climate and Culture in Productivity" in Schneider, Benjamin, ed. *Organizational Climate and Culture* (Oxford: Jossey-Bass Publishers, 1990) 282.

Kutz, Christopher, *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2000)

Lacey, Nicola, "In Search of The Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory" (2001) 64 The Modern Law Review 350.

Lacey, Nicola, "A Clear Concept of Intention: Elusive or Illusory?", (1993) 56 The Modern Law Review 621.

Ladd, John, "Corporate Mythology and Individual Responsibility" in White, Thomas I., *Business Ethics: A Philosophical Reader* (Toronto: Maxwell MacMillan Canada, 1993) 236.

Ladd, John, "Corporativism," reprinted in French, Peter A., *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991) 305.

Ladd, John, "Morality and the Ideal of Rationality in Formal Organizations" (1970) 54 The Monist 488.

Latty, Elvin R., "The Corporate Entity as a Solvent of Legal Problems" (1936) 34 Michigan Law review 597.

Laufer, William S, "Corporate Bodies and Guilty Minds" (1994) Emory Law Journal 647.

Laufer, William S., "Corporate Liability, Risk Shifting, and the Paradox of Compliance" (1999) 52 Vanderbilt Law Review 1343.

Laufer, William S. and Strudler, Alan, "Corporate Intentionality, Desert, and Variants of Vicarious Liability" (2000) 37 American Criminal Law Review 1285 online:<http://web1.infotrac.galegroup.com/itw/infomark/895/658/44940293w1/purl=rcl_EAIM_0.>

Laufer, William S. and Walt, Steven, "Why Personhood doesn't matter: Corporate Criminal Liability and Sanctions" (1991) 18 American Journal of Criminal Law 263.

Lederman, Eliezer, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle" (1985) 76 Journal of Criminal Law and Criminology 285.

Lederman, Eliezer, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity" (2000) 4 Buffalo Criminal Law Review 641.

Leigh, L. H, "The Criminal Liability of Corporations and Other Groups" (1977) 9 Ottawa Law Review 247.

Le Goff, Pierrick B., "The French Approach to Corporate Liability for Damage to the Environment" (1997) 12 Tulane European & Civil Law Forum 39.

Leigh, L. H, *The Criminal liability of Corporations in English Law* (London: Lowe & Brydone, 1969)

Leite, Maria Celeste Cordeiro, Tiedemann, Klaus, "A responsabilidade Penal da Pessoa Juridica" in Gomes, Luiz Flavio, ed., *Responsabilidade Penal da Pessoa Juridica e Medidas Provisorias e Direiro Penal* (Sao Paulo: Revista dos Tribunias, 1999), 104.

Lewis, H. D, "The Non-Moral Notion of Collective Responsibility" in French. Peter A., ed., *Individual and Collective Responsibility*, 2nd ed (Rochester, Vermont: Schenkman Books, 1998) 167.

Lizée, Marcel, "De la Capacité Organique et des Responsabilités Délictuelle et Pénale des Personnes Morales" (1995) 41 McGill Law Journal 131.

Lofquist, William S., Cohen, Mark. A & Rabe, Gary A., eds., *Debating Corporate Crime* (Cincinnati, OH: Anderson Publishing Co., 1997)

Lukes, Steven, " Methodological Individualism Reconsidered" in *Sociological theory and Philosophical Analysis,* ed. by Dorothy Emmet and Alasdair Macintyre (London: Macmillan and Co Ltd, 1970)

Luisi, Luiz, "Notas Sobre a Responsabilidadde Penal das Pessoas Juridicas", in Luiz Regis Prado, ed., *Responsabilidade Penal da Pesoa Juridica: Em Defesa do Principio da Imputacao Penal Subjetiva* (Sao Paulo: Revista dos Tribunais, 2001) 79.

Lynch, Gerard E., "The Role of Criminal Law in Policing Corporate Misconduct" (1997) 60 Law and Contemporary Problems 23.

MacAuley, Finbarr & McCutcheon, J. Paul, *Criminal Liability: A Grammar* (Dublin: Round Hall Sweet & Maxwell, 2000)

MacCrimmon, Kenneth R, "Understanding Strategic Decisions: Three Systematic Approaches" in Johannes Pennings and Associates, *Organizational Strategy and Change: New Views on Formulating and Implementing Strategic Decisions* (San Francisco, CA: Jossey-Bass Inc., 1985) 76.

Machen Jr, Arthur W, "Corporate Personality" (1911) 24 Harvard Law Review 253.

Mackie, J. L, "The Straight Rule of Responsibility" reprinted in Peter French

Malleta, H. E, "Corporate Group Theory" (e-mail message of H. E Maletta to Eugene L. Mendonsa) at http://csf.colorado.edu/mail/ipe/2000/msg00321.html

Mander, J, "The Myth of Corporate Conscience" (1992) 81 Business and Society Review 56.

