Analysis of Organizational Ethics

Evan Slavitt
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Evan Slavitt*

ABSTRACT
Whether an organization is ethical or not has become an increasingly important question both in public and legislative discourse as well as in the application of tort and criminal law. Historical approaches to organizational ethics have either attempted to evade the problem or sought to use paradigms developed for individuals. This Article reviews the various models that have already been proposed and explains why those models are unsatisfactory, focusing particularly on the attempts to articulate an organizational substitute for individual intent. The article then proposes a new framework that differentiates the various aspects of organizations and clarifies how ethical questions should be framed for organizations and how to answer those questions.

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* General Counsel of AVX Corporation, J.D. Harvard Law School, B.A., M.A. (Economics) Yale University.
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But you were always a good man of business, Jacob,” faltered Scrooge, who now began to apply this to himself. “Business!” cried the Ghost, wringing its hands again. “Mankind was my business. The common welfare was my business; charity, mercy, forbearance, and benevolence, were, all, my business. The dealings of my trade were but a drop of water in the comprehensive ocean of my business!”

I – INTRODUCTION AND OVERVIEW

Introduction

The issue of organizational ethics is not new. According to Philip Pettit, “[i]n 1246, Pope Innocent IV argued that a corporate body, or universitas, cannot be excommunicated, being only a fictional person, not a real one.” Some years later, Blackstone came to the same conclusion. “A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may in their distinct individual capacities.” Implicit in these assertions is the premise that organizations, as such, are not subject to ethical analysis nor can they be held to ethical standards. The more specific question of the meaning of criminal liability vel non for organizations (at least with respect to crimes involving knowledge or intent) has been a thorn in the scholarly side for as long as courts have permitted corporate prosecutions. It has also plagued courts seeking to identify and apply international law to organizations.

The problem is that there is no satisfactory account of ethics as applied to organizations. For some, such as Pope Innocent IV, even the phrase “organizational ethics” is a meaningless one, the equivalent of saying “desk ethics” or “chair ethics.” As the Second Circuit recently explained the state of current international law,

1 Charles Dickens, A Christmas Carol (1843).
2 Philip Pettit, Responsibility Incorporated, 117 Ethics 171, 188 (2007) (citing E. H. Kantorowicz, The King’s Two Bodies: A Study in Mediaeval Political Theology 305–6 (Princeton University Press, 1997)). See also Peter French, Collective and Corporate Responsibility at vii (Cambridge University Press 1984) (“For centuries, the standard minimum entrance qualifications for membership in the moral community have included being a natural person (a human being . . . .”).
3 1 W. Blackstone, Commentaries 476. See In the case Anonymous, 88 Eng. Rep. 1518 (K.B. 1701) (“A corporation is not indictable, but the particular members of it are.”). More recently, this issue arose during the Nuremberg (also Nurnberg or Nuernberg) trials. Justice Jackson himself focused on individual responsibility for war crimes. Robert H. Jackson, Final Report to the President Concerning the Nurnberg War Crimes Trial (1946) (emphasis added), reprinted in 20 Temp. L.Q. 338 , 342 (1946). See also Brigadier General Telford Taylor, U.S.A., Chief of Counsel for War Crimes, Final Report to the Secretary of the Army on the Nuerberg War Crimes Trials Under Control Council Law No. 10, at 109 (1949) (“[T]he major legal significance of the [Nuremberg] judgments lies, in my opinion, in those portions of the judgments dealing with the area of personal responsibility for international law crimes.” (emphasis in original)).
5 See, e.g., Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010) (“The question of corporate liability has been identified as recently as 2009 in [Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009]) as an open question in our Circuit. See 582 F.3d at 261 n.12 (‘We will also assume, without deciding, that corporations . . . may be held liable for the violations of customary international law that plaintiffs allege.’”).
6 This position is by no means purely historical. See, e.g., Manuel Velasquez, Debunking Corporate Moral Responsibility, 13 Bus. Ethics Q. 531 (2003); John Ladd, Persons and Responsibility: Ethical Concepts and
From the beginning, however, the principle of individual liability for violations of international law has been limited to natural persons—not "juridical" persons such as corporations—because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an "international crime" has rested solely with the individual men and women who have perpetrated it. As the Nuremberg tribunal unmistakably set forth in explaining the rationale for individual liability for violations of international law: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." The Nurnberg Trial (United States v. Goering), 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946) (rejecting the argument that only states could be liable under international law).

More recently, during the establishment of the International Criminal Court, the proposal to grant it jurisdiction over organizations was rejected.

For many, however, intuition indicates that the phrase is meaningful. In the last decade, for example, Enron has become such a symbol for organizational evil that the phrase

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7 Kiobel, supra at 119.
9 This article will frequently refer to "intuition" or "the common intuition." The use of intuition in philosophy has a long history. See, e.g., Michael DePaul, William Ramsey, Rethinking Intuition: The Psychology of Intuition and its Role in Philosophical Inquiry (Studies in Epistemology and Cognitive Theory) Rowman & Littlefield Publishers, Inc. (October 9, 1998). Indeed, Plato asserted that the more significant forms such as Equality, Beauty, Truth, and the Good itself can best be apprehended by intuition (Gk. νοησις [nôësis]). In this context, the common intuition is informed by thousands of years of analysis and discussion of individual ethics in philosophy, religion, law, and social science. It should be noted that there is also a long tradition of casting doubt on the value of intuition in various contexts. See, e.g., Louis Kaplow & Steven Shavell, Fairness v. Welfare (Harvard University Press 2002); R.M. Hare, Sorting out Ethics (Oxford University Press 2000). Even Hare, however, who profoundly dislikes appeals to intuition, cannot deny that intuition is part of the moral process. R. M. Hare, Moral Thinking: Its Levels, Methods and Point 40 (Oxford University Press 1982).
“Enron scandal” triggers over 200,000 Google hits. Such usage strongly suggests that it is the corporation Enron itself that is being referred to in moral terms\textsuperscript{11} rather than the several individuals whose misconduct has become widely known.\textsuperscript{12} As one commentator explained,

The naive argument for corporate criminal liability begins with the premise that corporations are treated as separate legal entities for many purposes. Corporations can enter contracts, sue and be sued, and own property in their own name. They even possess a broad range of constitutional rights, including a First Amendment right of expression. Corporations are also liable for the torts of their employees in many circumstances under the tort law doctrine of respondeat superior. Is it not a trivial extension of these principles to hold that corporations are also criminally liable for crimes committed by their agents?\textsuperscript{13}

Even amongst those who accept the notion that ethical standards can be applied to organizations, however, there is a dramatic lack of agreement on how to do so or what standards to apply.

This confusion creates problems in numerous contexts. In the context of criminal law – at least that subset in which intent or specific intent is implicated – it is essential. In the free market, whether or not some entities should be shunned notwithstanding pure economic considerations is a matter of importance both to buyers and sellers. Finally, members of organizations must grapple with these issues whether they want to do so or not as they make daily decisions on corporate conduct and strategy.

**Overview**

Part I lays the groundwork for the analysis in this article. First, it briefly addresses why the issue of organizational ethics is important, some concepts central to the history and analysis of the problem: what is an “organization,”\textsuperscript{14} what are “ethics,”\textsuperscript{15} and when and how can ethical responsibility be assigned?\textsuperscript{16} Part II then establishes several paradigms that will be used to test various approaches to organizational ethics.

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\textsuperscript{11} It is true that from a grammatical perspective “Enron scandal” could either mean the scandal caused by Enron or the scandal that occurred at Enron. Even a cursory review of a few of these sites strongly suggests the former reading which attributes a moral judgment rather than a merely referential use. This is also consistent with the treatment of other organizations. “We can credibly blame the financial institution known as “Goldman Sachs” because we believe, on multiple levels, that Goldman Sachs is an identifiable entity. It means something to refer to “Goldman Sachs” and not “Citibank” or “Morgan Stanley . . . .” Baer at 4-5.

\textsuperscript{12} Further, the ‘evil corporation” has become an entrenched *mise en scene* in fiction. E.g., SPECTRE (James Bond books and movies); KAOS (Get Smart series and movie); THRUSH (Man from UNCLE series); LexCorp (DC Comics); Tyrell Corporation (Blade Runner), Weyland-Yutani (Alien films); Cyberdyne Systems Corporation (Terminator films); Soylent Corporation (*Soylent Green*); The Company (Dr. Who series); and GeneCo (Repo! The Genetic Opera).

\textsuperscript{13} Daniel R. Fischel and Alan O. Sykes, Corporate Crime, 25 J. Legal Stud. 319, 321 (June 1996). A somewhat more sophisticated phrasing of this idea is set forth in Julian Velasco, The Fundamental Rights of the Shareholder, 40 U.C. Davis L. Rev. 407, 455 (2006) (“Communitarians insist that corporations have political and social dimensions as well as the obvious economic dimension.”). Peter French notes that even some very sophisticated moral philosophers such as John Rawls share that intuition as well. French, *supra* at 33-34.

\textsuperscript{14} See TAN ____.

\textsuperscript{15} See TAN ____.

\textsuperscript{16} See TAN ____.
Part III first focuses on the importance of distinguishing the concept of organizational intent as distinct from individual intent. It then reviews the leading approaches to analyzing corporate intent and evaluating the ethics of organizations:

Evasion – Redefining the problem to avoid corporate intent

Corporate Policy – Using the organizations policies as a proxy for intent

Corporate Character – Ascertaining the “character” of an organization as a proxy for intent

Corporate Culture – A variation of the Corporate Character approach that instead uses an organization’s “culture” as a proxy for intent

Corporate Response – Substitution of the organizational response to wrongdoing for pre-action intent

Collective Intent/Aggregation Theory – This approach seeks to meld the individual intent of some or all of the members of an organization into a distinct intention of that organization

Corporate Process/Strategic Model – This approach seeks to analyze how an organization makes decisions to determine an intent

During the course of that analysis, continuing reference is made to the body of law addressing criminal intent not because it is identical with ethical analysis, but because both the theory and the practicality of determining corporate intent has often been analyzed and discussed in applying statutes with an intent element. This section demonstrates that each approach suffers from flaws that are either incurable or that can only be cured by foregoing generality, concordance with common ethical intuition, or the distinguishing characteristics of the approach itself.

Part IV discusses other possible solutions. The solution of redefining the issue of organizational ethics to avoid the problems plaguing historical approaches is rejected because it fundamentally fails to address the issue either practically or from the perspective of the common intuition. Next, the Utilitarian ethic is examined as a way of evading the issue of corporate intent. While that approach has some benefits in very specific contexts such as social engineering and organizational ethics, it too fails to address the issue comprehensively or consistently. Finally, Part IV proposes a new approach which addresses the fundamental differences between organizations and individuals. Instead of attempting a direct organizational proxy for individual intent as it is customarily used in ethical analysis, this approach distinguishes four different aspects of organizational activity: ultimate ends, intermediate ends, means, and internal conduct. The section then draws on historical ethics to evaluate ultimate ends and intermediate ends as

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well as a synthesis of ethical approaches to analyze organizational means and internal conduct. This approach, while sacrificing conceptual simplicity, accomplishes the twin tasks of preserving generality and coordination with common intuition. Finally, Part V draws some tentative conclusions.

II – FOUNDATIONAL ISSUES

Why Are Organizational Ethics Important?

Whether ethics, in general, are important or worthy of study is beyond the scope of this article. Instead, the importance is taken as given. Nonetheless, that does not necessarily imply that organizational ethics are important. There are, however, several plausible answers to this question.

At the most abstract level, one could reason as follows: ethics in general is worthy of study, organizations are ubiquitous in modern society, therefore their ethics are worthy of study. It would seem inconsistent to accept the first premise but disregard a substantial segment of the modern world.

At a more practical level, important policy and societal decisions are premised on ethics. Traditionally, criminal law is based on moral judgments about conduct. As Judge Kozinski recently explained:

Civil law often covers conduct that falls in a gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal. That is not only because of the dire consequences of a conviction – including disenfranchisement, incarceration and even deportation – but also because criminal law represents the community’s sense of the types of behavior that merits the moral condemnation of society. See United States v. Bass, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) (“[C]riminal punishment usually represents the moral condemnation of the community . . . .”); see also Wade v. United States, 426 F.2d 64, 69 (9th Cir. 1970) (“[T]he declaration that a person is criminally responsible for his actions is a moral judgment of the community . . . .”)

Even outside the legal context, consumers often factor into their purchasing decisions judgments about the ethical quality which, consequently means that businesspersons must also take ethics into account.

It is beyond the scope of this article to describe how society should react to moral or immoral organizations, or whether sanctions should be imposed, or what those sanctions should be. Those reactions depend on what judgments are made. The focus below is not on what judgments are made but on how they can be reached in a way that allows for meaningful discussion and debate. Otherwise, each person arrives at his or her own perspective without any

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18 United States v. Goyal, 629 F.3d 912, 922 (9th Cir. 2010).
way of reconciling that view with another person’s differing viewpoint. Accordingly, the balance of this article attempts to develop a framework for such discussion.

What Is An Organization?

The legal definitions of an organization vary. They range from overly narrow definitions that require legal organization to those that contain no meaningful limits at all. The first category fails to include many entities that would be commonly recognized as organizations but which are not formally constituted. For example, many political organizations, social clubs, youth groups, and the like are clearly organizations, but few of them have government issued charters. An organization can be permanent or temporary; it can be established in some formal way or be created by happenstance. The Catholic Church, having its own nation state, is an organization, but so is an ad hoc team of children formed during recess to play basketball against other ad hoc teams. Thus, any definition that requires a particular legal formulation is too narrow for purposes of understanding the ethical nature of organizations as a whole.

In contrast, the definition in 18 U.S.C. § 18 – “‘Organization’ means a ‘person other than an individual.’” – is, at least on its face, just a bit too broad. Although the courts occasionally cite this provision, they seem never to have actually construed it. In the absence of some sort of internal coordination, a group of people is merely an assortment of individuals. For example, the set of riders on a particular subway car at rush hour would be defined as more than one individual; to treat them, however, as an organization stretches the notion of ‘organization’ too far. Further the coordination must have some internal aspect. The audience at a particular

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19 See, e.g., 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (defining a terrorist organization as “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).”); 18 USCS § 513(c)(4) (“the term ‘organization’ means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce.”); Alaska Stat. § 11.81.900 (2011) (defining an organization as “a legal entity, including a corporation, company, association, firm, partnership, joint stock company, foundation, institution, government, society, union, club, church, or any other group of persons organized for any purpose.”); OR Ann. 2901.23(D) (“As used in this section, ‘organization’ means a corporation for profit or not for profit, partnership, limited partnership, joint venture, unincorporated association, estate, trust, or other commercial or legal entity. ‘Organization’ does not include an entity organized as or by a governmental agency for the execution of a governmental program.”).

