CORPORATIONS AND THE DEVIL'S DICTIONARY: The Problem of Individual Responsibility for Corporate Crimes

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> Corporation, *n*—An ingenious device for obtaining individual profit without individual responsibility.
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> —Ambrose Bierce,
> *The Devil's Dictionary.*

I. INTRODUCTION

Standards of individual responsibility in Anglo-Australian law are based principally upon Aristotelian notions of voluntariness and choice. As a result, it is only in very exceptional cases that individuals are held to be criminally responsible for their actions and thereby liable to punishment when the constraints on their exercise of will are such that it is felt that they are not morally responsible for what they did.[1] Current legal notions of responsibility, however, presume a fairly low level of constraint on the individual's exercise of will in the conduct of his or her daily life and legal excuses are generally only directed at very serious constraints on an individual's freedom to choose between courses of action.

The development over the last two centuries of large and complex organizations has resulted in the rise of thorny ethical problems of individual responsibility on the part of members of these organizations. Thus far, there have been few attempts to adapt and modify legal notions of individual responsibility in order to address these ethical problems. Consequently, the development of principles of accountability of individuals for acts performed by organizations is very uneven (if indeed there can be said to be development at all), with little thought being given to the peculiarly organizational nature of the problem.

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[1] See I. Kant, *Philosophy of Law* (trans. W. Hastie), T&T Clark, Edinburgh, 1887, p. 52f; G. Williams, *Criminal Law: The General Part*, Stevens & Sons, London, 1961 (Second Ed.), p. 737ff. One such case was *R* v. *Dudley* (1884) 14 Q.B.D. 273.

It is proposed here to examine aspects of this problem from the angle of individual responsibility for crimes committed by corporations. As a modern large corporation is principally a type of bureaucratic organization,[2] problems of moral responsibility will have to be identified by recourse to organizational theory. In order to do this, it is proposed first to suggest a moral theory of responsibility which can be applied to organizations and from which appropriate standards of legal responsibility may be developed. It will also be necessary to examine the general rules of positive law which currently apply to this area and to suggest, tentatively, avenues for reform.

Before proceeding, it should be noted that a positivist framework will be employed in this paper, despite the limitations of positivism as a description of the content of law.[3] This is because positivism provides a convenient framework within which to structure a discussion of moral and legal responsibility in corporations.[4]

II. A MODEL OF INDIVIDUAL RESPONSIBILITY

A. INDIVIDUALISM AND COLLECTIVISM

A recurring theme in the literature on corporate crime is the conflict between individualism and collectivism—i.e. the question of whether individuals or the corporation should be held responsible when a crime is committed.[5] The crux of the controversy is the fact that punishing a corporation is considered to be in effect punishing the members of the corporation (or, in the case of a company, the shareholders). Some commentators argue that this is a repugnant notion, given that group or collective responsibility is otherwise alien to Western liberalism.[6]

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[2] See M. B. Clinard & P. C. Yeager, *Corporate Crime*, The Free Press, New York, 1980, pp. 24-26; 44-46.

[3] See, e.g., L. Fuller, "Positivism and Fidelity to the Law—A Reply to Professor Hart", (1958) 71 *Harv. L. Rev.* 630; R. M. Dworkin, *Taking Rights Seriously*, Duckworth, London, 1977 (new impression with a reply to critics, 1981), pp. 14-45.

[4] The limitations of positivism as a description of the content of law is acknowledged, as is the danger, when applying a positivist framework, of being excessively formalist. However, positivism should not and need not be allowed to enable what Hart terms "the vice known to legal theory as formalism": H. L. A. Hart, *The Concept of Law*, Oxford University Press, Oxford, 1961, p. 126. It is perfectly permissible for a positivist judge, for example, to acknowledge that the interpretation of rules involves a question of choice, owing to "the open texture of language", and thereby to make a choice between two interpretations of a rule on moral grounds: Hart, pp. 121-150. Similarly, it is legitimate to have recourse to moral principles when criticizing positive laws. Further, a positivist framework would not prevent the legal normative model of the modern corporation from being re-examined and a model which better describes the modern corporation from being employed as the correct normative model for analysis. As such, positivism provides the clearest framework from which moral and legal responsibility in corporations may be examined.

[5] A bibliography of some of the more recent literature is provided by B. Fisse and J. Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Syd. L. Rev.* 468, note 3.

[6] See, e.g., L. H. Leigh, *The Criminal Liability of Corporations in English Law*, London School of Economics, London, 1969, p. 185f. See also R. H. Iseman, "The Criminal Responsibility of Corporate Officials for Pollution of the Environment" (1972) 37 *Albany L. Rev.* 61; E. Ledermann, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle" (1985) 76 *Journal of Criminal Law and Criminology*, 285.

Historically, collective responsibility was not unknown, the men of the hundred being fined for murders and robbery taking place within the locality.[7] This was not in itself unjust, given the structure of society at the time, but rather a means of preventing crimes and ensuring that offenders were delivered up to justice by the group.[8] With the subsequent weakening of family ties, this form of responsibility became less valid as a means of enforcing the law.[9] In fact, until late in the 19th century, the courts refused to employ vicarious responsibility (which this form of collective liability effectively amounted to) to ground criminal liability.[10] Even today, responsibility which is not individual (outside of corporate crime) is considered to be an exception rather than the rule.[11]

However, despite this presumption of individual accountability, the current trend in Australia is for public regulatory agencies to prosecute corporations rather than individuals.[12] It is submitted that such an approach should not be taken as it undermines the notions of individual responsibility upon which criminal liability in our law primarily is based. Primary liability for corporate crimes should remain with individuals and this should be reflected not just in the law but also in its enforcement, insofar as it is not unfair or unjust for an individual to be held liable for a corporate crime.[13] This is not, of course, to say that there is no place for corporate criminal liability (i.e. punishing the corporation), especially where circumstances are such that no one individual can be said fairly to be responsible.[14]

A recent paper by Fisse and Braithwaite[15] has analysed in detail the potential problems with the individualist approach to corporate crime, namely: limited resources on the part of regulatory agencies, jurisdictional problems where responsible individuals do not reside in the jurisdiction

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[7] F. Pollock and M. Maitland, *The History of English Law before the Time of Edward I*, Cambridge University Press, London, 1968 (1898 ed.), p. 558f.

[8] G. Williams, *Criminal Law*, at para 91. Feinberg argues that collective responsibility under such conditions is vicarious liability without fault and only justifiable if: (1) there is group solidarity, (2) efficient policing is otherwise infeasible, and (3) those held vicariously responsible have some control over the individual wrongdoer. Arguably, the men of the hundred satisfied each of these requirements. See J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton University Press, Princeton, 1970, p. 241.

[9] Feinberg, *Doing and Deserving*, pp. 240-241.

[10] *Huggins* (1730) 2 Ld. Raym. 1574, 92 E.R. 518; *Bagge* v. *Whitehead* [1892] 2 Q.B. 355. Cited by Williams, *Criminal Law*, at para 92.

[11] Williams, *Criminal Law*, at 92ff.; D. Lloyd, *The Idea of Law*, Penguin, Harmondsworth, 1964 (revised 1981), p. 163; P. Gillies, *Criminal Law*, Law Book Co., Sydney, 1985, pp. 86-87.

[12] B. Fisse & J. Braithwaite, "The Allocation of Responsibility for Corporate Crime", p. 186. See also P. Grabosky & J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Oxford University Press, Melbourne, 1986. This is a matter of prosecutorial practice rather than substantive law. It is proposed to argue later that although primary legal liability is individual, most of the legal provisions are deficient in some way or another.

[13] See L. H. Leigh, *The Criminal Liability of Corporations in English Law*, pp. 184-186.

[14] B. Fisse, "The Social Policy of Corporate Criminal Responsibility" (1977) 6 *Adelaide L. Rev.* 361, pp. 378-9; Fisse & Braithwaite, "The Allocation of Responsibility for Corporate Crime", pp. 19-21.

[15] "The Allocation of Responsibility for Corporate Crime", *supra*.

and fairness to the individual in holding him or her responsible.[16] This paper concentrates on the moral dimension of responsibility for corporate crime. It is therefore appropriate to confine the discussion in this paper to the potential problem of fairness to the individual.

B. FAIRNESS TO THE INDIVIDUAL AND SUBSTANTIVE MORAL RESPONSIBILITY

It is generally considered that individuals should not be punished for wrongs committed unless they are in some way responsible for those wrongs. Yet, at the same time, punishment is said to have many purposes, namely, deterrence, retribution, incapacitation, denunciation and rehabilitation.[17] Of the five purposes, deterrence, incapacitation and rehabilitation do not necessarily require that the actor punished for the wrongful act be also "responsible" in some moral sense for his or her act. Punishing an insane person, for example, may have a positive utilitarian effect in that it may "secure a higher measure of conformity to the law on the part of normal persons" than if an excuse of insanity were permitted, notwithstanding that it is generally agreed that insane people are not responsible for their acts.[18]

This apparent dilemma is easily resolved if the distinction proposed by Hart between a "general justifying aim" of punishment and a "principle of distribution" is adopted.[19] Any or all of the purposes of punishment enumerated in the previous paragraph may be considered to be a general justifying aim or general justifying aims of punishment, without also requiring that persons who are responsible for their acts be punished. The additional requirement of responsibility is a requirement of fairness to the individual or a means by which the individual's rights are protected against the claims of society, and belongs to the question of distribution of punishment (i.e. "Who do we punish?" as opposed to "Why do we punish?").[20] Thus, an individual should not, as a general principle, be punished for acts for which he or she is not responsible. It is not proposed to deal with the various general justifying aims of punishment mentioned above any further, since this paper is concerned with distribution.

The question then arises as to what is meant when an individual is said to be responsible. The word "responsible" is used to describe a number of different concepts, as is aptly illustrated by Hart in a story

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[16] Fisse & Braithwaite, "The Allocation of Responsibility for Corporate Crime", pp. 494-499; See also Fisse, "The Social Policy of Corporate Criminal Responsibility", pp. 369, 378-9; Leigh, *The Criminal Liability of Corporations in English Law*, p. 142; *R. v. Michigan Central Railroad Co.* (1907) 17 C.C.C. 483 per Riddell J at 494.

[17] See, e.g., M. C. Baire, "Terrorism Reconsidered as Punishment: Toward an Evolution of the Acceptability of Terrorism as a Method of Societal Change or Maintenance" (1984) 20 *Stanford Journal of International Law* 55 at pp. 95-96.

[18] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, London, 1968, p. 19f. On insanity generally see, e.g., Williams, *Criminal Law*, Chapter 10.

[19] *Id.* p. 9.

[20] *Id.* pp. 8-13, 81.

about a sea captain.[21] It is proposed only to employ two "senses" of responsibility for purposes of application to corporations, which may conveniently be termed "formal" and "substantive" responsibility.

Formal responsibility may be moral or legal and derives from an individual's occupation of an office in a corporate organization.[22] Thus, the individual is responsible for the performance of the duties which attach to that office, for example: "the directors are responsible for the management of the company". The failure to discharge this type of responsibility may render the individual liable to punishment, but in no way does it carry with it any imputation of substantive responsibility. This is because responsibility in the formal sense can arise whether or not an individual could have chosen to act otherwise or whether or not there were constraints on his or her ability so to choose.[23]

Substantive responsibility may similarly be moral or legal. Under this form of responsibility, an individual may be considered liable to punishment for an act (or omission to act) where he or she satisfies a prescribed set of mental or psychological criteria[24] and has the 'capacity' to be liable.[25] If the individual is being charged with responsibility for the consequences of his or her act, then there must be a sufficient causal connection between act and consequences.[26] Further, if the culpable acts in question were the acts of another, then there must be a relationship of control between the individual charged and the actual actor sufficient to justify holding the individual responsible.[27] Substantive responsibility is in fact the form of responsibility referred to when a person is said to be responsible for a crime committed by him or her or by someone else.

