

# Corporate Crime – Should corporations be criminally liable?<sup>1</sup>

*By Héctor Ferreira \**

## I) Introduction

### I.i) Is it correct to criminally punish corporations?

It is difficult to find in Law a topic so controversial and so deeply analyzed throughout history. A topic about what the world is divided.

Part of the world maintains that it is not possible to accept the criminal liability of a corporation since just human beings can think and have intentions. Corporations are fictions driven by people and cannot perform criminally punishable acts.

On the other hand, the other part of the world claims that it does not matter if corporations have or do not have intention; the fact is that society needs corporate crime as a way to avoid or at least to diminish criminality.

Furthermore, while one part of the world claims the responsible to be the person who is behind the corporation, the other part challenges about if the liability should fall just in the corporation or it also should be extended to people behind it.

To adequately understand the problem we will consider in this paper, a hypothetical that can help:

Executives of Maligna Corporation, in order to increase their profits, order employees to release toxic chemicals into certain orange crops to obtain a more competitive product. The executives who gave the order knew that such releases were highly dangerous and contrary to both civil and criminal law. The chemicals cause the death of Joe and economic loss to Peter.

The laws of nearly every country would hold Maligna Corporation responsible for civil damages in this situation.

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<sup>1</sup> Final Paper, University of California, Davis (LL.M. 2008), *Tutor*: Professor Floyd Feeney

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The question is: Who is criminally liable? The possible answers are Maligna, the executives, or both Maligna and its executives.

The possibility of finding Maligna criminally responsible for the death of Joe is admissible in some countries and is not admissible in the others.

Immediately the question becomes why?

How is it possible that a single topic is perceived in different ways in the world?

Is there a better solution?

By holding corporations responsible for crimes, are we destroying Criminal Law? Are we increasing or decreasing criminality?

These are some of the questions we will explore in this paper seeking to answer the critical question of what legal systems in the world should do on this ground.

### **I.ii) Individual and Collective Responsibility**

According to Black's Law Dictionary<sup>2</sup>, responsibility is "... a person's mental fitness to answer in court for his or her actions".

The first conclusion we can draw after reading the definition is that "responsibility" is something inherent of "persons", because they are who can perform actions in a physical sense.

Nevertheless, this idea, in principle, only applicable to natural persons, can easily be extended to legal entities in general and corporations in particular, since they can also perform actions.

It is clear that the way in which this action is performed by legal entities is different from the way natural persons could be able to do that; because natural persons are individuals and corporations are legal entities typically formed by more than one person making them: "collective persons".

Considering the foregoing, the question becomes whether or not the collective person can have a criminal liability different from the one that the individual persons who are behind it have. Also, granted that the collective person can be criminally liable, the new question would be if it is fair that all the individuals

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<sup>2</sup>Black's Law Dictionary, Eighth Edition, (2004)

that formed the legal entity suffer the collective responsibility for something in which some of them possibly did not participate.

Garrath Williams<sup>3</sup> discussed these aspects by asking what kind of creature can properly be held criminally responsible for its actions. The simple answer is: a normal human adult. To explain and justify this response, authors tend to turn to psychological and metaphysical features of normal adults, such as free will.

In recent decades increasing attention has been given to the question of collective responsibility. This question can arise wherever the actions of a group of people combine to obtain a particular result – whether a corporation, or the citizens of a state, or even individuals who have no particular connection to one another. There are questions about the responsibilities of the collective, and of the individual as a member of that body.

Many perplexities about shared criminal responsibility arise from the thought that individuals are responsible agents, in a way that groups cannot be. A well-known formulation captures this problem neatly: “No soul to damn, no body to kick” (Coffee, 1981). It is usually thought that a person can be blamed or deserve criminal punishment by virtue of certain psychological capacities (“soul”), as well as by virtue of being the same person (“body”) today as she was yesterday. On this account, there is a serious puzzle as to how a collective can be criminally responsible, since a collective lacks the psychological capacities of an individual person and its membership tends to alter over time.

Williams approach is very useful to identify the irreconcilable aspect that makes the two models that have explained corporate crime, so different. From one perspective, the fact that the corporation, as a collective entity, does not have a body or a soul is not relevant for determining if the corporation can be criminally liable. On the other hand, for the other model, this is exactly the factor that makes the responsibility of corporations unacceptable.

## **II) The two Models that have explained Corporate Criminal Liability**

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<sup>3</sup>Garrath Williams, *Responsibility*, THE INTERNET ENCYCLOPEDIA, Lancaster University UK, (2006)

In order to face the problem, it is not possible just to draw a distinction between the Common Law tradition and the Civil Law tradition as in many other cases in law. In this case, we will see that many countries with Civil Law systems have admitted the responsibility of the corporation, doctrine that is a genuine product of the Common Law tradition. As Mueller<sup>4</sup> stated in 1957, imposition of criminal responsibility on corporations is almost exclusively a common-law tradition. Corporate criminal liability is generally unknown to civil law countries. Notwithstanding the common-law origin of corporate accountability for crime, however, English courts were among the slowest to adopt an express rule holding corporations generally criminally liable.

