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2002

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Citation for this paper:

Victor V. Ramraj, "Disentangling Corporate Criminal Liability and Individual Rights" (2002) 45 Crim LQ 29.

2002 45 C.L.Q. 29
Criminal Law Quarterly
2002

29 — Disentangling Corporate Criminal Liability and Individual Rights

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Disentangling Corporate Criminal Liability and Individual Rights

Victor V. Ramraj*

This article addresses the impact of corporate criminal liability on the constitutional protection of individual rights within the criminal justice system. Its central concern is the tendency of the law to treat corporations as persons legally equivalent to human beings. Treating corporations as full legal persons is particularly troublesome because increased efforts by the authorities to secure the conviction of *corporate* defendants have resulted in stricter principles of criminal liability overall — even in cases involving individuals — and have eroded the protection of constitutional rights across the board. The solution, I suggest, is to reject the equation of corporations with human beings and to construct independent principles to govern the attribution of corporate criminal liability.

Two propositions regarding the criminal liability of corporations form the focus of this article: (1) that individuals and corporations ought to be treated alike in respect to both general principles of criminal liability and constitutional rights; and (2) that corporations ought to be held criminally liable for the harm they cause. To the extent that these two propositions are accepted in the positive law, there is a real danger both that principles of criminal fault will be relaxed and that constitutional rights *generally* will be diluted in order to ensure that errant corporations are duly convicted. Individual criminal liability is, in turn, affected because of the strength of proposition (1), the equation for legal purposes of corporations and individuals. So the more we try to convict corporations by treating them in the same manner as any other defendant, the more we risk watering down legal and constitutional protections, not just for corporations but for human defendants as well.

Some might try to argue that these consequences can be avoided by denying the second proposition, that corporations ought to be held criminally liable for the harm they cause, arguing that some form of *civil* liability is more appropriate.¹ This approach may well have merit, as it would remove the corporation from the realm of criminal liability, relieving the pressure on individual rights. At the same time, it would recognize implicitly that constitutional rights need not apply with equal vigour to corporations. However convincing this approach might be, it does not hold favour legally or politically; there is a growing desire on the part of many environmental law scholars, legal academics and policy makers to hold corporations criminally liable for the harm they cause.² For present purposes, I therefore remain agnostic as to the merits of this particular strategy.

Instead, I argue that we can consistently affirm the significance of corporate criminal liability while denying both that corporations ought to be subject to the same principles of liability as individuals and that constitutional rights ought to apply with equal vigour to corporations. In the first part of this article, I argue that standards of criminal fault and protections afforded by constitutional rights have been relaxed so as to ensure that corporations are convicted. I then argue, in the second part of the article, that the idea of corporate personality does not provide us with sufficient justification for subjecting corporations and individuals to the same general principles of liability or to assume that corporate constitutional rights will be co-extensive with individual rights.

1. — The Impact of Corporate Criminal Liability on the Individual

Both in criminal law and to a lesser extent in constitutional law, corporations are considered to be legal persons, equivalent in status to natural persons. What I intend to show in this section is that this assumed legal equivalence may well lead to, and in some instances has already resulted in, a stricter application of criminal law in cases of individual liability and a relaxation of constitutional safeguards generally.

(1) — Principles of Criminal Liability

For over a century, corporations have been seen by the common law as independent legal entities, distinct from their shareholders, directors, officers and employees for the purpose of legal liability.³ Although this general principle is subject to a number of exceptions which permit the courts to lift the “corporate veil” to impose liability on a corporation’s owners,⁴ these exceptions are few, and may be seen as genuine exceptions that prove the general rule. And while corporations were traditionally exempt from criminal liability at common law largely because of their perceived inability to form the requisite criminal intent,⁵ it did not take long for the logic behind the distinct legal personality of the corporation to give rise to corporate criminal liability.⁶ The treatment of corporations as equivalent to natural persons for the purpose of assigning criminal liability can now be seen in the penal statutes of many jurisdictions, according to which corporations are subject to the same general penal laws.⁷

The tendency of legal doctrines governing corporate criminal liability subsequently to affect individual liability can be seen in the context of strict liability, which emerged originally in the commercial context, but is now applied equally to individuals even in non-commercial contexts. Statutes impose liability on a strict (or absolute⁸) liability basis when they permit a conviction without proof of fault — that is, without proof of intention, knowledge, recklessness or negligence. The genesis of strict liability can be traced to the mid-19th century,⁹ coinciding with a period of rapid industrialization in Europe.

In the latter half of the 19th century, a series of legislative and judicial developments created the legal foundation for the regulatory state, which increasingly controlled everyday life, from working conditions in factories to the sale of adulterated food.¹⁰ At this stage in English legal history, no obvious alternative to the criminal justice system was readily apparent for dealing with harmful effects of rapid industrialization, since administrative law was yet in its infancy.¹¹ Thus, the emergence of the criminal justice system as the principal means for controlling the dangers associated with industrialization came about in an incremental and haphazard way. Nevertheless, the few cases in the mid-19th century that chipped away at the *mens rea* doctrine eventually gave rise to a “regulatory” regime characterized by offences of strict liability, which was carved out of, but still very much a part of, the criminal law.