20 E.g., Alaska Stat. § 11.81.900 supra.


22 E.g., the new “Tea Parties” are clearly organized but few, if any, have officially organized as political parties under relevant state law.


24 Peter French’s name for these types of groups is “aggregate collectivity” to make clear that only a collection of individuals with some common characteristic is being designated. French, supra at 5. He contrasts this with a “conglomerate collectivity” which means more that such a shorthand designation of an assortment of individuals. Id. at 13.
performance of a play are coordinated in the sense that the theatre sold tickets ensuring that only one person would be assigned to one seat, but the audience members, as such, are not engaged in any coordinated activity.

Even within the legal context, the classification of organizations is a kaleidoscope without any real meaningful consistency. For example, although there are a number of formal legal distinctions made between partnerships and corporations, the practical difference between a limited liability partnership with freely alienable partnership shares and a privately-held corporation is inconsequential. On the other hand, the only real point of similarity between a one- or two-person professional corporation (“P.C.”) and a publicly-held corporation is the legal liability shield. The problem becomes even more complex when international forms of organization are taken into account.

For purposes of this analysis, therefore, an organization will be defined as any group of two or more individuals who are, in some coordinated fashion, doing something. Because of their special status, however, governments and governmental entities will be excluded from this definition. It is important to note that words suggesting the existence of an organization – e.g., “team,” “gang,” “club” – can be used even when there is no real organization as such. For example, the “Larry Miller Drinking Society” issues membership cards, but there is no actual coordinated activity (either directed from above or cooperative); the cards are used only as a symbol of individual support for a particular podcast.

**A Brief Review of Ethics and the Organization**

“The field of ethics (or moral philosophy) involves systematizing, defending, and recommending concepts of right and wrong behavior.” This formal definition corresponds to the common use of the term to mean a systemic attempt to define morally defensible behavior. For purposes of this analysis, no more precise definition is needed.

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25 This is consistent with other definitions such as “a group of people who work together in a structured way for a shared purpose,” Cambridge Advanced Learner’s Dictionary, or “an organized group of people with a particular purpose,” World Dictionary, Oxford University Press, or “[a]n organization is a deliberate arrangement of people to accomplish some specific purpose.” S.P. Robbins & M. Coulter, Management at 17, (Prentice Hall 9th ed. 2007). Except for the exemption for governmental entities, it is also consistent with the current approach in Canada that defines an organization as:

(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(b) an association of persons that
   (i) is created for a common purpose,
   (ii) has an operational structure, and
   (iii) holds itself out to the public as an association of persons.

Section 2 Canada Criminal Code.

26 This Week With Larry Miller (Ace Broadcasting). Similarly, neither the “Mickey Mouse Club” nor the “Green Team” are real organizations.

27 For obvious reasons, this summary is intended merely to establish the context of this inquiry rather than constitute a free-standing history of the field of ethics.

Historically, the field of ethics has examined the notion of individual ethics. From the pre-Socratics, Socrates and the various Greek schools of philosophy to modern Existentialism the discussions historically center on how a person should (in the sense of “ought”) conduct himself or herself and when such person should be blamed (or condemned) for such behavior. In part, this reflects the priority such philosophers gave to the individual; in part it results from the fact that the idea that organizations have an existence separate and apart from their constituent individuals is relatively new.

Setting aside governments and governmental entities, it appears that the first European entity with something like a modern legal corporate nature was the Great Copper Mountain (“Stora Kopparberg” in Swedish), a mining community in Sweden, which was given a charter from King Magnus Eriksson in 1347. Thus, the first iteration of the innovation of organizations as conceptually separate from their constituent individuals were privately run, but were often extensions of governmental activity. For example, the British East India Company had its own army and navy and was the de facto government of what is now modern India, Pakistan, Bangladesh, among others. To the extent their ethics were considered at all, it was as governmental agents rather than autonomous entities.

The first formal studies of corporations (in English) began in the late 1700’s with Adam Smith’s “Wealth of Nations” and Stewart Kyd’s “A Treatise on the Law of Corporations.” By the 1800’s, the explosion in organizations was notable to Alexis de Tocqueville. “Americans of all ages, all stations of life and all types of disposition are forever forming associations,” he noted. “There are not only commercial and industrial associations in which all take part, but others of a thousand types-religious, moral, serious, futile, very general and very limited, immensely large and very minute.”

The increasing importance of organizations in society did not lead to examination of the field of ethics as it relates either to corporations specifically or to organizations in general. Even in the specialized field of criminal law, the notion that corporations, as such, are proper subjects

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29 E.g., Aristippus of Cyrene (435-354 B.C.) (Hedonism), Antisthenes (444-369 B.C.) and Diogenes of Sinope (414-324 B.C.) (Cynicism), Zeno (336-264 B.C.) (Stoicism).
30 E.g., Albert the Great (1193-1280), Thomas Aquinas (1225-1274), Bonaventure (1221-1274), and Duns Scotus (1274-1308).
31 Sartre (DATE).
32 The inclusion of women within the scope of historical ethical analysis is conceptually correct albeit somewhat ahistorical.
33 There is not always complete overlap between “bad” behavior and behavior that is condemned. Not every person is a saint or hero, but the failure to meet such exalted standards is generally not grounds to condemn them for such failure.
34 Vikramaditya Khanna points out in “A New View of the Economic History of Organizations: Evidence from Ancient India, that entities similar to the modern corporation may have existed in India as long ago as 800 B.C.E. The existence of these entities, however, appear not to have had much impact on the development of ethical analysis in the Western tradition not only because of the limited awareness of such entities in the West, but also because they seem to have died out in about 1000 C.E. Indeed, Europe’s then-immediately neighboring culture, the various Islamic entities, also did not recognize private commercial organizational entities.
35 S. Rydberg, Stora Kopparberg - 1000 Years of an Industrial Activity at 13 (Gullers International AB 1979).
37 Reference needed.
of prosecution is a comparatively recent development even in the United States and not without some continuing controversy. Indeed, that concept is still unaccepted in international law today. Further, much of the scholarly analysis relating to organizations and criminal law focuses either on the practical aspects of prosecuting organizations or on the policy issues of such prosecution. Very little of the literature addresses any underlying ethical theory.

What Is Ethical Responsibility?

For purposes of determining whether responsibility can be allocated under any ethical system the individual or entity must have some ability to both understand the circumstances and exercise some level of free will. As Philip Pettit summarizes:

there are three conditions that must be satisfied if someone is fit to be held responsible in a given choice. These conditions correspond to the requirements outlined in some Christian catechisms as conditions necessary and sufficient for a deed to constitute a serious sin. There must have been grave matter, it is said, full knowledge of the guilt, and full consent of the will. The first condition stipulates that the agent faced a morally significant choice; the second that the agent was in

38 For a good recounting of the history of corporations as subjects of criminal prosecution, see W. Laufer, Corporate Bodies And Guilty Minds, 43 Emory L.J. 648 (Spring 1994) (“In the middle 1800s, the conventional wisdom was that there must be ‘a proper distinction between the innocent and guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation, should be indicted.”” citing Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819)). See James R. Elkins, Corporations and the Criminal Law: An Uneasy Alliance, 65 Ky. L.J. 73, 107 (1976) (“Although corporations from the mid-1830's have been liable for crimes of agents which did not require intent, that was not true for specific intent crimes until the beginning of the 20th century. The early courts were willing to impute the criminal acts of employees and agents to the corporation only in cases of crimes which did not require specific intent.”). Corporate Crime, supra at 320 (“it was accepted at common law and until the early 1900s in the United States that only people could commit crimes.”). Indeed, as late as 1942, La. Rev. Civil Code of 1870, Article 443 expressly stated that a corporation could not be convicted of any crime.


40 See, Kiobel, supra. As the Second Circuit noted, although organizations could be designated as criminal during the Nuremberg proceedings, that designation was only in aid of individual prosecutions. The organizations were not themselves punished or assessed liability. Thus, they were treated more as large conspiracies as to which individuals were punished for participation. Id. at 135.


42 Daniel R. Fischel and Alan O. Sykes, Corporate Crime 25 J. Legal Stud. 319, 320 (1996) (“The doctrine of corporate criminal liability has developed, however, without any theoretical justification. The law and economics literature, for example, is largely devoid of any discussion of vicarious criminal liability.”)

43 There was some analysis of organizational responsibility in the post-WWII era focusing on various Nazi organizations, It is not clear that this analysis is generalizable.
a position to see what was at stake; and the third that the choice was truly up to
the agent – it was within the domain of the agent’s will or control.\textsuperscript{44}

This accords with common intuition. A gun cannot be said to engage in ethical misconduct. Even if a grave matter is at stake – human life or death – guns neither have a way of understanding a situation or exercising free will.\textsuperscript{45} Thus, the gun is simply an instrumentality rather than an actor whose actions can be evaluated according to ethical standards.\textsuperscript{46} This leads to two key questions\textsuperscript{47}:

1. Corporate knowledge – How do organizations “know” and “understand” matters for purposes of ethical analysis? Put another way, since organizations cannot “know” things in the way individuals do,\textsuperscript{48} can we use these words at all and, if so, how?

2. Corporate intent – How do organizations engage in autonomous behavior, that is, how can they be understood to form intent or exercise free will?\textsuperscript{49}

Although each question could be analyzed separately, there is no need to do so for the purposes of this article. Intent presupposes knowledge. Something that does not have the capability to “know” will not have the capacity to “intend,” at least for purposes of ethical analysis.

\textsuperscript{44} Philip Pettit, Responsibility Incorporated, 117 Ethics, Vol. 171, 174 (2007). Compare Brent Fisse & John Braithwaite, Corporations, Crime and Accountability at 26 (Cambridge University Press 1993) (“Blameworthiness requires essentially two conditions: first, the ability of the actor to make decisions; second, the inexcusable failure of the actor to perform an assigned task” (cites omitted)).

\textsuperscript{45} Hence the commonplace, “guns don’t kill people, people kill people.” In some sense, it is clearly true that the immediate proximate cause of the death of a shooting victim is the gun’s discharge of a bullet, but the motive cause is the person who pulled the trigger. The counter-argument is not that the guns are ethically to blame rather than the persons who use them, but is a practical, outcome-driven view that if guns are not available to such persons, there will be some reduction in murder because some fraction of those persons will be unwilling or unable to use another modality such as a knife, candlestick, rope, lead pipe, etc. This article takes absolutely no position on this discussion. Similarly, sharks and tigers may have some ability to comprehend actions and consequences, but in practice they are largely governed by instinct. When a shark or tiger attacks a person, it is not sensible to attempt an ethical evaluation of the animal. The further up the ladder of intelligence one proceeds, the more that some level of ethical behavior can attach.\textsuperscript{45} Thus, notion of a “bad dog” is not facially ludicrous and is based on a belief – accurate or not – that dogs are smart enough to understand their actions and conform their behavior to a set of norms, at least a sufficient approximation of rudimentary ethics to allow use of the term “good dog” and “bad dog.” This might also be conceptually true of dolphins and whales but the situation in which such a phrase might be appropriate rarely arises. In contrast, it is unlikely that anyone has ever seriously contemplated saying “good shark” or “bad shark” either directly to the animal or in describing its actions.

\textsuperscript{46} For a good discussion of the distinction between causation and responsibility, see Celia Wells, Corporations and Criminal Responsibility at 43-52 (Oxford University Press 1993).

\textsuperscript{47} Celia Wells, however, observes “A philosophical account might entertain doubts about the appropriateness of mentalism and autonomy in establishing responsibility; such doubts might be seen as having their origin in Wittgenstein’s hermeneutic skepticism, which asserts that behavior gets its characteristics through the observers interpretive stance.” Wells, supra at 64. The author has nothing to add to this observation.


\textsuperscript{49} Indeed, it may be that these terms are entirely inapplicable in their classic sense. See Cressy, supra at 49 (“Corporations and organizations, being inanimate, cannot formulate criminal intent.”)
Accordingly, any discussion of organizational intent will necessarily subsume discussion of the meaning of organizational knowledge.

**Test Case Organizations**

The following are various types of organizations that will be used to test various approaches to organizational ethics. For purposes of the analysis, some aspects are idealized or modified from the specifics of any specific historical event or organization.

*Pirates/Privateers*\(^{50}\)

Although piracy and pirate ships have been glamorized in the public literature,\(^{51}\) there has been a consistent consensus that the activity of pirate crews – that is, piracy – is unethical.\(^ {52}\) On the other hand, when it comes to dealing with each other, the pirate crew operates in a way not dissimilar to any warship of the same era with strict discipline and clear hierarchy. There are internal norms that dictate how the members relate to each other, often imposing relatively high standards. Further, most of the time pirate crews are not engaging in piratical acts. Like any ship’s crew, they engage in a mundane daily shipboard routine.

Privateers were a special subset of pirates. A privateer is a private person or ship authorized by a government by letters of marque to attack foreign shipping during wartime. They were established as “for profit” enterprises and, at least as far as any target merchant ship was concerned, were little different from pure pirates. Indeed, even for the participants, there was little practical difference.\(^ {53}\)

*Mercenaries Group*

A mercenary group is an organization that hires its services as a private, for-profit military organization. For example, the Swiss Guard that protects the Pope is a mercenary organization\(^ {54}\) provided by the government of Switzerland. The United States itself has employed mercenary groups in Iraq and Afghanistan. Traditionally, between engagements, membership is voluntary. Once an engagement is accepted, all the members must obey the orders and obligations of the group even at personal risk of safety or loss of life. Such mercenary groups generally do not take into consideration the relative moral positions of putative employers in a conflict; they focus solely on the other factors that determine whether a contract is advantageous. Thus, whether the objective of the group is ethical may depend on how one views the controversy.\(^ {55}\)

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\(^{50}\) Or the Nazi Kriegsmarine, for that matter..

