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Introduction

What is a “fair” sentence for a corporate criminal?¹ Take for instance, *United States v. Berman*,² where the defendant Bergman, a white collar criminal who defrauded the government of \$1.2 million in Medicaid and taxes, received a prison sentence of only four months.³ The *New York Times* responded with indignation: “[A] four month sentence for a rich felon, guilty of a million-dollar fraud, can only reinforce cynicism about the realities of equal justice under the law.”⁴

That white collar criminals are being treated more leniently is no longer in doubt.⁵ The only question is whether the disparity in treatment is justified or, more to the point, whether it is fair. Issues of fairness in punishment are properly the concerns of retributionists.

¹ EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 29 (1949) 1961 (“Why have not criminologists regarded white collar crime as cognate with other crime?”).

² 416 F. Supp. 496 (S.D.N.Y. 1976). For a comprehensive literature on corporate criminality and liability, see Joseph F.C. DiMento, Gilbert Geis & Julia M. Gelfand, *Corporate Criminal Liability: A Bibliography* 28 W. St. U.L. Rev. 1 (2001).

³ For an excellent account of the development of the case, see WAYNE R. LAFAVE, MODERN CRIMINAL LAW 704 (2d ed. 1989).

⁴ The sentiment is best captured by this *New York Times* item on June 18, 1976, at A.22, col. 2.

⁵ See LEONARD ORLAND & HAROLD R. TYLER, JR., EDS., JUSTICE IN SENTENCING: PAPERS AND PROCEEDINGS OF THE SENTENCING FOR THE FIRST AND SECOND U.S. CIRCUITS 159-60 (1974) (stating that plain indications that white collar defendants, predominantly white, receive more lenient treatment as a general rule); J. Hagan & A. Palloni, “*Club Fed*” and the Sentencing of White Collar Offenders Before and After Watergate, 24 CRIMINOLOGY 616, 616-17(1986) (explaining that relative to less-educated common criminals, white collar offenders were more likely to be imprisoned after Watergate than before, but for shorter periods). The sentencing disparity between white collar and common criminals was well displayed in the public eye. See, e.g., Michael C. Jensen, *Watergate Donors Still Riding High*, N.Y. TIMES, Aug. 24, 1975, sec. 3, at 1,7; Lesley Oelsner, *Wide Disparity Mark Sentences Here*, N.Y. TIMES, Sept. 27, 1972, at 1. For a summary of research in sentencing disparity, see JEFFREY REIMAN, THE RICH GET RICHER AND POOR GET PRISON 98-115 (3d ed. 1990).

Whether it is fair to punish corporate criminals⁶ cannot be answered by other consequentialist/utilitarian theories⁷ such as deterrence⁸ or rehabilitation.⁹

Fundamentally, two fairness arguments exist: Is the imposed

⁶ A clear definition of the object and scope of this study is very important. The principle of retribution may justify the punishment of individuals but not corporations. It may justify punishing small corporations but not large ones. This Article confines itself to the study of a special sub-class of white-collar criminals, those perpetrated by the business corporations. The study of white-collar crime has been plagued by a lack of definitional focus. See Ronald C. Kramer, *Corporate Criminality: The Development of an Idea*, in *CORPORATIONS AS CRIMINALS* 15-16 (Ellen Hochstedler ed., 1984). The problem started with Sutherland. He first defined the term white-collar crime as crime committed by a person of respectability and high social status in the course of his occupation but proceeded to include in his book fraud in different repair businesses, fraud in income tax return, and fraud by a shoe salesman. See SUTHERLAND, *supra* note 1, at 9. Later, Clinard and Quinney who divided white collar crimes in two categories—occupational crime, i.e., offenses committed by individuals for themselves in the course of their occupations and the offenses of employees against their employers; and corporate crime, i.e., the offenses committed by corporate officials for their corporation and the offenses of the corporation itself. MARSHALL B. CLINARD & RICHARD QUINNEY, *CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY* 188 (1973). Yet a third classification is possible—that of organizational criminality. M. DAVID ERMANN & RICHARD J. LUNDMAN, *CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF GOVERNMENTAL DEVIANCE* (3d ed. 1978) (describing the corporate organization as a collection of replaceable people with jobs, positions, skills, power rules, and reward). See also DIANE VAUGHAN, *CONTROLLING ORGANIZATIONAL BEHAVIOR: SOCIAL STRUCTURE AND CORPORATE MISCONDUCT* (1983). A business corporation is a legal entity recognized by the state and vested with rights and responsibilities to facilitate the transaction of business, public or private. Though the definition is restricted to legally incorporated entities, the reasoning and findings of this study may have broader applications, e.g., they equally apply to other organizational such as business partnership or street gang. In fact, the Proposed Guidelines for Sentencing of Organizations of the U.S. Sentencing Commission (46 CrL 2001 – 2024) defined organization broadly as a person other than individual. 18 U.S.C. § 18. Thus defined, organizations include corporations, unions, and partnerships. The broader conceptual framework for analysis, which this study does not address and only tangentially deals with, is the fairness of punishing collectivity acting through its members.

⁷ Utilitarianism, which Jeremy Bentham in *Principle of Morals and Legislation* (1789), called moral science, argues for the maximization of social goods by the use of punishment. Under this paradigm there is no inherent objection to the use of a person's body as a mean to an end, e.g., punishing the innocent or punishing excessively to generate the desired deterrent effect." Ted HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 66-74 (1984) (hereinafter *PUNISHMENT*).

⁸ Jeremy Bentham, the founder of Utilitarianism, has suggested that punishment may prevent the occurrence of offenses in three ways: (1) by making it impossible or difficult for an offender to break the law; (2) by deterring both offender and others; (3) by providing an opportunity for the reformation of others. See *PUNISHMENT, supra* note 7, at 52.

⁹ See Justice Stewart's famous dicta in *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be cruel and unusual punishment for the crime of having a common cold.").

sanction fair to the “individual” criminal?¹⁰ Is it fair to others who are “similarly” situated? The first deals with individual justice; the later distributive justice. Persons troubled by sentencing disparity have been more concerned with the second question than the first.

Ultimately, the question that needs to be answer is what punishment properly fits corporate crime and criminal. More generally, does retribution theory help us in setting punishment for corporate criminals? This Article addresses these issues.

There are two reasons why the study of criminal responsibility and moral culpability of a corporation is in order. First, business organizations diverge from individuals in the following respects: as legally created entities, they are vested with rights and responsibilities not shared by individuals; moreover, they are rational entities and thus not capable of thought and feelings. Therefore, our traditional notion of criminal responsibility and common understanding of moral culpability may not apply to them.¹¹ As observed by Fiss:

The concept of wrongdoer is highly individualistic. It presupposes personal qualities: the capacity to have an intention and choice. . . (with organization offenders). . . . The focus is on a social condition, not incidents of wrongdoing, and also on the bureaucratic dynamics that produce that condition. . . . the costs and burden of reformation are placed on the organization, not because it has done wrong, in either a literal or metaphorical sense, for its neither intention nor will, but because reform is needed to remove a threat to constitutional values by the

¹⁰ This question encompasses two questions: First, is it ever just to punish the collective for the work of the individual? This is the attribution of guilt issue. Second, is it just to punish the individual for the work of the collective? This is the collective guilt issue.

¹¹ See Owen M. Fiss, *The Supreme Court 1978 – Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 22-23 (1979).

operation of the organization.¹²

Second, corporate America holds disproportionate and pervasive influence in economic, social and political matters.¹³ The corporation is fast becoming “the” way of doing business.¹⁴ How they should be dealt with is an important concern to the public, scholars and policy makers.¹⁵ Should corporate criminals face criminal sanctions? If we were to answer this question affirmatively, what manner of punishment is appropriate?¹⁶ Both questions hinge on our understanding of the justifications for punishment in general, and

¹² See ALFRED F. CONARD ET AL., ENTERPRISE ORGANIZATION 720-21 (1972).

