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Cover Page Footnote

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Corporate Criminal Liability Under The Criminal Laws of Jordan and Australia: A Comparative Analysis•

Dr. Mouaid Al-Qudah*

Abstract:

The current theory of corporate criminal accountability in Jordan focuses upon the individuals who make-up an organization. However, building our legal thinking around this approach, known as the identification doctrine, based on individual fault has its limitations. Corporations are not individuals nor can they be reduced to mere aggregation of their constituent human agents; rather their formation, structure, activities, policies and whole existence mark them as social structures in their own rights. The present paper provides a comparative analysis of corporate criminal liability in Jordan (a civil law jurisdiction) and Australia (a common law jurisdiction). It maps out some of the key developments in relation to the grounds of such liability (as proposed by some scholars) which concentrate on the organization itself based on the concept of "organizational" rather than "individual" blameworthiness. The paper is divided into two parts. In the fist part, it provides a theoretical comparative account of the problems surrounding corporate liability along with an analysis of the various bases of such liability. The second part of the paper takes a more serious approach to corporate liability. It uses the notion of "corporate culture" to argue for the extension of the theory of committing an offence by an innocent or non-responsible agent so as to allow the inclusion of situations involving crimes committed by a non-autonomous employee under "economic duress" when these offences are proven to have been caused by corporate negligent manipulation of the workforce. This is crucial if we must take very serious account of the radical disparities and real autonomy and freedom of choice across the social structure. The paper also argues that corporate "direct" criminal liability is better grounded in a principle of "organizational" rather than "individual" fault combined with a notion of strict liability with various possible patterns of corporate punishments considered.

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1. Introduction

Much of the difficulty surrounding the issue of corporate criminal liability lies in the fact that it challenges some of the basic principles and assumptions underlying criminal law and criminal responsibility. In particular, a consideration of corporate criminal accountability is largely confined within a paradigm of individualistic conceptions of liability according to which criminal liability is primarily understood in terms of individual free decision and action or inaction. The current model of corporate liability in Jordan, based upon vicarious liability and the doctrine of identification, is a reflection of this individualistic model. Although it is not suggested that this model should be abandoned, it has nonetheless been the object of much criticism. Critics in Australia find that this model of individualism provides an incomplete basis upon which to ground corporate criminal liability as it does not accurately capture the collective nature of corporate blameworthiness. It is, therefore, thought necessary not to retain our legal thinking captive to the individualistic model of liability as far as corporations are concerned. Rather, it is important to explore an alternative basis of such liability that seeks to lay criminal liability on the basis of corporate blameworthiness, incorporating the realities of modern organizations.

Given this focus, this paper provides a theoretical comparative analysis of corporate criminal liability(1) under the criminal laws of Jordan (a civil law jurisdiction) and Australia (a common law jurisdiction). It addresses the basis of such liability, and explores the extent to which the traditional foundations of criminal liability can form an appropriate basis for corporate criminal liability. The paper does not, however, attempt to provide a "clear-cut" answer to such major issues; rather it intends to map out some of the key developments of corporate criminal liability [as advocated by western legal scholars and adopted by their laws] to provide insight into how this comparative analysis might enhance the current model of corporate criminal liability in Jordan in respect of any potential law reform in relation to this contentious issue.

To this end, this paper is divided into two parts. The first part provides a comparative theoretical account of the problems surrounding the attribution of corporate criminal liability. Two matters are considered in this respect: (1) Individualism as a basis of criminal liability; and (2) the attribution of criminal culpability to corporations through an analysis of the various grounds of such liability. Central to the purpose of this part is to explore the possible bases of corporate "direct" rather than "vicarious" responsibility, and to demonstrate that

(1) This paper considers 'corporate criminal liability' rather than other 'non-human legal persons'.

the adoption of an individualistic approach to corporate liability is problematic. The second part considers three matters regarding corporate liability: (1) Corporate "culture" and the limits of criminal law; (2) combining the organizational doctrine with the notion of strict liability; and (3) corporate punishment. In the concluding section, a summary of the main findings of the paper is provided along with some suggestions for consideration by lawmakers in relation to corporate criminal liability.

2. Part One: The Problem of attributing Criminal Responsibility to Corporations

There are two major problems of accountability confronting criminal law in its attempt to address the commission of wrongful acts by large scale corporations(2). First, the principles of criminal liability are traditionally constructed around the notion of individualism. That is, individuals can commit offences but corporations do not, and therefore human individuals are considered the primary subject of criminal law. Secondly, where corporations are sanctioned for the commission of an offence, the imposition of meaningful sanctions is central to the utility of effective corporate criminal liability. Usually, the types of punishments which can be imposed on corporations are confined to fines or other monetary penalties. [This point will be discussed further below in part two]. The following discussion intends to highlight how the adoption of the individualistic model of liability is problematic in relation to corporate criminal liability.

2.1. Individualism as a Basis of Criminal Liability

In both Jordan and Australia, criminal liability is primarily understood in terms of free individual decision and action or inaction. As Hart points out "the principle of punishment should be restricted to those who have voluntarily broken the law"(3). From this perspective, the essential role of criminal law is to protect the socially permissible free actions of individuals [centred upon their enjoyment of their life and property] through punitive re-direction of the anti-social free choices of others(4). This emphasis upon "free individual choice" as a ground of criminal culpability finds expression in the requirement of establishing

(2) For more discussion see for example, Fisse B & Braithwaite J, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Syd LR* 468 at 469-513.

(3) Hart H L A, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, New York, 1968 at p 181.

(4) Mann S & Al-Qudah M, "Freedom of the Will and Criminal Culpability" (2004) 8 *University of Western Sydney Law Review* 97.

that the accused's guilty mind [or *mens rea*] has caused a particular criminal action or inaction [or the *actus reus*][(5)]. The question which arises in this context is: did the individual really intend [or have any mental state] to perform the action in question, and did their intention really cause them to commit the act**?**[(6)]

The term "action" here refers to the voluntary or intentional bodily movement, that is, a physical movement which is the result of the individual's "free will"[(7)]. Hart describes this as a bodily movement subordinate to the agent conscious plan of action[(8)]. It also includes the individual's deliberate omission to act when he or she is under a duty to do so [(9)]. As Norrie says:

An omission can be described as a negative act, a description which indicates that omissions are in their essence similar to rather than different from acts. Omission can be a conscious decision either not to do something or to do other thing than the thing that is not done…either way, to describe a failure to act is as much to describe a practical orientation to the world as is the description of an act[(10)].

The *mens rea*, on the other hand, has come to refer to a range of different state of minds including intention[(11)], knowledge[(12)], recklessness[(13)] and

(5) It is acknowledged that the criminal laws in both Jordan and Australia recognize the limits to the individual's free will by allowing a range of defences to operate so as to exculpate individuals from criminal responsibility. For example, under both legal systems various defences are recognized such as duress: Article 88 of the JPC; R v *Hurley* [1967] VR 529; *McCafferty* [1974] 1 NSWLR. Insanity: Articles 91 and 92 of the JPC; *McNaghten Case* (1843) 10 C1 &Fin 200; *R v Porter* (1933) 55 CLR 182. Necessity: Article 89 of the JPC; *R v Loughnan* [1981] VR 443; *Rogers* (1996) A Crim R 542.

(6) Mann and Al-Qudah, supra 2004 at p 94.

(7) Mann and Al-Qudah, supra 2004 at p 94; Alseid K, *Explanation of the General Principles in the Penal Code of Jordan: Comparative Study: Crime, Criminal Participation, Criminal Liability and punishment*, The Arabic Centre for Students Services, Jordan, 2002 at p 204.

(8) Hart, 1968 supra at p 181.

(9) Alseid, 2002 supra at p 205-209.

(10) Norrie A, *Crime, Reason and History: A Critical Introduction to Criminal Law*, Butterworths, United Kingdom, 2001 at p121.

(11) *He Kaw Teh* (1985) 157 CLR 523; Article 63 of the JPC which states that "intention is the will to commit a crime as defined by the law".

(12) *He Kaw Teh* (1985) 157 CLR 523; *Saad* (1987) 29 A Crim R 20. In Jordan, the requirement of knowledge of the proscribed facts on the part of the offender is understood from the wording of Articles 86 and 87 of the JPC, which lay down the effect of mistaken facts in relation to criminal liability. Article 86 states:

(1) Whoever commits an intentional offence under a mistake in one of its components shall not be punished as a perpetrator or inciter or accessory;

(2) If the mistake is related to one of the aggregative circumstances, the offender shall not be

negligence[14] under the laws of Jordan and Australia. However, unlike Jordan, in Australia, criminal liability can be attributed to individuals on the basis of strict liability in situations involving statutory offences which are enacted without any reference to mens rea [15]. The notion of strict liability exists under the *Criminal Code Act* 1995 (CCA) which provides that:

6.1 (1) if a law that creates an offence provides that the offence is an offence of strict liability:

(a) There are no faults element for any of the physical elements of the offence; and

(b) The defence of mistake of fact under section 9.2 is available.

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:

(a) There are no fault elements for that physical element; and

(b) The defence of mistake of fact under section 9.2 is available in relation to that physical element.

(3) The existence of strict liability does not make any other defence

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responsible for that circumstance.

Article 87 specifies that "A mistake which relates to the act of an unintentional offence precludes liability provided it is not the production of the offender's fault"

(13) *R v Kitchener* (1993) 29 NSWLR 696; *Crabble* (1985)156 CLR 464.

(14) *Nydam* [1977] VR 430; *Wilson v The Queen* (1992) 274 CLR 313; Article 64 of the JPC which provides that "a crime is intentional even though the result has exceeded the intention of the offender if he or she has expected its occurrence and accepted the risk. If the harmful consequences are the result of negligence, recklessness or non-observance of the laws and regulations on the side of the accused, then the form of mens rea is fault".

(15) For example, In the criminal case of *Wampfle*r (1987) 11 NSWLR 541 at p546, Street Chief Justice summarized the categories of mens rea for statutory offence as follows:

(1) Those in which there is an original obligation on the prosecution to prove mens rea.

(2) Those in which mens rea will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question in not criminal in which case the prosecution must undertake the burden of negativing such belief beyond reasonable doubt. [this refers to strict liability]

(3) Those in which mens rea plays no part and guilt is established by proof of the objective ingredients of the offence. [this refers to absolute liability]

In cases involving absolute liability, criminal liability can be imposed without requiring proof of any mental state with the accused cannot use the defence of honest and reasonable mistake of fact to negate his or her liability according the section (6.2/1) of the CCA. The accused can however, rely on other defences [such as duress or insanity] to avoid criminal liability (section 6.2/3) of the CCA.

unavailable.

So, according to the CCA, criminal liability can be imposed without any proof of fault on the part of the accused. But it has to be proved that the accused has acted consciously and voluntarily for his or her liability to stand(16). The accused can, however, use the defence of honest and reasonable mistake of fact to negative his or her liability. In both Jordan and Australia, the underlying notion is that of a responsible individual who has chosen, in some ways, to break the law(17). In this regard, Article 74/1 of the *Jordanian Penal Code* 1960 No 16 (JPC) states that "no-one shall be punished for an act unless he or she consciously and voluntarily has committed that act". Similarly, the Australian Common law cases(18) impose criminal liability where the action constituting the physical element of the crime is "willed and voluntary". This involves conscious "prior decision" to break the law, and it does also include the intention to engage in an action, which the individual knows [or at least foresees], involving a chance of causing a prohibited result. Consciousness is therefore a necessary condition of criminal culpability. It is not merely consciousness in the broad sense in which animals as well as humans are aware of their surrounding and experiencing feeling of various kinds. It is, rather, consciousness in the narrow sense of being, as a human, "capable" to stand back from his or her mental state and think about them, appraise and evaluate them(19). As Quaid notes "it is the capacity to be blamed- and therefore punished- which animates our conception of the notion of responsibility"(20).

The rationale of criminal liability and consequently punishment is crucially dependent upon these ideas. Thus, an argument can be framed as follows: because the offender has freely chosen to break the law, so he or she has therefore, in a sense, chosen to expose themselves to the possible infliction of

(16) See for example, *Ryan v R* (1966) 121 CLR 205; *Jiminiz v R* (1992) 173 CLR 572.

(17) t is understood that criminal liability is not only imposed on the basis of subjective standards of mens rea such as intentions but it is also imposed on the ground of the objective standards [that is, negligence]. But in all cases, the accused needs to chose, at the minimum, his or her wrongful action or inaction before criminal liability can be attributed to him or her. His state of mind toward the consequence of his or her conduct plays a crucial role in determining whether he or she should be liable for the commission of an intentional or non-intentional offence.

(18) See for example: *Ryan v R* (1966) 121 CLR; *Jiminez v R* (1992) 173 CLR 572; *He Kaw Teh* (1985) 157 CLR 525.

(19) Mann and Al-Qudah, 2004 supra at p98.

(20) Quaid J A, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" (1998) 43 *McGill Law Journal* 67 at p 70.

pain by the state as the cost of the suffering they have inflicted upon others[21]. In the western literature of ethic and philosophy of mind, these sorts of issues and notions are traditionally discussed in terms of "individual autonomy" or "self-governance"[22]. Moral philosophers[23] distinguish three different dimensions of autonomy along with different kinds of possible restrictions to such autonomy. First of all, there is autonomy as "liberty of actions". In this sense, an individual is autonomous if his or her action or inaction results from their conscious intention and is not the result of any external coercion or duress. They provide the example of an individual sitting under a tree, no-one is forcing him or her to sit under the tree. He or she is free to leave anytime he or she chooses. Therefore, his or her action results from their conscious intention to sit under the tree or leave. As has been pointed out:

When autonomy is identified with liberty of action, the primary contrast drawn is between autonomy and coercion. Coercion involves the deliberate use of force or the threat of harm. The coercer's purpose is to get the person coerced to do something he or she would not otherwise be willing to do[24].

Secondly, there is autonomy as "freedom of choice". This refers to the range of "real choices" actually available to an individual in terms of access to material means for the realization of particular goals or desires. To illustrate this, the authors consider the example of an individual seeking a vasectomy. Local doctors refuse to perform the operation and he cannot afford to travel further. Therefore, the individual is not free to act upon his decision. His lack of freedom is not due to duress, rather his autonomy is limited in the sense that his range of choices is narrowed. In this regard, intention is viewed as part of causation of action. Such intention, however, can only become operative in effective ways if the individual in question has effective control of the necessary resources of skill, knowledge, tools, finance, machines, assistance and opportunity.