\(^{51}\) See, e.g., David Cordingly, Under the Black Flag: The Romance and the Reality of Life Among the Pirates (Random House 2006); Angus Konstam, The History of Pirates (The Lyons Press, 2002).

\(^{52}\) *Id.*

\(^{53}\) William “Captain” Kidd, for example, started out as a legitimate British privateer but was later hanged for piracy.

\(^{54}\) That is to say, during the course of the contract, the members owe allegiance to the Vatican, not to Switzerland. In contrast, the French Foreign Legion is an element of the French Army although it has a semi-independent existence.

\(^{55}\) For example, there can be little doubt that the Lord of the Rings films take a clear position that the mercenaries hired to fight on the side of Sauron in certain battles are as morally reprehensible as those directly employed by Sauron as part of his ongoing effort to take control of Middle Earth. On the other hand, the seven samurai hired by the villagers in The Seven Samurai are the heroes of that film.
Organized Crime

Without specifying any particular organized crime organization, the essentials are a moderately hierarchical organization that has both core members and associates. Once core members have joined, they may not easily leave. Not only are the objectives of the organization unethical, its methods (“means”) are consistently unethical. Further, the internal interactions of its members tend not to be characterized by ethical conduct.\(^56\)

Lax Corporation

The idealized Lax Corporation as an exemplar has perfectly ethical objectives\(^57\) — profits for its shareholders — but has very little concern about the conduct of its employees. It may or may not have a written code of compliance, but does not make any significant effort to verify conformance. Such entity is characterized by the standard hierarchy, the extent of which is governed by the size of the company.

Strict Corporation

For purposes of its use as a paradigm in this article, the Strict Corporation is, in general, similar to the Lax Corporation, but engages in significant efforts to ensure compliance with law and internal compliance policies. It is the archetype of the corporate model that the Sentencing Guidelines seek to encourage. The strict corporation operates in many jurisdictions and scrupulously obeys the laws and regulations in each such country. Accordingly, in some countries it employs persons who are only sixteen years old, pays the prevailing wage which is lower than what it pays in the United States, and does not permit unions in countries which permit such policies.

Law Partnerships

Law partnerships are, in concept, non-hierarchical at the partnership level with little distinction made between partners.\(^58\) In addition to laws and regulations, lawyers hold themselves out as being held to very high self-imposed standards of conduct. In general, lawyers draw clear distinctions between their own ethical nature and that of their clients. Thus, a highly ethical lawyer is not only permitted but encouraged to represent unpopular and even unethical clients.\(^59\)

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\(^56\) Those whose knowledge of organized crime is limited to the view of the Italian Mafia set forth in Francis Ford Coppola’s *The Godfather* may disagree that the internal interactions are not ethical. Setting aside the fact that the internal interactions of the real Mafia were not, in fact, as they were romanticized in that movie, more modern criminal organizations — drug cartels, for example — bear no resemblance to that image.

\(^57\) This assumes a general acceptance of the ethics of the free market. *Contra, e.g.*, Pierre-Joseph Proudhon, *What is Property? Or, an Inquiry into the Principle of Right and of Government* (1840).

\(^58\) This model has been eroded by the increasing numbers of mega-law firms that are run more like typical corporations than real partnerships. In those organizations, most partners are little more than highly-paid employees, at least for purposes of ethical analysis.

\(^59\) This attitude is not universal. As noted below, those lawyers representing the Guantanamo prisoners came under personal attack as, more recently, did the lawyers defending the Defense of Marriage Act.
Bird-Watching Club

For purposes of this article, the bird-watching club has both an entirely legal object with entirely unobjectionable techniques. Membership is entirely voluntary and the organization has minimal or no hierarchy or formal policies and procedures.

Robin Hood and his Merry Men

The popular vision of the Robin Hood’s band (the “Hood Organization”) is that of a relatively informal organization that has a leader by consensus. Its overall objectives, which center on assistance to the poor, are admirable but its methods are illegal. Internally, each member treats the other members honorably and with respect, although some practices (e.g., the exclusion of women as active members) would be questionable under current standards.

Idealized Drug Cartel

For purposes of this analysis, the Idealized Drug Cartel operates in a country in which the manufacture of cocaine is entirely legal as is the use, possession, and sale of cocaine. The organization operates as a family business and its internal operations are highly monitored and consistent with the laws of its home country. Some of its drug sales, directly or indirectly, are made into the United States which still maintains its current ambivalent attitude towards drug use.

III – APPROACHES TO ORGANIZATIONAL INTENT

The Problem of Intent

Many, although not all, ethical systems focus on intent. While this concept has been watered down by the enactment of laws that do not require intent or even action, there is a strong correlation between this concept and the concepts applicable in ethical theory. Thus, the developments in criminal law are suggestive – although not controlling – in application of ethics to organizations.

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60 In the criminal context, this is generally referred to as mens rea.

61 E.g., Staples v. United States, 511 U.S. 600, 605 (1994) (“the requirement of some mens rea for a crime is firmly embedded” in “the background rules of the common law”); United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978) (“The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence.”) (quoting Dennis v. United States, 341 U.S. 494, 500 ) (1951)); Morissette v. United States, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” See, H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 114 (1968) (“All civilized penal systems make liability to punishment for . . . serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain frame of mind or will.”). For those who are unable to accept legal concepts unless they are stated in Latin, the relevant phrase is “actus non facit reum, nisi mens sit rea.”
Organizations have no will, no mind, and no emotion. Thus, organizations cannot have “intent” as it is traditionally understood. This presents a challenge in how to approach the concept of intent in the context of organizational ethics. Boiling down possible approaches to the problem, they reduce the solution to two possibilities: avoid the notion of organizational intent entirely or create an alternative concept that will substitute for organizational intent.

Avoiding the Problem of “Organizational” Intent

The first solution essentially redefines the problem by equating corporate ethics and corporate intent with the ethics and intent of the individuals within the organization. In corporate law, this concept is called vicarious liability or respondeat superior. Just over a century ago, the Supreme Court first ruled that a corporation could be held criminally liable for the acts, omissions, or failures of an agent acting within the scope of his employment. This fundamental concept continues to flourish. In order to determine whether the organization is responsible for the acts of the individual, the courts determine whether he or she was acting within the scope of his or her employment.

A similar result obtains under French law. Article 121-2 of the French Penal Code states that “organizations . . . are criminally liable . . . for the offenses committed on their behalf (pou

62 See United States v. 7326 Highway 45 North, 965 F.2d 311, 316 (7th Cir. 1992) (“As a legal fiction, a corporation cannot ‘know’ like an individual ‘knows.’”); 2 Int'l Commission of Jurists, Corporate Complicity & Legal Accountability 57-58 (2008) (“National criminal laws were developed many centuries ago, and they are built and framed upon the notion of the individual human being as a conscious being exercising freedom of choice, thought and action. Businesses as legal entities have been viewed as fictitious beings, with no physical presence and no individual consciousness.”); L.H. Leigh, The Criminal Liability of Corporations and Other Groups: A Comparative View, 80 Mich. L. Rev. 1508, 1509 (1982) (“These arguments [against corporate criminal liability] may be summarized quickly: a corporation has no mind of its own and therefore cannot entertain guilt; it has not body and therefore cannot act in propria persona; . . .”.

63 “It is clear, therefore, that the first challenge to any theory of corporate criminal liability lies in the ability to go beyond the confines of the human person and identify other attributes which enable an entity to be capable of being a responsible actor.” Quaid supra at 71. See also C. Wells, Corporations and Criminal Responsibility n. 6 at 88-89 (Oxford: Clarendon Press, 1993) (“If intentions are taken broadly as reasons for acting, then this requires the identification of a corporation's reasons for acting, over and above the reasons of the individuals.”).

64 Strictly speaking, this is a problem only for deontological ethics – as discussed below, any consequentialist theory (e.g. utilitarianism) would have no problem with this because intent would not be relevant to ethical value.

65 “Respondeat superior, a doctrine centuries old, is predicated on the assumption that a master, employer, or principal will be held responsible for the acts of a servant, employee, or agent respectively. The rationale for this view is succinctly expressed by the maxim qui facit per alium facit per se.” American Federation v. Equitable Life, 841 F.2d 658 at ___ (______).


68 See United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958) (holding that “the treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment”); Mylan Lab., Inc. v. Akzo, N.V., 2 F.3d 56, 63 (4th Cir. 1993) (holding that for corporation to be liable for employee's act, the act must be within scope of employment); D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 967 (7th Cir. 1988) (same); Automated Med. Labs, 770 F.2d at 406 (same); Bi-Co Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984) (same); Basic Constr. Co., 711 F.2d at 573 (same); United States v. Cincotta, 689 F.2d 238, 241 (1st Cir. 1982) (same); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972) (same).
compte) by their organs ou représentants.” The French legal literature speaks of “responsabilité par ricochet” to describe this mechanism. That is, the attribution of crime to the personne morale, the moral character, starts with the individual person and only then affects the legal entity. The criminal liability of the individual is a precondition to the criminal liability of the organization; there is no separate concept of corporate culpability as distinct from that of the underlying individual.

A similar approach is taken by English law. Called the “alter ego” theory or the “identification” theory, it was set forth in Tesco Supermarkets, Ltd. v. Nattrass. This theory assumes that all legal or illegal acts committed by high-level managers can be properly identified with the activity of the corporation. Many state laws use a similar approach. Thus, the offenses charged against such high-ranking personnel inherently are also those of the organization. Unlike the alter ego approach, those who are in the requisite management positions are not simply agents of the corporation, they embody the corporation itself. This conceptual approach is typified by Lord Denning’s description of the organization:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

69 C. PÉN. art. 121-2 (1994) (Fr.). (Essentially, “employees or agents.”).
70 Id. (Essentially, “responsibility by attribution.”)
74 ARIZ. REV. STAT. ANN. § 13-305 (West 1989); ARK. CODE ANN. § 5-2-502 (Michie 1993); COLO. REV. STAT. ANN. § 18-1-606 (West 1990); DEL. CODE ANN. tit. 11. § 281 (1995); HAW. REV. STAT. § 702-227 (1995); 720 ILL. COMP. STAT 5/5-4 (West 1993); IOWA CODE ANN. § 703.5 (West 1993); KY. REV. STAT. ANN. § 502.050 (Michie 1990); MO. ANN. STAT. § 562.056 (West 1979); MONT. CODE ANN. § 45-2-311 (1995); N.J. STAT. ANN. § 2C:2-7 (West 1995); N.Y. PENAL LAW § 20.20 (McKinney 1987); OHIO REV. CODE ANN. § 2901.23(A)(4) (Anderson 1996); OR. REV. STAT. § 161.170 (1990); 18 PA. CONS. STAT. § 307 (1983); TENN. CODE ANN. § 39-11-404 (1996); TEX. PENAL CODE ANN. § 7.22 (West 1994); UTAH CODE ANN. § 76-2-204 (1995); WASH. REV. CODE ANN. § 9A.08.030 (West 1988). While the remaining states have not adopted specific statutory requirements, some have adopted similar common law requirements. See, e.g., State v. Smokey's Steakhouse, Inc., 478 N.W.2d 361, 362 (N.D. 1991) (holding that for corporation to be liable for its agents' criminal acts, corporate management must have “authorized, tolerated, or ratified” the criminal acts); State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 20 (Minn. 1984) (stating that conviction of corporation was justified partly because middle manager had engaged in illicit conduct); State v. Adjustment Credit Bureau, Inc., 483 P.2d 687, 691 (Idaho 1971) (holding that a corporation could not be held liable for actions of its agents unless it was “requested, commanded performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”).
These attributory approaches, although simple, are not conceptually satisfactory.\textsuperscript{76} First, criminal law – as opposed to civil or regulatory laws – traditionally contains some element of moral disapproval.\textsuperscript{77} That means that the imposition of a criminal sanction inherently constitutes a moral judgment about the entity accused of the crime. When an attributory theory is employed, however, then person or entity A is not judged for its own moral conduct, but only for the immoral conduct of person or entity B.

In general, we do not accept such an approach when both A and B are natural persons.\textsuperscript{78} If Mr. Smith hires Mr. Jones as a gardener and, without instruction or assent by Mr. Smith, Mr. Jones then kills someone for walking on Mr. Smith’s lawn, Mr. Smith might be civilly liable for Mr. Jones’s actions under a doctrine of \textit{respondeat superior}, but would not be accused of murder. Nor would the common intuition find Mr. Smith blameworthy simply because he happened to hire someone then engaged in criminal behavior.

Taking exactly the same scenario, with the exception that Smith Corporation is substituted for Mr. Smith as the employee, one can test the attributory theories. Under such theories, however, the actions of the gardener might well be grounds for conviction of Smith Corporation because Mr. Jones’ actions are automatically attributed to, and deemed to be the actions of Smith Corporation. Such an antipodal ethical evaluation cannot be justified by the mere replacement of an individual by an organization. Put another way, If this approach does not correspond to ethical judgments about people, then it cannot be used to make ethical judgments about organizations which demonstrates that attributory theories tend to be over-inclusive.\textsuperscript{79}

A similar problem arises when two people with different motives are both involved in the same action. For example, postulate a company in which a purchasing decision requires the independent recommendation of two different persons of the same rank in the organization. Mr. Smith has taken a bribe to recommend a particular purchase. Mr. Jones has carefully evaluated the purchase, and recommends it entirely on its merits. Under this scenario, Mr. Smith is individually blameworthy, but attributory theory leads to contradictory results. Attributing Mr. Smith’s intentions to the entity leads to the conclusion the organization is also morally tainted. The very same analysis with respect to Mr. Jones leads to the antipodal result. Pure attributory

\textsuperscript{76} See Albert W. Alschuler, Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand, 71 B.U. L. Rev. 307, 313 (1991) (“The study of corporate criminal responsibility too long has been led astray by commentators seeking to fashion retributive justifications and anthropomorphic analogies.”).

\textsuperscript{77} It is true that it is increasingly common in the United States and elsewhere to impose criminal sanctions for actions that are not morally reprehensible \textit{per se}, but this blurring of the distinction between criminal and regulatory violations is irrelevant to the issues examined here. See John C. Coffee, Jr., Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193 (1991); James R. Elkins, Corporations and the Criminal Law: An Uneasy Alliance, 65 KY. L.J. 73 (1976). For purposes of this analysis, the focus will be on the more traditional view of criminal law.