¹³ See JOHN K. GALBRAITH, THE NEW INDUSTRIAL STATE (1967).

¹⁴ See WILLIAM H. WHYTE, JR., THE ORGANIZATION MAN (1956).

¹⁵ It was once observed that the public was not concerned with the morally neutral business transgressions. See Stanford Kadish, *Some Observations on The Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 UNIV. CHI. L. REV. 423, 446 (1983) (explaining that the purpose of criminal law is not to anticipate or built morality but reflect moral consensus). The lack of public concern may be due to the low visibility, diffused effects, delayed impacts, and incremental and cumulative nature of corporate criminal conducts. See John Braithwaite & Gilbert Geis, *On Theory and Action for Corporate Crime Control*, CRIME & DELINQ. 292 (1985). There are indications that the public are getting more sensitized to issues of corporate criminality and liability as a result of a few highly publicized corporate crime cases. See, for example, the Pinto case, in which corporate executives deliberately failed to make an \$11.00/car improvement that would have prevented 180 deaths based on a cost-benefit analysis. See Mark Dowier, *Pinto Madness*, MOTHER JONES, Sept.-Oct. 1977, at 2-13. The policy makers were made to face the issue by pressures from dedicated public interest advocates such as Ralph Nader. See RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1969); see also BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983). The academicians and scholars were galvanized by the leadership of Sutherland and the radical criminologists. The press seized the opportunity to cater to the growing interests in corporate criminality. See Sandra S. Evans & Richard J. Lundman, *Newspaper Coverage of Corporate Crime*, 21 CRIMINOLOGY 519 (1983) (explaining that newspapers protect corporate reputations by failing to provide frequent, prominent, and continue coverage of common corporate crimes such as price-fixing). And the government started to devote more time and energy into the enforcement of white collar crime laws. See Jack Katz, *The Social Movement against White Collar Crime*, 2 CRIMINOLOGY REV. Y.B. 161 (Egon Bittner & Sheldon L. Messinger eds., 1971). In all, the public has grown to be more critical about corporate crimes in the 1980s. See James Frank et al., *Sanctioning Corporate Crime: How Do Business Executives and The Public Compare*, 8 AM. J. CRIM. JUST. 139, 140 (1989).

¹⁶ For example, should and can corporations be compelled to prosecute—punish themselves with a self-referencing responsible scheme. See BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 202 (1993).

retribution in particular.

This Article is divided into three parts. Part I discusses the theoretical framework of retribution and its related principles. Part II provides some observations, comments, and critiques about the application of retribution theory to corporate criminality. Part III provides a summary and conclusion. The major thesis of this Article is that the retribution theory of punishment cannot be made to apply to corporate criminals without revising its underlying premises.

I. Retribution

A. Introduction

Retribution,¹⁷ deterrence¹⁸ and rehabilitation¹⁹ are the three most commonly recognized justifications for imposing punishment.²⁰

¹⁷ See definition and discussion in *infra* notes 21-29 and accompanying text.

¹⁸ “In everyday usage the word ‘deterrence’ . . . refer to any process by which someone is prevented from doing something. . . more accurate. . . a person was deterred from doing something if he failed to act because he feared the extrinsic consequences of that action.” DERYCK BEYLEVELD, A BIBLIOGRAPHY ON GENERAL DETERRENCE RESEARCH xv (1980). Deterrence can include incapacitation, i.e., totally deprivation of freedom or death.

¹⁹ Rehabilitation is the restoration of criminals to a law-abiding way of life through treatment. JOHN E. CONKLIN, CRIMINOLOGY (3d ed. 1989). The rehabilitation process is by definition therapeutic; any incidental deprivation and pain induced are not purposive.

²⁰ Textbooks introduce them as basic concepts in punishment. See SANFORD H. KADISH & MONRAD G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 392 (3d ed. 1975) (law school text), CONKLIN, *supra* note 19 (undergraduate criminal justice text). Scholars expounded on them. For a classical treatment of retribution, see IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., August M. Kelley Publishers 1974) (1887). For a detail discussion of the theoretical foundation of deterrence, see JEREMY BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION (1789). For a modern treatment of deterrence theory and literature, see DERYCK BEYLEVELD, A BIBLIOGRAPHY ON GENERAL DETERRENCE RESEARCH (1980). For a developmental view on rehabilitation, see DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1971). Policy makers relied on them. See KENNETH R. FEINBERG, THE NEW FEDERAL SENTENCING GUIDELINES (1988). Legislation referred to them. See General Code Reform Act of 1973, S. 1400, 93d Congress., 1st Sess., Mar. 27, 1973, § 102. State and federal judicial officials pay tribute to them. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

Of the three, retribution has the most instinctive appeal.²¹ It is the oldest²² and most universally accepted.²³ It is certainly the most popular with the general population.²⁴ It also has been accepted as a proper objective to punish by the Supreme Court.²⁵

Retribution is defined as “deserved punishment” in an English dictionary;²⁶ and “something given or demanded in repayment, esp[ecially] punishment” in an American dictionary.²⁷ The concept of “deserved” and “repayment” has long been made part and parcel of the concept of retribution and engraved in our national conscience.²⁸ Western culture has a powerful taboo against intentional violence, yet it does not hesitate to inflict pain for purposes of retribution or revenge.²⁹

Retribution is commonly known as the just desert theory of

²¹ RICHARD D. ALEXANDER, *THE BIOLOGY OF MORAL SYSTEMS* (1987); ROBERT ARDREY, *THE SOCIAL CONTRACT: A PERSONAL INQUIRY INTO THE EVOLUTIONARY SOURCES OF ORDER AND DISORDER* (1970); J.L. Mackie, *Morality and the Retributive Emotions*, *CRIM. JUST. ETHICS*, Winter/Spring 1982, at 3.

²² The Bible is replete with retributive admonitions: When one man strikes another and kills him, he shall be put to death. Genesis 27:45. And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe. Exodus 21:22-23.

²³ Retributive is commonly shared by other cultures. Retribution found expression in primitive cultures as in Melanesia. Mackie, *supra* note 21, at 3; *see also* B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1982).

²⁴ Richard Maxwell Brown, *The American Vigilante Tradition*, in *VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVE* 154 (Hugh Davis Graham & Ted Robert Gurr ed., 1979); George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26 *J. COMMUNI.* 173 (1976).

²⁵ Retribution is neither a forbidden objective nor one inconsistent with our respect for the dignity of men. *Gregg*, 428 U.S. at 183.

²⁶ *LONGMAN DICTIONARY OF CONTEMPORARY ENGLISH* (1978).

²⁷ *THE AMERICAN HERITAGE DICTIONARY* (2d ed. 1982).

²⁸ The just desert principle of punishment is loosely copulated with these terms: deserved, just desert, retributive, equivalent, proportional, commensurate, reciprocal, corresponding, fitting, merited, according to the offence, according to our right or the offender's rights. They are termed “desert-locution” by one author. *See PUNISHMENT*, *supra* note 7, at 210. Though the desert-locutions are not identical in meaning, they share a general get-even connotation.

²⁹ *See* CAROLE TAVIS, *ANGER* 60 (1982).

criminal punishment. Punishment is permitted or required because it is “just” to do. It is just to punish because the criminal deserves to be punished. Yet, there are many schools of thought in retribution. The principal schools are described below.

