Washington University Global Studies Law Review

Volume 4
Issue 3 *Centennial Universal Congress of Lawyers Conference—Lawyers & Jurists in the 21st Century*

January 2005

Models of Corporate Criminal Liability in Comparative Law

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MODELS OF CORPORATE CRIMINAL LIABILITY IN COMPARATIVE LAW

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INTRODUCTION

In modern legal systems, complex provisions regulate the structure of corporations, defining the nature and role of governing bodies, the organizational structure and modes of functioning, and the powers and obligations of those who take part in corporate operations. Depending upon the size and nature of the corporation, its structure may be complicated, multi-layered, centralized or decentralized, and organized somewhat hierarchically. There may be different models of organization and different chains of command or control.

The complexity of the corporate structure raises difficult issues over the allocation of responsibility for the consequences of unlawful behavior by individuals acting on the corporation's behalf. This is particularly true when the corporation and its shareholders materially benefit from the criminal conduct.

In the criminal law context, all modern systems share the basic assumption that criminal responsibility should be placed on the individuals who commit a crime in the corporation's interest. To what extent, and in what ways, should the corporation as a legal entity also be held legally responsible for criminal acts committed to further corporate objectives?

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The great ideological divide in modern systems concerns whether criminal law applies to the corporation itself. In some systems criminal law controls the criminality of both individuals and the corporate entity itself. Other systems restrict criminal law to punishing only the criminal acts of individuals. Where corporate liability is recognized, the rules vary in defining the circumstances under which it may be imposed.

In a world of multi-national corporations and business arrangements that cross borders, we may expect the laws regulating corporations to converge. But a surprisingly wide gap persists among developed nations in the mechanisms available to combat corporate criminality.

Modern systems that reject corporate criminal liability dismiss the notion that some corporations have more potential to cause harm than individuals. These systems do not accept that these organizations are criminogenic entities. Consequently, they fail to recognize the need to counteract these organizational offenders through criminal law.

Systems rejecting corporate criminal liability are usually justified not by policy analysis but, rather, by formal doctrinal theory. The fiction theory and the later humanity principle arrive at similar theoretical conclusions for the continued validity of the dogma *societas delinquere non potest*.[1] These theories affirm that mankind alone is the focus of criminal law; only individuals have the capacity of self-determination and the capacity for moral choice, and the essence of criminal liability relies upon a sum of physio-psychic factors unique to individuals. From this perspective, criminal responsibility requires a living person to be indicted for personal conduct, as corporations can neither be imprisoned nor suffer the effects of criminal punishment. In this context, retribution and rehabilitation are meaningless objectives. Moreover, it is argued that criminal sanctions against organizations provoke a spill-over effect on innocent third parties, such as non-culpable shareholders.

An emphasis on personal liability also can be observed in systems that have formalized the rule of corporate criminal liability as essentially derivative. Some of these systems have introduced the principle of organizational criminal responsibility, but have rejected the idea of requiring a corporate *mens rea* before liability will be imposed. The result is a method of attributing criminal responsibility to the corporation, while avoiding any need to prove its culpability. If the corporate agent is blameworthy and the agent acted on its behalf, the corporation is also blameworthy. This mode of analysis is regarded as serving policy goals

1. This is the widely-known principle that a corporation is incapable of criminal liability.

without violating formal doctrinal logic. Such compromise models of corporate criminal liability are interesting to analyze, as they signal the difficult transition from tradition to modernity.

This Article considers modern systems of criminal justice and the different models of assessing responsibility for crimes committed to benefit corporate interests. The analysis is two-pronged.

First, this piece examines systems that have adopted the principle of corporate criminal liability. Within this category, a further important distinction must be made between the most evolved models, which have accepted a requirement of corporate *culpability*, and those models that reject the idea of an organizational *mens rea*, imposing instead various corporate liabilities without any separate measure of corporate blameworthiness.

Second, this piece considers those models that reject the principle of corporate criminal liability and are restricted to the use of extra-criminal mechanisms for the regulation of corporate crime.

I. DEFINING THE MAIN MODELS

In Common Law systems, legal principles originated with the judiciary, which were in turn thematized by legal theorists and subsequently codified and refined in legislation. In civil law systems, reform usually begins with the codes that govern. In these systems pressure for code reform has been generated by concerns of the dangers posed by corporate fraud and the need to harmonize the laws of European Union States.