The foregoing idea is correct since from the Civil Law perspective of criminal law, just a person from a physiological point of view can commit a crime.

Corporate structures are “fictions” which receive from Law, the quality of “legal entities” and, under this quality, they can act in the market. After thinking one second in this sentence, the question becomes: how can this fiction can be criminally liable?

This is a critical gap between the two models. On the one hand is the Common Law model which accepts the criminal responsibility of the corporation, and on the other is the traditional Civil Law approach (that nowadays is essentially upheld by the legal systems of Latin America, Spain and Portugal) which deems the liability of the corporation unacceptable since it, as a legal fiction, does not have intention.

Currently in Latin America there is an easily recognizable tendency that pursues a revision of the traditional civil law approach, seeking a modification in the legal system that can allow the criminal responsibility of corporations. This movement argues that Latin American legislations are not ready to face situations as the ones that occurred in the United States with, among others, the bankruptcy of WorldCom and Enron.

Notwithstanding the foregoing, in the United States, the country that more has upheld the criminal responsibility of corporations, it is possible to find commentators that are seeking to change the

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<sup>4</sup> Gerhard Muller, *Mens Rea and the Corporation*, 19 U. PITT. L.REV. 21, 28 (1957)

traditional Common Law vision about corporate criminal responsibility. As an example of the referred ascertainment, in the last edition of the Journal of the American Bar Association Section of Litigation (winter 2008), Gregory L. Diskant<sup>5</sup> wrote an article named: “Rethinking Corporate Criminal Liability”, in which he maintains that, it is time to review the traditional framework in terms of corporate liability.

Mr. Diskant stated, following Judge Kaplan’s opinion, that a corporation is ‘a person’ only in a metaphorical sense, and a criminal prosecution of such a ‘person’ does not self-evidently serve any of the ordinary goals of criminal law. Indeed, the criminal conviction of a corporation does not punish the wrongdoers. It punishes the stockholders.

As we can see, there is a clear dissatisfaction on both sides, which produces a natural interaction between both models, since the defenders of each model find arguments against the other model, observing how it works, its strengths and weaknesses.

In order to understand how we have reached the 21st century still trying to determine what the best system is, it is imperative to analyze this topic from a historical perspective.

## **II.i) Evolution of the two Models**

### **(A) Roman Law: *societas delinquere non potest***

The modern concept of “legal entity” was born in Rome with the concept of “*Universitas*” which was something different from the human being, but under the Roman law this abstract entity was not able to commit crimes.

The Roman law had in the center of its doctrine the “human body”. The human body considered not as something alive but something that was able to suffer pain. According to this doctrine, the punishment did not pursue the prevention of the crime but to harm and torment the human body of the criminal (e.g. the crucifixion).<sup>6</sup>

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<sup>5</sup>Gregory L. Diskant, *Rethinking Corporate Criminal Liability*, ABA LIT. L.REV 34 ,35 (2008)

<sup>6</sup>JESÚS MARÍA SANGUINO SÁNCHEZ, LA RESPONSABILIDAD PENAL DE LA PERSONA JURÍDICA 495 (2006)

The criminal and ethical liability of these legal entities fell upon the human beings that agreed to perform the action and the sanctions also affected them. This principle of the Roman law was known as “*societas delinquere non potest*” (corporations cannot commit crimes).

(B) Germanic Empire Law

When the Roman Empire fell, legal institutions were overlapped by a completely new law, the law of the Germanic Empire. On the contrary, the Germanic Empire Law admitted the criminal liability of the legal entity.

(C) Middle Ages

In the Middle Ages, law and religion were interchangeable and law, obviously, was impregnated by the doctrine of the Catholic Church.

Religious leaders of the Middle Ages ruled that the cities that infringe the religious principles against the Pope or against the Emperor would be responsible and punished with excommunication. This sanction was a very important weapon that the Catholic Church used in some cases in an outrageous way.

Pope Innocence IV, struggled in the Council of Lyon of 1245 for the elimination of the excommunication of the “*Collegia est Universitas*” (legal entities) and the Cardinals of that Council enforced a new principle stating that legal entities cannot commit crimes (*Impossibili est quad universitas delinquat*).<sup>7</sup>

Under this principle, which is similar to the one ruled by the Roman law (*societas delinquere non potest*) there is no responsibility of the legal entity; the responsibility for the actions performed by the legal entity fell onto the head of the officers of the entity.

(D) Situation after the World War II. Nuremberg Courts

Generally speaking, until the World War II the principle *societas delinquere non potest* prevailed in the world.

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<sup>7</sup> JESÚS MARÍA SANGUINO SÁNCHEZ, *Supra* Note 5 at 496

After the defeat of the National Socialism of Germany by the United States and the allied countries, a historical landmark occurred. In November of 1945 in Nuremberg an International Court was established in order to determine the criminal responsibility of the main officers of the Nazi's government.