B. The Traditional or Classical School³⁰

1. Retribution and Moral Right

Immanuel Kant best summarized the classical or pure retribution tradition:

Juridical Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society but must in all cases be imposed only because the individual on whom it is inflicted has committed a Crime. But what is the mode and measure of Punishment which Public Justice takes as its principle and Standard? It is the just scale of Equality. . . . Hence it may be said: “If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you kill another, you kill yourself.” . . . Whoever has committed Murder, must die. There is, in this case, no juridical substitute or surrogate, that can be given or taken for the satisfaction of justice.³¹

2. Retribution and Annulment of Rights

Hegel argued for punishment as an annulment of a crime—or righting a wrong. Thus, we are obligated to punish so as “to annul the crime, which otherwise would have been valid, and to restore the right.”³² A crime is a denial of a moral principle; a punishment is required to restore the principle’s vitality and integrity. Punishment is thus not to pay back the victim or society, but to ratify the deficit in

³⁰ The classical or pure retributionism is sometimes referred to as intrinsic retributionism. See PUNISHMENT, *supra* note 7, at 212.

³¹ See Immanuel Kant, *Philosophy of Law*, in THE GREAT LEGAL PHILOSOPHERS 237,257-58 (Clarence Morris, trans. ed., 1971).

³² G.W. HEGEL, PHILOSOPHY OF RIGHT 69 (T.M. Knox trans. 1942).

morality to a place.³³ The criminal also deserves and expects the punishment because “[i]f we respect personality, we must respect responsibility. If we respect responsibility, we must respect the right of the offender to be punished for their offence.”³⁴

C. Functional Retributionism³⁵

Functional retributionists also believe in a right to punish. Unlike, classical retributionists, the functional retributionists postulate that the punishment is functional to promote other worthy goals. Suffering is thus not intrinsically good but justified with respect to other goals.

1. Retribution and Social Fairness

Retribution as social fairness is based on social contract theory.³⁶ Thomas Hobbes observed that men in nature have no right but liberty. He must kill or be killed in order to survive. Civil government is formed to tame the individual will for the benefits of all.³⁷ Rousseau observed that “man was born free, and every where he is in chains.”³⁸ Individualism gives way to collectivism in the promotion of general welfare. “The need of self-preservation dictated a contract, formed by the free will of all; and the society so created in

³³ See also H.L.A. LAW, *LAW, LIBERTY AND MORALITY* 63 (1963).

³⁴ See ERNEST BARKER, *PRINCIPLES OF SOCIAL AND POLITICAL THEORY* 179 (1951). For a general discussion of Hegel’s position, see PUNISHMENT, *supra* note 7, at 45-49.

³⁵ As far as I know no one use the term functional to describe retribution. The main reason is functionalism is a consequentialist brainchild whereas retribution in the pure form is not end regarded.

³⁶ See generally C.L. TEN, *CRIME, GUILT AND PUNISHMENT* (1987).

³⁷ See Thomas Hobbes, *Leviathan*, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 31, at 109-113.

³⁸ See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* at ch. 1 (Maurice Cranston trans., Penguin Books 1968) (1762).

the establishment of justice and the attainment of. . . morality.”³⁹ Social contract theorists provide the justification for punishment based on a breach of contract. Those who enjoyed the benefits of a civilized society are expected to give something in return, i.e., obedience to rule.⁴⁰

Morris argued that the retributive punishment is due because an individual, in violating a criminal law, takes “unfair advantage” of the society and its members. Like the other social contract theorists, he observed that social rules are for the benefits of all. The fundamental rules of criminal law are to prohibit violence and deception thus benefiting all those whom come under its protection. The benefit a person derives is a sense of security, to wit, security of non-interference by others and general protection. When a person violates a law, he is breaching the boundary of self-restraint at the expense of others. Punishment is justified to remove the unfair advantages enjoyed by the criminal and restore the equilibrium of relative benefits and burdens before the disruption.⁴¹

2. Retribution and Social Solidarity

Durkheim argued that though punishment is mechanical and non-reflective, it does serve useful functions. “Its true function,”

³⁹ See ROUSSEAU, *supra* note 38, at xii-xiii.

⁴⁰ Rousseau talked in terms of subjugating the individual will to the common will, which is not a quantitative aggregate of all the individual wills. ROUSSEAU, *supra* note 38, at xiii. Hobbes postulated that individual members of a civilized society give up their natural (unbounded) rights once a society is formed. ROUSSEAU, *supra* note 38, at xiii.

⁴¹ See Herbert Morris, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 40 (Jeffrey G. Murphy eds., 1977). John Finis, *Old and New in Hart's Philosophy of Punishment*, 8 OXFORD REV. 73 (1978). See also TEN, *supra* note 36, at 50-60.

according to Durkheim, “is to maintain cohesion intact, while maintaining all its vitality in the common conscience.”⁴² Punishment serves an affirmative function in the process of rejecting wrong. It also serves to heal the wound inflicted upon the collective sentiments. The denial of punishment in the face of wrong will lead to a general breakdown of social solidarity. Crime without punishment will result in moral decay and social disintegration.

3. Retribution and Social Symbolism

Feinberg observed that:

Punishment is a conventional device for the expression of attitudes of resentment and indignation and of judgments of disapproval and reprobation on the part of the punishing authority himself or of those “in whose name” the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalty. . . .⁴³

Punishment surely expresses the community’s strong disapproval of what the criminal did. Indeed, it can be said that punishment expresses the judgment (as distinct from any emotion) of the community that what the criminal did was wrong. It is a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment by the community as a whole.

If we reserve the less dramatic term “resentment” for the various vengeful attitudes and the term “reprobation” for the stern judgment

⁴² EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 62-63 (W.D. Halls trans. 1984). Lord Devlin made the same point. He argued that a society is a community of ideas, which he called morals. The transgression of morals should be made a crime or punished, otherwise the society will drift apart. He went so far as to equate criminals as rebels against the rightness of the society. LORD DEVLIN, *THE ENFORCEMENT OF MORALS* 9-10 (1959).

⁴³ JOHN FEINBERG, *DOING AND DESERVING* 98 (1970).

of disapproval, then perhaps we can characterize condemnation (or denunciation) as a kind of fusing of resentment and reprobation.⁴⁴

In this sense, retribution acts as a social condemnation serving useful social functions and purposes. It makes possible the performance of such symbolic functions as “authoritative disavowal,”⁴⁵ “symbolic non-acquiescence,”⁴⁶ “vindication of the law,”⁴⁷ and “absolution of others.”⁴⁸

The great jurist and legal historian Stephen was quick to add that the infliction of punishment legitimizes vengeance. Punishment ratifies hatred excited by the commission of an offense. “Deliberate anger and righteous disapprobation” is a proper and healthy release of penned up emotion.⁴⁹

4. Retribution and Revenge

Justice Holmes once observed that retribution is but vengeance in disguise.⁵⁰ To the general public, the two terms are hardly distinguishable.⁵¹ Historically, private grievances were settled by

⁴⁴ FEINBERG, *supra* note 43, at 98

⁴⁵ The punishment serves as formal and official denunciation of the act. FEINBERG, *supra* note 43, at 98.

⁴⁶ Failure to punish is a tacit acceptance of what is being done. FEINBERG, *supra* note 43, at 98.

⁴⁷ A statute honored mainly in the breach begins to lose its character, unless, as we say, it is vindicated (emphatically reaffirmed). FEINBERG, *supra* note 43, at 98.

⁴⁸ Punishment relieves others of suspicion and informally absolves them of blame.

⁴⁹ JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81-82 (1883). *See also* JAMES FITZJAMES STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863) (“The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.”).

⁵⁰ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 45 (1881); EDMUND L. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 16 (1966) (stating that “the theory is but a cover for a much less commendable motive than respect for justice: elegant draping for naked revenge”).