While the theoretical tension between *mens rea* and strict liability was readily apparent,¹² the existence of strict liability was, and continues to be, defended either as not truly criminal¹³ or as an exception to the principles of criminal liability — one that is needed to control corporations¹⁴ and to ensure public safety.¹⁵ It is doubtful whether, in their efforts to control commercial and industrial enterprises, anyone in the mid-19th century would have been able to foresee the pervasive role that strict liability would come to play in regulating the conduct of both corporations *and* individuals,¹⁶ imposing penal sanctions, including imprisonment, upon conviction.¹⁷

Notwithstanding attempts to restrict the use of strict liability to “regulatory” offences involving threats to public welfare or safety caused by corporations, modern criminal law is peppered with examples of strict liability imposed on individuals even in non-business situations. Celia Wells observes that in the United Kingdom, “many strict liability offences, road

traffic for example, are not enforced through separate regulatory mechanisms and apply to individuals as much as to businesses”.¹⁸ Francis Sayre warned against this sort of danger in 1933 in his celebrated article on public welfare offences:¹⁹

The modern rapid growth of a large body of offences punishable without proof of a guilty intent is marked with real danger. Courts are familiarized with the pathway to easy convictions by relaxing the orthodox requirement of a *mens rea*. The danger is that in the case of true crimes where the penalty is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare offences may now and again similarly relax the *mens rea* requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions.

Sayre thought that the difference between “true crimes” and public welfare offences was relatively clear and non-controversial. But modern jurisprudence demonstrates that this distinction is far less than clear, and that the line between public welfare offences and traditional “criminal” offences is difficult to maintain, notwithstanding judicial efforts to hold them apart.²⁰ We need look no further than the felony-murder or constructive murder provisions²¹ in many jurisdictions to see just how far principles of strict liability have permeated traditional criminal offences.

While it is clear that criminal law contains many examples of strict liability in relation to crimes that could scarcely be classified as “public welfare” offences, it is difficult to demonstrate conclusively that, as a historical matter, this danger that Sayre warned against came about directly as a result of 19th century laws designed to control corporations. I would argue, though, that there is at least a strong *prima facie* case. First of all, it is generally accepted that strict liability offences were introduced, at least in part, to control the dangers arising from a modern industrialized society,²² and that these offences were aimed primarily at businesses, if not corporations. Second, the line between regulatory offences and “true” criminal offences is a difficult one to draw, and is one that in any event cuts across the individual-corporate divide, as the use of strict liability in road traffic cases neatly demonstrates. Finally, there is a significant and increasing number of offences in most jurisdictions that impose serious sanctions on individuals on a strict liability basis.²³

In any event, even if my historical claim concerning strict liability is not susceptible to proof, it is incontrovertible that to the extent that strict fault principles are applied to corporations, and on the assumption that corporations and individuals are equally legal persons, the extension of these principles to individuals is inevitable. While the common law has long recognized that corporations can be held criminally accountable, it is often said today that the criminal law is not applied rigorously enough to corporate offenders, and there are calls in many circles to augment its use.²⁴ The modern history of strict liability stands as a subtle warning that the more criminal law is used to control corporate crime without distinguishing clearly between corporate and individual criminal liability, the greater the propensity for the *general* principles of criminal liability to be manipulated to control corporate crime, regardless of the impact on individual liability.²⁵

(2) — Constitutional Rights

Not only are the principles governing individual fault shaped by our approach to the criminal liability of corporations, but there is also a significant body of literature that advocates the extension of constitutional rights protections to corporate defendants. For instance, the Ontario Law Reform Commission, in its *Report on the Basis of Liability for Provincial Offences*, argues that corporations are entitled to the same degree of constitutional protection afforded to individuals in respect of the presumption of innocence:²⁶

It may be argued that the reversal of the onus of proof can be justified in the context of corporations and other like²⁵ institutions. Many provincial statutes, such as those involving environmental protection, occupational health and safety, and financial matters, involve violations by institutions which have very complex damage control or

damage prevention systems. Evidence of the operation of these systems and, in particular, the aspect of the system which failed, may be known only to the alleged violator. Arguably, the effectiveness of important social legislation would be jeopardized if the persuasive burden were not placed squarely on the corporation. The Commission does not agree. *The presumption of innocence is a fundamental right that ought to apply to both individuals and institutions.*

Unfortunately, the Ontario Law Reform Commission does not provide us with reasons for this conclusion, but the unspoken concern may be that if a corporation is a genuine legal person, it ought therefore to be vested with the same constitutional rights as individuals.

Similar arguments have been made in the United States. Notwithstanding the formidable attempt by the U.S. Supreme Court in *Hale v. Henkel*²⁷ to distinguish the rights of natural persons from those of corporations under the Fifth Amendment, the literature abounds with arguments that specific constitutional rights should be extended to corporations, such as the Sixth Amendment right to a jury trial²⁸ and Eighth Amendment rights under the “excessive fines” clause.²⁹ It has been suggested that the jurisprudence since *Hale v. Henkel* has followed “a seemingly *ad hoc* approach to the question of which constitutional rights a corporation can assert”.³⁰

The Canadian experience demonstrates, however, that as constitutional rights are conferred on corporations, individual rights are correspondingly diluted. The early jurisprudence under the *Canadian Charter of Rights and Freedoms*³¹ was characterized by two important principles relevant to our analysis of criminal liability: first, that corporations are distinct from individuals for Charter purposes and thus are not entitled to the same constitutional protections as individuals; second, that as a constitutional matter, absolute liability offences cannot be combined with a term of imprisonment. But as clear as these two principles might first have appeared to be, neither is sufficiently entrenched in the constitutional jurisprudence.