Thirdly, there is autonomy as "effective deliberation". This refers to the "internal" rather than "external" resources available for the exercise of individual autonomy. In particular, it refers to the individual's "capacity" for making rational and informed decision. In this sense, autonomy is allied with rationality, and an individual is characterized as one who is capable of making rational and

(21) Mann and Al-Qudah, 2004 supra at p98.

(22) For more discussion on this issue see for example Ashworth A, Principles of Criminal Law, 3rd ed, Oxford University Press, New york, 1999 at 27-29.

(23) Mappes T A & DeGrazia D, *Biomedical Ethics*, McGraw-Hill, Inc, New York, 1996 at p25-28.

(24) Mappes and DeGrazia, 1996 supra at p 25.

unconstraint decisions and acting accordingly. On one hand, an individual is described as rational when he or she is capable of choosing the best means to some chosen ends. For a person to be regarded as a rational individual, he or she has to be capable of reasoning well on the basis of good evidence about the best means to achieve some ends. It also entails being able to choose the appropriate timing to achieve any chosen goals. On the other hand, an individual is described as rational if he or she is capable of choosing appropriate ends, although what counts as appropriate ends is a notorious matter of dispute. Briefly, an individual is autonomous only to the extent that he or she possesses the abilities necessary for effective deliberation and reasoning, free of internal constraints to exercise those abilities, and is neither coerced by others nor has his or her range of options narrowed by them. As Mappes and DeGrazia state,

These abilities can be limited in many ways. When they are, decisions and actions may be less than fully rational. First, some individuals may not have sufficiently developed the necessary abilities or may even be incapable of sufficiently developing them. Second, even individuals who have the requisite abilities may be unable to *exercise* them on a particular occasion due to various internal factors. For example, emotions such as fear may make the impartial weighing of information impossible… the presence of pain or the use of drug may also affect the exercise of reasoning abilities. It may be best, therefore, to speak of *degrees* of rationality and irrationality since many factors can make decisions and actions less than fully rational without pushing them to the irrational end of the spectrum. Furthermore, autonomy as effective deliberation may be constrained in ways that do not affect the "rationality" of the decision. Lies, deception, and a lack of appropriate information can all limit the effective exercise of the abilities required for rational deliberation[25].

In sum, the foregoing theoretical analysis reveals that criminal liability can primarily be imposed on autonomous individuals when they possess the abilities necessary for effective deliberation free of internal restrictions (autonomy as effective deliberation), and when their actions are neither coerced by others (autonomy as liberty of action) nor their options are narrowed by material constraints (autonomy as freedom of choice). The following discussion highlights how the adoption of such individualistic approach is problematic in relation to corporate criminal liability.

(25) Mappes and DeGrazia, 1996 supra at p 27.

2.2. Grounds of Corporate Criminal Liability

The criminal responsibility of corporation was virtually unknown to criminal law until the second half of the nineteenth century[(26)]. This is because, traditionally, criminal law is somehow centred upon the notion that individuals are the bearers of rights and duties, and consequently their wrongdoings are the direct object of criminal liability. Many of the problems surrounding the attribution of criminal liability to corporations revolve around the question of whether it is possible to regard corporations as capable of possessing mental states as individuals and consequently being found guilty of the commission of an offence. It was noted above that the traditional response to the problems of accountability is individualism, the basic credo of which is that corporations do not commit offences but people do[(27)]. In the same vein, it has been stated that "the immediate response to the question as to who can be convicted of a crime is to envisage a human being"[(28)]. It is the concept of individuals which is known as the primary target of criminal laws. Quaid has explained the reason behind such approach in the following terms:

> One of the reasons why contemporary legal systems have difficulty with any concepts other than that of the individuals [as the objects of criminal liability] is the heritage of political liberalism. The dominance of liberalism which has celebrated the ultimate value of the individual person and correspondingly denounced collectivism or social welfarism has inevitably been reflected in legal accounts of responsibility. Corporate accountability can be seen as an example of a shift toward a mid-way theory of communitarianism, which undermines the liberal theory of self, but equally wary of social welfarism…individualism is unable to account for the corporateness of corporate action and corporate responsibility[(29)].

Under the present state of law in both Jordan and Australia, corporations are recognised as separate "legal persons[(30)] " or entities from their shareholders and management and so regarded as "legal persons" for some purposes such as

(26) Bronitt S & McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney, 2001at p154.

(27) Fisse and Braithwaite, 1988 supra at p473.

(28) Bronitt and McSherry, 2001 supra at p154.

(29) Quaid, 1998 supra at p 71.

(30) See Articles (50 and 51) of the Jordanian Civil Code 1976 No 43. For Australia, see section (22) of Acts interpretation Act 1901 (Cth); sections (8/d and 21/1) of the Interpretation Act 1987 (NSW). Generally, see for example Ashworth, 1999 supra at 116-117; Wells C, Corporations and Criminal Responsibility, 2nd ed, Oxford University Press, New York, 2001 at 75-81.

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property ownership. But this has created theoretical and practical problems. On the theoretical level, there is the obvious point that merely calling or labelling a corporation as a person for legal purposes does not really make it into a person. A corporation does not have conscious awareness in the sense just considered above. This is because it has no mental states, nor can it have the capacity to step back from those states and make rationale and moral decisions about its future actions. This absence of consciousness and free will seems to undermine the rationale of corporate punishment as retribution and deterrence. As has been frequently said, corporations "have no soul to damn and no body to kick"(31). Moreover, companies cannot be imprisoned but they can only be fined. But small fines tend to be treated as relatively minor costs of doing business and can be passed to insurers or customers. In addition, corporations cannot be executed in the sense of revoking their charters or canceling their registration [although this is theoretically possible under the JPC as will be seen below] or fining them into bankruptcy or compulsorily nationalizing them. But, in the former case at least, workers, and other shareholders who are obviously not guilty of the crime in question are highly likely to be major victims of such operations. It is therefore likely that the courts will be unwilling to do any of these things. [Corporate punishment is considered further below].

On the practical level, there are major evidentiary problems for investigators and prosecutors in establishing not only who specifically has engaged in the forbidden action, but also whether the person [or group of persons] had the required mental state for the commission of the crime in question. Another dangerous, but possible, risk which might emerge here is what we might refer to as the "sacrificed personnel". As Fisse points out "to impose individual liability alone would be to allow corporations to externalize the criminal costs of their enterprise by getting expendable personnel to take the rap"(32). He continues to say that the continuing relevance of the risk created by personnel expendability is evident from the tactic adopted by some companies of setting up the internal accountability in such a way so as to have the vice-president who goes to jail(33). The adoption of such mechanism which offers a splendid sacrifice will make the prosecutors feel sufficiently satisfied and refrain from pressing charges against the corporation.

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(31) Dirkis M & Nicoll G, Corporate and White-Collar Crime, In Hazlehurst K M, (eds) *Crime and Justice*, LBC Information Service, Sydney, 1996 at p261.

(32) Fisse B, The Duality of Corporate and Individual Criminal Liability, In Hochstedler E, (eds) *Corporations As Criminals*, Sage Publications, London, 1984 at p 73.

(33) Fisse, 1984 supra at 74.

There is a growing social awareness that corporate wrongdoings are more widespread, dangerous and more likely to cause harm to society than those of individual behavior(34). Indeed, as it has been asked by Quad what is more serious: pollution of a river as part of industrial activities or stealing a loaf of bread by an individual to feed his or her starving children(35). But as he says, although the answer is quiet clear, corporate activities are often viewed differently from human activities. As Wells notes:

> The contrast between the social and legal constructions of crime prevents us from seeing corporations as real criminal and highlights a paradox. Theft is the dishonest appropriation of property belonging to another…much of what corporations do legitimately is the lawful pursuit of that which done dishonestly would be regarded as anti-social. Corporate goals are directed toward making profits at another's expense…the line between acceptable and unacceptable appropriation, then, may be a fine one. The process whereby class and wealth determine the enthusiasm with which undesirable activities are repressed is what Foucault dubbed "the restructuring of the economy of illegalities"(36).

It is commonly acknowledged by legal commentators that companies may commit most offences such as conspiracy, black marketing offences, being an accessory to an offence of causing death or dangerous driving, incitement, attempt to commit a given offence and many other offences(37). It is undeniable that corporations operate as providers of services in a wide range of areas such as transportation, food production, and they are involved in major activities relating to the environment, consumer protection and occupational health and safety which pose serious potential dangers to the public(38). Corporate criminality is not limited to economical cost associated with corporate crime such as tax violation, rather it has physical and social cost as well. For example, in Australia, there are a significant number of work related deaths occurring every year because of corporate criminal behaviors.

> In a study of occupational health and safety offences, Santina Perrone found that between January 1987 and December 1990, 353 work related

(34) Norrie, 2001 supra at p82.
(35) Quaid, 1998 supra at p109.
(36) Wells, 2001 supra at p 10.
(37) Gillies P, *Criminal Law*, 4th ed, LBC Information Services, Sydney, 1997 at p132; McSherry and Bronitt, 2001 supra at p155.
(38) Ashworth, 1999 supra at p169

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> deaths had occurred in Victoria alone… of those deaths, 203 occurred in a corporate context and 25 of those were related to an "extreme level of company negligence" sufficient to establish criminal culpability to sustain a conviction of manslaughter[39].

Similarly, Kramer states that, in America for example:

> Over 100,000 deaths a year are attributed to occupational related diseases, the majority of which are caused by the knowing and willful violation of occupational health and safety laws by corporations…additionally, 14,200 workers are killed in industrial accidents, with two million more receiving disabling injuries. The majority of these deaths and injuries can be attributed to dangerous work conditions maintained by corporations in violation of federal law[40].

Workers are not the only victims of corporate crime as Kramer argues but the general public is often victimized simply by living in an environment made unsafe by corporate actions. But as Ashworth points out, this growing recognition of the significance of corporate harm-doing has not been accompanied by substantial alteration of the framework of criminal liability[41]. The trend has been to attempt to fit corporate liability within the existing structure instead of considering its implication afresh. But the foregoing discussion reveals that the notion of individual autonomy does not provide a proper basis of corporate criminal liability. The idea of a person being liable for a crime caused by his or her action or inaction is understandable. By contrast, the concept of a corporation, which is a "legal fiction", committing a crime is more difficult as a corporation is an entity with no "soul or body, does not think, speak or act". So, our conception regards only individuals as being real in the social world while corporations are abstractions which cannot be observed. **Yet, as has been argued:**

> The notion that individuals are real, observable, flesh and blood, while corporations are legal fictions, is false. Plainly, many features of corporations are observable (their assets, factories, decisionmaking procedures), while many features of individuals are not (.e.g personality, intention, unconscious mind). Both individuals and corporations are defined by a mix of observable

(39) Cited in McSherry and Bronitt, 2001 supra at p154.

(40) Kramer R C, Corporate Criminality: The Development of an Idea, In Hochstedler E, (eds) *Corporations As Criminals*, Sage Publications, London, 1984 at p19-20.

(41) Ashworth, 1999 supra at p117.

and abstracted characteristics[42].

Although there is no settled theory of corporate personality, corporate criminal liability has been dominated by a "nominalist" theory which postulates that corporations do not commit crimes but individuals do[43]. According to this view, corporations are simply a collection of individuals and corporate criminal liability involves the attribution of the fault of specific individuals to the corporate entity as corporations are incapable of being at fault on their own. In contrast, the "realist" theory of corporate personality conceives corporations as having an independent existence and capable of being at fault in their own right[44]. From this perspective, corporations are not simply regarded as vehicles for individuals to commit crimes, but as criminal actors in themselves. The attribution of criminal liability to corporations according to this view entails basing such liability on the ground of an "organizational" rather than "individual" fault.

It might be questionable whether corporations should be equated with individuals and treated on the same footing for the purpose of imposing criminal liability. It is, however, unquestionable that corporations should be held accountable for their wrongdoings. But the challenge to any theory of corporate criminal liability lies in the ability to go beyond the confines of the human person and identify other attributes which enable an entity to be capable of being criminally a responsible actor[45]. So, the question becomes how to impose criminal liability upon corporations? There are two possible ways through which a corporation can be held criminally accountable for the commission of an offence: "vicarious" liability and "direct" liability. In what follows, these possible grounds of corporate criminal liability are considered with a view to suggesting that corporate direct criminal liability as a more effective approach to such liability.

2.2.1. The Traditional Approach to Corporate Criminal Liability: Vicarious Liability

As discussed above, criminal laws in both Jordan and Australia focus on the notions of mens rea and actus reus as the components of a criminal offence. Accordingly, a corporation as an artificial entity cannot act nor can it possess a

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(42) Fisse and Braithwaite, 1988 supra at p476.

(43) Clough J & Mulhern C, The Prosecution of Corporations, Oxford University Press, New York, 2002 at p64.

(44) Clough and Mulhern, 2002 supra at 64-65.

(45) Quad, 1998 supra at p 71.

guilty mind except through its officers and agents. If corporations are to be made criminally liable, then the law has to create a way through which criminal liability can be attributed to them. In response to this need, the criminal laws in both Jordan and Australia have introduced and recognized the notion of vicarious liability. Borrowing from civil law principles, it is now well established that a corporation can be held vicariously liable for the act of its employees provided that they have acted within the scope of their employment. Under this doctrine of vicarious liability, corporations are made criminally liable as a principal offender not because of their own "direct actions" but because of the "action of another person"(46). It has been stated that there is no doubt that in Australia the vicar's criminal actions may be attributed to the employer in reliance upon the doctrine of vicarious liability(47). The bulk of the Common law cases in Australia and Article (74) of the JPC tend to assert this type of corporate accountability on the basis of this doctrine(48).

But for this type of vicarious liability to be imposed various requirements need to be established. First, this liability can only be attached to the corporation when the relevant law intends to impose vicarious liability. It appears that the criminal laws in both Jordan and Australia contain legal provisions to this effect. In Jordan, Article 74/2 of the JPC states that:

Excluding the governmental departments and the public official organizations, criminal liability can be attributed to the 'non-natural persons' for the crimes which are committed by their managers or representatives when they commit such an offence using the name of the organization or with the intention of benefiting it(49).

In Australia, Division (12) of the CCA states that:

12.1. (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as set out in this Part, and with such other modifications as are made necessary by the

(46) Gillies, 1997 supra at p130,134; McSherry and Bronitt, 2001 supra at p156; Alsied, 2002 supra at p531-534; Almajalee N T, *Explanation of the General Principles in the Penal Code of Jordan*, Dar Althakafah for Publication, Jordan, 2005 at p392.

(47) Gillies, 1997 suprat at p135.