The moral rules informing substantive responsibility which constitute the models from which the legal rules were formulated centre upon the notion of voluntariness.[28] Thus, where a person has no choice as to whether to do the wrongful act or not or if that person is mentally retarded or insane, he or she may be considered not to have performed that act voluntarily (i.e. through the exercise of choice) and therefore not to be responsible. Similarly, where the degree of control exercised by the

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[21] Hart's sea captain was "responsible for the safety of his passengers" but owing to his "irresponsible" conduct on his last voyage was "responsible for the loss of the ship with all aboard". He argued that storms were "responsible for the loss of the ship" but was found both criminally as well as civilly responsible. He was also considered to be "morally responsible" as he was "responsible for his actions" though drunk at the time: see Hart, *Punishment and Responsibility*, p. 211.

[22] *Id.* pp. 212-214.

[23] *Infra.*

[24] Known in law as *mens rea.*

[25] Examples of incapacity are infancy and insanity.

[26] Not discussed further.

[27] Hart, *Punishment and Responsibility*, pp. 215-227.

[28] A. Kaufman, "Responsibility, Moral and Legal", in P. Edwards (ed.), *The Encyclopaedia of Philosophy*, Vol. 7, Macmillan, New York, 1972, p. 183. The use of voluntariness in this section should be distinguished from its ordinary meaning in criminal law—see the definition of constructive involuntariness (*infra*).

individual charged with liability for the wrongful act over the actual actor is negligible, that individual may be said not to have permitted the commission of the wrongful act voluntarily and not to be responsible for it. These moral standards are in fact reflected in the law. To quote Blackstone:

> . . . the concurrence of the will when it has the choice either to do or avoid the act in question [is] the only thing that renders human actions praiseworthy or culpable.[29]

Aristotle identifies two circumstances in which a person's actions may be considered not to be voluntary: firstly, where the acts were performed under compulsion or constraint external to the actor's will, and secondly, where the actor had no knowledge of the material facts informing the act.[30] An act is involuntary due to external constraint on the actor's freedom to choose where it has "an external origin of such a kind that the actor or agent contributes nothing to it."[31] Thus, a voyager on a sailing ship which was blown off its course is not responsible for the change of course. Aristotle is in two minds, however, about the predicament of a man whose family is in the power of a tyrant who threatens to kill them unless he does something dishonourable. He seems to think that such acts are voluntary because the action of the agent's limbs "has its origin in the agent himself", yet ought to be pardoned because "the alternative is too much for human nature and nobody could endure it".[32] The second circumstance under which involuntariness arises is not controversial if "knowledge" is defined to mean *actual knowledge of material facts or knowledge of facts disclosing a high risk that the material facts exist*, because it would equate with notions of knowledge in criminal law.

Aristotle's theory of responsibility is difficult, partly because of inexact use of terminology, but the following notion of an act performed under constraint may be constructed from it: An act is involuntary where the constraint on it is such as to negate the will or where there is no knowledge of the material facts (actual involuntariness) or where the nature of the compulsion is such that a person would not have chosen otherwise (constructive involuntariness). Constructive involuntariness is assessed not just by reference to the compulsion or constraint but also with respect to the nature of the wrongful act performed. This is because, in Aristotle's words, there are some acts for which a person "must sooner die than do, though he suffer the most dreadful fate".[33]

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[29] W. Blackstone, *Commentaries on the Laws of England*, Garland, London, 1978 (1783 ed.), IV.2.

[30] Aristotle, *Nichomachean Ethics* (tr. J. A. K. Thomson), Penguin, Harmondsworth, 1955 (rev. ed. 1976), III.1.

[31] *Ibid.*

[32] *Ibid.* See also J. Glover, *Responsibility*, Routledge & Kegan Paul, London, 1970, pp. 4-13.

[33] Aristotle, *Nichomachean Ethics*, III.1. This notion has been adopted by the criminal law: see *R* v. *Dudley* (1884) 14 Q.B.D. 273; *Lynch* v. *D.P.P.* [1975] 1 All E.R. 198; *McConnell* [1977] 1 N.S.W.L.R. 714; *Darrington & McGauley* (1979) 1 A. Crim. R. 124.

It is necessary at this point to draw some of the threads of the preceding discussion together. Responsibility, as discussed above, is a principle of distribution rather than a general justifying aim of punishment and stems from a requirement of fairness to the individual.[34] A system of punishment based on formal responsibility alone would not go very far towards satisfying the requirement of fairness, insofar as an individual could be punished for an act that he or she could not have avoided performing or for an act that an average person would not have avoided performing. The requirement of fairness is better satisfied if distribution is based on substantive rather than on formal standards of responsibility.

Something less than absolute substantive moral responsibility may be sufficient to ground liability to punishment where circumstances are such that the claims of society override the rights of the individual. This is actually where the dividing line between law and morality becomes apparent. While a moral system may tend to favour the individual by almost always requiring a finding of absolute substantive responsibility before liability to be punished is incurred, the legal system, as a matter of social policy, allows the claims of society to trump individual rights more readily.

Thus, substantive legal responsibility may on occasions require a lesser degree of responsibility than substantive moral responsibility. For example, the requirements of substantive legal responsibility which inform liability for crimes of strict liability reflect a very low level of responsibility when compared to the degree of responsibility normally required.[35] Even so, it is submitted that laws imposing criminal liability should not as a general policy depart greatly from moral standards of substantive responsibility except where the needs of society are overwhelming—an excessive erosion of standards of responsibility would make for bad laws.[36] Moral standards should always be applied first to given circumstances to establish the fairness or otherwise of a relevant law.

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[34] It is impossible to discuss substantive moral responsibility without saying a few words about determinism. Determinism is "the thesis that all human behaviour is governed by causal laws": Glover, *Responsibility*, p. 21. If determinism is true, then the model of moral responsibility outlined in this paper would be invalid, since all human behaviour would be "caused" by circumstances beyond the control of human will and all choice would be illusory: See Kaufman, "Responsibility, Moral and Legal", *passim*. Hart argues that because the legal system has adopted standards of responsibility in the interest of fairness to the individual, this enables the individual to determine by his or her choice what the future will be (in terms of the legal consequences of his or her action) and to be able to predict what the future will be. He further asserts that the fact that legal institutions do this is a matter of empirical fact and that determinism cannot show this to be illusory: see Hart, *Punishment and Responsibility*, pp. 45-46. Clever though this may be, it does not answer the question of whether our exercise of choice itself was determined. Further, his assertion that this argument applies only to legal but not moral responsibility is cryptic. However, an aspect of Hart's approach, namely confining the inquiry into voluntariness to the external facts that impinge on choice without considering whether choice itself was determined, has been adopted here.

[35] Nevertheless, the basis of liability for strict liability offences is a degree of culpability (though not amounting to ordinary criminal culpability)—i.e. the basis of liability is not formal responsibility alone. A degree of substantive responsibility is required: see H. Gross, *A Theory of Criminal Justice*, Oxford University Press, New York, 1979, pp. 342-348.

[36] See Fisse & Braithwaite, "The Allocation of Responsibility for Corporate Crime", p. 509f.

It is therefore proposed that the following principles should govern the discussion of criminal liability in respect of corporations:

That the notions of individual responsibility which underpin our criminal law in other areas may govern responsibility for corporate crimes unless they result in unfairness to the individuals made liable to punishment.

That it will be unfair to punish an individual for his or her acts unless he or she can be said to be morally responsible (in the substantive sense) for those acts, provided that the corporate form does not require a departure from standards of substantive moral responsibility when determining appropriate criteria for individual legal responsibility.

That substantive moral responsibility only arises when there is voluntariness.

An act is involuntary when it is actually or constructively involuntary as defined above.[37] A corollary to the voluntariness principle is that where a person is charged with liability for the acts of a subordinate, there must be a sufficient relationship of control to ground liability to punishment. It is submitted that such a relationship would exist where the superior officer has, in addition to formal responsibility for the subordinate's acts, knowledge of those acts.

III. THE CORPORATION AS A BUREAUCRACY AND INDIVIDUAL RESPONSIBILITY

A. THE CORPORATION AS A BUREAUCRATIC ORGANIZATION

The modern large company by no stretch of the imagination can be made to resemble the model in traditional company law of a group of people associating for the purpose of establishing a common fund with a view to profit, electing amongst themselves the management of the new entity created, and regulating the resulting legal relationships by recourse to contract and fiduciary law.[38] In fact, the modern corporation stands in sharp contrast to the traditional legal model. A large public company can more readily be characterized as an entity in which there is no necessary connection between ownership and control and in which the most important source of corporate finance is not the capital pooled by the original investors.[39] Identification by shareholders (legally the members of the company) with the company becomes minimal and the

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[37] *Supra.*

[38] See, e.g., H. A. J. Ford, *Principles of Company Law*, Butterworths, Sydney, 1986 (4th ed.), *passim* for a model of the traditional company.

[39] A. Berle & G. Means, *The Modern Corporation & Private Property*, Macmillan, New York, 1932, *passim*; J. K. Galbraith, *The New Industrial State*, André Deutsch, London, 1967 (2nd ed. 1972), pp. 72, 77-80. See also J. C. Coffee, "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response" (1977) 63 *Virg. L. Rev.* 1099 at p. 1142f.

real management of the company is carried on by what Galbraith terms the "technostructure".[40]

The large organized corporation is therefore a bureaucracy in the Weberian sense.[41] Weber describes an ideal-type of such an organization as possessing certain typical characteristics: specialization or division of labour; an administration based on files; occupation of offices by individuals, each office having a prescribed sphere of competence; impersonality in decision-making; and rules, accompanied by a set of standard operating procedures governing the daily performance of tasks.[42]

To a certain degree, the model of bureaucracy provided by Weber is misleading as it only describes the organization in a formal sense. This formal description "will always differ from the organization as it actually operates".[43] An informal order based on informal practices inevitably arises as a result of interpersonal relationships amongst the actors in the organization.[44] Various commentators have discussed informal practices in terms of 'goal displacement', a process in which specialized sections of the organization pursue subgoals at the expense of the organization's principal goal; in terms of politics within the organization or the process of game-playing, conflict and compromise amongst the actors; and in terms of conflict between the personal goals of individual actors and those of the organization.[45] Some of these practices complement the formal structure of the organization, but others may actually conflict with and falsify the picture of the organization presented by the formal description.[46] Thus, an examination of the responsibility of individuals for the acts of a corporate organization cannot discount totally the possible effects of the "informal organization" on the formal scheme of the corporate technostructure. The case of informal practices which are behavioural norms resembling rules of positive law will not be dealt with.[47]

B. RESPONSIBILITY OF INDIVIDUALS IN CORPORATIONS

It is trite to say that a corporation can only act through human

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[40] Galbraith, *The New Industrial State*, at pp. 83-85.

[41] See M. B. Clinard & P. C. Yeager, *Corporate Crime*, p. 44ff; M. B. Clinard, *Corporate Ethics and Crime: The Role of Middle Management*, Sage Publications, Beverly Hills, 1983, pp. 17-19.

[42] M. Weber, "Bureaucracy", reproduced in F. Fischer & S. Siriani (eds.), *Critical Studies in Organization and Bureaucracy*, Temple University Press, 1984, at pp. 24-26.

[43] H. A. Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization*, The Free Press, New York, 1976 (3rd ed.), p. 148. See also P. Blau & M. Meyer, *Bureaucracy in Modern Society*, Random House, New York, 1976 (3rd ed.), p. 38ff.

[44] Simon, *Administrative Behavior*, pp. 147-9.

[45] *Id.* p. 148; N. Mouzelis, *Organization & Bureaucracy: An Analysis of Modern Theories*, Routledge and Kegan Paul, London, 1967, pp. 59-61; S. M. Kriesberg, "Decision-Making Models and the Control of Corporate Crime" (1976) 85 *Yale L. Journal* 1091, p. 1121ff; Blau & Meyer, *Bureaucracy in Modern Society*, p. 46f.

[46] Mouzelis, *Organization and Bureaucracy*, p. 60; Simon, *Administrative Behavior*, p. 148f.

[47] However, see M. Reisman, *Folded Lies: Bribery, Crusades and Reforms*, The Free Press, New York, 1979.

agents.[48] The following theory of individual responsibility in the corporate technostructure will concern the responsibility of direct actors or their superiors for acts which commit the corporation to crime. Crimes committed for individual profit at the corporation's expense present less difficult ethical problems and will not be dealt with.