\textsuperscript{78} Daniel R. Fischel and Alan O. Sykes , Corporate Crime 25 J. Legal Stud. 319 (1996)(“Vicarious criminal liability is disfavored in American law.”)

\textsuperscript{79} Albert W. Alschuler, Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand, 71 B.U. L. Rev. 307, 311, 313 (1991) (“Neither ‘senior management’ nor a ‘senior corporate official,’ however, is ‘the corporation.’”).
theory does not explain how to resolve this conflict. Of course, one could impose an ad hoc rule that the taint trumps to innocent, but such rule is not organic to the attributory approach.

A second problem with the attributory approach is that it fails to account for the distinction between the knowledge of an individual and the composite knowledge of an organization. Except for extraordinarily rare psychological syndromes, all the knowledge accumulated by an individual is simultaneously accessible to that individual. On the other hand, since organizations have no unified mind, then whether any series of actions is intentional – in the criminal context, whether *mens rea* is present – depends on whether at least one individual had sufficient facts to establish the necessary foundational intent (*mens rea*). As a result, even if the organization, considered as a whole, did have the necessary knowledge, neither any individual nor the organization itself could be prosecuted.

Take for example, a chemical company that is manufacturing a pesticide. The engineer who designs the production facility might have no idea what was going to be produced. As a result, he might intentionally cut corners building an unsafe facility. The plant manager knows that what is being produced is hazardous, but does not know that the facility is unsafe. The foreman who intentionally exceeds the pre-set capacity of the piping might not be aware of either the defects in the design nor of the precise product flowing through the pipes. When the pipes rupture killing the inhabitants of the nearby town, no individual can be said to have sufficient knowledge to be subject to criminal sanction. Using an attributory theory, that would mean that the organization also cannot be prosecuted. Such an outcome, however, appears to exonerate the organization of moral blame even though the cumulative knowledge of all the chemical company’s employees, if attributed to the organization as a separate entity would be more than enough to show intent. When compared to the actual ethical judgments about companies such as Union Carbide after the Bhopal incident or BP after the Gulf of Mexico incident, the attributory approach does not seem satisfactory as an account of organizational ethics.

A third problem arises from its failure to distinguish between types of corporations. Under an attributory theory, both the lax corporation and the strict corporation would be judged exactly the same way. No matter what effort is made by the strict corporation to ensure high standards of conduct, if one employee transgresses, the same knowledge and intent will be attributed to both entities. Even the managerial variation of the attributory approach does not solve this issue; a “rogue” chief financial officer would still lead to the same evaluation of the two organizations. Any attempt to ameliorate such an outcome by taking into account all the other differences between the two corporations – their policies, internal procedures, character, etc.,

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80 Some counterexamples exist in fiction. For example, the Borg as portrayed in Star Trek: The Next Generation and Star Trek: Voyager, have a collective mind representing a unified consciousness. To the extent that the Borg are considered an organization rather than one large individual, it would have knowledge similar to that of an individual.

81 “The greater difficulty with the doctrine, however, is that liability is predicated upon the existence of at least one human actor possessing the requisite mental state for the offence from within the limited class described above. If no one person can be imputed with the mental element of the offence, the prosecution fails. The result is that system failures and objectionable corporate policies which cause harm are left outside of the scope of criminal responsibility.” Jennifer A. Quaid, The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis, 43 McGill L.J. 67, 97

82 Cite Needed.

83 See TAN
ethos and the like – would constitute a serious modification of the approach. Such modifications would no longer constitute a straightforward attributory approach and, therefore, would lose all the benefits of this type of theory from the avoidance of the issue of determining the intent of the organization *qua* organization. Accordingly, even when narrowly applied only to traditional corporations, the attributory model, which cannot fit the concept of a rogue employee whose actions are not those of the corporation into its strict rules, is not congruent with common intuition.

When it comes to non-traditional corporations, the analysis becomes even less satisfactory. For example, many entities now contract out even essential operations, creating a “virtual” company. In such circumstances, determining whether an individual is acting on behalf of this entity when he or she is either an independent contractor or an employee of an independent contractor becomes problematic. In *United States v. Parfait Powder Puff Co.*, 163 F.2d 1008, 1009-10 (7th Cir. 1947), _cert. den._ 332 U.S. 851 (1948), the Seventh Circuit affirmed the use of the *respondeat superior* approach to impose criminal liability on a company for violations of the federal Food, Drug and Cosmetic Act committed by its independent contractor. Two points are of note, however, about this case. First, although still viable precedent, it has not spawned any real trend to consider how the doctrine should be applied outside the corporate context. Second, the underlying law is clearly regulatory and is well-known for its lack of any *mens rea* element. Therefore, the ethical implications of the case are very limited.

It seems counter-intuitive that a company can contract out ethical responsibility. At the same time, the more attenuated the connection between the corporation and the individual malefactor, the harder it is to equate the individual conduct with that of the organization. As a tool of ethical analysis (as opposed to pure legal application), therefore, an attributive approach is not easily generalized to non-corporate forms of organization.

Outside the corporate format, matters become even less clear. The pirate crew and the criminal organization are sufficiently hierarchical that even an attributory theory limited to managers is logically consistent. Applying this model to the bird-watching club, however, leads to problems. It is hard to assert that every person who holds a membership card can really be said to “be” the corporation as the attributory theory implies. On the other hand, there may not actually be an identifiable group of core actors. Even those who are nominal officers may not really have any deeper involvement than the other members. Thus, either the attributive approach is over-inclusive or so limited that there may not actually be anyone whose actions

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84 See TAN
87 *United States v. Dotterweich*, 320 U.S. 277 (1943) (proof of the defendant's intent to commit a violation is not required). See also T. Gilman and B.. McCormick, Federal Food and Drug Act Violations, 38 Am. Crim. L. Rev. 819, 821 (Summer 2001)(“Convictions under the FDCA require proof of various elements. First, the object of the violation must be a “food,” “drug,” “device,” or “cosmetic.” Second, the item must be “adulterated” or “misbranded.” Third, the item must have been introduced into interstate commerce. Additionally, the introduction into interstate commerce of “new drugs” that are not safe or effective for their intended use is subject to prosecution under the FDCA. Generally, establishing the above three statutory elements is sufficient to obtain a misdemeanor conviction.”)
embody the club. That would either mean that the club must be deemed not to be an organization or it must be conceded there is no way of making any ethical judgments about it. Such a group does, however, meet the definition of an organization88 and would be considered an organization by a reasonable person using common intuition. That leads to the conclusion that, at least for some types of organizations, the attributory model fails as an ethical approach.

Problems also arise when it comes to the Idealized Drug Cartel test case. In the view of all those in the cartel’s home country, the organization is acting entirely legally and appropriately. Accordingly, judging those persons under an attributory theory would lead to the conclusion that the cartel is perfectly ethical. For those whose actions are within the jurisdiction of the United States laws, their conduct is not only illegal but, according to many, unethical. It is hard, however, to see why the cartel’s ethical status could be so dependent on which employee’s conduct is examined or where. That does not mean that the conduct of the individual subject to the United States laws might not be individually prosecuted or subject to ethical criticism; it does suggest, however, that the attributory model is not satisfactory for purposes of evaluating the conduct of the organization as a whole.

A fourth, and perhaps most problematic, difficulty with using an attributory theory as the basis for application of ethical theory to organizations is that it is so profoundly antithetical to common intuition, as well as to a great deal of scholarship, about the actual functioning of organizations. Implicit in any pure attributory theory is the assumption that ethical judgments simply cannot be made about organizations, as such. This directly conflicts with common intuition. For example, one could not say that the German Nazi Party or the Ku Klux Klan were inherently evil – that is to say, immoral – organizations, only that their members engaged in unethical conduct. In practice, however, there is little doubt that common moral judgment would view them as morally corrupt as organizations, not just as collections of individuals who committed crimes.

Turning to scholarship about corporate decision-making, there is substantial support for the proposition that no one individual’s intent can truly represent the organization. Ann Foerschler89 summarizes two important models of organizational behavior: the Organizational Process model and the Bureaucratic Politics model.90 Both models suggest that any significant corporate action or decision is the result of an amalgam of forces within the organization. Whether the result of the task specialization in organizations or of a bargaining process among individuals, what a corporation does simply cannot be traced to one individual. That also means that any particular individual may have a purpose or intent that varies widely from the vast majority of the other individuals within the corporation, even if only the intent and motivations of each of the individuals involved in the decision are considered. By adding in all the others who may have secondary involvement, it is almost certain that multiple motives and intentions are involved.

88 See TAN __.
The common notion of the “rogue employee”\(^91\) demonstrates the issue of multiple, and inconsistent, motives.\(^92\) Inherent in the notion of a rogue employee is that he or she is out of control; i.e., that the actions of the employee are not the same as the intentions of the organization.\(^93\) Under the attributive theory, however, by definition the actions of the employee **embody** the actions of the organization. Put another way, the very articulation of the “rogue employee” concept **requires** a divergence between what the corporation wants and what such rogue employee wants. Such divergence, however, is not possible when there is a definitional identity between the intent of the individual and that of the corporation. Accordingly, in order for the well-entrenched notion of a rogue employee to maintain viability – which seems to be the case – then an attributory theory is neither a satisfactory method to determine corporate intent in criminal law nor a useful framework for organizational ethics nor .

Ultimately, therefore, a purely attributory approach does not appear satisfactory as a framework for organizational ethics even if it is convenient for legal prosecution of organizations. Thus, the next step is to review existing models of organizational intent to see if they fare any better.

To evaluate these models, several criteria are relevant:

**Scope** – Given the broad variety of organizational types, a model that has more general applicability is stronger than a model that can only be used for certain categories of organizations. For example, a model that can only deal with publicly held corporations leaves out a substantial range of organizational forms.

**Need for Supplemental Rules** – An approach that can only work with arbitrarily added rules is weaker than an approach that does not.

**Useability** – For the reasons set forth above, a theory that can only be used by professional philosophers is less valuable.\(^94\)

**Corporate Policy Model**

Under the corporate policy or pro-active\(^95\) fault\(^96\) model, a corporation is criminally culpable if it has corporate policies that intentionally or foreseeably enable illegal actions, and

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\(^91\) See TAN __.

\(^93\) Compare, for example, the concept of a “rogue elephant” or its use in S. Palin, Going Rogue: An American Life (HarperCollins November 17, 2009).

\(^94\) There can be some disagreement about this criterion. Nonetheless, for the purposes of this article, this will be given substantial weight.

\(^95\) Although originally a term from psychology, the sense of “proactive” as an antonym of “reactive” apparently dates to 1951. See www.oed.com.

either the policies are illegal per se or they permit or encourage criminal conduct. “Although it is often said that corporations cannot possess an intention, this is true only in the obvious sense that a corporate entity lacks the capacity to entertain a cerebral mental state. Corporations exhibit their own special kind of intentionality, namely corporate policy.”97 In some versions of this model, in addition to the policies themselves, the internal procedural rules for making decisions and taking action are also considered. 98 As Peter French explained, “when the corporate act is consistent with an instantiation or implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.”99 Under such a broader construction of this model, a managerial stance tolerating, or showing systematic blindness toward, criminal conduct would support a finding of corporate culpability.

To some extent, this concept has infiltrated into the law of criminal corporate liability. In United States v. Basic Construction Co.100 the Fourth Circuit approved a lower court instruction that “[a] corporation may be responsible for the action of its agents done or made within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position. However, the existence of such instructions and policies, if any be shown, may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation.”101 Such instruction clearly implicates an underlying acceptance of the corporate policy model.102

Unlike the attributory approach, this model does accept the notion that an organization is more than an accumulation of individuals. It implicitly accepts a theoretical framework which accepts that (i) corporations have an existence which transcends the individual personalities of its employees, directors, agents and original founders, and (ii) that organizational decisions are the result of procedures and internal bargaining processes which cannot always be traced back to the individuals who contributed to them.103 “Strategic mens rea therefore reflects the truly corporate nature of the acts of corporations.”104

This model appears to depart from the corporate culture model105 because it addresses a specific set of practices rather than a collage of actions, intentions, and the like. Focusing on these specifics has the advantage of some level of clarity, at least on the surface. Deeper examination, however, suggests that such increase in clarity still does not result in a meaningful paradigm to evaluate the ethics of an organization.

97 Corporations, Crime and Accountability supra at 26.
99 French supra at 44.
101 Id. at 573.
102 See also, United States v. Beusch, 596 F.2d 871 (9th Cir. 1979) (“a corporation may be liable for acts of its employees done contrary to express instructions and policies, but that the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.”).
104 Id.
105 TAN ___
First, the strictly construed notion of the corporate policy model seems to miss the difference between general principles and the evaluation of a particular intent associated with a particular act. For example, a person may truly believe that “honesty is the best policy” while at the same time occasionally varying from that rule. When that person does so in order to gain a pecuniary advantage – by defrauding a victim – that conduct is ethically suspect. In contrast, when a police officer goes undercover to infiltrate a criminal conspiracy, that conduct may be ethically defensible. In both circumstances, the individual may have a policy and then vary from it, but the ethical evaluation of his or her conduct does not depend on the existence of a policy as such.\footnote{Indeed, as one commentator notes, it may be in society’s interest for corporations to promulgate aspirational codes of conduct, and yet such interest would be undermined if variations from that code are inherently deemed to constitute unethical Conduct. Elizabeth F. Brown, No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?, 26 Yale L. & Pol’y Rev. 367 (Spring, 2008) (“If a corporation adopts a code of conduct with aspirational standards - or standards higher than ones prescribed normally under existing statutes, regulations, or the common law - some courts will allow stakeholders to sue the corporation if it fails to meet those standards in its code of conduct. Thus, the law creates a perverse set of incentives that encourage corporations to do the legal minimum rather than aspire to do more for their stakeholders.” (citations omitted)).}

Second, the concept of an organization’s “policy” is elusive, at least in part because there is no clear analogy established in individual ethics. Individuals do not adopt “policies,” they have intentions and engage in actions. Otherwise, they would be simply automatons acting according to pre-set programming. If organizations were composed of robots, then it might be possible to evaluate intent according to policies, but the intent would be that of the programmer, not of the robots or the organization. Since organizations are not, as yet, made up of robots, the formal set of organizational policies is neither all-inclusive nor dispositive.