Mansilha, Eduardo, "Responsabilidade Penal das Pessoas Colectivas", online: <http://www.verbojuridico.net/estudos/rp_pc.html>

March, James G. et al., "A Garbage Can Model of Organization Choice" in Pennings, Johannes M., ed., Decision Making – An Organizatonal Behavior Approach (New York: Markus Wiener Publishing Inc., 1976)

Martin, Joanne, Cultures in Organizations- Three Perspectives (Oxford: Oxford Unversity Press, 1992)

Martin, Luis Garcia, *La Cuestion de le Responsabilidad Penal de Las Proprias Personas Juridicas* , in Responsabilidade Penal da Pessoa Juridica: Em defesa do Prinicipo da Imputacao penal subjetiva, Revista dos Tribunais, Sao Paulo, Brazil, 2001, 35-78.

Martinage, Renée. *Histoire du Droit Pénal en Europe* (Paris: Presses Universitaires de France, 1998)

Maxwell, Seth, "The Foreign Corrupt Practices Act and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability" (1982) 29 UCLA Law Review 447.

May, Larry, *The Morality of Groups* (Notre Dame, Indiana: Notre Dame University Press, 1987).

May, Larry, "Vicarious Agency and Corporate Responsibility," reprinted in French, Peter A., *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991) 313.

McGary, Howard, "Morality and Collective Liability" in May, Larry May and Stacey Hoffman, eds., *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics* (Maryland: Rowman & Littlefield Publishers, 1991) 77.

Merryman, John Henry, *The Civil Law Tradition,* 2nd ed. *(*Stanford: Stanford University Press, 1985)

Metzger, Michael B. & Dalton, Dan R., "Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency" (1996) 33 American Business Law Journal 489.

Meyer, Jürgen, "Criminal Responsibilities of Legal and Collective Entities: Comments on Developments in Germany" in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998,* 129.

Meyers, Christopher, "The Corporation, Its Members, and Moral Accountability" White, Thomas I., *Business Ethics: A Philosophical Reader* (Toronto: Maxwell MacMillan Canada, 1993) 251.

Mills, Eric Burke, "Perspectives on Corporate Crime and The Evasive Individual" (1985-1986) 8 Criminal Justice Journal 327.

Mills, Jean C. Helms & Mills, Albert J., "Rules, Sensemaking, Formative Contexts, and Discourse in the Gendering of Organizational Culture" in Ashkanasy, Neal M., Wilderom, Celeste P.M & Peterson, Mark F., eds., *Handbook of Organizational Culture & Climate* (London: Sage Publications, 2004) 55.

Millstein, Ira M. & Katesh, Salem M. *The Limits of Corporate Power* (New York: MacMillan Publishing Co. Inc., 1980)

Miner, John, Theories of Organizational Behavior (Hinsdale, Ill: The Dryden Press, 1980).

Möhrenschlager, Manfred, *National and International Developments* in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998,* 89.

Mokhiber, Russell & Weissman, Robert, *Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust* (San Francisco: Sierra Club Books, 1989)

Molan, Mike, Lanser, Denis and Bloy, Duncan. *Bloy and Parry's Principles of Criminal Law, 4th ed. (Cavendish publishing limited,* 2000)

Monks, Robert A. & Minow, Nell, *Power and Accountability* (United States: Harper Business, 1991)

Moore, Michael, "The Moral and Metaphysical Sources of the Criminal Law" in J. Roland Penncok, ed., *Criminal Justice: Nomos XXVII* (New York: New York University Press, 1985) 11.

Morgan, Molly and Edwards, Jane, "Abolish Corporate Personhood" (2002) 59 Guild Practitioner 209.

Morris, Christopher W. & Frey, R.G, eds., *Liability and Responsibility: Essays in Law and Moral* (Cambridge: Cambridge University Press, 1991)

Morrison, Wayne, *Jurisprudence: From the Greeks to Post-modernism* (London: Cavendish Publishing Limited, 1997).

Morse, Stephen, "Inevitable Mens Rea" (2003) 27 Harvard Journal of Law and Public Policy 51.

Mueller, Gerhard O., "Mens Rea and The Corporation" (1957-58) 19 University of Pittsburgh Law Review 21.

Neal David, "Review of B Fisse & J Braithwaite, *Corporations, Crime, Accountability,* Cambridge University Press, 1993" (1994) 24 Western Australian Law Review 136.

Needleman, Martin L. & Needleman, Carolyn, "Organizational Crime: Two Models of Criminogenesis" (1979) 20 The Sociological Quarterly 517.

Nelson, Sarah E. and Malle, Bertram F., "Judging Mens Rea: The Tension Between Folk Concepts and Legal Concepts of Intentionality" (2003) 21 Behavioral Science and Law 563.

Nesteruk, Jeffrey, "Belloti and the Question of Corporate Moral Agency" (1988) Columbia Business Law Review 683.

Nielsen, Gorm Toftegaard, Heine, Gunter "Criminal Liability of Collective Entities – The Danish Model" in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998,* 189.

Nietzsche, Friedrich , *The Genealogy of Morals* (New York: Dover Publications, Inc, 2003)

Nonet, Philippe, *The Legitimation of Purposive Decisions,* (1980) 68 California Law Review 263.

Norrie, Alan W, *Punishment, Responsibility and Justice* (New York: Oxford United Press, 2000).

Norrie, Alan W, " 'Simulacra of Morality'? Beyond the Ideal/Actual Antinomies of Criminal Justice" in Duff, R.A, ed., *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998) 101.

