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**CRIMINAL LIABILITY OF CORPORATIONS—COMPARATIVE JURISPRUDENCE**

**by**

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Submitted in partial fulfillment of the requirements of the  
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## 1. INTRODUCTION

Criminal liability of corporations has become one of the most debated topics of the 20<sup>th</sup> century. The debate became especially significant following the 1990s, when both the United States and Europe have faced an alarming number of environmental, antitrust, fraud, food and drug, false statements, worker death, bribery, obstruction of justice, and financial crimes involving corporations. The most recent and prominent case in the United States has been the Enron scandal in which one of the largest accounting firms in the world, Arthur Andersen LLP, was charged with obstruction of justice.<sup>1</sup> Some corporations, including Dynegy, Adelphia Communications, WorldCom, Global Crossing, Health South, Parmalat (in Italy), and Royal Ahold (in Netherlands) falsified their financial disclosures. Other corporations, among which are Royal Caribbean, Olympic Pipeline, Exxon, Pfizer, Bayer, and Shering-Plough Corporation,<sup>2</sup> breached the environmental or health and safety laws. McWane Inc., one of the world largest manufacturers of cast-iron pipes, has an extensive record of violations causing deaths.<sup>3</sup> These corporate crimes resulted in great losses. The consequences that most directly affect our society are the enormous losses of money, jobs, and even lives. At the same time, the long-term effects of these crimes, such as the damaging effects upon the environment or health, which may not severely affect us now, should not be underestimated.

The reaction to this corporate criminal phenomenon has been the creation of juridical regimes that could deter and punish corporate wrongdoing. Corporate misconduct has been addressed by civil, administrative, and criminal laws. At the present, most countries agree that corporations can be sanctioned under civil and administrative laws. However, the criminal liability of corporations has been more controversial. While several jurisdictions have accepted

and applied the concept of corporate criminal liability under various models, other law systems have not been able or willing to incorporate it. Critics have voiced strong arguments against its efficiency and consistency with the principles of criminal law. At the same time, a large pool of partisans, to which I belong as well, has vigorously defended corporate criminal liability.

In the following sections, I will attempt to determine the purposes of corporate criminal liability, the reasons why some jurisdictions adopted this concept, but others still refuse to accept it, the models of corporate criminal liability developed so far, the reasons why corporate criminal liability developed differently in different countries, and the lessons we could learn from these developments. Different countries have adopted various models of criminal liability or refused to adopt any due to their peculiar historical, social, economical, and political developments. Based on these developments, each country found it appropriate to respond to the criminal behavior of corporations in different ways. None of the systems is perfect; each one has advantages and disadvantages. Although the American system seems to be the best reply to the criminal corporate phenomenon, other models of corporate criminal liability have some elements that should be considered for the purpose of creating a better model.

The main goals of criminal liability of corporations are similar those of criminal law in general. The first characteristic of corporate criminal punishment is deterrence—effective prevention of future crimes. The second consists in retribution and reflects the society’s duty to punish those who inflict harm in order to “affirm the victim’s real value.”<sup>4</sup> The third goal is the rehabilitation of corporate criminals. Fourth, corporate criminal liability should achieve the goals of clarity, predictability, and consistency with the criminal law principles in general. The fifth goal is efficiency, reflected by the first three goals mentioned above, but also by the costs of implementing the concept. Finally, we should not forget the goal of general fairness. The models

of corporate liability developed by different countries vary significantly and, as shown below, none of them reflect all these goals perfectly.

Although corporate criminal liability initially started by imitating the criminal liability of human beings, new models of criminal liability, such as the aggregation or self-identity theories, have been developed to better fit the corporate structure and operation. The American system of corporate criminal liability has been the most developed and extensive system of corporate criminal liability created so far. The American model includes a large variety of criminal sanctions for corporations (such as fines, corporate probation, order of negative publicity, etc.) in attempt to effectively punish corporations when any employee commits a crime while acting within the scope of his or her employment and on behalf of the corporation. The most distinguishing and bold element of the American model of corporate criminal liability is the adoption of the aggregation theory. This theory provides that corporations can be held criminally liable based on the act of one employee and on the culpability of one or more other employees who, cumulatively, but not individually, met the requirements of *actus reus* and *mens rea* of the crime. Although this system meets the goals of retribution, rehabilitation, predictability, and clarity, it apparently has the tendency of being a bit over-detering and costly.<sup>5</sup> It also has some significant spill-over effects on innocent shareholders and employees, and, some argue that, due to the adoption of the aggregation theory in particular, it lacks consistency with the traditional principles of criminal law.

The English and French models proved to be more restrictive mainly due to their requirement that the individuals acting on behalf of the corporation hold a high position or play a key function within the corporation's decisional structure. Moreover, these systems refused to adopt the aggregation theory. Due to the contemporaneous tendency of corporations to fragment

and delegate the power to decide and act, the prosecution of a significant number of crimes is prevented. Thus, although the requirements of clarity and consistency with the traditional principles of criminal law are met for the most part, these models seem to be under-detering, less retributive,<sup>6</sup> and, overall, less efficient. Moreover, due to the lack of the sanction of criminal probation the way it is instituted in U.S. and, in England, due to the lack of various other forms of sanctioning, the rehabilitative requirement is not adequately satisfied.

In Germany, the criminal liability of corporations is non-existent. Instead, Germany implemented a comprehensive administrative-penal system that regulates corporate criminal wrongdoing. The German legislators believe that the administrative liability of corporations fulfills the goals of deterrence, predictability, clarity, and general fairness, and is also less costly to implement than corporate criminal liability. Moreover, by refusing to adopt the concept of corporate criminal liability, the German law system pays tribute to the traditional concepts of the criminal law. Thus, Germans argue that the administrative-penal system is sufficient. However, many critics have emphasized the close similarity between the German administrative-penal law and the criminal law, and suggested that this system might be just a façade for criminal sanctioning without the protections offered by the criminal procedure. The German system underemphasizes the role of the moral stigma that accompanies any criminal sanction; therefore, it is not characterized by the retribution of the criminal punishment. In addition, the lack of corporate criminal liability might create the undesirable effect of attracting corporations whose acts are not tolerated by the criminal law of other countries; this, in turn, would increase the level of corporate crime.

The Continent European countries have based their legal systems on long history and traditions that have permanently marked the development of their laws. In civil law countries, the

doctrinal issues heavily influenced the laws and judicial decisions. And the tradition has been that corporations cannot commit crimes. Germany still refuses to accept the criminal liability of corporations and remains loyal to the old maxim *societas delinquere non potest*. Some of the reasons for this refusal have been the alleged corporations' lack of capacity to act, lack of culpability, and inappropriateness of criminal sanctions.<sup>7</sup> The most important reason has been the belief that the moral stigma of criminal sanctions is not necessary to fulfill the scopes of the punishment. At the same time, German corporations have been extremely well regulated by the very advanced German system of administrative law. Thus, Germany has not yet considered it necessary to override the old doctrinal restraints on corporate criminal liability.

France has abandoned the old maxim *societas delinquere non potest* and adopted a comprehensive, yet restrictive, system that addresses corporate criminal liability. This change was a much needed response to the increasing corporate crime phenomenon, especially when France lacked the very well developed and established system of administrative law previously developed by Germany. The French system is more restrictive compared to the American one because it is relatively new and the legislators have been probably cautious when implementing new concepts. Moreover, the adoption of corporate criminal liability has encountered a strong opposition from the French corporations.

Unlike, civil law systems, the common law legal systems have not struggled with doctrinal issues at the same level of intensity. The Anglo-American legal system has adopted the concept of corporate criminal liability as soon as it became necessary (due to the increasing corporate crime and lack of adequate civil or administrative sanctions) without thinking and re-thinking the old doctrinal traditions and arguments the way Germany or France did. The English and American law systems incorporated corporate criminal liability models easily. Although the

English model is still much more restrictive than the American one, several authors predict that the English model will soon undergo substantial changes towards a model similar to the American one. Some of the reasons that prevented the adoption of an extensive criminal corporate liability model in England have been the possible negative effects on innocent individuals and the high costs that corporations would have to pay for a monitoring system that would effectively prevent crimes.

The development of the concept of corporate criminal liability in different countries reveals its important functions in our society. However, because corporate criminal liability is only at its inception, this area of law is open to continuous improvement. Only time and practice will tell what the best way of achieving the goals of corporate criminal liability are. In the following sections I will emphasize the historical, social, and political contexts that influenced the development of the corporate criminal liability, the essential differences among different models of corporate criminal liability, and the possible desirable changes in the existing models.

## **2. HISTORICAL EVOLUTION**

Corporate criminal liability has its origins in ancient law, and became the center of the doctrinal discussions at the end of the 19<sup>th</sup> century. The history, laws, economics, and politics unique to each country have had a remarkable influence on the adoption and development of the concept of corporate criminal liability. This influence resulted in different models of corporate criminal liability. The concept of criminal liability of corporations has had a different evolution under civil law systems as compared to its development under common law systems. At the same

time, under the civil law or common law systems, corporate criminal liability has developed differently to reflect the historical and socio-economic realities of different countries. The historical evolution of corporate criminal liability shows that corporate criminal liability is consistent with the principles of criminal law and the nature of corporations. Furthermore, the historical development of corporate criminal liability reveals that criminal liability of corporations is part of an important “public policy bargain. The bargain balances privileges granted upon the legal recognition of a corporation—such as limited liability of corporate shareholders and the capability of a group of investors to act through a single corporate form—with law compliance and crime prevention pressures on the managers of the resulting corporate entity.”<sup>8</sup>

Aside from the existence of the Roman state and its territorial units called *civitas* or *coloniae*, the right of individuals to constitute trade, religious, and charitable associations has been recognized early in the development of the Roman law. The Roman entities were called *universitates personarum* (or *corpus/universitas*, which included the Roman state and other entities with religious, administrative, financial, or economic scopes) and *universitates rerum* (which included entities with charitable scopes). Upon creation by authorization, the entities had their own identity, owned property separate from that of their founders, and had independent rights and obligations. Although these entities were viewed as a fiction of the law, and despite the fact that the Roman doctrine considered that these associations lacked independent will, in some authors’ view, an entity could commit a crime and criminal causes of actions against them existed.<sup>9</sup> The acknowledgement of the existence of independent entities with rights and obligations constituted the basis for the evolution of corporate institutions in the medieval.

The Germanic law has also promoted the development of associations. The land was shared among families, and not among individuals. However, unlike the Roman *universitas*, which were fictitious creations of the law, the Germanic law considered that both the corporations and the individuals were real subjects of law. In 595, Clovis II created the *centuries* and *curies* (territorial units); these territorial entities were liable for the crimes committed on their territory.<sup>10</sup> The rationale of the collective responsibility in the Germanic law relied on the function of the sanction; sanctions were imposed not based on the concept of guilt, but on the outcome of the action. Therefore, if damages resulted from an individual action, a sanction was imposed to repair the damages. The sanction was viewed more as compensation than punishment, and because the property was owned by the collectivity, it was only logical that the collectivity should pay the damages.

Later, in the 12<sup>th</sup>-14<sup>th</sup> centuries, the concept of corporate criminal liability evolved; the Romanic law clearly imposed criminal liability on the *universitas*, but only when its members were acting collectively.<sup>11</sup> At the same time, Pope Innocent IV created the basis for the maxim *societas delinquere non potest* by claiming that, unlike individuals who have willpower and a soul, can receive the communion, and are the subjects of God's and emperor's punishments, *universitas* are fictions that lack a body and a soul, and therefore, cannot be punished. However the majority of the doctrine rejected this argument because of the realities of that time, and admitted the existence of juristic persons and their capacity of being sanctioned for their crimes if certain conditions were met. The emperors and popes used to frequently sanction the villages, provinces, and corporations.<sup>12</sup> The sanctions imposed could be fines, the loss of specific rights, dissolution, and spiritual sanctions upon the members of the corporations, such as the loss of the right to be buried, or excommunication.<sup>13</sup>

In the 14<sup>th</sup> century, the doctrine recognized that corporations had their own willpower and therefore, their criminal liability was a given. With a few exceptions (such as bigamy, rape, etc.), an entity could commit any crime which could be committed by an individual, regardless of the fact that the crime had no connection with the scope of the corporation.<sup>14</sup> This theory dominated the continental European doctrine until the end of the 18<sup>th</sup> Century. The medieval conception was based on the belief that all the corporations should be liable, both civilly and criminally, for the acts committed by their members. Cities, villages, universities, trade, and religious associations have been required to pay fines for their crimes. At the same time, the Germanic law was still loyal to the old concept of collective responsibility and, through a 1548 ordinance, sanctioned the cities that did not keep the peace by fines and loss of all liberties.<sup>15</sup>

In France, Ordonnance de Blois of 1579 enacted the criminal liability of corporations. The crime committed must have been the result of the collectivity's decision. Therefore, although the corporations were still considered legal fictions, the existence of corporate criminal liability sustains the conclusion that corporate criminal liability was not incompatible with the nature of the corporations. Before the French Revolution, the French Grande Ordonnance Criminelle of 1670 established<sup>16</sup> the criminal liability of corporations on similar basis. In addition, the ordinance provided for the simultaneous criminal liability of individuals for committing the same crimes as accomplices.

