

CORPORATE CRIMINAL LIABILITY IN THE TWENTY-FIRST CENTURY: ARE ALL CORPORATIONS EQUALLY CAPABLE OF WRONGDOING?

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I. INTRODUCTION

A simple glance at the literature on corporate criminal liability shows that little attention has been paid to the question of whether all—as opposed to only some—corporations are potentially liable in criminal law. This Article will advance a potentially groundbreaking thesis: not all corporations have the capacity to be guilty and therefore criminally liable. Only those corporations that have achieved a certain degree of internal self-referential complexity should be subject to the imperatives of criminal law. The others should be treated as corporate offenders with “diminished capacity” or “immaturity” and therefore not subject to “real” punishment.

Certainly this assertion will generate strong criticism from both sides of the current debate on corporate criminal liability. Scholars and practitioners opposing the institution of criminal liability may argue that even if only some corporations—and not potentially all of them—are to be subject to criminal responsibility, it would still be too many.¹ On the other side, stark advocates

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1. See Carlos Gómez-Jara Díez, *Corporate Culpability as a Limit to the Overcriminalization of Corporate Criminal Liability: The Interplay between Self-Regulation, Corporate Compliance, and Corporate Citizenship*, 14 *New Crim. L. Rev.* 78, 80–82 (2011) (criticizing the modern application of criminal law to corporations through respondeat superior and proposing self-regulation, corporate compliance, and corporate citizenship as organization-based alternatives to assessing corporate culpability); see also e.g. John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 *Am. Crim. L. Rev.* 1329, 1329 (2009) (arguing that there is “no theoretical justification for corporate

of corporate criminal liability will probably pinpoint that it is hard enough to defend the institution itself, and it would get even harder if there were a need to distinguish between “capable” and “non-capable” corporations.

Yet, if not all human beings are potentially accountable according to individual criminal law, why should all corporations be potentially responsible according to corporate criminal law? Would it not more accurately respond to the logic of criminal law to say that, to the same extent that not all human beings are potentially criminally accountable, not all corporations are potentially criminally accountable? This Article’s thesis is that a genuine corporate criminal law must differentiate between corporations that have criminal capacity, i.e., that may be considered guilty at trial, and those that have no such capacity (or a diminished one), i.e., against which certain measures and sanctions may be adopted, but not attaching the “guilt” label. Only organizations that have truly emerged as corporate actors should be rendered criminally liable.

To develop this position, this Article uses systems theory, and more specifically the theory of the organizational hypercycle and the constituency of corporate actors as high-order autopoietic systems. This Article argues that the emergence of the corporate actor is a basic requirement to affirm the social reality of corporations as demanded by criminal law. Assigning blame to an entity is a serious matter that goes far beyond nominalism, and to this extent something beyond bare incorporation is required.² This may thwart the aspirations of some criminal law scholars, but on the other hand it may enthrall those who feel that there is a social need to punish entities that have “no soul to be damned, and no body to be kicked.”³ To put it briefly: to avoid contradicting criminal law’s main logic, the State must punish for substantive (not just formal) reasons. The current regulation of corporate criminal liability in the United States does not fully acknowledge

criminal liability”).

2. See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 Ind. L.J. 473, 477–478 (2006) (suggesting that criminal liability for corporations as entities would deter corporate misconduct by assigning blame to the corporation itself as the wrongdoer).

3. *The Concise Oxford Dictionary of Quotations* 259 (2d ed., Oxford U. Press 1981) (quoting Edward, First Barron Thurlow 1731–1806).

this tenet, although some provisions reflect it to a higher degree than others.

In this sense, the Federal Organizational Sentencing Guidelines distinguish between closely held corporations and other organizations. This Article argues that closely held corporations should be considered corporations with “diminished capacity” or “immaturity,” because they are not fully separated from their owners. As the commentary of the Federal Sentencing Guidelines explains, for practical purposes most closely held organizations are the alter egos of the owner-managers.⁴ The consequence is straightforward: the court may offset the fine imposed upon a closely held organization when one or more individuals, each of whom owns at least a five percent interest in the organization, has been fined in a federal proceeding for the same offense for which the organization is being sentenced.⁵ The amount cannot exceed the amount resulting from multiplying the total fines imposed on those individuals by those individuals’ total percentage interest in the organization.⁶

Also related to the corporate diminished capacity issue is the regulation of those organizations operating primarily for a criminal purpose or primarily by criminal means: criminal-purpose organizations should receive a fine sufficiently high to divest these organizations of all their assets.⁷ These corporations are only used as vehicles or instruments for criminal activities⁸ and therefore should not be recognized as corporate citizens entitled to certain rights. They do not operate as law-abiding citizens that only occasionally may have committed a crime. They are treated as dangerous objects that should be eradicated from the legal system. Here, criminal law is not dealing with corporate citizens with full capacity, but is fighting against corporate enemies.

The United States’ system still tends to overcriminalize corporate activity and does not fully distinguish between capable and non-capable corporate entities. This is not to say, as some others have argued, that the institution of corporate criminal liability is

4. *U.S. Sentencing Guidelines Manual* § 8C3.4 cmt. background (2010) (available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/guidelines_chapter_8.htm).

5. *Id.* at § 8C3.4.

6. *Id.*

7. *Id.* at § 8C1.1 cmt. background.