The first principle was articulated in *Irwin Toy Ltd. v. Quebec (Attorney-General)*³² and *R. v. Amway Corp.*³³ In *Irwin Toy*, the corporate defendant challenged the constitutional validity of the penal provision under which it was charged on the basis that this provision violated the corporation’s right under s. 7 of the Charter not to be deprived of its “liberty” in a manner not consistent with the principles of fundamental justice. The majority of the court ruled that a corporation could not avail itself of this argument under s. 7,³⁴ distinguishing between corporations and human beings:³⁵

[R]ead as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase “Everyone has the right to life, liberty and security of the person” serves to underline the human element involved; only human beings can enjoy these rights. “Everyone” then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty and security of the person, and include only human beings.

For similar reasons, the Supreme Court of Canada held in *Amway* that a corporation could not avail itself of the guarantee against self-incrimination in s. 11(c) of the Charter, since this right “was intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth”.³⁶

This principle, that corporations are not entitled to the same constitutional protections as individuals, however, remains in tension with the principle that allowed corporate defendants to benefit from the argument that the law is unconstitutional *in its application to individuals*.³⁷ By invoking this principle, corporations have been able to escape liability, even where the corporation itself had suffered no real constitutional injustice. In *R. v. Big M Drug Mart*,³⁸ for instance, a corporation was able to escape liability by arguing successfully that the impugned legislation, *The Lord’s Day Act*, which prohibited businesses from opening on Sunday, infringed the individual’s right to freedom of religion.³⁹

While the extent to which corporations can avail themselves of Charter protection remains a controversial doctrinal issue, I want now to shift our focus to the second principle, that as a constitutional matter absolute liability offences cannot be combined with a term of imprisonment. This principle was first articulated in *Reference re Section 94(2) of the Motor Vehicle Act*.⁴⁰ The issue in this case was the constitutional validity of s. 94(2) of the British Columbia *Motor Vehicle Act*, which created an absolute liability offence⁴¹ for driving under a licence suspension and imposed a penalty of imprisonment for a minimum of seven days. Under this Act, a person could be convicted and imprisoned for driving under a licence suspension even if the licence was suspended without his or her knowledge. The Supreme Court of Canada determined that s. 94(2) of the Act infringed s. 7 of the Charter. Section 7 confers on everyone “the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. This case effectively established a minimum constitutional standard of fault.⁴² But while this principle remains a crucial part of Charter jurisprudence, recent cases involving corporate liability have eroded the extent of the protection that it affords to individual *human* defendants.⁴³ This trend in the case law started in earnest after the decision of the Supreme Court of Canada in *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)*.⁴⁴

The issue before the court in *Thomson Newspapers* was whether the provisions of the *Combines Investigation Act*,⁴⁵ which had been used to compel the appearance before the Restrictive Trade Practices Commission of individual representatives of Thomson Newspapers and the production by them of business records, violated their Charter rights. It was argued on their behalf that the subpoena violated their s. 8 right to be secure against unreasonable search and seizure and the right, which they asserted under s. 7, not to be compelled to give self-incriminating evidence. In five separate reasons for judgment, the majority of Supreme Court of Canada held that neither right had been infringed.

In rejecting the argument that the impugned provisions of the *Combines Investigation Act* violated the individuals’ Charter rights, both La Forest J. and L’Heureux-Dubé J., in separate judgments for the majority, based their reasoning in part on the regulatory nature of the statute. La Forest J. regarded it as “determinative” that the statute is “far removed from what is the typical concern of the criminal law system”.⁴⁶ However, in the spirit of *Irwin Toy*, L’Heureux-Dubé J. in her analysis of the s. 8 issue found it significant that the subject of the investigation was a corporation.⁴⁷ From this she inferred that the privacy interest at stake was very low. Neither was she prepared in the s. 7 context to allow the corporation to benefit from the Charter by allowing individual representatives of the corporation to refuse on Charter grounds to testify.⁴⁸

Unfortunately, the Supreme Court of Canada, in subsequent cases, has effectively ignored the principle, reflected in *Irwin Toy* and *Thomson Newspapers*, that the Charter has but limited application to corporations. In *Wholesale Travel*,⁴⁹ the defendant corporation was charged, together with an individual defendant, with five counts of false or misleading advertising under the *Competition Act*. Of particular concern in this case was s. 37.3(2) of the Act, which placed the persuasive burden on the accused to prove due diligence, and s. 37.3(2)(c) and (d), which made a timely retraction of the misleading representation a precondition of the due diligence defence. The timely retraction requirement was challenged on the ground that, contrary to s. 7 of the Charter, it created an absolute liability offence, and the persuasive burden was challenged as being contrary to the s. 11(d) presumption of innocence. The court unanimously struck down the timely retraction requirement, but was divided as to the validity of the persuasive burden, with the majority finding that it was constitutional.