Max Weber does present a scheme of responsibility which is based on notions of collective responsibility. He argues that members of an organization possess "solidarity" which is either "active" (i.e. members participate directly in a given set of actions) or "passive" (i.e. members participate vicariously through representatives of the group whose actions bind them).[49] As a result of this "solidarity" or unity of purpose, "all the participants may be held responsible for the action of anyone, just as he himself is".[50] As discussed above, such excessive collectivism should not be adopted.[51] Further, Weber fails to discuss "the conditions under which responsibility functions, what determines its operation or limits its scope".[52]

The conditions under which responsibility arises may be explained as follows: Firstly, each office in the corporate technostructure will have attached to it a "sphere of obligations".[53] A corporate officer occupying a given office will be formally responsibility for performing these obligations. Secondly, the officer will have a certain amount of discretion in the performance of his or her duties, stemming from the fact that rules or orders may be open to a variety of interpretations owing to the "open-texture" of language[54] or that directions from superiors are cast in a deliberately ambiguous form.[55] The breadth of the officer's discretion relates directly to his or her capacity to choose not to violate a positive rule of public law. Thirdly and finally, where the authority accompanying the sphere of obligations includes authority to supervise others or to delegate tasks to subordinates, the officer is formally responsible for the acts of the subordinates. Substantive responsibility would then be measured by reference to the degree of control the superior officer had over his or her subordinates.

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[48] See e.g. *Grant* v. *Downs* (1975) 135 C.L.R. 678.

[49] M. Weber, *Theory of Social and Economic Organization* (tr. A. R. Henderson & T. Parsons), William Hodge & Co., London, 1947, p. 144.

[50] *Ibid.*

[51] Responsibility should be individual where possible, so as to be consistent with the general approach of criminal law.

[52] C. Friedrich, "Some Observations on Weber's Analysis of Bureaucracy" in R. Merton *et al.* (eds.), *Reader in Bureaucracy*, The Free Press, New York, 1952, p. 27 at p. 33. Substantive moral responsibility should therefore form the basis of "what determines the scope" of responsibility in corporations.

[53] Weber, *Theory of Social and Economic Organization*, p. 330.

[54] H. L. A. Hart, *The Concept of Law*, p. 124f. See also H. Kelsen, *General Theory of Law and State* (tr. A. Wedberg), Harvard University Press, Cambridge, 1949, pp. 132-134: Kelsen argues that the application of a norm always involves creating another norm.

[55] Kriesberg, "Decision-Making Models and the Control of Corporate Crime", p. 1104.

In discussing problems with individual responsibility which are peculiarly organizational in nature, it is proposed to deal with subordinate actors and superior officers separately. Naturally, not all corporate crime will take place along the lines of the simple primary actor/responsible superior model discussed here, but it is convenient to adopt such a model to highlight the issues that are likely to arise in a given corporate criminal case. The situations outlined below are necessarily simplified and are not intended to be exhaustive.

1—Subordinate officers

Where a subordinate officer makes a deliberate decision to commit the corporation to criminal activity in order to further his or her career with the corporation then *prima facie* no problems arise with respect to holding that officer responsible for his or her acts.[56] However, matters are seldom so simple—often there are constraints on the officer's discretion to make choices within the scope of his or her authority.

One way in which such a constraint may arise is where a direct order is given to the officer to perform an illegal act. Such an order is often accompanied by an express or implied threat that the officer's promotional prospects or even the officer's job itself could be at stake if he or she disobeys the order.[57] It is well known that "obeying orders" has seldom been accepted legally as an excuse for committing a crime, but the moral implications of holding a subordinate officer responsible when faced with the above predicament are less clear-cut.[58] Firstly, there is psychological evidence that most people have been so conditioned to obey authority that few can resist its exercise.[59] Secondly, given the fact that most crimes committed on behalf of corporations tend to be of a regulatory nature rather than crimes which are regarded by the community in general as serious moral wrongs—*mala prohibita* as opposed to *mala in se*—it is possible to argue that the act was constructively involuntary (the officer, having weighed up the alternatives, would not have chosen

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[56] E.g. the vice-president of G.E. who had engaged in price-fixing to advance his career without the concurrence or knowledge of top management. He had been ordered to comply with the law early in his career by the President of the company but had chosen to ignore the instruction—see G. Geis, "The Heavy Electrical Antitrust Cases of 1961" in M. D. Ermann & R. J. Lundman (eds), *Corporate and Governmental Deviance*, Oxford University Press, New York, 1987, p. 124 at p. 137ff.

[57] See, e.g., K. Vandivier, "Why Should My Conscience Bother Me?" in Ermann & Lundman, *Corporate and Governmental Deviance*, p. 103; Geis, "The Heavy Electrical Antitrust Cases", p. 134.

[58] Consider A. Camus, *The Rebel*, Random House, New York, 1959, p. 182—"The crime is handed down from chief to sub-chief until it reaches the slave who receives orders from above without being able to pass them on to anybody. One of the Dachau executioners weeps in prison and says, 'I only obeyed orders'." See also *Fedorenko* v. *The United States* 449 U.S. 490; 66 L. Ed. 2d. 686; 101 S. Ct. 737 (1982).

[59] C.f. Milgram's experiment, where subjects consistently obeyed an experimenter who instructed them to administer "electric shocks" of increasing voltage on an actor: S. Milgram, *Obedience to Authority: An Experimental View*, Harper & Row, New York, 1974.

otherwise).[60] Therefore, it is possible to argue that the officer in question was not responsible for the crime in a given case.

A variant on the above way in which constraints on the discretion of the subordinate officer to choose not to act illegally arise is more subtle. The division of labour and the operation of rules and standard operating procedures limit the possible range of decisions within the officer's discretion.[61] This, compounded with goal-setting from above, where production targets, for example, may be set by superior officers, leaving the subordinate officer with the task of finding the means to achieve them, can mean that the individual has little choice but to commit a crime.[62] The individual is always free, of course, to refuse to meet unrealistic goals or to follow a standard operating procedure that results in a violation of the law, but this may compromise the individual's career prospects or lead to dismissal from the corporation.[63] As such, the acts could be constructively involuntary.[64]

It may be quite difficult to decide that an officer acted involuntarily, as the inducements to commit a crime are not always based exclusively on internal corporate sanctions but also the possibility of reward or advancement.[65] The general effects of such constraints were commented on by Ganey J when sentencing the corporate executives convicted in the *Electrical Equipment Antitrust Cases*.[66] His Honour remarked that the defendants

> . . . were torn between conscience and an approved corporate policy, with the rewarding object of promotion, comfortable security, and large salaries. They were the organization or company man, the conformist who goes along with his superiors and finds balm for his conscience in additional comforts and security of his place in the corporate set-up.[67]

The precise outcome in each case will depend, of course, on the

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[60] Hart uses the *mala prohibital/mala in se* distinction to argue the opposite, namely that it is justifiable to impose, e.g., strict liability for the former since punishment in the former category of crimes only fulfils a utilitarian function: H. L. A. Hart, *Punishment and Responsibility*, p. 236. It is submitted that corporate crimes, though still *mala prohibita*, are nevertheless distinguishable from, say, parking offences, as the penalties that are imposed for them can be quite high. In other words, punishment for a corporate offence is sufficiently detrimental *to the individual* to require that responsibility be retained as a principle of distribution in punishment.

[61] On division of labour generally, see N. P. Mouzelis, *Organization and Bureaucracy*, p. 126. On how standard operating procedures provide constraints see A. Hopkins, "The Anatomy of Corporate Crime" in P. Wilson & J. Braithwaite, *Two Faces of Deviance: Crimes of the Powerless and Powerful*, University of Queensland Press, St. Lucia, 1978, p. 214 at pp. 216-218.

[62] See Clinard, *Corporate Ethics and Crime*, pp. 22, 95-100.

[63] Clinard & Yeager, *Corporate Crime*, p. 276.

[64] *Supra.*

[65] *Ibid.*

[66] *U.S.* v. *Westinghouse Electrical Corp.*, Criminal No. 20399 (E.D. Pa. 1960); cited in M. Watkins, "Electrical Equipment Antitrust Cases—Their Implications for Government and Business", (1961) 29 *Univ. Chicago L. Rev.* 94.

[67] *New York Times*, Feb. 7, 1961; cited by Geis, "The Heavy Electrical Antitrust Cases", p. 136.

application of the "voluntariness" test, turning particularly on how the seriousness of the constraint on the officer's will balances against the seriousness of the offence. Nevertheless, it is submitted that with most regulatory offences, threats of dismissal would make the acts constructively involuntary. By contrast, promises of advancement would not normally negate the voluntariness of the officer's acts.

2—Superior officers

It will be assumed that superior officers do not perform the actual acts which constitute the crime, but stand in a position of formal responsibility with respect to the particular activities carried on by the actual actors who perpetrate the crime.[68] The test of responsibility for such an officer has been outlined in Part II of this paper[69] and concerns the degree of control the superior officer has over the acts of the subordinate officer. Where direct supervision of the activities of the subordinate takes place, the superior officer is clearly responsible.

Problems arise, however, where the superior is more remote. Superior officers in modern corporations tend to delegate matters like designing the mechanisms of task performance to subordinates in order to concentrate on "strategic" matters such as communications with other firms, corporate policy and goal-setting.[70] As such, their attention is directed outwards rather than inwards, and their reliance on subordinates to ensure that day to day management is properly conducted is substantial.[71] In cases like these, it is difficult to find any substantive responsibility on the part of the officers concerned for the commission of the crime, unless it could be said that they *knew of and acquiesced in* the criminal act.[72]

The principal problem with establishing a sufficient relationship of control to ground responsibility on the part of senior corporate executives thus tends to revolve around whether any knowledge of the illegal acts reached them. Organizational science abounds with theories about

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[68] It is acknowledged that often, a superior officer is himself or herself part of a chain of command and therefore also subject to constraints on his or her freedom to make decisions. Where this is the case, the responsibility of that officer for orders given to subordinates is assessed in the same way the responsibility of subordinate officers is assessed. For the sake of discussion, however, it is proposed to focus on the responsibility of senior officers for the acts of subordinates by focusing on that relationship alone. The focus on "formal responsibility" is to cover situations where there are lateral responsibilities amongst superior officers of the same rank—only officers with authority over the particular activities concerned stand in a position of formal responsibility with respect to the said activities. The simple two tier model adopted in this paper is of course capable of refinement—a task which will be left unperformed for reasons of size.

[69] *Supra.*

[70] C. Stone, *Where the Law Ends: The Social Control of Corporate Behaviour*, Harper & Row, New York, 1975, p. 60; see also D. Warwick, *A Theory of Public Bureaucracy: Politics, Personality and Organization in the State Department*, Harvard University Press, Cambridge, 1975, Chapter 4, *passim.*

[71] This was argued by the defendant in *United States* v. *Park* 421 U.S. 658; 44 L. Ed. 2d. 489; 95 S. Ct. 1903 (1975)—unsuccessfully.

[72] Knowledge includes knowledge of facts which disclose a high probability that material facts exist: *supra.*

bottlenecks and defects in the passage of information up the hierarchy. One theory, known as the "Theory of Cognitive Dissonance", suggests that recipients of information unconsciously filter it and reinterpret it according to their preconceptions, thus distorting information as it passes up the corporate hierarchy.[73] As a consequence, the superior officer receiving it at the end of the chain could have totally misleading information as to what the situation really is. Another similar theory suggests that "each additional relay in a communications system halves the message while doubling the noise".[74] In cases where these theories operated it could well be that the senior officer in question was totally innocent of the crime committed by his or her subordinate as he or she had no knowledge of the wrongful act.

Problems with information flow also affect situations where the senior corporate official had at an earlier date innocently designed a standard operating procedure which was defective—in the sense that its application in a particular case involved a breach of a positive rule of law. Unless that official (who had the authority to rectify the defect) received knowledge about the defect, it cannot be said that he or she was responsible for the crime.[75] This is especially so where subordinate officers deliberately concealed the fact that a crime had been committed from the superior officer in question,[76] or where such information was simply not passed on owing to a belief on the part of subordinates that their superiors did not wish to have such knowledge.[77] However, something less than knowledge as defined above,[78] such as a negligent failure to supervise, would not be sufficient to ground liability to punishment.