8. *Id.*

itself a sign of overcriminalization.⁹ This Article contends that corporate criminal liability is a natural consequence of the citizen-status that full-fledged corporations have gained in the twentieth century. But as others have written extensively, overcriminalization is well spread in the areas of white-collar crime and federal criminal law,¹⁰ which are two areas in which corporations are tremendously active.¹¹

Therefore, this short Article's goal is to present a feasible thesis about the foundations of corporate diminished capacity and some of its possible uses. Part II of this Article will conduct a brief review of the history of corporate criminal liability in the United States. Part III will explain what it means for some corporations to have a diminished capacity for criminal law. Part IV will analyze the consequences to be drawn from this perspective, acknowledging that setting a specific benchmark for capable and non-capable corporations is a real challenge to be met in the future.

Finally, it is true that, at least for now, another problem in United States federal criminal law seems to be coming upon corporations: overenforcement.¹² Though enforcement of corporate criminal liability has dramatically increased in the twenty-first century,¹³ especially through corporate deferred prosecutions,¹⁴ the levels of enforcement in individual criminal law are still well above the average enforcement in corporate criminal law. But it is only a matter of time until this downside of American law will

9. See e.g. Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 Am. Crim. L. Rev. 1279, 1281–1282 (2007) (criticizing Congress for enacting too many criminal statutes and enhancing criminal penalties, stating that such overcriminalization reduces the deterrent effect of criminal law).

10. See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 748–749 (2005) (discussing similarities and differences between various forms of overcriminalization).

11. See *id.* at 780–781 (noting that corporations and businesses are the main potential defendants in federal regulatory and white-collar crime cases, including scandals throughout various industries).

12. See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. 1743, 1773–1774 (2005) (arguing that overenforcement of corporate criminal law can have the paradoxical effect of discouraging corporations from internal deterrence measures).

13. Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 Brook. J. Corp. Fin. & Com. L. 45, 51 (2006) (noting that the Justice Department increased its focus on criminal prosecutions and convictions since the enactment of the Sarbanes-Oxley Act).

14. *Id.* at 55–67 (discussing the rise of deferred prosecution and non-prosecution agreements for corporations under criminal investigation).

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also hit American corporations, and, as the Arthur Andersen case¹⁵ has shown, the impact may be devastating.

II. A BRIEF HISTORY OF CORPORATE CRIMINAL LIABILITY IN THE UNITED STATES

Since the landmark decision of *New York Central & Hudson River Railroad Co. v. United States*,¹⁶ the theory of corporate criminal liability for malfeasance crimes has been deeply rooted in the American criminal law system.¹⁷ In *Hudson*, the United States Supreme Court employed the civil theory of vicarious liability to justify a criminal law institution.¹⁸ This approach was based on efficiency and policy,¹⁹ and with time it became more

15. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

16. 212 U.S. 481 (1909). See generally Charles G. Little, *Punishment of a Corporation—The Standard Oil Case*, 3 Ill. L. Rev. 446 (1909) (offering an early discussion of the case). The need for corporate criminal liability was then questioned over the following years. See e.g. George F. Canfield, *Corporate Responsibility for Crime*, 14 Colum. L. Rev. 469, 477, 480 (1914) (arguing that corporate criminal liability is an irrational fiction because a corporation cannot have a criminal state of mind); Frederic P. Lee, *Corporate Criminal Liability*, 28 Colum. L. Rev. 1, 16–17, 22 (1928) (criticizing corporate criminal law for attaching liability to actors without any moral fault).

17. See William S. Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* 9–43 (U. of Chi. Press 2006) (providing a recent, comprehensive exposition through the various stages of corporate criminal law history); see also Kathleen F. Brickey, *Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers and Agents* vol. 1, 63–86 (2d ed., Clark Boardman Callaghan 1992) (overviewing the evolution of corporate criminal liability as a common law tradition); Richard S. Gruner, *Corporate Criminal Liability and Prevention* § 2.02 (L.J. Press 2004 & Supp. 2011) [hereinafter Gruner, *Liability and Prevention*] (arguing that corporate criminal liability has a long history as a regulatory tool in American law based on public policy concerns rather than the moral concerns that usually motivate criminal law); Richard S. Gruner, *Corporate Crime and Sentencing* 76–84 (Michie Co. 1994) (examining the historical development of corporate criminal liability and arguing that “[c]orporate criminal liability has long been seen as a mere construct divorced from principles of individual liability”); Leonard Orland, *Corporate Criminal Liability: Regulation and Compliance* §§ 1.05[D], 1.07, 2.01 (Aspen Publishers Supp. 2006) (explaining that corporate criminal liability was rejected in the early 1700s but grew exponentially after *Hudson*, especially as the corporate world grew and various corporate scandals were publicized).

18. *Hudson*, 212 U.S. at 494. The Court reasoned that the doctrine of respondeat superior in tort law supplied the necessary ingredients for vicarious criminal liability: “Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.” *Id.*

19. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1114, 1117 (1991) (commenting on *Hudson*’s application of respondeat superior to criminal law and rejecting the Court’s claim that this

obvious that a solid theoretical body to support such an institution was lacking.²⁰ It took the courts, the legislature, and the academic world seventy years to provide the first justifications based not on individual actions, but on the “essence” of the corporate actor.²¹ As a result, the institution of criminal liability, despite constant criticism, achieved a previously unknown degree of consistency.

These new trends in corporate criminal liability were fundamentally due to the insights of organizational theory.²² Under this theory, the corporation is no longer a collection of individuals, but a complexity of synergetic interactions that cannot be reduced to individual actions. Put differently, the corporate actor is said to be not a mere addition of individuals but something separate from them. It is precisely in the corporation’s distinctiveness where its culpability, its blameworthiness, dwells. Therefore, concepts like

was the only effective remedy against corporate wrongdoing); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 Vand. L. Rev. 1341, 1361–1363 (1999) [hereinafter Laufer, *Corporate Liability*] (arguing that *Hudson’s* extension of corporate criminal law to cover crimes of intent was part of an overall effort at the time to use criminal law as a regulatory tool to reign in the modern corporation); William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 Neb. L. Rev. 1049, 1053–1054 (1992) (noting that *Hudson* determined the threshold issue that the basis of corporate criminal liability is respondeat superior, but arguing that corporate criminal law also requires mental culpability).