What is particularly striking about the discussion of the validity of the persuasive burden is the reliance that is placed by Cory J. in particular on the regulatory context in determining the scope of the constitutional right:⁵⁰

A contextual approach is particularly appropriate in the present case to take account of the regulatory nature of the offence and its place within a larger scheme of public welfare legislation. This approach requires that the

rights asserted by the appellant be considered in light of the regulatory context in which the claim is situated, acknowledging that a Charter right may have different scope and implications in a regulatory context than in a truly criminal one.

Under the contextual approach, constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences. Rather, the content of the Charter right must be determined only after an examination of all relevant factors and in light of the essential differences between the two classes of prohibited activity.

Cory J. traces this contextual approach to the judgment of La Forest J. in *Thomson Newspapers*, and its interpretation of the scope of s. 8 of the Charter. He bluntly summarizes the essence of this approach: “In the present case, the contextual approach requires that regulatory and criminal offences be treated differently for the purposes of *Charter* review.”⁵¹ Cory J. argued that the legislation in this case was “regulatory” even though it was possible for an individual convicted under it to serve a custodial term of up to five years.

There are several problems with Cory J.’s attempt to distinguish between regulatory and criminal offences, not the least of which is his refusal to be moved by the fact that the consequence is the same (imprisonment) regardless of whether a person is convicted under a regulatory or a criminal statute.⁵² But the main problem with Cory J.’s reasoning for our purposes is that his attempt to distinguish regulatory from criminal offences cuts across the corporate-individual divide; regulatory offences, as he understands them, apply indiscriminately to corporations and individuals. Moreover, the scope of the constitutional protection depends not, as L’Heureux-Dubé J. suggested in *Thomson Newspapers*, on whether the rights claimant is a corporation or a natural person, but rather on the nature of the regulated activity. In order to ensure that corporate defendants are convicted, Cory J. is prepared to tolerate lower constitutional standards by taking refuge in the intractable notion of a regulatory offence, even though by doing so he makes it easier to convict individuals as well.

Although Cory J.’s interpretation of the presumption of innocence did not carry the support of the majority of the court,⁵³ his reasoning in *Wholesale Travel* and, in particular, the distinction he draws between crimes and regulatory offences have been used by lower courts to uphold other reverse onus provisions in the *Competition Act*,⁵⁴ the *Fisheries Act*,⁵⁵ and the *Liquor Control Act* (Nova Scotia)⁵⁶ and to uphold an “inspection” under the *Fisheries Act* conducted without reasonable grounds, but rather on suspicion alone.⁵⁷ In *R. v. Fitzpatrick*, the regulatory nature of the offence was held by the Supreme Court to justify the mandatory submission of incriminating hail reports and fishing logs even though, in the case of a second or subsequent offence, imprisonment was a possible consequence.⁵⁸ Remarkably, in all but one of these cases the defendant was an individual.

But more important, as far as the standard of fault is concerned, Cory J. has recently described *Wholesale Travel*, albeit in *obiter dicta*, as standing for the more general proposition that “in regulatory offences the mental element of blameworthiness may be assessed objectively”.⁵⁹ But since regulatory offences are not limited to corporate liability, Cory J.’s approach comes dangerously close to permitting imprisonment for absolute liability offences, contrary to the early Charter jurisprudence. The transformation here is disturbing. What began in *Thomson Newspapers* as a limited exception to a constitutional right in the discrete context of *corporate* criminal liability is evolving into a *widespread* dilution of constitutional rights, even in their application to individual criminal defendants.⁶⁰

2. — Possible Solutions: Theories of Corporate Personality Revisited

It would seem then that there is a tendency in the law toward the relaxation of the *mens rea* or fault requirements in the criminal law and the erosion of the constitutional rights in their application to individuals. Both of those trends are due in large measure to a desire to hold corporations accountable within the criminal justice system and to our assumptions about the nature of the corporate person. Analytically speaking, the solution to the difficulties I have described is quite

simple; we need only deny that corporations ought to be subject to the same principles of liability as individuals and that constitutional rights ought to apply with equal vigour to corporations. But to do so, we must first refute the theoretical claim that corporations, as persons, should be accorded equivalent legal and moral standing.

The contemporary literature on corporate liability recognizes two broad theories of corporate personality. One regards corporations as artificial entities that are no more than the sum of the individuals that comprise them (the “individualist” theory of the corporation); another sees the corporation as an entity with an existence in itself that is more than the sum of its component parts (the “organic” theory).⁶¹

Within the individualist theory of the corporation, which sees corporate personality as “fictional”⁶² in character, there are essentially two models of corporate liability: vicarious liability and identification liability.⁶³ According to the model of vicarious liability, a corporation is not liable for its own conduct but is liable automatically for the conduct of its “officers, employees, and agents acting within the scope of their authority or employment”.⁶⁴ In contrast, on the identification theory, the corporation is liable for the conduct of key personnel who stand in a relationship of control to the corporation and are said to represent its will.⁶⁵ On either of these theories, however, the corporation is not a real entity in its own right; rather, it owes its existence to individuals.

The problem with this approach to corporate personality is that it provides no good reason for according moral status to the corporation. In the case of vicarious liability, the corporation is simply “held liable for the misconduct of another”.⁶⁶ There is no basis for attributions of moral agency to the corporation in its own right. And there is no intrinsic, normative reason based, for instance, on Kantian notions of dignity, for according constitutional status to the corporation.⁶⁷ In the case of the identification theory, the corporate will is deemed to be embodied in the will of its directors or senior management. The corporation cannot act but through natural persons; it is *their* desires, intentions and purposes that are deemed to be those of the corporation.