It would be quite easy, on the basis of the preceding discussion, to form an impression that superior officers seldom receive knowledge of crimes committed by their subordinates. Recent empirical evidence, however, suggests otherwise. A study by M. B. Clinard of the middle management of corporations in the *Fortune* magazine list of the 500 largest corporations in the United States revealed that generally, lines of communication were quite open and that "top management would know about violations either before they occurred or shortly thereafter".[79] Thus, while theories about information blockage can provide explanations for why particular items of information fail to pass up the corporate hierarchy, it should not be assumed in every case in which a superior officer claims

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[73] Cf., e.g., Coffee, "Beyond The Shut-Eyed Sentry", p. 1137f.

[74] *Id.* p. 1138.

[75] C. Stone, *supra* n. 33, p. 89. See also the facts in *Eva* v. *Mazda Motors (Sales) Pty. Ltd.* (1977) A.T.P.R. 40-020; *Ducret* v. *Nissan Motor Co. (Aust.) Pty. Ltd.* (1979) 38 F.L.R. 126.

[76] Coffee, *supra* n. 2, p. 1127f.

[77] *Id.* p. 1131.

[78] *Supra.*

[79] Clinard, *Corporate Ethics and Crime*, p. 138. A similar finding was made in a study of 46 corporations involved in questionable commercial payments reported to the S.E.C.: see Clinard & Yeager, *Corporate Crime*, pp. 279-280.

not to have known of a violation, that a blockage of information occurred.[80] Nevertheless, it is submitted that the standard of responsibility which applies to superior officers should not be more stringent than moral substantive responsibility because such a standard would have the potential to be unfair to the individual—particularly when a blockage in information occurs.

Thus, where a senior officer knows of a potential violation of the law or knows of recurring violations and has authority to rectify defective standard operating procedures or otherwise prevent the violation (arising out of his or her formal responsibility),[81] the relationship of control test is satisfied and he or she is substantively responsible if he or she fails to take bona fide steps to prevent the violation. The officer could be said to know of a potential violation if the facts within his or her knowledge disclose a very high risk that a crime will be committed.[82]

3—No responsible person; organizational/corporate responsibility

It is always possible that organizational factors are such that the corporation becomes more than the sum of its parts. It is quite possible, with reference to organizational principles discussed above, to conceive of situations where no one individual in a corporation can be said to be responsible for a wrongful act committed on behalf of the corporation because no one has the complete picture of how their individual acts interact. In *Eva* v. *Mazda Motors (Sales) Pty. Ltd.*,[83] for example, Mazda commissioned an advertising agency to prepare advertisements for its range of cars, based on technical information prepared by the company. One of the advertisements contained misleading information. The advertisement was in fact checked by the general manager and sales manager of the company, neither of whom had any technical knowledge. No one had had the foresight to include the service manager in the checking procedure. Consequently the advertisement was published in breach of Part V of the *Trade Practices Act* 1974 (Cth.).

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[80] For example, John Braithwaite, in a study of corporate crime in the pharmaceutical industry, commented that "the presumed diffusion of accountability in a complex organization sometimes can be a hoax that the corporation plays on the rest of the world, especially courts and sociologists!"—J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry*, Routledge & Kegan Paul, London, 1984, p. 324.

[81] The case of a superior officer who knows of a violation stemming from a defective standard operating procedure but who does not actually have the authority him/herself to rectify the procedure is not dealt with for reasons of size, but would be an appropriate case for discussion in constructing a more elaborate model than the two-tier model adopted in this paper.

[82] The standard of knowledge equates with the criminal law formula of "recklessness". Thus, the level of knowledge required is stricter than "reason to know" (see *US Restatement of the Law of Contract* 2d., s. 19). The officer must not only have information from which a person of his or her intelligence would infer that a set of facts exists—that inference must be that there is a high probability that those facts exist. This moral model further imposes a duty to supervise on superior officers where they have the formal authority to do so.

[83] (1977) A.T.P.R. 40-020. See also *Hornstein* v. *Paramount Pictures Inc.* 22 Mix. 2d. 996; 37 N.Y.S. 2d. 404 (1942).

As argued earlier, primary liability for corporate crimes should remain with individuals. However, in situations where this would result in unfairness to the individual, it would not be improper to punish the corporation.[84] It is not proposed to dwell at length on this topic—suffice it to say that there is a sound philosophical basis for treating organizations in some cases as entities with "personalities" separate from that of their members.[85]

4—Some conclusions on individual moral responsibility

It is appropriate, at this stage, to make some general comments about moral responsibility for crimes committed by corporations, so that moral principles may be formulated to enable assessments to be made about the fairness of the positive rules of law discussed in the following chapter. Again, the overall purpose of the law should be not to compromise the principle of fairness to the individual as a matter of distribution unless the need of society is overwhelming.

The circumstances in which subordinate and superior officers can be said to be responsible for their acts has been discussed.[86] It may be inferred from that discussion that, as a general rule, superior officers of corporations have a wider range of choices and consequently greater freedom to decide not to perform an illegal act. They are also better able, through the exercise of their formal authority, to encourage a culture of compliance with corporate regulations. Subordinate officers, however, are constrained by orders, rules, standard operating procedures and goals or targets set by their superiors. The only problem for finding that there was responsibility on the part of a superior is where the actual act was performed by a subordinate and the superior had no knowledge of it or of a high risk that that act would be performed. Where this is the case, there is clearly no responsibility on the part of the superior for the act. However, some empirical studies carried out in the United States suggest that top management generally knows more than organizational theory suggests it does.[87] This proposition is far from startling—a successful corporation is unlikely to have poor information systems.

A dramatic instance in which recognition was given to the peculiar way in which responsibility is separated from the actual physical acts in cases involving organizational crime was the trial of Adolph Eichmann

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[84] To punish an individual when he or she is not responsible would be unfair as a matter of distribution of punishment, notwithstanding that it could fulfil a deterrence function.

[85] Meir Dan-Cohen, *Rights, Persons & Organizations: A Legal Theory for Bureaucratic Society*, University of California Press, Berkeley, 1986, Ch. 4. By way of contrast see S. J. Stoljar, *Groups and Entities: An Inquiry into Corporate Theory*, Australian National University Press, Canberra, 1973, Ch. 11. The matter has been discussed at length by Fisse & Braithwaite, "The Allocation of Responsibility for Corporate Crime", *passim*.

[86] *Supra*.

[87] Clinard & Yeager, *Corporate Crime*, pp. 279-280; Clinard, *Corporate Ethics and Crime*, p. 138.

in Jerusalem. In the course of its judgment, the District Court of Jerusalem commented that with crimes

> . . . wherein many people participated, on various levels and in various modes of activity—the planners, the organizers, and those executing the deeds, according to their various ranks . . . [ordinary concepts of criminal responsibility do not apply and] in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands.[88]

Emphasis should be placed on the fact that the remark made by the District Court about responsibility in organizations is only a generalization, and as with all generalizations, can only be a precarious victory over the facts. It can be no substitute for an actual application of the principles of substantive responsibility discussed above to the actual facts of each case. However, it does emphasize that as a matter of *policy*, the ordinary presumption that responsibility rests principally with the primary actor should give way to a presumption that in the case of organizational crimes, responsibility also resides higher up in the corporate hierarchy. Thus, the following principle may be stated:

Morally, substantive responsibility rests with the officer who was in the best position to prevent the crime provided that that officer had knowledge of relevant facts pointing to the crime, and with the primary actor, provided that that actor was able voluntarily to choose not to perform that act.[89]

The best position test incorporates the informal as well as the formal organization. Thus, an officer would be in the best position to prevent a crime if he or she had formal responsibility for the "sphere" in which the crime was committed (i.e. had authority to prevent the crime) and actually exercised authority within that sphere of competence. This would have the effect of focusing on the officer who actually gave the order to commit the crime or knew of and acquiesced in its commission when he or she had the authority to prevent the illegal act. An officer can also be said to have knowledge of the crime where the facts within his or her knowledge disclose that the probability that a crime will be committed is high. Of course, where no single actor possessed sufficient knowledge to foresee the high probability of the crime, then responsibility is corporate and not individual.[90] It is submitted that a lesser standard

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[88] H. Arendt, *Eichmann in Jerusalem*, Random House, New York, 1959, p. 225. Marshall Clinard also concludes that responsibility should lie with top management: Clinard, *Corporate Ethics and Crime*, p. 156.

[89] The first limb of the principle is adapted from Kriesberg, "Decision-Making Models and the Control of Corporate Crime", p. 1098.

[90] Punishing the corporation is not necessarily unfair to its shareholders because corporate losses stemming from corporate liability is part of the risk shareholders consent to bear in return for professional management of their capital—see Bearle & Means, *The Modern Corporation and Private Property*, pp. 284-287 (described by Partlett & Burton as "agency costs"—D. Partlett & G. Burton, "The Share Repurchase Albatross & Corporation Law Theory" (1988) 62 *A.L.J.* 139 at 141). In other words, shareholders are only corporate distributees and not recipients of criminal punishment in any meaningful sense—see Fisse & Braithwaite, "The Allocation of Responsibility for Corporate Crime", p. 48.

of knowledge, such as negligence, would not sit easily with general standards of substantive moral responsibility and should not be given effect to, notwithstanding the peculiarities of the corporate form.[91]

IV. POSITIVE LAW AND INDIVIDUAL RESPONSIBILITY

A. LEGAL RESPONSIBILITY

1—Corporate responsibility

The topic of corporate responsibility has received much examination in recent times, and it is not proposed to deal with it at length here.[92] However, it is necessary to outline briefly what the current basis of corporate responsibility in positive Anglo-Australian law is in order fully to appreciate the place individual responsibility occupies in the jurisprudence of corporate crime.

The current bases for corporate criminal liability have not rid themselves of the essentially individualistic bias of the criminal law, and overlap with, rather than complement, individual liability—that is, corporations are treated as means by which individuals commit crimes as opposed to criminal actors in their own right. They also fail adequately to deal with situations where the defect is "organizational" rather than "individual", as discussed above.[93] Basically, there are two ways in which corporate criminal liability arises. Firstly, where the law admits of vicarious liability for the crimes of another, a corporation can be vicariously liable for the acts of its agents just as a non-corporate employer can be.[94] Secondly, where an officer, said to be the "directing mind and will" of the company, commits a crime, the acts and state of mind of that officer can be imputed to the company.[95]

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[91] For a critique of negligence as a standard of criminal responsibility, see "Developments in the Law—Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions" (1979) 92 *Harv. L. Rev.* 1227, pp. 1270-1272.

[92] See, e.g., B. Fisse, "Responsibility, Prevention and Corporate Crime" (1973) 6 *New Zealand Universities L. Rev.* 250; "Developments in the Law—Corporate Crime"; B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1982) *S. Calif. L. Rev.* 1141; L. H. Leigh, "The Criminal Liabillity of Corporations and Other Groups: A Comparative View" (1982) 80 *Mich. L. Rev.* 1508.

[93] *Supra.* In the case of *Eva* v. *Mazda Motors* (1977) A.T.P.R. 40-020, the company was held liable for a violation of Part V of the *Trade Practices Act* although no individual employee was responsible—the fault was one of defective standard operating procedures. However, liability under the *T.P.A.* is to an extent unusual—for constitutional reasons, the focus is on corporations (s. 84) subject to defences under s. 85. See also: *Ducret* v. *Nissan Motor Co. (Aust.) Pty. Ltd.* (1979) 38 F.L.R. 126.

[94] *Moussel Bros. Ltd.* v. *London & North-Western Rly. Co.* [1917] 2 K.B. 836; *R* v. *Australasian Films Ltd.* (1921) 29 C.L.R. 195; *Morgan* v. *Babcock & Wilcox Ltd.* (1929) 43 C.L.R. 163; *Schenker & Co. (Aust.) Pty. Ltd.* v. *Sheen* (1983) 48 A.L.R. 693 at 703.

[95] *D.P.P.* v. *Kent & Sussex Contractors Ltd.* [1944] 1 K.B. 146; *I.C.R. Haulage Ltd.* [1944] 1 K.B. 551; *Moore* v. *I. Bresler Ltd.* [1944] 2 All E.R. 515; *Tesco Supermarkets Ltd.* v. *Natrass* [1972] A.C. 153; *Universal Telecasters (Qld.) Ltd.* v. *Guthrie* (1977) 15 A.L.R. 439.