20. For an early harsh critique, see Gerhard O. W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. Pitt. L. Rev. 21, 21 (1957) (“Many weeds have grown on the acre of jurisprudence [that] has been allotted to the criminal law. Among these weeds is . . . corporate criminal liability. . . . Nobody bred it, nobody cultivated it, nobody planted it. It just grew.”). For recent heavy criticism, see Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability*, 17 Managerial & Dec. Econ. 381, 381, 389–390, 393 (1996) (arguing that corporate criminal liability cannot achieve its desired objectives and that its doctrine of collective responsibility is morally, legally, and economically destructive to society).

21. See Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 Am. Crim. L. Rev. 501, 520 (1980) (criticizing current corporate criminal law as insufficiently linked to culpability, making punishment dependent upon whether the actor is a corporation or a natural person).

22. The enactment of the Federal Organizational Sentencing Guidelines showed the final decision to move away from the optimal penalties theory and into organizational theory considerations. Laufer, *supra* n. 17, at 32–33. In the years prior to the passage of the Federal Sentencing Guidelines, Jeffrey S. Parker advocated strongly for the optimal penalties theory. See Jeffrey S. Parker & Raymond A. Atkins, *Did the Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations*, 42 J.L. & Econ. 423, 426 (1999) (evaluating the efficacy of the Federal Sentencing Guidelines and their organizational approach); Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 Am. Crim. L. Rev. 513, 516 (1989) (arguing that simple principles of economic theory provide a basis for organizational sentencing policy).

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“corporate policy,”²³ “corporate ethos,”²⁴ “corporate structure,”²⁵ or “corporate culture”²⁶ started playing a key role in determining, at least at some stage of the proceedings,²⁷ to what extent a corporation should actually be punished. In sum, a distinct entity arises, and there is a need to punish its wrongdoings.

Codification of “corporate culpability” came with the enactment of the Federal Sentencing Guidelines in 1991²⁸ and was decisive in developing the approaches named earlier. These concepts were obviously not isolated from a broader debate taking place in the field of corporate law, i.e., the corporate-governance debate, which, though consistent since the groundbreaking work of Berle and Means in the 1930s,²⁹ reached its peak in the 1980s and 1990s.³⁰ In these decades, an unprecedented development of “corporate compliance” took place, which resulted in a new con-

23. See Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 Cal. L. Rev. 1287, 1306 (1990) (suggesting a framework that determines corporate liability by examining corporate policy and whether it was violated); Jennifer Moore, *Corporate Culpability under the Federal Sentencing Guidelines*, 34 Ariz. L. Rev. 743, 760, 768–770, 773 (1992) (suggesting ways to define corporate policy that would help determine corporate culpability).

24. See Bucy, *supra* n. 19, at 1099 (suggesting a standard in which corporations can only be held criminally liable if the corporate ethos encourages agents to engage in criminal behavior).

25. See Peter A. French, *Integrity, Intentions, and Corporations*, 34 Am. Bus. L.J. 141, 152 (1996) (arguing that actions done by corporate agents in accordance with a corporation’s structure can properly be considered intentional corporate actions).

26. See *infra* pt. IV(B) (discussing the importance of a corporate culture in assessing culpability).

27. See e.g. William S. Laufer, *Corporate Culpability and the Limits of Law*, 6 Bus. Ethics Q. 311, 319 (1996) (pointing out that corporate (constructive) culpability should be assessed during the guilt phase of the trial and not only during the sentencing phase).

28. *U.S. Sentencing Guidelines Manual*; see also Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 706–707, 719 (2002) (assessing the Federal Sentencing Guidelines’ effects in deterring corporate crime, and concluding that the Guidelines have been a major success); Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts about Their Future*, 71 Wash. U. L.Q. 205, 209–210 (1993) (arguing that the Federal Sentencing Guidelines have drafted “private companies . . . into a war against corporate crime”).

29. See Adolf A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property*, at v, 357 (MacMillan Co. 1933) (arguing that the modern corporation has evolved from a private business device into an institution equally or perhaps even more powerful than the State, creating challenges when the State seeks to regulate the corporation).

30. See generally ALI, *Principles of Corporate Governance: Analysis and Recommendations* vol. 1 (ALI Publishers 1994) (offering an extensive review of corporate governance issues). The first tentative draft was released in 1982. ALI, *Principles of Corporate Governance and Structure: Restatement and Recommendations, Tentative Draft No. 1* (ALI 1982).

cept that would dominate the coming years: the “good citizen corporation” or “corporate citizenship.”³¹ According to this approach, corporations had to be law-abiding citizens, and if they adequately complied with the law by enacting “true” compliance programs³²—not just “make-up” compliance programs³³—they would be rewarded with up to a ninety-five percent reduction in the monetary penalty to be imposed upon them.³⁴

An interesting point in this late development is that corporate citizenship started shifting from a strict economic perspective to a stronger political significance. Optimal penalties and perverse effects, though important, lost weight in the ultimate debate on corporate punishment. Just as the debate regarding

31. See generally U.S. Senten. Comm'n, Proceedings of the Second Symposium on Crime & Punishment in the U.S., *Corporate Crime in America: Strengthening the “Good Citizen” Corporation* (1995) (available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/wcsympo.pdf) (offering extensive discussions on the Federal Sentencing Guidelines' effectiveness in encouraging corporate self-policing efforts). For a brief overview, see Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. Corp. L. 731, 732 (1996) (discussing compliance efforts and suggesting reinforcement for organizations that undertake these efforts).

