
The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis

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Current theories of corporate criminal liability in Canada and the U.K. focus upon the individuals who make-up an organization. However this approach, called the identification doctrine, has its limitations, especially when employed in the context of large, decentralized organizations. The present article examines a different basis for liability, proposed by some scholars, which concentrates on the organization itself. It is believed that this form of liability could enhance both the effectiveness and the fairness of the current system.

The article is divided into two parts. In the first part, the author provides a synthesis of the work of some of the main advocates of a "corporate" criminal liability. From this overview, she argues that it is conceptually possible and philosophically justifiable to treat organizations as subjects of criminal law. Drawing on the contributions of scholars, the author identifies the characteristics which enable organizations to be viewed as intentional actors, accountable for their actions. She concludes by examining some of the justifications for recourse to a organizationally-defined basis of liability.

The second part of the article takes the concept of a "corporate" intentional actor and applies it to the traditional analysis of the conditions required for the imposing of criminal liability. The author retains the traditional division of an offence into *actus reus* and *mens rea* elements because any novel concept of corporate liability will nonetheless be incorporated into the existing body of offences. In addition, examining how it functions within the current system serves to demonstrate the proposed concept's strengths and weaknesses. The author ultimately concludes that because "corporate" liability reflects aspects of corporate culture not captured by the current system, its inclusion would contribute to the development of corporate criminal law.

Les théories actuelles de la responsabilité criminelle des personnes morales s'attardent, au Canada comme au Royaume-Uni, aux individus qui forment l'organisation. Toutefois, cette approche appelée la doctrine d'identification a ses limites, surtout dans le cas de grandes organisations décentralisées. Cet article examine les différentes bases de responsabilité avancées par certains auteurs se concentrant sur l'organisation comme telle. Il semble qu'une telle forme de responsabilité pourrait augmenter tant l'efficacité que l'équité du système actuel.

L'article se divise en deux parties. Dans la première, l'auteure présente une synthèse de l'oeuvre des principaux tenants d'une responsabilité criminelle des personnes morales. Ce survol permet à l'auteure de défendre conceptuellement et philosophiquement l'identification de personnes morales comme sujets de droit criminel. À partir des travaux de certains chercheurs, l'auteure identifie les traits permettant de voir les organisations comme des acteurs capables d'intentions et responsables de leurs actions. Elle examine certaines justifications pour un recours à une responsabilité définie sur des bases organisationnelles.

La deuxième partie de l'article applique le concept de personne morale capable d'intentions et l'applique à l'analyse traditionnelle des conditions de responsabilité criminelle. L'auteure retient la division traditionnelle de l'infraction en éléments, *actus reus* et *mens rea*, puisque tout nouveau modèle de responsabilité criminelle devra être incorporé au système actuel. L'examen de cette nouvelle responsabilité dans le cadre actuel permet d'évaluer les forces et faiblesses du concept proposé. L'auteure conclut que le fait de réfléchir des aspects de la culture organisationnelle jusqu'ici négligés permet au modèle de responsabilité de contribuer au développement du droit criminel des personnes morales.

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Introduction

I. The Corporation as a Responsible Actor

- A. *The Attribution of Responsibility*
 - 1. The Foundations of Criminal Responsibility
 - 2. The Responsible Actor
- B. *The Nature of Corporations*
 - 1. Types of Organization
 - 2. The Characteristics of an Organization
- C. *Corporate Intentionality*
- D. *Justifications for Corporate Responsibility*

II. The Conditions for Liability

- A. *Act Requirements*
 - 1. The Notion of Act and the Requirement of Voluntariness
 - 2. Causation
 - 3. Justifications
- B. *Fault Requirements*
 - 1. The Notion of Corporate Fault
 - 2. Types of Fault
 - a. *Fault Based on an Aware State of Mind*
 - i. Knowledge or Intention
 - ii. Recklessness and Wilful Blindness
 - b. *Strict Liability*
 - c. *Absolute Liability (No Fault)*
 - 3. Defences

Conclusion

Introduction

Much of the difficulty surrounding the discussion of corporate criminal liability lies in the fact that it challenges some of the basic assumptions underlying the criminal law. In particular, discussions of a theory of corporate criminal liability have often been confined within individualist conceptions of criminal law. This paradigm bases the characteristics necessary for an actor to be treated as blameworthy, as well as the nature of the concepts of *actus reus* and *mens rea* on a distinctly human model.

The current system of corporate liability in Canada and the United Kingdom, based upon vicarious liability and the identification doctrine, is a reflection of this individualist model. Although no one suggests that the individualist model for liability should be abandoned, it has nonetheless been the object of much criticism. Critics find that individualism is an incomplete basis upon which to ground the criminal liability of corporations because it does not accurately capture the nature of corporate behaviour. As a result, the purpose of the present article is to examine how the alternative basis of liability most commonly advocated by these same critics — one which seeks to impose criminal liability on the basis of a *corporate* blameworthiness incorporating the realities of the modern corporation — might enhance the current model of corporate criminal liability.

Given this focus, the article shall be divided into two parts. The first will examine the suitability of the corporation as a subject of criminal law. The purpose of this part is to demonstrate that it is both practically possible and philosophically justifiable to treat corporations as accountable for the wrongs and harms they cause. The first section will examine the notion of a responsible actor and determine if there are non-human characteristics upon which one can base an attribution of responsibility. The next two sections will describe the particular characteristics of a corporation and then identify those which enable it to be viewed as a subject of criminal liability. From the conclusion that it is such a subject, the final section will consider the justifications for imposing criminal liability upon corporations.

The second part will apply the above-mentioned concept of “corporate responsible actor” to the traditional criminal law evaluation of the conditions required for the imposition of liability with respect to a particular offence. Retaining the classic analytical division of the elements of an offence into *actus reus* and *mens rea* is important, given the reality that any novel concept of corporate liability will nonetheless have to be incorporated into an existing body of offences defined separately in terms of conduct and mental elements. Although modifications to this bi-partite assessment of criminal behaviour may be desirable in the long run, it is the approach currently used and is unlikely to be radically changed for the moment. More importantly, however, following the structure of the current criminal law will serve as a useful means of comparison with new proposals as well as a demonstration of its inherent limitations when applied to corporations.

I. The Corporation as a Responsible Actor

The purpose of this part is to identify the basis upon which corporations may be considered responsible actors. It is divided into four sections: the attribution of responsibility, the nature of corporations, corporate intentionality and justifications for corporate liability.

A. The Attribution of Responsibility

1. The Foundations of Criminal Responsibility

In order to better construct a theory of corporate responsibility, it is necessary to begin with a brief consideration of what constitutes criminal responsibility generally. Paul Fauconnet, in his seminal work, *La responsabilité: étude de sociologie*, advances the following general definition: “la responsabilité est communément entendue comme la propriété qu’a une personne de devoir légitimement supporter une peine; dans l’usage, les mots *responsable* et *justement punissable* sont largement synonymes.”¹ Thus, in his view, it is the *capacity* to be blamed — and therefore punished — which animates our conception of the notion of responsibility.

For Fauconnet, there are two steps to consider in the attribution of responsibility. The first is that the subject must possess these aptitudes of a potential subject of punishment. This is a necessary precondition to the second step, which corresponds to the transformation of this potential liability into actual liability through the occurrence of an event “capable of generating responsibility”.²

In the general criminal law, however, discussion focuses upon the second branch of Fauconnet’s conception of responsibility — the circumstances which lead to the blaming of an individual. It is apparent that the first arm, the issue of capacity to be blamed or what Peter French calls “moral personhood”,³ is rarely addressed. In fact, the principle upon which responsibility is premised, autonomy of the individual, is largely assumed:

The principle [of autonomy] is usually assumed rather than stated in legal doctrine ... If ... the principle is expressed in terms of sufficient freedom in most situations, making it fair to use concepts such as “desert”, “choice” and “control”, that expresses ... the position which criminal law has reached. It also accords with the political underpinnings of the law, namely, that citizens should

¹ P. Fauconnet, *La responsabilité: étude de sociologie* (Paris: Librairie Félix Alcan, 1920) at 7 [emphasis in original]. The author’s translation is: “responsibility is commonly understood to be the capacity of a person to be legitimately subjected to punishment: usually, the terms *responsible* and *justly punishable* are synonymous.” Following quotations from this source are translated by the author of this paper.

² *Ibid.* at 26-27.

³ P.A. French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984) at 38.

be regarded as rational, choosing individuals whose autonomy the law should respect.⁴

While this point of view has been challenged by utilitarian thought,⁵ the current criminal law has adopted the view that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behaviour. Implicit in this idea of autonomy is that people have causal power over their bodies, something Celia Wells considers an essential attribute by which we understand and evaluate ourselves as persons.⁶ She goes so far as to assert that the language of both rationality and autonomy assumes a *human* body.⁷

Of course, as with Fauconnet's analysis, the principle of autonomy is only the starting point of the discussion of individual responsibility. There are various subsequent lines dividing responsibility and non-responsibility of individuals, such as voluntariness, justifications and excuses.⁸ Nonetheless, the significant consequence of the principle of autonomy is that the law initially assumes the adult human being to be an apt subject of responsibility.

It is clear, therefore, that the first challenge to any theory of corporate criminal liability lies in the ability to go beyond the confines of the human person and identify other attributes which enable an entity to be capable of being a responsible actor. The inquiry is not without general interest, as Wells notes, because a corporate criminal liability may even enhance our appreciation of the factors which influence responsibility:

One of the reasons why contemporary legal systems have difficulty with any concept other than that of the individual is the heritage of political liberalism. The dominance of liberalism which has celebrated the ultimate value of the individual person and correspondingly denounced collectivism or social welfarism has inevitably been reflected in legal accounts of responsibility. Corporate accountability can be seen as an example of the beginnings of a shift toward a mid-way theory of communitarianism, which undermines the liberal theory of self, but is equally wary of social welfarism. Not only has the sovereignty of the individual obscured group and cultural influences, methodological individualism "is unable to account for the corporateness of corporate action and corporate responsibility".⁹

Thus, for Wells and many others there are perhaps good reasons why corporate liability should neither flow from nor depend on the same arguments as those which

⁴ A. Ashworth, *Principles of Criminal Law* (Oxford: Clarendon Press, 1991) at 80-81.

⁵ See *ibid.* at 79-80.

⁶ C. Wells, *Corporations and Criminal Responsibility* (Oxford: Clarendon Press, 1993) at 63 [hereinafter *Corporations*].

⁷ See *ibid.*

⁸ See Ashworth, *supra* note 4 at 81.

⁹ *Corporations*, *supra* note 6 at 66-67 [footnotes omitted]. The quote is from B. Fisse & J. Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney L. Rev. 468 at 476 [hereinafter "Allocation of Responsibility"].

serve for individuals.¹⁰ Support for such a view can be found first in a more detailed examination of the notion of responsibility, and then in a consideration of the characteristics of the modern corporation. Once this basis for an aptitude for responsibility has been established, its justifications shall be examined.

2. The Responsible Actor

Before considering the appropriateness of clothing corporations with a capacity to be blamed, it is important to consider in greater depth what it means to be a responsible actor or intentional agent. As Wells has noted, "moral personhood has tended to be the meeting-place for theories of corporate accountability."¹¹ Therefore, the fundamental question is whether an organization can be blameworthy in itself, or is it always a function of the blameworthiness of the individuals involved?¹² The object of this section is to demonstrate that corporations are capable of being blameworthy on the basis of a moral accountability which does not depend upon human characteristics.

Fauconnet is of the view that the blame for wrongful acts of collective entities can and must be borne by the entity itself and not by its constituent members. This derives from the distinct personality of a collective entity, which subsumes the individual personalities composing it. As such, it is unfair to hold individuals responsible for what is the fault of the entity itself. Collective responsibility is likened to a new form of individual liability, derived from the fact that corporate legal personality assumes a single juridical unit.¹³

A more developed approach is elaborated by French.¹⁴ He grounds his analysis in a consideration of what it means to be part of the moral community, the principle being that only those who are moral actors can be responsible. Unlike Fauconnet, he concludes that legal personhood is unhelpful for the purposes of determining who is a responsible actor because it fails to distinguish between subjects of rights and administrators of rights. Within the former type are those right-holders who, though legal persons, lack the capacity to dispose of or administer their rights and thus cannot be intentional actors. As a result, French warns against relying on the notion of legal personhood in order to settle the issue of the qualities required for moral personhood.¹⁵

Wells echoes this observation by noting that traditionally, "[r]ecognition [of a corporation] as a legal person has largely carried with it protections without the imposition of corresponding responsibilities or obligations."¹⁶ She also points to the irony that the separate legal personality of the corporation often serves as a shield for the directors

¹⁰ *Corporations*, *supra* note 6 at 63. See also "Allocation of Responsibility", *ibid.*; French, *supra* note 3 at 1-47.

¹¹ *Corporations*, *supra* note 6 at 87.

¹² See *ibid.*

¹³ See Fauconnet, *supra* note 1 at 340-41.

¹⁴ French, *supra* note 3.

¹⁵ *Ibid.* at 38.

¹⁶ *Corporations*, *supra* note 6 at 3.

and shareholders from their individual responsibility.¹⁷ In short, the possession of legal personality by both corporations and individuals does not mean that they are subjected to the same legal treatment, nor that they are perceived in the same way.¹⁸ Ascriptions of responsibility do not flow from the current notion of legal personhood.

It is within the interdependent notions of moral and metaphysical personhood that French sets the conditions for participation in the moral community. A moral person is "the referant of any proper name or of any noneliminatable subject in an ascription of moral responsibility."¹⁹ At a minimum, a moral person must be an intentional actor. Thus, the issue of whether corporations are moral persons must be resolved by determining if it is possible to characterize certain events as being intended *by the corporation itself*.²⁰ The concept of metaphysical personhood adds the possibility of describing an event as an intentional action. Attributing reasons for an action rationalizes its occurrence and helps causally explain it.²¹ However, French notes that there may exist more than one set of reasons — or even different kinds of reasons — for an event. This is particularly important in the corporate context as the actions of a corporation involve, or at least include, the actions of individual human actors. For corporate responsibility to exist there must be corporate reasons for a given action, irrespective of those of the individual actors involved.²²

Thus in French's model, moral, or responsible, persons are those persons who possess an intentionality, and act for reasons related to it. For the corporation to be responsible it must be capable of demonstrating its own intentionality. Wells expresses it another way: "If intentions are taken broadly as reasons for acting, then this requires the identification of a corporation's reasons for acting, over and above the reasons of the individuals."²³ In essence, corporate intention should be something more than a means of referring to the collection of the intentions of the individuals comprising the corporation. Whether corporations actually have this ability will be discussed later on in this paper, in the section on the nature of the corporation.

While French's attempts at integrating corporations into the moral community may have a certain analytical appeal, some are not convinced that this is the best way to found corporate responsibility. In particular, Wells is critical of this position because it asserts, on the one hand, that corporate minds are not like human ones, but on the other, argues that responsibility is rooted in moral blame. While she argues that it does make sense, both philosophically or practically, to treat a corporation as a single and separate entity capable of committing a criminal offence, she prefers the more neutral term "accountability" to describe the corporate capacity to be blamed.²⁴ The term conveys the notion that corporations are not analogous to human beings but remain crimi-

¹⁷ *Ibid.* at 92.