Scholarly documentation of corporate fraud in recent years has undermined civil legal systems' level of comfort with corporate immunity. The ideological pressures of the international movement of *Modernizierung des Strafrechts*,[2] and the need to harmonize the laws of the EU countries, eventually led most western nations to accept the principle of *societas delinquere potest.*

Corporate criminal liability currently exists in many legal systems, including the United States, England, Australia, Canada, Finland, Denmark, France, and in the *European Corpus Juris.* But these systems use models of corporate criminal liability that differ in three important respects:

2. Translated means "Modernizing the Criminal Law."

A. The choice of *which* organizations are criminally liable;

B. The *typology* of the offenses attributed to corporate entities;

C. The *criteria* for attributing responsibility to corporations.

II. ORGANIZATIONS SUBJECT TO CRIMINAL LAW CONTROL

In examining the mechanisms of corporate criminal liability, an important contrast concerns the identification of the organizations subject to criminal liability control. The comparative experience suggests three possible models or solutions. One approach is to use the term "organization" without any definition or restriction. The second approach is to list all the specific types of organizations upon which criminal liability may be imposed. The third approach is to restrict liability to only those organizations that the civil law considers legal entities with status.

Under the first approach there is a general model, which takes no specific legislative stance on the typology of punishable organizations. Emblematic of this model is the Australian legislation on corporate criminality: the 1995 Criminal Code Act contains not only a rule, but a specific set of provisions directed at corporate criminal liability.[3] However, it avoids any *express* indication of the typology of organizations subject to criminal law.[4] Indeed, Div. 12.1 (1) establishes that the Code "applies to bodies corporate in the same way as it applies to individuals," but does not define the concept of "body corporate."[5]

The second approach is a specified liability model, worthy of particular consideration because it sets forth a definite list of criminally liable organizations. The main reference model for this systemic choice is that of the United States. The U.S. Federal Sentencing Guidelines defines the organizations which are subject to regulation. "'Organization' means a 'person other than an individual.' 18 U.S.C. § 18. The term includes corporations, partnerships, associations, joint stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and nonprofit organizations."[6]

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3. Criminal Code Act, 1995, c.2 Div. 12.1(1) (Austl.), *available at* http://scaleplus.law.gov.au/html/pasteact/1/686/pdf/CriminalCode1995.pdf.

4. *Id.*

5. *Id.*

6. U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 cmt. n.1 (2004) [hereinafter U.S. SENTENCING GUIDELINES] (citations omitted).

The same method has been adopted in Canada. Section 2 of the Canadian Criminal Code extends criminal liability to organizations by defining the terms "everyone" and "person" to include "public bodies, corporate bodies, societies and municipalities in relation to the acts and things that they are capable of doing."[7]

The third approach is a traditional bipartisan model that reflects the classical opposition between legal-status and non-legal-status entities. Some European legal systems, influenced by theoretical but outdated suggestions, have attributed corporate criminal liability only to legal-status entities. French and Danish law are emblematic in this regard. The leading legal literature in this area invokes reasons of effectiveness and safety, as an effort to rationalize limiting liability to only legal-status entities. The lack of precise criteria defining non-legal-status entities creates uncertainty and confusion for the courts.

In contrast, the solution adopted by Dutch law appears more modern. The Dutch Penal Code has eliminated all theoretical questions, from a criminal law standpoint, eliminating the distinction between legal-status entities and non-legal-status entities.[8]

The alternative discussed here is a broad definition of organization that includes both legal-status and non-legal-status entities, and both private and public entities as defined by statute. This is so in light of the adequacy of the cheaper American and Canadian systems, which generate lists of specific organizations subject to criminal liability. In the preferred broader system, any organization that consistently participates in economic activity should be eligible for penal liability whether the organization is a corporation or not.

III. TYPOLOGY OF OFFENSES

Comparative analysis shows the existence of different systemic approaches addressing the problem of which offenses can be attributed to corporations.

The first method is the absolute parification of physical and juristic persons. In this view, organizations are criminally liable for all the same offenses that can be attributed to individuals. The second method is to avoid a general rule designating the typology of crimes imputed to the corporation and, instead, to legislate for organizational liability crime by

7. Criminal Code, R.S.C. ch. C-46, § 2 (2005) (Can.).
8. 51 Stb. (1990) (Neth).

crime. The third method is to list which crimes can be committed by collective entities such as corporations.

First, the paradigm of plenary liability for physical and juristic persons deserves specific mention. This method is adopted by the Australian Criminal Code and by the Canadian and Dutch systems. The Australian Criminal Code plainly affirms that "a body corporate may be found guilty for any offense, including one punishable by imprisonment."[9]

This is a remarkable solution, although perhaps too general considering the complexity of the activity to be regulated. It is an important method nonetheless, from a criminal policy perspective, because it expresses the impartiality of criminal law in the face of two types of actors—physical and juristic persons—that are considered equally relevant both formally and substantively.