32. U.S. Sentencing Guidelines Manual § 8C2.5(f) (suggesting the culpability score be reduced for organizations that had an effective compliance program in place at the time of the offense). For interesting perspectives in the field, see Gruner & Brown, *supra* n. 31, at 764–765 (suggesting a due diligence test for corporate criminal liability); Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 Am. Crim. L. Rev. 1537, 1538 (2007) (noting the urgency for an affirmative defense based on corporate compliance programs); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs As a Defense to Criminal Liability: Can a Corporation Save Its Soul?* 47 Rutgers L. Rev. 605, 689 (1995) (suggesting an affirmative defense based on corporate compliance programs); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 414 (2007) (stating that there is a need for an additional element to be proven by the government: that the corporation has “failed to have reasonably effective policies and procedures to prevent the conduct”). For an early discussion, see generally Jennifer Arlen & Reinier H. Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687 (1997) (developing a full-scale defense of composite mitigation regimes); see also Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. Leg. Stud. 833, 866–867 (1994) (questioning the economic efficiency of vicarious corporate criminal liability and suggesting mitigation provisions, a negligence rule, and a modified evidentiary privilege for corporate information as ways to induce efficient enforcement).

33. See U.S. Sentencing Guidelines Manual § 8B2.1 (detailing guidelines for an effective compliance program). Some scholars have contended that corporations are most interested in the cosmetic appearance of compliance. *E.g.* Bierschbach & Stein, *supra* n. 12, at 1774; John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 229 (1991); Laufer, *Corporate Liability*, *supra* n. 19, at 1371–1373.

34. Gruner, *Liability and Prevention*, *supra* n. 17, at § 14.01[5].

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corporate free speech achieved new levels of political meaning,³⁵ the possibility of a corporation expressing its views of society in the public square, according to Lawrence Friedman,³⁶ also accounted for the possibility of suffering the imposition of a criminal sanction.

Summing up: the evolution of the corporate criminal liability debate over past decades has experienced three fundamental developments. First, the concept of corporate culpability has been consolidated, not only as a theoretical achievement, but also as a practical matter that has great weight in determining the actual corporate sanction. Second, there is a link between political relevance in the public sphere and the possibility of imposing criminal sanctions on corporations. Third, there is a need to apply the traditional knowledge of individual criminal law to corporate criminal law if criminal sanctions are to keep their social significance.

If all these key features apply, it is necessary to acknowledge that not all corporations are equally capable of wrongdoing, and the Federal Sentencing Guidelines should take this fundamental insight into account. There are some tenets in current regulation

35. See Robert L. Kerr, *The Corporate Free Speech Movement: Cognitive Feudalism and the Endangered Marketplace of Ideas* 13 (Melvin I. Urofsky ed., LFB Scholarly Publ'g LLC 2008) (suggesting that corporations are significantly advantaged over other citizens and therefore have dominated the marketplace of ideas); Robert L. Kerr, *The Rights of Corporate Speech: Mobil Oil and the Legal Development of the Voice of Big Business* 155–156 (LFB Scholarly Publ'g LLC 2005) (arguing that the enhanced corporate speech protections elevating corporations to “citizens” may threaten democracy as corporations dominate the marketplace of ideas through advocacy efforts that are constitutionally protected from regulation).

36. See Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 Harv. J.L. & Pub. Policy 833, 846, 848 (2000) (“A corporation thus can be considered as similarly situated to an individual for purposes of the expressive rationale if it has a discrete identity within a community and expressive potential—that is if . . . a corporation objectively can be viewed as having an identity apart from its owners, managers, and employees to which expressive conduct can be ascribed. . . . The modern corporation also can be substantively distinguished from its owners, managers, and employees by its capacity to express independent moral judgments in the discourse of the public square, and so to participate in the process of creating and defining social norms.”). On the contrary, the group agency position of Christian List and Philip Pettit is still to be explored. See generally Christian List & Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford U. Press forthcoming 2011) (copy on file with author) (providing an outstanding book exploring the implications of their theory of group agency for the organizational design of corporate entities and for the normative status these entities ought to be accorded). Regarding the inequality of corporations and individuals in a deliberative democracy: is it fair for the legal system to hold corporations criminally responsible (maximum responsibility) without affording them equal standing in the democracy?

that reflect this distinction to a certain degree, although it is far from well established.³⁷ Therefore, this Article will briefly outline different areas in which corporate diminished capacity may play a large role.³⁸ But first this Article will examine an old critique that acquires a new dimension in light of the contributions made by various organizational and sociological theories in the past decades.

III. CORPORATE “DIMINISHED CAPACITY” OR “IMMATURENESS”: THE EMERGENCE OF THE CORPORATE ACTOR AS A REQUIREMENT FOR CORPORATE CRIMINAL LIABILITY

A. An Old Critique with New Implications: The Need for a Self-Conscious Mind to Become a Potential Offender

Throughout the years, many legal academics have starkly questioned the existence of corporate criminal liability because, after all, corporations are not equipped with a “mind,” so they can never enjoy the “state of mind” that is so important for criminal law.³⁹ Put differently: corporations have no will in a psychological sense, and therefore they cannot meet the requirement of criminal *intent*. Moreover, when updating old arguments from the nineteenth century, some modern scholars in Europe have pointed out that corporations are not self-conscious.⁴⁰ Hence, they do not experience freedom of choice in the way an accountable being should—at least according to a tradition that goes back to idealism and philosophers such as Hegel or Kant.⁴¹

37. See *supra* nn. 4–8 and accompanying text (discussing some ways the Federal Sentencing Guidelines distinguish between culpability levels of different organizations).