However, the most important thing that happened in the Nuremberg Court was that the Judges attributed criminal responsibilities not against Germany as a country but against the legal entity Nazi's Political Party. It was convicted for several crimes and the sanction was its extinction.<sup>8</sup>

#### (E) Evolution in the United States

While in the rest of the world corporate crime has been debatable, the US Congress has deemed, since the very beginning, that criminal sanctions are appropriate mechanisms for controlling misconduct. As Brickey<sup>9</sup> stated, the federal government's early predisposition to incorporate criminal penalties in statutes that regulate corporate behavior is nowhere better illustrated than in its enactment of the Sherman Act in 1890. Even though a theory of corporate capacity to commit criminal acts was in a relative state of infancy then, Congress nonetheless made the Sherman Act's criminal and civil prohibitions expressly applicable to corporations.

The Leading case in terms of Corporate Crime in the United States was *New York Central & Hudson River v. United States*<sup>10</sup>.

In the referred case the issue of whether or not a corporation can be criminally prosecuted was analyzed and the holding was: yes.

The Court ruled "(...) while the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies (...) to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would

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<sup>8</sup> JESÚS MARÍA SANGUINO SÁNCHEZ, *Supra* Note 5 at 498

<sup>9</sup> KATHLEEN F. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME* 3 (2002)

<sup>10</sup> *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909)

virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at (...)"

The idea of corporate crime has been accepted in the United States at least since the 19<sup>th</sup> century, even though the doctrine against corporate criminal responsibility had its followers. As an example, in the same Judgment is cited an earlier Common Law writer (Lord Chief Justice Holt) who said that corporations cannot commit crimes.

Notwithstanding, it is clear that while in the rest of the world the two models were fighting, in the United States the corporate crime was deemed as something normal, natural and acceptable long ago.

#### (F) Current situation in the world

There is in the world a division between countries that accept corporate crime without limitations, others that admit it in an indirect way and finally some countries that do not accept the criminal responsibility of corporations.

The corporate crime is admitted without limitations in the United States, Great Britain, Norway, Denmark, Ireland, the Netherlands, Germany and France.

The criminal liability of corporations is admitted in an indirect way (since there is no applicable law) in Italy and Belgium.

In the countries of Latin America, Spain and Portugal the corporate crime is not admitted. They continue following the maxim of the Roman law: "*societas delinquere non potest*" (corporations cannot commit crimes).

In some of these countries corporations are liable for some infractions against tax and administrative laws but never for crimes (e.g. Uruguay).

### **III) Should legal systems criminally punish corporations?**

At the beginning of this paper we used a hypothetical that involved a corporation (Maligna Corp.) which through its executives committed a crime.

In one of the approaches we have analyzed (traditional Civil Law approach) the responsibility will fall in the executives who drive the corporation because they were the “minds” behind the corporation. However, in countries that accept the responsibility of corporations, the final responsible party would be the corporation.

If the damage was produced by an act performed by the corporation, why would the responsibility fall on the executives?

On the other hand, if we deal with the other face of the responsibility that emerged from the case, the civil responsibility, nobody has doubts about the responsibility of the corporation. Why are there oppositions in the case of the criminal responsibility?

This is the question that the theory that does not accept the criminal liability of the corporation answers.

### **III.i) Why Maligna Corp. would not be criminally liable?**

The theory that does not admit the criminal responsibility of corporations in essence maintains that it is something unacceptable that fictions created by persons and driven by persons have criminal responsibility.

Criminal law was designed for people in the sense of human beings, not for abstract entities created by law.

Corporations do not think, do not want, do not have intention, the people who are behind the entity are who think, want and have intentions. Corporations are fictions and are not human beings and Criminal law is a branch of law created just for human beings.

Savigny<sup>11</sup> wrote that nobody tries to accuse a city of committing adultery or a hospital of committing bigamy. It is also impossible in his opinion to punish a city with exile.

Jakobs<sup>12</sup> stated that no legal entity has electoral rights (it cannot elect or be elected) and cannot comply with every possible action in a valid way. Consequently, it cannot commit a crime. In his opinion, “culpability” is the lack of fidelity to the law and it is impossible that a legal entity can have fidelity.

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<sup>11</sup> FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 106 (1975)

In Jakobs' opinion a legal entity can be punished but never through the criminal law devices and in the case of legal entities the concept of culpability is not applicable.

As Lord Chief Justice Holt<sup>13</sup> said, a corporation is not indictable, although the particular members of it are. A corporation cannot commit treason, or felony, or other crimes in its corporate capacity, though its members may in their distinct individual capacities.

Cairolì<sup>14</sup> ruled out corporate crime since criminal law is based on a principle of subjective responsibility. He said that criminal law was made for people and the crime organized considering human behavior which has as a consequence that unanimated things, animals or legal entities are not achieved by criminal law.