Notes, "The Criminal Responsibility of Corporations" (1923) 27 Dickson Law Review 89.

Notes, "Criminal Liability of Corporations for Acts of their Agents" (1946) Harvard Law Review 283.

Notes, "Corporate Criminal Liability" (1973) 68 Northwestern University Law Review 870.

Notes, "Negligence and the General Problem of Criminal Responsibility" (1972) 81 The Yale Law Journal 949.

Notes and Comments, "Increasing Community control over Corporate Crime – A Problem in the Law of Sanctions", (1961- 1962) 71 Yale Law Journal 281.

Odujirin, Adekemi, *The Normative Basis of Fault in Criminal Law: History and Theory* (Toronto: University of Toronto Press, 1998)

Oshana, Marina A. L, "Ascriptions of Responsibility" (1997) 34 American Philosophical Quarterly 71.

Packer, Herbert L., *The Limits of the Criminal Sanction* (California: Stanford University Press, 1968)

Page, Geneviève, «La responsabilité pénale des personnes morales,» online: <http://www.uni.ch/penal/quoi/memoires-environnement/personnesmorales.html.>

Paine, L. S, "Managing for Organizational Integrity" (1994) 72 Harvard Business Review 106.

Paliero, Carlos Enrico, "Problemas y Perspectivas de la Resposnabilidad Penal de la Persona Juridical en el Derecho Italiano" (1996) Anuario de Derecho Penal – asociacion peruana de Derecho Penal, online: <http://www.unifr.ch/derechopenal/anuario/96.html>

Parker, Herbert L., *The limits of the criminal sanction* (Stanford, Calif. : Stanford University Press, 1968)

Parisi, Nicolette, "Theories of Corporate Criminal Liability (or Corporations Don't Commit Crimes, People Commit Crimes)" in Hellen Hochstedler, ed., *Corporations as criminals- Perspectives in criminal justice 6* (New York: Sage Publications, 1984) 41.

Paton, G. W & Derham, David (ed), *A Textbook of Jurisprudence*, 4th ed. (Oxford: Clarendon Press, 1972)

Pearce Frank & Snider, Laureen, "Crimes of the Powerful: Contemporary Approaches to Corporate Crime" (1992) 4 Journal of Human Justice 1.

Pearce, Frank & Tombs, Steve, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (England: Dartmouth Publishing Company Limited).

Pepinsky, Harold, *"From White Collar Crime to Exploitation: Redefinition of a Field",* (1974) 65 The Journal of Criminal Law and Criminology 225.

Peterson, Mark F., "Sources of Meaning, Organizations, and Culture" in Ashkanasy, Neal M., Wilderom, Celeste P.M & Peterson, Mark F., eds., *Handbook of Organizational Culture & Climate* (London: Sage Publications, 2004) 101.

Pierangeli, José Henrique, "Penas atribuidas as pessoas juridicas pela lei ambiental," online: <http://www.apriori.com.br/artigos/penas_da_lei_ambiental.html>

Pinto, Amanda & Evans, Martin, *Corporate Criminal Liability* (London: Sweet & Maxwell, 2003).

Pitt, Harvey L. & Groskaufmanis, Karl A., 'Minimizing Corporate Civil and Criminal Liability: A second Look at Corporate Codes of Conduct" (1990) 78 The Georgetown Law Journal 1560.

Pollock, Sir Frederick, *A First Book of Jurisprudence* (New York: Burt Franklin, 1970)

Pollock, Sir Frederick, " Has the Common Law Received The Fiction Theory of Corporations?" (1911) 26 The Law Quarterly Review 219.

Posner, Richard A. "An Economic Theory of the Criminal Law" (1985) 85 Columbia Law Review 1194.

Posner, Richard A., *Economic Analysis of Law,* 4th ed. (Boston: Little Brown, 1992)

Posner, Richard, " The Criminal Sanction and Criminal Law" in Hyman Gross and Andrew von Hirsch, eds., *Sentencing* (Oxford: Oxford University Press, 1981) at 203.

Post, James E, *Corporate Behaviour and Social Change* (Reston, Virginia: Reston Publishing Company, Inc., 1978)

Poste, Edward, *Elements of Roman Law by Gaius,* 2nd ed. (London: MacMillan and Co., 1875)

Pozo, Jose Hurtado, "Responsabilidad Penal de Las Personas Juridicas", (1996) Anuario de Derecho Penal – asociacion peruana de Derecho Penal, online: <http://www.unifr.ch/derechopenal/anuario/96.html>

Pradel, Jean, "La Responsabilidad Penal de la Persona Moral" (1996) Anuario de Derecho Penal – asociacion peruana de Derecho Penal.

Prado, Luiz Regis, *Responsabilidade Penal da Pessoa Juridica: Fundamentos e Implicacoes* , in Luiz Regis Prado, ed., *Responsabilidade Penal da Pesoa Juridica: Em Defesa do Principio da Imputacao Penal Subjetiva* (Sao Paulo: Revista dos Tribunais, 2001) 101.

Prado, Luiz Regis, *Curso de Direito Penal Brasileiro- Parte Geral*, 2ed. (Sao Paulo: Revista dos Tribunais, 2000).