This leads to a more broadly construed notion of organizational policy to include not just the written policies in the book labeled “Official Policies,” but also includes all the informal, indeed unwritten policies of the organization. This immediately leads to the possibility – if not the near-certainty – that such actual policies broadly construed are not only inconsistent with the subset of official policies but inconsistent with each other.

Indeed, at a fine enough level of resolution, the complete set of policies and procedures varies as widely as the number of individuals in the organization, each one of which has a slightly different understanding of the practices and policies of the organization. Accordingly, broadly construed, the corporate policy model becomes incoherent and unable to constitute a particular organization’s “intent.”

The proponents of this approach would, of course, suggest that there is a line between the very narrow and unrealistic construction as set forth above and a more realistic but incoherent broad construction. For purposes of practical application in sentencing or legal culpability, this is probably true. As a tool in fundamental ethical analysis, however, any such ad hoc line drawing
is useless. At most, an organizational policy is an expression of aspiration rather than of actual intent as it relates to actual actions.

A simple thought experiment confirms that conclusion. Suppose that the Board of Directors of EvilCorp. promulgates a virtuous set of policies that no one in the company actually observes while engaging in cutthroat, illegal, and vicious behavior. Meanwhile, the Board of Directors of SaintCo promulgates no such policies, but the actual conduct of the business of SaintCo. turns out to be spotless. It is unlikely that any ethical intuition would praise EvilCorp. and condemn SaintCo. Indeed, the fact that EvilCorp. has a perfect set of policies as its employees cut a swath of destruction would, for many, make its ethical situation worse; the sin of hypocrisy could also be laid at EvilCorp.’s doorstep. If, on the other hand, one ignores the existence vel non of formally promulgated policies and instead attempts to deduce the “real” policies of EvilCorp. and SaintCo. from the conduct of their employees, the analysis just reduces either to an attributory approach or one of the other approaches discussed infra.

Turning to the test cases, the corporate policy model generally fails. It might suffice for the paradigm of the Strict Corporation, but it appears to fail elsewhere. The Lax Corporation may not have any explicit policies as narrowly construed. Unless the proponents of this approach are willing to establish a blanket rule that any organization that does not have a set of official policies are inherently unethical—a position that would also implicate the bird-watching club—then, as noted above, the approach either merges into a corporate culture approach or becomes so amorphous as to evade definition.

**Corporate Culture Model**

Under the corporate culture model for criminal law, the concept of corporate intent is founded on the assumption that corporations have personalities and that such personalities either encourage or discourage members of the corporation to commit crimes. This model emerged slowly in the United States beginning in the 1970s. In 1975, Christopher Stone characterized the corporation as “a community[,]” with “its own attitudes, norms, customs, habits, and mores.” Similarly, Wally Olins asserted that corporations have their own distinct personalities according to which they express their identity. In 1982, Terrence Deal and Allan Kennedy identified the elements that characterize a corporate culture: the environment in which business is done, the values inspiring the corporation, the main actors of the corporation, and the cultural background. The assertion that “corporate culture” exists continues to this day.

Although the corporate culture model has made some inroads in the context of sentencing in the United States, it has made relatively little progress as part of the determination of corporate intent. Outside the United States, it has been adopted in Australia. “'Corporate culture’

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107 See, e.g., United States v. Hilton Hotels, 467 F.2d 1000, 1007 (9th Cir. 1972), cert den. sub nom. Western International Hotels Co. v. United States, 409 U.S. 1125 (1973) (Court concludes that existence of abstract corporate policy against antitrust violations was not a defense if employees are acting within their scope of employment because it is the actions of the company that are at issue.)

108 CITE NEEDED


110 CITE NEEDED

111 See, e.g., James Fanto, Organizational Liability, 19 J.L. & Pol'y 45, 46 (2010)
is an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place.”¹¹²

Although there is no bright line distinction between this approach and the proactive model, it appears from the literature that its proponents seek to consider every aspect of the operation of the organization – formal and informal – to determine the culture of a particular organization. This includes, and often focuses on, how individuals within the enterprise treat each other as much as it addresses how they deal with those outside the organization.

It is this approach, whether adopted explicitly or implicitly by those sitting in judgment, that allows for such activities as ranking organizations by how “family friendly” they are, or distinguishing entrepreneurial from bureaucratic organizations, or asserting that some organizations are “socially responsible” while others are not. Indeed, its prevalence suggests that it cannot be dismissed out of hand.

The problems with using culture as a proxy for intent are legion, and have not been solved by any of its proponents. As a starting point, there is the fact that only organizations can have a “culture”; it makes no sense to talk about an individual’s culture. That means that every use of this idea in legal or philosophical systems developed primarily with individuals in mind must be carefully examined to ensure that no false comparison or assumption arises. Put another way, for example, the Stoics developed an entire concept of how individuals should behave. The structure of this philosophy depended on concepts of individual intent and character that, as noted above, are not meaningful when applied to organizations. Even if “corporate culture” might be useful in some contexts (such as deciding levels of criminal culpability), that does not mean it can automatically be redeployed as a direct substitute for the Stoic notions of individual intent and character to evaluate an organization. Even if it were usable in that specific context, it might not map to the Epicurian approach to ethics. In short, even if corporate culture is a meaningful concept, it is not a generally applicable substitute for individual intent in the broader context of ethics.

Setting aside such systemic objections, there are a plethora of more practical problems. For example, assume that Lax Corporation has a laissez-faire corporate culture. That does not, however, mean that every interaction it has with the outside world is unethical; it only means that it has, for want of a better phrase, a cavalier attitude toward the conduct of its employees. Accordingly, to determine the ethical nature of a particular transaction it is necessary to examine the specifics of the circumstances. As soon as the specifics are called into question, however, corporate culture appears to dissolve into a modified attributory approach. First, the ethical quality of the individual’s conduct is examined and determined to be ethical or non-ethical. Only then is the culture examined to decide whether it encouraged, permitted, or discouraged that individual conduct. As a gloss on the attributory approach, it might have some value, but it also suffers from all the defects of that approach as well.

A related problem comes from the determination of corporate culture. As a collage of different factors no one of which is dispositive, it appears to depend far too much on the person

or entity making the judgment. What one person perceives as aggression may be perceived by another as diligence. In the absence of some objective standard, even the determination of what an organization’s culture is becomes mired in ambiguity.

For example, in the late 1800’s and early 1900’s, arms dealers were called “merchants of death” and were generally viewed as amoral, selfish organizations. This conception arose not just from their products, but from their willingness to sell to all customers rather than simply their “home” country. Very clear judgments were made about them as organizations, not just as collections of individuals.

It is hard to detect the same level of disapproval in current times.\footnote{This is not to say that there is no disapproval, but only that it has substantially receded from this earlier apex of condemnation.} As long as the sale is approved by the federal government, arms dealers in the United States feel unconstrained to sell simultaneously to India and Pakistan, Israel and Saudi Arabia, China and Taiwan. Indeed, it is often the case that government policy mandates that they do so. There seems to be no incremental disapproval (over and above any generic opposition to the sale of arms) from this approach. It is not the organizations that have changed, but simply society’s view of those activities.

The response may be made that temporal changes in ethical judgments this applies to individuals as well. Washington and Jefferson owned slaves, an activity that was socially accepted at the time but is now abhorrent. Yet closer examination reveals the false analogy. When it comes to Jefferson’s intent in drafting the Declaration of Independence or completing the Louisiana Purchase, one can examine his intent with respect to those actions without specifically considering his ownership of slaves. If anything, such ownership goes to an evaluation of his general character. Character, as discussed below, however, is very different from intent. Even today, we can examine his specific intentions in connection with those specific actions on the same basis as we examine the intent of those still alive. Thus, the concept of corporate culture, like the concept of beauty, seems to depend as much or more on the beholder as it does on the entity itself.

When considering organizations that are less hierarchically structured than the modern corporation, additional problems arise. Does the bird-watching club have a culture as such? It is hard to see how to apply the corporate culture concept to an organization in which all members are only casual participants and the constituents and operation of the club can be variable over short periods of time. Any approach that is not applicable to all organizations which must be supplemented by another approach has obvious drawbacks. Making this problem worse, there is nothing in the corporate culture model that gives any indication of when it is and is not applicable.

Similarly, it might be possible to make a generic judgment about the corporate culture of the exemplar criminal organization because it appears to be consistently unethical in every aspect of its operation. The same might not be true of the pirates or of the Hood Organization. Within each entity, the members treat each other with respect and fair dealing. Each has made a particular judgment about outsiders and has determined that they need not deal with outsiders on
the same basis as they deal with each other. One might be more sympathetic to the objectives of the Hood organization – assuming one is not the Sheriff of Nottingham – than that of the pirates, but from a corporate culture point of view, it is very hard to distinguish them as a matter of principle.

Issues also arise in connection with the Idealized Drug Cartel and the Strict Corporation. In the Idealized Drug Cartel test case, the range of actions of employees in each job category are the same, only the jurisdiction in which they act changes. Unless there is total equivalence between what is legal and what is ethical – which appears to be contrary to the general consensus – then an ethical judgment should not depend on pure geographical location. If ethics encompasses more than mere legality, it becomes very hard to explain why the Idealized Drug Cartel has a “bad” (or a “good”) corporate culture. Similarly, the Strict Corporation not only requires adherence to strict codes of conduct, it is posited to be a culturally sensitive and non-imperialistic entity. That means that its corporate culture varies to some degree from country to country. It may be somewhat more formal in Japan and somewhat less formal in Australia. The corporate culture model appears to assume that one cultural evaluation is made of an organization as a whole. When it comes to multinational organizations, this approach unravels.

Even at the level of core values, there is no unanimity even among relatively similar cultures. In the United States, for example, the SEC and the Sentencing Guidelines encourage corporations to set up whistleblower hotlines that permit employees to report allegations of misconduct anonymously because disclosure of wrongdoing is given a priority over issues of privacy. In Europe, however, where privacy is given comparatively greater value, the laws strongly discourage anonymous reporting. Thus, regardless of which approach a company picks, it will be inconsistent with the value system of either the EU or the US. On the other hand if it picks two different approaches depending on location, then it can hardly be said to have a unified corporate culture.

As currently articulated, the corporate culture model does not seem particularly helpful in discerning a useful praxis for evaluating the ethics of an organization. Nonetheless, given the ubiquity of the perception that some corporations seem to have good or bad cultures, this approach will be re-examined in Part IV.

Corporate Character Model

In 1991, in an attempt to reformulate the corporate culture model into something more akin to traditional ethical concepts for individuals, Pamela Bucy articulated a model based on the character – or ethos as she called it – of a corporation. As she explained it, “a corporation's ethos or ‘characteristic spirit’ toward employees’ rights, competitors, research and development, marketing, and the like is relevant only to the extent it sheds light on whether there exists a corporate ethos that encouraged the particular conduct at issue.” Determining such an ethos,
will require a resort to circumstantial evidence, as does proof of intent in every criminal case. Although the actual evidence available will always turn on the particular facts of each case, there are certain guides for every factfinder. When the defendant is an individual, the factfinder looks to the statements and actions of the defendant before, during, and after the crime as well as corroboration for and explanations of such statements and actions. From this information, the factfinder assesses the defendant's mens rea for the criminal conduct charged. By comparison, in applying the corporate ethos standard of liability, the factfinder should look to the following types of facts to determine whether a corporate ethos existed which encouraged corporate employees to commit the criminal conduct. If so, the government has proven the corporate mens rea. These facts concern the internal, formal and informal, structure of the corporation.117

The balance of her article catalogs specific facts that are asserted to be determinative of a corporate ethos in particular circumstances.

Whether this approach is valid depends entirely on two premises:118 (i) that the perception that different organizations seem to have different characters is both valid and meaningful, and (ii) that such corporate character, however precisely determined, can substitute for intent.119

As noted above, there is support in the literature for the proposition that different organizations do have different cultures. In any event, since that question is more a problem for sociologists and behavioral economists, it is beyond the scope of this article. For present purposes, the existence of different organizational cultures is assumed. Whether such differences support the ethos approach or are meaningful for the purpose of ethical analysis is a separate question and one which Ms. Bucy does not address.

In ethical discussions about individuals, there is a clear difference between a person’s character and the ethics of his or her conduct. Take as an example a demanding, unemotional, unrelenting person such as Mr. Spock from the original Star Trek series.120 Without being demeaning, in his case it is clear that from a human point of view he had a number of questionable character traits. As portrayed by Leonard Nimoy, he was generally insufferable and unpleasant. On the other hand, his actions were ethically immaculate.121

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117 Id.
118 Strictly speaking, it also depends on the ability to discern such an ethos, but that is more of a problem of application than inherent validity. Nonetheless, some scholars have questions whether such an inquiry is possible. Corporations, Crime and Accountability at 28 (“The difficulty with the Bucy proposal, however, is that, as a general requirement, it may be impractical to expect the state to marshal all the evidence needed to prove that a corporate defendant had a criminal ethos.”).
119 For a discussion of this factor, see TAN ____.
120 Star Trek (Desilu Studios) originally ran from 1966-69.
121 There can be some disagreement about his actions in The City on the Edge of Forever in which he prevented Captain Kirk from saving the life of one woman in order to avoid changing history to one in which the world was destroyed by nuclear war. Arguably, these actions violated Kant’s Universal Imperative never to use individuals as instrumentalities. Nonetheless, given that his situation involved time travel – the ethics of which are unclear at best – this is not clear evidence of unethical conduct.
In contrast, a person of disreputable character can still act ethically, whether out of fear of discovery, a need to fit in, or some other motive that may not be admirable but still leads to ethical conduct. Put another way, there is a significant difference between the generic character of an actor and the ethical quality of some specific action. For example, imagine a pirate who, in general, acts in a piratical way. Such a person might nonetheless risk his or her own life to save an innocent child drowning at sea. When evaluating the ethics of such an act, it is the circumstances and motives relevant to that act that determine its ethical value, not the generally disreputable character of the actor.

In short, there seems a general recognition that no human is entirely good or entirely bad. That means that a person of good character may still, on occasion, act unethically and a bad one may act ethically. Indeed, the phrase “out of character” would be meaningless if such events never occurred. This means that there is a distinction between the judgment of the act and the judgment of the character of the individual. At most, character suggests a tendency toward acting in one fashion, not a certainty.