38. *Infra* pt. IV(E).

39. E.g. V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion? The Case of Corporate Mens Rea*, 79 B.U. L. Rev. 355, 356 (1999).

40. See e.g. Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, 2 Bus. & Prof'l Ethics J. 1, 5–6 (1983) (arguing that moral responsibility presupposes both intention and action originating from the same agent, but a corporation can only act through its members; thus, intentional actions cannot originate from the corporation as an entity).

41. See generally G. W. F. Hegel, *Phenomenology of Spirit* (A. V. Miller trans., Oxford U. Press 1977) (originally published 1807) (explaining the relationship between freedom and subjective will through dialectic reasoning); Immanuel Kant, *Critique of Pure Reason* (Werner S. Pluhar trans., unified ed., Hackett Publ'g Co. 1996) (1st ed. originally published 1781; 2d ed. originally published 1787) (discussing a philosophical system of

Consciousness, that psychological substrate, shows certain special qualities that are essential to render persons liable. Actually, the ultimate quality lies in the self-referential nature of the mind, i.e., in self-consciousness. There is a need to inquire in detail into the importance of human consciousness for our modern understanding not just of criminal law, but in general terms of many philosophical debates. This holds especially true when addressing the relationship between self-consciousness and personal identity. In this context, self-consciousness has been a reference point for identifying the human being's self-determination. And this, in turn, has been a reference point for free will and the corresponding rise of criminal responsibility.

B. Self-Consciousness as Internal Self-Referentiality of Human Beings

If we can avoid the anthropocentric bias that generally dominates the discussion on corporate criminal liability,⁴² it is possible to develop a consistent theory of corporate criminal law. To do so, systems theory—a theory that combines organizational and sociological theories—among others, provides an excellent tool, since it questions the position of the human being as the sole epistemological subject. Moreover, thanks to recent developments in the field of communication science,⁴³ systems theory explains how consciousness and communication show nearly the same degree of self-referentiality, recursivity, and reflection. The self-referential nature of communication produces important consequences for two key systems: the legal system (law) and the organizational system (corporation). Due to space limitations, this Article shall

transcendental idealism and exploring the relationship between freedom and morality).

42. See Peter A. French, *The Corporation as a Moral Person*, 16 Am. Phil. Q. 207, 207, 214 (1979) (criticizing the anthropocentric bias present in discussions of corporate criminal liability and suggesting a theory that treats corporate persons as equal to natural persons); Laufer, *supra* n. 17, at 47 (noting that one contention with corporate personhood is that it is too anthropomorphic); Steven Walt & William S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, 18 Am. J. Crim. L. 263, 264 (1991) (rejecting the notion that persons and corporations are radically different, but suggesting that it is unnecessary to anthropomorphize corporations to hold them criminally liable); see also List & Pettit, *supra* n. 36, at 159–163 (providing an affirmative response to the question of whether group agents have the control required to choose between options, as the ability to choose is one of the three conditions requisite to being held responsible).

43. See e.g. Niklas Luhmann, *Social Systems*, 143–144 (John Bednarz & Dirk Baecker trans., Stanford U. Press 1995) (describing communication as a “self-referential process”).

only outline some basic tenets of this great development in social theory.

As to the legal system, communicative self-referentiality implies that the law has no direct access to the human mind's internal dimension (psychological system) or the corporation (organizational system).⁴⁴ Both systems, psychological and organizational, can only aim to show rational evidence of sufficient self-referentiality.⁴⁵ And this, as Teubner and Zumbansen have masterfully explained, is exactly the fundamental criterion used by the (criminal) law system to attribute "personhood."⁴⁶ The self-referential process reflects the constitution of the so-called high-order autopoietic systems.⁴⁷ Because the constitution of psychological systems (human beings) as high-order autopoietic systems is not questioned by the vast majority of scholars, it is worth focusing attention on the organizational system (corporation) to provide an answer to the fundamental question: can a corporation become a high-order autopoietic system?

44. See *id.* at 144 (stating that "[t]he unity of communication corresponds to nothing in the environment").

45. Gunther Teubner & Michael Hutter, *Homo Oeconomicus and Homo Juridicus—Communicative Fictions?* in Richard M. Buxbaum, *Corporations, Capital Markets and Business in the Law* 569 (Theodor Baums et al. eds., Kluwer L. Int'l 2000).

46. See Gunther Teubner & Peer Zumbansen, *Rechtsentfremdungen: Zum gesellschaftlichen Mehrwert des zwölften Kamels*, in *Die Rückgabe des Zwölften Kamels* 208–209 (Gunther Teubner 2000) (discussing internal self-reference as a basis for attributing subjectivity); Gunther Teubner, *Law As an Autopoietic System* 13–24 (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., Blackwell Publishers 1993) (same).

47. See Humberto R. Maturana & Francisco J. Varela, *The Tree of Knowledge: The Biological Roots of Human Understanding* 87–89 (Robert Paolucci trans., rev. ed., Shambhala Publ'ns, Inc. 1998) (arguing that all living beings are characterized by autopoietic organization in which they participate in producing their own transformation networks, and explaining that metacellululars are second-order autopoietic systems identified by internal processes); *contra* D. Mossakowski & H. K. Nettmann, *Is There a Linear Hierarchy of Biological Systems?* in *Self-Organizing Systems: An Interdisciplinary Approach* 44–45 (Gerhard Roth & Helmut Schwegler eds., Campus Verlag 1981) (noting that "[a] main property of autopoietic systems is the existence of a system-produced boundary which is constituted by components of the system" and concluding that higher-level systems are not autopoietic because their boundaries are not constituted by components of their own systems and also because higher-level systems do not reproduce); Francisco Varela, *Autonomy and Autopoiesis*, in *Self-Organizing Systems: An Interdisciplinary Approach*, *supra* n. 47, at 14, 17 (observing that higher-level systems may be considered autonomous but are not strictly autopoietic, because "[a]utopoiesis is a case of, and not synon[ym]ous with, autonomy in general").