The French Revolution brought extreme changes in the French law; the corporations, including the provinces and nonprofit hospitals, have been completely eliminated and all their goods confiscated.<sup>17</sup> The notion of corporation was incompatible with the individualist aspirations of the revolutionary government.<sup>18</sup> Moreover, the new government thought that, due to their economic and political influence, corporations represented a potential threat for the new

regime.<sup>19</sup> There was also a financial explanation for this decision; the new revolutionary government was in immediate need of funds. The finances were mainly owned by the corporations and the easiest way of getting those funds was by confiscation from the corporations after their elimination.<sup>20</sup> Therefore, the French Penal Code of 1810 stopped mentioning the criminal liability of corporations, but not because the concept was incompatible with the doctrine, but because such liability was futile as a consequence of the corporations' disappearance from the French system of law.<sup>21</sup>

Under the influence of the French Revolution ideals, the majority of the continental Europe changed its view regarding corporate criminal liability. Corporations lost their power and importance and became undesirable entities under the antagonistic coalition of the monarchic absolutism and liberalism. This reality determined the creation of doctrinal theories that tried to find a basis for the lack of criminal liability of corporations. Malblanc and Savigny are the first authors sustaining the principle *societas delinquere non potest* in the 19<sup>th</sup> century.<sup>22</sup> The main argument was that a corporation is a legal fiction which, lacking a body and soul, was not capable of forming the criminal *mens rea* or to act in *propria* persona. Moreover, corporate criminal liability would violate the principle of individual criminal punishment.<sup>23</sup> German jurists also adhered to the "fiction theory." Thus, E. Bekker and A. Briz argued that corporations have a pure patrimonial character which is created for a particular commercial purpose and lacks juridical capacity. Therefore, corporations cannot be the subjects of criminal liability.<sup>24</sup>

Critics of the "fiction theory," such as O. Gierke and E. Zitelman, argued that corporations are unities of bodies and souls and can act independently. The corporations' willpower is the result of their members' will.<sup>25</sup> F. von Liszt and A. Maester were some of the principal authors who tried to substantiate the concept of corporate criminal liability in this period. They argued

that the corporations' capacity to act under the criminal law is not fundamentally different from that under civil or administrative law; corporations are juristic persons that have willpower and can act independently from their members.<sup>26</sup>

During the time of these doctrinal disputes, the number and importance of corporations in the European society increased significantly. The laws became more flexible and the states' role in the process of incorporation diminished.<sup>27</sup> For the purpose of controlling the corporate misconduct, the Council of Europe recommended that "those member states whose criminal law had not yet provided for corporate criminal liability to reconsider the matter."<sup>28</sup> France responded by making several revisions of its Penal Code for the purpose of modernizing its text. The revision of 1992 officially recognized the corporate criminal liability because, in the opinion of the French legislators, it made more judicial sense<sup>29</sup> and because it lacked other effective ways of sanctioning criminal corporate misconduct. This process culminated with the Nouveau Code Penale in 1994.<sup>30</sup> The French New Penal Code established, for the first time in any civil law system, a comprehensive set of corporate criminal liability principles and sanctions<sup>31</sup> providing in article 121-2 that, with the exception of the State, all the juristic persons are criminally liable for the offenses committed on their behalf by their organs or representatives.<sup>32</sup> The establishment of the corporate criminal liability attracted the critiques of thousands of corporations that could not believe in "such a revolution."<sup>33</sup> Ever since, France has had a relatively wide practice in this field.<sup>34</sup>

France's example was followed by numerous other European countries. Thus, Belgium, through the Law of May 4, 1999, modified art. 5 of the Belgian Penal Code and instituted the criminal liability of juristic persons.<sup>35</sup> Netherlands adopted the concept of corporate criminal liability even earlier, in 1976. Art. 51 of the Dutch Penal Code provides that natural persons as

well as juristic persons can commit offenses. In 2002 Denmark modified its Penal Code and established that corporations may be liable for all offenses within the general criminal code.<sup>36</sup>

Germany on the other hand, due to doctrinal issues, still resists the idea of incorporating corporate criminal liability in its legal system.<sup>37</sup> In Germany, corporate criminal liability is still governed by the maxim *societas delinquere non potest* and corporate misconduct is the subject of a very developed system of administrative<sup>38</sup> and administrative-penal law.<sup>39</sup> Germany's administrative-penal system, called *Ordnungswidrigkeiten (OwiG)*,<sup>40</sup> is the successor of *Ubertretungen*, a category of petty offences. The reason for "this growth of administrative procedures is of course to be found in the evolution of the Etat-Gendarme to the twentieth-century welfare State, resulting in an enormous expansion of the domain of the State..."<sup>41</sup>

The administrative fines, called *Geldbussen*, are imposed by specialized administrative bodies which are part of the executive branch of the government. The sanctions can be imposed both to individuals and corporations. Under the administrative-penal law, punitive sanctions can be applied.<sup>42</sup> However, the imposition of administrative sanctions does not imply moral stigma "and this consideration seems to have been the most important for the German legislature in opting for administrative sanctions rather than leaving the matter under the aegis of the criminal law."<sup>43</sup> The main arguments in defense of the lack of corporate criminal liability in Germany are: corporations do not have the capacity to act, corporations cannot be culpable, and the criminal sanctions are appropriate, by their nature, only for human beings.<sup>44</sup>

Italy, Portugal, Greece, and Spain followed the German model and refuse to hold corporations criminally liable.<sup>45</sup> For example, Italy imposed a system of administrative liability of corporations through the Decree-Law No. 300 of September 29, 2000 and the Decree-Law No. 231 of May 8, 2001.<sup>46</sup> However, the Italian doctrine argues that this administrative liability

is, in reality, criminal in nature because it is connected to the commission of a crime and is applied by using rules of criminal procedure.<sup>47</sup>

Due to historical circumstances, the evolution of common law systems has been different and did not embrace the Roman concepts. Unlike the civil law, which has its sources in legislative acts, the sources of the common law are the judicial decisions and the legislative acts. The adoption of the concept of corporate criminal liability has followed a conservative course under the English law.<sup>48</sup> Initially, England refused to accept the idea of corporate criminal liability for several reasons. Corporations were considered legal fictions, artificial entities that could do no more than what “legally empowered to do (*ultra vires* theory).”<sup>49</sup> Because corporations lacked souls, they could not have *mens rea* and could neither be blameworthy, nor punished.<sup>50</sup> Chief Justice Holt decided that corporations could not be criminally liable, but their members could.<sup>51</sup> In addition, corporations were very few in number, incorporation being a privilege granted by the crown. Therefore, the influence of corporations on the society was minimal.<sup>52</sup>

During the 16<sup>th</sup> and 17<sup>th</sup> centuries, corporations became more common and their importance in the socio-economic life increased. A need for controlling corporate misconduct became more and more obvious. Corporations have been recognized as independent entities which owned property distinct from that of their members.<sup>53</sup> The first step in the English development of corporate criminal liability was made in the 1840s when the courts imposed liability on corporations for strict liability offenses.<sup>54</sup> Lord Bowen decided that the most efficient way of coercing corporations was by introducing the concept of corporate criminal liability in the English law.<sup>55</sup> Soon after, by borrowing the theory of vicarious liability from the tort law,<sup>56</sup> the courts imposed vicarious criminal liability on corporations in those cases when natural persons

could be vicariously liable as well.<sup>57</sup> In 1944, the High Court of Justice decided in three landmark cases<sup>58</sup> to impose direct criminal liability on corporations and established that the *mens rea* of certain employees was to be considered as that of the company itself. The motivation of the decisions was vague and confusing due to the lack of clear and organized criteria for attributing the *mens rea* element to corporations.<sup>59</sup> This issue was clarified in 1972 in a case<sup>60</sup> in which the civil law *alter ego* doctrine was used to impose the criminal liability on corporations; this is now known under the name of “identification theory.”<sup>61</sup> The Chamber of Lords compared the corporation to a human body, different individuals representing different organs and functions of the juristic person (*e.g.* the directors and managers represent the brain, intelligence, and will of the corporation). The willpower of the corporations’ managers represented the willpower of the corporations. This theory was later criticized and slightly modified, but this decision still represents the landmark precedent in the English corporate criminal liability.

The United States initially followed the English example, but later developed differently and more rapidly due to the important role of corporations in the American economy and society. The foundation of most forms of political organization in the American colonies was the corporate charter which perpetuated the corporate form of governance.<sup>62</sup> Unlike the English courts, the American courts were much faster in holding corporations criminally liable.<sup>63</sup> Initially, the American courts promoted similar arguments against corporate criminal liability.<sup>64</sup> The courts started by imposing criminal corporate liability in cases of regulatory or public welfare offenses not requiring proof of *mens rea*<sup>65</sup>—nuisance, malfeasance, non-feasance and vicarious liability cases.<sup>66</sup>

At the beginning of the 20<sup>th</sup> century, the corporate criminal liability concept was widely accepted in the American society and was expanded to *mens rea* offenses.<sup>67</sup> The Court held in

*New York Central & Hudson River R.R. v. U.S.*<sup>68</sup> that the defendant corporation can be responsible for and charged with the knowledge and purposes of its agents, acting within the authority conferred upon them. The Court held that the law “cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and [giving] them immunity from all punishment because of the old doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”<sup>69</sup> At the present, corporate criminal liability is virtually as broad as individual criminal liability, corporations being prosecuted even for manslaughter.<sup>70</sup>

### **3. ESSENTIAL CONDITIONS FOR CORPORATE CRIMINAL LIABILITY**

Criminal liability of corporations has been the subject of vigorous debates for the last century. International congresses, studies, articles, and notes have addressed this issue and have been the ground for doctrinal confrontations among the partisans and adversaries of this concept. Every element of corporate criminal liability has been discussed, attacked, or defended. Most of the arguments were built on the principle *societas delinquere non potest* and on the belief that alternative forms of liability (like civil or administrative liability of corporations or criminal liability of individuals acting for the corporation) are superior to corporate criminal liability. In the following subsections I will show how different countries have responded to these arguments, and the basic elements of corporate criminal liability which vary from country to country. First, it must be determined what entities can be held criminally liable. Second, you will find out for what crimes corporations can be held criminally liable. Third, you will learn what

individuals, by what kind of act, and with what state of mind, can induce the criminal liability of corporations. Finally, I will make a concise presentation of the criminal sanctions available for corporate crimes and the alternatives to corporate criminal liability.

**a. What Entities?**

The first step in determining the applicability of corporate criminal liability is delineating the types of entities that it applies to. There is no unitary view regarding this aspect. Initially, some argued that corporations cannot be held criminally liable because, unlike human beings who are true subjects of law, corporations are legal fictions. This argument was rapidly abandoned due to the fact that the existence of the corporations is an incontestable reality in the social, economic, and juridical life of our society. Nowadays, corporations have legal capacity in the majority of areas of law, own real property and goods distinct from those of their members, and have their own rights and obligations.

Similar to individuals, corporations have an identifiable persona and the capacity to express moral judgments.<sup>71</sup> Corporations have an identifiable persona in the sense that they have a unique presence in the community, different from that of their owners or managers; they have “ethos” that makes them unique and different from the individuals controlling or working for the corporations.<sup>72</sup> The ethos can be derived from the corporation’s dynamic, structure, monitoring system, aims, policies, promotion of compliance with the laws, and discipline of the employees.<sup>73</sup> The United States Supreme Court has decided that corporations have the capacity to express independent points of view and moral judgments, and their freedom of speech should not be abridged without a compelling state interest.<sup>74</sup>

Moreover, corporations are recognized as passive legal subjects in criminal law; a corporation has a cause of action against an individual who harmed it. It would be at least bizarre to accept that a corporation is a reality when it is harmed by others, but not when it violates the rights of other persons.<sup>75</sup> Therefore, the “fictive character” argument cannot be successfully used by the adversaries of corporate criminal liability.

Once it has been decided that corporations can be subjects of criminal law, it has been subsequently debated whether all corporations should be held criminally liable. Some authors have argued that the creation of exceptions would produce an inequitable discrimination. This point of view cannot be sustained because the criminal law also has exceptions regarding the individuals who can be subjects of criminal liability.<sup>76</sup> Thus, if a government employee acting in his or her ministerial function is immune from criminal liability, there is no reason why the governmental institutions would not benefit from the same exception. Some very limited and clearly delineated exceptions that promote higher interests should be admissible. At the same time, in order to avoid confusion, entities with no legal status, or entities in process of dissolution or merger should be held liable when the entities held liable are clearly individualized.

The majority has agreed that private entities are subject to criminal liability. The French legislators have raised the issue of freedom of association when deciding whether entities without a lucrative scope should be held criminally liable. They decided that the freedom of association cannot be manifested outside the legal limits. The non-commercial character of the associations cannot justify their impunity when committing a crime; the exceptions from criminal liability must be absolutely necessary.<sup>77</sup> Thus, private entities with commercial and non-commercial scopes should be held equally liable under the criminal law. Under article 121-2 of the French Penal Code the juristic persons are criminally liable for the crimes they committed.<sup>78</sup>

Therefore, associations, foundations, parties, and syndicates/ unions are criminally liable because they often own property that could be used for illicit purposes or they could use information obtained from their members for illegal purposes.<sup>79</sup>

The criminal liability of syndicates in England has a special treatment. In 1871, syndicates were not considered passive subjects of criminal law and the causes of actions against them were actually causes of actions against their trustees.<sup>80</sup> In 1901, the English court decided that syndicates could be held criminally liable; if the law acknowledges the syndicates' capacity to own property and commit defamation, then syndicates should bear the responsibility for their unlawful acts.<sup>81</sup> Following the strong protests of the syndicates, the English Parliament adopted in 1906 a law conferring immunity from criminal liability to syndicates. At the present, the English syndicates are the only private entities that are not held criminally liable.<sup>82</sup>

Unlike England, the United States decided in 1922 that unions can be held criminally liable. The Supreme Court held in *United Mine Workers v. Coronado Coal Co.*<sup>83</sup> that trade unions could violate the criminal law provisions and they should not escape its application. Because unions manage enormous sums of money and their membership exceeds hundreds of thousands of people, they should be held criminally liable. Moreover, the victims of unions' misconduct cannot realistically sue such a large number of members individually in order to recover the damages caused.