### **III.ii) Are executives of Maligna Corp. criminally liable?**

According to Clinard & Yeager<sup>15</sup> crimes committed from corporations are individual actions performed through organized collective entities.

Kelsen<sup>16</sup> said that the persons who are behind the legal entities –in this case the executives of Maligna- are liable for the rights and duties of the legal entities. It is impossible, in his opinion, to separate the responsibility that belongs to the legal entity from the one that belongs to the natural persons. Even though the legal entity is not criminally responsible, this does not mean that it is not responsible for the rest of kinds of responsibilities (contractual, administrative, etc.). The crime is not an action of the legal entity but an action directly performed by a natural person according to the bylaws.

As Prof. Aller<sup>17</sup> stated, legal entities are different from natural persons, among others, since the first ones do not have conscience and will, self-determination and physiological activity. In fact, these levels of evaluation and action –i.e. human features- are received directly from a man. Consequently, there is

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<sup>12</sup> GUNTHER JAKOBS, PUNIBILIDAD DE LAS PERSONAS JURÍDICAS? 96 (2002)

<sup>13</sup> KATHLEEN F. BRICKEY, *Supra* Note 8, at 2

<sup>14</sup> MILTON CAIROLI, DERECHO PENAL URUGUAYO, T. IV 141 (1994)

<sup>15</sup> MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 208 (1988)

<sup>16</sup> HANS KELSEN, GENERAL THEORY OF LAW AND STATE, 196 (1945)

<sup>17</sup> GERMÁN ALLER, ESTUDIO ACERCA DE LA RESPONSABILIDAD PENAL DE LAS PERSONAS JURÍDICAS 32 (2006)

always a human action behind an action performed by a legal entity, the *leit motiv* continue being the man as the trigger of every criminal behavior.

Furthermore, only a human being can grasp the content of a criminal law that sanctions a specific behavior and as a consequence, corporations or other legal entities, that cannot do that, are unable to suffer criminal sanctions.

In the countries where the corporate crime is not admitted and otherwise the criminal responsibility falls in the hands of the human beings who are behind the corporation, legislations have introduced in the last decades the idea of “piercing the veil”.

Generally speaking, corporations in the world provide their owners with limited liability and in certain countries like Panama and Uruguay the stock can be represented in bearer shares which allow the stockholders to become anonymous.

Under these circumstances and without criminal responsibility of the corporation, legislation had to create a device that provided creditors and the government with some way to catch the persons who drive the corporation.

Even though the “corporate veil” provides owners of a company with limited liability, this limitation on liability does not protect individuals from liability in tort or for criminal acts as fraud or similar wrongdoing, even when the actions at issue are taken in the name of and on behalf of the company.

In Aller’s<sup>18</sup> opinion there is a contradiction between the theory of piercing the veil of legal entity and the corporate criminal responsibility. In his opinion “(...) seeking the corporate criminal responsibility we obtain just a symbolic punishment which can allow that the responsible speculates with the convenience of taking the risk of a corporate sanction in lieu of sanctions against himself, either due to the cost of the fine (which can worth less than the benefits derived from the crime) or because of the formation of several corporations that aim to receive the sanctions instead of the natural persons. This fosters the formation of “ghost companies” which are born purporting their extinction.

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<sup>18</sup>GERMAN ALLER, *Supra* Note 16, at 17

To admit the corporate criminal responsibility will be necessary to modify the concept of “crime” and the principle of “culpability” since the crime is based on criminal responsibility, culpability and chargeability which are thought for human beings (...).”

### **III.iii) *Mens Rea & Actus Reus* – Are they applicable to corporations?**

There are two indispensable elements that have to be filled in order to commit a crime in the great tradition of the Common Law: *Mens Rea* and *Actus Reus*.

#### *(i) Mens Rea*

In *United States v. Cordoba – Hincapie*<sup>19</sup> the concept of “mens rea” is discussed in the following terms:

“The term, ‘mens rea,’ meaning a ‘guilty mind; a guilty or wrongful purpose; a criminal intent’, is shorthand for a broad network of concepts encompassing much of the relationship between the individual and the criminal law. These doctrines of criminal responsibility and the theories that support them are deeply rooted in our legal tradition as one of our first principles of law (...). Western nations have long looked to the wrongdoer’s mind to determine both the propriety and the grading of punishment. ‘For hundreds of years the books have repeated with unbroken cadence that *Actus non facit reum nisi means sit rea* (...).”

Black’s Law Dictionary<sup>20</sup> defines ‘mens rea’ as “(...) the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime, criminal intent or recklessness (...) mens rea is the second of the two elements of every crime at common law, the other being the *actus rea*.”