The second method is that found in French legislation. The French Penal Code adopts the "specialty principle," by which corporate criminal liability does not cover a large spectrum of offenses but applies only when there is a express mention "in the law or in a Regulation."[10] This technique of incrimination, aimed to a specific goal, has been rationalized by invoking criminology as a science. Whether a corporation is punished is therefore based upon statistics providing how frequently the corporation is involved in crimes.

Nonetheless, the application of French law to corporate crime is by no means comprehensive. Although the list of crimes ascribed to corporations is virtually exhaustive, the principle of corporate criminal liability does not apply to economic crimes, labor law, consumer law, or media law. If this is seen as representative of the class of special liabilities and exclusions, there are reasons to be wary of the approach, as there are no obvious reasons to justify these exclusions.

The third method is that followed by the United States. The U.S. Sentencing Guidelines include a detailed list of the offenses covered under the regulation. This list includes most of the crimes committed in the corporate environment, such as theft, money laundering, bribery, fraud, antitrust offenses, and tax offenses.[11]

The American approach is remarkable for its clarity. In contrast, the French system, by failing to list specific crimes, may lead to confusion due

9. Criminal Code Act, 1995, c.2 Div. 12.1 (Austl.), *available at* http://scaleplus.law.gov.au/html/pasteact/1/686/pdf/CriminalCode1995.pdf.

10. C. PÉN. art. 121-2 (1994) (Fr.).

11. Criminal sentencing applies to "all organizations for felony and Class A misdemeanor offenses." U.S. SENTENCING GUIDELINES, *supra* note 6, § 8A1.1.

to its extensive and inconsistent legislative materials. An interpreter may search through numerous statutes for a provision making a corporation criminally liable.

The American method represents the more rational and practical option. Any legislation that seeks to regulate corporate criminal liability should be placed in the general part of the criminal code, among a detailed list of offenses imputed to organizations. This is the solution that gives the best guarantees of precision.

IV. CRITERIA OF ASCRIPTION OF THE *ACTUS REUS*

As to the selection of criteria for attributing the *actus reus* to the corporation, a comparative view does not produce clear contrasts. The U.S. system is the most significant point of reference: here, the civil law system's notion of *respondeat superior* automatically transfers into the domain of criminal law.

The *respondeat superior* theory also is adopted, with insignificant variations, by the Australian Criminal Code, the Dutch Penal Code, and the Danish Penal Code.[12] The principle of respondeat superior represents the implementation of the principles governing vicarious liability: the *actus reus* and the *mens rea* of the individuals who act on behalf of a corporation are automatically attributed to the corporation. This rule, which has authoritative support in the "organic theory" developed in Germany by Otto von Gierke, requires the presence of several conditions. The corporation is criminally liable if:

a. an *agent* of the corporation commits a crime,

b. while acting within the *scope of employment*,

c. with the *intent* to benefit *the corporation*.

Two alternatives emerge from the implementation of this theory. These alternatives concern the scope of the rule of *respondeat superior*, specifically, the concept of the agent.

The concept of agent may include *all* the individuals who act on behalf of the organization; or in the alternative, only managers in the corporation.

Interpretating "agents" as those who act on behalf of a corporation does not limit the notion of agent to the managers who decide the internal and external policies of the corporation. The broad definition of agency in this

12. STRAFFELOVEN [Penal Code] 1996 (Den.).

sense includes all individuals who work in the corporation. This interpretation is one followed by most U.S. jurisdictions. The corporation is always criminally liable, even if the offense is committed by those situated at the lowest levels of the organization. This interpretation of agency significantly influenced Australian legislation. The Australian Criminal Code Act states that "[i]f a physical element of the offense is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her apparent authority, the physical element must also be attributed to the body corporate."

"Scope of employment," as conceived in the first alternative, has been extended by the courts. The traditional interpretation limited the concept of fault to acts "expressly, tacitly or impliedly authorised" by the board of directors. The interpretation fashioned by the courts includes within the "scope of employment" all acts corresponding to the *general* patterns of employee behavior as agents.

Finally, with respect to the requirement that the act be done with the "intent to benefit" the corporation, it is important to note that courts currently do not require that the agent acts with the intent to benefit the corporation exclusively. Even a "mixed motivation," an intent to only partially benefit the corporation, is enough to satisfy the "intent to benefit" requirement.