Quaid, Jennifer. A, "The Assessment of corporate criminal Liability on the basis of corporate identity: an analysis", (1998) 43 McGill Law Journal 69.

Rachels, James, 'Nietzsche and the Objectivity of Morals', in N. Scott Arnold, Theodore M. Benditt and George Graham, eds, *Philosophy Then and Now* (Malden, Mass. : Blackwell Publishers, 1998) 385.

Radin, Max, " The Endless Problem of Corporate Personality" (1932) 32 Columbia Law Review 643.

Rafaeli, Anat & Worline, Monica, "Symbols in Organizational Culture" in Ashkanasy, Neal M., Wilderom, Celeste P.M & Peterson, Mark F., eds., *Handbook of Organizational Culture & Climate* (London: Sage Publications, 2004) 71.

Ramos, Luiz Rodrigues, "Societas Delinquere Potest : Nuevos Aspectos Dogmaticos y procesales de la cuestion" (1996) Anuario de Derecho Penal – asociacion peruana de Derecho Penal, online: <http://www.unifr.ch/derechopenal/anuario/96.html>

Richard Ouellet, "C'est une Revolte. Non Sire. C'est une revolution – Tentaitve de metaphore sur la transition paradigmatique du droit" (1999) 30 Revue du Droit 205.

Richardson, Erick., "When I Was a Child I Thought Like a Child: Corporations as Morally Equivalent to Children" (2001) 32 Journal of Philosophy 18.

Risser, David T, "The Social Dimension of Moral Responsibility: Taking Organizations Seriously" (1996) XXVII Journal of Social Philosophy 189.

Robinson, O. F, *Persons* in Metzger, Ernest, ed., *A Companion to Justinian's Institutes* (New York: Cornell Univerity Press, 1998), 18.

Robinson, Paul H, "The Modern General Part: Three Illusions" in Stephen Shute and A. P. Simester, eds., *Criminal Law Theory: Doctrines of the General Part* (New York: Oxford University Press, 2002) 75.

Rothenburgh, Walter Claudius, "A Responsabilidade Criminal das Pessoas Juridicas na Nova Lei de Infracoes Ambientais," online: <http://200.180.3.8/iiiencontro/convidados/C8/principal.htm>

Reale Junior, Miguel, "A Responsabilidade Penal da Pesoa Juridica" , in Luiz Regis Prado, ed., *Responsabilidade Penal da Pesoa Juridica: Em Defesa do Principio da Imputacao Penal Subjetiva* (Sao Paulo: Revista dos Tribunais, 2001) 137.

Rescher, N, "Corporate Responsibility" (1998) 29 Journal of Social Philosophy 46.

Rideout, R. W, *The Limited Liability of Unincorporated associations,* (1996) 49 Current Legal Problems 159.

Ridley, Ann & Dunford, Louise, "Legislating for Unlawful Death?" (1997) 26 Industrial Law Journal 99.

Rios, Rodrigo Sanchez, *Indagacoes sobre a possibilidade da imputacao penal a pessoa juridical no ambito dos delitos economicos*, in Responasabilidade Penal da Pesoa Juridica: Em defesa do Prinicipo da Imputacao penal subjetiva, (2001), Revista dos tribunais, Sao Paulo, at pp. 181-196.

Robaldo, Jose Carlos de Oliveira, "A Responsabilidade Penal da Pessoa Juridica: direito Penal na Contramao da Historia", in Luiz Flavio Gomes, *Responsabilidade Penal da Pessoa Juridica e Medidas Provisorias e Direiro Penal* (Sao Paulo: Revista dos Tribunais, 1999) 96.

Robinson, Paul H., "Criminal Law Scholarship: Three Ilusions" (2001) 2 Theoretical Inquiries in Law 1.

Rosen, Lawrence, "Intentionality and the Concept of the Person" in J. Roland Penncok, ed., *Criminal Justice: Nomos XXVII* (New York: New York University Press, 1985) 52.

Ross, Jennifer, "Corporate Criminal Liability: One form or many forms?" (1999) 14 Juridical Review 50

Rothenburg, Walter Claudius, *Considerações de Ordem Prática a Respeito da Responsabilidade Criminal da Pessoa Juridica* in Responsabilidade Penal da Pessoa Jurídica e Medidas Provisórias e Direito Penal (1999), Revista dos Tribunais, São Paulo, at 143.

Rubin, Edward L, "Puting Rational Actors in Their Places: Economics and Phenomenology" (1998) 51 Vanderbilt Law Review 1705.

Ruth Jr., Henry S, et al., *The Challenge of Crime in a Free Society: Perspectives on the Report of the President's Commission on Law Enforcement and the Administration of Justice* (New York: Da Capo Press, 1971)

Sasson, Joseph, "Colors, Artifacts, and Ideologies" in Pasquale Gagliardi, ed., *Symbols and Artifacts, Views of the Corporate Landscape – de Gruyter Studies in Organization 24* (Berlin: Walter de Gruyter, 1990) 169.

Sales, Sheila Jorge Selim de, "Anotações sobe o principio *societas delinqeure non potest* no direito penal moderno; um retrocesso pratico em nome da politica criminal?" in Luiz Regis Prado, ed. , 'Responasabilidade Penal da Pesoa Juridica: Em defesa do Prinicipo da Imputacao penal subjetiva' (Sao Paulo: Revista dos tribunais, 2002) 197.