#### *(ii) Actus Reus*

According to Dressler<sup>21</sup> the ‘Actus Reus’ is the physical or external part of the crime; the ‘mens rea’ is the mental or internal ingredient. The term ‘Actus Reus’ has no universally accepted definition, courts and criminal lawyers use the term in various ways. The most common definition of the term would

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<sup>19</sup> *United States v. Cordoba – Hincapie*, United States District Court, E.D., New York, (1993). 825 F. Supp. 485

<sup>20</sup> *Supra* Note 3

<sup>21</sup> JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 111 (1999)

include both the conduct and the harmful result: Actus Reus is to be interpreted as the comprehensive notion of act, harm, and its connecting link, causation, with *actus* expressing the voluntary physical movement in the sense of conduct and *reus* expressing the fact that this conduct results in a certain proscribed harm i.e., that it “causes” an injury to the legal interest protected in that crime.

As we can appreciate, even in the great tradition of the Common Law, where the idea of corporate crime grew up, these two elements are necessary to commit a crime.

Consequently, the question becomes how a Corporation can have a ‘guilty mind; a guilty or wrongful purpose; a criminal intent’. It is not so difficult to accept, even from the Latin American point of view, that a corporation can perform an “*actus reus*” since through its officers it can act in the market. However, to admit that a corporation or other legal entities can have a ‘guilty mind’ is something unacceptable from the perspective we are analyzing in this section of the paper.

From the anthropological perspective that is maintained by the doctrine that does not accept the criminal responsibility in these cases, a ‘guilty mind’ is something inherent to human beings. It is impossible to accept that corporations have ‘minds’ and consequently they cannot be guilty. The ‘guilty mind’ belongs to the person, the human being that steers the corporation.

#### **III.iv) Corporate Crime is not a heresy against Criminal Law**

Is it so important to fit exactly in the classic ideas of criminal law? The answer to this question in the majority of countries in the world would be: no, it is not. Also, the adoption of the liability of corporations did not destroy or have any other bad consequence in the Criminal Law of the jurisdictions that admitted it.

There are other reasons that make crucial the existence of corporate crime in the majority of jurisdictions around the world.

In 1948, Sutherland<sup>22</sup> presented in the Toynbee Club a paper named: “Crime of Corporations”. In that paper he explained that since 1928 he had been studying the law violations committed by businessmen, fact that did not have a correlation with the type of people who were in prison. Poverty was not a direct cause

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<sup>22</sup> EDWIN H. SUTHERLAND, CRIME OF CORPORATIONS 78 (1956)

of crime since the person that committed the crimes he investigated were socially acceptable, well dressed, with good manners, etc. In his paper he revealed that there was a type of crime different from the “traditional” one committed by poor people, the “white collar crime”. As a consequence of that, he said that corporations should be criminally responsible and that the criminal responsibility of the corporation should be added to the individual criminal responsibility of the human beings that are behind the corporation.

Von Gierke<sup>23</sup> in Germany admitted the criminal responsibility of corporations. In his opinion, legal entities are not fictions, but something different from the people that are behind them. Corporations have an active and special life and consequently they can commit crimes. According to this theory either corporations or the individuals that are behind it can be punished, never both categories for the same crime.

Baigun<sup>24</sup> stated that the law can attribute criminal responsibility to corporations. Also, in his opinion it is possible to apply to corporations different degrees of responsibility (mens rea, recklessness, etc.) as well as the attempt to commit a crime. In the author’s opinion it is possible that a corporation can be released due to self defense.

Regarding punishment, this author believes that a corporation could be considered as a dangerous criminal and the possible sanctions he proposes are: (a) cancelation of the legal entity, (b) fine, (c) partial or total suspension of activities, (d) adverse publicity, etc.

Niklas Luhmann is recognized as one of the most influential scholars in the change we have referred.

Luhmann refused the traditional idea according to what the human being is the center of the legal system.

He said that this is not enough to explain the changes in the society. To explain the social and political phenomena, the author created a functional structure based on **Systems of Communications**.

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<sup>23</sup> OTTO VON GIERKE, DAS DEUTCHE GENOSSENSCHAFTSRECHT, T IV 97 (1954)

<sup>24</sup> DAVID BAIGUN, LA RESPONSABILIDAD PENAL DE LA PERSONA JURÍDICA 75 (2000)

Luhmann's theory had a clear influence in Criminal Law which affected the foundations of the classic criminal law (anthropocentric). Following his theory, currently the crime is something that destroys nets of communications, which produces a dysfunction in the social organization.

Criminal law will not protect any more the human being in itself, but the systems of communications. According to this theory, the human being is not the center of the legal system, the center of the legal system are the political system, economical system, familiar system, monetary system, etc.

Based on Luhmann's theory (which is very important currently in the world) it is possible to maintain that legal entities in general and corporations in particular are incorporated to a **social system** and that this system allows a communication in net. When this communication is false, the legal system has to sanction the performer of the crime even if the criminal is a corporation<sup>25</sup>.

#### **IV) Corporate Crime in the United States**

According to LaFave<sup>26</sup> the early common law view was that a corporation could not be guilty of a crime: it had no mind, and thus was incapable of the criminal intent then required for all crimes; it had no body and could not be imprisoned. This view was changed with the growth and development of the corporate entity in the modern business world, and today it is almost universally conceded that a corporation may be criminally liable for actions or omissions of its agents on its behalf.