Even setting aside these difficulties, many contemporary theorists argue also that the individualist theory does not accurately reflect the decision-making structure of large corporations. Brent Fisse and John Braithwaite contend that corporations are more than the sum of their individual members:⁶⁸

The products of organisations are more than the sum of the products of individual actions; while each member of the board can “vote” for a dividend, only the board as a collectivity is empowered to declare a dividend. The collective action is thus qualitatively different from the human actions which, in part, constitute it.

The idea of a person or group of persons who together constitute the “directing mind”⁶⁹ of the corporation is an unrealistic picture of modern corporate decision-making, where the decision-making structure “is no longer based on a pyramid headed by a single, all-powerful individual”.⁷⁰ The model of the corporation as an organic entity has thus emerged as a more accurate empirical theory of the corporation and the corporate decision-making structure.⁷¹

If the corporation is regarded in this way — as an organic rather than fictional entity — it may not be as easy to reject its claims to equivalent legal status in the criminal law and full legal standing under the constitution. Organic theories of the corporation, in rejecting the view that corporations are merely fictional, derivative entities, hold instead that corporations have a real existence⁷² and should therefore be treated in the same fashion as natural persons. Alan Brudner expresses this point succinctly: “If corporate minds are real entities, there is no reason why the analysis that applies to individual persons should not apply to corporations. As selves, they too would be the loci of freedom.”⁷³

But even if we concede that corporations can in a broad sense be regarded as persons or rational actors,⁷⁴ the nature of corporate decision-making and corporate agency⁷⁵ remains distinct.⁷⁶ Consider, for instance, negligence as a mode of criminal liability. In the context of individual liability, negligence is often regarded as an *exceptional* basis for criminal

liability, if it is accepted as a legitimate basis at all.⁷⁷ To the extent that negligence is an appropriate basis for attributing fault, it is considered much less culpable than intention or recklessness. The choice or will to do wrong is the essence of responsible human conduct.⁷⁸

In large corporations, however, it is often the case that no one person holds all the requisite knowledge in respect of a particular corporate decision. The complex structure of decision-making in larger organizations suggests that it is rarely the case that all of the features of individual agency (desire, belief and purpose, for instance⁷⁹) that make individual conduct *intentional* can be found in a particular locus in the corporation. As Jennifer Quaid observes, in large corporations “the presence of many individuals contributes to the anonymity and impersonality of corporate decisions”.⁸⁰ In any event, since corporations typically have express policies prohibiting illegal conduct (implying lack of intention), negligence, not intention, is said to be the paradigmatic form of corporate fault.⁸¹ So even if it can be said that corporations exhibit some form of agency, the nature of this agency is distinct from human agency.

Indeed, in recognition of the distinct nature of corporate criminal liability, the Law Commission of England and Wales has recently recommended in its report on involuntary manslaughter that a new offence of corporate killing be created, distinct from the individual offence. In particular, the commission recommended, *inter alia*, “that (unlike the individual offence) the corporate offence should not require that the risk [of death] be obvious, or that the defendant be capable of appreciating the risk”.⁸² The commission openly favoured the view that the principles of individual liability should be “adapted to a corporate context”.⁸³

As for the constitutional rights of corporations, it is not immediately obvious why corporations need to be protected constitutionally. There may be sound reasons why we would want to treat corporations as means to an end, which are not met by Kantian objections. It seems perfectly reasonable to be purely instrumental in our treatment of corporations, where it would be objectionable to be so toward individuals. Corporations are routinely bought, sold, broken up, dissolved and assimilated for reasons of profit or public policy. The nature of corporate existence is in these respects fundamentally different from that of the individual. Corporations exist primarily, if not exclusively, for the good of others or society at large; most theories of individual rights, however, regard autonomy⁸⁴ or liberty⁸⁵ as fundamental.

But even if we grant that the corporation as an organic entity is nevertheless such that it ought to be accorded constitutional rights, it is not clear that the interests at stake are sufficiently serious to trigger the full array of constitutional protections, or that these rights would be coextensive with constitutional rights of the individual.⁸⁶ After all, corporations cannot be imprisoned, and so are not in need of the same degree of protection as individuals.⁸⁷ The argument for extending requirements of fundamental justice or due process to corporations is particularly weak given that the penalties are typically monetary. Certainly, monetary penalties can be devastating to corporations, and there may be some need for protection against abuse of state power,⁸⁸ but all this is true whether the context is civil or criminal.⁸⁹

What I have attempted to show, then, is that even if corporations exhibit a form of agency and can in limited respects be regarded as persons deserving of constitutional rights, they are nevertheless persons in a conceptually and normatively distinct sense from individuals. In light of the many differences between corporate and human personality, and between corporate and human agency, there is no reason to think that the legal approach to the two should be the same.