(48) See for example, Australian *Stevedoring Industry Authority v Overseas and General Stevedoring Co Pty Ltd* (1959) 1 FLR 298; *Banger v Drift Fruit Juices Pty Ltd* [1974 VR 677; *Schenker and Co (Aust) Pty Ltd v Sheen* (1983)48 ALR 693; *Woolworths Ltd v Luff* (1988) 77 ACTR 1.

(49) Article (442) of the JPC also provides that" upon the commission of an offence for the benefit of a corporation, the corporation shall be held responsible for that crime with the individuals who have committed that offence or participated in its commission being held liability".

fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment[(50)].

12.2. If a physical element of an offence is committed by an employee, agent, or officer or body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

Secondly, the employee, officer or agent must have committed the offence in question in the course of his or her employment or authority. This requirement is evident from the wording of the above-mentioned legal provisions in both Jordan and Australia. But unlike Australian law, vicarious liability under Jordanian law can only be attached to a corporation when an employee acts or omit to act with the intention of benefiting the corporation pursuant to Article (74/2) of the JPC. Whereas, acting with this intention is not a condition for corporate vicarious liability in Australia[(51)], though it is necessary that the act committed falls within the employee's scope of employment or authority.

Thirdly, the employee needs to have the relevant state of mind required in the definition of the offence committed under both the Australian[(52)] and Jordanian criminal laws. In Australia, unless the offence is one of strict or absolute liability, it needs to be proved that the employee possessed the relevant mental state concerning the crime in question. Section 12.3 (1) of the CCA states that:

If intention, knowledge or recklessness is a fault element in relation to the physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorized or permitted the commission of the offence.

Similarly, although the wording of Article (74/2) of the JPC does not explicitly state that, this requirement is implied in that Article and can be inferred from other Articles of the JPC. A close look at the JPC, particularly Articles

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(50) Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

(51) *Austrakian Stevedoring Industry Authority v Overseas and General Stevedoring Co Pty Ltd* (1959) 1 FLR 298.

(52) *Moussell Bros Ltd v London and Northwestern Railway Co* [1917] 2 KB 836.

(63-67) which lay down the principles regarding mens rea, reveals that proving the mens rea is required before criminal liability can be attributed to the offender for the commission of any offence. As has been argued there is no evidence in the JPC to indicate that criminal liability can be imposed without a proof of a certain form of mens rea(53). Noticeably, the attribution of criminal liability to a certain corporation for the commission of an offence by one of its employees does not excuse that employee of being personally held liable for his or her crime(54). In other words, in principle, the liability of the corporation is not a substitute for the individual liability and visa versa.

As discussed above, a corporation, like a human individual, can be made vicariously liable for a crime committed by its employee. The status of the employee acting within the scope of employment is irrelevant for the purpose of the doctrine of vicarious liability. Thus, the most junior employee can act in such a way so as to incriminate his or her employer. Liability may arise notwithstanding that the offence is or may be committed without reference to a senior person within the company, who is so closely associated with its affair management. Moreover, the assumption underlying vicarious liability is that corporations are held liable for the criminal acts of their vicars because the former have failed to take the necessary steps to make sure that no crime is committed. Deeper consideration of the issue, however, entails examining situations involving corporations as being the primary cause for the crime committed by either intentionally causing their employees to commit crimes or through providing an encouraging environment for criminal behaviors. In this sense, it is necessary to look beyond the notion of "vicarious" liability by exploring other possible grounds for corporate "direct" criminal liability. The bases which allow the attribution of direct criminal liability to corporations are dealt with below.

(53) Alseid, 2002 supra at p341-343.

(54) Alseid, 2002 supra at p534; Gillies, 1997 supra at p147-149; Saleh N A, *Crimes against the Economy in the Jordanian La*w, Dar Alfeker for Publication, Amman, 1990 at p152.

2.2.2 Direct Criminal Liability for Corporations(55)

The purpose of this section is to explore the possible basis of corporate "direct" rather than "vicarious" liability. Three possible grounds have been proposed to allow the attribution of direct criminal liability to corporations including the "identification" doctrine, the "aggregation of fault" doctrine and the "organizational" doctrine. These doctrines are considered below consecutively.

2.2.2.1. The Identification Doctrine

As noted above, the gist of the problem associated with the attribution of "direct" criminal liability to corporations revolves around the question of whether or not corporations can possess mens rea in relation to a criminal conduct. The answer to this question lies in what is known as the identification doctrine which seeks to assimilate corporate mens rea to individual mens rea. Liability under this doctrine hinges upon the allocation of an individual (or individuals) within the corporation who is so closely associated with its affair or management so as to regard his or her act or state of mind as being those of the company for legal purposes. In this sense, he or she is not viewed as being mere "vicar" of the corporation, and as such the corporation's liability is not merely vicarious. This doctrine operates to allow the attribution of "direct" criminal liability to corporations for the acts of certain persons who, when acting in the company's business, are viewed to be the "embodiment of the corporation" and whose acts are thus deemed to be the corporation's act(56).

In other words, corporate criminal liability under this doctrine hinges upon the allocation of the "mind of the company in selected employees". This doctrine seeks to identify the individuals who control or who are said to represent the mind and will of the corporation such as directors, managers or other superior officers and regard their state of mind as the state of mind of the corporation for the purpose of criminal liability(57). Accordingly, where those individuals at the top of the corporation, act on its behalf with a guilty mind, then their state of

(55) For a more general discussion on this issue see, Norrie, 2001 supra at p92-105; Fisse and Braithwaite, 1988 supra at 469-513; Fisse B, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 (1) *UNSW LJ* 1 at 1-41; Fisse B & Braithwaite J, Corporations, Crime and Accountability, Cambridge University Press, New York, 1993; Field S & Jorg N, 'Corporate Liability and Manslaughter: Should we be Going Dutch?' [1991] *Crim LR* 156 at 156-171; Ashworth, 1999 supra at 116-124.

(56) Murugason R & McNamara L, Outline of Criminal Law, Butterworths, Sydney, 1997 at p40.

(57) See for example *P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 at 81-2; *Collins v State Rail Authority* (NSW) (1986) 5 NSWLR 209; *Brambles Holdngs Ltd v Carey* (1976) 15 SASR 270; *R v Roffel* [1985] VR 5 11(FC).

mind will be directly transferred to the corporation[58]. In Jordan, a version of this doctrine exists under Article 74/2 of the JPC which provides that a corporation can be held liable for the act or acts of its "managers" when the crime is committed by using one of its means or with the intention to benefit that corporation. At Common law, the origins of this doctrine is found and clearly explained in the following quote from Lord Reid in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at170-171[59]:

> A living person has a mind which can have knowledge or intention or be negligent and he [or she] has hands to carry out his [or her] intention. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He [or she] is acting as the company and his [or her] mind which directs his [or her] acts is the mind of the company. There is no question of the company being vicariously liable. He [or she] is not acting as a servant, representative, agent, or delegate. He [or she] is an embodiment of the company, or, one could say, he [or she] hears and speaks through the persona of the company, within his [or her] appropriate sphere, and his [or her] mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agents. In that case any liability of the company can only be a statutory or vicarious liability … normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not…the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them… within the scope of the delegation [the delegate] can act as the company.

2.2.2.1.1. Problems with the Doctrine of Identification

The doctrine of identification attracts some major criticisms[60].With its current formulation, it stands as a legal barrier for effective corporate direct

(58) Norrie, 2001 supra at 93.

(59) See also, for example, *Hamilton v Whitehead* (1988) 166 CLR 121 at 127; *Collins v State Rail Authority* (NSW) (1986) 5 NSWLR 209; *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270; *R v Roffel* [1985] VR 511(FC). In addition, the echo of *Tesco* principle is witnessed under the *Criminal Code Act* 1995 (Cth) although the net extends wider to include 'high managerial agents' in s 12.3 (1,2 (a, b).

(60) See Fisse, 1990 supra at 3-4; Clough and Mulhern, 2002 supra at p 89-93.

criminal liability since it fails to apprehend the collective responsibility of corporations. As it has already been pointed out, it is the acts and mental state of mind of those who represent the "head" of the corporation or those who have an influential position as controlling officers which is relevant to the question of corporate direct criminal culpability(61). Along the lines of vicarious liability, the law has tried to superimpose its individualistic constructs onto companies instead of trying to look at the problem of corporate wrongdoing with fresh eyes. This approach is narrow because those who are not the "head" of the company but rather are considered as its "hands'" may be involved in certain criminal actions in the course of their employment without any attribution of fault to the corporation. The principle in *Tesco* tends to restrict corporate criminal liability to a high level by confining the accountability of corporation to those who are said to be the directing mind and will of that corporation such as the board of directors, its managing directors to whom the function of the board has been fully delegated(62).

Further, the identification theory fails to acknowledge the diffusion of responsibility in the corporation where a number of persons at the top of an organisation might be severally liable for acts of contributory negligence or recklessness(63). Moreover, even if it might be possible to identify the individuals who are regarded as the mind of the corporation, it would be difficult to prove their "mental" involvement in the commission of an offence due to complex corporate structure and delegation of authority. Furthermore, as has been asserted, the *Tesco* principle is unworkable in the context of large corporations(64). This is because offences committed on behalf of an organisation are often committed at a middle or lower level of management whereas the *Tesco* principle requires fault on the part of a high level management. Fisse continues to point out that it is a fallacy that corporate criminal liability should be defined by reference to the state of mind of those located at the top of the company. Corporate decision making is not confined to the highest level of the corporation but it is diffused throughout the organization. In the corporate world, many employees have input in managing the company and the persons at the top are

(61) Parson S, "The Doctrine of Identification, Causation and Corporate Liability for Manslaughter" (2003) 67(1) *The Journal of Criminal Law* 69 at p69-71.
(62) Ashworth, 1999 supra at p119-120 ; Norrie, 2001 supra at p93-94; McSherry and Bronitt, 2001suprat at p157.
(63) Norrie, 2001 supra at p94.
(64) Fisse ,1990 supra at p3.

often remote from the day-to-day sources of operational power. In a similar vein, it has been stated that:

> [O]ne effect of [the] identification doctrine is that the more diffuse the company structure, the more it devolves power to semi-autonomous mangers, the easier it will be to avoid liability. This is of particular importance given the increasing tendency of many organisations specifically to decentralize safety services. It is clearly in the interest of shrewd and unscrupulous management to do so… secondly, the limits of criminal liability constructed by the identification doctrine do not reflect properly the limits of the moral responsibility of the corporation itself. This cannot be limited to responsibility for the acts of high ranking officials such as company directors. Priorities in hierarchical organisations like corporations are set predominately from above. It is these priorities that determine the social context within which a corporation's shop-floor workers and the like make decisions about working practices. A climate of safety or unsafety may permeate the entire organisation but be created at the highest level. Thus, if criminal law is to reflect this moral responsibility, in appropriate cases legal responsibility ought to extend to acts done by the 'hands' of the corporation(65).

In line with the above criticism, Fisse and Braithwaite strongly criticized the identification doctrine stating that it is highly unsatisfactory mainly because it fails to reflect corporate blameworthiness(66). To prove fault on the part of one managerial representative of a company is not to show that the company was at fault. The authors continue to, rightfully, argue that the *Tesco* principle does not reflect personal fault but amounts to vicarious liability for the fault of a restricted range of representatives exercising corporate functions. This compromised form of vicarious liability is doubly unsatisfactory because the compromise is struck in a way that makes it difficult to establish corporate criminal liability against large companies. According to them, offences committed on behalf of corporations are often visible at the level of middle management whereas the *Tesco* principle requires proof of a top-level manager. Furthermore, it has been warned that well-advised corporations can take steps to make sure that they do not fall within the identification principle because some judgments suggest that the principle is not applicable to situations involving managers exercising

(65) Field and Jorg,1991 supra at p158-159.
(66) Fisse and Braithwaite, 1993 supra at p47.

substantial functions when the boards of directors have retained a formal right of vote or intervention[67].

It appears that the authors' main concern, as stated above, is evident in the Common Law case *R v AC Hatrick Chemical Pty Ltd (Unreported,* 29/11/1995 SC VIC). In that case, the corporation [the plant engineer and the plant manager] were charged with manslaughter in relation to a tank which had exploded during a welding operation causing the death of a worker and serious injury to another. The charges against the individuals were withdrawn and the Judge directed a verdict of acquittal against the corporation. The acquittal rested, in part, on the fact that the plant engineer and the plant manager were not "the guiding mind" of the company.

But again, assuming that it is possible for a corporation as a whole to be blameworthy, it is arguable that a fault on the part of any individual representative does necessarily mean that the corporation was at fault. And even if this is possible to attain, in large corporations with complex management structures, it will be virtually impossible to identify an individual who has committed the requisite element of the crime. Blameworthiness often appears to be widely distributed amongst many different individuals and levels of the hierarchy. But the problem of the *Tesco* principle is that without any "particular individual" or "level" being sufficiently blameworthy no corporate criminal liability can follow. Another possible basis of corporate liability which has been offered to address these concerns is discussed below.

2.2.2.2. The Aggregation of Fault Doctrine

Various solutions have been proposed to accommodate corporate responsibility including the notion that the law should adopt an "aggregation of fault" doctrine. This doctrine seeks to overcome the limitations of the identification doctrine, particularly, the dichotomy between the acts of the high-ranking officials in a company and the company's "hands". As has been asserted, this dichotomy fails to acknowledge the indissoluble connections between individuals in collective enterprises like corporations[68]. The diffusion of responsibilities or decision-making process in the real world of corporations militates against corporate culpability when the harm is being caused by the corporate "hands" or persons who are not seen as its "controlling mind". The basic idea of the aggregation of fault doctrine is that corporate culpability should be constructed around the knowledge and attitudes of the employees as a whole

(67) Fisse, 1990 supra at p4.

(68) Field and Jorg, 1991 supra at p160.

instead of being contingent on the knowledge of one or few employees(69). In other words, the accumulative actions of various persons within a corporation could be aggregated so that in their totality they might amount to the requisite degree of corporate blameworthiness. Aggregation in this sense involves a recognition that individuals within the corporation contribute to the whole mechanism, and hence it is the whole which is judged not the parts.

At Common Law in Australia, it has been proposed that the guilty mind of a corporation can be collected from the mental states of several employees. To this effect, in *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270 at pp 275-276, Chief Justice Bray made the following remarks:

> In my view, it is a fallacy to say that any state of mind to be attributed to a corporation must always be the state of mind of one particular officer alone and that the corporation can never know or believe more than one man knows or believes. This cannot be so when it is a case of successive holders of the office in question or of the holder of the office and his deputy or substitute during his absence. Let us suppose that a piece of information, X, is conveyed to one officer of the company, A, then A goes on holidays and B takes his place and a further piece of information, Y, is communicated to him. It is a fallacy to say that the company does not know both X and Y because A only Knows X and B only knows Y. As a matter of fact, it may well be B's duty when he is told about Y to find out about X. I hasten to add that although I think a corporation has in a proper case the combined knowledge or belief possessed by more than one of its officers, that does not mean that it can know or believe two contradictory things at once.