As we have already analyzed in this paper, the United States of America, as a direct heir of the great tradition of the Common Law, adopted, since the very beginning, the corporate crime in its law, firstly in its judicial precedents (NY Central & Hudson River Railroad vs. United States) and secondly in its statutes.

As Brickey stated, general principles of criminal law predicate liability upon conduct consisting of a culpable act or omission to act. A corporation may only be said to "act", of course, by imputing the conduct of corporate agents to the corporate entity itself. Courts easily concluded that public policy

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<sup>25</sup>NIKLAS LUHMANN, SOCIAL SYSTEMS 90 (1995)

<sup>26</sup>WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, Vol. 2 382 (2003)

considerations required that the corporation be held accountable for crimes committed or authorized by officers and directors at the policy-making level of the corporate hierarchy. The principle that a corporation is accountable for the criminal conduct of its agents is subject to the limitation that the agents must act within the scope of their employment.

#### **IV.i) The Model Penal Code**

In 1956, the American Law Institute included a corporate liability provision in the Model Penal Code (M.P.C.). Section 2.07 creates a “trifurcated scheme of corporate liability that draws intersecting lines between acts and omissions, between true crimes and regulatory offenses, and between the operatives who are the ‘hands’ of the corporation and the policy makers who constitute its ‘mind’”<sup>27</sup>

Section 2.07 regulates the liability of corporations, unincorporated associations and persons acting, or under a duty to act, in their behalf.

Subsection 1) provides for three situations in which a corporation will be involved in a criminal process. The broadest base of liability, incurred as a consequence of conduct by an agent of the corporation acting on behalf of the corporation and within the scope of his employment, is limited to violations and to offenses defined by statutes outside the criminal code that plainly evidences a legislative purpose to impose liability on a corporation.

The second base of corporate liability is invoked when the offense consists of an omission to discharge a specific duty of affirmative performance that is imposed on corporations by law. The third base of liability includes all situations where the board of directors or a high managerial agent acting in the course of his employment on behalf of the corporation is responsible for the commission of the crime.

Subsection 2 provides that strict liability statutes should be construed to apply to corporations unless a contrary legislative purpose plainly appears.

Subsection 3 refers to the liability of unincorporated associations and Subsection 4 contains definitions that are applicable to terms used in this section. “Corporation” is defined to exclude governmental entities. “Agent” and “high managerial agent” are also defined.

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<sup>27</sup>KATHLEEN F. BRICKEY, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988)

Subsection 5 provides a “due diligence” defense to the corporation, based on proof by the corporation by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense, exercised due diligence.

Finally, Subsection 6 speaks to the liability of individuals for conduct on behalf of the corporation. Paragraph (a) provides that a person is individually liable for conduct he performs on behalf of a corporation to the same extent as though it were performed on his own behalf. Paragraph (b) speaks to cases where a corporate agent having primarily responsibility for the discharge of a duty imposed on the corporation fails to discharge the duty. If his omission was reckless, he is individually liable for the failure to the same extent as he would be if the duty were imposed upon him. Paragraph (c) speaks to the sanction that is available in cases of individual liability under these provisions, assimilating the offense in such cases to the sentence that is authorized by law when a natural person is convicted of an offense of the grade and degree involved<sup>28</sup>.

In order to determine how important the Model Penal Code is in the United States, it is enough to see that 37 states out of 50 have adopted it in whole or in part.

Summing up it is possible to recognize in the MPC two categories of crime:

- a) Ordinary Crimes in which the Code limits the agents of the company whose acts can create criminal liability for the corporation.
- b) Crimes specifically directed at corporations. In these cases the focus no longer is on the culpability of the high managerial agent. An act is deemed not to be within the scope of employment, so as to subject the corporation to criminal liability, if the company exercised ‘due diligence’ to prevent its commission

#### **IV.ii) White Collar crimes. Application of Corporate Crime**

Even though the MPC was drafted in 1956 and the majority of the discussions about corporate crime were held long ago, the debate about Corporate Crime revived essentially on the one hand with a new concept of (created by the criminology) “white collar crimes” and on the other hand with well known cases of fraud involving corporations.

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<sup>28</sup>AMERICAN LAW INSTITUTE, MODEL PENAL CODE, COMPLETE STATUTORY TEXT 34 (1985)

White-collar crime or 'incorporated governance' has been defined by Edwin Sutherland<sup>29</sup> as a crime committed by a person of respectability and high social status in the course of his occupation. White-collar crime overlaps with corporate crime because the opportunity for fraud, bribery, insider trading, embezzlement, computer crime, and forgery is more available to white-collar employees.

(i) The Enron Case

Enron was an American energy company based in Houston, Texas. Before its bankruptcy in late 2001, Enron employed around 22,000 people and was one of the world's leading electricity, natural gas, pulp and paper, and communications companies, with claimed revenues of \$111 billion in 2000.