The majority of legislations granted the state/government an exception from criminal liability. Art. 121-2 of the French Penal Code provides that the juristic persons, with the exception of the State, are criminally liable.<sup>84</sup> France also grants an exception to some territorial collectivities when exercising a governmental function which cannot make the subject of

delegation to private subjects of law.<sup>85</sup> Thus, the majority of public entities have a criminal responsibility similar to that of private entities.

In common law systems, the rule was that *the King can do no wrong*. In England, the state, government, and ministries are not criminally liable for the common law crimes. However, the laws can provide that the Crown can be held liable for other crimes.<sup>86</sup> In the United States, the Model Penal Code expressly states that the entities organized by a governmental agency for the purpose of implementing a governmental activity are not criminally liable. However, the courts have not denied the possibility that governmental institutions be held criminally liable. Even though there is no case of criminally sanctioning governmental institutions, the administrative liability of such institutions has been admitted.<sup>87</sup>

The issue of whether entities without a legal status can be held criminally liable has been also resolved differently. Some opinions argued that criminal liability of such entities should not be allowed in order to maintain the coherence, consistency, and predictability of the criminal law. Others argue that the act of registration or incorporation should not bear so much importance when the entity is already an autonomous subject; the predictability of the criminal law can be assured if the law clearly individualizes the entities that can be assimilated to the juristic persons.<sup>88</sup>

Article 121-2 of the French Penal Code does not acknowledge that the non-legal-status entities can have the capacity to commit crimes.<sup>89</sup> The Cassation Court manifested the intention of extending the criminal liability to non-legal status entities that benefited from such crimes.<sup>90</sup> The majority of the French doctrine has negatively criticized this attempt based on theoretical concepts. The doctrine argued that such a jurisprudential extension of the concept of juristic person would create insecurity.<sup>91</sup> Moreover, due to the basic characteristics of the civil law

systems, courts are to strictly interpret the law and cannot create new rules throughout the *stare decisis* process.

In common law systems, the unregistered or unincorporated entities are criminally liable under the same conditions as the registered or incorporated entities. Thus, in England, under the Interpretation Act of 1978, the concept of juristic person includes associations<sup>92</sup>. In U.S., the traditional view was that, in the absence of a law passed by Congress that provides otherwise, partnerships or joint ventures cannot be held criminally liable because they do not have a separate identity from that of their members.<sup>93</sup> However, under the federal law, the concept of “person” includes the partnerships and other similar entities.<sup>94</sup> The U.S. Federal Sentencing Guidelines defines and lists the organizations which are subject to regulation. “Organization” means a “person other than an individual.”<sup>95</sup> “The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and nonprofit organizations.”<sup>96</sup>

On the other hand, corporations and partnerships going through the process of dissolution, transformation, or merger are liable for the crimes committed in most of the countries.<sup>97</sup> Thus, under article 133-1 of the French Penal Code, the fines can be executed before the end of the liquidation of the corporation.<sup>98</sup> The American law has similar rules. Succession or merger does not extinguish the corporate criminal liability. When a corporation merges with another, the former continues to exist as part of the latter, and is responsible for its crimes.<sup>99</sup> The courts have held that corporations in the process of dissolution can be held criminally liable because corporations continue to exist for the purpose of “paying, satisfying and discharging any existing debts and obligations...”<sup>100</sup>

In Germany, under the non-criminal liability model, corporations and other legal status entities are autonomous subjects of law enjoying the same fundamental rights as the individuals.<sup>101</sup> The liability of corporations, enterprises, entrepreneurs, associations, and other juristic persons is equally recognized under the administrative-penal system. At the same time, public entities and territorial collectivities can be held liable under the administrative-penal law.<sup>102</sup>

The American system of defining the entities that can be held liable under the criminal law has some substantial advantages. Listing the entities that can be held criminally liable is probably more clear and cheaper; it prevents unnecessary waste of time and money by the courts when determining what entities can be held criminally liable. At the same time, the goal of general fairness is satisfied by including non-legal status entities. This inclusion reflects the reality that non-legal-status entities can commit crimes and should not escape liability due to a technicality. Because of the unpredictable situations that can appear due to the development of the law and the ingenious nature of the human beings creating such entities, the list should not be exhaustive so courts could add to the list new entities based on clear standards that give appropriate notice. This would satisfy the predictability requirement. The American model also meets the goals of deterrence and retribution by giving notice to all potential corporate criminals and by punishing most of them. The only disadvantage would be the arguable lack of consistency with the general principles of criminal law when punishing non-legal status entities.

The French and English models are more restrictive. They are less efficient because they do not clearly enumerate the entities that can be held criminally liable. The requirement of general fairness is not met when refusing to punish non-legal-status entities that commit crimes. At the

same time, the goals of deterrence and retribution are not satisfied. However, these systems have the advantages of being clear and consistent with the general principles of criminal law.

### **b. What Crimes?**

There are three systems of determining for which crimes the corporations can be held liable. Under the first system—general liability<sup>103</sup> or plenary liability<sup>104</sup>—the juristic persons' liability is similar to that of individuals, corporations being virtually capable of committing any crime. The second system requires that the legislator mention for each crime whether corporate criminal liability is possible. The third system consists of listing all the crimes for which collective entities can be held liable.<sup>105</sup>

The first system has been adopted by England, Netherlands, Belgium, Canada, and Australia.<sup>106</sup> In England, the corporations are liable for almost any type of crimes. Although general liability is the rule, there are some limits based on the principle *lex non cogit ad impossibilia*.<sup>107</sup> Thus, juristic persons are not liable for crimes punished only by imprisonment.<sup>108</sup> Presently there are only two crimes punishable only by imprisonment: murder and treason. Under the same principle, corporations are not liable for crimes expressly excluded by the legislator or crimes that, due to their nature, cannot be committed by corporations. Hence, corporations cannot commit bigamy, incest, perjury, or rape<sup>109</sup> even though, some authors argue that such crimes could be committed by corporations as instigators.<sup>110</sup> The English courts have held that corporations can be sued for manslaughter.<sup>111</sup>

The second system has been implemented in France. Thus, under article 121-2 of the French Penal Code, the juristic persons are criminally liable only when the law or regulation

expressly provides for such liability.<sup>112</sup> Thus, when one wants to know whether a corporation is liable for a certain crime, he or she must look in the code/law, under the section for that specific crime, to see whether the legislator mentioned the possibility of engaging the criminal liability of corporations. This system has its rationale in the science of criminology; corporations are sanctioned for specific crimes based on the frequency of the corporations' involvement in such crimes.<sup>113</sup> However, this system is not comprehensive. By trying to exclude the crimes that cannot be committed by corporations, the French legislators inadvertently omitted some labor and economic crimes, and also neglected the fact that even the crimes that cannot be committed by corporations as authors can probably be committed by corporations as instigators or accomplices.<sup>114</sup>

The third model is reflected by the American law. The U.S. Sentencing Guidelines include a detailed list of the offenses that can be committed by corporations.<sup>115</sup> Corporate criminal liability virtually extends to all the crimes that can be committed by individuals.<sup>116</sup> Thus, a corporation can be convicted for theft, forgery,<sup>117</sup> bribery,<sup>118</sup> and manslaughter or negligent homicide.<sup>119</sup> Also, in *People v. O'Neil*, even though the corporation has not been found guilty, the court has not denied the possibility that corporations can be held criminally liable for murder.<sup>120</sup>

Under the German non-criminal model of corporate liability, the corporations are administratively liable for crimes or administrative-penal offenses committed by an organ or representative.<sup>121</sup> Section 30 of *Ordnungswidrigkeitengesetz* (OWiG) does not impose a limit on the list of offenses for which corporations can be held liable. Corporations are not liable for offenses which by their very nature can be committed only by individuals. The only condition is that the offenses be linked with the corporation's activities. However, it is not required that the

offense be within the competences conceded to the corporation. Thus, a corporation can be held liable under the administrative-penal system for homicides, offenses against the patrimony, etc.<sup>122</sup>

The American model has the advantages of avoiding confusion and long searches in various statutes. Thus, the American system meets the requirements of clarity, predictability, efficiency, and consistency with the general principles of criminal law. Unless it is certain that there is no other possible crime that a corporation could be held liable for, the list of crimes should not be exhaustive. In this respect, the English and German models are good examples because they do not limit the list of crimes for which corporations can be held criminally liable, but they provide for liability similar to that of individuals. The French system, in attempt to be clear and predictable, turned out to be less efficient due to the amount of time necessary to do the searches in various statutes and to the omission of several crimes. Moreover, similarly to the English system, the French system omits the possibility that some crimes that could not be committed by corporations as principals could probably be committed by corporations as accomplices or instigators.

### **c. When and Which Natural Persons Can Cause Corporate Criminal Liability?**

Initially, it has been argued that corporations are not capable of forming the material and mental elements of a crime due to their immaterial and highly regulated existence. The attribution of the acts and the mental state of persons acting on behalf of the corporation to the corporation it was said to contravene the principle of individual punishment underlying the

criminal law. These arguments failed in most legal systems, but the sphere of individuals and the conditions in which they can lead to the criminal liability of corporations differs more or less dramatically from country to country.

At first, some critics argued that corporations do not have the capacity to act on their own and therefore, the *actus reus* element of a crime cannot be attributed to them.<sup>123</sup> The acts attributed to the corporations are merely those of individuals acting on behalf of the corporations. Thus, “[i]mposing criminal liability on a corporate entity requires resort to the principles of respondeat superior, rather than individual responsibility, which is the hallmark of the criminal law.”<sup>124</sup> It is incontestable, that, due to the corporations’ nature, the actions or inactions cannot be committed directly and personally by the corporation. However, the acts of the representatives are those of the corporation itself because the representatives are not distinct from the corporation; representatives are part of the corporation, a structural element of the corporation essential for the corporation’s existence and without which the corporation cannot fulfill its purpose. Moreover, representatives are not personally liable for acts within the scope of the powers granted to them, but the corporation is held liable for them. Therefore, admitting the existence of the corporations’ ability to act does not mean liability for another’s act; it merely means that corporations are liable for the activity conducted by individuals on their behalf using the power that has been conferred upon them by the corporations’ bylaws.<sup>125</sup> Moreover, those that are subjects of legal duties, not only can perform those duties, but can also breach them.<sup>126</sup>

Another argument was based on the *ultra vires* theory. Critics argue that an illicit act would fall outside the scope of the corporation and therefore, cannot be considered to be perpetrated by the corporations.<sup>127</sup> The capacity of action of corporations and their representatives is limited by the laws, articles of incorporation, and bylaws; no law or bylaw gives them the power to commit

a criminal offense. Therefore, any crime is necessarily *ultra vires*. The protection of corporations resulting from the *ultra vires* theory has been eliminated first in tort law and subsequently, at the beginning of the 20<sup>th</sup> century, in the criminal law.<sup>128</sup> The purpose of the articles of incorporation and bylaws is to assure organized services, to avoid confusion regarding the corporations' activity, and to permit an efficient surveillance of their activity. It would be absurd to consider that the *ultra vires* theory, destined to insure the legality of the corporations' activity, could transform into a reason to refuse to punish the corporations when acting illegally.<sup>129</sup> Moreover, although the articles of incorporation provide certain scopes for the corporation, the corporation can do whatever else is necessary to conduct its activity. The scope of incorporation should not be confused with the corporations' scopes during its activity; the scope of incorporation must always be legal, but the corporations' actions after incorporation are not always in conformity therewith.<sup>130</sup> Although civil offenses are not within the scope of a corporation, corporations are nonetheless held liable when committing such offenses. Similarly, corporations should be held liable for criminal offenses.

The core argument against corporate criminal liability has been the belief that a corporation cannot have *mens rea* and therefore, cannot be blameworthy or guilty of a criminal offense.<sup>131</sup> Critics showed that the corporate will and power of decision are exercised through the will of the collectivity of people managing the corporation. Therefore, it is said that the *mens rea* element of a criminal offense does not belong to the corporation, but to the members who made the decision to take a specific course of action.<sup>132</sup> The corporation would be punished without being blameworthy and this would be against the criminal law principles.<sup>133</sup> However, the majority of doctrine recognizes the independent existence of a corporate will<sup>134</sup> which does not always identify itself with that of the collectivity of members of the corporation.<sup>135</sup> The corporation's

capacity to act and decide has been recognized in contract, administrative, and constitutional law. Therefore, if a corporation has the capacity to think and decide when it is a part to a contract (and thus being the subject of contractual rights and obligations), it cannot be sustained that corporate will power exists when it produces legal effects, but not when the effects created are illegal (criminal offenses).<sup>136</sup> Moreover, being widely accepted that corporations have civil liability, it would be difficult to explain why the corporation should not be held liable when the offense committed is more serious (criminal offense as opposed to civil offense). The culpability of corporations exists and it is sufficient for the culpability required by the criminal law.<sup>137</sup>

After defeating these arguments, the issue became how wide the pool of individuals who can draw the corporate criminal liability should be, by what acts, and with what mental state. Although the corporations are the subjects of the law, the action or inaction of a human being is necessary to engage the corporations' criminal liability. Initially, the persons who could engage the corporations' liability were limited to the corporate organs. The organs represented the soul of the corporation, their actions were the corporation's actions, and therefore, the crimes committed by the organs were those of the corporation.<sup>138</sup> Nowadays, in some legal systems, there is a tendency of expanding the categories of persons who can cause corporate criminal liability.