The alternative method, interpreting "agents" as encompassing only the managers of the corporation, is followed by the Model Penal Code (MPC) and by the French system. Section 2.07 of the MPC defines a three-dimensional scheme of corporate criminal liability. For the most serious and dangerous offenses, it recognizes criminal liability of corporations only in those situations where a corporate director or a high managerial agent authorized, commanded, performed, solicited, or recklessly tolerated an offense by a corporate employee or agent.[13] In drafting the rules regulating corporate criminal liability, French Lawmakers adopted a narrow standard for attributing corporate criminal liability, under which only the behavior of the official "*organes ou représentants*"[14] of the organization is relevant when attributing responsibility to the corporation.[15]

If broad coverage is the objective, the U.S. practice is preferable. The U.S. experience has demonstrated the weakness of restrictive standards of

13. MODEL PENAL CODE § 2.07 (1962).
14. Organs or representatives (trans.).
15. *See* C. PÉN. arts. 121-1, 121-3 (2003) (Fr.).

liability, which were practically misapplied by courts and fiercely criticized by scholars for lack of effective deterrence.

V. THE PROBLEM OF ORGANIZATIONAL CULPABILITY

On the viability of corporate culpability, a great theoretical divide exists, separating countries that have accepted the principle of corporate criminal liability from those that have not. Some systems, for instance those of the United States, English, Australian, Canadian, Dutch, and Finnish, have developed the idea of requiring a corporate *mens rea*. In contrast, the French system and the European Corpus Juris drafted a standard of organizational criminal liability that considers evidence of corporate blameworthiness to be irrelevant in determining corporate liability.

There are two problems with this latter approach to culpability of corporate crime that finds corporate *mens rea* irrelevant. The first concern is that it is theoretically awkward and by no means required by an essential characteristic of the corporate form. The second problem, a practical one, relates to the fact that this approach hinders effective regulation of corporate behavior. Due to the many forms of the modern corporation, some inspired by extreme decentralization, certain offenses can only be attributed to the corporation when it is dealt with as one cohesive unit. It sometimes is impossible to prove the culpability of individuals who act within the organization. In such a case, the corporation is the only actor that feasibly can be considered criminally liable.

This analysis begins with the systems that reject the idea of a corporate *mens rea*, focusing on the solution adopted by French law. Article 121-2 of the French Penal Code states that "organizations . . . are criminally liable . . . for the offenses committed on their behalf (*pour compte*) by their *organs ou représentants*."[16]

The French legal literature speaks of "*responsabilité par ricochét*" to describe this mechanism. That is, the attribution of crime to the *personne morale*, the moral character, requires that two phases of judgment are positively performed: the first concerns the physical person, and the second concerns the juristic person.[17] These two phases are distinct, because they are ordered in precise succession in space and time. If the first prong is not successfully completed, a case will not reach the second prong. The criminal liability of the individual first must be proved; only

16. C. PÉN. art. 121-2 (1994) (Fr.).
17. *Id.*

after that burden is met is it possible to address the corporation's criminal liability. In particular, the French legal construct does not require proof of corporate culpability. Rather, when the *élément matériel* (*actus reus*) and the *élément morale* (*mens rea*) of the offense are established with reference to an individual, "the cause and effect relationship (but not the culpability) between the commission of the crime and the activity realized on behalf of the organization must be proved."[18]

Considering the systems that take into account the existence of a corporate *mens rea*, it is important to note that the conception of corporate liability has not always meant the same thing. A comparative analysis shows, in fact, that various corporate *mens rea* constructs can be inserted into two different categories.

The first group includes the anthropomorphic models, which measure organizational blameworthiness by using the standards traditionally applied to individual culpability. The second group includes the organizational models, which determine culpability based on the characteristics of the corporation, on its policies, and its practices.

More specifically, the anthropomorphic models include the identification theory and the collective intent theory. The identification theory was developed *in primis* by English law and now is recognized by the Australian, Canadian, and Finnish systems.

This rule, also known as the alter ego theory, was explicitly formulated in the English case *Tesco Supermarkets, Ltd. v. Nattrass*,[19] the leading case for this approach.

The identification theory relies upon the assumption that all legal or illegal acts committed by high-level managers are properly identified with the activity of the corporation: the offenses charged against these high-ranking personnel automatically attribute to the organization. Under this theory, it is unnecessary to require any further translative mechanism of proof, as those in management positions act not as agents of the corporation, but as the corporation itself. The anthropomorphic approach is exemplified by Lord Denning's description of the division of roles within the organization:

> A company may in many ways be likened to a human body. It has a brain and 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

18. *Id.*
19. [1972] A.C. 153, 169–71.

> agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who 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.[20]

The collective intent or aggregation theory may also be connected to the anthropomorphic scheme. In the leading U.S. case *United States v. Bank of New England*,[21] the Bank of New England was convicted for willfully violating the Currency Transaction Reporting Act,[22] although there was no proof that any individual employee had willful intent at the moment of the *actus reus*. The rationale is based upon the difficulty in identifying an individual offender who operates within a complex and decentralized structure. Under these circumstances, a finding of the collective intent is "not only proper but necessary."[23] Any other rule would allow a company to compartmentalize information and thereby avoid criminal liability. Thus, if one assumes a crime with elements A, B, and C, where A is known to officer A, B is known to officer B, and C is known to officer C, then, for the purpose of criminal liability, all elements are known by the corporation.

Both the identification theory and the collective knowledge issue, are fascinating but not entirely persuasive. They also are not suited to the operational elements of a corporation.

Application of the alter ego principle only punishes wrongdoing in the boardroom; it does not cover crimes committed by corporate agents other than top managers. Moreover, it does not include crimes that rely on a defective organization, because the diffusion of responsibility that characterizes the postmodern corporation prevents identification of a single offender.

Even the collective intent theory does not work when the corporate *actus reus* is committed against the will of a minority of the shareholders.

There are four organizational models of corporate culpability. These models are more interesting and complete, because they focus on the organization's structure, practices, and policies. This article deals with

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20. HL Bolton Engineering Co. v. TJ Graham & Sons, Ltd., [1957] 1 Q.B. 159, 172 (Eng. C.A.).
21. 821 F.2d 844 (1st Cir. 1987).
22. Currency Transaction Reporting Act, 31 U.S.C. §§ 5311–5322 (1982).
23. 821 F.2d 844, 856 (1st Cir. 1987).

these four models in turn: corporate policy, corporate culture, preventative fault, and reactive corporate fault.

Under the corporate policy model, corporate culpability may attach under any corporate policy that intentionally or foreseeably enables illegal actions. First, corporate crimes may be found where the policies themselves are illegal because they compel or authorize criminal conduct. Second, illegal actions may occur when policies and practices, although lawful in themselves, encourage corporate crime in a foreseeable way. Even a managerial stance tolerating, or showing systematic blindness toward, criminal conduct can support a finding of corporate culpability.

Under the corporate culture model, a finding of culpability rests upon the assumption that the personality of the corporation encourages its agents to commit crimes. This model has emerged gradually in the U.S. since the 1970s.

In 1975, Christopher Stone spoke of the corporation as "a community[,]" with "its own attitudes, norms, customs, habits, and mores."[24] Three years later, Wally Olins affirmed that corporations have their own distinct personalities and ethos by which they express their identity.[25] In 1982, Terrence Deal and Allan Kennedy specified the elements that characterize a corporate culture: the environment in which business is done, the values inspiring the corporation, the main actors of the corporation, and the cultural background.[26]

More recently, some scholars explicitly affirm the existence of a corporate *mens rea* and emphasize a connection between corporate blameworthiness and the structure of the organization. Marshall Clinard focuses on both internal and external factors as affecting illegal behavior.[27] Pamela Bucy speaks of the corporate *ethos*, positing the existence of corporate criminal liability when this *ethos* motivates corporate agents to commit a crime.[28] Among the elements characterizing ethos, Bucy cites hierarchical structure, corporate goals, post-offense behavior, and the existence of a compliance program.[29]

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24. CHRISTOPHER STONE, WHERE THE LAW ENDS; THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 228 (Harper & Row 1975).

25. *See* WALLY OLINS, THE CORPORATE PERSONALITY (Design Council 1978).

26. TERRENCE E. DEAL & ALLAN A. KENNEDY, CORPORATE CULTURES 13–15 (Addison-Wesley 1982).

27. *See* MARSHALL B. CLINARD, CORPORATE CORRUPTION: THE ABUSE OF POWER (Praeger Publishers 1990).

28. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1101 (1991).