At the end of 2001 it was revealed that its reported financial condition was sustained mostly by institutionalized, systematic, and creatively planned accounting fraud.

The Enron scandal involved Enron Corporation and its accounting firm Arthur Andersen. After a series of revelations involving irregular accounting procedures bordering on fraud, perpetrated throughout the 1990s, it left Enron on the verge of undergoing the largest bankruptcy in history by mid-November 2001.

As the scandal was revealed, Enron shares dropped from over US\$ 90.00 to less than 50¢.

As a consequence of the scandal, a former executive Mr. Skilling was – among others- convicted on fraud charges and his sanction was 25 years in prison.

A bankruptcy court judge signed off on Enron's plan to exit Chapter 11 protection. Out of the \$63 billion it owes, Enron will pay \$12 million to most of its creditors, which number more than 20,000. The name Enron disappeared.

(ii) Arthur Anderson LLP v. United States<sup>30</sup>

Arthur Anderson LLP, formerly one of the "Big Five" accounting firms in the world, was convicted of obstruction of justice and for destroying Enron-related documents. This situation caused the dissolution of Arthur Andersen.

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<sup>29</sup> EDWIN SUTHERLAND, *Supra*, Note 21, at 80

<sup>30</sup> Arthur Anderson LLP v. United States 544 U.S. 696 (2005)

As Enron Corporation's financial difficulties became public, Arthur Anderson LL.P. instructed its employees to destroy documents pursuant to its document retention policy. The firm was indicted for "knowingly ... corruptly persuade another person ... with intent to ... cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." The jury returned a guilty verdict, and the Fifth Circuit affirmed.

The Supreme Court of the United State reversed and remanded arguing that the jury instructions failed to convey properly the elements of a "corrupt persuasion" conviction.

As we can see, beyond the specific outcome in these cases, "white collar" crime is a serious crime, and many Enron employees that had their whole pensions in Enron stock lost everything.

The face of "corporate crime" has been redefined by Enron, WorldCom and other cases of accounting fraud where the victims are primarily wealthy investors.

Due to the Enron Scandal a corporate reform and corporate accountability was passed with the 2002 Sarbanes-Oxley Act, which dealt almost exclusively with curbing accounting fraud.<sup>31</sup>

## **V) Punishment. How to punish a Corporation. There is no body and no soul.**

The question of what criminal sanctions are effective and/or desirable in corporate law and white collar prosecutions have generated much debate.

Despite innovative proposals for new sanctions for corporate and white collar defendants, Congress has continued to rely upon traditional criminal sanctions of fines, imprisonment and probation. As an exception the Congress has begun in earnest to invoke criminal forfeiture as an ancillary sanction for with collar crimes<sup>32</sup>

It is clear that not all of these sanctions are available in the case of corporations or other legal entities, since as Coffee<sup>33</sup> said there is not soul to damn or body to kick. Consequently, the fittest sanction continues being a fine. This conclusion helps the other model, which argues that the problem of the

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<sup>31</sup>Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (HR 3763) (2002)

<sup>32</sup> KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY 19 (1991)

<sup>33</sup> John C. Coffee, Jr., *No Soul to damn; No body to Kick: An unscandalized Inquiry into the problem of Corporate Punishment* 79 MICH. L. REV. 386 (1981)

Corporate Criminal Liability is a matter that perfectly can be treated by the administrative or the civil law, rather than the criminal law. From this point of view, it is not necessary to involve criminal law to regulate this topic.

In recent years scholars have criticized the traditional sanctions against corporations and have proposed “Alternative sanctions”.

### **V.i) Alternative Sanctions.**

Fines have been traditionally the most favored way to punish corporations because they have low administrative costs and return revenue to the government treasury.

Even when an adequate quantum can be calculated, the eventual distribution of the burden of the fine is still a problem. A company that is slapped with a fine inevitably faces increased running costs, which are typically passed on to its consumers, shareholders and employees.

The injustice becomes even more pronounced in large companies in which the shareholdings change constantly. The individuals who are shareholders at the time of the imposition of the fine may not yet have held shares at the time of the crime. If these individuals had no knowledge of the crime when they bought into the company, it is difficult to pin any blame on them at all. Passing the cost of the fine on to them is therefore extremely difficult to justify.<sup>34</sup>

As a consequence of this insufficiency detected in the application of traditional sanctions against corporations, some scholars proposed alternatives sanctions.

#### **(a) Corporate Probation**

This involves getting the company to comply with certain undertakings and subjecting it to a period of supervision. If the company breaches the conditions imposed, it may be brought back for re-sentencing.

One form of corporate probation involves getting the company to remedy the damage done by the offence. A company that pollutes the environment, for example, may be forced via a probation order to

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<sup>34</sup> MOHAN GOPALAN, CORPORATE CRIMINAL SANCTIONS: ALTERNATIVES FOR THE FINE CITY 2 (2007)

clean up the damage. If the company already possesses the special skills required to perform the task, the order will be an economically efficient way of remedying the damage.