The aggregation of fault as a basis of corporate culpability was also considered in the English case *R v HM Coroner for East Kent, Ex Parte Spooner and Others* (1989) 88 Cr App R 11-17. In that case, the legal issue arose after a ferry ship capsized after leaving Zeebrugge harbor with its doors open resulting in the loss of nearly 200 lives. Sheen Judge conducted an investigation about the cause of the incident finding that the immediate cause behind it was the sailing of the ferry while its doors were open. Sheen Judge criticized several individuals of the ship's crew who had failed to perform their duties. In particular, he criticized those responsible for failing to close the doors, those failing to see that the doors were not closed and those sailing without knowing that the doors were not closed. The relatives of victims relied on Sheen Judge's report and argued that it was not necessary to identify a person who is individually responsible for that

(69) Wells, 2001 supra at p156.

capsize to hold the company liable. Rather, the corporate culpability could be established by reference to a number of aggregate individual faults. But Bingham LJ rejected this argument ruling that:

> I do not think that the aggregation argument assists the applicants. Whether the defendant is a corporation or a personal defendant…a case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such (16-17).

Bingham J advanced no convincing reason for rejecting the idea that evidence of a corporation's culpability could be established by the aggregation of a number of individual instances of negligence. Arguably, it can be said that the criminal responsibility of a corporation might be addressed by allowing the aggregation of faults of several individuals within a certain corporation to be imputed to that corporation.

While the aggregation of fault approach has been rejected in England(70) and has no explicit basis under the JPC, it is recognized in Australia under the CCA. Section 12.4 (2) provides that:

(a) If negligence is the fault element of an offence; and

(b) No individual employee, agents or officer of the body corporate has that fault element; that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers.

2.2.2.2.1. Problems with the Aggregation of Fault Doctrine

Although the doctrine of aggregation is considered an advanced step toward effective corporate liability when compared with the identification doctrine, it has nonetheless been the object of various criticisms. First of all, realistically corporations are not individuals nor can they be reduced to mere aggregations of their constituent human agents so as to render the doctrine of aggregation workable. They are "systems" with distinct properties and complex entities with their own standards of behavior(71). Furthermore, although the notion of aggregation of fault acknowledges that the harm caused by a corporation might

(70) *R v HM Coroner for East Kent, Ex Parte Spooner and Others* (1989) 88 Cr App R at16-17 (per Bingham LJ).

(71) Clough and Mulhern, 2002 supra at p4.

involve combined activities of various persons, it fails to provide insight into what unifies those activities so as to justify the attribution of culpability to the corporation[72].

Clearly, the doctrine fragments the concept of "directing mind" to reflect the way in which the harm occurs. But without the allocation of individual fault resulting from a failure to carry out certain responsibilities, the doctrine will be rendered futile. According to Norrie the idea of "directing mind" works precisely because it analogizes corporate with individual human activities[73]. But if this analogy is rejected, then it is not clear what unifies aggregated actions to make them the actions of the corporation. The doctrine has also been criticized by others arguing that if responsibilities, within a corporation, are not vested in any particular group of individuals, it becomes difficult to identify any directing mind to suggest that his or her failure represents a culpable fault which if combined with faults of another person may form a ground for corporate liability[74]. Unless this requirement is satisfied the doctrine fails to explain why corporate culpability should be based thereon.

Moreover, even if one can accept that the aggregation of individual faults of those working within a corporation is imputable to that corporation, it would be extremely hard for the prosecution to prove all these faults beyond all reasonable doubt. To illustrate this point, I consider the example provided by Clough and Mulhern. Let us say that a child died as a result of drinking water from a contaminated stream the cause of which was a toxin discharged into the stream by a chemical company. Assume that the scientists knew the toxin was lethal but did not know that it was released into the stream. The production managers knew it was released into the stream but did not know the water was drunk by a local child. The plant manager knew it was drunk by the child but did not know it was toxin. Practically, in this example the aggregation of corporate knowledge is likely to be extremely complex with a high probability of leaving considerable scope of reasonable doubt in favor of the accused corporation[75].

The problems confronting the law in this area is generated by a failure to develop criteria for judging the collective processes rather than trying to establish corporate liability by resorting to the individualist approach. The identification doctrine serves the necessary connection between individuals

(72) Norrie, 2001 supra at p95.
(73) Norrie, 2001 supra at p95
(74) Field and Jorg, 1991 supra at p162.
(75) Clough and Mulhern, 2002 supra at p107.

within the corporation, and the rejection of aggregation lead to an inappropriate individualistic approach for corporate blameworthiness. As pointed out by Clough and Mulhern, aggregation is "a clumsy attempt to reflect organisational blameworthiness within a model that is inherently unsuited for the purpose"(76).

Therefore, it is thought necessary to go beyond both the individualism of the identification doctrine and the diffusion of that individualism in the aggregation approach seeking to place corporate direct criminal liability in what might be termed as the "organizational doctrine". In this sense, corporate culpability should be structured around accepting the idea that corporations are capable of being blameworthy in "their own right even in the absence of individual fault". Arguably, this model can better serve as a ground of such liability if combined with a notion of strict liability. These points are discussed below.

2.2.2.3. The Organizational Doctrine

The individualistic approach in its "aggregate or non-aggregate" form requires an identifiable human actor or actors in order to attribute fault to the corporation. Such an approach cannot accommodate situations involving corporate harmful behaviors resulting from a system failure or a cumulation of various faults by many agents neither of which are sufficient to sustain an individual attribution of fault. Vicarious liability is also limited because it holds the corporation liable for the acts of its agent regardless of any corporate fault. It is therefore, necessary to look for another alternative approach for such liability that seeks to move beyond the individualism of the identification doctrine and the diffusion of that individualism in the "aggregation of fault" doctrine. It rather envisages to ground the culpability of corporations in the creation of an organisational environment that may be unsafe, inefficient and consequently criminally dangerous(77). It intends to use the corporation’s policies, or their absence as a basis for corporate culpability(78).

A model of corporate criminal liability which attempts to go beyond individually-based and vicarious liability and proposes a means of integrating the concept of "organizational blameworthiness" has been developed by Fisse and Braithwaite in their work "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Syd LR* 468 at pp

(76) Clough and Mulhern, 2002 supra at p108.
(77) Norrie, 2001supra at p96.
(78) Ashworth, 1999 supra at p122.

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473-513[79]. The authors assert that corporations are blameworthy but such blameworthiness has been reduced by law to blameworthiness on the part of individual representatives. However, as they (at p478) point out, although institutions are constituted by individuals, and individuals are socially constituted by institutions, it is unacceptable to conceive corporations as no more than sums of the isolated efforts of individuals. The authors (at p479) argue that organizations are not just aggregations of individuals; rather they are systems ("socio-technical" systems, as they have sometimes been described). In the case of organizations, individuals may be the most important parts, but there are other parts which is evident from factories with manifest routines operating to some extent independently of the biological agents who flick the switches. According to them the reduction of a corporation to its constituent individuals is unacceptable because:

> Corporations are blamed in their capacity as organizations for causing harm or taking risks in circumstances where they could have acted otherwise. We often react to corporate offenders not merely as impersonal harm-producing forces but as responsible, blameworthy entities. When people blame corporation, they are not merely channeling aggregation against the ox that gored or symbolic object. Nor are they pointing the fingers at individuals behind the corporate mantle. They are condemning the fact that the organization either implement a policy of non-compliance or failed to exercise its collective capacity to avoid the offence for which blame attaches (pp 481-482).

It is often said that corporate blameworthiness is a phantom as corporations cannot possess a guilty state of mind. As has been asserted by Quaid, one should be aware of the distinction between the terms "corporate intentionality" and "corporate intention" which can be confused when corporate actions are discussed[80]. According to her, the first can be described as the source of the capacity of a corporation to be accountable. That is, the corporation is able to act in a manner where criminal liability can be attracted to it. The second term connotes the mental element which is relevant to a particular offence. Bearing this in mind, the author states that a perfect overlap of corporate intentionality and action is an interesting feature of the definition of corporate act. That is, unlike humans, who may perform involuntary actions through uncontrolled body movement, a corporation has no way to act without certain deliberateness. In a

(79) See also, Fisse B and Braithwaite J, Corporations, Crime and Accountability, Cambridge University Press, Australia, 1993.

(80) Quaid, 1998 supra at p90-91.

similar vein, it has been argued that while corporations cannot indeed possess intentions as "cerebral mental states", nonetheless:

> Corporations exhibit their own special kind of intentionality, namely corporate policy…which does not express merely the intentionality of a company's directors, officer or employees but projects the idea of a distinctly corporate strategy(81).

Fisse and Braithwaite (at p483-487) assert that the attribution of blameworthiness requires two conditions: First, the ability of the actor to make decisions. With regard to this condition, the authors point out that Herbert Simon has defined a formal organization as a "decision-making structure". Under this definition, a formal organization has one of the requirements for blameworthiness and we routinely hold organizations responsible for a decision when and because that decision represents an organizational policy and represents the outcome of an organizational decision-making process which the organization has chosen for itself.

The second condition of blameworthiness is the inexcusable failure of the actor to perform an assigned task. In relation to this condition, the authors assert that any "culture" confers certain types of responsibilities on certain kinds of actors. For example, fathers have responsibilities not to neglect their children, and doctors bear special responsibilities in the giving of medical advice. By analogy, just as fathers and doctors can be held to different and higher standards of responsibility by virtue of their role or capacity, so it is possible for corporations to be held to different and higher standard of responsibility than individuals. It is not a "legal fiction" for the law to hold corporations responsible. Corporations should be held responsible for the outcomes of their policies and decision-making procedures because they have the capacity to change their policies and procedures. As with human individuals, corporations can give moral reasons for their decision-making. They are also capable of changing their goals and policies and able to change the decision-making processes directed at those goals and policies.

In other words, an organizational blameworthiness can be seen or is reflected in the organizational environment that constantly produces certain expectations on the part of its employees based on the notion of "corporate culture". This "culture" could be found in an attitude, policy, rule, course of conduct or practice within the corporate body or in the part of the body corporate

(81) Fisse and Braithwaite, 1988 supra at p483.

where the offence has occurred[82]. Evidence may establish that a corporation's unwritten rule or policy tacitly authorizes non-compliance or fails to create a culture of compliance. This notion of "corporate culture" might well contribute or cause individuals within the corporation to commit crimes which they would not have done otherwise. As has been noted a number of psychological studies suggest that group decision-making can make members of the group willing to accept stupid ideas or hazardous risks that they would reject if making the same decision alone[83]. A "culture" of this kind might be transmitted from one generation of organizational role incumbent to the next, and the entire personnel of an organization may change without reshaping the "corporate culture". Thus, an advertent fault can be attributed to a corporation where that corporation has such a "culture" that promotes the commission of an offence[84].

Corporate intentionally does not exhaust the range of relevant fault concepts[85]. In practice, the predominant form of corporate fault is more likely to be corporate "negligence" than corporate intention. Corporate negligence is prevalent where communication breakdowns occur, or where organizations suffer from collective oversight. It may be possible to argue that corporate negligence amounts merely to negligence on the part of individuals. Yet, as the authors state, it may be possible to explain the "causes" of corporate wrongdoing in terms of particular contributions of managers and employees, but the "attribution" of fault is another matter. Corporate negligence is not necessarily reduced to individual negligence. This is because a corporation has a greater capacity to avoid the commission of an offence than an individual, and it may be for this reason that a finding of corporate but not individual negligence may be justified. Thus, where a corporate system is blamed, such blame should not be directed at individuals but rather toward an institutional set-up from which the standards of organizational performance are expected to be higher than those which are expected of any personnel.

It has been pointed out that while it is possible to define corporate fault in terms of corporate policy and corporate negligence, it is also possible that corporation will develop a compliance system that look immaculate on paper but is not to be taken seriously by the employees[86]. Norrie says that the organizational doctrine represents an advance step toward effective corporate

(82) Wells, 2001 supra at p131.
(83) Fisse and Braithwaite, 1988 supra at p479.
(84) Mann, 2003 supra at p202,
(85) Fisse and Braithwaite, 1988 supra at p 486.
(86) Fisse, 1990 supra at 16.

direct criminal liability as it reflects the "socially organized reality of corporations"[(87)]. Yet the problem revolves around establishing an "organizational fault" as a prerequisite for corporate culpability which requires the fulfillment of two conditions. First, it has to be established that a corporate entity "accepts" policies and practices despite the fact that they may cause harm. And, secondly, the corporation must have "power and capacity" to do something about it by changing the general practices and procedures but failed to do so.

Various solutions are proposed by legal commentators to proving the above-mentioned conditions. Fisse has suggested three possible ways to establish an "organizational fault"[(88)]. First, to recognize that corporations may have an implied policy of non-compliance in a given situation. This policy can be deemed to exist when the employee who is associated with the offence has reason to believe that the corporation expected him or her to act as he or she did and that complaining about the matter would be ineffective or would provoke retaliatory action against him or her. Secondly, the implied policy of non-compliance can also be deemed to have existed when the company has no system in place whereby employees can report suspected or anticipated episodes of non-compliance to high level management. Thirdly, Fisse advocates that it is also possible to articulate an ethically defensible and workable concept of "corporate fault" which reflects its organizational blameworthiness based on the "corporate reaction" to the commission of an offence[(89)].

As the foregoing discussion reveals, the general principle of corporate criminal liability requires proof of personal corporate fault on the part of certain individual within the corporation. Saying that this principle is unsatisfactory, Fisse and Braithwaite suggest to focus more on the "company's reaction" to having committed the physical element of an offence. They point out that corporate criminal liability for wrongdoing has traditionally been dependent on proof of responsibility for causally relevant action or inactions "at or before" the time the wrongful behaviors are committed. But they argue that it is not necessarily that the law should be focused exclusively on this time-frame. Similar to situations involving individual offenders, community sentiment of "reactive fault" can run deeper than that. For example, in the hit-run driver case, it is not so much the hitting but the running after the event which attracts condemnation. Corporate blameworthiness can also be judged within a reactive time-frame. In this regard, "corporate reactive fault" is defined as "unreasonable

(87) Norrie, 2001 supra at p96-97.
(88) Fisse, 1990 supra at p16-17.
(89) Fisse and Braithwaite, 1988 supra at p504-505.

corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the actus reus of an offence by personnel acting on behalf of the organization"[90].