Under Article 121-2 of the French Penal Code, corporations are criminally liable for the crimes committed on their behalf by their organs and representatives.<sup>139</sup> When the organs or representatives have the required *mens rea* and *actus reus* of the crime, the corporation is automatically liable.<sup>140</sup> The organs are individuals exercising an administrative or other important function conferred by law or the charter of the corporation.<sup>141</sup> The notion of "representative" is wider than that of "organ," and includes other persons such as the temporary

administrators, liquidators, and special agents.<sup>142</sup> Therefore, the acts of other members or subordinate employees cannot engage the criminal liability of corporations even when the acts are committed in the benefit of the corporations. Due to this requirement, the French system is the most restrictive model of the jurisdictions presented here.<sup>143</sup> However, it is not always necessary to identify the representative or the organ; such is the case for the crimes by omission or when the crime was based on a collective decision by secret vote. It is sufficient to know that an organ or representative acted or failed to act when he or she had a duty to, but knowing his or her identity is not necessary.<sup>144</sup>

The organs and representatives must act *on behalf* of the corporation.<sup>145</sup> The notion of crime committed on behalf of the corporation varies based on the type of crime committed because the commission of a crime presupposes the existence of a subjective element—*mens rea*—and an objective element—the profit.<sup>146</sup> Therefore, when committing theft, the objective element will be more accentuated, but when committing discrimination the subjective element would have more importance since it is difficult to point to a specific profit that the corporation would gain from such crime. Hence, crimes committed solely in the personal interest of the organ or representative would not engage the criminal liability of the corporation.<sup>147</sup> Nevertheless, when the individual acts partially in his benefit and partially in the benefit of the corporation, the corporation would be held criminally liable.<sup>148</sup> The benefit may consist in obtaining a profit, avoiding a loss, or any other kind of benefit.<sup>149</sup>

Acting on behalf of the corporation does not always imply a benefit; such is the case when a director discriminates in the process of hiring or when he or she negligently fails to verify the safety equipment used by the corporation's employees.<sup>150</sup> Despite the fact that the corporation does not benefit from such crimes, it is still held criminally liable. Moreover, the crimes by

omissions are presumed to be committed on behalf of the corporation when the organ or representative had a duty to act.<sup>151</sup> Even when an organ or representative acts outside the limits of his or her power, the corporation is held criminally liable.<sup>152</sup>

In France, the organ or representative of the corporation can commit both intentional and unintentional crimes on behalf of the corporation.<sup>153</sup> When the *mens rea* and the *actus reus* elements are established with reference to the organ or representative, the corporation is automatically liable as long as the cause and effect relationship (but not the culpability) between the commission of the crime and the activity done on behalf of the organization is proved.<sup>154</sup>

In Germany, although corporations cannot be held criminally liable, corporations are liable for criminal offenses under the administrative-penal law. Both administrative and criminal courts can impose administrative sanctions.<sup>155</sup> Section 30 of the *OWiG*—Administrative Offences Act limits the class of individuals whose acts can make the corporation liable to the legal representatives or directors of the corporation.<sup>156</sup> The acts of the representatives or directors are automatically considered those of the corporation if the crime could have been prevented by the corporation.<sup>157</sup> The corporation is merely responsible for the offenses, but not criminally culpable.<sup>158</sup>

The class of individuals who can engage the liability of corporations can be expanded in two ways; first, the courts “have not considered it necessary to name the persons who have acted provided it is clear that someone in the class described in section 30 of the *OWiG* has”<sup>159</sup> and, second, because under section 130 of *OWiG* lack of surveillance is an administrative-penal offense, when employees who are not legal representatives or directors commit an offense that could have been prevented by an adequate surveillance by officers within the section 30 of *OWiG*, the corporation is liable.<sup>160</sup> The lack of surveillance may be due to a defective

organization of the corporation. There must be a showing that the offense could have been prevented with reasonable efforts:<sup>161</sup> only then it is justifiable to punish the corporation.<sup>162</sup> Section 30 of *OWiG* also provides procedural rules which do not make it necessary to pursue or identify the individual author of the offense.<sup>163</sup> Moreover, the offense must be connected with the corporate activities.<sup>164</sup> The organ or representative must either have violated his or her legal duties, or the conduct must have resulted or been intended to result in patrimonial benefit to the corporation.<sup>165</sup> Under the German law, strict liability offenses do not exist because culpability is the core requirement for liability.<sup>166</sup>

In common law systems, corporate criminal liability is based on two main theories: the identification theory and the *respondeat superior* theory. The identification theory (also called the *alter ego* theory) was developed by the English law by importing the concept from the civil law of tort.<sup>167</sup> Under this anthropomorphic theory, a sufficiently high ranking corporate member acts not as an agent of the corporation, but as the corporation itself.<sup>168</sup> In *Tesco Supermarkets Ltd. v. Nattrass*,<sup>169</sup> the court compared corporations to human bodies; the high ranking managers represent the nervous systems that control what the corporations do. Therefore, the *mens rea* and *actus reus* of the high ranking managers are automatically those of the corporation and no other method of proof is necessary.<sup>170</sup> Whether an officer controls the corporation as the brains control the human body is a question of law; the determining factor of this test is whether the officer could act independently.<sup>171</sup>

The identification theory has been largely criticized. This theory can function properly only for small corporations where only the high-ranking managers are involved in the decision process.<sup>172</sup> Today's corporations are very complex and many other persons are involved in the decision making process. Corporate agents other than the top managers do not engage the

criminal liability of corporations. Moreover, corporations can evade liability by structuring themselves in a way that few decisions could be taken by controlling officers.<sup>173</sup> The identification of the person is also necessary and this creates a serious bar to prosecution of a highly complex corporation characterized by diffusion of responsibility. Therefore, crimes that rely on defective organization are not included.<sup>174</sup> Another disadvantage is that it is impossible to cumulate the acts or mens rea of multiple controlling officers.<sup>175</sup>

In the English law, the essential conditions of corporate criminal liability vary based on the nature of the crime. For strict liability crimes, corporations are liable if the crime resulted in a benefit to the corporations. The jurisprudence considers that if the law imposes an obligation, the corporations must organize themselves well enough so they can abide the law.<sup>176</sup> The corporations are liable under the *respondeat superior* theory for strict liability offenses and for crimes for which the law expressly or impliedly provides for indirect liability.<sup>177</sup>

For the crimes which require *mens rea*, corporations are liable under the identification theory. The natural persons who can make the corporation criminally liable are those who can identify themselves with the corporation; this category includes the members of the board of directors, the managing directors, other persons responsible for the general management of the corporation, and delegates responsible with management functions who can act independently.<sup>178</sup> The crime must be committed within the person's scope of employment.<sup>179</sup> If these conditions are met, the corporation is criminally liable even when the corporation itself is defrauded.<sup>180</sup> However, due to the strict limitations of the identification theory, it has been almost impossible to have convictions of corporations for *mens rea* crimes. As a result, the English law has started to slowly change; the courts decided that a corporation can be convicted for negligently omitting to take some preventive measures even though no person within the company had this specific

duty.<sup>181</sup> At the same time, however, the English jurisprudence has refused to adopt the aggregate or collective intent theory based on precedent cases that imposed the necessity to identify the person who had the required *mens rea* and *actus reus*.<sup>182</sup> This refusal has been strongly criticized.<sup>183</sup>

The United States has adopted the *respondeat superior* model from the civil law. “The principle of *respondeat superior* represents the implementation of the principles governing vicarious liability: the *actus reus* and the *mens rea* of the individuals who act on behalf of a corporation are automatically attributed to the corporation.”<sup>184</sup> The corporation is liable if the employee commits the crime while acting within the scope of his employment and on behalf of the corporation.<sup>185</sup>

Under the federal law, a corporation may be held criminally liable for the acts of *any* employee, not only for the acts of managers or directors.<sup>186</sup> The majority of U.S. jurisdictions agrees with the federal law and attributes the crimes of all the employees to the corporations.<sup>187</sup> In addition, the employees must have been acting within the scope of their employment. The acts “directly related to the performance of the type of duties the employee has general authority to perform”<sup>188</sup> fall within the scope of employment. It is also sufficient that the employees act with apparent authority.<sup>189</sup> It does not matter “that the act was *ultra vires* or unauthorized or contrary to corporate policy or to specific instructions given to the agent.”<sup>190</sup>

Unlike English law, under American law it is not necessary to identify the specific individuals who committed the crime; it is sufficient to prove that one or more agents of the corporation must have committed it. The American law went a step further and decided to impose liability based on the act of one employee and the culpability of another who realized the significance of the act.<sup>191</sup> This is known under the name of aggregation theory.<sup>192</sup> This theory

also provides that, while no single employee had sufficient information necessary to have the required *mens rea* of the offense, if multiple individuals within the corporation possessed the elements of such knowledge collectively, their aggregate knowledge can be attributed to the corporation.<sup>193</sup> As a result, in some situations corporations will be liable when no employee is.<sup>194</sup>

The employee must act on behalf of the corporation. This means that the employee must act with intent to benefit the corporation, but the corporation does not have to actually derive a benefit from the employee's act.<sup>195</sup> If the employee intended to benefit only himself or a third party, the corporation is not liable except for strict liability offenses.<sup>196</sup> If the employee intended to benefit both himself and the corporation, the corporation is held criminally liable.<sup>197</sup>

The Model Penal Code, adopted only by a few American jurisdictions, has proposed a different model which contains three systems of corporate criminal liability. The first system is similar to the English *alter ego* criminal corporate liability. Corporations are liable for the ordinary or true crimes, such as theft or manslaughter, committed by managers or other high corporate officers whose acts represent the acts of the corporation.<sup>198</sup> This is a direct criminal liability of corporations. Under the second system, corporations are liable for price-fixing, securities fraud, or other crimes for which there is an apparent legislative intent to impose liability on corporations, "committed by any employee acting within the scope of his employment on the corporation's behalf."<sup>199</sup> However, corporations can defend themselves by showing that their managers used due diligence when attempting to prevent the crime.<sup>200</sup> Finally, under the third system, corporations are generally liable for "violations" or regulatory offenses for which the law imposes strict liability. The offenses can be committed by any employee within the scope of his employment. The "due diligence" defense is not available.<sup>201</sup>

Generally, there are two models of corporate criminal liability: a restrictive direct liability model, followed by France and England, and a wide vicarious liability model, followed by the United States. The wider model seems to be more effective in combating corporate crime. The French and English models are not in line with the real developments of corporate structure. The reluctance of these models to adopt the aggregate responsibility model is likely to hamper the accomplishment of justice and accountability for significant types of corporate misconduct.<sup>202</sup> The fragmentation and specialization of corporate departments can create an ideal way of escaping liability under the restrictive models: one's apparently innocent action coupled with another's will often times form a crime. The requirement that the crimes be committed by high ranking officers or managers is also a great impediment in combating corporate crime because corporations will avoid liability by empowering lower level employees to make decisions. The English system presents another disadvantage when requiring the identification of the individual who committed the act. The identification of the individual who committed the crime is often times impossible. Although they have the advantages of being clear, predictable, and consistent with the general principles of criminal law, these systems do not meet the requirements of general fairness and efficiency. Moreover, due to the difficulty of prosecuting corporations, the English and French systems are less deterring.

On the other hand, the American model establishes a wide system of corporate criminal liability that promotes general fairness and deterrence. The adoption of the aggregation theory and the fact that any employee can engage the criminal liability of corporations under certain circumstances represent great advantages; the American model comprehensively covers the wide variety of loopholes existent under other systems. This system is clear, predictable and efficient in preventing corporate crimes. At the same time, the wide possibility of convicting corporations

for acts of any employee increases the number of lawsuits against corporations; this causes high costs for the courts and the corporations, and the loss of jobs and profits for innocent employees and shareholders.

Some countries did not adopt the concept of criminal liability, and others adopted a restrictive model. Germany sticks to the old concept of *societas deliquere non potest* for doctrinal reasons and because it believes that criminal sanctions are not necessary. Due to the insufficiencies of the civil and administrative liability, France distanced itself from the German model. France preferred a more restrictive model because of the strong doctrinal issues that prevented it from initially adopting the concept of criminal liability; also, the legislators might have considered it more appropriate to make little steps and ease the transition towards a more comprehensive model. Other political issues (such as the strong influence of corporations) may have prevented the adoption of a wider liability model. These differences can increase the number of corporate crimes. A country that does not have a comprehensive corporate sanctioning system will attract corporations whose actions will not be accepted somewhere else.<sup>203</sup> This might create an initial economical benefit for that country, but on an international, and ultimately national scale, such a result would be undesirable.

#### **d. Sanctions**

The issue of what sanctions are appropriate for corporate criminal activities has been the constant subject of the doctrinal debates, and often times, has been the argument for rejecting corporate criminal liability. The first issue raised in this debate was the individual character of criminal responsibility. The critics argue that by sanctioning the corporate entity, all its members

are sanctioned regardless of whether they had any participation in the criminal offense. Thus, sanctioning a corporation to pay a criminal fine would have the indirect effect of diminishing the income of the stockholders, or the corporation would be forced to reduce the number of innocent employees who would lose their income.<sup>204</sup> This would amount, in the critics' view, to a criminal liability for another's crimes, which would be unacceptable.<sup>205</sup> However, the majority of the doctrine sustains that corporate criminal liability does not conflict with the individual character of criminal responsibility. The only person suffering the direct effects of a criminal sanction is the corporation. Corporate property is separate from the property of its members who assumed the risk of losing their contribution to the corporate patrimony after incorporation. Members form corporations in order to avoid personal liability. Even though protected by the corporations' veils, members, through their corporations, cannot avoid any legal penalties that would result from their actions as members. Members are not usually personally liable for the corporation's activity, any liability being covered by the corporation's patrimony. The side effects of losing profits are risks that members have taken from the beginning. As members may benefit from the advantages resulting from the corporations' activities, they also may suffer some inconveniences.<sup>206</sup> Moreover, the indirect effects of corporate criminal liability suffered by the corporation's members are similar to the indirect effects that family members of an individual criminal offender suffer. Thus, family members of a convicted criminal offender would lose the criminal's material contribution and would suffer additional societal stigma. Similarly, members of a corporation may lose their profits, but, unlike family members of a criminal offender, they would not significantly suffer the infamous effect of the criminal conviction of a corporation if they are not also individually charged for the criminal offense.