The vicarious liability doctrine[96] is limited, as it can only arise in respect of statutory offences which are construed by the courts as capable of being committed vicariously.[97] Thus, the range of offences for which a corporation can be liable under the vicarious liability doctrine is quite small. On the other hand, the range of offences the corporation can commit under the "directing mind and will" doctrine is very wide,[98] but the applicability of the doctrine is limited by the fact that the officer whose acts and state of mind are to be imputed to the corporation must be in a sense the "alter ego" of the company, as opposed to a mere servant or agent.[99] This effectively limits the range of officers whose acts may be imputed to the company to those at the very top of the corporate hierarchy. Thus, conceivably, the acts of a middle manager of a company though performed within the scope of his or her employment may fail to satisfy the requirements of both the vicarious liability and the "directing mind and will" doctrines.[100] In such cases, the only type of liability which may be found will necessarily be individual.

2—Individual responsibility

Individual responsibility, by comparison with corporate responsibility, is more orthodox. In a sense, basic liability is individual, and corporate liability is only additional to but does not replace individual liability.[101] It is proposed to deal with direct actors (subordinate officials) separately from indirect actors (senior officials).

(i) Direct actors. Officers of a corporation who participate directly in a crime are generally personally liable for the commission of the crime.[102] Where the company is also convicted for the same crime, the officer concerned can be liable as a principal offender with the company as accessory[103] or the company can be liable as the principal with the officer

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[96] For a more complete discussion, see P. Gillies, *Criminal Law*, 1985, pp. 107-110. On vicarious liability generally see pp. 86-97.

[97] *Id.* p. 110. See also G. Williams, *Criminal Law*, ch. 7. See also, cases in n. 94 (*supra*).

[98] For a discussion of the "directing mind and will" doctrine generally, see Gillies, *Criminal Law*, pp. 108-118. A case by case examination of the crimes a corporation can and cannot commit is beyond the scope of this paper—for a discussion see *id.*, pp. 105-107.

[99] The "directing mind and will" is discussed in *Tesco Supermarkets Ltd.* v. *Natrass* [1972] A.C. 153 at 171, 180, 187, 190, 200. For the Canadian variation on the doctrine see *Canadian Dredge & Dock Co.* v. *R* (1985) 19 D.L.R. (4th.) 314. Some post-*Tesco* cases have attempted to stretch the "directing mind and will" doctrine to include middle-managers: see *Kehoe* v. *Dacol Motors Pty. Ltd.; Ex parte Dacol Motors Pty. Ltd.* [1972] Qd. R. 59; *Brambles Holdings Ltd.* v. *Carey* (1976) 15 S.A.S.R. 270; *Universal Telecasters (Qld.) Pty. Ltd.* v. *Guthrie* (1977) A.L.R. 531. It is submitted that such an approach is artificial as it attempts to stretch the doctrine beyond its logical limits. Corporate responsibility needs re-examination—a task beyond the scope of this paper. However, see the references in n. 92 above.

[100] Note the facts of *Tesco Supermarkets* v. *Natrass* [1972] A.C. 153, especially comments by Lord Morris at 180.

[101] Historically, those who joined in setting a company's seal to a deed were responsible for its contents: *Bentley's Case* (1731) 2 Stra. 913; 93 E.R. 937.

[102] *Dellow* v. *Busby* [1942] 2 All E.R. 439; *R* v. *Ovenell* [1968] 1 All E.R. 933.

[103] *Lewis* v. *Crafter; Cavendish Laboratories (Aust.) Ltd* v. *Crafter* [1942] S.A.S.R. 30; *R* v. *Robert Millar (Contractors) Ltd.* [1970] 2 Q.B. 54.

as accessory[104] or both parties may be liable as joint principals.[105] In general, there is little significance in the classification either as principal or accessory as both are viewed by the law as equally culpable and liable to the same punishment.[106] However, accessorial liability may become of significance where either the company or the officer is incapable of committing the crime, since a party may be an accessory to a crime that that party cannot commit.[107] An example of this is where a statute places a prohibition on the company and not on the officer—the officer in such a case can only be liable (if at all) as an accessory.[108]

It should be noted, however, that the scope of accessorial liability is limited by the nature of the corporation's liability. Where the corporation is vicariously liable for the acts of a servant, that servant cannot be liable for the crime as an accessory.[109]

Before an officer can be liable, there must be a finding of *mens rea*—normally that the officer knowingly participated in the commission of the offence.[110] This, of course, will not be the case where the crime is one of strict liability and the officer is charged as a principal offender.[111] Where the officer is charged as an accessory, however, it appears that even in the case of crimes of strict liability, the prosecution will have to prove intention to aid and abet together with knowledge of the facts of the offence—recklessness is not enough to constitute accessorial *mens rea*.[112]

It is no defence to a criminal charge that the acts performed were done on behalf of the company and not for the individual's benefit, and that the offence was in substance the company's and not the individual's.[113] An exception to this general principle will be discussed below. It is also no defence that the defendant was obeying orders of a superior officer.[114] In the recent case of *A.* v. *Hayden*[115] the plaintiffs, who were A.S.I.S.

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[104] *R* v. *Judges of the Australian Industrial Court; Ex parte C.L.M. Holdings Pty. Ltd.* (1977) 136 C.L.R. 235. *Thomas* v. *Ducret* (1984) 153 C.L.R. 506; *Crossan* v. *Commons* (1985) A.T.P.R. 40-542.

[105] *Moore* v. *I. Bresler Ltd.* [1944] 2 All E.R. 515. *L. Vogel & Sons Pty. Ltd.* v. *Anderson* (1968) 160 C.L.R. 157.

[106] See, e.g., Crimes Act 1900 (N.S.W.) ss 345, 346, 347.

[107] See *R* v. *Cogan* [1976] Q.B. 217.

[108] *Graham* v. *Strathern* [1927] J.C. 29; *Glasgow Corp.* v. *Strathern* [1929] J.C. 5; see L. H. Leigh, *The Criminal Liability of Corporations in English Law*, p. 173. But where the corporation cannot commit the offence, the officer cannot be an accessory: *Cain* v. *Doyle* (1946) 72 C.L.R. 409.

[109] *Mallan* v. *Lee* (1949) 80 C.L.R. 198 at 215-216 per Dixon J. See also *Hamilton* v. *Whitehead* (1989) 7 A.C.L.C. 34 at 37.

[110] *Dale* v. *Gerathy* [1980] Tas. R. 127; *Dellow* v. *Busby* [1942] 2 All E.R. 439.

[111] See *Stephens* v. *Robert Reid & Co. Ltd.* (1902) 28 V.L.R. 82 at 90.

[112] *Giorgianni* v. *R* (1985) 59 A.L.J.R. 461.

[113] *Graham* v. *Sinclair* (1918) 18 S.R. (N.S.W.) 75—affirmed on other grounds by the High Court: 25 C.L.R. 102; *Dellow* v. *Busby* [1942] 2 All E.R.; *R* v. *Ovenell* [1968] 1 All E.R. 933. See also: *U.S.* v. *Wise* 370 U.S. 408; 8 L. Ed. 2d. 590; 82 S. Ct. 1354 (1962).

[114] *A.* v. *Hayden* (1984) 56 A.L.R. 82 at 84 (Gibbs CJ), 92 (Mason J), 101 (Murphy J), 117 (Brennan J); See also *Keighley* v. *Bell* (1866) 4 F.&F. 763; 176 E.R. 781.

[115] 56 A.L.R. 82.

agents involved in the Sheraton Hotel affair, argued *inter alia* that they were obeying orders. The High Court rejected this argument emphatically—Murphy J said that

> In Australia, it is no defence to the commission of a criminal act or omission that it was done in obedience to the orders of a superior or of the Government. Military and civilians have a duty to obey lawful orders, and a duty to disobey unlawful orders.[116]

Thus, a very high standard of conduct is currently imposed on primary actors by positive law.

A similar position exists with respect to duress. The current state of the law is that duress is only available as a defence where the threat negating voluntariness is of death or violence to the person.[117] There was a *dictum* in *Lynch* v. *D.P.P.* by Lord Simon of Glaisdale that economic duress may in some cases be as compelling as threats of violence, but His Lordship actually appears to have been engaged in a line-drawing exercise by rejecting the notion of economic duress as a defence.[118] As most "threats" on corporate officers are of an economic kind, the defence of duress will almost never be available to an individual defendant to a corporate criminal charge.

Where the offence is of strict liability, the *Proudman* v. *Dayman* defence of an honest and reasonable mistake of fact may apply.[119] The availability of the defence is limited by the fact that ignorance of the law is no excuse—the mistake has to be one of fact.[120]

(ii) Indirect actors. Indirect actors can be liable as accessories to the corporation's "crimes of commission" (misfeasance) where their involvement in the crime is sufficient to ground accessorial liability. In *Wells* v. *Spanton*[121] for example, the defendant officer was the managing director of a company which had been convicted for breaching ss 64(3) and 64(5)(e) of the *Trade Practices Act* 1974. The defendant officer had formal responsibility for the sphere of operations in which the breach took place and had specifically authorized the act which violated ss 64(3) and 64(5)(e). He was thus held liable as an accessory to the crime in accordance with s. 5 of the *Crimes Act* 1914 (Cth.).[122] The standard rule

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[116] 56 A.L.R. 82 at 101. See also *supra* n. 22.

[117] *R* v. *Lawrence* [1980] 1 N.S.W.L.R. 122.

[118] *Lynch* v. *D.P.P.* [1975] A.C. 652 at 686-7. On this point see also D. O'Connor and P. Fairall, *Criminal Defences*, Butterworths, Sydney, 1988, p. 153.

[119] (1941) 67 C.L.R. 536.

[120] See, e.g., *Wells* v. *John R. Lewis (International) Pty. Ltd; Wells* v. *Spanton* (1975) A.T.P.R. 40-007 at p. 17, 133. This distinction can be elusive: See S. J. Stoljar, *The Law of Quasi-Contract*, Law Book Co., Sydney, 1964 at p. 43ff.

[121] *Ibid.*

[122] Despite the use of the words "knowingly concerned" in s. 5 of the *Crimes Act* 1914, the section has been interpreted as adding nothing to accessorial liability: *Walsh* v. *Sainsbury* (1925) 36 C.L.R. 464 at 476-7 (Isaacs J), *Goldie; Ex parte Picklum* (1937) 59 C.L.R. 254 at 268 (Dixon J). See P. Gillies, *The Law of Criminal Complicity*, Law Book Company, Sydney, 1980, p. 23.

with respect to accessorial liability is that where there is no active participation in the crime, an indirect actor may escape liability since some sort of positive encouragement (counselling or assistance no matter how minor) is needed to constitute the *actus reus* to ground accessorial liability.[123] There is some authority for the proposition that where a person has authority to control the direct actor and fails to do so, that person may be liable as an accessory.[124] It appears, however, that even where a person has such authority, his or her failure to act must still constitute some sort of positive encouragement to the direct actor to commit the crime—mere acquiescence of itself will not suffice to make that person an accessory.[125] Further, it may be hard to prove that the officer concerned, as an indirect actor, had actual knowledge of the offence—a mere suspicion or even recklessness as to the truth is not enough to constitute accessorial *mens rea*.[126]

Peversely enough, a single judge of the Supreme Court of Western Australia recently decided that an officer who was the "directing mind and will" of a company for the purpose of corporate liability could not himself be liable as an accessory to a breach of ss 169 and 174 of the *Companies Code*.[127] Fortunately this decision was overturned on appeal to the High Court. In deciding that such an officer could be held liable as an accessory, Mason CJ, Wilson and Toohey JJ commented that

> . . . the fundamental purpose of the companies and securities legislation—to ensure the protection of the public—would be seriously undermined if the hands and brains of a company were not answerable personally for breaches of the Code which they themselves have perpetrated.[128]

Senior officers of a corporation are never personally liable at common law for the corporation's "crimes of omission" (nonfeasance) where statutory duties have been imposed on the company.[129] The Canadian case of *R* v. *Michigan Central Railroad Co.*[130] is illustrative of this point.