Sales, Amy L. & Mirvis, Philip H., "Feeling the Elephant: Culture Consequences of a Corporate Acquisition and Buy-Back" in Schneider, Benjamin, ed. *Organizational Climate and Culture* (Oxford: Jossey-Bass Publishers, 1990) 345.

Schall, Maryan S.,"A Communication-Rules Approach to Organizational Culture" (1983) 28 Administrative Science Quarterly 557.

Schneider, Benjamin, ed. *Organizational Climate and Culture* (Oxford: Jossey-Bass Publishers, 1990).

Schrager, Laura Shill & Short Jr., James F., "Toward a Sociology of Organizational Crime" (1978) 25 Social Problems 406.

Scholz, Christian, "The Symbolic Value of Computerized Information Systems" in Pasquale Gagliardi, ed., *Symbols and Artifacts, Views of the Corporate Landscape – de Gruyter Studies in Organization 24* (Berlin: Walter de Gruyter, 1990) 233.

Shapiro, Susan, "Collaring the Crime not the Criminal: Reconsidering the Concept of White- Collar Crime (1990) 55 American Sociological Review 346.

Shapiro, Martin, " The Deconstruction and Reconstruction of Intent" in J. Roland Penncok, ed., *Criminal Justice: Nomos XXVII* (New York: New York University Press, 1985) 78.

Shridhar, B. S and Camburn, Artegal, "Stages of Moral Development of Corporations" (1993) 12 Journal of Business Ethics 727.

Sirvinskas, Luis Paulo, "Pessoa Juridica e Responsabilidade Penal,"online: <http://www.neofito.com.br>

Sistare, C. T, *Responsibility and Criminal Liability* (London: Kluwer Academic Publishers, 1989)

Slapper, Gary & Tombs, Steve, *Corporate Crime* (London: Longman, 1999)

Souza, Keity Mara Ferreira de, "A (ir)Responsabilidade da Pessoa Juridica-enfoques comparado, doutrinario e legal," online: <http://www1.jus.com.br/doutrina/texto.asp?id=1716>

Stroud, Douglas Akinhead, *Mens Rea or Imputability Under the Law of England* (London: Sweet & Maxwell, Ltd., 1914)

Sutherland, Edwin H., *White Collar Crime: The Uncut Version* (London: Yale University Press, 1983

Santos, Maria Celeste Cordeiro Leite, *A Responsabilidade Penal da Pessoa Juridica,* in Responsabilidade Penal da Pessoa Juridica e Medidas Provisorias e Direiro Penal, (1999), Revista dos tribunais, Sao Paulo, at pp. 104-130

Sarra, Janis, "The Corporate Veil Lifted: Director and Officer Liability" (2001) 35 Canadian Business Law Journal 55.

Shecaria, Sérgio Salomão, *A Responsabilidade Penal da Pessoa Jurídica,* 2 ed. (São Paulo: editora Método, 2003)

Shecaria, Sérgio Salomão , "A Responsabilidade Penal da Pessoa Juridica e Nossa Recente Legislacao," in Luiz Flávio Gomes, ed., *Responsabilidade Penal da Pessoa Juridica e Medidas Provisorias e Direiro Penal* (São Paulo: Revista dos Tribunais, 1999) 131.

Sciulli, David *Corporations vs. The Court; private Power, Public Interests. (*Lynne Rienner publishers, 1999)

Sirvinskas, Luis Paulo "Pessoa Juridica e Responsabilidade Penal," online: O Neófito <http://www.neofito.com.br>

Sistare, C. T, Responsibility and Criminal Liability (Boston: Kluwer Academic Publishers, 1989)

Smith, Susan, " An Iron Fist in the Velvet Glove: Redefining the Role of Criminal Prosecution in Creating an Effective Environmental Enforcement System (1995) 19 Criminal Law Journal, 12.

Smiley, Marion, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View* (Chicago: The University of Chicago Press, 1992)

Smircich, Linda, "Organizational Culture" (1983) 28 Administrative Science Quarterly 339.

Snider, Laureen, "The Sociology of Corporate Crime: An Obituary" (2000) 4 Theoretical Criminology 169.

Spencer, Margaret P., "A Look at Corporate Crime" in Spencer, Margaret. P and Sims & Ronald R, eds, *Corporate Misconduct* (Westport, US: Quorum books, 1995), 23.

Spencer, Margaret. P & Sims, Ronald R, eds, *Corporate Misconduct* (Westport, US: Quorum books, 1995), 23.

Stackman, Richard W., Pinder, Craig C. & Connor, Patrick E., "Values Lost" in Ashkanasy, Neal M., Wilderom, Celeste P.M & Peterson, Mark F., eds., *Handbook of Organizational Culture & Climate* (London: Sage Publications,2004) 37.

Stewart, Hamish, "Legality and Morality in H.L. Hart Theory of Criminal Law" (1999) 52 S.M.U Law Review 201.

Stoljar, S.J., *Groups and Entities: An Inquiry into Corporate Theory* (Canberra: Australian National University Press, 1973).