3. — Conclusion

Once we see that the theory of corporate personality cannot sustain a theory of corporate rights — at least as being identical to individual rights — it becomes easier both to deny that corporations ought to be subject to the same principles of criminal liability as individuals and to deny them equal constitutional protection. This brings me, finally, to the jurisprudence of former Chief Justice Lamer of the Supreme Court of Canada, who consistently denied corporations

a constitutional status equivalent to that of individuals. He argued that the financial interests of a corporation are fundamentally different from the liberty and security interests of the individual,⁹⁰ and that a corporation should not be entitled to raise Charter defences applicable to individuals where the provisions in question apply only to corporations.⁹¹ But he also steadfastly maintained that even in the face of “regulatory” offences, individual liberty ought to be protected:⁹²

A person whose liberty has been restricted by the way of imprisonment has lost no *less* liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. Jail is jail, whatever the reason for it. In my view, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the principles of fundamental justice.

Former Chief Justice Lamer recognized that as a matter of both criminal liability and constitutional rights, corporations and individuals were normatively and legally distinct. In this respect, his jurisprudence certainly points us in the right direction.

I would suggest, however, that we follow his approach to its logical conclusion in two ways. First, we need to draw a clear distinction in our laws between corporate criminal liability and individual criminal liability. Ideally, in addition to a criminal code of general application to individuals, we would have a separate corporate criminal code, governing corporate criminal liability and reflecting its distinct character. Second, we should acknowledge, as a matter of unambiguous constitutional principle, that to the extent that constitutional rights ought to apply to corporations at all, they are not co-extensive with individual rights. However, the precise extent to which constitutional rights ought to apply to corporations is a matter best left for another day.

Footnotes

- * B.A (McGill), M.A., LL.B, Ph.D. (Toronto), Barrister & Solicitor (Ontario), Assistant Professor, Faculty of Law, National University of Singapore. An earlier version of this paper was presented at the International Society for the Reform of Criminal Law conference, “Human Rights and the Administration of Criminal Justice”, in Johannesburg, South Africa, December 5, 2000, under the title “Disentangling Corporate Criminal Liability and Human Rights”.
- 1 V.S. Khanna, “Corporate Criminal Liability: What Purpose Does it Serve?” (1996), 109 *Harv. L. Rev.* 1477 (arguing that corporate civil liability can achieve all of the goals of corporate criminal liability without the attendant procedural protections and stigmatic effects of the latter).
- 2 See, for instance, Susan Hedman, “Expressive Functions of Criminal Sanctions in Environmental Law” (1991), 59 *Geo. Wash. L. Rev.* 889 (arguing that criminal sanctions are necessary in order to express the moral outrage of the community in response to environmental misconduct); Robert W. Adler and Charles Lord, “Environmental Crimes: Raising the Stakes” (1991), 50 *Geo. Wash. L. Rev.* 781 (arguing that stricter legislation and penalties are needed to deter environmental crime). But see Nicola Atkinson, “Environmental Policy and Management in Asia: A Learning Experience” (1999), 1 *Journal of Environmental Assessment and Management* 81 (arguing that alternatives of the traditional “command and control” model, such as environmental assessments and environmental audits, may be more effective at preventing pollution).
- 3 *Salomon v. Salomon*, [1897] A.C. 22 (H.L.) at p. 51: “The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.”
- 4 See, for instance, *Constitution Insurance Company of Canada v. Kosmopoulos*, [1987] 1 S.C.R. 2 at pp. 10-11, 21 O.A.C. 4, 34 D.L.R. (4th) 208:

As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by ‘lifting the corporate veil’ and regarding the company as a mere ‘agent’ or ‘puppet’ of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the ‘separate entities’ principle is not enforced when it would yield a result ‘too flagrantly opposed to justice, convenience or

the interests of the Revenue': L.C.B. Gower, *Modern Company Law* (4th ed., 1979) at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice.

See also *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), affd 74 A.C.W.S. (3d) 207 (C.A.) where Sharpe J. of the Ontario Court General Division acknowledged that there are "undoubtedly situations where justice requires that the corporate veil be lifted" (at p. 433), but refused to do so in this case.

5 C. Tolefson, "Corporate Constitutional Rights and the Supreme Court of Canada" (1993), 19 Queen's L.J. 309 at p. 314. See also Keith Welks, "Corporate Criminal Liability: An Idea Whose Time Keeps Coming" (1991), 16 Col. J. Envtl. L. 293.

6 For an overview of the development of corporate criminal liability in English law, see Celia Wells, *Corporations and Criminal Responsibility* (Oxford: Clarendon Press, 1993), pp. 94-122.

7 In Canada, for instance, s. 2 of the *Criminal Code* provides that the terms "every one", "person", "owner", and similar expressions include, *inter alia*, "public bodies, bodies corporate, societies, [and] companies". Celia Wells, *ibid.*, refers us at p. 96, note 11 to, in the United Kingdom, the *Interpretation Act* (U.K.) 1978, s. 5, Sch. 1, and in the United States to Title 1, U.S. Code, s. 1, both of which hold that the word "person" includes, *inter alia*, corporations.

8 There is some terminological difficulty here. "Strict liability" is sometimes used to describe provisions that impose liability without proof of fault, but allow the defendant to establish, by way of defence, that he or she exercised due diligence or took all reasonable steps to avoid the proscribed harm: see, for instance, *R. v. Sault Ste. Marie (City)* (1978), 40 C.C.C. (2d) 353, 3 C.R. (3d) 30, [1978] 2 S.C.R. 1299. "Absolute liability" is then used to describe liability where no such defence is permitted. In this article, however, I shall use "strict liability" in the sense described above in the text.