29. *Id.*

In 1995, Australia adopted a modern and complex model of corporate culpability, expressly addressing the problem corporate culture as a fault element. According to the Criminal Code Act, "corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place."[30]

The preventive-fault model of criminal culpability finds liability when a corporation fails to insert and implement an adequate internal system of controls to prevent the commission of a crime. Requiring such a compliance and ethics program allows a finding of corporate liability "for failing to take reasonable steps to prevent or detect criminal conduct."[31] This model of culpability is found in the U.S. Sentencing Guidelines. Under this model, the implementation of an effective compliance and ethics program by a corporation acts not only as a mitigating factor in determining the fine assessed to a corporate offender; it also represents a strong incentive for monitoring corporate policies and for modeling a law abiding corporate ethos. In the United States, the existence of an effective compliance and ethics program has become virtually prerequisite to avoiding a finding of corporate negligence.

Professors Fisse and Braithwaite propose a model of reactive corporate fault.[32] Reactive fault exists when a corporation fails to react satisfactorily to the *actus reus* of an offense. Failure to undertake effective preventive and corrective measures in response to the discovery of an external element of a crime is a form of corporate fault.

In order to control corporate crime, a model of corporate criminal liability must be based on the existence of a corporate *mens rea*. In determining corporate liability, it is necessary to establish that the corporation itself is criminally liable; and that liability does not derive merely from an individual's guilt.

The structure of modern organizations often prevents identifying and proving the personal liability of individual offenders. Corporations no longer correspond to juristic persons as theorized by Max Weber.[33] Under the Weberian *Idealtüp*, the juristic person follows a bureaucratic model of governance aimed at efficiency, by means of strict allocation of tasks and

30. Criminal Code Act, 1995, c.2 Div. 12.3 (6) (Austl.).

31. U.S. SENTENCING GUIDELINES § 8B2.1(a)(6)(B).

32. BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 47–49 (Cambridge University Press 1993).

33. *See* MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich trans., University of California Press 1968).

roles. Compliance is ensured by thorough hierarchical control centered around predictability and coordination within the corporation.

This hierarchical pyramid structure no longer exists. Corporate governance is now decentralized, because such a framework reacts more promptly to the market fluctuations and technological change. The effect of this framework is to diffuse responsibility. Fragmentation of liability is due mainly to specialization, which may be both vertical and horizontal within the corporation. When working only within a small sector, one cannot be fully aware of what happens within other sectors. One may not perceive that one's own seemingly innocent actions, when combined with the actions of other individuals, may contribute to the commission of a crime. Each individual's action is a cause-in-fact of the crime, but no individual could be found criminally liable.

In order to find corporate fault without individual culpability, traditional criminal norms may not work. The models of criminal liability in France and in the European *corpus juris*, although recently promulgated, are already outdated and inadequate to counteract corporate crime.

Questions arise as to how the *mens rea* requirement should be structured. The organizational model is preferable, because it does not impute corporate culpability from individual actions. It focuses on organization peculiarities and culture.

The proper construction of corporate culpability should consider a multitude of factors in assessing corporate fault. The best approach would find corporate culpability in any of the following circumstances: by having a policy that expressly or implicitly compelled, encouraged, authorized, or in any way tolerated the commission of the offense; by having a culture that directed, encouraged or tolerated the commission of the offense; by failing to implement a compliance program or exercise due diligence preventing the commission of the offense; or by failing to take preventive measures in response to the commission of an offense.

VI. MODELS OF NON-CORPORATE CRIMINAL LIABILITY

The main trend in the European Union has been toward adopting the principle of corporate criminal liability as opposed to a model based on the criminal culpability of individuals within a corporation. However, some countries have been confined by tradition and lag behind the evolution of different models of corporate culpability. This is true of both the German and Italian systems. Both countries still rely solely on administrative penalties to control corporate crime.

In Germany, the *Ordnungswidrigkeitengesetz* enables both administrative agencies and criminal courts to fine corporations up to one million Euros for intentional criminal conduct or five hundred thousand Euros for negligent conduct.[34] In some cases these amounts may be exceeded when specifically provided for by statute. Under the German system of administrative penalties, rules governing individual criminal culpability are more adaptable to the corporate context. It is thus possible to speak of a wider conception of *mens rea*, one more suitable to the emerging social and juridical categories.

In Italy, *societas delinquere non potest* is a basic assumption, deeply rooted in the judicial culture and in the collective conscience. The principle of corporate criminal liability does not exist. The main reason for this is based on the Italian Constitution. Traditional doctrine establishes that criminal culpability is unique to individuals.[35]

Due to the recent need to harmonize European countries, Italian lawmakers enacted a new law containing "the discipline of the administrative responsibilities of collective entities."[36] This law is remarkable in that it contains detailed regulations pertaining to the direct responsibility of juristic persons. The law regulates both substantive and procedural aspects of corporate liability, and it represents a corporate criminal culpability system separate from that of personal criminal culpability.