It has also been argued that corporate criminal liability would result in double sanctioning when both the individuals and the corporation are convicted for the same criminal offense. Thus, the convicted individuals who acted on behalf of the corporation would be sanctioned through the individual penalty and also by losing income from the corporation.<sup>207</sup> However, as shown above, there is no risk of violating the *non bis in idem* principle because the corporation and the individuals have separate patrimonies and identities. When a representative of the corporation commits a criminal offense we can distinguish two separate liabilities—individual liability and corporate liability—which are based on separate elements.<sup>208</sup> Therefore, corporate criminal liability is not incompatible with the individual character of criminal liability.

Part of the doctrine argued that the notion of corporation is incompatible with the notion of punishment.<sup>209</sup> Critics consider that the concepts of prevention, rehabilitation, and moral pressure cannot be applied to corporations. Moreover, corporations cannot be physically retained in prisons (one of the most effective sanctions known) or executed.<sup>210</sup> The solutions proposed by different countries vary widely from sanctions that merely affect the patrimony of corporations to those that affect all the corporations' attributes. Although corporations cannot always be sanctioned identically to human beings, the concept of punishment includes a variety of sanctions that can alternatively be applied, and new types can be created, as necessary, both in the case of humans and corporations. The criminal fine penalty has been successfully applied to corporations in the majority of countries and has had a deterrent effect when its quantum was properly individualized.<sup>211</sup> The negative publicity associated with the criminal conviction causes reputational harm that most of the corporations try to prevent. Criminal convictions would determine the adoption of new corporate policies and practices designated to prevent future illegalities. Moreover, the concept of rehabilitation has also been applied to corporations through

the penalties of reorganization or probation.<sup>212</sup> The death penalty has been replaced with the penalty of corporate dissolution. At the same time, the criminal punishment of corporations has been proven to be just when it was proportional to the culpability of the corporation.<sup>213</sup> Thus, the experience of the countries that have adopted corporate criminal liability has shown that criminal sanctions are appropriate means of fulfilling the retributive, rehabilitative and deterrent goals of the criminal law.

The criminal fines are the most common sanction. A pecuniary sanction has the advantages of directly affecting the corporation, it generates the capital necessary for compensation or restitution to the victims, it can be executed with minimum costs, and when appropriately individualized, it has a sufficiently strong impact to accomplish the scope of the punishment (especially the retributive and deterrent scopes).<sup>214</sup> “Whereas the greatest threat to an individual may be the loss of liberty, the greatest threat to a company is the loss of profitability. Because such a loss strikes at the essential purpose of the company, a fine holds the potential to be an effective deterrent.”<sup>215</sup> A corporation will balance the monetary gain from the offense with the loss from the potential criminal fine. Therefore, the fines must be sufficiently high to have an impact on the corporations.<sup>216</sup> The amount of the fines should also take into account the financial resources of the corporation.<sup>217</sup>

At the same time, fines have some disadvantages. A very high fine would have a negative effect on innocent third parties. Although a corporate manager usually commits the crime, he will be the last one to suffer the impacts of his actions.<sup>218</sup> However, the stockholders, other employees, and creditors will be affected by the secondary consequences of the penalty. Other effects can be the increase of the price for the corporation’s products and even the dissolution of

the corporation.<sup>219</sup> Despite all its drawbacks, the fine is the least expensive and most frequently applied sanction.

Another sanction often used is confiscation of the fruits of the crime.<sup>220</sup> Deprivation of the proceeds of the crime is imposed by different systems as a punishment or as a security measure.<sup>221</sup> However, in order to achieve the scope of the criminal punishment, the best solution would be if confiscation were a complementary sanction. If confiscation were the only punishment imposed, the corporations would be encouraged to take the chance, since the probability of getting caught is not 100%.<sup>222</sup>

As a penalty, the activity of the corporation can be suspended for a limited period of time. This sanction has an important drawback because of the ricochet effect on the employees who would lose wages. However, this sanction seems to be justified for serious violations of labor or environmental laws.<sup>223</sup> Moreover, as a solution that would attenuate the ricochet effects, some authors suggested that employees should be paid their salaries for the time of suspension.<sup>224</sup>

Dissolution represents the capital punishment for corporations. Due to its drastic effects, some authors argued that the sanction of dissolution should be applied only when the corporation committed very serious crimes, or when the corporation was created for illegal purposes.<sup>225</sup> Others argue that such punishment should be completely eliminated for the category of corporate sanctions.<sup>226</sup>

The publication of the decision or the adverse publicity orders (which consist in the publication at the company's expense of an advertisement emphasizing the crime committed and its consequences) are also sanctions for corporate criminal activity.<sup>227</sup> Both sanctions can have an important deterrent effect because of the incidental loss of profits that negative publicity can cause.<sup>228</sup> By its nature, this sanction can be only an auxiliary sanction accompanying another

corporate penalty.<sup>229</sup> This sanction also has a possible spill-over effect; the losses can cause the corporations to close plants or even go out of business, which in turn will negatively affect innocent employees, distributors, and suppliers.<sup>230</sup>

Other sanctions consist in restraining the corporation from the performance of some activities, denial, suspension or retraction of licenses, loss of rights (such as benefiting from subventions or tax breaks), prohibition of advertising or selling on specific markets, etc.<sup>231</sup> Corporations can also be restructured, required to submit periodical reports, or put under the supervision or control of a consultant who can recommend or impose appropriate measures for prevention of future crimes.<sup>232</sup> This “corporate probation” has very strong rehabilitative effects.<sup>233</sup> Its side effects on innocent third parties are also minimal.<sup>234</sup> “The goal, which is the rectification of the corporate policies and practices that gave rise to the criminal offence, is so crucial that a remedial/rehabilitative probation condition should be virtually automatic unless the company could show that it had already taken adequate steps to prevent a reoccurrence of the offence.”<sup>235</sup> Another attractive solution is the sanction of community service order which is not likely to result in job losses and it would be extremely beneficial to the community.<sup>236</sup>

The French Penal Code lists all the sanctions that can be applied to corporations.<sup>237</sup> The most common sanction is the fine which is applicable for all types of offenses.<sup>238</sup> In some cases, the fine can be replaced with the prohibition of issuing checks, or confiscation.<sup>239</sup> The amount of the fine is determined based on the limits applicable to individuals;<sup>240</sup> the maximum amount for corporations cannot exceed five times the maximum for individuals unless the corporation is a recidivist (when the amount can be ten times the maximum for individuals).<sup>241</sup> In addition to fines, the French Penal Code provides for various other sanctions such as: dissolution, disqualification from performing specific economic or social activities, placement for no longer

than five years under judicial supervision, temporary or permanent closing down of plants used in the commission of the crime, temporary or permanent prohibition to contract with the government or other public institutions, temporary or permanent prohibition to issue stock or checks, confiscation of goods used or produced as a result of the crime, and publication of the judgment.<sup>242</sup>

The German non-criminal model accepts as sanctions the following: fines, dissolution, confiscation of the fruits of the crime, privation of rights or licenses, and the imposition of mandatory management oversight.<sup>243</sup> The publication of the judgment has been rejected because it would be too hostile to the corporations.<sup>244</sup> The maximum fine varies according to whether the offense was a criminal offense or an administrative one. For criminal offenses, the corporation can be fined up to DM 1 million.<sup>245</sup> For administrative offenses the maximum must be more than the ill-gotten gains.<sup>246</sup> Mandatory oversight can be imposed only when the other measures have been unsuccessful in preventing the commission of criminal acts and it cannot be imposed for more than five years.<sup>247</sup>

In England, the standard sanction is the fine. However, because the fines are often too low in relation to the corporation's financial means and the damages caused by the offense, corporate probation, confiscation of the proceeds of the crime, and withdrawal of licenses have also been scarcely accepted.<sup>248</sup> Some authors argue that English law should reassess both the nature of the sanctions applicable to corporate offenders and the principles of attribution of criminal liability to corporations.<sup>249</sup>

Unlike the English sanctioning system, that, in some authors' opinions, lacks imagination and effectiveness,<sup>250</sup> the United States Sentencing Guidelines impose an innovative sanctioning system. The main goals of the American system are to "provide just punishment, adequate

deterrence, and incentives for organizations to maintain internal mechanism for preventing, detecting, and reporting criminal conduct.”<sup>251</sup> Under federal law, the main sanctions are the fines, restitution, remedial orders, community service, and probation. Under some state laws, corporations can be sanctioned with dissolution, and ordered to refrain from engaging in certain kinds of business activities.<sup>252</sup>

The U.S. system insists on retribution and deterrence; the punishment must be just and fit.

Therefore, the courts must calculate the amount of the fines by following several steps:

In the first, the court will calculate a base fine that reflects the seriousness of the offence committed (USSG s8C2.4.). Seriousness is measured by the greater of the pecuniary gain to the offender; the pecuniary loss to the victim (to the extent the loss was caused intentionally, knowingly or recklessly); and the intrinsic wrongfulness of the offence as established by a statutory table (USSG s8C2.4(a)). Next, the court will multiply the base fine by a numerical factor that reflects the culpability of the offender (USSG s8C2.7). This will yield a recommended fine range. Finally, the court will select an appropriate fine from within the recommended range, unless it can justify a departure from that range (USSG s8C2.8).<sup>253</sup>

Moreover, in case a corporation operated primarily for a criminal purpose or by criminal means, fines will be set at an amount “sufficient to divest the organization of all its net assets.”<sup>254</sup>

In addition to paying high fines, corporations must also adopt complex internal mechanisms to prevent and detect crime. “This new approach to deterrence is called the carrot-stick model. The stick consists of the application of fines, which are much higher than in the past. The carrot consists of a reduction in fines if the corporation has adopted an effective compliance and ethics program.”<sup>255</sup>

The American sanctioning system also ensures the goal of rehabilitation.<sup>256</sup> The probation sanction allows an invasive and intense reconstruction. Courts imposing the sanction of probation may require corporations to

submit to the court an effective compliance and ethics program;[] ... [to] make periodic reports to the court or probation officer ... regarding the organization's progress in

implementing the program ... . In order to monitor whether the organization is following the program ... the organization shall submit to ... a reasonable number of regular or unannounced examinations of its books and records[;] ... [or] interrogation of knowledgeable individuals within the organization.<sup>257</sup>

The sanction of probation is imposed in eight categories of cases such as when the corporation has prior criminal history or it does not have an effective program to prevent and detect violations.<sup>258</sup>

The sanctions applicable to corporate offenders vary from country to country. As shown above, France has a wide variety of sanctions and U.S. has a very innovative and effective system which offers corporations strong incentives to prevent and detect corporate crimes, while the English system lacks many of the sanctions presented. The French system has the advantage of being clear, but the system seems to be less deterring because the calculation of fines is reported to the fines applicable to individuals. This disadvantage can also be viewed as an advantage because of its smaller spill-over effects on innocent employees or shareholders. The French system may also be less rehabilitative because it lacks the corporate probation sanction.

The American system not only achieves the goals of deterrence, retribution, and rehabilitation, but it also offers incentives for self-policing and avoidance of costly trials. And “[i]t is in society's interest to transform corporate cultures that might previously have encouraged or implicitly tolerated illegality to cultures that take seriously their legal obligations.”<sup>259</sup> The fines are not reported to the maximum applicable to individuals so courts can impose fines with deterrent effects on corporations. However, this may have some significant spill-over effects on innocent employees and shareholders. Moreover, the innovative sanction of corporate probation has the advantage of fulfilling all the scopes of the criminal punishment while having insignificant spill-over effects.

### **e. Alternatives to Corporate Criminal Liability**

Some critics have argued that other types of liability are more efficient than corporate criminal liability. Law and economics theorists believe that criminal liability is too over-detering; it induces corporations to spend more resources for prevention than is economically and socially useful.<sup>260</sup> Moreover, the costs of criminal proceedings are higher than the civil ones and therefore, not justified when both have the same result—pecuniary penalties.<sup>261</sup> It has also been argued that the reputational harm accompanying corporate criminal liability is either unnecessary or excessive.<sup>262</sup> Thus, corporations convicted for minor criminal offenses would suffer unjustified reputational harm. Corporations that have a good reputation suffer the most, while corporations not yet created or that previously lost their good reputation suffer little reputational harm. When a corporation is convicted for a serious crime, the reputational harm imposed through criminal liability might not even be necessary due to the negative publicity created by the press. The high risk of reputational harm would also pressure corporations to speed up the procedures and plead guilty when the charge is groundless. In addition, the reputational damage resulting from a criminal conviction, unlike civil damages, “does not provide a reciprocal gain to any injured party.”<sup>263</sup> Hence, several authors argue that civil liability of corporations is sufficient.

Although the civil liability of corporations has its advantages in compensating for the injuries caused by corporations, it is not sufficient to prevent corporate criminal misconduct. Some offenses, called crimes “of danger,” do not create victims who can sue the corporations for civil damages. Or in environmental crimes, victims might not even know about the commission of the crime by the corporations. Moreover, in some crimes connected with the process of

production and distribution of goods, the victim is so far in the chain that he/she does not even realize that the corporation was the author of the offense.<sup>264</sup> On the other hand, although the benefit to the corporation is substantial due to a high number of victims, the prejudice caused is so small that the initiation of a civil lawsuit is unjustified.<sup>265</sup> Even when a corporation is civilly obligated to pay damages, civil sanctions may not be sufficient to determine the corporation to refrain from future misconduct when the benefits obtained from the misconduct outweigh the civil damages paid. The reputational harm resulting from corporate criminal liability might encourage faster settlements, thus avoiding pricey trials.<sup>266</sup> Furthermore, criminal liability expresses the society's condemnation of the corporate misconduct,<sup>267</sup> "thereby vindicating the proper valuation of persons and goods whose true worth was disparaged by the corporation's conduct - just as in the case of an individual wrongdoer."<sup>268</sup> Corporations have an identifiable persona and can express moral judgments distinct from those of their members. Therefore, corporations can be the subject of the expressive retributive goal of criminal law.