¹⁸ See *ibid.* at 84.

¹⁹ French, *supra* note 3 at 38.

²⁰ *Ibid.*

²¹ See *Corporations*, *supra* note 6 at 63.

²² See French, *supra* note 3 at 40.

²³ *Corporations*, *supra* note 6 at 88-89.

²⁴ *Ibid.* at 90.

nally responsible for their behaviour.²⁵ This qualification is important because invariably organizational accountability will have an impact upon some individuals, but this should not mean that only individuals can be responsible.²⁶ As she states:

Corporations may be likened to, or treated as, individuals for some purposes, but should not be regarded as individuals. To do so would artificially limit the role of corporate liability and render sterile much of the argument about corporate structures, activities and capacities to cause harm.²⁷

A similar "non-moral" view is held by Brent Fisse, who, in developing his justification of corporate liability, disputes the necessity of attributing a moral character to the offences for which corporations are punished.²⁸ In fact, he goes so far as to say that corporations are not capable of being immoral in the sense we understand human beings to be.

Indeed, if one believes that offences are "sins with legal definitions" ... then one cannot believe in corporate criminal liability; *corporations lack a conscience in any real sense and hence are incapable of committing sinful offenses.*²⁹

The advantage of the non-moral approach is that it avoids entering the debate of whether corporations make truly moral choices when choosing one course of action over another. Certainly, it is on the strength of the moral character of the criminal law that the individual has remained the base unit of responsibility. Indeed, it is virtually impossible to argue that corporations have souls in the sense the term is understood. Wells and Fisse are justified when they argue that it is unnecessary and even undesirable to frame corporate responsibility in moral terms. Blameworthiness does not have to be tied to morality. It does, however, require a principled foundation to guide its application.

Such a principled foundation may be found in Fauconnet's discussion of the ancient Greek practice of holding entire cities responsible for the acts of their leaders. The rationale for the practice was that a city had a single and continued existence over time in much the same way as a human being remains the same individual throughout life. Just as the achievements of its citizens, past and present, became part of its heritage, certain criminal acts were also identified with the city itself. Responsibility for criminal acts flowed as naturally to a Greek city as did glory for great achievement.³⁰

²⁵ See *ibid.* at 84.

²⁶ See *ibid.* at 90.

²⁷ *Ibid.* at 94.

²⁸ B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 S. Cal. L. Rev. 1141 at 1177 [hereinafter "Reconstructing"].

²⁹ *Ibid.* [emphasis added].

³⁰ See Fauconnet, *supra* note 1 at 89. This example is not an endorsement of the notion of imposing liability on a city for the acts of its leaders. This type of liability was developed in a context very different from the modern era, where distinctions between leaders and citizenry resulted in differing treatment at the hands of the law. The interest in this example is in the development of a concept of identity of a composite entity distinct from the individuals who compose it.

This distinct identity enabled the city to be considered responsible as a collectivity. Thus, once its responsibility was triggered, the city as a whole was punished, irrespective of whether the individual actor who committed the act was actually subjected to any punishment. It was punished on the basis of its own separate blameworthiness. Thus the city, at least for the purposes of specific criminal offences, was considered to be a responsible actor, capable of being blamed and thus punished for wrongful acts.

The above example describes a concept of a continued and collective existence that goes beyond that of the individuals composing it. The idea of a distinct identity is a first step toward recognizing corporations as responsible actors. The second and more decisive step is made with the assistance of the concept of intentionality. While French uses it as a means of incorporating collective actors into the moral community, it is contended that intentionality does not contain any moral element itself. It is simply a means of setting out a criterion of responsibility which is independent of human characteristics.

Nonetheless, this non-human criterion of intentionality must be based upon a certain fixed conception of the corporation. At this point, it is particularly important to establish more clearly the general characteristics of the modern organization before continuing a discussion of corporate liability. Many critics feel the current system fails to integrate modern corporate reality into its framework. Therefore, the next section will examine the characteristics of a corporation in order to develop a notion of intentionality which appropriately reflects them. To do so requires a brief discussion of organization theory.

B. The Nature of Corporations

One of the significant differences between individual and corporate liability is that in the former the subject of responsibility is easily identified. Adult human beings all take one of two basic physical forms, despite infinite individual variations. It is upon this common ground of the human body that the twin principles of fault ascription — rationality and autonomy — are premised.³¹ There is, of course, considerable debate surrounding the conditions under which human beings fulfill these requirements of moral personhood,³² but this does not alter the fact that the notion of a human being corresponds to something quite specific.

No such standard form or structure links all the disparate forms of collectivities which operate within and influence the course of modern society. Even more specific terms, such as organization and corporation, offer limited assistance in identifying a fixed set of characteristics upon which to develop a general doctrine of responsibility. And yet, as Meir Dan-Cohen has stressed, it is necessary to fix an initial conception of the organization before subjecting it to the norms of law and morality.³³ As a result, this

³¹ See *Corporations*, *supra* note 6 at 63. See also Ashworth, *supra* note 4 at 81.

³² See Ashworth, *ibid.* at 93-111.

³³ See M. Dan-Cohen, *Rights, Persons and Organizations* (Berkeley: University of California Press, 1986) at 27.

section will review the different types of organization and, from these, distill those characteristics of collectivities which are consistent with an ascription of liability. The resulting composite will serve as the base unit of responsibility in the ensuing discussion of corporate liability.

1. Types of Organization

While accepting that organizations are different from individuals may seem intuitive, Dan-Cohen observes that the two most common conceptions of the organization — holistic and atomistic — are both based upon a human model.³⁴ The holistic approach — or personification — acknowledges the reality of collective entities and denies the possibility of their complete reduction into individuals and their interrelations.³⁵ However, the theory goes further by finding that as organizations share some of the characteristics of individuals, they must therefore have all the characteristics relevant to the individual's moral and legal status.³⁶ It is on this assumption that the holistic theory deems a corporation fit for legal personhood. Nonetheless, personification is useful:

It conveys the triple insight that organizations are commonly the objects of meaningful predication; that this predication is possible and meaningful apart from and in the absence of any detailed knowledge pertaining to individual constituents of the organization; and that in many cases the *same predication* is appropriate for organizations and individuals.³⁷

In stark contrast, the atomistic approach — or aggregation — sees collective entities as aggregates of individuals, and thus completely reducible into individuals and their interrelations. As Dan-Cohen notes, "it correctly insists upon the critical dependence of organizations, both phenomenally and normatively, on the actions and interrelations of individual human beings."³⁸ However the theory exaggerates this interrelation by equating an organization with a homogeneous group of individuals and dictating that the normative status of the collective entity must correspond to the normative status of the individuals that compose it.³⁹ This latter approach is more commonly associated with the theory of individualism, its principal tenet being that only individuals act, that only individuals are responsible and that corporate action is no more than the sum of its parts.⁴⁰

³⁴ *Ibid.* at 15-16.

³⁵ See *ibid.* at 15.

³⁶ See *ibid.* at 27.

³⁷ *Ibid.* at 26 [emphasis in original].

³⁸ *Ibid.* at 27.

³⁹ See *ibid.* at 15.

⁴⁰ See "Allocation of Responsibility", *supra* note 9 at 475. This paper does not challenge the notion that there are many circumstances where individually-based liability may be the most appropriate response to corporate misconduct. The most notable example is that of small, closely-held corporations where the principal owners and shareholders are probably more concerned about individually-incurred liability than that of the corporate shell within which they operate. As a result, the threat of individual liability will have greater deterrent value than a corporate liability. However, my difficulty

While the focus upon individualism can be criticized when applied to all organizations, it does not follow that all organizations transcend and exceed the cumulation of their individual members. Wells identifies two conceptions of the organization: atomic, where the organization is viewed as a collection of individuals; and organic, where it corresponds to more than the sum of its parts.⁴¹ French observes a similar division between types of collectivities, which he names respectively aggregate and conglomerate.⁴² As the name suggests, the first of these designates a mere collection of people. It follows that the identity of the collectivity is altered with each change in its constituent membership and that, in general, acts and intentions of the collectivity are reducible to those of the collectivity members.⁴³ Such a collectivity is by definition not capable of being an intentional actor.⁴⁴

French uses three characteristics to distinguish aggregates from conglomerates. First, conglomerates have internal decision-making procedures by which courses of concerted action can be chosen. Second, there is more stringent enforcement of standards of conduct of individuals within the conglomerate than there is in the larger community of individuals. Third, members of a conglomerate fill differing defined roles within it, but a change in the identity of the individual occupying a given role does not necessarily cause a corresponding change in the conglomerate's identity.⁴⁵ A conglomerate thus possesses an identity not exhausted by the identities of its constituent members. As such, ascriptions of responsibility to the conglomerate cannot be reduced to a conjunction of ascriptions of responsibility to the individuals with which it is associated.⁴⁶

The importance of recognizing the enduring existence of organizational identity, especially in the light of changing membership, is brought into sharper focus by Dan-Cohen when he traces the evolution in the structure of corporations over the past century. First, the concept of a corporation has shifted from the notion of an enterprise headed by one entrepreneur, who both owns and runs the going concern, to that of an organization where stock ownership becomes separated from the control of the corporation's affairs, the latter being managed by a professional, hired and self-perpetuating bureaucracy. Second, the individual shareholder's role has changed from part-owner to investor, and its importance has diminished in large corporations where the most significant shareholders are collective entities.⁴⁷ Third, the attachment of the shareholder to the corporation is becoming secondary and indirect, reflecting the fact that corporations serve a variety of interests besides those of shareholders, including those of their employees, customers and the community at large. As Dan-Cohen observes, "the corporation can no longer be identified with a single homogeneous group of individuals.

with individualism, or at least with some of its advocates, is the idea that there is no other basis, besides the individual, upon which it is appropriate to impose criminal liability.

⁴¹ *Corporations*, *supra* note 6 at 84.

⁴² French, *supra* note 3 at 5, 13.

⁴³ See *ibid.* at 5.

⁴⁴ See *ibid.* at 12.

⁴⁵ *Ibid.* at 13-14.

⁴⁶ See *ibid.* at 13.

⁴⁷ See Dan-Cohen, *supra* note 33 at 16ff.

Its decisions and activities are the resultant of and are responsive to a complicated set of interests and conflicting claims."⁴⁸

However, the more significant change for the purposes of the criminal law is the fact that the structure of many, especially large-scale, corporations is no longer based on a pyramid headed by a single, all-powerful individual.⁴⁹ The modern organization is "portrayed as a coalition of groups of divergent claims and interests, engaged in a continuous process of bargaining with one another."⁵⁰ This vision of the corporation is not included in the current individual-based responsibility model, which imposes liability only upon the individual or individuals identified as the "directing will and mind" of the corporation.⁵¹ Wells aptly characterized the relationship between large corporations and the various groups of individuals which compose them, demonstrating the need for a separate, corporate basis for responsibility:

Public corporations ... are owned by a dispersed range of shareholders who have little or no control over the day-to-day or even year-to-year management. Managers have control over resources which they do not own and on a scale which no one individual would ever be likely to own. In addition, the organizational structure is such that knowledge and control is disaggregated: corporate goals are the responsibility of a large number of individuals who may or may not know what other individuals are doing.⁵²

A final change to be noted is the orientation of corporate goals. It is no longer accurate to describe them solely as a function of the self-interested and profit-seeking entrepreneur. The modern corporation pursues various goals, some of which may not be consistent with one another nor pursued concurrently. Corporate choices are made as a function of both monetary and non-monetary considerations.⁵³ Thus, a wide range of factors can influence corporate decisions, the extent of such influence is circumscribed by both information constraints and the internal structure and operating procedures of the firm.⁵⁴

The ultimate consequence of the above changes is that many corporations, particularly large ones, have developed to the state of being ownerless. The idea of a group of individual members has given way to that of a permanent, self-perpetuating bureaucratic machine in which members are only secondary and can no longer be realistically identified with the organization.⁵⁵ This view is analogous to that of the Greek city described earlier, in that a separate collective identity emerges from the contributions of many individuals. However, the separate identity of the modern organization is based

⁴⁸ *Ibid.* at 19.

⁴⁹ See *ibid.* at 19-20.

⁵⁰ *Ibid.* at 19.

⁵¹ See "Allocation of Responsibility", *supra* note 9, for an excellent critique of the individualist position.

⁵² *Corporations*, *supra* note 6 at 36.

⁵³ See "Reconstructing", *supra* note 28 at 1154-55.

⁵⁴ See Dan-Colien, *supra* note 33 at 20.

⁵⁵ See *ibid.* at 22.

upon a complex set of characteristics which go far beyond those of the ancient theory and allow for separate blameworthiness on the basis of truly corporate action.

2. The Characteristics of an Organization

A very complete description of the characteristics of an organization is provided by Dan-Cohen who finds that an organization possesses functional structures, it is permanent, large, formal, complex and goal-oriented, and has decision-making structures.⁵⁶ As will be readily observed, organizations in which these characteristics are present provide a strong case for the need to recognize, in certain circumstances, a separate corporate identity. The existence of structure implies a more or less fixed and perceptible pattern of order, which is susceptible to representation in the form of an organizational chart. Organizational permanence is reflected in its operative time-span, which can extend for many generations and is distinct from that of any of its constituent individual members.

Of particular significance for an eventual criminal liability of organizations is the decision-making aspect. This highlights the role that information plays in organizational activities and underlines the fact that information activities (gathering, recording, registering, decoding, disseminating) are best attributed to the organization because the total information required for a specific decision is not normally possessed by an identifiable individual or group of individuals. Moreover, an organizational decision embodies organizational preferences, which may or may not reflect the individual preferences contributing to them.⁵⁷

Although not all organizations share the characteristic of being large-scale operations involving many individual participants, it should be noted that small corporations do not generally raise the same problems for prosecutors as large ones. One of the criticisms of the current individual liability model is that it cannot attribute blameworthiness where no one individual can be identified as responsible.⁵⁸ In large corporations, the presence of many individuals contributes to the anonymity and impersonality of corporate decisions, which translates into a discontinuity between individual interests and those of the organization.⁵⁹ This discontinuity does not exist to the same extent in small corporations, where the acts of the corporation can more easily be attributed to high-ranking individuals constituting its directing will and mind.⁶⁰ Moreover, the social

⁵⁶ This argument is taken from Dan-Cohen, *ibid.* at 31-33.

⁵⁷ See *ibid.* at 32-33.

⁵⁸ See B. Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 Sydney L.R. 277 at 289-90 [hereinafter "Attribution of Criminal Liability"].

⁵⁹ See Dan-Cohen, *supra* note 33 at 34.

⁶⁰ The seminal case in Canada that analyzes the identification doctrine is *R. v. Canadian Dredge & Dock Co.*, [1985] 1 S.C.R. 662, 19 D.L.R. (4th) 314 [hereinafter *Canadian Dredge* cited to S.C.R.]. Estey J. describes the development of the doctrine from its English origins in the case *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 [hereinafter *Lennard's Carrying Co.*]. The preoccupation of the Court was how far this notion should extend beyond the definition used in *Lennard's Carrying Co.*, which held that the directing will and mind was limited to a small class of persons:

importance of an organization's policies and decisions increase with the magnitude of its resources, reflecting the greater potential of large organizations to cause substantial harm.