⁵¹ REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 17-18 (1973) (“The principle of retribution is apt to be confused because the word is not always used in the same sense. Sometimes it intended to mean vengeance, sometimes

blood feuds. Personal revenge was accepted and expected.⁵²

Conceptually, retribution is not to be confused with revenge. Hegel rightly observed that “[w]hen the right against crime has the form of revenge, it is only right implicit, not right in the form of right, i.e.[.] no act of revenge is justified.”⁵³

Revenge is personal in nature and emotional in substance. It satisfies an internal psychological need.⁵⁴ The penalty is made equivalent to grievance felt by the victim.⁵⁵ By contrast, retribution is founded on a universal principle: penalty proportionate to the gravity of the crime.⁵⁶ Consequently, “[r]etribution is done for a wrong, while revenge may be done for any injury or harm or slight and need not be a wrong.”⁵⁷ The most significant difference for our purpose is that revenge is not bound by any principle other than to quench the thirst of vengeance, whereas retribution is guided in its exercise by established principle as to what to punish, who to punish and how to

reprobation.”).

⁵² See HENRY BURNS, JR., CORRECTIONS 80 (1975) (explaining that “[i]n the primitive society demands for vengeance was settled by orderly retaliation”).

⁵³ HEGEL, *supra* note 32, at 141.

⁵⁴ Honderich and others have coined this satisfaction theory – punishment exists to quench the first for blood. See PUNISHMENT, *supra* note 7, at 28; John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 241-42 (1979). Our yearning for vengeance may have a more enduring biological-physiological roots. See Sidney L. Barnes, *A Review of The Philosophical, Theoretical and Practical Aspects of Legalized Punishment*, in PENOLOGY 36 (George Killinger et al., eds. 1979).

⁵⁵ The judicial system gives vent to the victim’s psychological and emotional need by restitution. See 18 U.S.C. § 3579 (a) (1), the Victim and Witness Protection Act. The law provides restitution to any victim of the offense in addition to authorized penalty. The amount restitution is determined in part by the loss sustained by any victim as a result of the offense. See 18 U.S.C. § 3580. Some states have broadened the participation of victims in the disposition of a crime case, e.g., a Maryland statute allows for a victim impact statement before sentencing. The law requires that pre-sentence report to include information about the victim’s economic loss, physical injury, personal life disruption and psychological adjustment. Md. Ann. Code, art. 41, § 4-609(c) (1986).

⁵⁶ For an articulation of the proportionality test in the context of capital punishment, see *Coker v. Georgia*, 433 U.S. 584 (1977).

⁵⁷ See ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 366 (1981).

punish.

II. Retribution and the Punishment of the Corporate Criminal

A. Introduction

The corporation has changed considerably from its infancy in the fourteenth century, when it was a depository of property and privileges for the church, towns and boroughs, and guilds, to its emergence in the sixteenth century as a vehicle for capitalization and management, and its modern presence as a business entity of collective ownership and shared responsibilities.⁵⁸

Regrettably, medieval law—with its emphasis on individual responsibility—has not been able to keep up with the rapid change in the size, function, complexity and problems of the corporation.⁵⁹ In fact, few if any policy makers “had given . . . systematic thought to whether the law’s approach makes sense vis-à-vis corporations, labor unions, foundations, and the like—the ‘atoms’ of contemporary social action.”⁶⁰

Conceptually, since the corporation cannot act and think for itself, it can do no wrong.⁶¹ Practically speaking, it is very difficult to

⁵⁸ NOZICK, *supra* note 57, at ch. 4.

⁵⁹ NOZICK, *supra* note 57, at ch. 2.

⁶⁰ NOZICK, *supra* note 57, at xiii.

⁶¹ The common law makes the corporation civilly liable for the acts of its agents acting within their scope duty, e.g., *Mound v. Monmouthshire Canal Co.*, [1812] 104 ENG. REP. 991 (K.B.); in the course of employment, e.g., *Limpos v. London General Omnibus Co.*, [1862] 158 ENG. REP. 993 (Ex.) and with malice, e.g., *Citizens Life Assurance Co. v. Brown*, [1904] A.C. 426. In criminal law the corporation is held responsible for some crimes and not others, e.g., treason or murder per *Queens v. The Great North of England Ry. Co.*, [1846] 115 ENG. REP. (Q.B.). The most difficult

attach legal responsibility on any one employee, in as much as “the information and acts are distributed among many different employees engaged in various functional groups within the modern corporation.”⁶² This applies to senior management as well: they may not be informed of operational details; indeed, they may be deliberately sheltered from bad news from below.⁶³

In sum, it is very difficult to assess blame and place responsibility upon a collective entity with shared mission but divided responsibilities. Nowhere is the difficulty made more apparent than in the application of the concept of restitution to a corporate criminal.

B. Retribution and the Corporate Person

Retribution is an ethical concept. It is concerned with justice, fairness and above all morality—ideas and principles that only highly developed persons can share.⁶⁴ The fundamental concept of retribution—from the Old Testament⁶⁵ to Kant—spoke in terms of culpable individuals deserving retributive punishment and moral wrong requiring reparatory adjustment. In the punishment of corporate criminal, especially in the application of retribution

problem is to define what constitute criminal intent for corporate criminals. The common law’s approach is to impute intent.

⁶² CHRISTOPHER STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 53 (1975),

⁶³ STONE, *supra* note 62, at 62.

⁶⁴ Lawrence Kohlberg theorized that people’s cognitive development evolved in stages which he called stages of moral development. He identified six stages organized into three levels. The recognition of autonomous moral principles happens, if at all, only after thirteen years of age or approaching young adulthood. See Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in *HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH* 347 (David A. Goslin ed., 1969).

⁶⁵ “When one man strikes another and kills him, he shall be put to death. When one man injures and disfigures his fellow-countryman, it shall be done to him as he had done; fracture for fracture, eye for eye, tooth for tooth.” LEVITICUS 24:20.

principles, three questions can be raised:

- (1) What corporate conducts should be punished?
- (2) Who should be held responsible for corporate misconduct?
- (3) How should corporate criminals be punished?

C. What Corporate Conduct Should be Punished?

1. Retribution and Moral Wrong

All retribution theorists start from one basic premise: a moral wrong has been committed, requiring reparation. The theorists differ not only in what they consider to be an immoral conduct but also how to look for it. The Old Testament borrowed heavily from the biblical teachings as revealed by the Holy Spirit. Kant spoke in terms of natural law evidenced by pure reason and incorporated in positive laws. Morris looked at the law protecting the general will and common welfare. Feinberg relied on the public to register their “resentment and indignation” of wrong doings. None of the theorists are very helpful in deciding what corporative conduct is morally wrong.

2. Kant and Moral Wrong

Kant is not very informative as to what criminality arises from the application of pure reason.⁶⁶ Kant observed that:

Laws of Morality is not drawn from observation of oneself or of our animal nature, nor from perception of the course of the world in regard to what happened. . . . Reason commands how we ought to act. . . nor does Reason give any regard to the Advantage which may accrue to us by

⁶⁶ See Lewis White Beck, *Apodictic Imperatives*, in *KANT: FOUNDATIONS OF THE METAPHYSICS OF MORALS* 144 (Robert T. Paul Wolf ed., 1969).

so acting. . . .”⁶⁷

Thus, the idea of right or wrong is unconditional and non-experiential. It exists *a priori*, to wit, prior to any posterior and relative knowledge. It is unaffected by human nature nor influenced by personal experience, social conditions and practical consequences.⁶⁸ The “supreme principle” of the “science of morals” is the “categorical imperative,” i.e., to “act according to a Maxim which can likewise be valid as a Universal Law.”⁶⁹ The only substantive moral rule is “every Action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist with the freedom of every other, according to a universal Law, any one does me a wrong who hinders me in the performance of this condition.”⁷⁰

Since pure reason of a person is not susceptible to validation or challenge by others,⁷¹ Kant’s “categorical imperative” cannot be disputed. Because the categorical imperative is not experiential and material-based, it is not subjected to empirical verification.⁷² What makes for a universal rule promoting individual freedom is highly speculative and overtly subjective. In the end, the rejection of experientialism and consequentialism does not readily provide a

⁶⁷ See Kant, *supra* note 31, at 240.

⁶⁸ Kant, *supra* note 31, at ix-xi.

⁶⁹ Kant, *supra* note 31, at 241.