This concept of "reactive fault" offers a way of attributing intentionality to corporations insofar as they enact and implement corporate policies. Realizing that a ready-made compliance policy might be in place and it is very rare to find a company displaying a criminal policy, the authors[91] state that the focus should be shifted from the company's general policies of compliance to what is especially proposed to be done to implement a program of internal discipline, structural reform or compensation. Adoption of such approach will allow the corporate blameworthy intentionality to be flushed out easily if compared to looking into the corporate policy "at or before" the time of the commission of the offence.

In a similar vein, some have argued for what they call "organizational criteria" as a basis for establishing corporate fault and consequently justifying corporate culpability[92]. In particular, they argue that a corporation should be open to criminal liability where it manifests an "acceptance" of the possibility of harmful consequences stemming from actions of its employees and where it had the "power" to do something about them by changing its general practices and procedures but failed to do so. With regard to the power to change the corporation’s practices and policies, the authors point out that the evaluation should take into account "corporate realities". That is, if the practices of a corporation lead to accidents which could have been prevented or avoided by readily available safety measures, by changing the general practices and procedures of the corporation or by installing new safety devices, that corporation may be said to have the power to eliminate the risk. In relation to the corporation’s acceptance of its dangerous practices, the authors argue that, rather than addressing issues of anticipation of risk, corporate liability should simply relate to the adequacy of corporate monitoring of risky or illegal behaviors.

As Brown, Farrier, Egger and McNamara[93] point out, Fisse and Braithwaite's concepts of "organizational blameworthiness" has now been taken

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(90) Fisse and Braithwaite, 1988 supr at p505.

(91) Fisse and Braithwaite, 1988 supr at p506.

(92) Field and Jorg ,1991 supra at p 163-171.

(93) Brown D & Farrier D & Weisbrot D & McNamara L, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, 3rd ed, The Federation Press, Sydney, 2001 at p479.

up in Division (12) of Part (2.5) of the CCA. Section (12.3)of that *Code* provides that:

(1) If intention, knowledge or recklessness is the fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorized or permitted the commission of an offence.

(2) The means by which such an authorization or permission may be established include:

(a) Proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or

(b) Proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or

(c) Proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) Proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

Under the CCA, the notion of 'corporate culture' is defined as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place" (s 12.3 (6). These paragraphs need to be read alongside section 12.3.4 which articulates that factors relevant to the application of paragraph 2 (c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) Whether the employee, agent, or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body

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corporate would have authorized or permitted the commission of the offence Section 12.4 (2)(94) provides that:

(a) If negligence is the fault element of an offence; and

(b) No individual employee, agents or officer of the body corporate has that fault element; that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers.

Section 12.4(3) provides that: negligence may be evidenced by the fact that the prohibited conduct was substantially attributed to:

(a) Inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) Failure to provide adequate system for conveying relevant information to relevant persons in the body corporate.

While the approach adopted in the above provisions may constitute a significant step in developing and clarifying standards of corporate criminal liability, it gives rise to new questions that may reveal the need for further reform. Part three of this paper elucidates some of these issues.

3. Part two: Serious Consideration of Corporate Accountability

Three issues are considered in this part including corporate culture and the limits of criminal law, combining the organizational doctrine with the notion of strict liability, and corporate punishment.

3.1. Corporate Culture and the Limits of Criminal Law:

3.1.1. The Limits of Criminal Law: A Black and White Picture

The notion of "corporate culture" poses some serious issues and problems in relation to corporate accountability including a re-consideration of the scope and boundaries of the theory of the "moral perpetrator of crime" in Jordan and its corresponding, and to a large extent identical, doctrine of innocent agent in Australia. In both jurisdictions, this theory is restricted and confined to only

(94) Subsection (1) of section 12.4 provides that "the test of negligence for a corporate body is that set out in section 5.5. Section 5.5 states that: a person is negligent with respect to a physical element of an offence if his or her conduct involves: (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence.

accommodate situations involving the principal's "intentional" exploitation and usage of another innocent agent to perform the physical element of a certain offence. In this sense, the principal offender could be an individual or a corporation. But the theory does not apply to situations involving any state of mind less than intention on the part of the principal when he or she "negligently" causes another person to commit a given offence. To add to the picture, both laws recognize a range of criminal defences which operate as exculpating excuses of criminal liability such as duress, necessity, insanity and so forth. But they do not go any further considering notions including what might be termed as "economical duress" and its relevance to criminal culpability, at least, in relation to corporate criminal liability.

It is submitted here that, any serious consideration of corporate crime and responsibility should involve a re-examination of these issues if corporate collective blameworthiness is really to be reflected. Although it is acknowledged that it will be an uphill struggle to achieve legal reforms in this direction, it is nonetheless necessary to raise this issue and highlight, briefly, its relevance in the context of corporate criminal liability.

In both Jordan and Australia, "duress" involves a very severe restriction of the options available to the individuals concerned(95). They are forced to make a

(95) In Australia, Smith J in *R v Hurley* [1967] VR 526 (which has been approved in subsequent decisions) sets out the elements of duress as follows:
Where the accused has been required to do the act charged against him (i) under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impeding…and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) that the crime was not murder, nor any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused in such circumstances at least, has a defence of duress (p543). [See also McCafferty [1974] 1 NSWLR 89 at 90 per Glass J]
In Jordan, Article 88 of the JPC deals with duress as follows:
There shall be no punishment for the person who commits a crime under a threat of duress and, at the time of the commission of that crime, he or she was reasonably under the apprehension of imminent death or a serious injury which would cause a permanent disability or mutilation of one of his or her organs if he or she did not submit to commit the crime (excluding murder) which he or she is coerced to commit. For a person to avoid criminal liability, he or she needs not to have created the situation of duress or subjected himself or herself to that duress, and there should be no other way to avoid such duress but to commit the crime.

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coerced choice from morally unacceptable options[96], and where circumstances other than the threat of serious violence or harm by another person similarly restrict the options available to a person, such that he or she can only avoid irreparable evil through the commission of some criminal act [involving a lesser evil], they can apply the defence of "necessity[97] or duress of circumstances". In effect, the only sort of duress by the action of another, recognized by law, is the threat of immediate death or serious personal violence where such immediate threat either overbears the ordinary power of human resistance or provokes legitimate resistance in self-defence. The only sort of "duress of circumstances" – or of "necessity" recognized in law is a threat of immediate death or very serious injury by natural disasters such as fire or earthquake.

While the law appears to be in line with the same broad categories of restrictions on autonomy, it nonetheless falls down in its crudely black and white approach. Much of criminal activities result from social conditions, and if the criminal law is supposed to express and reflect individuals' way of living, then it should start to consider some of the deeper issues which underpin and might explain criminal behaviors. As Norrie points out, the existing criminal law's approach:

> Misses the social context that makes individual life possible, and by which individual actions are…mediated and conditioned. There is no getting away from our existence in families, neighborhoods, environment, social classes

(96) Clarkson C M V, *Understanding Criminal Law*, 2nd ed, Fontana Press, London, 1995 at p86.

(97) In Australia, a useful definition of the defence of necessity is provided in the case of *R v Loughnan* [1981] VR 443 at 448 by Young CJ and King J:

[T]here are three elements involved in the defence of necessity. First, the criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect…The [second] element…[is]…that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril…thus if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed. The [third] element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril? (p 448).

Whereas in Jordan, this defence exists in Article 89 of the JPC which states that:

the perpetrator of an offence is not subject to punishment if he or she carries out the conduct constituting the offence in response to an emergency which forced him to ward off immediately an immediate peril against himself or his property or against another person or his property, provided that he or she did not intentionally cause that peril and provided that his or her conduct is proportionate with the danger.

and politics… the basic truth of the duality of human life, as both individual and social, is ignored by a practice and philosophy of legal judgment in which context is always regarded as extrinsic to agency. Even where it is admitted, it as a secondary and exceptional phenomenon added on to the judgment…the significance of duress and necessity defences is that they begin to open up this otherwise hidden world within legal discourse…they involve a kind of threat that most will never experience. But the fear that stems from such situations is qualitatively no different from a range of other fears which may be equally efficacious for the 'ordinary reasonable man'. These include 'fear of economic ills, fear of displeasing others, or any other determinant of choice'. People stealing out of hunger, or breaking into property because they are homeless(98).

3.1.2. Sociological Analysis

In reality, there are many different forms and degrees of restrictions, many sorts of ways in which the actions of some affect and constrain the decisions and spontaneous actions of others, increasing the likelihood of criminal behaviors. So, on the sociological side(99) criminal law should focus upon the broad reality of contemporary economic life while determining the liability of individuals. For example, in a capitalist society, the capitalist-owners have ultimate authority, and they enjoy a higher degree of autonomy than others. They are interested in profits and in maintaining the conditions that keep their profits. They cannot oversee every aspect of workplace activity to ensure that these conditions prevail so they hire special employees who are empowered to act on their behalf in the day to day organization of such profit maximization. Such co-coordinators oversee the day to day actions of the workers – the actual producers and wealth generators – whose autonomy is, in consequence, hugely restricted, controlled and lacking in creative possibilities. They obey the co-coordinators out of fear of being punished or fired(100). In other words, those with limited material resources enjoy little autonomy or even do not have real one.

A hierarchical division of labour within larger and more complex corporate

(98) Norrie, 2001 supra at p172.

(99) See for example, Miliband R, Divided Socities: Class Struggle in Contemporary Capitalism, Oxford University Press, Oxford, 1991; White R & Perrone S, Crime and Social Control: An Introduction, Oxford University Press, New York, 1997; Croal H, Understanding White Collar Crime, Open University Press, Buckinham, 2001; Mann S, Economics, Bussiness Ethics and Law, Lawbook CO, Sydeny, 2003; Kuhn R & O'Lincoln, Class and Class Confilct in Australia, Longman Australia Pty Ltd, Austrialia, 1996.

(100) Mann and Al-Qudah, 2004 supra at p111.

structures apportions tasks, empowerment, status, remuneration and quality of life in hierarchical order. A few at the top have excellent working conditions and very substantial empowerment. They are hugely autonomous in that they are largely free from day to day external duress, they have massive freedom of choice – in terms of real options in the organization of their work and leisure time, and they have access to a wholly different quality and quantity of information for rational decision making within the organization – including access to substantial human and mechanical information processing resources. The economic power of owners and higher co-coordinators gives them power to directly influence the political process – participating in the formulation of legislation and directing the day to day decision-making of the political leadership. So they can exert huge social and political power via the control of mass communications which provide the means of persuasion and ideological control[(101)]

As has been pointed out by Mann and Al-Qudah[(102)] those who have acquired sufficient assets through inheritance or other means can live very comfortably with no need to work at all. They can leave the management of such assets to others. They can choose to do whatever work might appeal to them, or simply enjoy the benefits of consumption. They can study what they want, possess what they want, travel when and to where they want. In contrast, those in the middle ranks fall well below these levels of autonomy –in relation to both effective power and decision-making within the organization and the power of money outside it. The great majority, in the lower ranks, have effectively no power at all, within the structure or outside it. In developed countries, they probably do have access to basic necessities of food, clothing, accommodation and transport – though the increasing numbers employed on a casual or part time basis find it more and more difficult to make ends meet. In some developing countries, those on the shop floor typically toil in slave-like conditions for what is often significantly less than a living wage.

Many of such individuals do not enjoy their jobs, or do not enjoy much of what they do at work. They work in order to get money to live. While they work they follow orders from others, with which they do not necessarily agree and they are highly vulnerable to pressure from above and below. And today, with high levels of chronic unemployment and underemployment, they must struggle harder in order to hold onto any kind of employment. In other words, the greater

(101) Mann and Al-Qudah, 2004 supra at p111; Mann S, Economics, *Bussiness Ethics and Law*, Lawbook CO, Sydeny, 2003 at p162-163.

(102) Mann and Al-Qudah, 2004 supra at p111-112.

part of their working lives consists of "economically coerced, rather than free action". They operate under continuous duress, and their limited incomes also reduce the options available to them outside the working environment. They suffer from long term unemployment or underemployment. But they are forced to accept these situations and may be driven to break the law in order to maintain their jobs out of fear of poverty and hunger. Government social security payments fail to accommodate for rents, food, clothes etc – to allow for even minimally decent living standards. Some do not even receive these payments and some are unable to make best use of them. In other words, their life options are severely restricted – so long as they stay within the legal economy. And powerful social forces of denigration and victimization work to undermine the self-esteem and psychological well-being of those in this group(103).

3.1.3. Class and Crime

The hierarchy of the social class structure can therefore be seen to map out a hierarchy of degrees of liberty of action, freedom of choice and effective deliberation, with reduced free will and increased "economic duress" further down the system. And such increasing duress goes a long way towards explaining patterns of crime amongst those lower down in the hierarchy(104). For some of those faced with the poverty and ignominy of long term unemployment, or a life of powerless drudgery with minimum respect and remuneration, a life of property crime or drug dealing can offer [or appear to offer] a viable and rational alternative. One can compare the situation here with the "legal category of duress" as recognized by the criminal law in both Jordan and Australia. In this case, duress is the threat of a wasted life that motivates the criminal choice as the lesser of the two evils.

In Australia, for example, it is suggested that the two most common types of violent interaction identified as crimes of violence by the Australian criminal justice system are "confrontational violence between males" typically young and of marginal socio-economic status, and "violent interaction between family members and other intimates" both often involving alcohol(105). In the first case, as Mann and Al-Qudah(106) argue, we can trace a path of causal determination from income inequality and discrimination, through disrespect and powerlessness, to street violence associated with the defence of honour. The

(103) Mann, 2003 supra at p165-166.
(104) Mann, 2003 supra at p167-172 ; Mann and Al-Qudah, 2004 supra at p113.
(105) Hogg R & Brown D, *Rethinking Law and Order*, Pluto Press, Sydney, 1998 at p53-58.
(106) Mann and Al-Qudah, 2004 supra at p115.

greater the scale of income and social power inequality, the more those at the bottom of the scale, experiencing comparatively greater poverty and powerlessness, and corresponding social disrespect, feel that they have to defend the vestiges of self respect they have left. Physical violence is sometimes seen as the only means at their disposal to do so. The greater their general powerlessness and lack of autonomy, the greater their sensitivity to anything seen as disrespect on the part of their peers. In the second case, Hogg and Brown[107] state that "it would be surprising if the material stresses generated by poverty, unemployment and social isolation did not seriously exacerbate the ordinary, day-to-day tensions that arise within family relationships and produce higher levels of conflict and violence".