Stone, Christopher D., "A Comment on 'Criminal Responsibility in Government'"in J. R Pennock and J. W. Chapman (eds.) *Criminal Justice* 27 Nomos XXVII, 241.

Stone, Christopher D. *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper & Row Publishers, 1975)

Stone, Christopher D., "The Place of Enterprise Liability in the Control of Corporate Conduct" (1980) 90 The Yale Law Journal 1.

Stroud, Douglas Ainkehead, *Mens Rea or Imputability under the Law of England* (London: Sweet & Maxwell, Ltd., 1914).

Stuart,Don, *Canadian Criminal Law: A Treatise*, 4th ed. (Ontario: Carswell, 1943).

Stuart, Don, *Punishing Corporate Criminals with Restraint,* (1995) 6 Criminal Law Forum 219.

Stuart, Don, *Charter Justice in Canadian Criminal Law,* 3 ed. , Carswell: Ontario, 2001.

Stuart, Don & Ronald Joseph Deslile. *Learning Canadian Criminal Law,* 5Th ed. (Ontario: Carswell, 1999).

Sullivan, G. R., "Expressing Corporate Guilty" (1995) 15 Oxford Journal of Legal Studies 281.

Thomas, Charles W & Hepburn, John, *Crime, Criminal Law, and Criminology* (Dubuque, Iwoa: WM. C. Briwn Company Publishers, 1983).

Thompson, Denis F., "Criminal Responsibility in Government" in J. R Pennock and J. W. Chapman (eds.) *Criminal Justice* 27 Nomos XXVII, 201.

T. L. Bouscaren & A. C. Ellis, *Canon Law a Text and Commentary* (Milwaukee: The Bruce Publishing Company, 1957).

Tiedemann, Klaus, Responsabilidad Penal de las Personas Juridicas, (1996) Anuario de Derecho Penal – asociacion peruana de Derecho Penal, online: <http://www.unifr.ch/derechopenal/anuario/96.html>

Tiedemann, Klaus, "Responsabilidad Penal de Personas Juridicas y Empresas en Le Derecho Comparado" in Gomes, Luiz Flavio, ed., *Responsabilidade Penal da Pessoa Juridica e Medidas Provisorias e Direiro Penal* (Sao Paulo: Revista dos Tribunias, 1999).

Timberg, Sigmund, "The Case of Antitrust Enforcement, (1953) 14 Ohio State Law Journal 315.

Tollefson, D, "Organizations as True Believers" (2002) 33 Journal of Social Philosophy 395.

Tracy, Lane, The Living Organization – Systems of Behavior (New York: PRAEGER, 1989)

Trainer, Ted, *The Nature of Morality*: *An Introduction to the subjectivist perspective* (Aldershot, England: Avebury, 1991)

Turner, Barry A., ed., Organizational Symbolism (Berlin: Walter de Gruyter, 1990)

Turner, Victor, Dramas, Fields, and Metaphors: Symbolic Action in Human Society (Ithaca, New York: Cornell University Press, 1990)

Ulmann, W, "The delictual Responsibility of Medieval Corporations" (1978) 64 The Law Quarterly Review 77.

Van den Haag, Ernest, "Comment on "Challenging just deserts: Punishing White- Collar Criminals", (1982) 73 Journal of Criminal Law and Criminology 764.

Van den Haag, Ernest, "The Criminal law as a Threat System", (1982) 73 Journal of Criminal Law and Criminology 769.

Velasquez, Manuel G., "Why Corporations Are Not Morally Responsible for Anything They Do?" (1983) 3 Business and Professional Ethics Journal 1.

Vervaele, J.A.E, "La Responsabilité pènale de et au sein de la Personne Morale aux Pays-Bas. Mariage entre Pragmatisme e Dogmatisme Juridique" in Delmas-Marty, Mireille, ed. *La Responsabilité Pénale dans L'Enterprise Vers un Espace Judiciaire Européen Unifié?* (Paris : Dalloz, 1997) 325.

Vining, Joseph, "Corporate Crime and the Religious Sensibility" (2003) 3 Punishment & Society 313.

Von Hirsch, Andrew. *et al.*, *Criminal Deterrence and Sentence Severity* (Portland, Oregon: Hart Publishing, 1999)

Von Hirsch, Andrew "Doing Justice: The Principle of Commensurate Deserts" in Hyman Gross and Andrew Von Hirsch (editors), *Sentencing* (New York: Oxford University Press, 1981) 243-256.

Von Hirsch, Andrew, *Past or Future Crimes* (London: Rutgers University Press, 1985), 53.

Walker, Nigel, "The Ultimate Justification: Varieties of the Expressive Theory of Punishment" in *Crime, Proof and Punishment: Essays in Memory of Rupert Cross* (London: Butterworths, 1981), at 109-121.

Walker, Nigel, *Punishment, Danger and Stigma* (Oxford: Basil Blackwell, 1980)

Walker, Nigel, *Why Punish?* (New York: Oxford University Press, 1991).

Wall, Edmund, "The Problem of Group Agency" (2000) XXXI The Philosophy Forum 187.

Walsh, Charles J. And Pyrich, Alicia, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?" (1995) 47 Rutgers Law Review 605.