⁷⁰ Kant, *supra* note 31, at 242. This maxim makes every moral agent and autonomous legislature unto himself.

⁷¹ Julius Ebbinghaus, *Interpretation and misinterpretation of categorical imperative*, in KANT: FOUNDATIONS OF THE METAPHYSICS OF MORALS, *supra* note 66, at 100 (If pure reason is effectively separated from personality and devoid of experience, free will became unconditional and autonomous. It has no master but itself. Everyone can will what he or she likes without due regard to what others’ will.).

⁷² Ebbinghaus, *supra* note 71, at 97.

practical way to ascertain right and wrong.⁷³ The discovery of moral wrong becomes an endless debate and constant struggle with no end in sight.

In sum, pure reason unaffected by personality and devoid of experience is a logical impossibility. One who is not informed of the past nor instructed about the future has no value foundation to work from. “*A priori* cognition” constrained only by the “categorical imperative” and “universality maxim” does not inform upon what constitutes right and wrong, much less be able to provide a basis for conduct guide, policy debate, legislation enactment, and judicial decision making. As aptly pointed out by one scholar:

The moral law (the categorical imperative) springs from pure reason, i.e.[.] from our reason in that mode of its operation which is not to any extent conditioned by empirical (material) factors. Issuing as it does from pure reason, the moral law is therefore by necessity a merely formal paradigm, an abstract form, completely indeterminate in so far as reference to the empirical dimension of reality is concerned. Our maxim, on the other hand, which need to be tested in some way or other by this prescriptive law, are material principles, concrete principles, namely empirically determined (and subjective) rules of voluntary action.⁷⁴

All choices are logically acceptable—if they are derived from free will. In this sense the classical retributionists fail to articulate clear and ascertainable substantive principles to guide our search for corporate misconduct. They also fail to provide us with objective means to evaluate the “correctness” of a corporation’s moral choices.

⁷³ Paul Dietrichson, *Kant’s Criteria of Universalization*, *supra* note 66, at 163, 167.

⁷⁴ Dietrichson, *supra* note 73, at 166.

Last, but not least, they fail to provide the corporation executives with rules and guidance in interpreting and applying the moral imperatives they discovered.

3. Public Opinion and Moral Wrong

Some have suggested that we should look to public sentiment to determine criminal conduct. Lord Devlin would ask the “man in the Chapam omnibus.”⁷⁵ A public opinion poll may be a rough indicator.⁷⁶ Legislature, grand juries and trial juries all reflect public morality.⁷⁷ In this regard, the U.S. Supreme Court has opted for a mechanic approach to ascertaining the notion of fairness.⁷⁸ However, all of these fall far short of what is required by Kant: “The act of Choice that can be determined by pure reason, constitutes the act of Free Will. The act which is determinable as a sensuous impulse or stimulus would be irrational brute Choice.”⁷⁹

⁷⁵ See Lord Patrick Devlin, *Morals and The Criminal Law*, in *THE PHILOSOPHY OF LAW* 78 (Ronald M. Dworkin ed., 1977).

⁷⁶ See Francis T. Cullen et al., *Dissecting White-collar Crime: Offense Type and Punitiveness*, *INT'L J. COMP. & APPLIED CRIM. JUST.* 15 (1985); Francis T. Cullen et al., *Public Support for Punishing White-collar Crime: Blaming the Victim Revisited*, 2 *J. CRIM. JUST.* 481 (1983); Francis T. Cullen et al., *The Seriousness of Crimes Revisited: Have Attitudes Toward White-collar Crime Changed?*, 20 *CRIMINOLOGY* 83 (1982); Laura Schragger & James F. Short, *How Serious a Crime? Perceptions of Organizational and Common Crimes*, in *WHITE COLLAR CRIME: THEORY AND RESEARCH* 14 (G. Geis & E. Stotland eds. 1980); Marvin E. Wolfgang, *Crime and punishment*, *N.Y. TIMES*, Mar. 2, 1980, at E-21.

⁷⁷ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“Eighth Amendment judgment. . . should be informed by objective factors. . . attention must be given to the public attitude concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.”).

⁷⁸ In deciding whether capital punishment is offensive to the Eighth Amendment, the Court has consistently resorted to counting death penalty states vs. abolitionist states. This mechanical jurisprudence does not conform to the dictate of arriving at a moral principle by pure reason. *Gregg v. Georgia*, 428 U.S. 153, 179 (1976).

⁷⁹ To the extent that public opinion polls, political elections and jury determinations are more affected by impulses than based on pure reason, the resulting judgment does not fit Kant’s methodological considerations. More significantly, if pure reason is the guide, head counts are a poor substitution for enlightened debate and

Public opinion expressed through legislature, juries, or polls, holds no sway with Kant's idea of right and wrong and cannot be used to guide public policies or used as conduct norm for the following reasons. First, the opinion of the public may or may not be guided by pure reason and is likely to be influenced by personal disposition, self-interests, emotions, feelings, and external influences and pressure.⁸⁰ Second, the search for the right moral rule is an individual undertaking and not a collective exercise.⁸¹ Third, individual will as informed by pure reason is exercised autonomously. Public consensus or parliamentary majority cannot be used to over-ride individual autonomous will.⁸²

4. Categorical (Moral) Imperatives and Practical (Material)

Maxims⁸³

Given an ascertainable categorical imperative, there is still a problem of extracting the proper conduct norms (practical maxims). Whether a conduct is right or wrong cannot be answered totally in the abstract. Conduct norm cannot be deduced from moral principles without any contextual reference. Killing another human being

reflective judgment on moral issues.

⁸⁰ A responsible social agent is different and more than a rational person. To be truly an autonomous agent worthy of Kant's respect, one has to give due consideration to all aspects of one's human existence, which rationality forms but a small part. People have endowed personality, acquired appetite, and developed emotions. See George A. Schrader, *Autonomy, Heteronomy, and Moral Imperatives*, in *KANT: FOUNDATIONS OF THE METAPHYSICS OF MORALS*, *supra* note 66, at 126.

⁸¹ See *supra* note 58.

⁸² Ebbinghaus, *supra* note 71, at 106 ("[I]f he subjects himself to the arbitrary will of another, cannot possibly have the character of a law for his will, and therefore cannot possibly be a categorical imperative; for such a law would make him have no will of his own at all—consequently he would also cease to be a person.").

⁸³ See generally Beck, *supra* note 66, at 134-62.

becomes a murder when it is done under morally unacceptable circumstances.⁸⁴ What is or what is not morally acceptable depends on the attending facts and circumstances of each case. A person who is unaware that the victim does not consent to having sexual intercourse cannot be held accountable for rape.⁸⁵ A person who does not know all the facts cannot be expected to tell the whole truth.⁸⁶

5. Indeterminacy of Corporate Responsibilities

The standard fact-pattern for the retribution model is a discrete criminal act, perpetrated by a single individual, happening at a point of time, with an identifiable victim, causing immediate, noticeable injury or damage. Finally, there are limited contextual factors to be considered. The typical example would be murder, which Kant used to illustrate his theory of retribution. The moral imperative is clear: “thou shall not kill.” The conduct norm (maxim) is easy to derive: “thou shall not kill unjustifiably.” The interpretation and application of the maxim is unproblematic. When the applicable rule (categorical imperative, practical maxim, and interpretation rule) is clear and attending circumstantial considerations few—right and wrong can

⁸⁴ Every time a judge or jury decides to acquit a criminal, we are drawing a line on the morality map, explicating what is acceptable or unacceptable. Criminal law violations, their prosecution and subsequent convictions all help to continuously define the outer boundary of morality.

⁸⁵ See, e.g., *Director of Pub. Prosecutions v. Morgan*, 1976 A.C. 182, 2 All E.R. 347, [1975] 2 W.L.R. 913 (H.L.) (describing where the defendants were acquitted, on the basis of mistake of fact, of raping the wife of an N.C.O. when they construed the struggle of the victim as a charade stimulating her sexual excitement).