As Mann[108] points out, in psychoanalytic terms, the poor and the powerless employ the defence of displacement of their anger, away from those who really oppress them [who remain outside the scope of their effective action] and onto the closer targets offered by hostile peers and family members. Otherwise, the anger is turned against themselves. According to Wilkinson[109] ‘except perhaps in revolutionary situations’, violence will always appear to be

> concentrated in poor areas and occur primarily amongst the poor themselves…because what counts as violence are those forms of coercion not sanctioned by social institutions; making people homeless by ending a tenancy is not an act of violence, whereas hitting the landlord…is.

In the context of corporate criminal liability, an existing culture within a corporation which tolerates, provokes or even encourages law breaching combined with the individual pressing economic needs could lead employees into criminal activities as they cannot afford to lose their jobs and go hungry. The fear of being sacked or made redundant, deprivation, social inequality, poverty and discrimination, resulting from an existing corporate culture might well lead the employee to engage in criminal activities which he or she would not otherwise have done. As has been stated[110] "the relationship between economic circumstances and crime is evident in the fact that lack of employment is a key variable in who actually ends up in prison".

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(107) Hogg and Brown, 1998 supra at 54.

(108) Mann, 2003 supra at 169.

(109) Wilkinson R, *Mind the Gap*, Wiedenfeld and Nicholson, London, 2000 at p24

(110) Kuhn R & O’Lincoln, *Class and Class Confilct in Australia*, Longman Australia Pty Ltd, Austrialia, 1996 at p133.

Given this focus, one can see how generally meaningless and misleading is any idea of the "criminal mind" as "cause" of crime(111). As Mann and Al-Qudah(112) point out were those at the top to be exposed to the same circumstances of those at the bottom, no doubt they would respond in similar fashion. Their minds are not different, but it is their social circumstances that are different leading to different behaviors or different treatment of the same behavior. Bearing the foregoing discussion in mind, the question which should be raised is whether the lawmakers should stretch or extend the scope of the theory of using an innocent or non-responsible agent to include such non-intentional exploitation by corporations of their workers to engage criminal behaviors based "economic duress". Or at the minimum, should not the criminal law introduce new defence to allow such notion to exist within the current legal structure?

3.1.4. Causation Analysis

In both Jordan and Australia, it is a settled legal position that the theory of using an innocent agent applies only to situations involving intentional exploitation of that agent by the principal to perform the actus reus of an offence(113). However, some have argued for the application of this theory to situations involving crimes of negligence. For example, Smith(114) argues that if the "agent" is to be seen as no more than a conduit through which causal liability can flow, then, there is nothing to suggest the restriction of the theory to situations involving intentional usage of the agent by the principal. As he says, if we accept that P had caused A to commit a crime, it does not follow that intention on the part of P is required and consequently a lesser mental state such as negligence should be sufficient to establish P's liability. Namely, where negligence is the relevant mens rea, the principal who with that mens rea "causes" another to commit an offence, the former should be held liable for its commission. As Smith points out, if P negligently fits a tyre to A's car causing it to run out of control and kills C, it can be said that P is liable for manslaughter

(111) Mann and Al-Qudah, 2004 supra at p 122.

(112) Mann and Al-Qudah, 2004 supra at p 122.

(113) For Australia see for example *White v Ridely* (1978) 140 CLR 342; *Hewitt* (1997) 1 VR 30; *Cogan and Leak* [1975] 2 ALL ER 1059. In Jordan, although no explicit guidance exist in the JPC, legal commentators tend to take the position that only intentional crime can be committed by an innocent agent as the principal needs to intentionally use that agent o commit the crime (Alseid, 2002:375-381 & Almajalee, 2005:292-293).

(114) Smith K J M, *A Modern Treatise on the Law of Criminal Complicity*, Oxford University Press, United States, 1991 at p98-103.

through the innocent driver A. Similarly, Almsari(115) argues that a non-intentional offence can be committed by a principal through an innocent agent. According to him, if a pharmacist mistakenly adds a poisonous substance to medicine and gives it to a father who in good faith administers it to his ill son who consequently dies, then the pharmacist could be considered as a principal of manslaughter through the innocent father.

Although the aim here is not to engage in a detailed discussion of causation, it is nonetheless important to highlight how a person's action or inaction can be taken to have contributed to the acts (and consequences) of another. The term "cause" can apply to both necessary and sufficient conditions, and conditions that are both necessary and sufficient. Most often, each of a number of necessary and jointly sufficient conditions are called "causal" factors. When all necessary conditions are present, a single necessary factor becomes sufficient to produce a particular result. Where such a "final" necessary condition involves some sort of human action or inaction, it is more likely to be identified as the cause of that particular result. Absence can also be a necessary condition.

In the context of criminal law, lawyers are familiar with necessary conditions (and absences) treated as causes via the so-called "but for" analysis. That is, where an individual (A) intentionally or negligently fails to intervene in another's action (P), it is possible to say that P would not have achieved his or her goal had (A) acted as he or she is obliged to do. Here, we can see that A's free abstention from doing something has contributed to the outcomes produced by P. Typically, we identify a range of different conditions as "individually necessary" and "jointly sufficient" to bring about particular consequences. In this sense, every event is recognized as "the result of many conditions that are jointly sufficient to produce it"(116). Fleming says:

> In legal inquires it does not matter if we are unable to identify all, or even most, of the individual elements which constitute the complex set of conditions jointly sufficient to produce the given consequence. The reason is that we are usually interested only to investigate whether one, two or perhaps three specific conditions [for example identified acts or omissions by the defendant or other participants in the accident] were causally relevant… whether a particular condition qualifies as a causally relevant factor will

(115) Almasri, A M D, '*The Theory of The Moral Perpetrator of Crime: Comparative Study*', Thesis submitted in fulfilment of the requirement for the degree of Master at the University of Jordan, 1998 at p141.

(116) Fleming J G, *The Law of Torts*, 8th ed, The Lawbook Co, Sydney, 1992 at p193.

depend on whether it was necessary to complete a set of conditions jointly sufficient to account for the given occurrence(117)

A deeper understanding of causation typically centers upon identifying and explaining the characteristics, powers and tendencies possessed by particular sorts [or natural kind] of things by virtue of their particular structure. We must then consider the way in which particular powers are released or triggered to bring about particular sorts of results in particular sorts of situations. For example, by virtue of their cellular structure, seeds have the capacity to germinate and grow into plants- but such a power is released only in the "presence" of some necessary conditions such as water, appropriate substrate and nutrients and in the "absence" of growth restricting toxins or obstacles.

In law, the principal causal agents are humans. Here, the crucial issue is whether an individual’s action or inaction has caused a particular result. Or whether the individual’s guilty mind has caused a particular criminal action. Liability on the basis of negligence does not mean that the action of the offender was unconscious or involuntary. Rather, as has been stated, it can be argued that a person who negligently causes harm could have done otherwise so long as he or she had the capacity to change his or her course of conduct by taking necessary care upon the existence of sufficient signals to alert a reasonable person under the same circumstances(118). Criminal law imposes duties and obligations on individuals who engage various activities, and should they fail to observe their duties by not taking reasonable care when they have the capacity to do so, they should bear the responsibility for their actions. Liability in this sense is referred to as "the culpability of unexercised capacity"(119).

Applying this to crimes involving corporations, it can be argued that corporate liability, as a principal offender, can be established by reference to the doctrine of innocent agent when one (or more) of its employees commits a crime which he or she believes to have been caused by an existing corporate culture which encourages or tolerates such criminal activities with the corporation doing nothing to change such culture.. And when the autonomy of the employee, as liberty of action and freedom of choice, is restricted by such culture in the sense that he or she had no other alternative but to act the way he or she did. In terms of causation analysis, one can see how a combination of two necessary conditions (that is, corporate culture and the economic duress) can together form

(117) Fleming, 1992 supra at p193-194.
(118) Ashworth, 1999 supra at p198.
(119) Ashworth, 1999 supra at p198.

a sufficient factor in producing particular criminal consequences by the employee. In other words, it is possible to trace a causal link between corporate negligence (through allowing such conditions to exist when having the capacity to change them but failing to do so) and the resultant criminal consequences. Arguably, the absence of such "necessary" conditions might well produce different outcomes.

As the foregoing discussion reveals, an individual is deemed to be autonomous when his or her actions are produced by his or her free will without any external restrictions (autonomy as liberty of action), and when the individual in question has a range of "real" choices actually available to him or her in terms of access to material means for the realization of a certain goal. As has been suggested(120) a person who lacks or even does not have the necessary material means is not free to act upon his or her decision. From this perspective, it is arguable that an employee whose autonomy is restricted and limited because of "economic pressure" cannot be deemed to have acted freely.

Therefore, it is suggested here that the theory of using an innocent agent to commit a crime should be made applicable to form a ground of corporate liability in situations involving crimes committed by employees under "economic duress" when these offences are proved to have resulted from the exploitation of the workforce by a given organization. This can be made possible if the lawmakers are ready to accept the notion of "economic duress" as a basis for determining the degree of real freedom of choice exercised by the employee. This is crucial if the law is to take serious account of the radical disparities of autonomy and freedom of choice across the social class structure. It is acknowledged that an issue of this kind can be taken, or might be considered, relevant at the sentencing stage. But the real issue is whether it should be taken into account at a prior stage when the question of individual criminal liability is decided.

3.2. An Organizational Doctrine Combined with Strict Liability

3.2.1. The Concept of Strict Liability

As in most other jurisdictions, in both Jordan and Australia, a presumption of innocence underpins the criminal process of individual liability; that is a person is presumed innocent until proven guilty. It is a basic rule of evidence in both jurisdictions that the prosecution bears the burden of proving the accused's

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(120) Mappes and DeGrazia, 1996 supra at p25-28.

criminal liability beyond reasonable doubt(121), and the accused should be given the benefit of the doubt. The prosecution must persuade the court that the accused is guilty, and this burden of proof remains upon the prosecution throughout the trial, and if the prosecution fails to prove the elements of the crime (the actus reus and mens rea) charged no criminal liability shall be imposed. In contrast, the criminal liability of an individual may rest on a presumed "strict liability". The following discussion explains the meaning of this form of liability, arguing that it may be preferred in cases involving corporate criminal liability.

In Australia, unlike Jordan, criminal liability can be imposed on the ground of strict liability in relation to statutory offences. Although a presumption of mens rea is presumed if the statute does not explicitly require that, it is nonetheless accepted that this presumption can be rebutted by the word of the statute(122). In *Wampfle*r (1987) 11 NSWLR 541 at p546, Street Chief Justice summarized the categories of mens rea for statutory offence as follows:

(1) Those in which there is an original obligation on the prosecution to prove mens rea.

(2) Those in which mens rea will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question in not criminal in which case the prosecution must undertake the burden of negativing such belief beyond reasonable doubt. [This refers to strict liability]

(3) Those in which mens rea plays no part and guilt is established by proof of the objective ingredients of the offence.

As mentioned above, the notion of strict liability exists under the CCA, which provides that:

6.1 (1) if a law that creates an offence provides that the offence is an offence of strict liability:

(a) There are no faults element for any of the physical elements of the offence; and

(b) The defence of mistake of fact under section 9.2 is available.

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(121) See Article 147/1 of the JPC; *Woolmington v DPP* [1935] AC 462; *Reeves* (1992) 29 NSWLR 109.

(122) *He Kaw Teh* (1985) 157 CLR 532.

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(2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:

(a) There are no fault elements for that physical element; and

(b) The defence of mistake of fact under section 9.2 is available in relation to that physical element.

(3) The existence of strict liability does not make any other defence unavailable.

According to the CCA, the term "strict liability" indicates that the offence for which a person may be convicted does not require a proof of any state of mind intention, knowledge, recklessness or negligence in relation to the physical element of that offence. It is, however, necessary to establish that the accused has committed the physical element of the offence in question, and it is up to the accused to negate his or her liability by adducing the defence of honest and reasonable mistake of facts, provided that the prosecution fails to prove the contrary(123).

Although it is important to retain the position of requiring a proof of mens rea in relation to individual responsibility, it is nonetheless presumed to be equally important not to require the same standard of proof as far as corporate criminal liability is concerned. Given the scope and seriousness of corporate crime, and the substantial resources available to large corporations which they could use and exploit to avoid scrutiny by the legal justice system, it would be necessary to introduce some serious methods to appropriately address this issue.

Arguably, one of these ways is to radically reverse the burden of proof in such a way where corporations are required to negate their guilt for the crime committed. As Mann(124) puts it "it would make sense to reduce the standard of proof in relation to such crime, with the state required to establish guilt on the balance of probabilities rather than beyond reasonable doubt, or to shift the burden of proof onto corporations to prove their innocence". A possible conduit whereby this can be achieved is to combine the organizational doctrine [as presented above] with the notion of strict liability. As has been stated "the history of strict liability, for long accepted as a straightforward response to industrialization…many commentators recognize that corporate harms demands

(123) *Proudman v Dyman* (1941) 67 CLR 536.

(124) Mann, 2003 supra at p201-202.

different types of analysis but few are bold enough to suggest that the tradition basis for ascribing responsibility is inadequate"(125).

3.2.2. Arguments in Favor of Strict Liability as Ground of Corporate Culpability

Various arguments can be presented in favor of strict liability in the context of corporate culpability. First, one of the major and practical benefits of rendering corporations strictly liable for their wrongdoings lies in shifting the burden of proof from the prosecution and placing it on the corporation itself. Namely, instead of requiring the prosecution to prove the mental state of the individuals identified within the corporation in relation to the physical element of an offence, it would be the task of the corporation to insulate itself from criminal liability by showing that all reasonable steps have been taken to prevent the commission of the offence in question. This is important because in most circumstances it is difficult or even impossible for the prosecution to prove "beyond all reasonable doubt" the mental involvement of the corporation in the commission of an offence. It has been asserted that the notion of "corporate culture" provides a considerable scope for raising such reasonable doubt especially in the case of large and well-resourced corporations(126).