Ms. Bucy seems to recognize this problem implicitly. She first defines the key question as whether the corporation “encourages” the bad conduct. She then asserts that

To apply this standard of liability, it is not necessary to ascertain the overall and complete ethos of an organization. The corporate ethos standard is concerned only with the ethos relevant to the criminal conduct in question. Thus, a corporation’s ethos or “characteristic spirit” toward employees’ rights, competitors, research and development, marketing, and the like is relevant only to the extent it sheds light on whether there exists a corporate ethos that encouraged the particular criminal conduct at issue.

Not only does this not solve the problem, it creates further difficulty. If the character to be judged is not general but relates only to a particular action, then it is not really character as such. As noted above, a person generally of good character may do something unethical. Using Ms. Bucy’s approach, however, such a person could be transmuted into a person of “bad” character because the focus would only be on the specific motives and intent leading to the specific act. When considering such a person, no one would say that he or she has a good character when they do something good and a bad character when he or she does something bad.

Further, it is inconsistent with her earlier discussion of the notion of a general corporate culture that can be distinguished from one entity to another. Those organizational studies were explicitly not action-specific, but instead addressed overall ways of doing business – the same way that one speaks of an individual’s character. At most, therefore, this notion of ethos

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122 For example, even in the Bible, Moses lost his temper, [CITE], and Paul denied Jesus, [CITE], but each is still considered to be of generally high character.
123 Bucy at 1127.
124 Id. at 1127-28.
125 Id. at 1124 (“In their popular work, Corporate Cultures, Deal and Kennedy identify five elements of a company’s culture: business environment, values, heroes, rites and rituals, and cultural network.”).
devolves into an examination of the act itself broadly construed, rather than a separate ethical standard.

The problem of character or ethos becomes even more acute when one attempts to evaluate a non-hierarchical organization. Ms. Bucy’s specialized concept of “encouraging” implicitly assumes that there are senior persons who encourage subordinates to engage in one kind of behavior or another.\(^{126}\) Many of the specific factors that go into this sort of evaluation apply only in organizations that have structures that correspond to this approach’s criteria. As a result, like the corporate culture approach it purports to replace, the ethos model requires supplementation with other approaches, substantially reducing its value.

A second problem is that some of the factors adduced do not appear to have any significant ethical component. For example, two factors asserted to be relevant to ethos are whether the entity educates employees about legal standards and whether it monitors their compliance with such standards. Here, the pure issues of adherence to law creep into what is otherwise a discussion of character. Presumably, even an “evil” corporation might want to educate its employees about legal standards, if only to ensure that they engage in the evil conduct when it is profitable from a risk-reward point of view. For example, a team of bank robbers might very well have a strong desire that the driver of the getaway car,\(^{127}\) be familiar with traffic rules and regulations to avoid being stopped for improper lane changes or to avoid driving on the wrong side of the road and colliding with other vehicles. Similarly, money-laundering organizations are very aggressive in instructing the persons engaging in transactions that avoid reporting obligations\(^{128}\) as to the rules that the banks must follow in order for the scheme to be successful. They may even have managers who ensure that, in engaging in the overall money laundering scheme, they do not violate other laws in order to avoid law enforcement scrutiny.

All things considered, the corporate ethos model may be relevant for purely legal questions under the laws and sentencing guidelines as currently constituted and interpreted.\(^{129}\) It does not, however, shed light on the underlying problem of determining if corporations can be judged ethically and, if so, how to do so.

**Corporate Response**

Andrew Weissmann suggests an alternative to the proactive approach.\(^{130}\) He proposes “[a] carefully constructed limitation of criminal corporate liability to those situations where a company reasonably should have taken steps to detect and deter the criminal action of its

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\(^{126}\) It is, of course, the case that there can be “encouraging” behavior among peers. This is not the specialized usage of the corporate ethos approach and simply transmutes the idea into a corporate culture approach, discussed TAN

\(^{127}\) The “wheel man” in common parlance.

\(^{128}\) The “smurfs” in common parlance.

\(^{129}\) There are some questions even as to this limited usefulness. “Bucy's proposal provides few standards, invites prosecutors to appeal to the anti-corporate sentiments of some jurors, and probably would yield outcomes based mostly on the jurors' proclivities, the trial lawyers' rhetoric, and how much harm the defendant's agents had caused.” Albert W. Alschuler, Two Ways To Think About The Punishment Of Corporations, 46 Am. Crim. L. Rev. 1359, 1379 (Fall, 2009).

\(^{130}\) There is some ambiguity whether his proposal is entirely “reactive” or is a mix of the proactive and the reactive. To the extent it contains an element of the proactive, it suffers from all the defects of that approach discussed *supra*. 
employee.” Under this concept of responsibility, an organization’s intent is essentially reconstructed based on its response to the discovery of a questionable act.

The Corporate Response approach may have some analytical use as part of a larger effort to establish corporate culpability in a criminal context. If, for example, the Lax Corporation does nothing when an allegation of suspect conduct comes to the attention of its management, that could be construed as suggestive that the organization condones or approves of such conduct. On the other hand, such failure to act could result from paralysis of decision-making or an inability to formulate a response. Thus, the Corporate Response paradigm is open to too many contradictory interpretations.

The problem of using the Corporate Response model outside the standard hierarchical organization becomes even more apparent in the context of the bird-watching club. Because the organization is so unstructured, it may simply lack the ability to respond to an allegation that one of its members has acted unethically. To avoid unfairly characterizing the organization as unethical, it would have to be excluded entirely from consideration by this model. Nor is this limited to social clubs. Partnerships, family businesses, charitable organizations, and other non-hierarchical entities may also fail to respond, not as a result of ethical deficiency, but because of internal paralysis or organizational power.

Inversely, a positive action might not be motivated by ethically approved considerations. The fear of punishment, of lawsuits, of individual impact all affect the organization’s actual response. As a result, even the lax corporation could have an apparently admirable reaction to allegations of improper conduct.

In sum, the Corporate Response model might have some use in the context of a larger framework, or as part of a sentencing protocol, but it does not itself constitute a satisfactory approach to organizational intent.

Collective Intent/Aggregation Theory

There is a substantial body of literature that asserts that there exists a collective intent separate and distinct from the organization’s constituent individuals. As one writer explained,
[C]onglomerate collectivities can be justifiably held blameworthy . . . and hence differ significantly from aggregate collectivities. . . . [W]hen we say that a conglomerate collectivity is blameworthy we are saying that other courses of collectivity action were within the province of the collectivity and that had the collectivity acted in those ways the untoward event would not likely have occurred and that no exculpatory excuse is supportable as regards the collectivity. That is not to say that an individual member or even all individual members of the collectivity cannot support excuses. In fact, that is never really at issue.133

The collective intent or aggregation theory, if valid, would be the closest analogy to individual intent in traditional ethical theory.

The leading134 articulation of this approach in the case law135 is United States v. Bank of New England,136 In that case, the Bank of New England was convicted for willfully violating the Currency Transaction Reporting Act,137 although there was no proof that any individual

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133 Types of Collectivities and Blame, supra at 166.


135 There were some earlier articles asserting this theory in the legal community. See, e.g., Kathleen F. Brickey, Corporate Criminal Liability 1:04 (1984); Kathleen F. Brickey, Conspiracy, Group Danger and the Corporate Defendant, 52 U. Cin. L. Rev. 431, 448-51 (1983); Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1248 (1979).

136 821 F.2d 844 (1st Cir. 1987). There is some dissent from the assertion that this case actually stands for this proposition. Thomas A. Hagemann and Joseph Grinstein, The Mythology of Aggregate Corporate Knowledge: A Deconstruction, 65 Geo. Wash. L. Rev. 210, 218 (1997)(“For two key reasons, popular comprehension of Bank of New England has been flawed. First, the Bank of New England court itself analyzed the underlying facts of the case in a manner destined to lead to confusion. What emerges from a clearer factual analysis of the Bank's prosecution is something quite unlike the different employees with different knowledge scenario addressed at some length by the court. Second, however, and more important, subsequent interpretation of Bank of New England has entirely ignored the driving factor behind the court's opinion - namely, the section not on knowledge but on specific intent that showed the Bank's employees and the Bank itself had acted in a quite culpable fashion. Taken together, these two flaws cry out for a reexamination of Bank of New England and the myth of collective knowledge that it has spawned.”).

137 The Currency Transaction Reporting Act, 31 U.S.C. §§ 5311 –5322 (1982), requires banks to report certain cash transactions. At the time, the limit above which reports were required was $10,000. There were, therefore, attempts to evade this limit by structuring transactions so the trigger limit would never be reached in any one event. Such intentional structuring was also illegal. A detailed discussion of the events leading up to the prosecution is set forth
employee had willful intent at the moment of the *actus reus*.\(^{138}\) The First Circuit’s rationale was based upon the difficulty in identifying an individual offender who operates within a complex and decentralized structure. Under these circumstances, a finding of the collective intent is “not only proper but necessary.”\(^{139}\) In its view, any other rule would allow a company to compartmentalize information and thereby avoid criminal liability. Thus, if one assumes a crime with elements A, B, and C, where A is known to officer A, B is known to officer B, and C is known to officer C, then, for the purpose of criminal liability, all elements are known by the corporation.\(^{140}\)

Neither the academic articulation\(^ {141}\) nor the legal articulation of the collective intent theory appears to suffice as an ethical approach on close examination. First, under the collective intent approach, an organization could be judged unethical even if each and every one of its members acted ethically. That result seems counterintuitive.


\(^{139}\) For a strong counterargument that the case does not stand for the collective intent approach, see Hagemann *supra*. Whether the case does or does not stand for this proposition is not directly relevant to this article. The fact that it is asserted to be so is sufficient.

\(^{140}\) This should be distinguished from the situation in which one or more persons intentionally withhold information from other members of the organization or go out of their way to avoid learning information.

As an initial example, consider the situation in which a company makes two lines of products that are otherwise identical except that one line contains lead and the other is lead-free. A salesperson signs a contract with a customer promising to delivery lead-free products. At quality control, the tester confirms that the product meets the specifications for the company’s line of products which contain lead. A person in the shipping department misunderstands coding protocols and prints out a label indicating that one box of product is lead-free when it is not. Finally, a person at the warehouse puts that box on a truck to be delivered to that customer.

Under the collective intent model, since the salesman knows the customer wants lead-free product, the tester knows the product contains lead, and the warehouse employee knows that the product is being delivered to that customer the organization, as a whole, has the “collective” knowledge that it is sending non-conforming conduct. Given that knowledge, then the collective intent approach would conclude that the organization “intended” to send out lead-containing material. Thus, the company appears to be knowingly delivering lead containing product to a customer to whom it promised lead-free product. If an individual engaged in such “bait and switch” conduct, there is no doubt that the person would be acting unethically. Under the collective knowledge model, therefore, the company’s conduct should also be deemed unethical; yet that seems inappropriate. Intuition suggests that the corporate actions At most, this would be characterized as an error, perhaps even negligence, but not intentional, unethical conduct.

There can also be a problem in the other direction. Assume a similar situation except that the shipping employee intentionally puts a misleading label on the goods with knowledge that the customer wants lead free product. When it gets to the warehouse, however, the box is dropped and damaged. One of the employees, seeking to cover up this problem, takes another box of product that contains lead free product (without knowing what the customer actually wanted) and secretly substitutes it for the damaged box.

At least two employees in this set of circumstances engaged in conduct that they intended to be deceitful. From a collective knowledge point of view, the company still knew that the customer wanted lead-free products and that the box containing lead-free products was delivered to the customer. Thus, although two employees acted in an underhanded fashion, the organization’s superior collective knowledge means that it engaged in no unethical behavior even though the reality is that two intentional acts of malfeasance accidentally cancelled each other out.

A response could be made that an organization cannot be acting ethically if one or more of its employees act unethically, but then the collective knowledge approach is, at least implicitly, either being supplemented with or replaced by the attributory approach, that simply takes each individual’s actions and directly makes the corporation responsible. These inherent defects suggest that the collective knowledge model cannot be used as the direct organizational substitute for individual intent.

A second solution would be to impose an overarching obligation on the organization to ensure that its members are fully knowledgeable. Accordingly, when the problem results from distribution of knowledge, the organization is still responsible for failure to provide the members with adequate information.
While this supplementation has some surficial appeal, it suffers from several fatal defects. From an ethical perspective, failure of a company to give full information to all of its members appears to be more of an operational problem than it is an ethical problem. There are few, if any corporations that give all corporate information to all employees. It seems inappropriate, therefore, to assert that such decision is itself unethical.

From a practical perspective, this solution also fails. Even smaller organizations accumulate enormous amounts of information and full distribution would be impractical; for global organizations, it would be impossible. Indeed, given the legal restrictions imposed on distribution of information, such practice would itself be unethical.

**Corporate Process/Strategic Model**

Peter French asserts that corporate intent can be discerned by use of a concept he describes as corporate internal decision (“CID”) structure. This structure has two elements: an organizational flowchart that sets out levels within the corporate structure, and corporate decision-recognition rules. French asserts that the CID structure most accurately describes how the actions and intentions of individual human persons within the corporation become a corporate decision. Through the rules set out by CID structure, it becomes possible to identify whether or not a given action or decision has been made “for corporate reasons”. Only corporate decisions that are made according to this procedure and which are in basic accord with company policies qualify as corporate decisions to which intent can be attributed.

This approach has the benefit of being comparatively objective. Assuming that sufficient attention and information are available, the CID can be determined with some level of precision. Thus, as is not the case with the impressionistic corporate culture, character, and ethos models, rather less depends on the person engaging in the analysis.

Several key problems arise when considering this approach for purposes of ethical analysis. First, although CID can determine whether an action was taken for a corporate purpose or for a purely selfish, individual reason, that is only one step in an ethical inquiry and it is not the first step which requires understanding the ethical value of that corporate purpose. Take, for example, the pirate crew. Attacking and robbing the passengers of a ship is clearly well within the basic company policies of the pirate organization. Further, the attack and robbery were instituted within the normal decision-making process of the organization. CID can tell us, therefore, that the actions were for the purposes of the pirate crew as a whole, but does not

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142 E.g., HIPAA, ITAR, EU Privacy Directive.
143 Fisse makes a similar case for what he calls a strategic analysis, see Fisse, ________, as does Clinard, see Marshall B. Clinard, Corporate Corruption: The Abuse Of Power (Praeger Publishers 1990). They are ably summarized in Jennifer Quaid, The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis, 43 McGill L.J. 67, 98.
144 French, supra at 41-52.
145 It is only comparatively objective in that the determination as to which policies should be considered to ascertain whether an action is “in basic accord” with company policy has a subjective element as discussed supra.
146 In such a case, it is very likely that the decision-making process is essentially the captain of the pirate crew saying “Attack that ship.” There is nothing in CID that requires a detailed process.
discern whether the underlying purpose is ethical, or indeed whether the conduct itself is ethical nor whether it should be deemed an individual or organizational ethical judgment.