Two corollaries of size are formality and complexity. The first reflects a bureaucracy that is constituted by formal offices and the rules connecting them. The impersonality of such formality renders the organization impermeable, such that events can be said to affect the organization in a way which is not easily reducible to a comparable impact on individuals.⁶¹ Complexity also contributes to this opaqueness of organizational decision-making. The large number of interdependent sub-units that constitute the organization and interact in various ways makes it "difficult to trace organizational decisions and acts to the wills and actions of particular individuals."⁶²

The final characteristics of an organization are functionality and goal orientation. As organizations are functional structures, their distinct characteristic is that they have been formally established for the explicit purpose of achieving certain goals. However, it is not possible to fully explain organizational behaviour solely on the basis of stated goals. Given that functionality and goal orientation are dynamic and relative, it is necessary to impute to the organization some self-serving or reflexive goals, not necessarily related to stated goals.⁶³

There is one serious challenge to the idea of a separate corporate identity, which poses significant problems for eventual criminal liability, although it does not under-

those under the direction of the shareholders, the board of directors itself, or those with authority granted under the articles of association, who are appointed and removed by the shareholders.

Estey J. describes the broader operation of the identification theory in Canada at 693:

[The doctrine of identification] is a court-adopted principle put in place for the purpose of including the corporation in the pattern of criminal law in a rational relationship to that of the natural person. The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation. ... a corporation may, by this means, have more than one directing mind.

While Estey does not expressly say that the doctrine applies better to closely-held corporations, this conclusion can be inferred from his discussion of the economic effect of criminal penalties on corporations (*ibid.* at 694):

The corporation which set the directing mind in position to do the wrong will suffer an economic penalty. While it is true that this penalty will feed through to stockholders, who may well be totally innocent as in the case of large public companies, it may be seen as a risk or cost associated with the privilege of operating through the corporate vehicle. In the case of personal corporations, the imposition of a criminal penalty on the corporation may be an additional penalty imposed upon the "personal" corporate stockholder but such a result would be an acceptable part of the sentencing process as it simply reflects the economic identification, as well as the legal identification, present in such a corporation. [Emphasis added]

⁶¹ See Dan-Cohen, *supra* note 33 at 34-35.

⁶² *Ibid.* at 36.

⁶³ See *ibid.* at 36-37.

mine the ability of corporations to be intentional actors. It relates to the consequences of insolvency upon the notion of the corporation and its legal personality. As Wells states:

Ultimately there is an insoluble difficulty with maintaining the existence of the juristic person for the purpose of administering a criminal sanction. If the company is forced to remain in existence, it cannot be forced to carry on its trading; if it seeks to reconstitute itself, with different directors and members, then is it the same entity? In other words, what is the entity — its trading name, its capital plant or its directors and members? Criminal liability can have a meaning so long as the enterprise retains either its name or its directors, but once these are lost then it is difficult to say what *the company is*.⁶⁴

This difficulty may be more procedural than substantive. For if an act is committed by a corporation that meets the criteria to be considered corporate in terms of its intentionality, then it should not matter if the company exists as a formal legal entity or not. However, as most statutes sanctioning criminal behaviour specifically define a corporate person with reference to corporate legal personality, difficulties in practice may occur. This could be solved by statutory language which permits the prosecution of unincorporated organizations possessing the characteristics necessary for corporate intentionality. If these characteristics could not be demonstrated, then only individuals may be held accountable. This is not meant to suggest that the impact on an eventual criminal liability of changes in corporate ownership and management following the commission of an offence is insignificant. Nonetheless, a fuller discussion of the issue may await further study without undermining the premises of the present article.

This final reservation aside, the above discussion assists in the identification of those aspects of organizational structure which can render an organization, at least *prima facie*, a suitable subject of criminal liability. In essence, the organization must be a conglomerate-type collectivity: that is, a collectivity which possesses an identity which exceeds that of the sum of its individual members. According to Dan-Cohen's discussion of modern organizational structure such an identity results from the conjunction of several characteristics: size, goal-orientation, permanence, complexity, formality, and the possession of decision-making and functional structures. What these characteristics reveal, in the words of Fisse and Braithwaite, is that "[o]rganizations are systems, not just aggregations of people. More crucially, however, organizations consist of sets of expectations about how different kinds of problems should be resolved."⁶⁵ It is those organizations which fit these characteristics which shall be the object of discussion in this article. It shall be argued that an appreciation of the role of these characteristics in corporate behaviour will enhance the current system's ability to assess corporate blameworthiness by incorporating an alternative basis of liability more reflective of how certain corporations operate.

⁶⁴ *Corporations*, *supra* note 6 at 93 [emphasis in original].

⁶⁵ "Allocation of Responsibility", *supra* note 9 at 479.

C. Corporate Intentionality

The above sections have laid the groundwork for the present discussion. The basis upon which to impute corporations with accountability should be the distinct identity of corporations, and their resultant capacity to act with intentionality. An examination of the characteristics of the modern corporation confirms its corporate identity. Now, it is necessary to determine how this distinct identity enables a corporation to act with intentionality.

For French, intentionality can be attributed to a corporation by means of a concept he describes as corporate internal decision ("CID") structure.⁶⁶ CID structure has two elements: an organizational flowchart that sets out levels within the corporate structure and corporate decision-recognition rules.⁶⁷ In essence, French argues that CID structure is the means by which the actions and intentions of individual human persons within the corporation are transformed into a corporate decision. Moreover, it is through the rules set out by CID structure that it is possible to identify whether or not a given action or decision has been made "for corporate reasons". It does this in two ways: first, the corporate decision-making structure indicates the procedure that must be followed in order for a decision to become the corporation's; second, the decision must instantiate the basic policy of the corporation.⁶⁸ Wells has a similar approach in which the reasons for corporate action are sought in procedural rules and corporate policies. Identifying corporate reasons for action confirms the existence of corporate intentionality.⁶⁹

A criticism of this approach is that corporate policy simply reflects the views of the current directors of a corporation. French disagrees, stressing that in practice, especially in large corporations, this is not the case: even where the original incorporators have organized an undertaking to further their personal interests, these give rise to a long-range point of view which is distinct from that of the incorporators.⁷⁰ He traces part of the reluctance to recognize corporate policy as a kind of intentionality to the fact that it depends upon policies and purposes produced by a group of biological persons: "Corporate intent seems somehow to be a tarnished illegitimate offspring of human intent."⁷¹ And yet, French sees the advantage of corporate intentionality based upon CID structure as allowing corporate responsibility to co-exist with individual liability. The fact that individuals can, through their actions, participate in corporate acts does not exclude the possibility of them being held responsible for their actions in their own capacity as intentional actors.⁷²

There is another clear advantage to grounding corporate blameworthiness in a notion of intentionality which corresponds to the capacity to make decisions on the basis of reasons. It avoids the conceptual difficulty of asserting that corporations can enter-

⁶⁶ French, *supra* note 3 at 40-41.

⁶⁷ See *ibid.* at 41.

⁶⁸ See *ibid.* at 42-43.

⁶⁹ See Corporations, *supra* note 6 at 89.

⁷⁰ French, *supra* note 3 at 45-46.

⁷¹ *Ibid.* at 46.

⁷² *Ibid.* at 47.

tain a cerebral mental state, while still identifying the corporation as the source of the wrong or harm caused. Fisse and Braithwaite correctly state:

The fact is that organizations are blamed in their capacity as organizations for causing harm or taking risks in circumstances where they could have acted otherwise. We often react to corporate offenders not merely as impersonal harm-producing forces but as responsible, blameworthy entities. When people blame corporations, they are not merely channeling aggression against the ox that gored or some symbolic object. Nor are they pointing the finger at individuals behind the corporate mantle. They are condemning the fact that the organization either implemented a policy of non-compliance or failed to exercise its collective capacity to avoid the offence for which blame attaches.⁷³

It is thus appropriate to use the ability of a corporation to make decisions for imposing corporate liability when and because a decision instantiates both an *organizational* policy and an *organizational* decision-making process chosen by the organization. The fairness of such a formulation is demonstrated by the fact that it avoids finding liability of the corporation where a decision is made by a rogue individual in defiance of corporate policy. However, this does not mean that the corporation cannot be held responsible for the actions of individuals where the intention of the individuals is other than to promote corporate goals and policies. In essence, the intention of individuals is irrelevant; what matters is whether the actions are animated by corporate intentionality, as expressed through corporate policy.⁷⁴

It is essential at this juncture to note that all the above conceptions of intentionality are couched in terms of a responsibility based upon identifying corporate intention — in the sense of fault. Intentionality, however, should describe the characteristics needed to be a subject of responsibility, without regard to the question of fault. While corporate intentionality and corporate intention are both given meaning by reference to the distinct nature of corporate structure and policy, the two concepts are different although obviously linked. It is a case of distinguishing the general from the specific. Intentionality requires an aptitude for undertaking action on the basis of cognitive choices or decisions.⁷⁵ Corporate policy and structure are the means to demonstrate that corporate action is the result of rational decisions, in the same way that human characteristics create an assumption that adult persons choose to act in the way they do. The existence of intentionality distinguishes aggregates and conglomerates.⁷⁶ By contrast, corporate intention refers to the mental state to be established in a given case for a given offence.

With this distinction in mind, it is important to underline the more expanded description of corporate blameworthiness offered by Fisse and Braithwaite. Their model incorporates into corporate intentionality the fact that corporations, because of their collective might and resources and vast knowledge,⁷⁷ can be held to higher standards of responsibility than individuals. These standards apply not only to affirmative acts but

⁷³ "Allocation of Responsibility", *supra* note 9 at 481-82.

⁷⁴ *Ibid.* at 484.

⁷⁵ See French, *supra* note 3 at 38.

⁷⁶ *Ibid.* at 5, 12.

⁷⁷ "Allocation of Responsibility", *supra* note 9 at 486.

also to the existence of states of affairs which can in turn generate organizational failure to either achieve results or avoid harm.⁷⁸ Responsibility for the outcomes of policies and decision-making procedures can be imposed for two reasons: first, because corporations make decisions on the basis of reasons; and second, because they have the capacity to change not only the goals and policies animating decisions but also the manner in which decisions are made.⁷⁹ Viewed in this way, corporations choose a course of action based on a rational decision to do so, but this rationality is not fixed and can adapt to differing circumstances.

From the above discussion it can be observed that corporations do exhibit the characteristics necessary to be considered intentional actors. However, the imposition of liability upon corporations must not only be justified in terms of their ability to exhibit intentionality. Consideration must also be given to the reasons for imposing criminal liability for corporate action *per se*. The next section examines the general justifications for holding corporations accountable for the wrongs and harms they cause.

D. Justifications for Corporate Responsibility

The rationale for imposing criminal liability upon corporations is often expressed in terms of justifications for *punishing* corporations for their actions.⁸⁰ While the notion of punishment is inextricably linked to criminal responsibility, there are justifications for holding corporations responsible for their actions which lie beyond the traditional utilitarian and desert-based theories of punishment. Not all corporate misconduct or harm should be criminalized; not all types of corporate wrongdoing are appropriately sanctioned through the recourse to the criminal law. This section examines justifications for imposing criminal liability upon corporations generally, without inquiring into what specific corporate behaviour is best controlled by imposing criminal as opposed to civil liability.

Of all the theories of justification for corporate responsibility, Fauconnet's is the most appealing. After conducting an extensive historical analysis of the imposition of responsibility since ancient times, he concludes that responsibility is becoming more and more individually-based, largely because the power of the State has triumphed over that of smaller entities such as family clans. With the emancipation of the individual comes a diminution of responsibility because the person is no longer responsible for collective acts, such as those of family members. The individual is only responsible for personal acts.⁸¹ Nonetheless, Fauconnet recognizes that collective responsibility subsists, albeit in a form different than has historically been the case. This new form of

⁷⁸ See *ibid.* at 483.

⁷⁹ See *ibid.* at 485.

⁸⁰ See *e.g.*: Note, "Developments in the Law: Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions" (1979) 92 Harv. L. Rev. 1227 at 1231 [hereinafter Harvard Note]; J.C. Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Mich. L. Rev. 386; "Reconstructing", *supra* note 28.

⁸¹ See Fauconnet, *supra* note 1 at 334-35.

responsibility is that of associations, corporations, foundations, unions and other *personnes morales*⁸² — entities which have a conscience, a personality and a will distinct from that of their members. Fauconnet continues:

Et comme ... les associations de toute nature ont repris dans les sociétés contemporaines un rôle important, il est de plus en plus nécessaire de reconnaître, *comme contre-partie à la liberté et aux droits toujours plus étendus que nous leur accordons*, leur responsabilité pénale.⁸³

Thus, as corporations are capable of exercising rights and benefiting from an ever-increasing number of entitlements granted to them by society, the natural corollary is that they are equally capable of assuming responsibility for criminal acts. However, Fauconnet is careful to note that this recognition of corporate criminal responsibility is not a return to more ancient times, when collective responsibility took the form of a vicarious liability for the acts of other family members. Collective responsibility should fall squarely on the entity itself and not the individuals which compose it.⁸⁴

A more modern echo of the view that corporate responsibility is a counterweight to the rights accorded to them is the opinion of Chief Justice Lamer of the Supreme Court of Canada in *R. v. Wholesale Travel Group*.⁸⁵

In my opinion, when the criminal law is applied to a corporation, it loses much of its "criminal" nature and becomes, in essence, a "vigorous" form of administrative law. With the possibility of imprisonment removed, and the stigma which attaches to conviction effectively reduced to a loss of money, the corporation is in a completely different situation than is an individual. While it might be argued that in closely held corporations, where there are only two or three shareholders who themselves manage the company, the stigma which attaches to the corporation will carry over to those individuals and will, therefore, affect human interests, it is my view that this consideration should not alter the analysis. *The corporate form of business organization is chosen by individuals because of its numerous advantages (legal and otherwise). Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it is to their benefit to do so, should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit).*⁸⁶

While this passage clearly reflects the paucity of corporate sanctions available and the corresponding impact it has on perceptions of the gravity of corporate responsibility as compared to individual responsibility, there is nothing unfair about imposing corporate criminal liability. In fact, Lamer C.J.C. underlines the reality that corpora-

⁸² *Personne morale* is the French term for a non-natural person who nonetheless possesses legal personality.

⁸³ Fauconnet, *supra* note 1 at 339-40 [emphasis added]. The author's translation is: "And as ... associations of all types have taken on an important role in contemporary society, it is increasingly necessary to recognize, *as a counterweight to the liberty and the ever-expanding rights we grant to them*, their criminal responsibility."

⁸⁴ See *ibid.* at 340-41.

⁸⁵ [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161.

⁸⁶ *Ibid.* at 182-83 [italics added].

tions exist largely for the convenience and benefit of those who constitute them. Moreover, corporations are legal actors who can and do enjoy a full panoply of rights in the same way as individuals. As such, it is only natural that they bear the consequences of participation in the legal and social order upon which society is based in the form of responsibility for wrongful and harmful actions.

Additional support for this justification of corporate liability can be found in the Law Reform Commission of Canada's Working Paper *Criminal Responsibility for Group Action*.⁸⁷ While it recognizes that corporations provide benefits to society, they can and do produce significant harms. It views group liability principally as a means of controlling the influence groups can have on society through the anonymous use of power. The control of such groups is needed to prevent them from asserting their values and interests to the detriment of those less powerful groups and individuals.