⁸⁶ The moral law (the law of pure practical reason) is an empirically empty principle, a purely formal principle. A maxim, on the other hand, is an empirically determined such-and-such a type of empirical circumstances, I will adopt such-and-such rule as my action guide. See Paul Dietrichson, *Kant's Criterial of Universalization*, in *KANT: FOUNDATIONS OF THE METAPHYSICS OF MORALS*, *supra* note 66, at 173-74.

easily be established. Moral imperative and practical maxim converge. There is no need to draw any exceptions. Moral indignation⁸⁷ is high when damage is tangible, harm is focused, victim and offender are identifiable and fear of crime is transferable.⁸⁸ Then and only then, is moral responsibility not questionable.

These conditions usually do not obtain in the modern business world, where corporate morality and criminality has to be determined amidst a large array of circumstantial facts and situational factors. Corporation misconduct is often characterized by the products of an amalgamation of many interdependent and interrelated activities and events. It can be a culmination of events conducted over a protracted period of time. It can be a combination of activities occurring at the same time. Most of the activities, viewed independently, are of a morally neutral nature. Taken together, they breached a moral norm. Each of the activity is a necessary but not sufficient condition for attaching moral guilt. All are necessary to demonstrate a moral transgression. The moral wrong can thus be described as a set of patterned or structured activities. This scenario raises the ultimate question: which event or activity, in sequence or combination, constitutes a corporate immoral conduct? Given the multitude of

⁸⁷ Kant's principle of retribution is based on pure rationality. The common notion of revenge is founded on raw emotion. There is however a nexus. The principle of retribution legitimizes revenge and feuds emotions. Revenge calls for a formal finding of retribution in giving vent to its proper release.

⁸⁸ By transferability of fear I mean that others come to share the loss and feel the anguish suffered by the victim. Fear transference is based less on cognitive awareness of objective risk but depends more on emotional response to common risk and harm. See WESLEY G. SKOGAN & MICHAEL G. MAXFIELD, *COPING WITH CRIME: INDIVIDUAL AND NEIGHBORHOOD REACTIONS* at ch. 5 (1981).

business activities being conducted, it is difficult to advance any universal moral principle, which, when applied, is not subject to some exceptions. An *a priori* categorical moral imperative, as supplied Kant, will have little utility as conduct guide for corporations. The contingent nature of the practical maxim, the infinite possibilities generated by the combination of events, the dynamic nature of interacting events, and the evolving contextual circumstances, invite ad hoc judgment of the moral propriety of each and every patterned action in point of time. It is the difference between fixed, absolute, and universal categorical rules as juxtaposed to evolving and indeterminate practical maxims that allow for the practice of situational ethics—a practice which is condemned by Kant as creating materially based conduct norms not worthy of moral consideration.

In practical terms, the ever changing material circumstances and fast moving operational reality of the business environment invites open disregard of any fixed moral and legal norms. The lack of established moral imperatives promotes corporate decisions and conducts that are based on contingent “sets” of material circumstances. After the fact judgments of right or wrong, though serving emotional needs such as retribution or revenge, are not helpful in placing moral blame, especially when the critical events as perceived by the key actors diverge substantially from that of the affected victim, reviewing judge, or interested public. The contingent nature of the conduct norm allows for good faith interpretation and debate. The lack of consensus, in turn, detracts from the legal

correctness, moral authority and political legitimacy of any conduct norm based on retribution.

A categorical imperative or practical maxim governing corporate decisions or conducts must anticipate all the contingencies of such collective and dynamic effort. It also has to make allowance for the changing nature of the make-up of the group. General admonition is next to useless. Universal, simple and clear-cut conduct norms are impossible to design.

Given this standard, discrete fact-pattern for modern corporate criminality, the determination of conduct norm or practical maxim cannot be easily ascertained. An action is not morally right or wrong universally and categorically but more or less wrong contextually and relatively. It is only wrong if done in a certain time, manner, place, and under certain conditions and context. The excepting conditions are so many and varied that any universal normative principle is inherently suspected. The deviations from the norm are so numerous that they swallowed the rule. Perhaps this is why people's feelings towards corporate criminality are ambivalent. Let me briefly elaborate. Whereas clear, unequivocal moral principles are easy to communicate, advocate and defend, a conditional rule, which is contingent on a set of yet to materialize circumstances, is difficult to explain to an audience and inhibits a consensus over the wrongfulness of a corporate act.

6. Distributive justice and Individual Justice: Bentham or Kant

Most immoral acts that come to mind are without any socially redeeming value. Killing a person without justification is murder. Wounding others without excuse is an assault. Having sex with another without consent is a rape. These are all instances of wrongful conduct perpetrated on person upon another. One person's gain becomes another's peril. The activity engaged in has no extrinsic functional value and intrinsic moral worth. Maiming and hurting has no moral value or instrumental utility beyond satisfying ones subjective needs for revenge or money.⁸⁹

Corporate conduct is rarely without any social redeeming value and moral worth. In fact, it is often functional in creating wealth for some and social goods for all. The size of International Telephone and Telegraph Company in the 1980s allows it to monopolize the market but also provides more access to long distance phone services through broader coverage and lower rates. Making tires creates pollution but facilitates travel. The Ford pinto killed innocent drivers but saved the consumers an average of \$11.00 per car. Even the victims of the burnt vehicles enjoyed the fruit of consumerism (a cheaper vehicle), until they fell victim to the accident. Extra earnings are made available for other socially beneficial activities such as community

⁸⁹ When criminals diverge from their self-serving mode, much of our emotional objection is diluted. A person who kills to relieve others of agony of living is not hated. No one asks for revenge or retribution. When Robin Hood and Little John robbed King John blind, people actually felt a sense of reverse just desert. Although theoretically in criminal law the question of motive is not important, but in terms of conviction and sentencing (especially by jury) it is perhaps the most important criteria to determine moral culpability and in turn criminal responsibility. See LAFAVE, *supra* note 5, at 105.

development or safety research.⁹⁰

In other words, there is a distributive justice in play—one addressing how social goods should be shared and community welfare improved, which is seldom addressed by retributionists. Seldom are business decisions irrational and without counterbalancing economic and social utilities, if not even moral ones.⁹¹ No act is in fact categorically bad, as suggested by Kant, only relatively so.

Without a proper moral calculus, which the retributionists refuse to consider, it is difficult to condemn an act as unjust to all those who are implicated or affected by it. The final arbiter of corporate social—if not moral—responsibility is not the moral philosopher but practical policy makers echoing the wants and needs of the public. The best forum to debate the propriety of the corporate conduct is not in criminal courts but in the legislature and court of public opinion.⁹²

7. Justice Principles in Conflict

All along we have assumed the validity and primacy of using retribution as basis of assigning moral and criminal responsibility. The popularity and appeal of Kant's categorical imperative rests with its simplistic elegance. If we should diverge from this simplistic

⁹⁰ At this juncture I am not prepared to question the vitality of our political economic system as a whole and thus avoid raising the more controversial question of whether the free market and capitalistic system benefits human kind, more than other arrangements. Nor am I interested in raising issues with allowing the corporations to channel our important resources. I can concede the evilness of our economic system in allowing for inequitable distribution of resources and still be able to sustain my argument that as a general rule all social choices in whatever political economic system involves the distribution of limited resources benefiting some and hurting others.