CID also appears to assume that any decision that is not in accord with the organizational process is not relevant to the evaluation of the organization’s ethics. When looking at the lax corporation, its decision-making process may be so unconstrained that many, if not most, of the actions of individuals are largely independent of any formal process. One possibility would be to characterize such anarchy as the CID structure in which case all actions, however motivated, would be attributed to the corporation. The other possibility would consider other factors – such as individual motive or legal compliance – in which case the discipline and objectivity of the CID model is lost with little incremental benefit. In either case, the CID model as an independent technique fails either because it fails to accord with ethical intuition or because it requires supplementation in order to work. Similar problems arise in applying this model to the Idealized Drug Cartel. All employees are assumed to work toward the corporate objectives. Under the CID, this would result in ethical approval. On the other hand, that seems in conflict with the judgment of those persons who sell drugs in jurisdictions in which such actions are viewed not only as illegal, but unethical.

Another problem arises when the CID model treats potentially unethical circumstances that arise from the failure to act. Not every ethical issue arises from an affirmative positive action. For example, there may be no affirmative decision not to provide a safe workplace, but the unaddressed existence of an unsafe workplace could be deemed unethical. To the extent that CID traces how decisions are made, it will fail to deal with most forms of inaction which are not the consequences of an actual decision, or even a decision about the decision-making process. To the extent it attempts to reconstruct how decisions are not made that should be made, it moves from an objective approach to a much more subjective one in deciding what decisions “should” have been made. The only way to make that determination is to apply a separate ethical framework.

Finally, some criminal laws make distinctions between types or levels of intent as do some versions of ethical theory. CID lacks such nuance. It can only determine if an action is in accordance with corporate process. Thus, either all such distinctions must be ignored, or some supplement to CID must be supplied.

IV – POSSIBLE SOLUTIONS

Can The Problem Be Resolved By Redefinition?

One possible solution to the problem of organizational ethics is to modify the definition of an organization. A narrowly drawn definition could reduce the problems with some of the above approaches. Thus, for example, limiting the definition to organizations that have a clearly defined hierarchical structure, could focus the attributive approach only on those at the top of the pyramid. Similarly, the issue of corporate defining the intent of the organization becomes more tractable – although still problematic – if only the intent of those who run the entity is considered.

147 E.g., French, supra at 54-55.
In addition to a defined hierarchy, other criteria that could be considered include: formal organizational documents such as charters or bylaws, existence of formal procedures and rules of conduct, and explicit mechanisms to become a member or end membership in the organization, depending on the particular analytic approach at issue. The tighter the definition, the easier it is to apply an approach to evaluate the ethics of an organization.

There are two fundamental issues with the definitional solution. First, while it may ameliorate the problems discussed in Part __, it does not eliminate them. For example, the fewer the people considered with respect to corporate knowledge, the less likely there will be significant divergence between the collective knowledge of the organization and the specific knowledge of each individual. Nonetheless, even a smaller possibility of such divergence still requires consideration of the implications of such divergence.

More generally, however, the narrower the definition, the less it overlaps with the common intuition. This is not a problem for Pope Innocent, Blackstone, and their current intellectual inheritors; in their view the concept of organizational ethics is incorrect and the common intuition is wrong. To the extent they accept the existence of such an ethical evaluation, they would apply it to a very narrow range of entities.

In the alternative, since the common intuition does recognize a broad array of organizational forms, the definitional solution appears excessively cramped. It trades applicability for ease of use. If there is a way of solving the problem while still maintaining a broad scope for application, that course appears preferable.

**Should Any Moral Standard Be Applied?**

Another possible approach is to discard entirely the concept of organizational ethics, and instead treat organizations entirely from an instrumental point of view. In this approach, whether organizational ethics exist or not is irrelevant. Blame – or criminal liability – would be assigned as a matter of public policy whenever such action would, on balance, improve society.

Thus, for example, the Lax Corporation would be subjected to societal condemnation not because it is ethically deficient, but only because society would prefer that it be more like Strict Corporation. In short, organizational ethics is set aside in favor of a pure outcome-determinative (consequentialist) approach. Such an approach is consistent not only with a utilitarian system, but with any ethical system that only prohibits the use of natural persons as tools to accomplish ultimate goals but does not extend that prohibition to whole organizations.

In effect, all those who use “deterrence” to justify the application of laws or norms to organizations are implicitly using a utilitarian justification. Application of criminal liability or ethical blame is justified by practical reasons, such as the complexity of attempting to discern

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148 “Responsibility . . . is a device for achieving social control that does not depend on metaphysical or intrinsic qualities of ‘moral persons’ or human agents.” Corporations, Crime and Accountability at 133.

149 See, e.g., Samuel Buell, The Blaming Function of Entity Criminal Liability, 81 Ind. L.J. 473, 491 (2006) (“Further, the criminal process can impose a unique form of reputational sanction, the effects of which can flow through to institutional members in ways that promise to deter individual wrongdoing and promote group endeavors toward compliance. No non-criminal legal process can fully replicate these effects.”).
which individual in a large organization is responsible for some improper activity.\textsuperscript{150} An alternative formulation is that if an act is beneficial, the organization’s conduct is deemed “ethical” in a very specialized sense that is unrelated to traditional notions of moral judgment. Their reasoning is as follows:

1. Society will be benefited if organizations refrain from $X$.

2. If we pass laws – criminal or otherwise – to penalize organizations from doing $X$ or to reward organizations for doing not-$X$, such organizations’ cost-benefit analysis will change the behavior of such organizations toward that objective.

3. Whether such penalties/rewards are applied in the context of social pressure, civil lawsuits, or criminal prosecution is simply a function of the tactic’s effectiveness.

4. The only test of the course of action is whether it does or does not achieve the outcome desired.

Notice that such analysis never requires anyone to determine if the organization’s conduct was good or bad, moral or immoral, except as the outcome is or is not achieved.

Two examples may demonstrate the application of this approach. Suppose a Sentencing Commission clearly believed that it would save investigative resources and result in better information if corporations voluntarily reported violations of law. Accordingly, under the Guidelines, self-reporting is taken as a mitigating circumstance that tends to reduce criminal fines. The expectation would be that corporations would be more likely to self-report if there were a clear financial benefit from doing so. If, in fact, such a provision did increase self-reporting, then it is appropriate; if it does not, then it is inappropriate. It would be odd to assert that failure to comply with this provision inherently makes a company immoral; it only means that it does not get the benefit of this circumstance. On the other hand, even without the action of the Sentencing Commission, some may attribute ethical value to self-reporting even if it does not result in any societal benefit. This suggests that the utilitarian approach is not necessarily identical to the common ethical intuition.

Similarly, in recent California legislation, companies are required to describe the efforts they undertake to avoid the use of forced or child labor in their supply chains.\textsuperscript{151} Strictly speaking, the law does not prohibit the use of such labor, but the expectation is that the public’s disapproval of such use will affect the attractiveness of products sold directly or indirectly into the public market. Whether the indirect use of labor makes a company evil is beside the point; there is a clear incentive to be entirely conflict mineral-free from a marketing perspective.


\textsuperscript{151}California Supply Transparency Act, CITE NEEDED.
There is, of course, some moral judgment that the use of child or forced labor is bad, but the point of the law is simply to get corporations to stop purchasing directly or indirectly from entities that employ such methods. A company that makes the judgment to eliminate such practices from its supply chain is not doing so (or at least, not necessarily doing so) because it wants to do the “right thing.” It is doing so for the same pragmatic reasons that might lead it to make a product that was “green” or “energy efficient” even if its officers and directors actually had no concern for the environment as such.\textsuperscript{152} Indeed, at some point, such decisions may even make the directors liable for breach of their fiduciary duty to the shareholders.\textsuperscript{153}

The simplicity of this approach has a great deal to recommend it. For example, it is hard enough for politicians to agree on existing facts and probable outcomes. Asking them to agree on ethical judgments may require more from them than is reasonably possible. The entire analysis resolves into a purely technical, factual question of whether incentive A will result in outcome B. This is a questions for sociologists and economists; philosophers need not apply. An examination of the literature confirms that much discussion of the application of criminal law to organizations tends to take place on this level. From a public policy perspective, this reductionist approach may be appropriate.

For everyone to set aside the possibility of ethical judgments of organizations may, however, be too much to ask. Indeed, this purely functional view does not appear to be entirely consistent with the common ethical intuition. Enron is not used as a technical example of an organization whose incentives were not properly designed; it is viewed as an example of an “evil” company. Similarly, the recent public discussions of the Deepwater Horizon Oil Spill in the Gulf of Mexico do not generally compare the economic value of a non-spill Gulf with a spill Gulf and proceed from there.\textsuperscript{154} Instead, there is an implicit assumption that the act of pollution (or the negligence leading to the pollution) had a non-economic moral component. For example, the media’s repeated use of a picture of an oil-drenched bird was not intended to suggest that the problem was the loss of the market value of that bird, or even similar birds, but to suggest that the conduct was immoral. In sum, a purely instrumental, outcome-determinative may be useful, but it does not displace an ethical analysis if one is possible.

\textsuperscript{152} That does not mean that some companies may not eliminate child and forced labor from their supply chains or make “green” products because their officers and directors believe in the moral advantages of such actions, only that organizations can rationally engage in these acts without making any moral judgments at all.

\textsuperscript{153} In the movie Iron Man [CITE], the CEO, Tony Stark, makes the unilateral decision that Stark Industries – largely a weapons manufacturer – would immediately cease making such products, not only driving the value of the shares down directly, but potentially subjecting the corporation to multiple claims of breach of contract. A shareholder suit reverses that decision. In the context of the movie, the audience is supposed to root for Stark and despise Obadiah Stane who seizes control of Stark Industries. For corporate lawyers in the audience who recognize the impact on the workers, other companies, and those to whom promises of delivery were made and on which lives of troops in harm’s way critically depend, these actions of the ostensibly evil Obadiah Stane are, in fact, praiseworthy. Given the profits of the film, the producers apparently were correct that they could ignore this demographic group.

\textsuperscript{154} A purely economic approach would take this difference and then compare it to the costs of a regulatory scheme that would be strict enough to prevent this pollution and determine the optimum amounts of pollution and regulation. For many, even the notion of an optimal amount of pollution is anathema, suggesting that they do not use an economic approach to evaluate corporate activities.
What Can Be Evaluated?

The starting point for a meaningful system for organizational ethics must be to confront the reality of artificial constructs that are not natural persons. Specifically, there are two aspects that must be recognized and incorporated into any approach. First, organizations are instrumentalities by nature, and cannot be Kantian, rational beings who exist as ends in themselves and not merely as a means to be arbitrarily used by this or that will. That does not necessarily mean that that organizations are the same as a hammer. It does, however, mean that corporations function in different ways for different purposes. As a result, corporations can be dissected into different aspects. Thus, meaningful analysis must attend to a variety of aspects of the organization; no Procrustean “one size fits all” test will work.

This also explains much of the confusion in articulating the meaning of organizational ethics. Any attempt to treat them as if they were individuals leads analysts to design models that can substitute on a one-for-one basis for individual intent in order to use existing ethical approaches. Such efforts are, however, doomed to failure.

A better approach abandons any attempt to create direct correspondence between organizational ethics and individual ethics. Instead, it uses ethical theories to evaluate separately the four principal aspects of organizations and the way they operate: ultimate ends, intermediate ends, means, and internal conduct. To determine whether an organization is ethical, each aspect must be separately evaluated before making any meaningful judgment. It is only at that point that a specific question about an organization can be answered.

The “ultimate ends” of an organization are its final goal or goals, that is, its raison d’être. Thus, for example, the ultimate ends of both Strict Corporation and Lax Corporation are the same: to maximize the financial gain of its owners. Such an ultimate end is not possible by definition for a non-profit entity. Its ultimate ends will depend on the nature of the organization. Thus, a university hospital may have two ultimate ends: increasing the health of its patients while at the same time engaging in medical research.

Very few ultimate ends are immediately achievable. Instead, organizations set intermediate goals – or “intermediate ends” – that will lead to the final ends. Thus, an organization may set a 10% increase in annual sales as an intermediate end anticipating that achievement of that objective will be a waypoint to the creation of value for the owners. Similarly, the non-profit hospital may seek to establish a transplant unit in the hope that both heart patients and other surgical patients will benefit from a center for excellence.

For purposes of analysis, the way an organization acts with respect to the external world will be defined as its “means” of reaching its ends. An organization may engage in a variety of types of conduct from designing a better advertising campaign and cutting prices to industrial espionage and bribery. Such strategies are not confined to hierarchical for-profit organizations; even non-profit or informal organizations may engage in legal or illegal conduct.

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155 Citation to Kant needed. (Chapter 2 of the Groundwork, I think)
In addition to interacting with the external world, an organization’s individuals must also deal with each other. Such activities constitute the organizations “internal conduct.” There is no necessary connection between the quality and nature of an organization’s internal conduct and its external means. An organization can be scrupulous in its dealings with the outside and entirely unscrupulous in the way its members relate to each other (or vice-versa). This is the most significant difference between organizations and individuals. Individuals do not have any internal conduct as such; this ethical evaluation applies only to multi-individual organizations.

Given these four organizational aspects, it becomes possible to evaluate each one separately. Indeed, there is no inherent necessity that each aspect be subjected to the same ethical framework. It also allows for the question to be honed to be more meaningful than “Is the entity ‘good’?”. Some examples may flesh out this approach.156

As a first example, the Ku Klux Klan (“KKK”) is an organization. Its ultimate end is the oppression of ethnic and religious minorities. The intermediate ends appear to be marginalizing the political and societal power of such groups. These also are almost certainly characterized as unethical. The means of the KKK include or have included lynching, violence and intimidation, but, for purposes of the analysis, assume that not all branches that are nominally part of the KKK use all of those means. Thus, depending on the particular branch at issue, its methods could be deemed either ethical or unethical. Internally, however, there is no necessity for any branch that the dealings within the organization between members are other than honest and direct. Accordingly, taken on its own, its internal conduct cannot be designated as unethical.