Possible difficulties which might be raised and considered hard to overcome might include addressing what constitutes corporate culture, whether corporate passive stand could amount to authorization or permission of the wrongful acts being committed. Establishing the existence of an implied permission to commit an offence may well work to cast serious doubt as to whether such notion existed in the corporate policy. It is also recognized that proving corporate criminality can be both time-consuming process with the enforcement staff being confronted with what amounts to a network of complexities. To highlight the practical difficulties of proving corporate crime, I quote two U.S prosecutors summing up the position by stating that

> Economic crimes are far more complex than most other federal offences. The events in issue usually have occurred at a far more remote time and over a far more extensive period. The "proof" consists not merely of relatively few items of real evidence but a large roomful of often obscure documents. In order to try the case effectively, the Assistant United Attorney must sometimes master the intricacies of a sophisticated business venture. Furthermore, in the course of doing so, he, or the agent with whom

(125) Wells, 2001 supra at p68,71.
(126) Clough and Mulhern, 2002 supra at p 143-147.

he works, often must resolve a threshold question that has already been determined in most case: Was there a crime in the first place[127].

As has been noted corporations are protected by the resources available to them and they can use such resources to contest prosecution, and on the grounds of time, efforts, cost and reduced chances of convictions, the prosecutors may be deterred to take the case to court[128]. The justifications of the development of strict liability are largely efficiency-based justifications which can be explained by reference to the difficulties in prosecuting corporations for their violations of the laws[129]. It has been argued that in many cases it is difficult to draw any inference about the offender's mental state from his or her actions[130]. Thus, it is arguable that placing the onus of proof upon the accused corporation instead of the prosecution [being required to engage in a battle of proof with large and powerful organizations with high possibility of failing to establish corporate blameworthiness] might well lead these organizations to work effectively toward the minimization of their potential violations of law.

Secondly, there is the capacity theory argument. Although strict liability as a basis of criminal liability does not consider the actual knowledge or awareness of the agent, it can however be justified on a ground of a capacity theory[131]. Criminal law imposes duties and obligations on individuals who engage in various activities and upon their failure to observe these duties, by not taking the reasonable precautions when they have the capacity to do so, the law holds them responsible for their actions where there are sufficient signals to alert the reasonable person. By analogy, if this proposition is true in the case of individual responsibility, then there should be no problem in holding corporations criminally liable to a higher standard on the same ground given the capacities they have to avoid breaching their duties.

Thirdly, there is the social welfare argument. Strict liability has often been regarded as being unfair or unjust. But as Ashworth[132] points out, various forms of harm which afflict or threaten to afflict individuals result from corporate activities. For example, activities involving pollution, defective products, food and drugs, safety at work, transport systems are all dominated by corporate undertakings. And where corporations operate in a sphere which is potentially

(127) Citied in Fisse and Braithwaite, 1988 supra at p 494.
(128) Mann, 2003 supra at p174.
(129) Quaid, 1998 supra at p109.
(130) Quaid, 1998 supra at 109.
(131) Ashworth, 2001 supra at p197-199.
(132) Ashworth, 1999 supra at p169.

dangerous to society, they should be held liable to a higher standard than individuals. Basically, these types of harm represent a threat to the collective interests of the society and affect its well-being. Thus, the imposition of strict liability on corporations can be justified on the ground of protecting these collective interests of the society which might be said to be embodied in the prevention of these types of harm.

There are numerous breaches of law that may produce undue harm and considerable prejudice to the public welfare because of the large number of persons affected by them. Thus, the conflict between social welfare and fairness should be resolved according to whether the offender is a private citizen or a corporation according to Ashworth(133). He further argues "it is wrong that powerless individuals should be treated more severely, in law and practice, than powerful corporations…the question of strict liability for companies should be considered afresh"(134). Arguably, requiring corporations to exercise a higher standard of care by introducing the notion of strict liability could contribute to the reduction of the general harm and subsequently deter corporations from potential wrongdoings. To this effect, it has been said that the exposure of an offender to the prospect of punishment on the ground of merely committing the actus reus of the offence without requiring proof of any mental state, will of course have the tendency of causing the offenders to conduct themselves with a special degree of caution(135).

Ashworth(136) acknowledges that it is a controversial question whether criminal liability without fault is an efficacious preventive means of harm, but according to him at least two aspects of efficacy arise. On one hand, it is easy to enforce no-fault offences, and on the other hand there is the preventive effect of liability without fault. In the later sense, the prosecution can use the threat of strict liability in order to secure compliance. In other words, the prosecutor with power to invoke strict liability can adopt what may be termed as a "compliance strategy" toward law enforcement aiming to secure conformity to the law without the need to process and penalize violators. This is because when a clear indication is made to corporations that any breach of the law will result in strict responsibility, there is a possibility that they will exercise a higher level of care to avoid such liability.

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(133) Ashworth, 1999 supra at p169.

(134) Ashworth, 1999 at p175.

(135) Gillies P, *Criminal Law*, 4th ed, LBC Information Services, Sydney, 1997 at p88.

(136) Ashworth, 1999, supra at p 169-170.

3.3. Corporate Punishment

So far the discussion has been centred upon the theoretical analysis of corporate accountability. The enforcement of such accountability and the type of sanctions that may be applied is another relevant issue associated with corporate criminal liability. Traditionally, theories including rehabilitation, deterrence and retribution have been offered as a justification for punishment(137). Various retributive assumptions, based on the individualistic conception of liability, are deemed to underpin criminal liability. These include, for example, that punishment presupposes individuals and not corporations, retribution is preconditioned on fault, and the application of punishment to corporations violates the principle of desert(138). Issues of this kind, are highlighted above, and thus the following discussion maps out some of the key points concerning the deterrence theory and considers possible punishments that might be applied to corporations.

Starting with the question of whether the goals of punishment are achievable or not in the context of corporate liability, Fisse and Braithwaite(139) state that various assumptions are made in relation to the deterrence theory which are not necessarily sound as far as corporate punishment is concerned. The first assumption presumes that only human agents can be capable of responding to the deterrent effect of punishment. The authors assert that it is often said that criminal liability presupposes human choice and therefore the deterring effect of punishment is directed exclusively to individuals. Penalties directed to corporations seek to deter a wide range of individual associates from engaging in criminal behaviors. But sometimes it is impossible to successfully prosecute the individuals who are directly involved in the offence, and those who may have influenced the commission of that crime may fall outside the scope of criminal complicity or other head of liability. Thus, the punishment of collectivities with the view of inducing compliance with the law by human agents is consistent with the deterrence hypothesis. The threat of corporate punishment can form a substitute for the threat of individual punishment in situations involving difficulties of imposing punishment directly on individual personnel.

A second assumption postulates that there is no warrant for punishing corporate entities in the absence of corporate cogent action. The same authors(140)

(137) Tebbit M, *Philosophy of Law*: An Introduction, Routledge, London, 2000 at p165; Alseid, 2002 supra at p646-647; Brown et al , 2002 supra at 1379.

(138) Fisse and Braithwaite, 1998 supra at p502.

(139) Fisse and Braithwaite, 1998 supra at p488.

(140) Fisse and Braithwaite, 1998 supra at p490.

point out that it is said to be difficult to justify corporate punishment because it is not possible to account for corporate conduct in terms of biological and psychological characteristics. This is because corporations cannot intend actions and their criminality cannot be explained. Contrary to this view, the authors assert that if we lack an adequate theory of corporate action, we also lack an adequate theory of individual action within the corporation. In cases involving corporate liability, corporate actions can be allied with corporate decision-making process. Considering the work of Simeon Kriesberg, modeling the nature of decision-making within corporations, Fisse and Braithwaite state that Simeon specifies three models of corporate decision-making. First, the rational actor model which postulates a unitary, rational decision-making process derived from neoclassical economic theories of the firm. According to Fisse and Braithwaite penalties imposed upon the decision-making unit and the corporate entity are effective when directed to particular values such as profit, prestige and stability which a rational actor of the corporation seeks to maximize.

The second model, according to Simeon, is the organizational model which refers to the company as a constellation of loosely allied decision-making units such as marketing groups, manufacturing units and research and development staff. All these parts have their own role and responsibility which is governed by standard operating processes as established by written organizational rules. Fisse and Braithwaite note that this model suggests that punishment should be directed to individual personnel who are in a position to enact and supervise the standard rules. Thirdly, there is the bureaucratic politics model which views "corporations as a bargaining game involving a hierarchy of players and a maze of formal and informal channels through which decisions are made and implemented". According to this model sanctions are primarily imposed against the individual participants and secondarily against the corporation.

Fisse and Braithwaite(141) argue that although it may be impossible to pinpoint which model most closely corresponds to the realities of decision-making within a given corporation, nonetheless there is a need for sanctions which are capable of reflecting the implications of different models. It may be difficult to arrive at an acceptable theory of corporate action, but it is at least possible to devise a multi-purpose sanctions like punitive injunction and thereby hedge our theoretical bets according to them.

A third assumption about the deterrence theory of punishment is that corporations are not wrongdoers to be punished but entities to be reformed. But

(141) 1988 supra at 492.

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contrary to the individualistic perceptions, the conditions of corporations do not preclude them from being viewed and punished as wrongdoers. And corporations are not supposed to be punished in a negative manner by imposing fines, dissolutions or temporal ban of activities. They can be punished positively in such a way whereby institutional reform can be achieved. That is, if such reform is necessary, the blameworthiness of a corporate defendant can justify the imposition of a punitive injunction requiring organizational reform which is more exacting than those warranted by way of merely remedial injunctive relief(142).

A forth assumption presumes that it is impossible to punish corporations in an effective manner, and deterrence of corporate crime can be achieved by punishing the individual persons who are responsible. Fisse and Braithwaite (143)assert that this assumption underestimates the difficulties involved in enforcing individual liability within the corporation. According to them, difficulties of this kind include, for example, enforcement overload, expendability of personnel within the corporation, corporate safe-harboring of individual suspects, the prosecutors being confronted with what amounts to a network of complexities such as tortuous legislations, complex accounting practices and a lot more of an obscure documentations in addition to the time-consuming nature of corporate crime investigation. One possible way of responding to difficulties of this kind is to extend the criminal liability to "corporate entities" in the hope that they will undertake internal disciplinary action and impose individual liability as a matter of private policing.

The individualistic belief that it is impossible to account for an effective corporate punishment rests on the ground that only fines or other monetary penalties are applicable to corporations according to Fisse and Braithwaite (at 499). The effect of this belief is evident in the CCA and the JPC which allows only these types of sanctions to be imposed upon the commission of an offence by a corporation. For example, Article 74(3) of the JPC states that:

> "Non-natural'" persons can only be punished with fine and confiscation. And if the law specifies a primary punishment other than fine, that punishment shall be substituted with fine which should be applied against the "non-natural" persons in accordance with the rules as stated in Articles 22 to 24[of the JPC].

In Australia, as mentioned above, section 12(2) of the CCA provides that:

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(142) Fisse and Braithwaite, 1988 supra at p493.

(143) 1988 supra at p494-499.

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(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

But Section (4B) of the *Crime Act* 1914 (Cth) enables a fine to be imposed for offences that only specify imprisonment as a penalty.

Fisse and Braithwaite (at p499) argue that it is "short-sighted to suppose that more suitable forms of sanctions cannot be devised" to deal with corporate criminality. The authors acknowledge that corporate entities cannot be sent to jail and the traditional sanctions used against them are usually of a monetary nature which tends to be regarded as a minor cost of doing business. But in line with their idea of organizational blameworthiness discussed above, they argue for new patterns of criminal punishment including equity fines (stock dilution), probation and punitive injunctions and community service. According to them one promising possibility is corporate probation as taken up by the *Crimes Act* 1900 (NSW) and the *Crimes Act* 1914 (Cth) (Brown et al, 2001:485). In Jordan, the JPC allows the imposition of what is known as "precautionary measures" upon the conviction of a corporation for the commission of an offence. These include the temporal suspension of business license and liquidation. Article (36) provides that:

It is permitted to suspend any syndicate or company or association or any organization, except the public administration institutions, if a felony or a misdemeanour punishable by at least two years imprisonment is committed by its mangers or one of its managing members or its representatives or employees using one of its means or with the intention of benefiting it.

Article (37) sets out the condition for the dissolution of a given organization as follows:

The dissolution of the above-mentioned organizations is permitted in situations similar to those mentioned in the above Article:

A. If the organization does not comply with the legal conditions that underpin its establishment

B. If the aim behind its establishment contravenes the laws or if the organization is actually intends to do so

C. If the organization contravenes the enacted legal rules under the threat of cessation

D. If a final judgment is being laid down, by which the organization is suspended, which has not exceeded five years.

Article (38) articulates the requirements of suspension and the consequences of corporate liquidation in the following terms:

1. An organization can be suspended for a period of one month to two years, and the suspension involves the cessation of the organization's business activities, regardless of changing its name, managers or the managing members. A suspension also prevents abandoning/transferring the premises to another person without prejudice to the rights of individuals with good faith.
2. Dissolution entails the liquidation of the organization's assets, with its managers or the managing members and every person who is responsible for the commission of the crime losing the eligibility to establish a similar organization or to act as its manager(144).

Arguably, the type of measurement recognized under the JPC [although not labeled as punishment] can, if strictly applied, offer an effective way to deter corporate criminality. The probationary conditions and the punitive injunctions as suggested by Fisse and Braithwaite (at p501) also offer a means for overcoming the limitations of fine and other monetary penalties against corporate wrongdoings. One possible advantage of this method is to encourage corporations to develop and implement their own internal disciplinary measures in such a way whereby individual responsibility can be achieved within corporations The authors suggest a mechanism for enforcing corporate accountability which rests on restructuring corporate liability so as to require corporations causing harm to "react and implement their own disciplinary measures" under court supervision. They state that:

> Where the actus reus of an offence is proved to have been committed by or on behalf of a corporation, the court, if equipped with a suitable statutory injunctive power, could require the company (a) to conduct its own inquiry as to who was responsible within the organization, (b) to take internal disciplinary measures against those responsible, and (c) to return a report detailing the action taken. If the corporate defendant returned a report demonstrating that due steps had been taken to discipline those responsible then corporate criminal liability would not be imposed. [But] if the reaction

(144) Article (39) provides punishments for not complying with the above mentioned rules stating that: "The violation of the above-mentioned rules is punishable by imprisonment from one to six months and by a fine of 5 to 100 Dinar".

Al Qudat: ????????? ???????? ??????? ????? ????????? ???????? ?? ?????? ????????? : ????? ??????? ??????

> of the company was inexcusably deficient then both the company and its top mangers would be criminally liable for their failure to comply with the order of the court. The range of punishments for corporate defendants would include…equity fines (stock dilution), probation… court-ordered adverse publicity, community service, and punitive injunctive sentences… the strategy here is to rely on the good faith of corporations while at the same time to make it plain that lack of good faith will be severely punished (p511-13).