While the goals of many of our corporations — profit and growth — spur important advances in the technologies of production and marketing benefiting the Canadian consumer, decisions made in the course of this development have detrimental influences as well. In some cases these are felt by society generally, for example resource depletion and environmental pollution; in others they are felt by individuals — for example, injuries caused by faulty production or marketing standards. The fact that many corporations come into contact with large numbers of people increases the risk of detriment flowing from corporate action. ...

As a society we face the difficult problem of coping with the detrimental effects of corporate activities. ...

There is ... a need for exerting controls over corporate processes and for developing policies that will keep the interests of corporations in line with public interest considerations.⁸⁸

On the Commission's reasoning, it is legitimate to impose liability upon corporations for the detriment they cause, as a consequence of the license granted to them by society to pursue their own goals and interests. As society usually bears the impact of corporate harm, it is natural that the limits of lawful corporate action are set where harm to others begins.

The Commission also enumerates specific justifications for a corporate criminal liability — as opposed to an individually-based one — three of which are relevant to this section. The first is that individual responsibility focuses on isolated acts, thereby failing to consider the impact of the system in use in the corporation upon the commission of the offence. The second underlines that some offences simply have more meaning when analyzed as a collective effort, which can reflect the pressures and procedures involved in corporate decision-making better than the conduct of one individual. A third justification is efficiency. The Commission favours directing efforts at making corpo-

⁸⁷ Law Reform Commission of Canada, *Criminal Responsibility for Group Action* (Working Paper No. 16) (Ottawa: Law Reform Commission of Canada, 1976) [hereinafter L.R.C.C.]. The observations of the Commission, although made two decades ago, are still valid today.

⁸⁸ *Ibid.* at 3-4.

rations police themselves through internal disciplinary procedures. Thus the state would be able to allocate its scarce resources to prosecuting only the corporation. The resulting corporate liability would translate into internal action against individuals.⁸⁹

These specific justifications for corporate liability are shared in large measure by L.H. Leigh.⁹⁰ Like the Law Commission, he sees corporate liability as a means of transferring a police function from the community at large to persons and entities active in industry. He adds that corporate liability avoids difficulties in identifying or locating an individual offender, as well as locating evidence relevant to particular individuals. Moreover, it offers a convenient and fair alternative to the conviction of a mere agent of the corporation, or its top management, whose acts may be the result of corporate pressures or policies.⁹¹

However, Leigh's strongest justification — what he calls fairness and social justice — links back to Fauconnet's original justification. Leigh states that "it is important that the public realize that powerful entities are not above the law."⁹² Here again is the argument that corporations, as participants in society, must accept and abide by societal rules like all other persons. The attraction of such a basis for liability is that it is rooted in fairness and has the advantage of providing a close analogy with the situation of natural persons. The principal defect in such reasoning, however, is that it assumes that rights and obligations are correlative. Although in an ideal world this might be the case, it is a feature of the Anglo-American and continental systems that not all bearers of rights are also bearers of responsibilities.⁹³ The capacity to be responsible does not flow from the mere possession of rights, but requires a recognition by the law of an ability to act.

⁸⁹ See *ibid.* at 30-32. It is clear that the use of corporate liability in this way depends on the ability of judges and courts to set fines at values which induce the corporation to conduct an internal investigation and to follow up with effective enforcement. Determining appropriate sentences and enforcing them are crucial elements in any system of corporate criminal liability. While it is beyond the scope of this article to discuss these issues in any detail, there is literature on the subject. A fine example is B. Fisse & J. Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993) in which they develop a corporate accountability model which seeks, *inter alia*, to shift the responsibility for investigations of individual responsibility onto the corporation in situations where the complexity of the corporation or the crime involved renders it fruitless for the prosecution to do so. In the final chapter, they address the question of how to ensure under such a model that corporations would, in fact, follow through with required internal investigations. Under their model, three means of enforcement would be employed: imposing sanctions, such as punitive injunctions and adverse publicity orders for failure to undertake internal disciplinary action against responsible individuals, working with top and middle management to ensure that compliance is taken seriously and providing courts with the power to impose monitoring and supervisory controls on the corporation (*ibid.* at 160-61).

⁹⁰ L.H. Leigh, "The Criminal Liability of Corporations and Other Groups" (1977) 9 *Ottawa L. Rev.* 247.

⁹¹ See *ibid.* at 287.

⁹² *Ibid.*

⁹³ See Part I.A., above.

If one assumes that the justifications enumerated above are intended to apply only to those types of corporations and organizations that already qualify as intentional actors, this difficulty is overcome. Although it may appear that this reverses the analysis, an examination of the situation of individuals demonstrates that it is appropriate to proceed in this way. Justifications for individual criminal liability are premised upon the notion of a human being who possesses certain characteristics independent of the law, the most important of these being autonomy and rationality. Similarly, corporations, although formally brought into existence by legal rules of incorporation, also have attributes unrelated to these normative rules. These are the internal decision-making structures and rules of recognition by which the efforts of numerous individuals become corporate policy and corporate acts. On such a basis, both individuals and corporations already possess the ability to make choices about their behaviour before the law imposes liability upon them. Thus, justifications for imposing liability necessarily follow the identification of the intentional actor in question, be it human or corporate.

The enumeration of the justifications for corporate liability indicates that it lies upon a sound basis. The overarching principle governing the imposition of liability is that corporations participate in and benefit from society. As intentional actors capable of making rational decisions, they should be expected to assume their share of responsibility for wrongs caused by these decisions which affect others or society as a whole. Nonetheless, this general principle does not dictate a specific form of corporate liability. It simply asserts that corporate wrongdoing should attract liability. In order to argue that the corporation itself, and not the individuals who compose it, should be held liable, one must consider justifications of a more practical order, as described by the Law Reform Commission and Leigh. These underline the fact that an imposition of liability upon the corporation itself is necessary in certain circumstances because of the nature of corporate criminality. The importance of the corporate basis for liability will be discussed in greater detail in the next section.

Now that the basis for imposing corporate liability has been both established and justified, it is necessary to examine the impact corporate liability has upon the evaluation of the constituent elements of a criminal offence: the *actus reus* and the *mens rea*. The following section will consider what circumstances transform the potential liability of intentional actors into actual responsibility based on the combination of a particular act, omission or state of affairs with a degree of fault.

II. The Conditions for Liability

From the starting premise that all adult human beings are responsible for the consequences of their actions, the traditional criminal law then moves to a consideration of the circumstances which may generate liability in a specific case, commonly referred to as the general part of the criminal law. It divides the preconditions to individual criminal liability into three elements: act requirements, fault requirements and defences.⁹⁴ The consideration of corporate liability in this framework highlights the com-

⁹⁴ See Law Reform Commission of Canada, *Criminal Law — The General Part: Liability and Defences* (Working Paper No. 29) (Ottawa: Min. of Supply and Services, 1982) at 24 (describing the

plexities of defining corporate criminal conduct, as well as indentifying when it occurs in a given case. While the focus of discussion is, of course, corporate liability, some of the criticisms leveled at the conditions for individual liability are more general in nature and go beyond the corporate context.⁹⁵

A. Act Requirements

Act requirements can be referred to as the conduct element of criminal liability. In the general criminal law, they are principally concerned with the need to protect individual autonomy against unduly intrusive state action.⁹⁶ They set the parameters within which the action (or inaction) of an individual may attract criminal liability. Act requirements can be divided into four parts: the notion of an act, voluntariness, causation and justifications.⁹⁷

Fauconnet also considers the conduct element of criminal liability when discussing the situations which generate liability, which he refers to as *la théorie de l'infraction*.⁹⁸ The elements of this theory are similar to the above division, although they are expressed in different terms. First, there must be an external act or material element to an infraction: in other words, there are no crimes of opinion or of pure intention. Next, this act must be the product of human activity, not of natural forces beyond control, and attributable to an agent or to a principal actor. Finally, only a voluntary act may be attributed to an actor.⁹⁹

1. The Notion of Act and the Requirement of Voluntariness

Curiously, the traditional debate surrounding the question of what constitutes an act for the purposes of individual liability — imposing liability for omissions upon individuals — is not really relevant to the corporate context. This may be traced in part to the history of the criminal liability of corporations which was first imposed for nonfeasance, or the failure to fulfill a positive duty.¹⁰⁰ Oddly enough, it was simpler for the

commonly understood conditions for liability in Canada). This view was retained in the L.R.C.C.'s subsequent report, Law Reform Commission of Canada, *Recodifying Criminal Law* (Report 30), vol. 1 (Ottawa: Minister of Supply and Services, 1986) [hereinafter *Recodifying Criminal Law*]. See also: D. Stuart, *Canadian Criminal Law: A Treatise*, 3d ed. (Scarborough: Carswell, 1995). The British criminal law divides the conditions for liability in a similar fashion. Ashworth, *supra* note 4 at 78-79, describes them as act requirements, positive fault requirements and negative fault requirements.

⁹⁵ Wells makes a similar observation in *Corporations*, *supra* note 6 at 62.

⁹⁶ See Stuart, *supra* note 94 at 71-72.

⁹⁷ This is Ashworth's division, *supra* note 4 at 78-126. I prefer its more general terms to those of Stuart, *ibid.* at 74, who leaves out justifications and describes conduct as follows: "an act must, in addition to coming within the precise offence definition, be an act (1) of commission, or, (2) in certain cases only, of omission, (3) by a human being, and, (4) that is voluntary, and (5) if consequences are part of the definition, have caused those consequences."

⁹⁸ Fauconnet, *supra* note 1 at 92. A literal translation is: the theory of infractions.

⁹⁹ See *ibid.* at 91-93.

¹⁰⁰ See *Corporations*, *supra* note 6 at 97-100; French, *supra* note 3 at 174-75; Leigh, *supra* note 90 at 249-50.

courts to determine when a collective entity had failed to do something than it was to determine when the same entity had actually done something. While corporate omissions must still respect the requirement of fair notice, this is often accomplished through the use of the notion of a "sphere of risk" within which the corporation operates.¹⁰¹ On this basis, corporations, because they function within a regulated environment to begin with, have to accept the imposition of certain duties as a consequence of the privilege of doing business. Only those duties which fall outside this sphere can give rise to the argument that the corporation was not given fair notice.

More problematic is finding corporations liable for dangerous or risky states of affairs where the realization of the risk has yet to occur. Particularly where the risky situation is the product of diverse factors, it will be difficult to identify the existence of the state of affairs without a harmful result. Fauconnet has suggested that these situations are somewhat analogous to attempts to establish when the line has been crossed between preparatory acts and the execution of the crime. His discussion of more primitive societies, which punish only acts without regard to the subjective state of the actor, points to a possible solution — rendering the existence of the risky state of affairs an offence in and of itself.¹⁰² Certainly in the case of corporations which create situations of risk through positive actions or inaction, this approach has its attractions. This view is shared by others, particularly Wells, who finds that our current conception of risk is too restrictive to catch much corporate criminality, and that attitudes about what constitutes criminal behaviour delays intervention in corporate activity to after the occurrence of substantial harm.¹⁰³ This point will be discussed in further detail in the sections on causation and intention.

The most difficult question of all, however, is the determination of positive corporate action. This can be attributed in part to the fact that corporations can only act through their agents. As a result, there is a tendency to reduce the acts of the corporation into the acts of its agents who physically and mentally participated in the act. Even if it is accepted that some actions by the agents of a corporation constitute corporate action, the issue arises of which of these can be attributed to the corporation. As has been discussed earlier, French¹⁰⁴ and Wells¹⁰⁵ argue that it is those actions which em-

¹⁰¹ See Ashworth, *supra* note 4 at 138-39. In Canada, there is judicial language endorsing a distinction between the fair notice requirements needed for regulatory and "real" crimes for the purposes of evaluating the vagueness of a statutory offence: *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161, Cory J.; *143471 Canada Inc. v. Québec (A.G.)*, [1994] 2 S.C.R. 339, 167 N.R. 321, Cory J.; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385, Gonthier J. (reference to the existence of the justification at 1077). One of the justifications for this lower standard of *Charter* scrutiny in regulatory crimes is the "licensing justification" which essentially states that persons entering into the regulated field should be held liable for the harms they cause because they are best able to control its occurrence. For another view, see Stuart, *supra* note 94 at 172-73, 587-88, who is unpersuaded by this line of reasoning, especially as regulatory crimes can be committed by persons as well as corporations.

¹⁰² Fauconnet, *supra* note 1 at 99-101.

¹⁰³ *Corporations*, *supra* note 6 at 72-73.

¹⁰⁴ French, *supra* note 3 at 41-47.

¹⁰⁵ *Corporations*, *supra* note 6 at 133-34.

body corporate policy and are decided pursuant to corporate rules of procedure which are corporate acts. It should be noted, however, that under this model of responsibility, the intentions of the agents involved in the act are not relevant to the determination of the "corporateness" of the act.¹⁰⁶ Agents who act in accordance with corporate policy but for their own non-corporate reasons (such as the desire for promotion) still act for the corporation. Furthermore, illegal acts committed by agents which are either tacitly condoned or actively ratified after discovery by the corporation are also imputable to it.¹⁰⁷

It is important at this stage to remember the distinction between the terms "corporate intentionality" and "corporate intention", which can be confused when discussing corporate acts. The first can be described as the source of the capacity of a corporation to be accountable — that it has the ability to act in a way which attracts liability. The second corresponds to the presence of the mental element relevant to a given offence. Bearing this in mind, it is an interesting feature of the definition of a corporate act that it ensures a perfect overlap of corporate intentionality and action. Unlike human actors, who can involuntarily produce an external act through uncontrolled body movements,¹⁰⁸ a corporation has no way of acting without a certain deliberateness. A corporate act can always attract liability because it cannot occur without the existence of a rational decision to act on the part of the corporation. Even where the corporation is imputed with responsibility for the illegal acts of its agents, these must have been either condoned tacitly or ratified. Both cases involve a conscious decision based on knowledge of the illegal activity. Thus, in one fell swoop, it seems the problem of voluntariness is subsumed by the question of the existence of corporate action.

The principal criticism of this definition of corporate act is that it is difficult to prove when an act has been done in furtherance of corporate policy. The current alternatives, however, are corporate liability predicated on the individual liability of high-ranking officers and managers, and vicarious liability. Neither one is a satisfactory basis upon which to assess all types of corporate criminal liability. The individualist approach requires at least one identifiable human actor in order to attribute fault to the corporation. Such an approach cannot accommodate the situation where corporate harm is caused by system failure or a cumulation of various faults by many agents of the corporation, neither of which are sufficient to sustain an individual attribution of blame. Vicarious liability is limited use because it holds the corporation liable for acts of agents without regard to questions of fault.

Fisse has developed a statutory model for corporate liability which attempts to go beyond individually-based and vicarious liability and proposes a means of integrating the concept of organizational blameworthiness into the definition of an offence.¹⁰⁹ However, he achieves this by creating a concept of corporate fault which reflects or-

¹⁰⁶ See "Allocation of Responsibility", *supra* note 9 at 483-84.

¹⁰⁷ See *ibid.* at 484.