Another advantage is the possibility of using "the extensive network of federal and state prosecutors and investigators..."<sup>269</sup> which has additional resources compared to the civil or administrative law enforcement departments. Defendants should afford the criminal procedure guarantees and speedy trials. The types of the criminal sanctions are also more diverse; in addition to fines, sanctions of corporate probation, equity fines, or withdrawal of licenses can be applied.

Civil liability of corporations for criminal fines imposed on corporate officers is another alternative to corporate criminal liability. This solution has been used in Italy,<sup>270</sup> Portugal,<sup>271</sup> Netherlands,<sup>272</sup> Belgium,<sup>273</sup> Luxemburg,<sup>274</sup> and France.<sup>275</sup> This alternative has been widely criticized. First, civil liability of corporations for criminal liability oftentimes serves only as a

surety.<sup>276</sup> Second, this system contravenes the principle of individual punishment; the corporate officer is said to be guilty, but the corporation has to bear the sanction.<sup>277</sup> The corporation is not the defendant in the criminal procedure and it does not have the opportunity to prove its case, but the burden of the sanction is placed on it. Third, this alternative would create inequality of treatment of the individuals convicted for the offenses; if the law provides as sanctions for the offense both imprisonment and a fine, the individual condemned to pay a fine will not execute it, but the individual sanctioned by imprisonment must execute the punishment.<sup>278</sup> Fourth, the identification of the person who committed the offense is necessary. Corporations have a very complex structure and sometimes it is very difficult or impossible to determine who the author of an offense was.<sup>279</sup> Finally, in a system that did not adopt the criminal liability of corporations, the limits of a fine are established taking into account the potential to pay of the individual. Therefore, even if the corporation has to pay the fine, the amount would be derisory.<sup>280</sup> Hence, the civil liability of corporations for criminal fines imposed on its employees cannot fulfill the purposes of deterrence and retribution.

A very frequently used alternative to corporate criminal liability has been the imposition of administrative sanctions. They are usually imposed by administrative bodies which are part of the executive branch, the courts playing a limited role in some countries when so allowed.<sup>281</sup> Some of the reasons why different countries chose to impose administrative sanctions by administrative bodies, as opposed to criminal sanctions imposed by courts, are: the belief that moral stigma is superfluous, the flexibility of the concepts of guilt and individual responsibility in the administrative law, and the specialized nature of the administrative bodies that could handle the matters more efficiently.<sup>282</sup> Germany, which still opposes the adoption of corporate criminal liability, has an elaborate system of administrative-penal sanctioning consecrated in art.

30 of *OwiG*. Because some administrative sanctions can be imposed by criminal courts and because they derive from petty-offenses, the non-criminal character of these administrative sanctions has been questioned.<sup>283</sup> France and Belgium have devised administrative sanctions whenever it seemed suitable in the course of drafting statutes.<sup>284</sup> Portugal<sup>285</sup> and Italy<sup>286</sup> have also implemented an extensive system of administrative sanctions. Many critics argue that the strong impact of these sanctions make them resemble criminal sanctions<sup>287</sup> which lack the constitutional guarantees of criminal procedure.<sup>288</sup> Moreover, corporate administrative liability raises the same issues as corporate criminal liability does regarding the *mens rea* element and the individual character of criminal liability.<sup>289</sup> Some authors argue that it is unfair that the individuals may be held criminally liable while the corporations are merely administratively sanctioned for the same offense. It is also strongly criticized the fact that corporations are administratively penalized for minor offense, but escape liability for very serious offenses like manslaughter.<sup>290</sup> Moreover, the administrative sanctions do not symbolize the moral condemnation of the society. Thus, the doctrine has advanced a possible resolution: corporations should be held administratively liable for minor offenses, but should be held criminally liable for more serious offenses.<sup>291</sup>

Some authors have also argued that individual criminal liability is less complicated and may be sufficient. This argument has been strongly criticized for several reasons. First, due to the high complexity of modern corporations, the individuals responsible for the offense might be impossible to identify. Such is the case when the decision process is fragmented among multiple departments, when the activity of some employees is not systematically verified because of his or her position of trust, or when a decision is taken by a multimember board by secret vote.<sup>292</sup> Second, prosecutors may conclude that indicting an individual is not justified because the

employee thought that his or her superiors were aware of and approved the action or because they acted from fear of losing their jobs.<sup>293</sup> Third, some of the persons who made the illegal decision might be located in another country and could not be prosecuted.<sup>294</sup> Fourth, individual criminal liability is most of the times ineffective because the amount of a fine is tailored to reflect the individual's financial possibilities, and some systems allow the reimbursement of fines paid by the corporate employee, or corporations can insure themselves against intentional and unintentional wrongdoing (for environmental offenses usually).<sup>295</sup> Lastly, some systems require the designation of a person responsible for the corporation's activities or high managers are automatically presumed responsible without strong requirements of showing of guilt or proximate cause;<sup>296</sup> the agent is compensated for this high risk and is reimbursed for the criminal fines. This solution encourages corporate wrongdoing because it would be probably less expensive for a corporation to hire a new manager "responsible with going to prison" than giving up the illicit activity.<sup>297</sup>

All of the above arguments underline the extreme importance of criminal corporate liability in a modern society. The new technology and development of industry give raise to unpredictable risks that pose serious threats to our society. Corporations try to obtain the highest profits in the shortest time, and some of them are ready to achieve this result by any means. Some corporations are especially incorporated with the secret purpose of committing criminal offenses. Most countries that adopted criminal liability of corporations concluded that corporate misconduct should not be left unsanctioned in the most efficient way. Criminal sanctions' retributive nature better expresses the society's moral condemnation and emphasizes the value of any victim. The experience of United States, France, and England in implementing criminal sanctions on corporations shows that corporate criminal liability can successfully improve and

coexist together with the criminal liability of individuals, administrative liability, and civil liability of corporations and individuals. Corporate criminal liability better promotes general fairness and is consistent with the principles of criminal law.

#### **4. CONCLUSION**

Several countries were, and some still are refusing to accept the concept of corporate criminal liability due to doctrinal, political, and historical reasons. Out of those formerly refusing to accept this concept, some started to slowly change their views. Why now? What has changed? The realities of our times have been changing so much that legislatures have realized that doctrinal issues are less important than the prevention and appropriate punishment of large-scale white-collar crimes, money-laundering, illegal arms sales, environmental harm, product liability, and many others. Some of the countries that have newly introduced the corporate criminal liability in their legal systems provide for restrictive systems of engaging liability and punishing criminal activities of corporations. That might be because they are apprehensive of rapid and extreme changes in a short period of time. Or maybe the realities of their societies are not sufficiently pressuring; the historical, social, economic, and political realities differ from country to country, and these differences have a strong influence on the legal systems. Also, the influence of the interests of powerful corporations should not be ignored. Hopefully, all the legal systems will achieve uniformity regarding this issue.

Although the system developed in United States is presently considered the most advanced in the world, the American model has a few drawbacks that could probably be

eliminated by using elements from other models or by creating new solutions. The American system's most important disadvantages are the significant spill-over effects on innocent employees and shareholders, the possible over-detering effect, and the high costs of implementing corporate criminal liability. However, its advantages outweigh its disadvantages. The American model seems to better reflect the actual developments of corporate structure and, thus, it is better suited to punish corporate crime. The retributive and rehabilitative effects of criminal punishment are almost perfectly reflected by the American model. Moreover, this system is clear, predictable, consistent with the principles of criminal law, and fair.

The French and English systems are also clear, predictable and consistent with the general principles of criminal law. Moreover, they do not have significant side effects on innocent individuals and are not over-detering. However, these systems seem to be less detering and, sometimes, unfair (in the English system for example, when the corporation is liable even when the manager defrauded the corporation itself). The prosecution of corporations is very difficult due to the significant restrictions of these models. Thus, the retributive goal of the criminal law cannot be effectively achieved. In addition, these systems, together with the German one, would probably have the effect of attracting potential corporate criminals seeking to avoid liability.

Corporations are independent juristic persons that can cause harm. Therefore, corporations should bear the responsibility of their actions. Although corporations have been initially conceived as a method of avoiding personal liability, and although its members will feel the side effects of sanctioning corporations, members do not lose more than what they

were willing to risk from the beginning (at incorporation). Moreover, they can prevent corporate crime by adopting special preventive measures, as the American model suggests.

The corporate criminal liability models developed so far show that the only way to effectively punish and battle corporate crime is to criminally punish corporations. Prosecution of individuals only is unjust not only to them, but to society at large because convictions of individuals will rarely affect the way corporations will conduct their business in the future. Moreover, civil and administrative liability of corporations is not sufficient. Victims do not always have the financial resources to pursue a civil claim. Although the administrative liability system promoted by Germany has some efficiency, similarly to civil liability systems, it lacks the procedural guarantees and the stigma characteristic to criminal law. Criminal law is the only one that reaffirms all the values trampled on by corporate criminals. Criminal law punishes justly; its irreplaceable retributive, deterrent, and rehabilitative characteristics satisfy the public demand for vengeance. Criminal punishment of corporations sends a symbolic message: no crime goes unpunished. And a just punishment includes the moral condemnation of society.

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<sup>1</sup> See *Arthur Andersen LLP v. U.S.*, 544 U.S. 696 (2005).

<sup>2</sup> For a detailed list of the top 100 corporate criminals see Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, at <http://www.corporatepredators.org/top100.html> (last visited Jan. 5, 2006).

<sup>3</sup> David Barstow & Lowell Bergman, *Deaths on the Job, Slaps on the Wrist*, N.Y. Times, Jan. 10, 2003, at A1.

<sup>4</sup> JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 130 (1988) cited in JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 33 (2d ed. 1999), at 46-47.

<sup>5</sup> See V.S. Khanna, *Corporate Criminal Liability: What Purposes Does It Serve?* 109 Harv. L. Rev. 1477, 1509 (1996); there are also some critics of the current systems of tort corporate liability who argue that the extensive liability of corporations makes it difficult for corporations to develop in the United States due to the significant amount of law suits that drain the resources of corporations. Thus, it has been suggested that the American system of corporate liability has been forcing corporations to relocate in foreign countries where the law is more lenient and which, in turn, has a seriously negative effect on the American work force. Information was obtained at a debate between Richard Scruggs and Steven Hantler.

<sup>6</sup> When fewer crimes can be prosecuted, it cannot be said that the corporate criminal is adequately punished for its wrongdoing or that the vengeance of the victims is appropriate.

<sup>7</sup> For a more in dept analysis of these arguments, see the following sections of this article.

<sup>8</sup> RICHARD GRUNER, *CORPORATE CRIMINAL LIABILITY AND PREVENTION 2-7* (Law Journal Press ed., 2<sup>nd</sup> release, 2005) (2004).

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- <sup>9</sup> FLORIN STRETEANU & RADU CHIRITA, RASPUNDEREA PENALA A PERSOANEI JURIDICE 7 (Rosetti ed., 2002) (one example is the action against the City of Cheronea; the city was found not-guilty, which saved it from destruction).
- <sup>10</sup> *Id.* at 9, *citing* CG. GEMINEL, DE LA RESPONSABILITE PENALE DES ASSOCIATIONS 8 (Librarie Arthur Rousseau ed., 1899).
- <sup>11</sup> *Id.* at 11, *citing* G. Richier, De la Responsibilite Penale des Personnes Morlaes 53 (1943) (dissertation).
- <sup>12</sup> *Id.* at 12.
- <sup>13</sup> *Id.* at 13-14.
- <sup>14</sup> *Id.* at 15.
- <sup>15</sup> *Id.* at 19, *citing* GEMINEL, *supra* note 10.
- <sup>16</sup> Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective* 43 Int'l & Comp. L.Q. 493, 494 (1994).
- <sup>17</sup> STRETEANU & CHIRITA, *supra* note 9, at 23.
- <sup>18</sup> Stessens, *supra* note 16, at 494.
- <sup>19</sup> STRETEANU & CHIRITA, *supra* note 9, at 23, *citing* A. Gebara, La Responsibilite des Personnes Morlaes en Droit Positif Francais 12 (1945) (dissertation).
- <sup>20</sup> *Id.*
- <sup>21</sup> Stessens, *supra* note 16, at 495.
- <sup>22</sup> STRETEANU & CHIRITA, *supra* note 9, at 24-25.
- <sup>23</sup> L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 Mich. L. Rev. 1508, 1509 (1982).
- <sup>24</sup> STRETEANU & CHIRITA, *supra* note 9, at 25.
- <sup>25</sup> *Id.* at 26, *citing* ST. STANCESCU, STUDIUL ASUPRA RESPONSABILITATEI PENALE A PERSOANELOR JURIDICE 31 (Libraria "Universala" Acaly ed. [sic]).
- <sup>26</sup> *Id.*, *citing* F. VON LISZT, TRATADO DE DERECHO PENAL 299-300 (Rues ed., 1999), and A. Maestre, Les Personnes Morales et le Probleme de Leur Responsibilite Penale 137 (1899) (dissertation).
- <sup>27</sup> *Id.*
- <sup>28</sup> Stessens, *supra* note 16, at 494.
- <sup>29</sup> Leigh, *supra* note 23, at 1520.
- <sup>30</sup> B. Bouloc, *La Criminalisation du Comportement Collectif – France*, in LA CRIMINALISATION DU COMPORTEMENT COLLECTIF: CRIMINAL LIABILITY OF CORPORATIONS 235, 237 (H. de Doelder & Klaus Tiedemann eds., Kluwer Law Int'l, 1996).
- <sup>31</sup> Leonard Orland & Charles Cachera, *Essay and Translation: Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) Under the New French Criminal Code (Nouveau Code Penal)*, 11 Conn. J. Int'l L. 111, 114 (1995).
- <sup>32</sup> See Code Penal [C. Pen.] art. 121-2 (Fr.).
- <sup>33</sup> Bouloc, *supra* note 30, at 238.
- <sup>34</sup> See Albert Maron & Jaques-Henri Robert, *Cent Personnes Morales Penalment Condamnees* JCP G 1999, I 123, for a quantitative and qualitative study of the first one hundred decisions cited by the French Chancellery.
- <sup>35</sup> STRETEANU & CHIRITA, *supra* note 9, at 29-30.
- <sup>36</sup> Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability*, 8 Buff. Crim. L.R. 89, 97 (2004).
- <sup>37</sup> Orland & Cachera, *supra* note 31, at 116.
- <sup>38</sup> *Id.*
- <sup>39</sup> H.J. Hirsch, *La Criminalisation du Comportement Collectif – Allemagne*, in LA CRIMINALISATION DU COMPORTEMENT COLLECTIF: CRIMINAL LIABILITY OF CORPORATIONS 31, 31 (H. de Doelder & Klaus Tiedemann eds., Kluwer Law Int'l, 1996).
- <sup>40</sup> Gunter Heine, *New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience—or Vice Versa?*, 1998 St. Louis-Warsaw Transatlantic L.J. 174 (1998).
- <sup>41</sup> Stessens, *supra* note 16, at 502-03.
- <sup>42</sup> Hirsch, *supra* note 39, at 48.
- <sup>43</sup> Stessens, *supra* note 16, at 503.
- <sup>44</sup> Hirsch, *supra* note 39 at 34.
- <sup>45</sup> Heine, *supra* note 40, at 174.
- <sup>46</sup> See *La Relazione al Decreto Legislativo Guida Normativa June 29, 2001* (Il Sole 24 Ore S.p.A. Ed., 2001).