C. Internal Self-Referentiality in Corporations: Corporate Actors as High-Order Self-Referential Systems

For the last twenty years, Gunther Teubner has conducted major research on the requirements for a corporation to become a high-order autopoietic system.⁴⁸ As Teubner puts it: the corporation leaves the “diminished capacity” stage by way of a hypercyclical link between the self-referential qualities of the organizational system, i.e., a double self-referentiality.⁴⁹ Wording it differently: over time, self-referential cycles in business corporations accumulate to make a hypercycle that links all of them together. In that precise moment when the hypercycle appears, the corporate actor emerges as a high-order autopoietic system.⁵⁰ Those self-referential cycles start their processes in four different domains: the system’s limit; the system’s structure; the system’s elements; and the system’s identity.⁵¹ The limit is provided by corporate membership; the structure embodies the final/conditional corporate decision premises; the elements, i.e., the basal operations that enable the system’s autopoiesis, are constituted by corporate decisions,⁵² and finally, the system’s identity is reflected in the corporate identity. Therefore, when corporate identity is hypercyclically linked to corporate decisions, and corporate rules determine corporate membership, a corporate actor emerges as a reality different from each and every underlying

48. E.g. Teubner, *supra* n. 46, at 28; Gunther Teubner, *The Many-Headed Hydra: Networks as Higher-Order Collective Actors*, in *Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation* 42–43 (Joseph McCahery et al. eds., Clarendon Press 1993); Gunther Teubner, *Hypercyclical Law and Organization: The Relationship Between Self-Observation, Self-Constitution and Autopoiesis*, in *European Yearbook in the Sociology of Law* 66–74 (Giuffrè Publisher 1988) [hereinafter Teubner, *Hypercyclical*]; Gunther Teubner, *Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person*, 36 Am. J. Comp. L. 130, 139–142 (1988) [hereinafter Teubner, *Enterprise Corporatism*].

49. Teubner, *Hypercyclical*, *supra* n. 48, at 73–74.

50. *Id.* at 47, 67, 69; see also Teubner, *Enterprise Corporatism*, *supra* n. 48, at 136 (explaining that an autopoietic social system is “a system of actions/communications that reproduces itself by constantly producing from the network of its elements new communications/actions as elements”).

51. See Teubner, *Hypercyclical*, *supra* n. 48, at 68 (providing an explanatory graphic).

52. See Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 L. & Socy. Rev. 727, 729 (1989) (discussing corporate decision as a basis for organizational systems).

psychological system. It achieves a self-organizational capacity that exceeds the organizational capacity of any of its members.⁵³

The bulk of my theory is that psychological and organizational systems must develop a certain level of internal self-referential complexity to be considered potential offenders in criminal law. Sufficient internal complexity is a requirement for developing enough self-referentiality to enable the system's self-determination regarding its environment.⁵⁴ A helpful comparison could be the development of sufficient internal complexity in children. To the same extent that children are not capable of wrongdoing according to individual criminal law until their psychological system is sufficiently complex, i.e., until it reaches a certain level of internal self-referentiality or self-consciousness, a corporation should not be held criminally liable until it develops a certain level of internal self-referentiality, i.e., self-organization. Corporations should also exceed that complexity benchmark, that is, enough internal self-referentiality, to be considered potential offenders by criminal law. The benchmark in individual as well as in corporate criminal law is certainly not a fixed line, and it implies a number of theoretical and practical consequences.

IV. THEORETICAL AND PRACTICAL CONSEQUENCES OF CORPORATE "DIMINISHED CAPACITY" OR "IMMATURENESS"

A. Discussing Corporate Culpability Issues at Trial (and Not Only at the Sentencing Stage)

If we discuss immaturity and diminished capacity at trial in individual criminal law, why should we not also conduct the same review in corporate criminal law? It is common knowledge that determining whether an individual is insufficiently mature or whether his or her capacities were diminished at the time of perpetrating the offense is something to discuss at trial—it is not just a factor affecting the sentencing procedure. The same should hold true for corporations. It is not possible to suggest that we are

53. See Teubner, *Enterprise Corporatism*, *supra* n. 48, at 142 (suggesting a unitary conception of the corporation).

54. Teubner, *Hypercycle*, *supra* n. 48, at 70; Teubner, *Enterprise Corporatism*, *supra* n. 48, at 136.

applying criminal law in a system of justice that handles the same questions in absolutely different contexts for individuals and corporations. The logic of individual criminal law is unique in requiring that breaches be strictly prevented.

Some scholars have already noted the importance of introducing defenses related to corporate culpability during the trial phase.⁵⁵ Despite the final formulation of such defenses, the corporate immaturity or diminished capacity argument exerts greater pressure to recognize that corporate culpability issues are not to be dealt with only at the sentencing stage. And this is not only because the concept of corporate culpability itself provides enough grounds to assert its existence at trial before conviction, but also because a strict comparison between individual and corporate criminal law points in the same direction. The fact that the corporate immaturity or diminished capacity argument is also a defense against liability should be self-explanatory. Therefore the defendant (be it an individual or a corporation) should be able to raise such a defense at the trial phase, and it should not be considered only *ex post* at the sentencing phase.