¹⁰⁸ For a discussion of the different types of automatism, see generally: Stuart, *supra* note 94 at 101-17; Ashworth, *supra* note 4 at 93-99.

¹⁰⁹ "Attribution of Criminal Liability", *supra* note 58 at 277-78.

ganizational blameworthiness, and by restricting the conduct element of a corporate offence to the commission of the external elements of the offence by a person for whose conduct the corporation is vicariously liable.¹¹⁰ This approach suggests that in order to develop a workable framework for corporate liability, it is not necessary, and perhaps not desirable, to include a concept of corporate *action*, as distinct from the notion of corporate *intention* in the elements of an offence. What is important is that corporate blameworthiness is part of the offence.

Certainly, there are practical advantages to reducing the *actus reus* component of the offence to proof of an external act committed by an agent of the corporation. However, theoretically, such a view dissolves the division between the conduct and mental elements of an offence. The consequence is that for a corporation to be liable on a corporate basis, corporate fault will always be required. It might seem this is simply a debate of terminology where the end result will be the same, irrespective of the approach. Nonetheless, there is a need to recognize a corporate act, as distinct from corporate intention. The fact that corporations act of necessity with a certain intentionality does not change the fact that they do act. Moreover, limiting potential criminal conduct to that which can be committed by an individual or a group of individuals is unduly restrictive. This is particularly true where an offence is drafted with a reduced level of fault, such as strict liability or even a no-fault standard. Conviction of a corporation on the basis of corporate rather than individual action reduces the power of charges of unfairness traditionally leveled at lower-level fault offences. No-fault offences would be transformed from vicarious liability into direct liability for behaviour over which, by definition, the corporation must have had control.

The example of an eventual liability of corporations for risky states of affairs demonstrates the problems of casting corporate action into an individual mold. Where it is corporate policy itself or the structure of the corporation which creates risk, the link between the individuals who physically or mentally contributed to the policies or the state of affairs becomes quite tenuous. It is simpler to qualify the existence of the policy, without regard to which agent or agents created it, as a corporate act. This does not mean liability should flow immediately from such a qualification; a consideration of corporate intention may be required, but it does avoid a complicated process of attribution of cumulative or truly collective activity to specific agents in the corporation. This process of attribution of an act to an agent — causation — should be considered.

2. Causation

Once an act, omission or state of affairs has been found to exist and is voluntary, then the question arises of the attribution of the voluntary act to a responsible actor.¹¹¹ However, scholars have noted that the principles governing causation in the criminal law are far from coherent.¹¹² Nonetheless, the factual “but for” causal link is not usually a problem in the criminal law: “The principle of individual autonomy presumes that,

¹¹⁰ *Ibid.* at 280-82.

¹¹¹ See Ashworth, *supra* note 4 at 99.

¹¹² See *ibid.* at 99-100; *Corporations*, *supra* note 6 at 43; Stuart, *supra* note 94 at 120.

where an individual who is neither mentally disordered nor an infant has made a sufficient causal contribution to an occurrence, it is inappropriate to trace the causation any further."¹¹³ It is the notion of *legal* causation which is more problematic. The concerns in individual liability thus lie with those cases where other factors, such as obvious culpability or intervening acts, are used to determine whether the attribution of the act to an actor on the standard "but for" factual test is appropriate.¹¹⁴

For Wells, causation is inextricably linked to blame. She views the exercise of blaming as the assertion of a causal link between an actor and an event. Moreover she believes that legal causation is a non-issue:

There is a deep tension between the needs of the legal system to name an individual, whether in a civil or criminal action, and the multiplicity of causes of any event. Causation illustrates well the argument that legal doctrine owes its existence to and is therefore dependent on a constellation of a wide range of factors. The inevitable result is that legal principles are blurred and often irreconcilable. I have called legal causation a non-issue to emphasize the futility of the traditional search for separate principles by which to impute cause beyond the factual "but for" level. This of course does not mean that any "but for" contribution must lead to a legal attribution, but that taking any steps beyond "but for" means entering a complex terrain of responsibility attribution which is connected to issues which lie beyond those of cause. Whether a result was the *sine qua non* of the defendant's act is a necessary but not sufficient condition for imputing cause.¹¹⁵

From this conception of causation, it becomes relevant to consider why blame is attributed to certain actors and not to others. As Wells observes, "[m]any of the decisions which establish which causal actor to pursue are made at a broad cultural level."¹¹⁶ Moreover, she argues that whether any causal link exists between an actor and an event depends largely on cultural attitudes toward risk, and the qualification of events as avoidable or unavoidable, natural or man-made.¹¹⁷

The relevance of these observations on causation to corporate liability can be seen in two areas. First, the traditional approach to causation, which seeks a human actor causally connected to the event, limits the inquiry into the range of potentially blameworthy actors. As corporate action is often an amalgamation of factors, the traditional criminal law will tend to overlook this multiplicity of causes and concentrate on identifying human actors. Not only does this individualize legal causation, it also ignores that a combination of several individual acts can result in the event without any of them alone being sufficiently causally connected to ground individual liability.

¹¹³ Ashworth, *ibid.* at 100. See also Stuart, *ibid.* at 128-29.

¹¹⁴ See Ashworth, *ibid.* at 103; *Corporations*, *supra* note 6 at 43-44.

¹¹⁵ *Corporations*, *supra* note 6 at 43. Stuart, *supra* note 94 at 130, has expressed a similar view with regard to the notion of "imputable cause" (his term for legal causation): "[T]he question is then, 'given that the accused's conduct was at least a cause of the consequence, is he criminally responsible for causing it'? This is not a scientific inquiry, rather one of fixing moral blame similar to, but distinguishable from, the moral inquiry involving the requirement of fault."

¹¹⁶ *Corporations*, *ibid.* at 49.

¹¹⁷ *Ibid.*

An absurd illustration of this point is found in the *Sheen Report*,¹¹⁸ published following an inquiry into the causes of the capsizing of the *Herald of the Free Enterprise*. In the report, several employees were found to have contributed to the factual events causing the capsizing itself. However, the individual responsibility that could attach to any one of them was problematic because it was the cumulation of their errors which actually allowed the disaster to occur. Moreover, the acts of some of the employees were a consequence of corporate policy.¹¹⁹ The company itself was eventually indicted for manslaughter (although not convicted), but the corollary was to proceed against all the individuals named in the *Report*. Such an approach reinforces the view that it is the human element in causation which is the primary concern.

In the corporate context, a more appropriate use of causation principles would operate in tandem with the notion of a corporate act described above. In this way, causal connections could be based upon collective activities or multiple factors, without the need to identify the individual causal connections of each constituent element of the collective act. This better reflects the view that a corporate actor has an existence which transcends that of its individual members and thus that events may be causally connected to it directly, as a separate entity. Moreover, it avoids the problematic attribution of blame for collective acts upon individuals who may constitute only a partial or indirect factual cause of the event.

The second point to be raised concerning causation in the corporate context is more abstract. It concerns the societal qualification of when certain actions should attract blame. As corporate crime often involves activities which are not traditionally considered avoidable or which are culturally accepted as part of an industrialist society, it obscures the establishment of a causal link between harm caused and the corporate actor because there is no perceived need to attribute blame at all. Fisse describes criminally proscribed harm as unwanted, in the sense that “[t]he infliction of criminal harm is unwanted even if the victim receives full compensation.”¹²⁰ While he argues that corporate crime is also unwanted, his observation goes to the public perception of the seriousness of corporate actions which are already criminalized. In particular, he is referring to the qualification of regulatory and strict liability offences as less serious than classical crimes. As corporate crime tends to be more regulatory in nature, this fuels a belief that corporate crime is less blameworthy than “real” crime.

However, Fisse’s comment does not consider those corporate actions which may fail to be considered crimes at the outset. This issue has been discussed by Wells, who notes that there is an “increasing trend towards blaming corporations for harms which in earlier times would have been attributed to individual fault or fate.”¹²¹ More importantly, she stresses that responsibility and blame attribution are not confined to individ-

¹¹⁸ Department of Transport, *M.V. Herald of Free Enterprise: Report of the Court No. 8074* (U.K. Department of Transport, 1987) [the *Sheen Report*].

¹¹⁹ See *Corporations*, *supra* note 6 at 48.

¹²⁰ “Reconstructing”, *supra* note 28 at 1150.

¹²¹ C. Wells, “Corporations: Culture, Risk and Criminal Liability” [1993] *Crim. L. Rev.* 551 at 553 [hereinafter “Culture, Risk and Criminal Liability”].

ual moral positions. Qualifications of harm and the expected response to them are functions of the type of social system in which they arise.¹²²

Wells identifies a particular difficulty in attributing blame to corporations related to the current legal conception of risk.¹²³ Although this notion plays a more significant role in the assessment of the mental element in negligence and recklessness offences, it also informs our conception of causation. In essence, to view a result as the materialization of a risk is in some way a recognition that the event was foreseeable (whether reasonably or not) and even preventable.¹²⁴ This is a first step toward treating the event as the result of a failure of foresight, a failure for which society may then require an attribution of blame. Thus, as the concept of risk is widened, so is the ability to trace a causal link between the harm caused by the materialization of the risk and a responsible actor. A further discussion of the nature of risk shall be presented in the section on mental states.

3. Justifications

For those who subscribe to the theoretical dichotomy between justification and excuse, the effect of a justification is that "society regards the citizen's conduct as right on that occasion."¹²⁵ Normally, justifications are rooted in arguments of individual autonomy, which allow a person to inflict harm to prevent a greater harm from materializing. It is clear that such considerations do not apply to corporations as they cannot be subjected to such serious acts as loss of life or grievous bodily harm. A discussion of corporate defences to liability naturally flows from an examination of corporate fault.

B. Fault Requirements

It is this final step in imposing liability that has posed the greatest obstacle to a separate corporate liability. The individualist bias in criminal law can be seen at its strongest here, where the notion of corporate fault has been restricted in practice to the

¹²² See *ibid.*

¹²³ Wells discusses this in detail in *Corporations*, *supra* note 6 at 68-75 and in "Culture, Risk and Criminal Liability", *ibid* at 553-558.

¹²⁴ See "Culture, Risk and Criminal Liability", *supra* note 121 at 556.

¹²⁵ Ashworth, *supra* note 4 at 113. The dichotomy between justification and excuse was discussed by the Supreme Court of Canada in *R. v. Perka*, [1984] 2 S.C.R. 232, 13 D.L.R. (4th) 1. Even though the Court split over how to classify the defence of necessity, both Dickson J. and Wilson J. recognized the theoretical distinction between justification and excuse. Dickson J., writing for the majority, expressed it as follows:

Criminal theory recognizes a distinction between "justifications" and "excuses". A "justification" challenges the wrongfulness of an action which technically constitutes a crime. ... For such actions people are often praised, as motivated by some great or noble object. The concept of punishment often seems incompatible with the social approval bestowed on the doer. In contrast, an "excuse" concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor (*ibid.* at 246).

But see Stuart, *supra* note 94 at 421-23, arguing that the distinction is of questionable value.

fault of certain high-ranking persons within the corporation. This approach, called the identification or alter ego doctrine, denies the existence of fault on the part of the corporation without the presence of fault by an individual.¹²⁶ It will be demonstrated that a distinct form of corporate fault, based upon the independent corporate identity discussed earlier, is an important complement to current theories of criminal responsibility.

Any discussion of corporate fault must cut across the spectrum of degrees of fault, and find the basis upon which corporations can fulfill the mental elements of an offence. Corporate fault will be examined generally before its various forms and relevant defences are considered. Moreover, reference will be made to the current system, in order to highlight its limitations, and to new proposals, which seek to address them.

It is clear that fault requirements are also the subject of much discussion in the individual context. In particular, the disagreement over the proper qualification of regulatory crimes, the differing perceptions of strict and absolute liability offences, as well as the subtleties of defining recklessness, raise important issues for the criminal law generally. While it is beyond the scope of this article to discuss them in any detail, these issues are interwoven into the corporate liability debate, and shall be examined as they relate to it.

1. The Notion of Corporate Fault

The four principles under which fault is ascribed to persons — accountability, fair opportunity, answerability, and justification or excuse¹²⁷ — help to explain why ascription of fault to corporations has been problematic. These principles underlie the doctrine of *mens rea*, which Ashworth describes as follows: “criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it might have, [such] that they can fairly be said to have *chosen* the behaviour and its consequences.”¹²⁸ The notion of individual choice, therefore, animates the understanding of when it is appropriate to ascribe fault for behaviour. The impact of this concern for preserving individual liberty has been a focus of subjective fault, in other words, the fault of the individual offender. Only where a defendant has intended or knowingly risked the consequences can responsibility be ascribed.¹²⁹ Added to the *mens rea* principle are the belief principle and the principle of correspondence. The

¹²⁶ For an historical overview and discussion of the doctrine, see generally: *Corporations, supra* note 6 at 103-111; French, *supra* note 3 at 181-86; Leigh, *supra* note 90 at 251-64.

¹²⁷ See *Corporations, supra* note 6 at 62.

¹²⁸ Ashworth, *supra* note 4 at 128 [emphasis in original]. See also: Stuart, *supra* note 94 at 141: “There is indeed a fundamental principle underlying the *mens rea* concept: in criminal law there should normally be no responsibility without personal fault. ... Criminal responsibility without personal fault removes the choice of lawful behaviour”; *Recodifying Criminal Law, supra* note 94 at 18: “a person is not liable for his conduct unless he has some fault or blameworthiness.” Both Stuart and the L.R.C.C. correctly note, however, that *mens rea* is a confusing term because of its dual meaning: first, as a general expression of fault and second, as a degree of fault involving knowledge, intention or recklessness. In this article, the term *mens rea* is used in the former sense.

¹²⁹ See Ashworth, *ibid.* at 129; Stuart, *ibid.* note 94 at 146-48.

former ensures that criminal liability is based upon the consequences the defendant believed, at the time, would result from it. The principle of correspondence requires that the fault element of a crime correspond to the conduct element of the crime.¹³⁰

As has been stated earlier in this article, concerns of individual autonomy and liberty are not relevant to corporations. Nonetheless, the prevailing opinion among advocates of corporate liability is that criminal liability should be ascribed to corporations on the basis of some form of fault. Therefore, the first step is to develop a notion of fault which takes into consideration the nature of corporate entities and thus reflects corporate blameworthiness.

Fisse describes three theories of corporate *mens rea*: managerial, composite and strategic.¹³¹ The first corresponds to the identification doctrine used by courts in both England and Canada.¹³² Taken strictly, it stands for the proposition that a corporation should only be held personally liable for the acts and intentions of those to whom the primary management of its affairs has been attributed in the constitutional documents of incorporation.¹³³ Generally, this limits the ambit of responsibility to members of the board of directors, the managing director or the general meeting, although these fixed categories are increasingly flexible. The inevitable result, as some authors have noted,¹³⁴ is that this model is not well-suited to the realities of large corporations where the decentralization of decision-making results in decisions of consequence being made by middle managers. Moreover, even if a more nuanced approach of identifying the will and mind of the corporation were used, such as one which distinguished between those persons who are in fact responsible for corporate policy as opposed to those who merely carry it out, the decentralization of decision-making makes it difficult to distinguish clearly between the two groups.¹³⁵

The greater difficulty with the doctrine, however, is that liability is predicated upon the existence of at least one human actor possessing the requisite mental state for the offence from within the limited class described above. If no one person can be imputed with the mental element of the offence, the prosecution fails. The result is that system failures and objectionable corporate policies which cause harm are left outside of the scope of criminal responsibility.¹³⁶

The second type of *mens rea* reflects an attempt to correct this situation. As the name suggests, composite *mens rea* is based on the knowledge of various persons within the corporation. It is premised upon the idea that the collective knowledge of all

¹³⁰ See Ashworth, *ibid.* at 129-30; Stuart, *ibid.* at 327-31.