9 Francis B. Sayre, "Public Welfare Offences" (1933), 33 Col. L. Rev. 54. In this well-known article, Sayre traces the emergence of the modern public welfare or regulatory offence in English law to two cases, *R. v. Woodrow* (1846), 153 E.R. 907, 15 M. & W. 404 (Exch.) and *R. v. Stephens*, [1866] 1 Q.B. 702.

10 Francis B. Sayre, *ibid.*, attributes the rise of regulatory offences to "the growing complexity of twentieth century life" (at p. 68).

11 On the development of administrative law generally, see P.P. Craig, *Administrative Law*, 4th ed. (London: Sweet & Maxwell, 1999), pp. 45-67.

12 For instance, in *Woodrow*, *supra*, footnote 9, the Court of Exchequer upheld a conviction for possession of adulterated tobacco where it was undisputed that the accused did not know that it was adulterated. Evidently aware of the inconsistency with the *mens rea* principle, Parke B. conceded that "an innocent man may suffer" under such a provision, but held that "the public inconvenience would be much greater if in every case the officers were obliged to prove knowledge" (at p. 913).

13 In *Stephens*, *supra*, footnote 9, the owner of a quarry was charged with obstructing the navigation of a river after his workers disposed of slate and other rubbish in the river. The defendant was upwards of 80 years of age and did not supervise his workers directly. Counsel argued that while he might be answerable civilly, he could not be criminally responsible for want of *mens rea*. Mellor J. held that "this in point of form is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding" (at p. 708).

By the time *Sherras v. DeRutzen*, [1895] 1 Q.B. 918, was heard in 1895, Wright J. was able to place into three broad categories the exceptions to the general presumption of *mens rea* in criminal cases. The categories identified by the court were: (i) acts "which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty" (at p. 922), such as possession of adulterated tobacco; (ii) acts that amount to public nuisances, as in *Stephens*, *idem*; and (iii) cases "in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right" (at p. 922). The court identified, but did not include in its threefold taxonomy, two other "exceptional" situations in which liability is imposed in the absence of *mens rea*: bigamy cases and abduction cases involving children under 16, such as *Prince* (1875), L.R. 2 C.C.R. 154. Of the three classes of offences noted above, it is Wright J.'s description of the first class that has had the greatest impact on contemporary jurisprudence and is most commonly used to justify the imposition of strict liability: See, for instance, *R. v. Pierce Fisheries*, [1970] 5 C.C.C. 193 (S.C.C.) at p. 199. See also *Proudman v. Dayman* (1941), 67 C.L.R. 536 (Aust. H.C.) at p. 540 and *Sweet v. Parsley*, [1969] 2 W.L.R. 470 (H.L.).

14 Phillip E. Johnson, "Strict Liability: The Prevalent View" in *Encyclopedia of Crime and Justice*, vol. 4 (New York: Free Press, 1983), pp. 1518-21 at p. 1519 (strict liability generally "refers to a body of offences that have emerged since the Industrial Revolution, offences that typically involve commercial activities such as the selling of unsafe or unhealthy products or environmental pollution").

15 *Gammon (Hong Kong) Ltd. v. Attorney General of Hong Kong*, [1984] 2 All E.R. 503 (P.C.) at p. 508. According to *Gammon*, the presumption that *mens rea* is required can be displaced only if this is clearly or by necessary implication the effect of the

statute and the statute is concerned with an issue of social concern such as “public safety”, and the creation of strict liability will be “effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act” (at p. 508).

- 16 This tendency is apparent, not only in the pre-Charter law of Canada (see *B.C. Motor Vehicles*, *infra*, footnote 40), but in other common law jurisdictions as well. For instance, in *Prosecutor v. Teo Kwang Kiang*, [1992] 1 S.L.R. 9, a case in the Singapore High Court, the defendant was convicted under s. 40(1) of the *Environmental Public Health Act* for possession of snow peas (imported from the Cameron Highlands) that were unfit for public consumption, even though he had no knowledge that the vegetables were tainted and he would not have sold the vegetables until they had been tested by the health inspector. The court held that the imposition of strict liability was justified on the grounds of public protection and held further that the “difficulties that an importer will face in ensuring that the vegetables are safe for human consumption are difficulties that the importer will have to live with and do his best to overcome” (at p. 13).
- 17 In *Teo Kwang Kiang*, *ibid.*, it was open to the Singapore High Court in the case of a second or subsequent offence to impose a custodial term of up to three months: Under s. 42(1) of the *Environmental Public Health Act*, a person convicted under s. 40(1) is “liable on conviction to a fine not exceeding \$1,000 and, in the case of a second or subsequent conviction, to a fine not exceeding \$4,000 or to imprisonment for a term not exceeding 3 months or to both”.
- 18 Celia Wells, *supra*, footnote 6, at p. 9.
- 19 Francis B. Sayre, in “Public Welfare Offences”, *supra*, footnote 9, at p. 79.
- 20 See, for instance, the judgment of Cory J. in *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at pp. 236-40, 8 C.R. (4th) 145, [1991] 3 S.C.R. 154.
- 21 Offences of constructive murder (or “felony-murder”) impose liability for *murder* where the accused causes the death of another person in the course of a serious offence, even though there was no intention to kill or no subjective awareness that death might result. The Canadian case, *R. v. Vaillancourt*, discussed *infra*, footnote 42, provides one example of a constructive murder provision.
- 22 Sayre, *supra*, footnote 9, at pp. 68-69.
- 23 See *Wholesale Travel*, *supra*, footnote 20, *per* Cory J., at p. 239:

Some indication of the prevalence of regulatory offences is provided by a 1974 estimate of the Law Reform Commission of Canada. The commission estimated that there were, at that time, approximately 20,000 regulatory offences in an average province, plus an additional 20,000 regulatory offences at the federal level. By 1993, the commission’s estimate of the federal total had reached 97,000. There is every reason to believe that the number of public welfare offences at both levels of government has continued to increase.