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[123] See generally: *R* v. *Coney* (1882) 8 Q.B.D. 534 at 557 (Hawkins J); *National Coal Board* v. *Gamble* [1959] 1 Q.B. 11 at 20 (Lord Devlin); *R* v. *Clarkson & Carrol* [1971] 3 All E.R. at 349 (Megaw LJ). On corporate crime see *R* v. *Hendrie* (1905) 11 O.L.R. 202; 10 C.C.C. 298.

[124] *Du Cros* v. *Lambourne* [1907] 1 K.B. 40; *Dennis* v. *Pight* (1968) 11 F.L.R. 458.

[125] *Cassady* v. *Reg Morris (Transport) Ltd.* [1975] Crim.L.R. 398. In most of the cases dealing with this matter, the defendant was actually present when the crime was committed by the direct actor, e.g., *Du Cros* v. *Lambourne* [1907] 1 K.B. 40; *R* v. *Harris* [1964] Crim.L.R. 54, *Dennis* v. *Pight* (1968) 11 F.L.R. 458, *Tuck* v. *Robson* [1970] Crim.L.R. 273.

[126] *Giorgianni* v. *R* (1985) 59 A.L.J.R. 461 at 465 (Gibbs CJ), 470 (Mason J); See also *Ferguson* v. *Weaving* [1951] 1 K.B. 814. Wilful blindness, however, will be sufficient knowledge to satisfy the *mens rea* requirement.

[127] *Hamilton* v. *Whitehead* (1988) 6 A.C.L.C. 871 at 877 per Franklin J.

[128] *Hamilton* v. *Whitehead* (1989) 7 A.C.L.C. 34 at 38f.

[129] *R* v. *Tyler & International Commercial Company* [1891] 2 Q.B. 582. Contempt of court is an exception to this rule—individuals can be attached for disobedience to an order of a court: see discussion by Williams, *Criminal Law*, p. 866.

[130] (1907) 17 C.C.C. 483.

The defendant company in that case had been convicted of a breach of statutory duty to take precautions when transporting dynamite. The company had neglected to train its employees to handle explosives. As a result, two people were killed and forty injured in an accident involving negligent handling of dynamite. Riddell J commented that though the company was liable, none of its officers were (despite their gross negligence) "guilty authors of the shocking casualty".[131]

It is appropriate to consider here the applicability of vicarious liability to indirect actors for the misfeasance of direct actors. As noted above, vicarious liability is limited to crimes imposed by statutes which have been interpreted as intending to displace the common law presumption against vicarious liability.[132] In such cases, the employer company is liable for the crime of its employee.[133] In Australia, where the crime is one requiring *mens rea*, the mental state of the employee can be imputed to the employer where such an act was performed within the scope of employment.[134] As a general rule, however, a principal agent has never been liable for the acts of a subordinate agent in the law of agency.[135] This principle has been carried over into the criminal law—senior officers are not vicariously liable for the misfeasance of their subordinates unless they are personally implicated in some other way.[136] It is the corporate employer which is vicariously liable.

There is, however, an exception to the principal agent/subordinate agent rule. In *Ex parte Falstein; Re Maher*[137] the principal agent of the company was also the holder of an import licence under the Customs Act. A subordinate agent of the company breached s. 234 of the Act and the defendant principal agent was held to be vicariously liable for the crime.[138] The case may be explained in that the terms of s. 234 contemplate that the person who may be vicariously liable is the licence-

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[131] *Id.* at 494. However, some *obiter* comments by His Lordship indicate that he realised that those officers who were really culpable—the general manager and directors—resided outside the jurisdiction. Thus, but for *R* v. *Tyler & Industrial Commercial Co.* [1891] 2 Q.B. 582, it may be possible to argue that the misfeasance/nonfeasance distinction is nonsense in the case of officers who are in fact the directing minds and wills of the company.

[132] The courts have purported to look at the language, scope and object of the statute: *Vane* v. *Yiannopoulos* [1964] 3 All E.R. 820 at 829.

[133] *Moussel Bros. Ltd.* v. *London & N.-W. Rly. Co.* [1917] 2 K.B. 836.

[134] *R* v. *Australasian Films Ltd.* (1921) 29 C.L.R. 195; See also *Stephens* v. *Robert-Reid & Co. Ltd.* (1902) V.L.R. 82. The law in England is different—there must have been a "delegation" there of authority by the employer to the vicar: *Mullins* v. *Collins* [1874] Q.B. 292. See Williams, *Criminal Law*, p. 270; Gillies, *Criminal Law*, p. 97.

[135] *Bear* v. *Stevenson* (1874) 30 L.T. 177; 5 A.J.R. 56: Directors of a company were held not to be liable for fraudulent representations made by an agent of the company.

[136] *Boyle* v. *Smith* [1906] 1 K.B. 432; *Booth* v. *Halliwell* (1914) 30 T.L.R. 529; *Rushton* v. *Martin* [1952] W.N. 258; *Mallon* v. *Allen* [1963] 3 W.L.R. 1053.

[137] (1949) 49 S.R. (N.S.W.) 133.

[138] See also *R* v. *Winson* [1969] 1 Q.B.D. 371. Note, however, that English law on vicarious liability is different from Australian law—the English "delegation" principle has not been applied in Australia: *supra.*

holder and not the employer of the direct actor. However, this approach has its difficulties, especially as the "scope of employment" principle is a condition precedent to vicarious liability in Australia.[139] It is submitted that as a matter of consistency this approach is wrong and that a better approach is that adopted in *Blazeley* v. *Pilkington*.[140] In that case the individual defendants were holders of licences under the *Traffic Act* 1925 (Tas.) to use public vehicles. They formed a company to take over their business and leased their vehicles to the company. The terms of the licence were breached by an employee of the company and the defendants were duly charged with an offence under the Act. The Full Court of the Tasmanian Supreme Court held that the defendants were not liable and that the appropriate party which should have been charged was the company.[141] Admittedly, the case could be construed as turning on the construction of the *Traffic Act*.[142] However, it is submitted that the court was concerned with something more fundamental, namely the scope of employment principle.[143] Thus, for vicarious responsibility to apply there must have been a relationship of employer and employee between the principal and the direct actor—one of principal agent and subordinate agent is not enough.

It is, of course, possible for officers of a company to be liable for contraventions of the law by a company by virtue of statutory provisions providing for such liability. The directors of a company, for example, may be deemed to be also liable for an offence where the company has been convicted of that offence.[144] It appears, however, that where officers are deemed by a statutory provision to be liable for a crime committed by a corporation, they cannot be liable by virtue of that deeming provision for an attempt by the corporation to commit that crime.[145]

Often, however, a formula such as that found in the *Trade Practices Act* 1974 is used. Under that Act, primary liability for the crime is on the corporation by virtue of ss 79 and 84. Section 79(1)(d) then provides that a person who has been, "directly or indirectly, knowingly concerned" in the contravention is also liable.[146] Unlike normal accessorial liability, mere acquiescence may be sufficient for there to be liability under this

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[139] *R* v. *Australasian Films Ltd.* (1921) 29 C.L.R. 195.

[140] [1977] Tas. S.R. 18.

[141] *Id.* at pp. 29 (Neasey J), 40 (Nettlefold J).

[142] See particularly Neasey J, *Id.* at 29.

[143] *Id.* at 40f., per Nettlefold J. His Honour alludes to employment as forming the basis of liability.

[144] *Dunne* v. *J. Connolly Ltd.* [1963] S.R. (N.S.W.) 873—s. 147(3) of the *Factories, Shops & Industries Act* 1962.

[145] *Millner* v. *Raith* (1942) 66 C.L.R. 1. This is because it is a condition precedent to the deeming provision operating that the substantive offence is committed: per Williams J at p. 8. See also Starke J at p. 5.

[146] See, e.g., *Adams* v. *Anthony Bryant & Co. Ltd.* (1986) A.T.P.R. 40-784.

sub-section.[147] Thus, under s. 572 of the *Companies Act* 1981, which employs a statutory formula similar to s. 79(1)(d) of the *Trade Practices Act*, an officer who is formally responsible for performing a duty in the company may be held liable for a failure to perform that duty if he or she possesses the relevant knowledge.[148] By contrast, s. 556(5), which provides that where a company does an act to defraud a creditor, any person who was "knowingly concerned in the doing of the act *with that intent or for that purpose*" is liable, has been interpreted to require an actual fraudulent involvement—acting with morally blameworthy irresponsibility is insufficient because of the more stringent requirement in the expressed words.[149]

An alternative formula is to place primary liability on the part of officers of the corporation for the commission of a specified offence, subject to their proving certain matters of exculpation.[150] An example of such a provision is s. 556 of the *Companies Act*. Sub-section 556(1) states that a person concerned in the management of a company at a time when the company incurred a debt which it could not reasonably be expected to pay is guilty of an offence. Sub-section 556(2) then provides certain defences.[151] Statutory provisions like s. 556 focus specifically on individuals—primary liability for breaching their provisions is placed on the officers of the corporation and the corporation is not criminally liable despite the fact that it is, due to the separate entity principle, the "person" committing the fraud.[152]

B. LEGAL RESPONSIBILITY AND MORALITY

It was concluded above that substantive moral responsibility tends to rest not only with primary actors but also with actors who are senior officers in the corporation (indirect actors). This is because they generally have more authority to alter standard operating procedures or otherwise to act to prevent the commission of crimes. By contrast, low-level

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[147] *Id.* at p. 48, 563 (Wilcox J). Some support for this proposition may be found in *Yorke* v. *Lucas* (1985) 158 C.L.R. 661 which discusses s. 75B(c) which is similar to s. 79(1)(d): The majority held (at 670) that actual knowledge of the facts constituting the contravention would suffice to constitute liability. However, Brennan J, in a separate judgment, held (at 677) that s. 75B(c) added nothing to normal accessorial liability, being drafted in the same terms as s. 5 of the *Crimes Act* (see *supra* n. 122)—the majority did not deal with this point. See also *Sutton* v. *A. J. Thompson Pty. Ltd. (In Liq.)* (1987) 73 A.L.R. 233 at 242.

[148] *Hamilton* v. *Stokes* (1982) 1 A.C.L.C. 375.

[149] *Coleman* v. *R* (1987) 5 A.C.L.C. 766; see also *Hardie* v. *Harman* (1960) 105 C.L.R. 451 which deals with the predecessor to s. 556(5).

[150] E.g. s. 85A *Crimes Act* 1914 (Cth.).

[151] For a detailed analysis of s. 556(2) see *Metal Manufacturers Ltd.* v. *Lewis* (1986) 4 A.C.L.C. 739; *Coates* v. *Hardwick* (1987) 12 A.C.L.R. 657.

[152] See also, e.g. *Companies Act* ss 129, 130, 565.

employees can only "respond to the fear of a criminal conviction by acting with greater care within their narrow realm of authority".[153]

However, the criminal law has focused liability for crimes committed by corporations primarily on direct actors. The law relating to direct actors is unexciting—the basic question is whether the requisite requirements of *mens rea* have been fulfilled (if any). There is seldom any problem with the *actus reus* since by definition a direct actor would have performed the external elements of the offence personally. Where, however, a statute is cast in such terms that only the corporation can be liable, there is the possibility of accessorial liability. No excuses tend to be available for the peculiarly organizational nature of the constraints on the accused's will. The fairness of this may be questioned, given the nature of the offence (*mala prohibita*) and the moral principles discussed in Part III of this paper.[154] However, this is where the interests of society at large trump the rights of the individual. Thus, "economic duress" and "obeying orders" are generally not admitted as legal excuses, notwithstanding that we feel that morally, actors acting under such circumstances should not be liable to punishment. Further, the interests of justice in the criminal system (treating like cases alike) demand that unless we are prepared to allow defences like "obeying orders" more generally (i.e. to apply outside the organizational context) we may not allow corporate officials to plead them as legal excuses.[155]

By contrast, the liability of indirect actors/superior officers at common law is limited to accessorial liability, which consequently means that unless there is some positive involvement on the part of the officer concerned (or at least presence at the time of the commission of the offence) it is unlikely that any liability will accrue. Although an officer with formal responsibility for the activities of the direct actor is not any less culpable merely because he or she only acquiesces in the act, he or she will escape liability unless the acquiescence can be construed to constitute some form of positive encouragement.[156]

The various provisions relaxing the positive encouragement rule contained in various statutes go some way towards solving this problem, but the formulae by which they address the matter are still to some degree deficient. Firstly, although there is a trend—especially in the *Companies Act* 1981 and the *Trade Practices Act* 1974—towards shifting liability

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153 "Developments in the Law: Corporate Crime", at 1261.