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- <sup>47</sup> STRETEANU & CHIRITA, *supra* note 9, at 77, *citing* G. FIANDACA & E. MUSCO, DIRITTO PENALE. PARTE GENERALE 146 (Zanachelli Ed., 2001).
- <sup>48</sup> C. Harding, *Criminal Liability of Corporations-United Kingdom*, in LA CRIMINALISATION DU COMPORTEMENT COLLECTIF: CRIMINAL LIABILITY OF CORPORATIONS 369, 382 (H. de Doelder & Klaus Tiedemann (eds.), Kluwer Law Int'l, 1996).
- <sup>49</sup> Stessens, *supra* note 16, at 495.
- <sup>50</sup> KATHLEEN BRICKEY, CORPORATE CRIMINAL LIABILITY 64 (2d ed. 1992).
- <sup>51</sup> STRETEANU & CHIRITA, *supra* note 9, at 34, *citing* C. WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 96 (Claredon Press, 1993).
- <sup>52</sup> BRICKEY, *supra* note 50, at 65.
- <sup>53</sup> *Id.* at 69.
- <sup>54</sup> Regina v. Birmingham & Gloucester R.R. Co., (1842) 3 Q. B. 223 (breach of statutory duty; strict liability for omissions--nonfeasance); Gt. North Of England R.R. Co., (1846) 9 Q.B. 315(strict liability for actions--malfeasance).
- <sup>55</sup> Regina v. Tyler, 173 Eng. Rep. 643 (Assizes 1838).
- <sup>56</sup> BRICKEY, *supra* note 50, at 72.
- <sup>57</sup> Regina v. Stephens, (1866) L.R. 1 Q.B. 702 (nuisance case); Regina v. Holbrook, (1878) 4 Q.B.D. 42 (criminal libel case).
- <sup>58</sup> DPP v. Kent and Sussex Contractors, Ltd., [1944] 1 All E.R. 119 (director used a false document); Moore v. Bresler, [1944] 2 All E.R. 515 (tax evasion); R. v. I.C.R. Haulage, Ltd., [1944] K.B. 551 (common law conspiracy).
- <sup>59</sup> Stessens, *supra* note 16, at 496.
- <sup>60</sup> Tesco Supermarkets Ltd. v. Natrass, [1972] A.C. 153.
- <sup>61</sup> Harding, *supra* note 48, at 370.
- <sup>62</sup> BRICKEY, *supra* note 50, at 74.
- <sup>63</sup> BRICKEY, *supra* note 50, at 63.
- <sup>64</sup> Stessens, *supra* note 16, at 496.
- <sup>65</sup> E.M. Wise, *Criminal Liability of Corporations- US*, in LA CRIMINALISATION DU COMPORTEMENT COLLECTIF: CRIMINAL LIABILITY OF CORPORATIONS 383, 384 (H. de Doelder & Klaus Tiedemann eds., Kluwer Law Int'l, 1996).
- <sup>66</sup> People v. Corporation of Albany, XII Wendell 539 (1834) (non-feasance); State v. Morris Essex R.R., 23 Zabriniski's N.J.R. 360 (1852) (misfeasance); *see also* BRICKEY, *supra* note 50, at 75-81 for a detailed presentation of the nuisance, malfeasance, and nonfeasance liability development in U.S..
- <sup>67</sup> Wise, *supra* note 65, at 384.
- <sup>68</sup> 212 U.S. 481 (1909) (sustaining the constitutionality of the Elkins act which provides that the acts and omissions of an officer acting within the scope of his employment were considered to be those of the corporation).
- <sup>69</sup> *Id.*, at 495.
- <sup>70</sup> BRICKEY, *supra* note 50, at 87; STRETEANU & CHIRITA, *supra* note 9, at 46.
- <sup>71</sup> Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 Harv. J.L. & Pub. Pol'y 833, 846 (2000).
- <sup>72</sup> Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1099 (1991).
- <sup>73</sup> Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 Buff. Crim. L. R. 694, (2000).
- <sup>74</sup> Bank of Boston v. Bellotti, 435 U.S. 765, 787-95 (1978).
- <sup>75</sup> STRETEANU & CHIRITA, *supra* note 9, at 45.
- <sup>76</sup> *Id.* at 88.
- <sup>77</sup> *Id.* at 89.
- <sup>78</sup> C. PEN. art. 121-2 (Fr.)
- <sup>79</sup> STRETEANU & CHIRITA, *supra* note 9, at 89 (for example, information could be used to commit libel or treason).
- <sup>80</sup> *Id.*
- <sup>81</sup> Taff Vale RR. Co. v. Amalgamated Society of RR. Servants, [1901] A.C. 426.
- <sup>82</sup> STRETEANU & CHIRITA, *supra* note 9, at 90.
- <sup>83</sup> 259 U.S. 344 (1922).
- <sup>84</sup> C. PEN. art. 121-2 (Fr.)
- <sup>85</sup> *Id.* ¶2.

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- <sup>86</sup> Leigh, *supra* note 23 at 18.
- <sup>87</sup> Wise, *supra* note 65, at 394.
- <sup>88</sup> *Id.* at 100.
- <sup>89</sup> C. PEN. art. 121-2 (Fr.).
- <sup>90</sup> STRETEANU & CHIRITA, *supra* note 5, at 101.
- <sup>91</sup> *Id.* at 102.
- <sup>92</sup> Interpretation Act 1978, Ch. 30, Sch. 1 (Eng.).
- <sup>93</sup> U.S. v. A&P Trucking Co., 358 U.S. 121, 128.
- <sup>94</sup> Wise, *supra* note 65, at 393; 49 U.S.C. 303(a); 18 U.S.C. §1.
- <sup>95</sup> 18 U.S.C. 18.
- <sup>96</sup> U.S. Sentencing Guidelines Manual, 18 U.S.C.S. Appx. § 8A1.1 (2005) [hereinafter U.S. Sentencing Guidelines]
- <sup>97</sup> STRETEANU & CHIRITA, *supra* note 5, at 107-08.
- <sup>98</sup> C. PEN. art. 133-1 (Fr.).
- <sup>99</sup> U. S. v. Alamo Bank of Texas, 886 F.2d 828, 830 (5<sup>th</sup> Cir. 1989).
- <sup>100</sup> Melrose Distillers Inc. v. U.S., 359 U.S. 271, 273 (1959); *See also* Lederman, *supra* note 73, at 641.
- <sup>101</sup> Hirsch, *supra* note 39, at 54.
- <sup>102</sup> *Id.* at 54-55.
- <sup>103</sup> STRETEANU & CHIRITA, *supra* note 9, at 112.
- <sup>104</sup> Cristina De Maglie, *Centennial Universal Congress of Lawyers Conference-Lawyers and Jurists in the 21st Century: Paper: Models of Corporate Criminal Liability in Comparative Law*, 4 Wash. U. Global Stud. L. Rev. 547, 552 (2005).
- <sup>105</sup> *Id.*
- <sup>106</sup> *See generally* LA CRIMINALISATION DU COMPORTEMENT COLLECTIF: CRIMINAL LIABILITY OF CORPORATIONS (H. de Doelder & Klaus Tiedemann eds., Kluwer Law Int'l, 1996).
- <sup>107</sup> STRETEANU & CHIRITA, *supra* note 9, at 112-13 (the law cannot foresee the impossible).
- <sup>108</sup> R. v. I.C.R. Haulage, Ltd., 1944 K.B. 551 (Crim. App.).
- <sup>109</sup> *Id.*
- <sup>110</sup> STRETEANU & CHIRITA, *supra* note 9, at 113, *citing* R. CARD, INTRODUCTION TO CRIMINAL LAW 195 ([sic] London/Edinburg 1988).
- <sup>111</sup> R. v. P & O European Ferries (Dover) Ltd., 93 Cr App Rep 72 (1990, UK); Lederman, *supra* note 73, at 645-46.
- <sup>112</sup> C. PEN. art. 121-2 (Fr.).
- <sup>113</sup> De Maglie, *supra* note 104, at 552.
- <sup>114</sup> STRETEANU & CHIRITA, *supra* note 9, at 118-19.
- <sup>115</sup> U.S. Sentencing Guidelines, *supra* note 96, at 8A1.
- <sup>116</sup> Wise, *supra* note 65, at 385.
- <sup>117</sup> State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17 (Minn. 1984).
- <sup>118</sup> Commonwealth v. Beneficial Fin. Co., 275 N.E.2d 33 (Mass., 1971).
- <sup>119</sup> Granite Construction Co. v. Superior Ct., 149 Cal. App. 3d 465 (1983); Vaughan \$ Sons, Inc. v. State, 737 S.W.2d 805 (Tex. Crim. App., 1987).
- <sup>120</sup> People v. O'Neil, 194 Ill. App. 3d 79 (1990).
- <sup>121</sup> Hirsch, *supra* note 39, at 57.
- <sup>122</sup> *Id.* at 58.
- <sup>123</sup> Ferguson v. Wilson, (1866) L.R. 2 Ch. App. 77, C.A.
- <sup>124</sup> Beale & Safwat, *supra* note 36, at 93.
- <sup>125</sup> STRETEANU & CHIRITA, *supra* note 9, at 46.
- <sup>126</sup> Hirsch, *supra* note 39, at 37.
- <sup>127</sup> Ashbury Ry Carriage and Iron Co. v. Riche, [1875] L.R. 7 H.L. 653. People v. Rochester Ry. & Light Co., 88 N.E. 22 (N.Y. 1909).
- <sup>128</sup> Nicolette Parisi, *Theories of Corporate Criminal Liability (or Corporations Don't Commit Crimes, People Commit Crimes)*, in CORPORATIONS AS CRIMINALS 41, 45 (Ellen Hochstedler ed., Sage Publications, 1984).
- <sup>129</sup> STRETEANU & CHIRITA, *supra* note 9, at 52.
- <sup>130</sup> *Id.*
- <sup>131</sup> Hirsch, *supra* note 39, at 37; Beale & Sawfat, *supra* note 36, at 93.
- <sup>132</sup> STRETEANU & CHIRITA, *supra* note 9, at 52.
- <sup>133</sup> Hirsch, *supra* note 39, at 38.