Warnock, G.J., *The Object of Morality* (London: Methuen, 1971)

Watkins, J.W. N, "Methodological Individualism Social Tendencies" in May Brodbeck, Readings in the Philosophy of the Social Sciences (New York: The Macmillan Company, 1968) 269.

Webb, Leicester C., ed.,*Legal Personality and Political Pluralism* (Victoria: Melbourne University Press, 1958)

Weeks, David & Whimster, Sam, "Contested Decision Making: A Socio-Organizational Perspective," in Wright, George, ed., *Behavioral Decision Making* (New York: Plenum Press, 1985) 167.

Wells, Celia, *A New Offence of Corporate Killing – the English Law Commission's Proposals* in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998,* 119.

Wells, Celia, "Criminal Responsibility of Criminal Persons in Criminal Law Jurisdictions" (Paper prepared for OECD _ Anti- Corruption Unit Working Group on Bribery in International Business Transactions), online: <http://www.greco.coe.int/evaluations/seminar/Wells_revised.pdf>

Wells, Celia, *Corporate Manslaughter: A Cultural and Legal Form*, 45 Criminal Law Forum 1995, 45-73.

Wells, Celia, *Corporations: Culture, Risk and Criminal Liability,* 1993 Criminal Law Review 93, 551

Wells, Celia, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001)

Wells, Celia, "International Trade in Models of Corporate Criminal Liability," online: <http://www.brass.cf.ac.uk/cacorptoolkitCW0203.pdf>

Welsh, R.S. "The Criminal Liability of Corporations" (1946) 62 The Law Quarterly Review 345.

Werhane, Patricia H., *Persons, Rights and Corporations* (Englewood Cliffs, NJ: Prentice Hall, Inc., 1985)

Wetherly, Paul (ed) "Mechanisms, methodological individualism and Marxism: A Response to Elster" in Marx's Theory of Hisotry: the Contemporary Debate (Brookfield, USA: Averbury, 1992)

Wharton, Francis, *Philosophy of Criminal Law* (Holmes Beach, FL: WM. W. Gaunt & Sons, 1989).

Wheeler, Stanton, 1976. "Trends and problems in the sociological study of crime" (1976) 23 Social Problems 525.

White, Thomas I. *Business Ethics: A Philosophical Reader* (Toronto: Maxwell MacMillan Canada, 1993).

Whiting, Richard A., "Criminal Antitrust Liability of Corporate Representatives", (1963) 51 Kentucky Law Journal 434.

Wilkitzki, Peter, "Comments on Developments in Germany" Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998,* 135.

Wilmot, Stephen, "Corporate Moral Responsibility: What Can We Infer from Our Understanding of Organizations?" (2001) 30 Journal of Business Ethics 161.

Wolf, Susan, "The Legal and Moral Responsibility of Organizations" in J. R Pennock and J. W. Chapman (eds.) *Criminal Justice* 27 Nomos XXVII, 267.

Wolff, Martin, " On the Nature of Legal Persons" (1938) 54 The Law Quarterly Review 494.

Yarosky, Harvey *The Criminal Liability of Corporations*, (1964) 10 McGill Law Journal 1964, 142 – 157.

Zarky, Alan. *Defending the corporation in criminal prosecutions: A Legal and Practical Guide to the Responsible Corporate Officer and Collective Knowledge Doctrines.*(Washington: The Bureau if National Affairs, Inc., 1990)

TABLE OF CASES

1. Australia

Hamilton v. *Whitehead* (1988) 166 C.L.R. 121

2. Brazil

TJ/ES (2 Turma) – HC – Processo: 9702230047 – TRF200050355 – 06. 09. 1997.

STJ/PR (6 Turma) – HC 18338 – STJ000470366 – 06/08/2002

STJ/SP (6 Turma) – HC 15051 – STJ000396822 – 06/03/2001

STJ/ PE (5 Turma) – HC 21644 – STJ000505979 – 29/09/2003

TRF/SC (4 Turma) – Ap Crim 2002. 71. 04. 002225-0- SC- 8 T. 06.0.2003

3. Canada

Canadian Dredge Dock Co Ltd v *The Queen* (1985) 19 D. L.R (4^{th}) 314

Irwin Toy Ltd v *Quebec (Attorney General),* [1989] 1 S.C.R. 927, 94 N.R. 167, 58 D.L.R. (4 th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, at p. 993 [S.C.R]

Karen Reese v. *London realties 7 Rentals* (1986), 7 C. H. R.R. D3587 (Ont. Bd. of Enquiry).

Moore v. *Bresler Ltd* [1944] 2 All E.R. 515 (K.B. Div.).

R. v. *Burt* (1987), 38 C.C.C. 93d0 299, 60 C.R (3d0 372, [1988] 1 W.W.R. 385 (Sask. C.A)

R. v. *P.G Marketpalce* (1979), 51 C.C.C. (2d) 185 (B.C.C.A)

R v. *McNamara* [1985] 9 O.A.C. 321, 59 N.R. 241

R. v. *J. J. Beamish Cosntruction Co*., [1967] 1 C.C.C. 301, [1966] 2 O.R. 867, 50 C.P.R. 97 (H.C.J), affd [1968] 2 C.C.C. 5, 65 D.L.R. (2d) 260, [1948] 1 O.R. 5 (C.A).