154 Arguably, when an offence is *malum in se* then such liability would not be unfair.

155 Although there is nothing to prevent them from being pleaded in mitigation of sentence. A discussion of whether economic duress and obeying orders should be general criminal defences is beyond the scope of this paper. However, it is clear that a plea of duress is effectively a plea that an act was constructively involuntary (in the sense used in Part II of this paper)—see e.g. O'Connor & Fairall, *Criminal Defences*, p. 156.

156 It is difficult to ground liability on the basis of "mere" acquiescence even where a statutory "deeming provision" is in operation: see *Metal Manufacturers Ltd.* v. *Lewis* (1986) 4 A.C.L.C. 739 per Hodgson J at 752.

from the corporation to individuals,[157] it is *ad hoc* and only directed at specific offences. Secondly, the interpretation of "knowingly concerned" varies from provision to provision—s. 5 of the *Crimes Act* 1914 (Cth) has been interpreted as adding nothing to accessorial liability[158] although there are *dicta* indicating that s. 79(1)(d) of the *Trade Practices Act* may apply more broadly to include mere acquiescence without any actual positive encouragement.[159] Thirdly, it is unclear if the different standards of responsibility laid down by ss 556(5) and 572 of the *Companies Act* (for example) indicate a lack of thought rather than a consciously principled differentiation of the standards of liability. Finally, the standard requirement of knowledge (or wilful blindness) in most provisions puts a very high burden of proof upon the prosecution, given the difficulties of proving knowledge on the part of senior corporate officials.[160] This is not of course to say that senior corporate officials do not know of violations—merely that it is very hard to prove that they do.[161] Further, this high knowledge requirement fails to cover the situation where the superior officer has knowledge of facts which disclose a high probability that a subordinate will commit a crime.[162]

It should be noted that the fact that senior corporate officials are never liable for a corporation's "crimes of omission" is anomalous. There is no reason in principle why misfeasance by a company can be accompanied by individual responsibility whereas nonfeasance cannot.

Some recognition of the organizational position of defendant officers has been taken, however, not in assessing responsibility but in sentencing. In *Murphy* v. *H.F. Trading Co. Pty. Ltd.*[163] for example, Gibbs J commented that the defendant officer had nothing to gain from the commission of the offences and that "his involvement in the offences, rendering him liable to very heavy penalties, seems to have been an act of great folly committed for the benefit of his employer."[164] This was allowed to go in mitigation of the penalty imposed on him.[165] By way of contrast is the case of *Adams* v. *Anthony Bryant Pty. Ltd.*[166] which involved a contravention of ss 53(g) and 55A of the *Trade Practices Act* 1914. Both defendant

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[157] E.g. ss 129, 556.

[158] *Walsh* v. *Sainsbury* (1925) 36 C.L.R. 464 at 476-7 (Isaacs J), *Goldie; Ex parte Picklum* (1937) 59 C.L.R. 254 at 268 (Dixon J).

[159] *Adams* v. *Anthony Bryant & Co. Ltd.* (1986) A.T.P.R. 40-784 at 48,563 (Wilcox J).

[160] *Cth.* v. *Beneficial Finance Co.* 360 Mass. 188, 274; 275 N.E. 2d. 33, 82, cert. denied, 407 U.S. 910, 914 (1971). Cited in "Developments in the Law: Corporate Crime", p. 1268.

[161] This is not to argue for a reversal of the onus of proof but rather for a relaxation of the standard of knowledge that the prosecution has to prove to bring it in line with the moral standard.

[162] A proposed solution to this will be discussed below.

[163] (1973) 47 A.L.J.R. 198.

[164] *Id.* p. 200.

[165] *Ibid.* See also *Minister of State for Customs & Excise* v. *Aunger Accessories Pty. Ltd.* [1969] S.A.S.R. 441; *T.P.C.* v. *Queensland Aggregates Pty. Ltd.* (1982) 2 T.P.R. 289.

[166] (1987) A.T.P.R. 40-784.

directors in that case pleaded guilty so little evidence was adduced as to their actual responsibilities in the company. Wilcox J, when sentencing the defendants, commented that all that was known was that "each is a director, that each is aware of the true facts and that neither took any steps to prevent the company proceeding as it did."[167] Thus, an $8000 fine was imposed on each officer on the basis that he had the authority to prevent the crime, but had failed to do so.[168]

Thus, sentencing aside, there has been by and large a failure by the criminal law to push legal responsibility for corporate crimes up the corporate hierarchy. One reason why greater injustice has not been perpetrated against low level employees is because it is the enforcement policy of some regulatory agencies not to proceed against individuals unless it is felt that they are truly culpable and that their conviction would have some effect in reforming the company and deterring others.[169] However, in the one area in which enforcement action has been principally directed at individuals—mine safety—despite an ostensible desire on the part of mine safety inspectorates to hold the mine manager responsible, most prosecutions have been of miners or their immediate superiors.[170] This, if nothing else, is a reason for having clear legal standards of responsibility and for not relying on prosecutorial discretion to ensure that the law functions fairly.

V. REFORM—NEW STANDARDS OF INDIVIDUAL RESPONSIBILITY

It is appropriate to note here that an officer who commits a crime on behalf of a company may be liable to the company in fiduciary law, notwithstanding that the company benefited as a result of the criminal act.[171] Nevertheless, such internal liability cannot totally replace criminal

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[167] *Id.* at p. 48, 563.

[168] *Ibid.*

[169] An interview with John O'Neill of the Trade Practices Commission's Compliance Division revealed that the Commission only tends to proceed against individuals where they are, in effect, the alter ego of the company (see, e.g., *Crossan* v. *Commons* (1985) A.T.P.R. 40-542; *Wise* v. *Greenslade & C.L.M. Holdings Pty. Ltd.* (1977) A.T.P.R. 40-035; *Larmer* v. *Dome Lighting Products* (1978) A.T.P.R. 40-070) or where they are in some way directly involved in the commission of the offence (see e.g. *Trade Practices Commission* v. *David Jones (Aust.) Pty. Ltd.* (1986) A.T.P.R. 40-671). See also *Prosecution Policy of the Commonwealth: guidelines to the Making of Decisions in the Prosecution Process*, A.G.P.S., Canberra, 1986, para 2.16, especially (f) and (l).

[170] J. Braithwaite & P. Grabosky, *Occupational Health and Safety Enforcement in Australia: A Report to the National Occupational Health and Safety Commission*, Australian Institute of Criminology, Canberra, 1985, pp. 44-47 esp. p. 46.

[171] See *E. Hannibal & Co. Ltd.* v. *Frost* (1988) 4 B.C.C. 3—A Managing Director of a company who had paid £21,000 of company money in bribes to secure contracts for the company was held to be liable to the company for that sum, notwithstanding that the bribes had secured £330,000 worth of work for the company. This is consistent with standard fiduciary law in that a director who makes a profit in breach of his or her fiduciary duties is liable to the company for those profits whether or not the company itself could have benefited: see e.g. *Regal (Hastings) Ltd.* v. *Gulliver* [1967] 2 A.C. 134n.

liability because criminal punishment fulfils a denunciatory function missing from other forms of liability.[172] Thus, it is proposed to examine certain alternative approaches to criminal liability for corporate officers.

A. PREDEFINED RESPONSIBILITY

One approach to the problem of individual accountability is a variation on strict liability—the responsibilities of the various officers of the corporation are defined in advance by legislation.[173] Where a corporate crime is committed, the officer whose predefined responsibility it was (formal responsibility) to prevent that particular violation is deemed responsible for the crime and liable to punishment.

A very good example of this approach is the New South Wales Coal Mines Regulation Act 1982.[174] Under this act, primary responsibility for breaches of coal mine safety is imposed on the mine manager.[175] This is because owners of mines are encouraged not to interfere with mine safety by s. 164(2)(a), which provides that it is a defence to criminal charges brought under s. 161 if the owner "was not in the habit of taking, and did not in respect of the matters in question take any part in the management of the mine". The manager is protected, however, in that it is an offence for any person to contravene the direction of the manager or the delegate of the manager where that direction was given to secure compliance with the Act or to secure the health and safety of employees.[176] In addition, the manager has a defence under s. 164(1) that he or she took all reasonable precautions to prevent the commission of the offence. This protects the manager from liability when a subordinate deliberately disobeys a direction of the manager.

Where the manager delegates his or her duties, the district inspector of mines must be notified of the delegation in writing, countersigned by the delegate.[177] This shifts responsibility for those functions to the delegate for the purposes of the Act.[178] If a direction from above is given which the manager feels compromises the safety of the mine, he or she may delay the execution of that direction until it has been confirmed in writing by the responsible senior officer—it is an offence to refuse to comply with a request for instructions in writing.[179] Where an offence is committed as a result of those instructions, liability would rest with

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[172] J. Feinberg, *Doing & Deserving*, pp. 98-101. See also I. Kant, *The Philosophy of Law*, p. 198.

[173] Liability is not really strict, however, because the legislation commonly provides defences.

[174] Discussed in J. Braithwaite & P. Grabosky, *Occupational Health and Safety Enforcement in Australia*, pp. 45-46.

[175] *Id.* p. 45. s. 161(1) in conjunction with s. 164(2)(a). See also s. 37. Liability is strict subject to certain statutory defences: s. 164(1).

[176] S. 160(d).

[177] Ss 56 & 57.

[178] S. 56(10).

[179] Ss 52 & 54.

the officer giving those instructions and not the mine manager.[180] Thus, the Act attempts to define, before the commission of any offence against it, who the guilty parties are. It attempts to prevent the diffusion of responsibility through the corporate technostructure by having the actual actors identify themselves when they perform certain acts.

Another feature of the Act is that it attempts to impose a duty on certain named classes of officers to prevent violations by making them liable for offences regardless of who the actual offender was,[181] subject to certain defences.[182] However, where the offender is the owner of the mine or where the offender is senior to a person in the corporate hierarchy, that person is not guilty of an offence.[183] This has the effect of pushing liability, where possible, up the corporate hierarchy.

Although the Coal Mines Regulation Act 1982 (N.S.W.) is an innovative piece of legislation which attempts to come to grips with the organizational nature of corporate offences, it is not a formula which lends itself to universal application.[184] The internal structures of organizations vary considerably from organization to organization and it may not always be possible to specify, in the comprehensive way the N.S.W. Act does, the responsibility of various corporate officers. Mining corporations are to a certain degree unique in that they share similar organizational structures. To impose such legislation elsewhere could stifle organizational innovation. Thus, a less rigid formula is required. Further, the Act effectively imposes liability on a negligent failure to supervise[185] and is inconsistent with ordinary standards of responsibility.

B. THE U.S. FOOD, DRUG AND COSMETIC ACT— 'DOTTERWEICH LIABILITY'

A type of accessorial liability has been developed by the United States Supreme Court which overcomes the requirement of "positive acts" which plagues Anglo-Australian law on corporate crime. Early in the century there already were cases in which attempts were made to overcome the problem of responsibility within corporations.[186] An example of such a case is the Colorado case of *Overland Cotton Mill Co.* v.

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[180] C.f. s. 161(2). See further *infra* on the operation of s. 161(2). The writing provision overcomes the problem of proving that the true offender was the senior officer.

[181] S. 161(1).

[182] S. 164; including the defences of reasonable precautions and impossibility: s. 164(1) & (3).

[183] S. 161(2).

[184] For other criticisms of the Act, see Braithwaite & Grabosky, *Occupational Health and Safety Enforcement in Australia*, pp. 90-92 esp. p. 92.

[185] S. 164(1)—note also that the onus of showing that the officer took reasonable precautions etc. may well be on the officer (the section has not been the subject of litigation).

[186] For a discussion see W. McVisk, "Toward a Rational Theory of Criminal Liability for the Corporate Executive" (1978) *Journal of Criminal Law and Criminology* 75 at pp. 79-85.