⁹¹ See text accompanying *infra* notes 93-99

⁹² This is the general admonition of Stone. See STONE, *supra* note 62.

model, an interesting, if controversial question, is raised as to how the retribution model can accommodate other conflicting moral principles.⁹³ As suggested in the section above, corporation actions are not entirely without other social values and moral claims, e.g., promoting social welfare in general or saving life of another in particular. What happens if Kant's categorical imperative comes into conflict with other equally significant moral principles? Should a corporation ever take the life of a person or, in the alternative, refuse to save the life of a person so that other lives can be preserved?⁹⁴ Should it ever lie to improve social conditions?⁹⁵ Should it be able to prioritize its use of resources so that the benefits of its product are available to some and not others?⁹⁶ Ultimately, should it engage in any business at all? After all, industrial enterprises have inherent risks of life and limb.⁹⁷ All corporate choices have attending costs and

⁹³ See JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* (1986).

⁹⁴ The dilemma of a doctor comes to mind. In deciding to provide a transplant organ for one and not another he is making critical life choices. So must the corporate executives in most business decisions. The routineness of the decision process and administrative overtone of the decision (I will operate on you first) should not hide the serious effects of such critical ethical choices.

⁹⁵ The experimentation with drugs comes to mind. Giving placebo is a form of lying but no one objects to this experimental design. Most test drugs involve some yet to be specified health hazard and ill effects and the society is quite prepared to condone its application to science. See JOSEPH FLETCHER, *MORALS AND MEDICINE* at ch. 2 (1954). At a more general level, living in a society requires the sacrifice of our most treasured freedom to protect, preserve, and advance those of others. To the extent that Kant refused to consider this social reality and moral dilemma, his theory is flawed both conceptually and when practiced. Rousseau and Hobbes, in realizing this flaw, have made the individual relinquishes his most treasured self – natural freedom, in return for a much tamer version – civil liberty. See generally ROUSSEAU, *supra* note 38.

⁹⁶ The finding of cure over AID comes to mind. The discovery of AZT saves the life of many. Should the pharmaceutical company be asked to lower its price or even distribute the drugs free on moral ground? If not, and someone die because he/she cannot afford the drug, should the drug company be held liable?

⁹⁷ The argument that workers assumed the risks by working and consumers agreed to the danger by buying does not address the issue of corporate moral responsibility. As a moral person should the corporation knowingly engage in any activities that

benefits. In most instances, they are calculated in economic units. But an economic medium of exchange should not obscure the ethical nature of such choices.⁹⁸

The refusal to deal with the issue of competing moral principled detracts from the moral strength of the categorical rule. The public is right in rejecting the proposition that corporate misconduct is necessarily without any social redeeming value of one sort or another. Their lukewarm attitude to corporate crimes reflected as much.⁹⁹

C. Who Should Be Held Responsible for Corporate Misconduct?

A latent function of any theory of punishment is to determine who deserves to be punished? Hart called this the “distribution of punishment issue.”¹⁰⁰ Distribution of punishment raises two broad types of questions: whether the corporation should be punished? Who in the corporation should be punished?

Retribution requires that punishment falls only on people who are morally at fault—those who voluntarily and intentionally engaged in a crime.¹⁰¹ In as much as a corporation is not an individual

have the potential to kill or main? Alternative, should a corporation not get into a business with a lesser degree of danger to either the workers or public.

⁹⁸ This basic dilemma in ethical choice appears in many forms. Police officers have to make this kind of decision many times during a day - from lying in the negotiation with hostages to the use of deadly force to stop a fleeing felon in a crowded street. *See* MICHAEL A. CALDERO & JOHN P CALDERO, *POLICE ETHICS: THE CORRUPTION OF NOBLE CAUSE* (2004)

⁹⁹ I am not suggesting that the public should refuse to take corporate criminals seriously. Judging by the polls, they already do—even though there are substantial problem with the validity and reliability of such measures. All I am posturing is that, when confronted with all the facts, the public may be willing to balance specific corporate wrongdoing along with general cooperate contributions in adjusting their overall (retributive) attitude towards the corporation.

¹⁰⁰ In punishment debates justification issues are distinguished from distribution issues. The former deals with the question why we punish. *See also* H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 11 (1968) (hereinafter *PUNISHMENT AND RESPONSIBILITY*)

¹⁰¹ *See* *PUNISHMENT AND RESPONSIBILITY*, *supra* note 100, at 11.

person, the question of moral culpability is a question of continuous debate.¹⁰² It is now common to quote Baron Thurlow that a corporation “has no soul to be damned, and no body to be kicked.”¹⁰³ The statement stresses three fundamental impossibilities in treating the corporation as a jural person: a corporation cannot harbor “evil” intent because it has no mind of its own; a corporation has no “autonomous” volition because it cannot act by itself and represents itself in a court of law; and the corporation cannot suffer the pains or guilt of punishment because it has no feeling or conscience. A fourth disability can be added. A corporation created by state charter to conduct legitimate business cannot act illegally beyond its legal authority.¹⁰⁴ For retribution debate the critical dimension is whether moral culpability can be imposed on an impersonal entity.¹⁰⁵

1. Retribution and Moral Culpability or the Corporation

¹⁰² Owen Fiss once observed: “The concept of wrongdoer is highly individualized. It presupposes personal qualities: The capacity to have an intention and to choose. Paradigmatically, a wrongdoer is one who intentionally inflicts harm in violation of an established norm.” Fiss, *supra* note 11, at 22. See LEONARD H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* (1969) (stating that individuals not corporation should be the basis of corporate criminal liability); Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 19, 21, 29-30 (1957) (explaining that common law mens rea doctrine cannot easily be reconciled with corporate responsibility).

Some have argued that the concept of retribution should change to adjust to social needs. Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1983) (stating that corporate criminal responsibility is possible under reactive fault concept); Peter A. French, *Types of Collectivities and Blame*, 56 THE PERSONALIST 160, 166 (1975) (stating that conglomerates can be justifiably held blameworthy). Others suggested concurrent punishment of offending corporation and individuals. See Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468 (1988) (stating that corporations as well as individuals should be held accountable).

¹⁰³ THE OXFORD DICTIONARY OF QUOTATIONS 547 (2d ed. 1966).

¹⁰⁴ See N.C. Collier, *Impolicy of Modern Decision and Statute Making Corporations Indictable and the Confusion in Morals Thus Created*, 71 CENTRAL L.J. 421, 423 (1910).

¹⁰⁵ For a comprehensive discussion of legal doctrinal difficulties in holding corporation criminally liable, See LEIGH, *supra* note 102.

Kant postulated that what is “right” is what is required by “pure reason.” “Pure reason,” according to Kant, is the source of “natural laws,” which, in turn, forms the foundation of secular legislation.¹⁰⁶ The basic criteria for assessing moral culpability, with Kant as with other moral philosophers, is a capacity to conduct moral reasoning and an ability to make responsible choices.¹⁰⁷ Harm alone is a necessary but not sufficient to attribute moral culpability and impose criminal punishment.¹⁰⁸ There must be some concurrence between harmful act and immoral mental state before retribution and punishment attaches. The retribution’s position of moral culpability is written into criminal jurisprudence. It was said that:

Man is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is subjected properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he has a capacity to obey. The consent of the will is that, which renders human actions either commendable or culpable, as there is no law there is no transgressions, so regularly there is no will to commit an offense, there can be no transgression or just reason to incur the penalty. . . .”¹⁰⁹

2. Retribution and Moral Culpability of the Corporate

¹⁰⁶ LEIGH, *supra* note 102, at 240-41.

¹⁰⁷ Aristotle argued that justice dictate that moral culpability be contingent on a voluntary action. See HERBERT MORRIS, *FREEDOM AND RESPONSIBILITY* 25 (1962). Hart observed that criminal liability must be based on a guilty mind. *PUNISHMENT*, *supra* note 7, at ch. 2. Most criminal defense focuses on the mental capacity of the defendant, e.g., accident, provocation, duress, mistake of fact or insanity. This general observation is subjected to exceptions of strict liability and vicarious liability doctrines. Both doctrines are based on policy and not justice consideration. In some instances society may find it beneficial to impose criminal liabilities without the requisite mental state. But the result is not compatible with justice principles.