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- <sup>134</sup> See STRETEANU & CHIRITA, *supra* note 9, 53-59; Friedman, *supra* note 71, at 847-52.
- <sup>135</sup> For example, when some of the members opposed a specific course of action adopted by the majority, the minority's will cannot be identified with that of the corporation represented by the majority.
- <sup>136</sup> STRETEANU & CHIRITA, *supra* note 9, at 55, *citing* R. PLASCENCIA VILLANUEVA, *TEORIA DEL DELITO* 73-74 ([sic] Universidad Nacional Autonoma de Mexico, 2000).
- <sup>137</sup> Hirsch, *supra* note 39, at 38.
- <sup>138</sup> STRETEANU & CHIRITA, *supra* note 9, at 120.
- <sup>139</sup> C. PEN. art. 121-2 (Fr.).
- <sup>140</sup> STRETEANU & CHIRITA, *supra* note 9, at 134.
- <sup>141</sup> *Id.* at 121, *citing* F. DESPORTES, *RESPONSIBILITE PENALE DES PERSONNES MORALES* 112 (Techniques Juris-Classeurs ed, 2001).
- <sup>142</sup> *Id.* at 123; Bouloc, *supra* note 30, at 238.
- <sup>143</sup> Stessens, *supra* note 16, at 507.
- <sup>144</sup> STRETEANU & CHIRITA, *supra* note 9, at 123.
- <sup>145</sup> C. PEN. art. 121-2 (Fr.).
- <sup>146</sup> STRETEANU & CHIRITA, *supra* note 9, at 128.
- <sup>147</sup> Bouloc, *supra* note 30, at 240.
- <sup>148</sup> *Id.*
- <sup>149</sup> Stessens, *supra* note 16, at 514.
- <sup>150</sup> STRETEANU & CHIRITA, *supra* note 9, at 128.
- <sup>151</sup> *Id.* at 129, *citing* A. LEVY ET ALL, *LA RESPONSABILITE PENALE DES COLLECTIVITES TERRITORIALES, DE LEURS ELUS, DE LEURS AGENTS* 30 (Litec Ed., 1995).
- <sup>152</sup> C. PEN. art. 131-39 (Fr.).
- <sup>153</sup> *See Id.* art. 221-6 or 222-21.
- <sup>154</sup> *Id.* art. 121-2; De Maglie, *supra* note 104, at 556.
- <sup>155</sup> De Maglie, *supra* note 104, at 561.
- <sup>156</sup> Stessens, *supra* note 16, at 507-08.
- <sup>157</sup> Hirsch, *supra* note 39, at 59.
- <sup>158</sup> *Id.* at 61.
- <sup>159</sup> Stessens, *supra* note 16, at 508.
- <sup>160</sup> *Id.*
- <sup>161</sup> STRETEANU & CHIRITA, *supra* note 9, at 121, *citing* G. Dannecker, *Reflexiones Sobre la Responsabilidad Penal de las Personas Juridicas* [sic] *Revista Penal* 51 (2001); Hirsch, *supra* note 39, at 69.
- <sup>162</sup> Hirsch, *supra* note 39, at 61.
- <sup>163</sup> Hirsch, *supra* note 39, at 69.
- <sup>164</sup> *Id.* at 58.
- <sup>165</sup> *Id.*; Stessens, *supra* note 16, at 514.
- <sup>166</sup> Hirsch, *supra* note 39, at 60.
- <sup>167</sup> Stessens, *supra* note 16, at 508.
- <sup>168</sup> Harding, *supra* note 48, at 370.
- <sup>169</sup> *Tesco Supermarkets Ltd. v. Natrass*, [1972] A.C. 153.
- <sup>170</sup> De Maglie, *supra* note 104, at 556.
- <sup>171</sup> Stessens, *supra* note 16, at 509.
- <sup>172</sup> *Id.*; STRETEANU & CHIRITA, *supra* note 9, at 139.
- <sup>173</sup> *National Rivers Auth. v. Alfred McAlpine Homes E. Ltd.*, [1994] 4 All E.R. 286 (Q.B. Div'l Ct.).
- <sup>174</sup> De Maglie, *supra* note 104, at 557.
- <sup>175</sup> *R. v. H.M. Coroner for East Kent* [1989] Cr. App. R. 16.
- <sup>176</sup> *Alphacell v. Woodward*, [1972] 2 All E.R. 475 (H.L.).
- <sup>177</sup> *Allen v. Whitehead* [1930] 1 K.B. 211; STRETEANU & CHIRITA, *supra* note 5, at 147.
- <sup>178</sup> [1972] A.C. 153, 178.
- <sup>179</sup> *Director of Public Prosecutions v. Kent & Sussex Contractors, Ltd.*, [1944] K.B. 146 (K.B. Div'l Ct. 1943);
- <sup>180</sup> *Id.*; Stessens, *supra* note 16, at 515.
- <sup>181</sup> *Seaboard Offshore, Ltd. v. Secretary of State for Transp.*, [1994] 2 All E.R. 99, 104 (H.L.)
- <sup>182</sup> STRETEANU & CHIRITA, *supra* note 9, at 149, *citing* S. Field and N. Jorg, *Corporate Liability and Manslaughter: should we be going Dutch?* 161 *Crim. L. Rev.* 161(1991).

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- <sup>183</sup>Harding, *supra* note 48, at 376 (stating that this refusal “misses the point that a corporation is not like a ‘personal’ defendant and side-steps the issue of what should be understood by the ‘corporation as such.’”).
- <sup>184</sup>De Maglie, *supra* note 104, at 553.
- <sup>185</sup>Wise, *supra* note 65, at 390-91.
- <sup>186</sup>U. S. v. Gold, 734 F.2d 800 (5<sup>th</sup> Cir. 1984); U.S. v. Automatic Medical Laboratories, Inc., 770 F.2d 399 (4<sup>th</sup> Cir. 1985).
- <sup>187</sup>De Maglie, *supra* note 104, at 553-54.
- <sup>188</sup>U.S. v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3d Cir. 1970).
- <sup>189</sup>U.S. v. Bank of New England, N.A., 821 F.2d 844 (1<sup>st</sup> Cir. 1987).
- <sup>190</sup>Wise, *supra* note 65, at 391; *see also* Stessens, *supra* note 16, at 514.
- <sup>191</sup>Wise, *supra* note 65, at 392.
- <sup>192</sup>For a comprehensive analysis of this model/theory *see* Lederman, *supra* note 73, at 661-66.
- <sup>193</sup>Bank of New England, N.A., 821 F.2d 844.
- <sup>194</sup>Wise, *supra* note 65, at 392.
- <sup>195</sup>*Id.* at 391.
- <sup>196</sup>*Id.*; Stessens, *supra* note 16, at 515.
- <sup>197</sup>Lederman, *supra* note 73, at 661.
- <sup>198</sup>Wise, *supra* note 65, at 389.
- <sup>199</sup>*Id.* at 389-90.
- <sup>200</sup>*Id.* at 390.
- <sup>201</sup>*Id.*
- <sup>202</sup>Harding, *supra* note 48, at 382.
- <sup>203</sup>Stessens, *supra* note 16, at 520.
- <sup>204</sup>James Gobert, *Controlling Corporate Criminality: Penal Sanctions and Beyond*, 2 Web JCLI page 6 (1998) available at <http://webjcli.ncl.ac.uk/1998/issue2/gobert2.html> (last visited January 14, 2006).
- <sup>205</sup>STRETEANU & CHIRITA, *supra* note 9, at 6, *citing* B. Schutz, *Le Principe de la Personnalite des Pienes* 114-116 (1967) (dissertation)..
- <sup>206</sup>Hirsch, *supra* note 39, at 43.
- <sup>207</sup>*Id.*
- <sup>208</sup>STRETEANU & CHIRITA, *supra* note 9, at 63.
- <sup>209</sup>Hirsch, *supra* note 39, at 40.
- <sup>210</sup>STRETEANU & CHIRITA, *supra* note 9, at 65.
- <sup>211</sup>*See supra* Introduction.
- <sup>212</sup>Gobert, *supra* note 204, at 13.
- <sup>213</sup>Hirsch, *supra* note 39, at 41.
- <sup>214</sup>STRETEANU & CHIRITA, *supra* note 9, at 170.
- <sup>215</sup>Gobert, *supra* note 204, at 3.
- <sup>216</sup>*Id.*
- <sup>217</sup>*Id.* at 4-5.
- <sup>218</sup>*Id.* at 4.
- <sup>219</sup>*Id.* at 5.
- <sup>220</sup>Stessens, *supra* note 16, at 515.
- <sup>221</sup>STRETEANU & CHIRITA, *supra* note 9, at 172.
- <sup>222</sup>*Id.*
- <sup>223</sup>*Id.*
- <sup>224</sup>*Id.*
- <sup>225</sup>Gobert, *supra* note 204, at 11.
- <sup>226</sup>STRETEANU & CHIRITA, *supra* note 9, at 172, *citing* L. DEL C. ZUNGIGA RODRIGUEZ, *BASES PARA UN MODELO DE IMPUTACION DE RESPONSABILIDAD PENAL A LAS PERSONAS JURIDICAS* 754 (Aranzadi Ed., 2000).
- <sup>227</sup>Gobert, *supra* note 204, at 9.
- <sup>228</sup>*Id.* at 10.
- <sup>229</sup>STRETEANU & CHIRITA, *supra* note 9, at 173.
- <sup>230</sup>Gobert, *supra* note 204, at 10.
- <sup>231</sup>STRETEANU & CHIRITA, *supra* note 9, at 174.

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- <sup>232</sup> Gobert, *supra* note 204, at 11-18.
- <sup>233</sup> Stessens, *supra* note 16, at 517.
- <sup>234</sup> Gobert, *supra* note 204, at 18.
- <sup>235</sup> *Id.* at 12.
- <sup>236</sup> *Id.* at 6-8.
- <sup>237</sup> Stessens, *supra* note 16, at 516.
- <sup>238</sup> C. Pen. art. 131-39 *et seq.* (Fr.).
- <sup>239</sup> *Id.* art. 131-42-1, -2.
- <sup>240</sup> *Id.* art. 131-38.
- <sup>241</sup> Stessens, *supra* note 16, at 516.
- <sup>242</sup> C. PEN. art. 131-47 (Fr.).
- <sup>243</sup> Hirsch, *supra* note 39, at 62; Heine, *supra* note 40, at 185.
- <sup>244</sup> Hirsch, *supra* note 39, at 63.
- <sup>245</sup> Stessens, *supra* note 16, at 516. The amount of this sanction is provided in DM and not in Euro because of the source's date.
- <sup>246</sup> *Id.*
- <sup>247</sup> Heine, *supra* note 40, at 185.
- <sup>248</sup> Harding, *supra* note 48, at 381; Stessens, *supra* note 16, at 517.
- <sup>249</sup> Harding, *supra* note 48, at 382.
- <sup>250</sup> *Id.* at 381.
- <sup>251</sup> U.S. Sentencing Guidelines, *supra* note 96, at § 8, introducing cmt.
- <sup>252</sup> Wise, *supra* note 65, at 395-97.
- <sup>253</sup> Gobert, *supra* note 204, at 14.
- <sup>254</sup> U.S. Sentencing Guidelines, *supra* note 96, at § 8C1.1.
- <sup>255</sup> De Maglie, *supra* note 104, at 565.
- <sup>256</sup> *Id.* at 564.
- <sup>257</sup> U.S. Sentencing Guidelines, *supra* note 96, at § 8D1.4(c).
- <sup>258</sup> Wise, *supra* note 65, at 401.
- <sup>259</sup> Gobert, *supra* note 204, at 19.
- <sup>260</sup> Beale & Sawfat, *supra* note 36, at 93.
- <sup>261</sup> V.S. Khanna, *Corporate Criminal Liability: What Purposes Does It Serve?*, 109 Harv. L. Rev. 1477, 1509 (1996).
- <sup>262</sup> *Id.* at 1504; Beale & Sawfat, *supra* note 36, at 94.
- <sup>263</sup> Beale & Sawfat, *supra* note 36, at 95.
- <sup>264</sup> STRETEANU & CHRITIA, *supra* note 9, at 73.
- <sup>265</sup> Gobert, *supra* note 204, at 3 (“millions of customers illegally overcharged by a matter of pence”).
- <sup>266</sup> Khanna, *supra* note 261, at 1507.
- <sup>267</sup> Beale & Sawfat, *supra* note 36, at 95.
- <sup>268</sup> Friedman, *supra* note 71, at 852.
- <sup>269</sup> *Id.*
- <sup>270</sup> Art. 197 the Italian Penal Code provides that corporations are obligated to pay the fine owed by one of its insolvent representatives or administrators when the offense was committed by the employee acting within the scope of his employment and in the interest of the corporation. CODICE PENALE [C. PEN.] art. 197 (It.).
- <sup>271</sup> See STRETEANU & CHRITIA, *supra* note 9, at 81 (numerous laws provided for corporate liability for the fines applied to the corporation's employees if they acted as such when committing the offense).
- <sup>272</sup> See Stessens, *supra* note 16, at 500-501 (Tax Act of 1870 created civil corporate criminal liability for criminal fines that were imposed on employees acting within the scope of the corporation).
- <sup>273</sup> *Id.* 502 n.42 (mainly used in labor law).
- <sup>274</sup> *Id.* (used to secure collection of Vat fines).
- <sup>275</sup> *Id.* (used in custom law). This liability model has been used significantly less after the introduction of corporate criminal liability in France.
- <sup>276</sup> See note 47.
- <sup>277</sup> See Stessens, *supra* note 16, at 502.
- <sup>278</sup> See STRETEANU & CHRITIA, *supra* note 9, at 82.
- <sup>279</sup> *Id.*

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- <sup>280</sup> *Id.*
- <sup>281</sup> *See* Stessens, *supra* note 16, at 502-03.
- <sup>282</sup> *Id.*; STRETEANU & CHIRITA, *supra* note 9, at 74.
- <sup>283</sup> *See* Stessens, *supra* note 16, at 503.
- <sup>284</sup> *Id.*
- <sup>285</sup> Decree-Law No. 433/10.27.1982.
- <sup>286</sup> Law No. 300 of September 29, 2000; Decree-Law No. 231 of May 8, 2001.
- <sup>287</sup> *See* Stessens, *supra* note 16, at 504-05 (critics referring to the extremely high administrative sanctions imposed by the European Commission).
- <sup>288</sup> *Id.* at 504.
- <sup>289</sup> STRETEANU & CHIRITA, *supra* note 9, at 78.
- <sup>290</sup> *Id.* citing R. Roth, *Responsibilite Penale de l'Enterprise: Modeles de Reflexion* [sic] *Revue Penale Suisse* 349 (1997).
- <sup>291</sup> *Id.* citing L. DEL C. ZUNGIGA RODRIGUEZ, BASES PARA UN MODELO DE IMPUTACION DE RESPONSABILIDAD PENAL A LAS PERSONAS JURIDICAS 208 (Aranzadi Ed., 2000).
- <sup>292</sup> *See* Heine, *supra* note 40; STRETEANU & CHIRITA, *supra* note 9, at 69.
- <sup>293</sup> Heine, *supra* note 40, at 176.
- <sup>294</sup> STRETEANU & CHIRITA, *supra* note 9, at 70.
- <sup>295</sup> Heine, *supra* note 40, at 176.
- <sup>296</sup> *Id.* at 177.
- <sup>297</sup> STRETEANU & CHIRITA, *supra* note 9, at 71, citing C.M.V. Clarkson, *Corporate Culpability* [sic] *Web J. of Current Legal Issues* §3 (1998).