The new Italian statute redefines a model of administrative liability, which is a departure from the traditional Italian legal principles governing administrative responsibility. The statute report conceives this law as being under a *tertium genus*, because it combines some aspects of criminal law with others typical of administrative law. The result is a mixed model aimed at balancing the preventive effect of administrative regulation with the stronger guarantees of criminal law.[37]

The criminal aspect of the Italian model is seen in the fact that a case is established by criminal proceedings, with all the procedures and mechanisms of a criminal trial. The administrative nature derives from administrative responsibility, which demonstrates the intent of the legislature. Another administrative aspect arises from the applicable statute of limitations, which differs from the statute of limitations in

34. Gesetz über Ordnungswidrigkeiten (Ordnungswidrigkeitengesetz) § 30, 1987 (BGBI.III Nr. 454–1), *available at* www.aufenthattstitel.de/owig.html.

35. COST. art. 27(1) (Italy).

36. Lgs. D. 231/2001.

37. Law on Companies "Direct" Liability, Gazz. Uff., Decree-Law, June 8, 2001, No. 231.

criminal cases. This ambiguity in defining legislation has attracted criticism under traditional Italian doctrine. Traditional doctrine is concerned with theoretical classifications with respect to traditional dogmatic categories, rather than the effectiveness of the law. Current debate focuses on whether the new law is a form of criminal or administrative responsibility. If one takes into account the new norms of this system, it becomes clear that the indecision over criminal or administrative is only an abstract theoretical problem.

The formula *tertium genus* used by the legislature shows the innovations characterizing this model. While this model does not follow a criminal construct, it is governed by the strong guarantees of the criminal process.

The traditional systems of both Germany and Italy send a clear message to the social community. Because the sanctions are labeled administrative rather than criminal, they are perceived to be less serious and, therefore, are not stigmatizing, even when imposed by criminal courts.

These types of punitive models reveal the same weakness in counteracting corporate criminal liability: they both lack a fundamental feature unique to criminal law: the stigma. Professor Friedman's groundbreaking essay, *The Defense of Corporate Criminal Liability*, stresses the importance of stigma.[38] Friedman concludes that corporations' well-defined social identity causes them to suffer from the moral condemnation exclusive to criminal law. The other branches of the legal system do not express the same moral disapproval.

In contrast, the most advanced legal theory has shown that criminal law performs a positive symbolic function. We live in a society that lacks ideological alternatives and has lost traditional familial, religious, and other ethical values. The disintigration of societal ethics as points of reference for the community has caused a transfer of ethical functions to criminal law. Policy now requires that criminal law directly reshape society's moral code, rather than simply indirectly influencing it. This is why even the most sophisticated non-criminal models are inadequate to control corporate crime.

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38. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 838, 838–40 (2000).

VII. CORPORATE CRIMINAL LIABILITY AND GOALS OF PUNISHMENT

There are various advantages of introducing a system of corporate criminal liability. In modern legal systems, adopting principles of corporate criminal liability depends on the level of legal and social awareness of the crisis of classical criminal law. The problem is criminal law's traditional focus on the individual and its corresponding inadequacy in counteracting corporate crime.

Many of the crimes most dangerous to society originate from an organization's activities and incentives. The criminal aggressiveness of organizations can be so devastating that it requires the implementation of new control techniques that exceed punishments for individual offenders.

Corporate crime experts have thoroughly studied the rationales that justify punishing organizations.[39] Some basic points on the advantages of corporate criminal liability deserve brief analysis with respect to the goals of punishment. These goals can be characterized as retributive, deterrent, and rehabilitative.

Corporate criminal liability can successfully achieve its goal of retribution. A corporation's economic resources allow for the payment of a fine that reflects the seriousness of an offense. Corporate offenses are normally extreme and damaging crimes, and thus better compensated by the corporation than by an individual agent.