(b) Freedom deprivation

It was maintained throughout history that corporations cannot go to jail. One of the arguments used by the doctrine that does not accept the criminal responsibility of corporations is that they cannot receive the most typical sanction of criminal law (imprisonment)<sup>35</sup>.

The conclusion is irrefutable: legal entities, as fictions, cannot be punished by limiting their freedom in a physical way. Nevertheless, as Baigun<sup>36</sup> said, it is possible to limit the freedom of a corporation in a different way, by impeding that this entity conducts business with the government for example. Furthermore, this freedom deprivation could be partial or total and for a period of time (just as in the case of imprisonment).

(c) Adverse Publicity

One alternative to imposing a fine is to cause the company to suffer from adverse publicity. This is not the publicity that is incidental to an ordinary conviction but that which results from a formal court-ordered sanction designed to have a punitive impact upon the corporation.

In the United States, courts may order a company to publicize the nature of the offence committed, the fact of conviction, the nature of the punishment imposed and the steps that will be taken to prevent the recurrence of similar offences<sup>37</sup>.

(d) Death Penalty

In fact, this is an old idea. Savigny<sup>38</sup> stated the State can create legal entities and this quality is a privilege granted by the State in order to perform legal acts and to purport just purposes. If a crime is committed the legal entity loses the referred privilege and cannot be punished as a legal entity; on the contrary the responsible is the natural person that is behind the legal entity who committed the crime. Legal entities

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<sup>35</sup> LAFAVE, *Supra* Note 25, at 382

<sup>36</sup> DAVID BAIGUN, *Supra* Note 23, at 75

<sup>37</sup> GOPALAN, *Supra* Note 33, at 4

<sup>38</sup> SAVIGNY, *Supra* Note 5, at 107

cannot commit crimes even when the action performed was criminal. In fact, the crime is something unconnected with the essence and special destiny of a legal entity.

However, he admitted the death penalty because it is possible to assimilate it to the dissolution and liquidation of a legal entity.

As we have already pointed out, Savigny, who did not admit the criminal responsibility of the legal entity, maintained that it is possible to assimilate the death penalty to the dissolution and liquidation of a legal entity.

This old theory is perfectly useful currently in order to create alternative sanctions that fit corporations.

## **VI) Evaluation – Conclusion**

If we analyze this topic from the anthropocentric point of view that the model that does not accept the responsibility of the corporation upholds, the conclusion could be just one: Corporations in particular and legal entities in general cannot commit crimes.

The answer is so clear since just human beings can think and have intentions. Corporations are fictions driven by people and cannot perform criminally punishable acts.

The last conclusion is true and has been the main argument of one of the two paradigms since the times of the Roman law.

However, this approach is not enough nowadays.

As commentators said regarding Sutherland's studies<sup>39</sup>, he did not conduct a dogmatic study based on the traditional framework of criminal law. On the contrary, he built his theory from a socio-political approach and following the principles of the Criminology. He did not try to combine the former theories with the necessity of punishing corporations.

Accepting this starting point is to understand how it is so easy for the legal system of the United States (as well as others) to admit corporate crime. Nobody is thinking of the crime of the corporation in the same

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<sup>39</sup> GERMAN ALLER, *Supra* Note 16, at 36

way as the crime of a human being. It is another perspective devoid of anthropocentric components and based on the idea that to protect the society in a better way corporate punishment is necessary.

It does not matter if in the case of a corporation there is not a body to kick since there exists alternative sanctions which can “harm” corporations as effectively as the imprisonment in the case of human beings.

As in other cases the “humanization” of corporations is necessary to comply with the current requirements of society.

It is correct that corporate crime had been studied inside Criminal Law since the structure of Administrative law or the Civil Law are not sufficient to cover the wide array of possible hypotheses in which corporations would be involved.

The criminal responsibility of corporations is absolutely indispensable in the 21<sup>st</sup> century as a way of avoiding the destruction of social organizations (as enterprises, banks, etc.) due to corporate crime. As we pointed out when we discussed Luhmann theory, nowadays people live connected; all of us are members of banks, clubs, companies, etc. Nothing that happens in the world is unconnected since in one way or another any change has consequences that affect all of us. It is not difficult to grasp this concept; it is just required to think of the “Enron scandal” that we discussed in this paper, which was not a simple bankruptcy. This corporate scandal changed the corporate world which required other devices to feel protected from other cases like Enron (e.g. corporate governance).

Accepting corporate crime is one step forward in this struggle which has been made for many countries in the world.

The two paradigms that we have discussed in this paper are consistent and arguable. Both have attractive features and can be admitted by modern legislations. However, the anthropocentric perspective, by alleging that just human beings can commit crimes, are excluding from the scope of criminal law a fact that is irrefutable, corporations commit crimes and can be punished.