¹⁰⁸ A culpable mind and freedom to act are the necessary conditions of moral responsibility. Kant’s whole moral philosophy is to promote pure rationality and autonomous will.

¹⁰⁹ 1 HALE, *PLEAS OF THE CROWN* 14-15 (1986).

Members

Lastly, it is most difficult to pinpoint responsibility within a corporation. The corporation is a collective of humanity. The decisions and actions of the corporation are carried out by a number of people in the organization. They hold different ranks and functional responsibilities. They work alone or as a team. They are more or less accountable for some or all aspects of a decision or action. They operate with different degree of shared knowledge, purpose and involvement. A decision may be arrived at individually with or without consultation. It may be based on the information, research or opinion supplied by others. It may be arrived at formally by vote or informally by discussion or debate. It can be the result of a delicate negotiation and compromise or as determined by fierce fighting with forced settlement. An action may be done individually or as a team. If done individually, it may be done with or without help or supervision. If it is done collectively, it may be the result of a joint project or the product of a series of a value added, cumulative processes. The action may build upon the foundation of prior work of others, or form the basis of future work.¹¹⁰ The membership of the corporation changes over time. The people who plan, direct, manage and execute the corporation's policy are continuously in flux.

¹¹⁰ Criminology research and criminal jurisprudence has been pre-occupied with how the past influence the present and future. There is a need to study how the future may impose on the present and the past. Corporate activities are mostly done to actualize a corporate plan that runs into the future. Corporate members work in an organization that will define his existence during his career. Kam C. Wong, *A Matter of Life and Death: A Very Personal Discourse*, 1 GEO. JL & PUB. POL'Y 339 (2003).

The roles, functions, powers, responsibilities and system design of the organization are constantly being modified. In as much as this operational mode of a modern corporation is a reality, in what sense and to what extent can we hold the individuals within a company responsible for a criminal act of the corporation?

D. How Should Corporate Crimes and Criminals Be Punished?

Retributionists determine how crimes and criminals should be punished by looking at the seriousness of harm, as intended or felt. However, the nature of the harm caused by corporate misconduct escapes simple and clear assessment, thus making the determination of punishment difficult and imprecise.

The harm done by corporate misconduct, often times, is of an incremental and cumulative nature. Each of the harmful acts may be inconsequential. Together they register substantial harmful effects. The individual harm may not be discernable but the aggregate damage is easily noticeable. The individual loss may not be discernable; the corporation however stands to benefit in aggregate terms. The harm or risk is usually diffused over a large population. Individual victims may only suffer inconsequentially or even not at all. Last, but not least, the nature of harm or exposure to risk is not identical for all within the at risk group.¹¹¹

A criminal act requires the demonstration of a resulting harm. An immoral act contemplates interference with others' autonomy and

¹¹¹ Water pollution does not only affect the riparian rights of people using the river. It also causes tourists, fisherman and may be even other industrialists who might be dependent on the quality of the water.

freedom. If the harmful effect of a corporate conduct is experienced differentially by different members of a group (including society or community) and at different time, place, and circumstance there is likely to be a difference in judgment of when harm is sufficient to be declared immoral or illegal. When only the group is being harm as a collective, and not that of the members individually, whose moral judgment should be taken into account? The lack of focused harm or concentrated damage on any one individual diffuses the impact of the harm and dilutes the feeling for retribution. When the harm is done to a group, especially when there is no flow through of deprivations, it elicits distinct and different emotion and/or cognitive response, than when an individual is personally injured.

Lastly, and more significantly, the victim of a corporate crime is not fully aware of the multiplicity of events or activities leading up to the wrong. Nor will the victim be able to see or experience all the consequences of the misconduct—be they contemporary or in the future. If the victim is made aware of all the circumstances, she is unlikely to have the individual ability (intelligence and education) or capacity (time or resource) to understand/investigate the whole criminal event. More significantly, she is not experientially equipped to appreciate the magnitude of the wrongdoing. In sum, the victim is not likely to have an “awareness” or “feel” for the wrongdoing. Ignorance leads to apathy and indifference on the one hand and emotionalism and sensationalism on the other. Retributive emotions giving vent to victimization is socially constructed and culturally

induced.

III. Conclusion

This Article began with the inquiry, “Can a ‘fair’ sentence for a corporate criminal be determined by the dominant, retributive approach to punishment?” At the close of Part II of the Article it became clear that retribution cannot be used to justify punishment satisfactorily or to calibrate sentencing for corporations equitably. I have shown that the basic assumptions and fundamental postulates of retribution cannot satisfactorily assess blame, impose liability, and exact restitution on corporations. This is so because offending corporations do not think, act and react the way ordinary people do.

Nonetheless, this Article stops short of challenging the moral anchor and cultural roots of the retribution. I do not doubt that as long as there is crime and punishment there will be blaming and condemning, retribution and restitution, reformation and reintegration.¹¹² Retribution is a staple of social life because society *must* go on attributing (moral) blame, imposing (legal) liability, and securing (personal, at least personalized) redemption.¹¹³

¹¹² HERBERT A. SIMON, *MODELS OF MY LIFE* 87-88 (MIT Press 1996) (1991) (asserting that “boundedly rational agents experience limits in formulating and solving complex problems and in processing (receiving, storing, retrieving, transmitting) information”).

¹¹³ In addition, this Article mounts only a limited challenge to retribution’s epistemology and not a wholesale attack on its moral authority and cultural legitimacy. Some might find it odd that this Article challenges the epistemological seed of retribution without disputing its cultural roots. This is not hard to explain. It is one thing to challenge the origin and method of knowledge, analytically or empirically, it is quite another to reject value postulates and culture system. The former helps us to see clearer and further, the later denies who we are as a people

However, this is not to say that we should embrace retribution without reflective judgment. This Article invites questions as to whether, when, where, what, how, and why should retribution be applied in specific cases. I do indeed contend that retribution, at least as applied to corporation setting—and by extension collective life and organized activities, has inherent limitations and irredeemable flaws.

How then should we treat corporate crimes and abuses? In challenging the retribution theory, this Article hinted at other possible philosophical and theoretical justifications for corporate punishment,¹¹⁴ starting with a “utilitarian” approach. Instead of playing a moral “blame game,” we can engage in a constructive and remedial “moral calculus” exercise.¹¹⁵ Utilitarianism is better suited to delineating prohibitions, finding liabilities and fashioning sanctions for corporation.

As concepts, utilitarianism and corporatism are cut of the same intellectual cloth. Both were born out of positivism: Utilitarian principles and the corporation both arose to promote public goods; and both are tempered by rationalism. Utilitarianism is driven by logical empiricism, and the corporation is informed by economic

and what we are made up of as a person.

¹¹⁴ M. DAVID ERMANN & RICHARD D. LUNDMAN, *CORPORATE DEVIANCE* (1982) (bringing an organizational theoretical perspective to the study and control of corporate deviance).; SALLY SAMPSON, *CORPORATE CRIME, LAW, AND SOCIAL CONTROL* (2002) (stating that empirical evidence shows that deterrent theory might not work effectively against mid-level managers); KIP SCHLEGLE, *JUST DESERTS FOR CORPORATE CRIMINALS* (1990) (positing that vengeance and desert are applicable to corporate regulatory offenses and internal governance structure; and decision making process can be modified to effectual control).

¹¹⁵ John Braithwaite, *White Collar Crime*, 11 ANN. REV. SOC 1, 14 (1985) (explaining that retribution theories irrelevant to moral choices in real world unless tempered with rational faculty and utilitarian calculus)

rationality. Both are pragmatic enterprises: Utilitarianism is a teleological exercise and the corporation is a result-oriented entity. Hence, the utilitarian approach has much to offer in deciding in concrete, specific, and verifiable ways, whether, how and who to punish

The research agenda is set. We need to find a viable alternative to the retribution theory as justification for sanctioning corporate criminality. Utilitarianism is a good place to start.