R. v. *St. Lawrence Corp. Ltd* [1969] 3C.C.C. 263 at p. 281, 7 C.R.N.S. 265 at pp. 272-3, 2 O.R. 305.

R v. *Stevanovich* [1983], 43 O. R. (2d) 266, 36 C.R. (3d) 174, 7 C.C.C. (3d) 174, 7 C.C.C. (3d) 307, 1 D.L.R. (4^{th}) 688 (C.A)

R. v. *Syncrude Canada Lltd*., [1984] 1 W.W.R. 355, 48 A.R. 368, 28 Alta. L.R. (2d) 233 (Q.B)

R. v. *Videoflcks* [1986] 2 S.C.R. 713, 55 C.R. (3d) 193, 30 C.C.C. (3d) 385, 87 C.L.L.C. 14, 001, 28 C.R.R. 1, 35 D.L.R. (4^{th}) 1, 19 O.A.C. 239, 71 N.R. 161, at p. 779 [S.C.R., p. 241 C.R.].

R. v. *Waterloo Mercury Sales Ltd* [1974], 18 C.C.C. (2d) 248 (Alt. Dist. Ct)

R. v *Wholesale Travel Group Inc* [1991], 8 C.R. (4th) 145, 67 C.C.C. (3d) 193 (S.C.C.).

Regina v. *Great West Laundry Co*., 13 Man. R. 66, 3 C.C.C. 514 (K.B. 1900)

Rex. v *Fane Robinson* (1941), 76 C.C.C. 196, [1941] 3 D.L.R. 409, [1941] 3 D. L. R. 409, [1941] 2 W.W.W.R. 235 (Alta. C.A).

Rex v. *Master Plumbers & Steam fitters Co-operative Ass'n* 14 O.L.R. 295, 12 C.C.C 371 (C.A. 1907).

Rhone v *Peter A. B. Widener,* [1993] 1S.C.R. 497, 58 F.T.R. 239 (note), 148 N.R. 349, 101 D.L.R. (4TH) 188.

Sault Ste. Marie, [1976], 13 O.R. (2d) 113, 30 C.C.C (2d) 257, 70 D.L.R. (3d) 430 (C.A) ,affirmed [1978] 2 S.C.R.. 1299, 3 C.R. (3d) 30, 40 C.C.C. (2d0 353, 7 C.E.L.R. 53, 21 N.R.295

The Union Colliery Co. v. The Queen [1900] 31 S.C.R. 81, 4 C.C.C. 400.

4. England

Lennard's Carrying Co Ltd v. *Asiatic Petroleum Co Ltd* [1915] AC 705

Meridian Global Fund Management Asia Ltd v *Securities Commission* [1995] 2 AC 500 PC

Regina v. *Birmingham and Gloucester Railway* (1842) 3 QB 223.

R v *Cory Brothers*[1927] 1 KB 810 and *R* v *North Strip Mining* (1965) (unreported)

R v *HM Coroner for east Kent, ex p Spooner* (1987) 152 J.P.R (1989) 88 Cr Ap R 10.

Tesco Supermarket v. *Nastrass* [1971] 2WLR 1166

The Queen v. *Birmingham & Gloucester Railway* [1842] 3 Q.B. 223, 11 L.J. Mag. 134.

The Queen v. *Great North of England Railway Co* [1846] 9 q.b. 315, 16 L.J. Mag. 16.

5. United States

Anonymous Case [1701] 12 Mod 559.

City of Vernon v. *Southern Cal. Edison Co.,* 955 F. 2d 1361, 1369 (9th Cir. 1992);

Egan v *U.S,* [1943] 137 f 2. ed 369 (8th Cir C.A).

Inland Freight Lines v. *United States*, 191 F. 2d 313 (10th cir. 1951)

In re Hellenic Inc., 252 F.3d 391, 396(5th Cir. 2001)

Meyers v. *Bennet Law Offices*, 238 F. 3d 1068, 1073 (9th Cir 2001)

New Hampshire v. *Zeta Chi Fraternity*, 696 A. 2d 530, 535 (N.H. 1997)

N.Y. Cent. & Hudson River R.R. Co. v *United States*, 212 U.S. 481, 491-495 (1909)

United States v *Bank of New England.* (1987) 821 F. 2d 844 (1st Cir.), *cert. Denied,* 484 U.S. 943.

United States v. *Bi-Co Pavers, Inc.,* 741 F. 2d 730, 737 (5th Cir. 1984)

United States v. *Investment Enter Inc.,* 10 F. 3d 263, 266 (5th Cir.1993)

United States v. *One Parcel of Land*, 965 F. 2d 311, 316 (7th Cir. 1992)

United States v. *Parfait Powder Puff Co*., 163 F.2d 1008, 1009-1010 (7th Cir. 1947)

United States v. *Photogrammetric Data Serv*., 259 F 3d 229, 242 (4th Cir. 2001)

United States v. Portac Inc., 869 F 2d 1298 (9th Cir. 1989)

Zero v. *United States*, 689 F. 2d 238, 242 (1st Cir. 1982)