B. Coining a Coherent and Consistent Concept of Corporate Culpability

As the previous explanation has shown, modern corporations are able to achieve a certain degree of internal self-complexity and self-referentiality. What implications does this have for the debate on corporate criminal liability? Well, first and foremost, it enables a coherent understanding of what a true and genuine corporate culpability implies. As noted before, many concepts of corporate culpability have been proposed in the past two decades. Yet, it seems that systems theory enables a more comprehensive approach, and therefore this Article will show the consistency of corporate immaturity arguments with what is coined as the constructivist concept of corporate culpability.⁵⁶

To keep this Article's argument simple, three basic features of modern corporations and modern society provide a consistent

55. See *supra* n. 32 (discussing corporate compliance programs as a defense to corporate criminal liability).

56. See Gómez-Jara Díez, *supra* n. 1, at 83–85 (providing a more detailed explanation of the constructivist concept of corporate culpability).

response to the development of corporate criminal law. First, a corporate culture of law-abiding behavior within corporations is important. Modern studies have shown that a law-abiding corporate culture encourages all individuals within corporations to comply with the law; therefore, society's most respected values, as expressed through enacted law, are not constantly challenged in this culture.⁵⁷ Second, the complexity of modern corporations has resulted in the State's incapacity to adequately regulate them. This governmental inability, in conjunction with the tremendous impact of corporations in society, results in the following agreement between the State and corporations: the State grants corporations a right to self-regulation, yet it holds them liable for the consequences of such self-regulation. Last but not least, the citizenship status corporations have achieved in modern society comports a democratic legitimacy to their punishment. Now that corporate free speech has been granted to corporations, they have the duty to express their views on community values through the exercise of that free-speech right rather than through crime perpetration.

Just before examining those consequences, it is worth reinforcing the consistency of the corporate immaturity arguments with the proposed concept of corporate culpability. Put simply, it is only in this context of corporations as high-order autopoietic systems that corporate culpability makes real sense. Only within a corporation with enough internal complexity is it possible to institutionalize a law-abiding corporate culture so that the inexistence of such culture can be conceived of as a deficit of law-compliant behavior, i.e., as betraying the role of a law-compliant citizen. To the same extent, a corporation with solely internal complexity may gain self-organizing capacity so that it seems feasible to hold it responsible for using that capacity. Finally, only a corporate entity with certain complexity and public relevance may participate in the enactment of social norms, using such participation to question, if it so desires, the validity of those norms through legal mechanisms, i.e., not resorting to crime.

57. See generally Tamar Frankel, *Using the Sarbanes-Oxley Act to Reward Honest Corporations*, 62 Bus. Law. 161 (2006) (discussing various studies on what makes corporations honest and concluding that corporate culture plays a large role).

There are many consequences to be derived from the concept of corporate immaturity. Unfortunately, due to space and time limitations, this Article is unable to fully explore many of these. Yet it is important to highlight some of them, since they may have an impact on how the Federal Sentencing Guidelines should be structured in the future.

C. Shell Companies: Can They Really Be Considered Corporate Offenders?

The first effect of recognizing corporate immaturity would be excluding shell companies from traditional criminal punishment. These companies lack the necessary internal complexity to achieve enough self-referentiality from a criminal law perspective. These are companies fully managed from the outside, lacking organizational autonomy from the inside. Therefore, adopting intervention measures against them is fully legitimate—though these measures should not be considered as “punishment” due to blameworthy actions of the company itself. Instead, at the most, such measures should be considered as sanctions on a blameless entity. White-collar criminals and organized criminals normally use shell companies to perform their activities; hence, criminal law needs adequate law-enforcing instruments. What this Article suggests is that those instruments cannot be rendered as real “punishment” subject to evidence of corporate culpability. From a crime-policy perspective it seems all the more reasonable to label such instruments as punishment: they could not be imposed unless certain requirements—*mens rea* among them—are met. And those requirements might end up being impossible to prove in shell companies.

D. Piercing the Corporate Veil: A Logical Consequence of Corporate Diminished Capacity

The second effect of recognizing corporate diminished capacity, which would have important theoretical and practical consequences, involves “piercing” the corporate veil. Some scholars have argued that the doctrine of piercing the corporate veil

actually stands against corporate criminal liability.⁵⁸ Yet, supporters of corporate criminal liability do not always provide an adequate response to this argument. From this Article's perspective, piercing the corporate veil is actually a logical consequence of a true and genuine corporate criminal law. For one, it is obvious that piercing the corporate veil "breaks through" corporate personhood. Such a technique is designed to pierce through the legal facade and reach the people really managing the company. Further, this type of intervention is usually deployed in shell companies or companies with insufficient internal self-complexity, aiming to reach the responsible actors behind the (corporate) scenes (being the individuals or corporations). Hence, piercing the corporate veil is an intervention technique that is only to be considered for corporations in which the corporate actor has not truly emerged and therefore is not capable of culpability. Once this emergence occurs, courts should never use corporate veil piercing.

E. Setting Limits: When Does a Corporation Become a Potential Corporate Offender?

The third effect of recognizing corporate immaturity deals with one of the more vexing problems posed to individual and corporate criminal law: where to set the dividing line between full-fledged and diminished offenders. To the same extent that it is difficult to set the accountable age in individual criminal law, setting that organizational limit for corporate offenders is also intrinsically difficult. As a guideline: first, the limit cannot resemble an ontological, rigid limit, but must depend on the entity's degree of social evolution; second, to the same extent that the *psychological basis* determines which psychological systems (individuals) are subject to criminal responsibility, the *organizational basis* should be fundamental for determining which organizational systems (corporations) are criminally responsible. Here, the existence of a formal organization should provide at least circumstantial evidence that we are dealing with a potential corporate offender. This analysis does not stress legal or economic personhood, but instead it stresses the underlying organizational social

58. See e.g. Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 *Hastings L.J.* 1155, 1191 (1982) (discussing the difficulty of holding a corporation liable for conspiracy when the corporation is considered a single entity).

system.⁵⁹ From such a perspective, it is possible to provide some guidelines for further development, notwithstanding the real need of pursuing a more in-depth analysis.