It is acknowledged by Fisse and Braithwaite that a more development of the proposal is needed to increase the successful chance of implementations as there is a whole range of matters which need to be mopped out within the paradigm of enforcing corporate liability. But due consideration cannot be given to these issues in the available pages of this paper. There is no doubt that corporate criminal liability is a complicated matter involving various competing theories with no single broadly accepted theory of corporate blameworthiness. And as Wells(145) says, "the development of corporate criminal liability is woven from a number of interweaving strands and the resulting cloth is uneven".

4. Conclusion

This paper sought to provide a comparative account of corporate criminal liability under the criminal laws of both Jordan and Australia. Central to this purpose was to determine how both jurisdictions can inform each other in relation to any potential law reform on this contentious issue. Based on the analysis undertaken, it has been shown that, in both jurisdictions, the notion of individual autonomy forms the basic tenet of individual criminal culpability the adoption of which was seen to be problematic in relation to corporate responsibility. It was highlighted that a similar approach to corporate criminal liability is adopted under the laws of Jordan and Australia as far as the question of vicarious liability and the identification doctrine are concerned. That is, under both laws, corporations are held liable for crimes committed by their employees, representative or managers [the guiding mind of the company as laid down in Tesco]. As stated above, the current theory of corporate criminal liability under the JPC still focuses upon the individuals who make the organization. But given the limitations of such approach, it was argued that serious consideration of corporate liability entails moving beyond this unsatisfactory notion of individualism as the ground of such culpability because it fails to capture the collective nature of corporate responsibility.

(145) Wells, 2001, supra at p85.

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Comparatively, in Australia, various possible approaches have been offered to "directly" address corporate collective blameworthiness. Solutions of this kind involved the introduction of the doctrine of the aggregation of fault, which has been criticized as providing another form of vicarious liability, and the organizational doctrine which seeks to reflect corporate collective blameworthiness. As has been seen above, this doctrine is regarded as an advanced step toward a more coherent doctrine of corporate "direct" culpability than the identity and aggregation doctrines as it seeks to reflect the socially organized reality of corporations. This model of corporate blameworthiness as developed by Fisse and Braithwaite incorporates key ingredients including new ideas about corporate intentionality, corporate capacity, corporate structure, corporate culture, corporate reactive fault and new mechanism for enforcing corporate liability with new patterns of corporate punishment including punitive injunctions and corporate probation. Drawing on the foregoing comparative analysis, it can be suggested that a separate notion of corporate blameworthiness would constitute a valuable addition to the current theory of corporate criminal liability in Jordan. As noted above, in Australia, this notion has been incorporated in the CCA, and arguably, any future law reform of corporate criminal liability under the JPC could be informed by the principles established in the CCA as stated above.

The analysis in this paper also raises some important issues for lawmakers to take into account in the future. That is, while the laws in Jordan and Australia appear to be in line with the same broad restrictions of freedom of the will as identified by moral philosophers, they depart from such approach in certain significant aspects. In particular, they adopt a black and white approach which does not reflect the complexity of the real world by overlooking the radical disparities of autonomy and real freedom of choice across the social structure. Thus, in the context of corporate liability, the foregoing analysis suggests that a deeper understanding of corporate "culture" and the various "economic" restrictions on the autonomy of the employees resulting with the greater part of their working lives consisting of "coerced" rather than "free" actions entails a re-examination of the current limits of the criminal laws so as to allow a radical restructuring of corporate liability.

To this effect, the paper used the notion of corporate "culture" to argue for extending the scope of the theory of committing an offence by an innocent or non-responsible agent so as to allow the attribution of criminal responsibility to corporations as principal offender for crimes committed by their non-autonomous employees on basis of "economic duress". That is, this theory

should not be confined to its current "intentional" limits under the laws of both Jordan and Australia. Rather, it should be extended to include situations involving crimes committed by a non-autonomous employee under "economic duress" when these offences are proven to have been "caused" by corporate "negligent" exploitation of the workforce. The paper also suggests that for a more effective approach to corporate liability both jurisdictions should combine the organizational doctrine with the notion of strict liability, and various, efficient forms of corporate punishment can be adopted.

References

Statutes:

1. Acts Interpretation Act 1901 (Cth)
2. Crimes Act 1900 (NSW)
3. Crimes Act 1914 (Cth)
4. Criminal Code Act 1995 (Cth)
5. Jordanian Civil Code 1976 No 43
6. Jordanian Penal Code 1960 No 16
7. The Interpretation Act 1987 (NSW)

Cases:

8. Australian Stevedoring Industry Authority v Overseas and General Stevedoring Co Pty Ltd (1959) 1 FLR 298
9. Banger v Drift Fruit Juices Pty Ltd [1974 VR 677
10. Brambles Holdings Ltd v Carey (1976) 15 SASR 270
11. Cogan and Leak [1975] 2 ALL ER 1059
12. Collins v State Rail Authority (NSW) (1986) 5 NSWLR 209
13. Crabble (1985)156 CLR 464
14. Hamilton v Whitehead (1988) 166 CLR 121
15. He Kaw Teh v The Queen (1985) 157 CLR 525
16. Hewitt (1997) 1 VR 30;
17. Jiminez v The Queen (1992)173 CLR 575
18. McCafferty [1974] 1 NSWLR 89
19. Moussell Bros Ltd v London and Northwestern Railway Co [1917] 2 KB 836
20. Nydam [1977] VR 430
21. P & O European Ferries (Dover) Ltd (1991) 93 Cr App R 72
22. Proudman v Dyman (1941) 67 CLR 536
23. R v AC Hatrick Chemical Pty Ltd (Unreported, 29/11/1995 SC VIC).
24. R v HM Coroner for East Kent, Ex Parte Spooner and Others (1989) 88 Cr App R 11-17

25. R v Hurley [1967] VR 526
26. R v Kitchener (1993) 29 NSWLR 696
27. R v Loughnan [1981] VR 443
28. R v Roffel [1985] VR 5 11(FC)
29. Reeves (1992) 29 NSWLR 109
30. Ryan v R (1966) 121 CLR 205
31. Saad (1987) 29 A Crim R 20
32. Schenker and Co (Aust) Pty Ltd v Sheen (1983)48 ALR 693
33. Tesco Supermarkets Ltd v Nattrass [1972] AC 153
34. Wampfler (1987) 11 NSWLR 541
35. White v Ridely (1978) 140 CLR 342
36. Wilson v The Queen (1992) 274 CLR 313
37. Woolmington v DPP [1935] AC 462
38. Woolworths Ltd v Luff (1988) 77 ACTR 1

Books and Articles:

39. Almajalee N T, Explanation of the General Principles in the Penal Code of Jordan, Dar Althakafah for Publication, Jordan, 2005. (In Arabic)
40. Almasri, A M D, ‘The Theory of The Moral Perpetrator of Crime: Comparative Study’, Thesis submitted in fulfilment of the requirement for the degree of Master at the University of Jordan, 1998. (In Arabic)
41. Alseid K, Explanation of the General Principles in the Penal Code of Jordan: Comparative Study: Crime, Criminal Participation, Criminal Liability and punishment, The Arabic Centre for Students Services, Jordan, 2002. (In Arabic)
42. Ashworth A, Principles of Criminal Law, 3rd ed, Oxford University Press, United State, 1999.
43. Bronitt S & McSherry B, Principles of Criminal Law, LBC Information Services, Sydney, 2001.
44. Brown D & Farrier D & Weisbrot D & McNamara L, Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales, 3rd ed, The Federation Press, Sydney, 2001.
45. Clarkson C M V, Understanding Criminal Law, 2nd ed, Fontana Press, London, 1995.

46. Clough J & Mulhern C, The Prosecution of Corporations, Oxford University Press, New York, 2002.
47. Croal H, Understanding White Collar Crime, Open University Press, Buckinham, 2001.
48. Dirkis M & Nicoll G, Corporate and White-Collar Crime, In Hazlehurst K M, (eds) Crime and Justice, LBC Information Service, Sydney, 1996.
49. Field S & Jorg N, "Corporate Liability and Manslaughter: Should we be Going Dutch?" [1991] Criminal Law Review 156.
50. Fisse B & Braithwaite J, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney Law Review 468.
51. Fisse B & Braithwaite J, Corporations, Crime and Accountability, Cambridge University Press, New York, 1993.
52. Fisse B, "Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties" (1990) 13 (1) University of New South Wales Law Journal 1.
53. Fisse B, The Duality of Corporate and Individual Criminal Liability, In Hochstedler E, (eds) Corporations As Criminals, Sage Publications, London, 1984.
54. Fleming J G, The Law of Torts, 8th ed, The Lawbook Co, Sydney, 1992.
55. Gillies P, Criminal Law, 4th ed, LBC Information Services, Sydney, 1997.
56. Hart H L A, Punishment and Responsibility: Essays in the Philosophy of Law, Oxford University Press, New York, 1968.
57. Hogg R & Brown D, Rethinking Law and Order, Pluto Press, Sydney, 1998.
58. Kramer R C, Corporate Criminality: The Development of an Idea, In Hochstedler E, (eds) Corporations As Criminals, Sage Publications, London, 1984.
59. Kuhn R & O'Lincoln, Class and Class Confilct in Australia, Longman Australia Pty Ltd, Austrialia, 1996.
60. Mann S & Al-Qudah M, "Freedom of the Will and Criminal Culpability" (2004) 8 University of Western Sydney Law Review 97.
61. Mann S, Economics, Bussiness Ethics and Law, Lawbook CO, Sydeny, 2003.

62. Mappes T A & DeGrazia D, Biomedical Ethics, McGraw-Hill, Inc, New York, 1996.
63. Miliband R, Divided Socities: Class Struggle in Contemporary Capitalism, Oxford University Press, Oxford, 1991.
64. Murugason R & McNamara L, Outline of Criminal Law, Butterworths, Sydney, 1997.
65. Norrie A, Crime, Reason and History: A Critical Introduction to Criminal Law, Butterworths, United Kingdom, 2001.
66. Parson S, "The Doctrine of Identification, Causation and Corporate Liability for Manslaughter" (2003) 67(1) The Journal of Criminal Law 69.
67. Quaid J A, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" (1998) 43 McGill Law Journal 67.
68. Saleh N A, Crimes against the Economy in the Jordanian Law, Dar Alfeker for Publication, Amman, 1990. (In Arabic).
69. Smith K J M, A Modern Treatise on the Law of Criminal Complicity, Oxford University Press, United States, 1991.
70. Tebbit M, Philosophy of Law: An Introduction, Routledge, London, 2000.
71. Wells C, Corporations and Criminal Responsibility, 2nd ed, Oxford University Press, New York, 2001.
72. White R & Perrone S, Crime and Social Control: An Introduction, Oxford University Press, New York, 1997.
73. Wilkinson R, Mind the Gap, Wiedenfeld and Nicholson, London, 2000.

Abbreviations:

74. A Crim R	Australian Criminal Reports
75. ACTR	Australian Capital Territory Reports
76. All ER	All England Law Reports
77. ALR	Australian Law Reports [Argus Law Reports]
78. CCA	Criminal Code Act
79. CLR	Commonwealth Law Reports
80. Cr App R	Criminal Appeal Reports
81. Crim L.R	Criminal Law Review [UK]
82. Cth	Commomwealth

83. ER English Reports
84. FLR Federal Law Reports
85. JPC Jordanian Penal Code 1961 No 16
86. KB Law Reports. King's Bench
87. NSW New South Wales
88. NSWLR New South Wales Law Reports
89. SASR South Australian State Reports
90. VLR Victorian Law Reports
91. VR Victorian Reports

Al Qudat: ????????? ???????? ??????? ????? ????????? ??????? ?? ?????? ????????? : ????? ??????? ??????

المسؤولية الجنائية للشركات بموجب القوانين الجنائية في الأردن وأستراليا : دراسة تحليلية مقارنة •

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ملخص البحث

لا تزال نظرية المسؤولية الجزائية للشركات في الأردن تتمحور حول الأفراد الذين تتألف منهم الشركة استنادا لمبدأ "Identification Doctrine " ، إلا أن بناء الفكر القانوني حول هذا الأساس هو نهج قاصر ومعيب، وذلك لأن الشركة ليست مجرد أفراد، كما أنه ليس من المقبول وصفها على أنها تتألف فقط من مجموعة من الأفراد، ذلك أن تشكيل الشركة وتنظيمها ونشاطاتها وسياساتها وفي الإجمال كيانها ككل يجعل منها بناء مستقلا بحد ذاته. من هنا، فإن هذا البحث يهدف إلى تقديم دراسة تحليلية مقارنة حول المسؤولية الجزائية للشركات في كل من الأردن وأستراليا المنتميتين إلى نظامين قانونيين مختلفين في محاولة لبيان مدى إمكانية إفادة هذين النظامين من بعضهما البعض في هذا المجال. ويرمي البحث أيضا إلى تسليط الضوء على أهم التطورات المتعلقة بأساس هذه المسؤولية والتي تركز على الشركة ذاتها استنادا لفكرة الخطأ المؤسسي لا الخطأ الفردي. وتحقيقا لهذه الغاية، فقد تم تقسيم البحث إلى قسمين يتناول الأول منهما دراسة تحليلية مقارنة للمشاكل المرتبطة بمسؤولية الشركات من خلال تناول الأسس المتنوعة لهذه المسؤولية مع التركيز على ضوابط مسؤوليتها "المباشرة" لا "التبعية" ، في حين أن القسم الثاني ينهج نهجا مطالبا

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بمسؤولية أكثر فعالية للشركات إذ يستخدم فكرة "ثقافة الشركة" للمطالبة بتوسيع نطاق نظرية الفاعل المعنوي بشكل يسمح بتطبيقها على الجرائم التي قد يرتكبها موظفو الشركات تحت ضغط "الإكراه الاقتصادي"، وخاصة عندما يثبت بان تلك الجرائم كانت نتيجة لاستغلال الشركة القائم على الإهمال "Corporate Negligent Manipulation" **للقوى العاملة. ويعد هذا النهج ضروريا إذا ما أردنا أن نأخذ بعين الاعتبار الفوارق الجوهرية والجذرية في مقدار حرية الاختيار الحقيقي المتاحة للأفراد داخل المنظومة الاجتماعية وخاصة في المجتمعات الرأسمالية المعاصرة. كما وقد تبنى البحث فكرة ضرورة ربط مسؤولية الشركات "المباشرة" القائمة على أساس "الخطأ المؤسسي" بفكرة "المسؤولية الصارمة" من اجل مسؤولية أكثر جدية وفعالية، مع عرض لنماذج ممكنة للعقوبات التي يمكن فرضها على الشركات بمناسبة ارتكابها جرما ما.**

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