In making ethical judgments about the KKK, it is likely that most focus on its ultimate ends and intermediate ends. For them, the key question is “Are the KKK’s goals ethical?” Even if the focus is on a branch that does not use unethical means and which also has good internal conduct, ultimate and intermediate ends would predominate. That does not mean that means or internal conduct are not relevant, only that are not dispositive. On the other hand, for purposes of analysis, one can imagine a KKK that has the same ultimate and intermediate ends as above, but which only uses legal means to accomplish its goals. It is unlikely that such a change in the hypothetical case would change the evaluation of the ethics of that organization for most people. Nonetheless, on several occasions the American Civil Liberties Union has defended branches of the KKK who seek to accomplish their ultimate ends by legal means. From its point of view, the KKK’s ends are within the acceptable range of societal discourse. As a result, the question that the ACLU believes is pre- eminent is only about the means of the organization; it is less interested in ultimate ends or the internal conduct of the KKK. From this, it is reasonable to infer that the ultimate and intermediate ends of an organization are also not necessarily dispositive. Instead, when the question changes, the answer changes.

Take as another example the Hood organization. It has as its ultimate goal an ethically unchallengeable objective: assisting the poor. Its intermediate end was obtaining resources from the rich. In and of itself, that goal is not unethical. All charitable organizations also seek money from the rich. The means employed by the Hood organization was (allegedly) theft limited to wealthy persons. The ethical evaluation of those means is ambiguous; much depends on the

156 It must be emphasized that some examples use organizations that are clearly indefensible. Nonetheless, because they are so extreme, they help clarify the analysis.
framework applied to the conduct. By all accounts, the internal dealings between Robin Hood and the Merry Men and among the Merry Men was forthright, and entirely honorable. Thus, the internal conduct of the organization were exemplary.

Accordingly, if the question is “Was the Hood organization’s attempt to seek social justice good?” , then the answer might well be yes. On the other hand, for those with strict notions that an organization cannot be ethical if it breaks the law, then the ethical evaluation of the Hood organization depends, therefore, on one’s stance toward stealing in the context of English society at that time. Even with entirely admirable ultimate and intermediate ends, it would not be unreasonable to assert, based on the illegality of the means used, that the organization was no better than the group of thieves in “Ali Baba and the Forty Thieves,” an organization generally considered to be unethical not only because of their violations of the law, but also for other reasons as well. This leads to the conclusion that means and ends – both intermediate and ultimate – are separate points of ethical consideration of organizations.

Now consider an organization that seeks to achieve ethical ends, both intermediate and ultimate, and deals with the external world ethically. Internally, however, the employees of the organization routinely engage in trickery and deceit against each other. Promotions and terminations are unfair, albeit not illegal. The consensus of all outside observers of such of such organization is that it is a snake pit, par excellence.

If the question is simply “Is this organization ethical?” , traditional methods based on individuals will not work because individuals do not have anything similar to the internal conduct of an organization. Any attempt to simply tweak historical approaches is destined for failure. If, on the other hand, the question is “Does the organization treat its employees ethically? or “Does the organization encourage its employees to act ethically towards each other?”, then ethical judgments can be made.

Because organizations are instrumentalities, it is impossible to evaluate them entirely in the abstract. Organizations need to be contextualized with the totality of their surroundings in order to engage in a meaningful ethical analysis. In order to truly understand the Hood organization, it must be placed in the context of medieval England. In those circumstances, there could be an argument that its means are defensible because of the injustice inherent in feudalism. Were that organization to operate in present-day England, it becomes substantially less likely to be viewed as ethical. Put another way, the question should not be “Was the Hood organization ethical?” , but “Were the Hood organization’s means justifiable under King John’s England?”.

The mercenary organization poses the same problems. Without knowing the context in which this instrumentality operates, it becomes impossible to make a meaningful ethical evaluation. In Afghanistan or Iraq, as a supplement to regular army forces, the ultimate ends of the organization might very well be considered to be justifiable. On the other hand, capitalizing on internece conflicts in Africa, the very same ultimate end of assisting the local armed forces becomes much more questionable. Even conceding the ethical value of the ultimate end, if the

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157 The thieves in the classic story steal for personal gain, murder or attempt to murder those who become aware of where they stored their proceeds.
question is “Does the mercenary organization act consistently with international ethical norms for armed conflict?”, the answer could be very different.

Using the test cases, the following could be one set of outcomes.

<table>
<thead>
<tr>
<th>Organization</th>
<th>Ends</th>
<th>Int. Ends</th>
<th>Means</th>
<th>Internal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pirates</td>
<td>U</td>
<td>U</td>
<td>U</td>
<td>E</td>
</tr>
<tr>
<td>Mercenaries</td>
<td>U or E</td>
<td>E</td>
<td>E</td>
<td>E</td>
</tr>
<tr>
<td>Organized Crime</td>
<td>U</td>
<td>U</td>
<td>U</td>
<td>U</td>
</tr>
<tr>
<td>Lax Corporation</td>
<td>E</td>
<td>U or E</td>
<td>U or E</td>
<td>U or E</td>
</tr>
<tr>
<td>Strict Corporation</td>
<td>E</td>
<td>E</td>
<td>E</td>
<td>E</td>
</tr>
<tr>
<td>Law Partnerships</td>
<td>U or E</td>
<td>E</td>
<td>E</td>
<td>U or E</td>
</tr>
<tr>
<td>Bird Watchers</td>
<td>E</td>
<td>E</td>
<td>E</td>
<td>E</td>
</tr>
<tr>
<td>Hood/Merry Men</td>
<td>E</td>
<td>E</td>
<td>U or E</td>
<td>E</td>
</tr>
<tr>
<td>Idealized Cartel</td>
<td>E</td>
<td>U or E</td>
<td>U or E</td>
<td>E</td>
</tr>
</tbody>
</table>

E = Ethical
U = Unethical
U or E = Depends on values applied and context

From this chart, a few conclusions become evident. First, only the strict corporation and the bird-watching club are unambiguously ethical and the organized crime unambiguously unethical. Even the Hood organization’s status depends on whether the commission of serious crimes is ever justified. If the answer is no, then the status of that organization depends on the question. Similarly, depending on one’s view of the ethics of providing legal representation to evil clients, and one’s view of the actual operation of law partnerships, those organizations could either be completely ethical or no better than the Idealized Drug Cartel.

The concept that whether an instrumentality is good or bad depends on the nature of the question is not unfamiliar. To take a simple example, the Land Rover, the Dodge Caravan and the Lamborghini Gallardo are all cars. To ask the question whether one of them is a “good” car is, in the abstract, almost meaningless. Without context, such a question assumes absolute standards that simply do not exist. Instead, it is meaningful to ask “Is this car good as a utility car for a family of five?” or “Is this car good for exploring the Serengti?” or “Is this car good for going incredibly fast and looking unbelievably cool?” When contextualized, the question can be answered and would be different for each specific context.158 By separating out the relevant aspects of an organization, then it may be possible to use ethical techniques. Thus, for those persons who are considering how an organization treats its employees, the question would be “Are the internal operations of the organization ethical?” On the other hand, if the interest is focused on what the organization does for society, the question would be “Are the ultimate goals of the organization ethical?”

Under such an approach, one could look at the ultimate ends of strict and the lax corporations. Both are in operation to make profits for their shareholders, a goal that is both legal

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158 Utility vehicle – Caravan, Serengti – Land Rover, overall coolness – Gallardo.
and generally accepted as ethical or at least ethically neutral. Thus, it could be meaningful to say that both entities have ethical ends. Along the same lines, one could examine the ultimate ends of the pirates and the Hood organization and discern that helping the poor is laudatory, but attacking and commandeering ships for personal gain is not.

On its own, this does not necessarily answer the questions set forth in Part I about corporate knowledge or corporate intent. It does, however, pose the questions so that meaningful progress is possible.

**What Ethical Standards Can Be Applied To Aspects of the Organization?**

Even if the standards will be applied individually to each aspect of the organization, there still remains the issue of the standards to be applied. Dissecting the aspects of an organization may not answer the question, but it does make answering easier. Thus, in answering some questions, using ethical systems derived for individuals may be plausible. For example, there are some ultimate ends that individuals have that can never be justified. No one really asks whether a genocidal tyrant gives to charity or is good to his or her family. The inquiry stops with articulation of the ends themselves. Here, at least, there can be a direct application of traditional ethical theory. Some ends are inherently immoral whether individual or organizational. Some techniques – intermediate ends – are susceptible to that analysis as well. For example, it does not matter whether an individual or an organization kills poor children to harvest their organs; that is immoral even if the goal is to help individuals needing transplants.

On the other hand, when a moral judgment requires evaluation of intent, the comparison breaks down. Organizations simply do not have intent in the way that individuals do. As noted above, trying to conjure up a simulacrum for organizations – whether culture, character, ethos, or the like – fails. A mercenary organization, for example, cannot be characterized as brave or cowardly. To ask any question framed in those terms cannot be meaningfully answered. Instead, it may have brave or cowardly members whose actions have implications for the employer of the mercenary organization. This means that, for at least some possible questions, the use of classical ethical approaches must be rejected by rejecting the question sought to be answered.

This tends to explain the difficulty in evaluating the Hood organization. Except for rare individuals such as Inspector Javert,159 most people recognize that theft may be justifiable in extreme circumstances. Considerations such as the motives of the particular individual are, therefore, examined. Did the person believe that no other course of action was possible? Was the person acting out of avariciousness or to benefit another? More simply, what was the intent behind the theft?

With the Hood organization, however, the organization, as such, had no intent or motive to examine. As a result, direct application of traditional ethical analyses that consider motive the organization will not work. Accordingly, an appropriate approach must either be one that does not consider motive, such as a pure Utilitarian approach, or one that is categorical, or some other

159 Victor Hugo, Les Miserables.
method. There may, of course, be substantial differences of opinion as to which of these is correct, but at least those debating the question can have a more meaningful discussion.

In the same way, asserting that the Lax Corporation is immoral simply because it is lax implicitly is condemning an organizational intent (that is, the intent to be lax) that does not exist. Few if any organizations are (or can be) rigorous in all ways at all times. Thus, the difference between Lax Corporation and Strict Corporation is one of degree. Lax Corporation, therefore, is lax because of the failure of senior management, not because the organization as a whole intends immoral conduct. This has consequences for the moral judgment that results from Lax Corporation’s conduct. If one takes the former view that laxity is the result of the intent of the organization, then the impulse could be to condemn the corporation; if one takes the latter view, then the focus of the condemnation is on the senior managers. Again, this is not dispositive of what society should or should not do; but whatever it does should be based on a clear understanding of the moral judgments being made.

Finally, there are simply no good analogies between the ethical evaluation of individuals and the ethical analysis of internal corporate operations. Characterizations such as “cutthroat” or “family friendly” can only be seen as descriptive rather than standing for any moral judgment. Indeed, such judgments often turn out to be expressions of personal preference and not application of objective standards. The distinction between a cutthroat organization and one that strives for excellence may lie in the eye of the beholder. Accordingly, extreme caution should be exercised before condemning an organization with ethical ultimate ends, intermediate ends, and means, but with questionable internal conduct.

A second level of issues arises from the possibility of nesting organizations. Individuals are, for the most part, unitary. Turning back to the definition of an organization, there is no necessity that the organization being evaluated is always identical to the legal entity. Instead, a legal entity or organization may consist of a variety of identifiable organizations. A simple example would be a conglomerate of diverse companies owned by a holding company. For some purposes, the “organization” would be the entire collection of entities; for other purposes, the “organization” would be limited to one of the constituent companies. Generalizing, that suggests that a deeper analysis of the nature of the question and the operation of the entity may be required before any judgments are made.

Indeed, examination of the nominal organization may reveal several de facto component organizations. Thus, it may make sense to isolate “senior management” as an organization in fact. As such, the way such an organization deals with outside entities – including the lower echelons of the corporation itself – may permit some ethical judgments to be made. While characterizing an entire company as deceptive may fail, there could be circumstances when such description might apply to senior management or the board of directors. Under such a focus, then such implicit organization’s ends, ultimate ends, and means may be subject to evaluation as described above.

\[160\] For purposes of this analysis, the unique problems posed by multiple personality disorder and conjoined twins will be set aside.
This can be seen in a situation in which there is a labor/management dispute and management engages in unfair labor practices. In such circumstances, members of the corporation are both the victimizers (employee-managers) and the victims (employee-union members). Implicitly, society already recognizes that in such circumstances, there are two separate “organizations” subsumed in the single corporation. Legally, the same distinction is made in derivative suits against boards of directors. At some level, boards are the final operational authority within a public corporation. One possible conclusion, therefore, would be that as a matter of definition, the board cannot act against the wishes of the corporation because they embody such wishes. In contrast, in some circumstances the board can be characterized as a de facto organization and the relationship between such entity and those outside – including the owners or the employees – may be subject to ethical evaluation.

Nonetheless, the result is not a judgment that the corporation is good or bad as such, but only that the de facto group’s means, ends or ultimate ends are unethical. This lays blame (or praise) where it most accurately belongs and avoids trying to apply ethical standards developed over millennia to judge individuals to matters beyond their scope.

V – CONCLUSIONS

Although “organizational ethics” is an important concept, it is not co-extensive with individual ethics. Fundamental differences in knowledge and intent as those terms are applied to organizations must be taken into account. Rather than attempt a comprehensive ethical evaluation of an organization as if it were an individual by trying to create an organizational substitute for individual intent, much more satisfactory results are available if the ethical question is contextualized and if it focuses on one of the four key aspects of organizations, internal operations, means, intermediate ends, and ultimate ends. Finally, attempts to apply ethical norms to internal operations of complex organizations are much more likely to be robust if a nuanced approach parses out sub-organizations within the notional organization under consideration.

This suggests that the discourse about a variety of topics – application of criminal law to organizations, approaches to sentencing of corporations, application of punitive damages in civil law, and others – can be clarified and sharpened if their underlying or implicit ethical foundation is made explicit. Otherwise, much of the discussion will be ships passing in the night.