People[187]—a case involving violations of child labour laws. The superintendent of the factory concerned was found guilty although the violations were only negligent and not intentional.[188]

In *U.S.* v. *Dotterweich*[189] the Supreme Court held that an offence under the Food, Drug and Cosmetic Act was of strict liability and that all employees of the company who aided and abetted its contravention were liable to punishment. The Court then said that all who stood in a "responsible relation" to the offence were to be taken as having aided and abetted the offence.[190] The "responsible relation" formula remained, however, unexplained.

An attempt was made by the majority in *U.S.* v. *Park*[191] to explain what "responsible relation" meant. In that case, the defendant was the president of ACME corporation which had violated the Food, Drug and Cosmetic Act in permitting one of its warehouses to be rodent infested. The defendant had been warned by the F.D.A. before as to unsanitary conditions in that warehouse but had delegated the task of securing compliance without following it up. The majority reaffirmed *Dotterweich*, holding that, with crimes for which liability is strict, indirect actors standing in a responsible relation to the offence are also liable.[192] "Responsible relation" was said by the court to incorporate some notion of blameworthiness—the defendant was not to be punished merely because of his position in the hierarchy.[193] The defendant was then said to have stood in a responsible relation to the offence because he had, by virtue of his position in the corporate hierarchy, the responsibility to prevent or correct the violation complained of and he had failed to do so.[194] A defence of "impossibility" was admitted but not proved by the defendant.[195]

Park's Case is unsatisfactory for two main reasons. Firstly, the judgment of the majority is contradictory—it was held that the defendant had to be culpable in some way and was not to be punished purely because of his formal position of responsibility; yet, this was the precise basis upon which he was said to have stood in a responsible relation to the offence. It is possible that the majority was swayed by the fact that he had been warned before—not just in relation to the warehouse concerned

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[187] 32 Colo. 263, 75 P. 924 (1904).

[188] 75 P. 924 at 926. See also *State* v. *Burnam* 71 Wash. 199, 128 P. 218 (1912).

[189] 320 U.S. 277, 88 L. Ed. 48 (1944).

[190] 88 L. Ed. 48 at 51.

[191] 421 U.S. 658, 44 L. Ed. 2d. 489, 95 S. Ct. 1903 (1975).

[192] 44 L. Ed. 2d. 489 at 498-499.

[193] *Id.* at 502.

[194] *Id.* at 502.

[195] *Id.* at 501, 502.

but also in relation to another of the company's warehouses prior to that.[196] Nevertheless, if this was the basis of the decision, the majority should have said so. Liability on the pure basis of formal responsibility fails to fulfil the requirement of fairness to the individual discussed in Part II of this paper.[197] Secondly, the case extends too far the possible range of people potentially liable for a strict liability offence. Strict liability by itself is a departure from normal standards of liability—there is no need for such provisions to be interpreted broadly to catch within their scope indirect actors who had no knowledge of the relevant facts constituting the offence (and were not reckless in relation to the probability that an offence would be committed).

C. SECTION 403 OF THE PROPOSED FEDERAL CRIMINAL CODE[198]

An alternative to the *Dotterweich/Park* approach is s. 403 of the proposed U.S. Code which went before Congress in 1977. Sub-section 403(a) merely reaffirms the principles of direct actor liability and adds nothing to the law. Sub-section 403(b) attempts, however, to codify *Dotterweich*. It provides:

> Except as otherwise provided, whenever a duty to act is imposed upon an organization by statute an agent of the organization having *significant responsibility for the subject-matter* to which the duty relates is criminally liable for an omission to perform the duty, if he has the state of mind required for the commission of the offence . . .[199]

The sub-section differs from *Dotterweich* in two ways. Firstly, it extends the scope of the *Dotterweich* principle to crimes of intent by requiring that the relevant officer have the same *mens rea* as required for the offence. Secondly, it narrows the scope of *Dotterweich* by requiring that the agent have "significant responsibility". Thus, an officer would have to stand in "a responsible and proximate relation to the violation",[200] that is, the officer would not only have to have actual authority to change

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[196] *Id.* at 495. Also at 502.

[197] *Supra* p. 5. Liability accrues uander the *Dotterweich* doctrine without the officer concerned having knowledge of criminal acts/omissions or knowledge of facts disclosing a high probability that the crime will be committed.

[198] The proposed Code has had a long and chequered history—it went through over 10 years of drafting, revision and debate. It finally went before Congress as the *Criminal Code Reform Act* of 1977, s. 1437, 95th Congress, 1st. Session: see S. D. Goodwin, "Individual Liability of Agents for Corporate Crimes under the Proposed Federal Criminal Code" (1978) 31 *Vanderbilt L. Rev.* 965, n. 1. The Code was passed in the Senate by a large majority early in 1978 but was defeated in the House: *Congressional Quarterly*, 95th. Congress, 2nd. Session, 1978. Amended versions of the Code were introduced several times between 1978 and 1982, but each attempt to have the Code passed failed. The final attempt to have the Code passed was made in 1982: *Congressional Quarterly*, 97th. Congress, 2nd. Session, 1982.

[199] Text produced in Goodwin, "Individual Liability of Agents for Corporate Crimes", p. 993 (my emphasis).

[200] *Id.* p. 998.

operating procedures to prevent violations but be more directly concerned in the actual management of the activities than the chief executive in *Park's Case* was.[201] It should be noted that s. 403(b) only applies where positive duties have been imposed by statute on the corporation. This overcomes the common law rule that senior officers are not liable for the corporation's crimes of omission.

Sub-section 403(c) deals with an entirely new basis for liability. It provides:

> A person responsible for supervising particular activities on behalf of an organization who, by his *reckless failure to supervise adequately* those activities, permits or contributes to the commission of an offence by the organization is criminally liable for the offence . . .[202]

This would have the effect of imposing on officers with formal responsibility over a particular area a *positive duty to supervise*, and is an attempt to prevent senior officials from deliberately neglecting to inquire where inquiry is due, then alleging that they have no knowledge of a particular violation.[203] The standard of conduct required of senior officers is not excessively burdensome, however. Firstly, the officer concerned would have to fail to supervise adequately; for example, by failing to adopt "generally approved systems designed to prevent misconduct by subordinates."[204] Secondly, the officer concerned would have to be reckless in his or her conduct. Mere negligence would be insufficient to attract liability. Recklessness would therefore carry its normal meaning in criminal law—that of a gross departure from normal standards of conduct.[205] Thus, an official would only be liable under this subsection where he or she had knowledge of facts which pointed to a substantial risk in the circumstances of subordinate misconduct and he or she chose to ignore that risk.[206] This is consistent with principles of substantive moral responsibility discussed in Part II of this paper.[207]

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[201] Thus this would permit a valid delegation of authority. See *McCollum* v. *State 165* Tex. Crim. 241, 305; S.W. 2d. 612 (1957). Goodwin, "Individual Liability of Agents for Corporate Crimes", pp. 1011-1013. See also the discussion in Part II.

[202] *Id.* p. 1002—reproduces the text (my italics).

[203] This would overcome the "positive encouragement" rule which currently characterizes accessorial liability. Thus, acquiescence by a superior which does not in fact encourage the direct actor would be sufficient to render the superior officer liable under s. 403(c). Note comments made by the Senate Committee on the Judiciary: 94th Congress, 1st Session, *Report on the Criminal Justice Reform Act of 1975* (Comm. Print 1975) at p. 75: cited in Goodwin, "Individual Liability of Agents for Corporate Crimes", p. 1002.

[204] Goodwin, "Individual Liability of Agents for Corporate Crimes", p. 1006. This is consistent with the requirement that an officer must fail to take bona fide steps to prevent the crime—*supra.*

[205] See, e.g., "Developments in the Law: Corporate Crime", p. 1272.

[206] Senate Committee on the Judiciary, p. 56; Goodwin, Individual Liability of Agents for Corporate Crimes", p. 1006.

[207] *Supra.* It is submitted that the standard of responsibility embodied by s. 403(c) is the standard which should be adopted by the law and that this is not a case where the demands of society should trump the rights of the individual by imposing a standard of legal responsibility which is more severe than substantive moral responsibility.

The advantage of subsections 403(b) and (c) is that they impose liability where Anglo-Australian criminal law has failed effectively to impose liability—on officers higher up in the corporate hierarchy.[208] They also manage this without breaching the principles of fairness to the individual discussed in the Second and Third Parts of this paper. It is recognized that s. 403 does admit of the criticism of vagueness and imprecise drafting. For example, it is not clear on the face of subsection 403(b) what "significant responsibility" means. Nevertheless, it is submitted that the principles embodied in the section are sound and that the imprecision of the language employed by the section is not incurable. "Significant responsibility" for example, could be defined to give it the meaning described above. Alternatively, the standards of responsibility outlined in s. 403 could be incorporated into the common law as a variation on accessorial liability. For present purposes, however, the precise mechanics of legal reform are of secondary concern—it is the broad principles of s. 403 which are of primary interest, insofar as they indicate the direction legal reform should take.

VI. CONCLUSION

This paper should not be taken as implying that individual responsibility is the only way to regulate corporate deviance. In fact, alternatives to orthodox criminal liability for both individuals as well as corporations may very well work better in preventing corporate violations of positive law.[209] However, it is submitted that so long as individualism is a basic assumption upon which our system of criminal justice functions, the presumption of individual responsibility should not be undermined by indiscriminate use of corporate responsibility. This is not to say that corporate responsibility is conceptually unsupportable, but rather that it should only apply where no individual can be said to be responsible for a crime.[210]

Where individuals are to be held liable for violations of the law committed "by corporations", fairness to the individual as a matter of distribution (who is to be punished) should be given effect to as far as possible to protect the individual from the potential harshness of excessive utilitarianism. Individuals should not be held legally responsible for crimes for which they are not morally responsible. This principle need not, however, be applied rigidly: there are areas in which it is felt that, because

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[208] "Developments in the Law: Corporate Crime", p. 1261.

[209] See Fisse & Braithwaite, "The Alloction of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability".

[210] See H. Kelsen, *General Theory of Law and State*, pp. 104-107. For an interesting account of group responsibility see R. M. Dworkin, *Law's Empire*, Harvard University Press, Cambridge, 1986, pp. 168-175.

of the harm to society which may otherwise occur, higher levels of responsibility are imposed on individuals by the law than by morality.[211] Examples are the imposition of strict liability and the denial of "economic duress" or "obeying orders" as legal defences. However, it is submitted that such departures from standards of moral responsibility are to be avoided whenever possible.

The principle of individual responsibility has fared poorly within the context of the corporate technostructure. Current legal notions of responsibility—especially in the common law—do not adequately reflect notions of fairness to the individual. Admittedly, part of the reason for this failure is that defences such as economic duress are denied to direct actors as a matter of social policy. Nevertheless, the current focus of legal responsibility on individuals at the base of the corporate hierarchy does not accord with the notion that moral responsibility for corporate crimes also resides higher up the corporate ladder and that superior officers should at least share co-equal responsibility with their subordinates for corporate violations. Various statutory formulae have been applied *ad hoc* to correct the common law bias, but their effectiveness in dealing with the modern corporation is limited by what appears to be an imperfect understanding of how responsibility for crimes tends to be distributed in organizations.

Central to the shortcomings of these provisions is their failure to address the difficulty of proving actual knowledge on the part of superior officers of violations of the law by subordinates. In addition, they generally fail to impose a positive duty to supervise to prevent violations. There is a pressing need for legal reform, given that corporate regulation is an all-pervasive aspect of the economic/political system. Such reform should apply generally to all corporate crimes and focus on extending primary liability for crimes up the corporate hierarchy without sacrificing moral principles of responsibility as the basis of liability to punishment.

Clearly, an approach such as that taken in the Coal Mines Regulation Act 1982 (NSW) would be too inflexible for general application. By contrast, s. 403 of the proposed US Criminal Code represents the correct general direction for legal reform to take, as it overcomes many of the difficulties of proving knowledge without sacrificing the requirement of responsibility as a principle of distribution of punishment. As a result, it extends the liability of senior officers adequately to reflect notions of responsibility. A legal formula based on s. 403 would therefore falsify the definition of corporation in *The Devil's Dictionary* in the best possible way—by extending responsibility for corporate crimes so that not only direct actors are held liable but also their superiors, who have hitherto escaped liability even when they were morally responsible.

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[211] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, p. 236.