¹³¹ "Reconstructing", *supra* note 28 at 1186.

¹³² The seminal cases are: in the U.K., *Tesco Ltd. v. Nattrass*, [1972] A.C. 153; in Canada, *Canadian Dredge*, *supra* note 60. However, Stuart, *supra* note 94 at 579, notes that in Canada the identification doctrine has been interpreted more flexibly than in the U.K.

¹³³ See Leigh, *supra* note 90 at 254. Nonetheless, the question of the precise level of manager who constitutes a "directing will and mind" is not definitively settled in Canada, see Stuart, *supra* note 94.

¹³⁴ See Stuart, *ibid.* at 580.

¹³⁵ See "Reconstructing", *supra* note 28 at 1188.

¹³⁶ See *Corporations*, *supra* note 6 at 132-33.

the employees of a corporation is imputable to it. Nevertheless Fisse is critical of the theory as it does not, in his mind, bear any connection to corporate blameworthiness: "composite *mens rea* is a mechanical concept of mental state that fails to reflect true corporate fault; discrete items of information within an organization do not add up to corporate *mens rea* unless there is an organizational *mens rea* in failing to heed them."¹³⁷ However, Fisse's criticism should be limited to only those cases where composite *mens rea* is understood to mean disparate and unconnected knowledge within the corporation. As Wells has pointed out, some of the objections to aggregation relate more to a failure to define culpability criteria in a manner which can be intelligently applied to corporations, rather than to the notion of aggregation itself.¹³⁸ This point will be discussed in further detail below.

The most radical conception of *mens rea*, however, is that which Fisse calls strategic. This is *mens rea* manifested through corporate structures and policies. Such a view clearly conforms with the emerging understanding of how a significant number of corporations operate.¹³⁹ Organization theory emphasizes that corporations have an existence which transcends those of its employees, directors, agents and original incorporators. Moreover, corporate decisions are the result of procedures and internal bargaining processes which cannot be traced back to the individuals who contributed to them. Strategic *mens rea* therefore reflects the truly corporate nature of the acts of corporations.

It is conceptually appropriate to develop a notion of corporate fault which, like the corporation itself, is dependent on no single person, but which is also distinct from any individual. The nuance is significant because it means the concept is more discerning and precise than aggregation. Thus discrete pieces of information or knowledge cannot be added together and imputed to the corporation unless they have been subsumed into the body of corporate knowledge through internal procedures and communication. Only those types of fault which are the product of *corporate mens rea* can result in corporate liability.

Strategic *mens rea* does leave one conceptual difficulty to be resolved. As corporate acts are only those animated by corporate policy, it would appear that all corporate acts are intentional to begin with. As a result, it should be questioned whether the conduct element of an offence can only be qualified as corporate before corporate intention is established. This is possible as examining corporate policy enables a distinction to be made between an act of the corporation and an act committed within the personal capacity of an agent. It is conceded that in practice such a distinction may be difficult to sustain. Nonetheless, it is possible that the level of intention required to identify the act with the corporation is less than that required for the mental element of a particular offence. However, this would only have a practical consequence where the corporation is indicted for an offence with several variants based on differing degrees of fault while

¹³⁷ "Reconstructing", *supra* note 28 at 1189-90.

¹³⁸ *Corporations*, *supra* note 6 at 133.

¹³⁹ See Part I.B., above, on the nature of corporations.

always requiring the same conduct element, or where no fault element is required.¹⁴⁰ Of course, it may also be argued that the attribution of the conduct to the corporation is achieved solely by the establishment of whatever level of intention is required in a given case.

The latter approach is the one preferred by Fisse. In his proposed statutory model of corporate fault, he broadly defines the conduct element as the commission of the external elements of the offence by a person for whose conduct the corporation is vicariously liable.¹⁴¹ While this seems to cast the net of potential liability over a broad range of activities, the fault element of the model is designed to attract only those cases that embody corporate blameworthiness.

Without describing Fisse's model in detail, it is important to mention his proposal for a new form of fault which will overcome practical difficulties in proving strategic *mens rea*.¹⁴² As he states:

Although strategic *mens rea* is a genuinely corporate concept of mental state, requiring the prosecution to establish a criminal corporate policy at or before the time that the *actus reus* of an offense is committed would make corporate *mens rea* extremely difficult to prove. Corporations almost never endorse criminal behaviour by express policy, and boilerplate anticrime policy directives may make it very difficult to establish the existence of implied criminal policies. The difficulty in proving strategic *mens rea*, however, may be significantly reduced if the requisite criminal *mens rea* need not be shown to have existed at or before the time of the *actus reus* of the offense. If the corporate defendant is given a reasonable opportunity to formulate a legal compliance policy after the *actus reus* of an offense is brought to the attention of the policy-making officials, the corporation's fault can be assessed on the basis of its present reactions rather than its previously designed formal policy directives.¹⁴³

A similar basis for responsibility is described by French, which he calls the principle of responsive adjustment ("PRA"). In his view, this expression captures the notion that the "causally responsible party for an untoward event should adopt specific courses for future action calculated to prevent repetitions."¹⁴⁴ The principle would hold an actor who has not made adjustments to correct a situation which has caused harm morally responsible for that harm. However, it is important to note that PRA does not amount to an attribution of intention for the previous act.

¹⁴⁰ This is in reference to the no-fault offence where proof of the *actus reus* suffices to convict the defendant. However, nothing prevents no-fault offences from being drafted such that it is *corporate conduct* which must be proved. This would constitute a more nuanced approach to no-fault offences than is currently the case, where proof of conduct by an agent is sufficient to attract the liability of the corporation. It would also expand the scope of possible conduct which could be viewed as unlawful to acts which cannot be qualified as the act of an individual agent, such as dangerous states of affairs and system failures.

¹⁴¹ *Supra* note 58 at 280-81.

¹⁴² *Ibid.* at 279-80; "Reconstructing", *supra* note 28 at 1191.

¹⁴³ "Reconstructing", *ibid.* at 1191-92.

¹⁴⁴ French, *supra* note 3 at 156.

PRA incorporates quite another idea. It might be expressed by saying that a refusal to adjust one's harm-causing ways of behaving has a second-level effect of associating oneself, morally speaking, with the earlier untoward event. I take it that refusal in this context is an intentional act or acts and that refusal may take a myriad of forms from practiced indifference to blatant repetition. The intuition to which PRA must appeal is that a person's past actions (even if unintentional) can be and usually are taken into the scope of the intentions that motivate that person's present and future actions. ...

PRA entails the idea that the intention that motivates a lack of responsive corrective action (or continuance of offending behaviour) affirms, in the sense that it loops back to retrieve the actions that caused the evil.¹⁴⁵

French's philosophical justification for PRA is interesting, but the real usefulness of the concept is in considerably lengthening the traditional *actus reus-mens rea* time-frame. While the principle of contemporaneity is not absolute,¹⁴⁶ a concept of reactive fault, as Fisse and French conceive of it, would create a new manner by which the conduct of corporations could be assessed.¹⁴⁷ Wells adds that an extension of the traditional time-frame used to consider the blameworthiness of actors would have a particularly apt application in the case of corporations creating situations of risk.¹⁴⁸ Finally, in practical terms, it would be easier to identify fault on the part of the corporation through its failure to act as a consequence of harm, than to prove the existence of a faulty policy prior to the harm.¹⁴⁹ The notion of reactive fault shall be discussed in greater detail as it applies to different degrees of fault later in this section.

Having established that corporate fault is best captured through a reference to corporate policy and structure, types of fault should be discussed. It will be necessary to examine not only what degrees of fault are appropriate when attributing corporate responsibility, but also how these types of fault might be reformulated to better reflect the manner in which corporate policy is adopted and carried out.

¹⁴⁵ *Ibid.* at 156-57.

¹⁴⁶ See Ashworth, *supra* note 4 at 133-34; Stuart, *supra* note 94 at 329-31. The classic case recognizing flexibility in the principle of contemporaneity is that of *Fagan v. Commissioner of Metropolitan Police*, [1968] 3 All E.R. 442 (C.A.) [hereinafter *Fagan*]. In that case, the accused ran his car onto a police officer's foot accidentally but then refused to remove it immediately afterward when requested to do so by the officer. The Court of Appeal held that although there had been no intent when the act had first occurred, because the accused had kept the car on the police officer's foot, the required intent could be "superimposed on an existing act" (*ibid.* at 445). The Supreme Court of Canada considered the *Fagan* approach in *R. v. Cooper*, [1993] 1 S.C.R. 146, 146 N.R. 367. In that case, the accused grabbed the victim around the neck and shook her, but he lost consciousness before she died some 30 seconds to 2 minutes later. It was held that the *mens rea* for murder had been established. Cory J., writing for the majority, noted at 157 that the principle of contemporaneity did not require that the guilty act and guilty intent be "completely concurrent." Instead, what was required was that the intent and the act coincided at some point, although how this would apply in an individual case would depend on the circumstances.

¹⁴⁷ "Attribution of Criminal Liability", *supra* note 58 at 284-86; "Reconstructing", *supra* note 28 at 1201-03; French, *supra* note 3 at 167-69.

¹⁴⁸ *Corporations*, *supra* note 6 at 133-134.

¹⁴⁹ See "Reconstructing", *supra* note 28 at 1192.

2. Types of Fault¹⁵⁰

a. Fault Based on an Aware State of Mind

Fault based on an aware state of mind is a general label covering several types of fault. Despite its varied content, it is a useful shorthand to describe fault based upon a guilty mind. Nonetheless, confusing terminology abounds (this level of fault is also called *mens rea*), complicated by an artificial distinction between regulatory and truly criminal law offences which affects the analysis and classification of intention-based fault levels.¹⁵¹ While it is trite to note that regulatory offences often require lower levels of fault than crimes, this distinction is not useful when speaking about levels of fault generally.¹⁵² The fact that certain levels of fault may be constitutionally mandated in specific circumstances does not alter this observation.

Much of the debate about intention-based fault concerns the appropriateness of a given level of fault for a given offence, most often in the context of a potentially substantial loss of liberty for the accused. The debate concerning subjective versus objective intent requirements is centred on the level of intent required in traditional criminal offences where the elaboration of fault is ambiguous in the description of the individual offence. As stated earlier, however, it is outside the scope of the present article to address this more general problem. The focus is to examine how the corporate model of fault would operate within the broad categories of fault recognized by the criminal law. As a result, the description of the variants of intention-based fault shall be brief, with a focus on the elements specifically pertinent to corporate liability instead. For simplicity, comments will be divided between intention and knowledge on the one hand and recklessness and wilful blindness¹⁵³ on the other.

i. Knowledge or Intention

Intention, or subjective intent, is the highest degree of fault. Although the criminal law has not defined it, its meaning has not usually caused any difficulty for courts.¹⁵⁴

¹⁵⁰ In this classification of types of fault, the divisions between them are both blurred and the object of dispute. The original version of this article used the British classification: intention, recklessness, negligence and strict liability (no-fault), see Ashworth, *supra* note 4 at 135-171. In this version, the adopted tripartite division was laid down by the Supreme Court of Canada in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161 [hereinafter *Sault Ste. Marie* cited to S.C.R.]: fault based on an aware state of mind or *mens rea* (intention, knowledge, recklessness or in some cases, wilful blindness), strict liability (fault on a simple negligence standard), and absolute liability (no fault). This is also the terminology used by Stuart, *supra* note 94 at 149. Although this is the division used for regulatory offences, a discussion of the *mens rea* level of fault can be broken down into the traditional divisions used for true crimes.

¹⁵¹ See Stuart, *ibid.* at 172-73. Stuart does not subscribe to such a distinction, but concedes that it unfortunately has a bearing on how fault requirements are analyzed by the courts.

¹⁵² See *ibid.*

¹⁵³ In Canada, wilful blindness has been recognized as a separate type of intention-based fault, see *ibid.* at 209-213.

¹⁵⁴ See *ibid.* at 196.

However, when considering the full range of offences which carry criminal sanctions, the number of offences actually requiring proof of intention is relatively low.¹⁵⁵ Of these, only a handful can be committed by a corporation, for example: fraud, theft, and in some jurisdictions, manslaughter.¹⁵⁶ In light of this, Wells is critical of the traditional approach to corporate criminal liability, which puts too much emphasis on overcoming the difficulties of holding corporations liable for intentional crimes:

Many of the discussions of corporate accountability fail to comprehend the broad nature of criminal culpability principles. Often the discussion assumes that intention is the base standard. *Few crimes require proof of intention*, but ... even objective recklessness, if rigidly applied, can be a powerful ally of a corporate defendant. Additionally, where a subjective standard is embraced, it draws on a dualist conception of human action which can be challenged as both mistaken and misleading.¹⁵⁷

Despite the fact that corporations are unlikely to be prosecuted for truly criminal offences, an examination of ways to establish when a corporation possesses an aware state of mind is still relevant since many public welfare offences contain express fault requirements¹⁵⁸ with respect to either the circumstances or the consequences of the conduct involved.¹⁵⁹ Thus, it is important to know how a corporation exhibits the intention and knowledge levels of fault.

At the outset, it is clear that establishing a subjective intentionality through tacit corporate policy presents serious evidentiary difficulties. Companies cannot (and would not) have *expressly* illegal purposes,¹⁶⁰ and proving unofficial policies might be

¹⁵⁵ See "Culture, Risk and Criminal Liability", *supra* note 121 at 562; Stuart, *ibid.* at 148 (referring to the fact that even among criminal offences considered "crimes", as opposed to public welfare offences, an increasing number require a standard of fault less than subjective intent). Stuart also observes, *ibid.* at 187, that recent Supreme Court jurisprudence indicates a trend where only very few offences will be found to *require* subjective intent. Under current Canadian law, *Charter* standards require proof of subjective intent for murder, attempted murder, accessory liability to an offence constitutionally requiring subjective intent, war crimes and crimes against humanity. This being said, many offences are nonetheless drafted in a manner which requires the Crown to prove subjective intent, see *ibid.* at 192-95.

¹⁵⁶ See e.g. C. Wells, "A Quiet Revolution in Corporate Liability for Crime" [1995] New L.J. 1326 at 1326, referring to the recent British prosecutions of manslaughter in *P&O European Ferries (Dover) Ltd.* (1991), 93 Cr. App. R. 72 and *OLL Ltd.* [1994] New L.J. 1704.

¹⁵⁷ "Culture, Risk and Criminal Liability", *supra* note 121 at 561-62 [emphasis added].

¹⁵⁸ These fault requirements are described using *mens rea* terms such as "intentional", "wilful", or "committed with knowledge." The expression "*mens rea* term" is borrowed from Stuart, *supra* note 94 at 195.