The U.S. Sentencing Guidelines insist on retribution.[40] They insist that sanctions be just, while being proportional to the seriousness of the offense and to corporation's level of culpability. The fine directly correlates to the seriousness of the offense. The more extreme the damage caused, the higher the fine.[41]

The requirement of just punishment is reflected in the organizational sanctions, expressly created to punish organizations that "operated primarily for a criminal purpose or primarily by criminal means."[42] In these cases fines will be set at an amount "sufficient to divest the organization of all its net assets."[43] Just punishment for corporate crime also ensures public confidence in, and respect for the law. Society must perceive criminal justice as a just system, because justice can reaffirm those values trampled on by corporate avarice. The penalty for the

39. A detailed analysis of these various rationales is beyond the scope of this Article.
40. U.S. SENTENCING GUIDELINES, *supra* note 6, § 8B1.1.
41. *Id.* § 8C2.5.
42. *Id.* § 8C1.1.
43. *Id.*

corporate offender must be proportional to the harm committed so that it satisfies the public's demand for vengeance. Strong penalties for organizational crimes are the perfect answer to society's increased desire for tougher criminal sanctions.

Corporate criminal liability also ensures the goal of rehabilitation. While criminal sanctions have limited ability to reform individuals, imposing sanctions on a corporation can correct the corporate culture of the organization. Where there is no human psyche to reorient, a criminal sanction can involve an invasive and extreme reconstruction. This can result in a complete reform of a corporation's practices after the offense.

Probation is an important tool that enables reform of wayward corporations under American law. To prevent future offenses, probation may require a corporation to

> submit to the court an effective compliance and ethics program;[] . . . [to] make periodic reports to the court or probation officer . . . regarding the organization's progress in implementing the program . . . . In order to monitor whether the organization is following the program . . . the organization shall submit to . . . a reasonable number of regular or unannounced examinations of its books and records[;] . . . [or] interrogation of knowledgeable individuals within the organization.[44]

Legal theorists also consider deterrence a main goal of corporate criminal liability. U.S. federal law has adopted the most modern preventive system to counteract corporate crime. The Introductory Commentary of the U.S. Sentencing Guidelines for organizations states, ". . . the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanism for preventing, detecting, and reporting criminal conduct."[45]

The U.S. Sentencing Guidelines do not use only the traditional prevention methods of threatening sanctions to deter criminal conduct. In addition to the classic deterrent of imposing high fines for corporate crime, a corporation also must adopt internal mechanisms to prevent and detect criminal activity. To be successful, an effective compliance and ethics program requires the implementation of seven factors specified in the U.S. Sentencing Guidelines.[46]

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44. *Id.* § 8D1.4(c).
45. *Id.* chap. 8, introducing cmt.
46. *Id.* § 8B2.1.

In May 2004, the U.S. Sentencing Commission strengthened the criteria for effective compliance and ethics programs. The Sentencing Commission first inserted the criteria into a separate guideline to emphasize the importance of this program, later introducing more detailed requirements. An effective program requires that the organization has exercised due diligence to prevent the crime; and that it has otherwise promoted "an organizational culture that encourages ethical conduct and commitment to compliance with the law. . . ."[47]

This revolutionary preventive model conceives of a complex mechanism of crime prevention controls within the corporation. It is an intermediate structure between the corporation and the criminal justice system. Under this mechanism, corporate managers perform the role of internal law enforcement agents. These agents are obligated to assist public authorities in preventing corporate crime. In addition, they must cooperate in investigations dealing with offenses by corporate agents.

These compliance programs affect corporate behavior by inserting sophisticated mechanisms into the internal structure of the corporation. This monitoring system reduces the risk of behavior as a source of corporate crime. If a crime occurs and the corporation can show that it occurred *despite* the implementation of an effective compliance and ethics program, it enjoys a presumption against serious sanctions. Its fine can be reduced by as much as 95%, and probation can be avoided.[48] However, if a crime occurs and the corporation had refused to adopt a compliance program, or had failed to implement an effective one, heavy penalties will be applied.[49]

This new approach to deterrence is called the carrot-stick model. The stick consists of the application of fines, which are much higher than in the past. The carrot consists of a reduction in fines if the corporation has adopted an effective compliance and ethics program.

CONCLUSION

There are no other judicial systems that follow the U.S. approach. The U.S. has adopted the most modern system of sanctions to counteract corporate crime. The U.S. Sentencing Guidelines possess a complex structure that represents the convergence of two modern tendencies: the

47. *Id.* § 8B2.1(b).
48. *Id.* § 8C2.5(f).
49. *Id.* §§ 8C2.4, 8C2.5.

exponential growth of corporate crimes and the refinement of sentencing mechanisms.

Legal theorists insist that organizational sentencing guidelines rely upon a philosophy of economic deterrence, because they offer corporations strong incentives to prevent and detect offenses. The U.S. Sentencing Guidelines reflect an approach with retributive, preventive, and deterrent elements. This reflects an innovative philosophy in the control of corporate crime, the core of which is found in an effective compliance and ethics program.