This Article must now commence with discussing corporations about which there is little doubt concerning their potentiality as corporate offenders: publicly listed companies. These corporations have already developed a minimum level of internal complexity, and actually, they are world-renowned for being paradigms of self-regulation and for adopting corporate codes of conduct closely related to corporate compliance programs.⁶⁰ Yet, setting these companies aside, it is actually quite difficult to determine what level of internal complexity and self-referentiality is needed for a corporation to really become a potential corporate offender.⁶¹

When dealing with this issue, certain matters should be noted. First, legal personhood *per se* cannot be the ultimate criterion. Legal personhood from a civil or tax point of view does not automatically imply legal personhood in criminal law. Hence, in individual as well as in corporate criminal law, civil personhood does not imply criminal personhood. This is consistent with this Article's prior claim that certain companies with legal personhood such as shell companies are not potential corporate offenders.⁶² Second, what is relevant here is that a corporation achieves a certain degree of internal self-referentiality. Good proxies for that achievement are provided by the corporate standard operating procedures.⁶³ These procedures function as decision premises that take into account the synergy and dynamics of the corporation

59. This reasoning seems to be deployed by the Federal Sentencing Guidelines in United States federal criminal law. The type of organization is fundamental to determining the penalty to be imposed upon the corporation. *U.S. Sentencing Guidelines Manual* §§ 8C1.1–8C2.5.

60. Laufer, *Corporate Liability*, *supra* n. 19, at 1400; *see generally* Carole L. Basri, Joseph E. Murphy & Gregory J. Wallace, *Corporate Compliance: Caremark and the Globalization of Good Corporate Conduct* (P.L.I. 1998) (offering various contributions).

61. This holds especially true for determining if groups of companies may be subject to criminal liability. Teubner's contributions to polycorporate networks as high-order autopoietic systems offer a brilliant starting point. *E.g.* Teubner, *supra* n. 46, at 126–127, 133–135, 149.

62. *Supra* pt. IV(C).

63. *See Decisionmaking Models and the Control of Corporate Crime*, 85 *Yale L.J.* 1091, 1102 (1976) (noting that most corporate conduct is based on an organization's standard operating procedures and explaining different ways the standard operating procedures are created).

itself.⁶⁴ Third, evidence of the emergence of a real corporate actor transpires from corporate membership being determined by corporate rules and corporate identity being institutionalized through corporate decisions.

*V. CONCLUSION: ADVANTAGES OF ACKNOWLEDGING
CORPORATE “IMMATURENESS” OR
“DIMINISHED CAPACITY”*

The reasoning outlined in the previous pages departs from the conventional wisdom of corporate criminal liability. Some may argue that, even though possible, the consequences referred to are simply unbearable for the system of criminal law. To avoid such criticism, this Article ends by advancing some advantages of this theory that provide both a consistent connection to traditional principles of criminal law and an efficient approach to the new trends in corporate self-regulation.

As a reminder: this Article’s major thesis contends that to the same extent that we do not render all individuals as potentially liable in individual criminal law, we should not consider all corporations as potentially liable in corporate criminal law. The first advantage is that distinguishing between fully and not-fully accountable corporations would stimulate responsible corporate self-regulation. If we treat General Motors (GM) as a shell company, we are certainly not encouraging good corporate conduct by the former. Acknowledging GM’s autonomy and distinctive self-referentiality surely represents a sort of liberty and equality concession that enshrines corporate citizenship, but it also provides fair grounds for punishing corporate offenders that misuse such a concession and are not “up to the task.” This model of corporate criminal liability stimulates law-compliant corporate self-regulation because corporations will feel more inclined to abide by the law when the meaning of punishment precisely reflects the abuse of something distinct and somewhat special. This model facilitates a decentralized control of corporate risks, simultaneously allowing for corporate freedom. To put it simply: if criminal law treats high-order corporate actors and shell companies alike,

64. *Id.*

then we are missing a great opportunity to exert a normative control on top of the coercive control.⁶⁵

The second advantage has more to do with the nature of criminal law than with strict efficiency parameters. Arguing that punishing a shell company means the same as punishing a grown adult seems to pervert the “sacred” nature of criminal punishment. To the contrary, parallels between human adulthood and corporate adulthood are easier to establish—and for that matter to justify. A full-fledged individual citizen with fully recognized rights to free speech appears to be in another category from a shell company with which individuals may arrange on an on-going basis. But the idea that corporations truly belong to corporate America is not farfetched. The status of these corporations resembles the positions attained by individuals in contemporary history. Wording the argument differently: would the United States Supreme Court acknowledge the right to free speech for shell companies? The answer is probably no. If this is so, then corporate criminal law has to make distinctions between both types of companies to the extent that individual criminal law makes such distinctions. Companies developing a corporate culture that may openly question the law’s validity, achieving a certain presence in our society to which free-speech rights are afforded, cannot be labeled as mere instruments of human beings.

The rationale of this model lies in the core meaning of being an accountable member of modern society. It might be tempting to punish without distinctions to secure as much efficiency as possible. But it surely misses an important point of what it means to punish nowadays. We do not punish trees, stones, or animals—at least not nowadays.

65. See Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 Va. L. Rev. 1839, 1840 (2000) (discussing the importance of normative control in criminal law).