¹⁵⁹ The intention level of a statutory crime should not *prima facie* be considered different from the intention level required for a traditional crime where similar language is used to describe the intent. It is clear that in more regulatory-type offences the *Charter* may not require proof of intention (especially where imprisonment is not available as a sanction). This does not change the fact that other offences can be drafted as intention-based, or have variants based upon more than one level of fault.

¹⁶⁰ See Leigh, *supra* note 90 at 258-59. This follows, by implication, from the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 15 [hereinafter *BCA*] which provides that "A corporation

difficult without the cooperation of some of the agents of the corporation. The most promising means of establishing intention or knowledge on the part of a corporation would be through the ratification of the illegal act of an agent, either by failure to discipline the agent, or because the actions in question are the effect of another corporate policy. Two examples of the latter are an insistence upon certain profit levels at whatever cost and maintaining of working conditions which greatly increase the likelihood of employee failure.

Such a model for corporate fault recognizes that expressions of intention by a corporation will rarely be overt. Nonetheless, by using ratification as a means of attaching fault to a corporation, the attribution of intention or knowledge rests upon a fair basis. After all, ratification can only occur where there is knowledge of the illegal act committed by an agent, thus revealing a tacit approval — if not encouragement — of the conduct.

Intention-based fault for corporations does not have to be limited solely to ratification of individual acts. In keeping with the model's appreciation for how corporate actions and decisions are carried out, corporations could also be faulted for corporate policies which seek to insulate higher officials from knowledge of illegal acts. While the purpose of such action is to institutionalize wilful blindness, the policies themselves are not wilful blindness. They reflect an intention to prevent detection of illegal acts where the corporation has either the knowledge or the suspicion that such acts occur within the organization. It should be emphasized, however, that the key to liability on this basis is the existence of the *intention* to shield managers from blame and not the mere fact that managers were not informed of illegal acts. While the existence of the latter fact might point to a lower level of fault, such as negligence, it would not be sufficient for proof of intention.

In essence, attributing intention to corporations focusses principally upon the institutional circumstances which allow illegal acts to occur or which seek to actively prevent knowledge of illegal acts from being recognized through normal internal decision-making procedures. It is not clear whether the creation of a separate offence prohibiting the deliberate structuring of decision-making channels to avoid accountability on the part of high-ranking officials would be a more effective way of controlling intentional corporate conduct than simply allowing proof of such structuring to be substituted for proof of intention of the specific crime at issue. The former better respects the fairness concerns inherent in the doctrine of fair labeling,¹⁶¹ while the latter would link proof of corporate intention more closely to how many large decentralized corporations operate.

These suggestions are all rooted in the corporate policy model of fault. It is clear, however, that such a model can and should coexist with individual liability on the part of agents of the corporation. Concurrent individual liability ensures that the corporate structure does not serve as a bar, either to identifying responsible actors within the corporation or to prosecuting them. Moreover, as has been mentioned, this may be the best

has the capacity and, subject to the Act, the rights, powers and privileges of a natural person." Clearly, this capacity excludes criminal activity, as is the case with natural persons.

¹⁶¹ See Stuart, *supra* note 94 at 190-91.

way to proceed with small corporations, as their high-ranking officials may be more directly linked to the occurrence of corporate harm than is the case in larger corporations. Of course, determinations of individual liability, particularly for intention-based offences, require all the procedural and other protections to which individuals are entitled under the general criminal law.

ii. Recklessness and Wilful Blindness

Recklessness is the standard of fault applied in many criminal offences of which corporations can be convicted.¹⁶² In Canada, recklessness is generally understood to be subjective awareness of the consequences and/or circumstances of an act.¹⁶³ In other words, it refers to the case where a defendant has foreseen the particular harm proscribed and yet has gone on to take the risk.¹⁶⁴ The key element in this type of recklessness is that it is based upon a risk the defendant believed to exist. In Great Britain, a second form a recklessness based on an objective standard is also recognized.¹⁶⁵

For the purpose of applying the notion of corporate fault to recklessness, it is not necessary to venture further into the appropriateness of a subjective or objective standard of recklessness.¹⁶⁶ As Canadian law uses a subjective standard for evaluating criminal recklessness, this analysis shall use the same standard. Lower standards of fault will be discussed in the section on strict liability.

Evaluating corporate recklessness requires a similar approach to that used in intention-based offences, namely, an awareness that express corporate policy will rarely be of assistance in proving fault. Thus, establishing recklessness is dependant upon the existence of tacit policies which the corporation adopted despite a known risk that prohibited conduct could occur as a result. While the line between recklessness and intention can sometimes be thin, even in individual liability,¹⁶⁷ A general distinction can be made between corporate policy which is actively undertaken to achieve an illegal end and corporate policy which is adopted despite a known risk that the criminal of-

¹⁶² See *Corporations*, *supra* note 6 at 68.

¹⁶³ See Stuart, *supra* note 94 at 202-203. In the U.K., Ashworth prefers to call subjective recklessness "common law recklessness", *supra* note 4 at 154.

¹⁶⁴ See Stuart, *ibid.* at 206, notes that with the exception of criminal negligence, Canadian courts use a standard of actual foresight, subjectively determined, in order to find recklessness.

¹⁶⁵ Ashworth refers to it as "Caldwell recklessness", based on the decision of the House of Lords in *R. v. Caldwell*, [1982] A.C. 341. This type of recklessness can be defined as where the defendant failed to give thought to an obvious risk that the harm would occur. The important element of this type of recklessness is that the risk would have been obvious to a reasonable person. Some have suggested that because objective recklessness catches the defendant who fails to foresee an obvious risk, it approaches the negligence standard of fault, see Ashworth, *supra* note 4 at 157-58. As noted above, the Canadian position rests with a subjective standard, with the exception of criminal negligence.

¹⁶⁶ In essence, because corporations cannot commit the vast majority of intentional crimes, whether the fault requirement of an intentional crime can be extended to recklessness does not raise the same concerns of fairness as does the idea of the conviction of an individual on a basis other than subjective awareness.

¹⁶⁷ See Stuart, *supra* note 94 at 203.

fence could occur as a result. Moreover, in practice, offences can be drafted with varying degrees of fault.

If the key to showing recklessness is an awareness of the risk of criminal conduct on the part of the corporation, then the issue of how a corporation gains an awareness of the risk is raised. Basically, the corporation has an awareness of risk in two ways. The first is where the agents of the corporation bring the risk to the attention of those who create policy in the corporation. This is essentially an application of the current system which finds corporate awareness through its agents. However, a second basis for finding awareness exists in the decision-making processes of the corporation itself. Just as the corporation transforms information and individual ideas into corporate decisions, so does the individual awareness of risk, previously detected and drawn to the attention of corporation, become part of an organization's general awareness. Such a conception of recklessness is in keeping with the idea discussed earlier in this article that a corporation possesses a culture or identity which transcends that of its agents. In essence, this second basis of finding corporate subjective awareness addresses the situation where the current agents of a corporation are unaware of the risk, while in fact the corporation itself had previously acquired information regarding the risk.

In reality, corporate recklessness may be easier to prove than corporate intention. Thus, composite offences providing for different levels of fault combined with a given form of conduct may be desirable. After all, outside of direct ratification of an illegal act, it will be simpler to show that a corporation was aware of a risk of criminal conduct as a result of a given policy, rather than to show a clear intention to achieve the criminal result through that same policy.

While it appears that the model of corporate fault could function within the current definition of recklessness, there is cause to consider an original and very useful proposal suggested by Wells to overcome some of the difficulties in applying a standard of recklessness, whether objective or subjective, to a corporation. Her proposal deals with the related issues of societal perceptions of risk and the use of foreseeability as the criterion for assessing recklessness.

On the issue of risk, Wells notes that legal discussions of the concept of recklessness take for granted that there is a common identifiable understanding of what risk is,¹⁶⁸ while in fact the underlying concept of risk on which recklessness rests is poorly articulated.¹⁶⁹ She argues that the discussion fails to distinguish between two types of risk: one based on probability and one based on a utility calculation.¹⁷⁰ The first examines risk as a function of the frequency of past occurrences of an event. The second involves a more complex analysis which looks at the nature of the activity, any future benefits it might bring, the type of harm threatened and the cost of avoidance, with a view to weighing the social utility of avoidance of the harm against the cost of elimi-

¹⁶⁸ *Corporations*, *supra* note 6 at 68, 72.

¹⁶⁹ *Ibid.* at 70.

¹⁷⁰ *Ibid.* at 72.

nating or reducing the risk and the nature of the interest threatened.¹⁷¹ As she notes, “[r]isk is more complex and recklessness more simple than legal doctrine allows.”¹⁷²

More importantly Wells discusses the cultural significance of risk: that is, how the assignment of responsibility is a function of cultural standards of what constitutes a proper risk. Communities use their shared experiences to determine what is acceptable risk. The legal concept of recklessness, however, deems that some risks are justifiable while others are not, without any calibration of the relevant risks based on a utility calculus.¹⁷³ As she notes:

Failure to recognise the cultural foundations of attributions of responsibility in the general infrastructure of criminal laws is one aspect of the inability of legal institutions to respond to the cultural shift towards blaming corporations for technological hazard.¹⁷⁴

She suggests that the notion of risk be assessed on the basis of an acceptance standard, such as risk criteria. Moreover, variables such as ease of elimination of risk and nature of harm could be incorporated into the analysis of an obvious and or serious risk used in the objective definition of recklessness.¹⁷⁵

A second criticism Wells levels at the concept of recklessness is its emphasis upon the ability of the actor to *foresee* the risk. She finds that such an approach misses the mark:

It leaves untouched the problematic questions about the nature of risk and what makes a risk obvious or serious. If some of these questions of justifiability of risk-taking, in other words the utility calculus, are inherent in the phrase “obvious and/or serious risk” then the question to be asked should not just be whether that person would have *foreseen* the risk but also whether they would have *taken* that risk.¹⁷⁶

The significance of such a view for corporate liability is obvious. That a corporation actually foresaw a risk of harm may be difficult to detect in its policies. By contrast, a policy which dictates that certain activities will be undertaken (that is, that a risky activity was actually taken) is more common. Although the decision to take a risk is based upon an assessment of the likelihood of risk occurring, Wells’ model concentrates on making corporations accountable for such risk assessments, rather than asking whether a risk assessment was or should have been done. The approach allows for recklessness to be found based on practical indifference to risk.

Incorporating this novel idea of recklessness to the general notion of corporate fault would attribute fault where corporate policy demonstrated an indifference to risk or an unwillingness to alter or create policies to deal adequately with situations of risk.

¹⁷¹ *Ibid.*

¹⁷² “Culture, Risk and Criminal Liability”, *supra* note 121 at 554.

¹⁷³ See *Corporations*, *supra* note 6 at 73.

¹⁷⁴ “Culture, Risk and Criminal Liability”, *supra* note 121 at 558.

¹⁷⁵ In the Canadian context, such variables could be used in evaluating departures from a standard of care in offences based on an objective or negligence standard.

¹⁷⁶ *Corporations*, *supra* note 6 at 73 [emphasis in original].

This focus on corporate attitude is important because it can apply to both reckless action, such as the decision to proceed with a course of action irrespective of the risks, and reckless inaction, such as corporate resistance to the implementation of adequate safety measures.

A word should be said about wilful blindness. It is distinct from recklessness since the offender is not subjectively aware of the risk. However, the reason for the lack of knowledge is a deliberate effort to remain ignorant of that risk.¹⁷⁷ In essence, wilful blindness is used where the offender consciously prevents subjective awareness of a risk, even though the risk is suspected to exist.

In the context of corporate fault, wilful blindness would likely take the form of managers who refuse to make inquiries into the actions of subordinates. The wilful blindness of supervisors towards departments could be established by demonstrating that the internal decision processes of the corporation do not ensure proper supervision of employees, or that there is an established practice by management of refraining from investigating questionable or suspicious activities. Wilful blindness might also be found where a corporation undertakes an activity while deliberately refraining from investigating the consequences of the action. While it may prove easier to establish fault for a failure to enquire on a negligence standard, there may be cases where the actions of the corporation will be better characterized as "deliberate ignorance",¹⁷⁸ rather than failing to meet a standard of care.

b. *Strict Liability*

Before discussing how the corporate model of fault is applied to the strict liability context, it is necessary to address the impact of the division of offences into two types: truly "criminal" and public welfare.¹⁷⁹ Although this traditional separation between the two types of offences is not necessarily useful when discussing corporate liability, the division has a particular impact on the development of corporate liability which cannot be ignored. As it is largely through regulation that the criminal law affects corpora-

¹⁷⁷ See Stuart, *supra* note 94 at 209. In *R. v. Sansregret*, [1985] 1 S.C.R. 570, 17 D.L.R. (4th) 577, the Court discussed the notion of wilful blindness in the context of a defence of honest but mistaken belief in consent to a charge of rape. While the Court's decision to apply wilful blindness to the circumstances of the case was heavily criticized, the general principles expressed in the decision are not controversial. McIntyre J., writing for the Court, distinguishes wilful blindness from recklessness:

Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry (*ibid.* at 584).

¹⁷⁸ The term is Stuart's, *ibid.* at 209.

¹⁷⁹ This article will not enter into a discussion of the relative merits of no-fault liability over fault-based offences.

tions, the practical importance of the distinction is on perceptions of the gravity of corporate liability.¹⁸⁰

It is generally accepted that the terms “strict” and “no-fault” liability carry connotations of lesser gravity,¹⁸¹ because no proof of a mental element is required.¹⁸² This differential perception has roots in the historical view of the role of the criminal law, which was to uphold a certain social order and protect private property interests. Wastes of natural resources, as well as other more social harms were only later considered matters of public concern to be regulated through specific statutes. As Wells notes, the bulk of corporate wrongdoing affects collective or social interests which are now sanctioned through regulatory rather than criminal offences.¹⁸³ This contributes to the view that corporate harm is less serious because regulatory offences tend to be viewed as the infringement of a statutory provision while otherwise pursuing a lawful activity.¹⁸⁴

In Canada, strict liability is a term confined to the public welfare context, originally conceived as a compromise solution between the requirement of a subjective mental element and no-fault requirement at all.¹⁸⁵ Context has played an important role in the elaboration of this level of fault. In terms of burden of proof, the standard is far from the “halfway house” label by which it is known.¹⁸⁶ As a reversal of onus based on an objective negligence standard,¹⁸⁷ it is much closer to the no-fault end of the spectrum

¹⁸⁰ See *Corporations*, *supra* note 6 at 78-79.

¹⁸¹ See Leigh, *supra* note 90 at 284-85.

¹⁸² In Canada, strict liability is really a no-fault offence which allows for a defence of due diligence.

¹⁸³ *Corporations*, *supra* note 6 at 23.

¹⁸⁴ See *ibid.* at 12, 76. The suggestion that statutory offences are viewed with less consideration than those created by the common law is captured in the interpretive maxim that “statutes in derogation of the common law should be construed strictly.” In Canada, the qualification “statutory” carries less of a negative connotation than in Great Britain, because the traditional criminal law offences have long been enacted into the *Criminal Code*.

¹⁸⁵ See Stuart, *supra* note 94 at 157, referring to the seminal Supreme Court case of *Sault Ste. Marie*, *supra* note 150.

¹⁸⁶ *Ibid.* at 163.

¹⁸⁷ Negligence is understood to be the failure of a defendant to take reasonable precautions to avoid a risk where this could have been reasonably expected. The Supreme Court of Canada addressed the distinction between subjective and objective evaluations of criminal fault in *R. v. Hundal*, [1993] 1 S.C.R. 867, 149 N.R. 189 [hereinafter *Hundal* cited to S.C.R.] in the context of dangerous driving. Cory J. defines and sets out the test for establishing negligence:

Depending on the provisions of the particular section and the context in which it appears, the constitutional requirement of *mens rea* may be satisfied in different ways. ... the *mens rea* or element of fault can be satisfied by proof of negligence whereby the conduct of the accused is measured on the basis of an objective standard without establishing the subjective mental state of the particular accused. ...

[T]he test for negligence is an objective one requiring a marked departure from the standard of care of a reasonable person. There is no need to establish the intention of the particular accused. The question to be answered under the objective test concerns what the accused “should” have known. The potential harshness of the objective stan-

than it is to subjective awareness.¹⁸⁸ Although the appropriateness of negligence as a standard of fault in the general criminal law is debated,¹⁸⁹ negligence is used mainly in the public welfare context¹⁹⁰ where the harm is great, the risk obvious, and the actor is capable of taking the reasonable precautions required.¹⁹¹ The justifications for a lower evidentiary burden on the prosecution are thus largely efficiency-based. As a result, many commercial and other activities are regulated using a standard of negligence.

The development of strict liability is often explained by the difficulties in prosecuting corporations for violations of public welfare offences, rather than in terms of the lesser blameworthiness of the actor responsible. As Leigh notes, the common public perception of decreased seriousness of regulatory offences can be misplaced: "in the case of some serious offences, strict and vicarious liability is necessary if the legislation is to be enforced efficiently or at all. The reasons why this is so are fairly clear. In many cases it is impossible to draw any inference about the mental state of the offender from the act done."¹⁹² Indeed, what is more serious: pollution of a river as part of an industrial process or stealing a loaf of bread to prevent starvation of one's children?¹⁹³

While the answer seems obvious, Wells notes that corporate activity is often perceived differently from human activity:

The contrast between the social and legal constructions of crime prevents us from seeing corporations as real criminals and highlights a paradox. Theft is the dishonest appropriation of property belonging to another. ... Much of what corporations do legitimately is the lawful pursuit of that which done dishonestly would be regarded as anti-social. Corporate goals are directed towards making profits at another's expense. ... The line between acceptable and unacceptable appropriation, then, may be a fine one. The process whereby class and wealth determine the enthusiasm with which undesirable activities are repressed is what Foucault dubbed "the restructuring of the economy of illegalities."¹⁹⁴

In contrast to the efficiency argument is the position that all serious offences should ideally require a subjective awareness standard of fault. This position reflects

ard may be lessened by the consideration of certain personal factors as well as the consideration of a defence of mistake of fact (*ibid.* at 882-85).

¹⁸⁸ See Stuart, *supra* note 94 at 157, 162.

¹⁸⁹ See *ibid.* at 228 (with respect to individuals), 585 (with respect to corporations). In this section, discussions of objective fault requirements outside of the public welfare context shall be avoided. This is done for simplicity and it is recognized that it is possible to contemplate corporate liability for non-public welfare crimes which require objective standards of fault, particularly that of criminal negligence. However, within the limited context of this article, it is not the purpose to identify all the possible sub-levels of fault used in the criminal law. Rather, it is to be demonstrated how the model of corporate liability would fit into the major categories of fault. In that light, how corporations may be found liable for objectively-based strict liability fault will be discussed. It is clear, however, that this analysis can be adjusted to apply to other types of objective fault.

¹⁹⁰ See *ibid.* at 160-61.

¹⁹¹ See Ashworth, *supra* note 4 at 171.

¹⁹² Leigh, *supra* note 90 at 285.

¹⁹³ The example is slightly modified from Leigh, *ibid.*

¹⁹⁴ *Corporations*, *supra* note 6 at 10-11 [footnotes omitted].

concerns about objective liability in the regulatory context mainly because of the potential burdens placed on individual accused persons. It is clear that justifications of efficiency in the corporate context do not sit well with concerns for individual liberty and the right to a fair trial.

In light of these differing views, it is easy to see how attitudes about the legitimacy of strict liability become hopelessly muddled with the idea of corporate liability. On the one hand, corporate wrongdoing is not as serious as "real" crime because most corporate convictions are for offences based on a lower standard of fault, even though the main concerns about a lower level of fault relate to the situation of individuals. On the other hand, liability for public welfare offences is often rooted in the belief that the harms caused by violations are serious enough to warrant that corporations be held accountable for them. Ironically, it is because it is socially important to sanction violations that a lower level of fault is used; it is argued to be the most effective, if not the only, means of controlling corporate behaviour.

The model of corporate fault discussed in this article cannot eliminate the legacy of the public welfare/real crime distinction. However, it does allow for corporate liability to be assessed in ways which shed light on how corporate action is often undertaken in reality. Increasing the likelihood of finding corporations liable on higher levels of fault such as recklessness and intention, could reduce the perception that corporate crime is less serious. In addition, examining corporate behaviour in light of new concepts of risk and on a reactive fault standard may serve to render the perception of some regulatory offences more serious because they reveal more accurately the extent to which corporations are able to prevent harms.¹⁹⁵

An awareness of the debate over regulatory offences, many of which are drafted in the form of strict and no-fault liability offences, does cast light on some of the resistance to corporate liability in these areas. Nonetheless, this debate must not obscure the more crucial issue of holding corporations accountable for the harms they cause. Lower fault liability is but one means of doing so, and is used primarily because it alleviates what can be an impossible task for the prosecution, namely to establish a subjective awareness relevant to the harm caused.

Bearing in mind the general definition of corporate fault, corporate liability on a negligence standard would be found where organizational failure resulted in the lack of precautions being taken to avoid the risk.¹⁹⁶ Fisse and Braithwaite offer the following description:

Corporate negligence is prevalent where communication breakdowns occur, or where organizations suffer from collective oversight. Does corporate negligence in such a context amount merely to negligence on the part of individu-

¹⁹⁵ Underlying this debate is the larger question of whether the criminal law is the most appropriate means of sanctioning corporate behaviour, particularly of a regulatory nature. Without answering the question directly, there can be little doubt that some corporate behaviour will always be more appropriately dealt with by the criminal law, especially intentional acts. It is equally clear, however, that many regulatory offences are less about blameworthy acts than government regulation of activity.

¹⁹⁶ See "Attribution of Criminal Liability", *supra* note 58 at 283.

als? It may be possible to explain the *causes* of corporate wrongdoing in terms of particular contributions of managers and employees, but the attribution of *fault* is another matter. Corporate negligence does not necessarily reduce to individual negligence. A corporation may have a greater capacity to avoid the commission of an offence and it may be for this reason that a finding of corporate but not individual negligence may be justified.¹⁹⁷

Thus, corporate negligence could also be found where there is a lack of corporate policy to address situations of risk which can be reasonably expected to arise in the field of activity in which the corporation operates. Negligence would no longer depend on an individual failure to take precautions in a given situation, but could be found in the general failure of the corporation to provide for situations of risk. Such an approach would better reflect the reality that corporate harm is often the result of collective oversight, or a general inertia with respect to instituting proper safeguards against risk.¹⁹⁸

Another form of negligence liability is proposed by Fisse in his concept of reactive fault.¹⁹⁹ Under his model, an organizational failure to adopt policies to correct a situation of risk could attract liability as well as an organizational failure to prevent harm. As has been mentioned, imposing fault upon organizations for a failure to respond adequately to address a situation of risk or harm caused has the advantage of giving organizations a chance to redeem themselves following the occurrence of the offence. Organizations found negligent on the basis of reactive fault would be unable to complain of a lack of notice or an inability to detect the conduct before it occurred. In this way, organizations would be less likely to claim that a lower standard of fault casts the net of liability too far by convicting those who are morally innocent: that is, subjectively unaware of the conduct. Under the reactive-fault principle they would be subjectively aware of the conduct. In this model, the difference between negligence and higher fault offences would be the evaluation of the adequacy of the reactive measures, where an objective failure to respond adequately would suffice for a conviction.

c. Absolute Liability (No Fault)

Briefly, while the qualification of no-fault offences²⁰⁰ varies, it corresponds generally to those offences which do not require proof of intention, knowledge, recklessness or negligence.²⁰¹ Conviction occurs once the prosecution proves the *actus reus* of the offence. This category of no-fault offence attracts much criticism, mainly rooted in the individualist concerns of autonomy and liberty, but also on more general grounds of fairness.²⁰² In addition, in Canada, absolute liability cannot be combined with impris-

¹⁹⁷ "Allocation of Responsibility", *supra* note 9 at 486 [emphasis in original].

¹⁹⁸ See "Attribution of Criminal Liability", *supra* note 58 at 281-82.

¹⁹⁹ *Ibid.* at 282-83.

²⁰⁰ In Canada, the term "absolute liability" is used to describe offences where only proof of the *actus reus* suffices for a conviction. In the U.K., no-fault offences are referred to as strict liability offences.

²⁰¹ See Stuart, *supra* note 94 at 149; Ashworth, *supra* note 4 at 135-36.

²⁰² See Stuart, *ibid.* at 585.

onment as a sanction; at a minimum, a due diligence defence must be available for imprisonment to be a sanction.²⁰³

The significance of the corporate liability model of fault for no-fault offences is the more accurate characterization of corporate action that the model offers. One of the principal criticisms of the use of absolute liability in the corporate context is that it becomes tantamount to vicarious liability.²⁰⁴ That is, conviction of the corporation can be based on the actions of one individual in the organization. Such a situation raises questions of fairness because it imputes liability on the corporation regardless of whether the act can be considered corporate. A stronger basis for grounding liability solely on the *actus reus* — where this is necessary — is to ensure that the *actus reus* is in fact an act of the corporation.

However, even in light of the efficiency justifications, using corporate action alone in imputing liability rests on questionable ground. A way of addressing the fairness question and of overcoming evidentiary difficulties in corporate prosecution is through the use of Fisse's reactive-fault proposal, which can be adapted to the typical no-fault liability type offence.²⁰⁵ Drafting many regulatory offences in terms of a duty to react to harm caused would be a better sanction of harm-causing behaviour than no-fault liability offences without the negative label of no-fault. In addition, the extended time-frame for assessing blameworthiness would shed some of the commonly held illusions that no-fault liability convicts subjectively unaware parties because the longer reaction time might disclose that the defendant was in fact aware of the risk of the harm occurring.²⁰⁶

3. Defences

No mention thus far has been made of any defences, be they justifications or excuses. Part of the reason for this is that many of the traditional defences which apply to individuals — automatism, self-defence, necessity, insanity and provocation — cannot be applied to corporations, although it has been suggested that economic duress might be an excuse for a corporation.²⁰⁷ While it is beyond the scope of this paper to discuss defences in any detail, some general remarks can be made about how the concept of corporate identity would affect the application of defences to corporate liability.

As corporate fault is based upon corporate policy, the defences open to corporations would be those asserting an interference with its ability to make or correct policy, and those asserting an absence or negation of corporate intention. The first cases involve situations where the corporation has either failed to implement a policy or has not reacted to one appropriately. A circumstance where this excuse might be entertained would be where the corporation is newly constituted and has not had the oppor-

²⁰³ See *Re Section 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 63 N.R. 266.

²⁰⁴ See Stuart, *supra* note 94 at 584-85.

²⁰⁵ "Reconstructing", *supra* note 28 at 1202-204.

²⁰⁶ See *Corporations*, *supra* note 6 at 81.

²⁰⁷ See "Reconstructing", *supra* note 28 at 1201.

tunity to adopt the appropriate policies.²⁰⁸ A further situation would be where government regulations imposing liability upon the corporation are contradictory or ambiguous.²⁰⁹

The second type of defence can be subdivided into two types. In the first type, the corporation asserts that there is an absence of corporate intention, in essence challenging the qualification of the act as corporate. In the second, the corporation argues that while the act is corporate, it should not be held liable because it acted with due diligence. The defence of absence of corporate intention protects a corporation where, for example, an offence is committed by a rogue individual, contrary to internal policy.²¹⁰ Such a defence would not be easy to establish, as the corporation would have to prove not only that the conduct was prohibited by corporate policy, but also that it had not condoned such conduct on a previous occasion.²¹¹

The defence of due diligence would also place a heavy burden of proof on the corporate defendant. In order to establish that it acted with corporate due diligence a corporation would have to point to existing measures taken to avoid the risk, as well as demonstrate that these measures reflected company practice.²¹² The emphasis is thus on the organizational attitude toward the prevention of risk. Fisse's model would add a concept of reactive due diligence in order to assess when a corporation has satisfied the requirements of a duty to respond to a specific act of harm-causing or risk-taking behaviour.²¹³

Conclusion

The above discussion has argued that a separate notion of corporate blameworthiness would constitute an invaluable addition to current theories of corporate criminal responsibility. It has been demonstrated that through the creative use of the criterion of intentionality, it is possible to fashion a concept of corporate blameworthiness which takes into account the differences between human and corporate persons, and reflects the distinct nature of much corporate action and expression. More specifically, intentionality is based upon how corporate structure and policy can transform the input of many individuals into decisions and actions of the corporation itself.

The justifications for treating corporations as accountable for the harms and wrongs they cause are found first in this ability to make decisions upon a rational basis, albeit one that is particular to them. A second more general justification is rooted in the fact that corporations can and do participate in society as right-holders. As a counterweight to the many advantages and entitlements flowing from corporate structure, as

²⁰⁸ See "Attribution of Criminal Liability", *supra* note 58 at 289.

²⁰⁹ See "Reconstructing", *supra* note 28 at 1201. In Canada, the ability of corporations to challenge legislative provisions on the basis of vagueness and overbreadth has been limited when the offences have been characterized as public welfare offences.

²¹⁰ See *Corporations*, *supra* note 6 at 134.

²¹¹ See *ibid.*

²¹² See "Attribution of Criminal Liability", *supra* note 58 at 290-91.

²¹³ "Reconstructing", *supra* note 28 at 1208.

well as to the power they now wield in society, fairness dictates that they also bear the negative consequences of their actions. The licence granted to them to do business should be restricted in the same way as is human action, that is, to activity which does not harmfully or wrongfully interfere with the rights of others.

A consideration of the mechanics of liability based on a corporate identity reveals that it presents many advantages and some problems. The advantages lie in the ability to capture a wider spectrum of corporate action within the bipartite structure of a criminal offence, thus rooting responsibility in a more complete understanding of corporate blameworthiness. The problems, while not to be marginalized, are more practically-based and mostly evidentiary in nature. On the whole, therefore, the advantages outweigh the potential problems and offer a means of ameliorating the current model of corporate criminal liability.

While there are many other issues facing the development of a complete theory of corporate criminal liability, the most important being the creation of effective sanctions for corporate behaviour, the addition of a new basis upon which to attribute blameworthiness is an important first step. Through the recognition that corporate criminality can take many forms and thus require different ways of assessing liability, separate corporate blameworthiness can serve as a foundation upon which a more complete framework for corporate liability can be built.