- 24 *Supra*, footnote 2.
- 25 In some instances, the impact of corporate criminal liability on individuals is even more direct. For instance, individuals are sometimes deemed liable upon a finding of corporate liability, unless they can prove a lack of fault in their part. For instance, in Singapore, s. 16(3) of the *Official Secrets Act* (Singapore), provides that where “the person guilty of an offence under this Act is a company or corporation or a member or employee of a partnership or firm, acting in the course of the business of the partnership or firm, every director and officer of the company or corporation or every member of the partnership or firm (as the case may be) shall be guilty of an offence unless he proves that the act or omission constituting the offence took place without his knowledge or consent.”
- 26 (Toronto: Ontario Law Reform Commission, 1990), at p. 48 (emphasis added).
- 27 201 U.S. 43 (1906). See generally Peter J. Henning, “The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions” (1996), 63 *Tenn. L. Rev.* 793.
- 28 F. Joseph Warin and Michael D. Bopp, “Corporations, Criminal Contempt and the Constitution: Do Corporations Have a Sixth Amendment Right to Trial by Jury in Criminal Contempt Actions and, if so, Under What Circumstances?” (1997), 1 *Colum. Bus. L. Rev.* 1.
- 29 Elizabeth Salisbury Warren, “The Case for Applying the Eight Amendment to Corporations” (1996), 49 *Vanderbilt L. Rev.* 1313.
- 30 Henning, *supra*, footnote 27, at p. 796.
- 31 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
- 32 (1989), 58 D.L.R. (4th) 577, [1989] 1 S.C.R. 927, 25 C.P.R. (3d) 417.
- 33 (1989), 56 D.L.R. (4th) 309, [1989] 1 S.C.R. 21, [1989] 1 C.T.C. 255.

- 34 *Supra*, footnote 32, at p. 632.
- 35 *Ibid.*, at p. 633.
- 36 *Supra*, footnote 33, at p. 323.
- 37 *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385 at p. 400, [1985] 1 S.C.R. 295, [1995] 3 W.W.R. 481, *per* Dickson C.J.C.
- 38 *Ibid.*
- 39 An alternative approach would have been to strike down the impugned law only in its application to individuals. This approach would have recognized the unique constitutional status of individuals under the Charter. The view adopted by the court, however, implies an equivalent constitutional status as between corporations and individuals.
- 40 (1985), 23 C.C.C. (3d) 289, 48 C.R. (3d) 189, [1985] 2 S.C.R. 486 (hereafter “*B.C. Motor Vehicles*”).
- 41 See discussion *supra*, footnote 8.
- 42 The reasoning in *B.C. Motor Vehicles* was subsequently extended to other substantive offences. For instance, in *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118, 60 C.R. (3d) 289, [1987] 2 S.C.R. 636, the Supreme Court of Canada struck down one of the constructive murder provisions in the Criminal Code as being inconsistent with s. 7 of the Charter (which guarantees the right to “life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”). The provision in question, what was then s. 213(d) of the *Criminal Code*, imposed liability for murder where the accused caused the victim’s death in the course of a serious offence such as robbery and had a weapon on his or her person. It was unnecessary to prove, even on an objective standard, that the accused could have foreseen the possibility of death. See, generally, James Stribopoulos, “The Constitutionalization of ‘Fault’ in Canada: A Normative Critique” (1999), 42 C.L.Q. 227.
- 43 Alan Brudner, “Guilt Under the Charter: The Lure of Parliamentary Supremacy” (1998), 40 C.L.Q. 287.
- 44 (1990), 54 C.C.C. (3d) 417 at pp. 478-79, 76 C.R. (3d) 129, [1990] 1 S.C.R. 425 *per* La Forest J.
- 45 R.S.C. 1970, c. C-23, ss. 17 and 20(2).
- 46 *Supra*, footnote 44, at p. 478.
- 47 *Ibid.*, at pp. 540-41: “Modern corporate existence carries with it a notion of privacy which is at odds with the privacy inhering in physical persons. This difference flows from the nature of corporate existence. While individuals as a rule have full legal capacity by the operation of law alone, artificial entities are creatures of the state and enjoy civil rights and powers only upon the approval of statutory authorities.”
- 48 *Ibid.*, at pp. 538-40.
- 49 *Supra*, footnote 20.
- 50 *Ibid.*, at p. 243.
- 51 *Ibid.*, at p. 244.
- 52 Confronted with the conceptually difficult task of distinguishing criminal and regulatory offences, Lamer C.J.C. concluded in *Wholesale Travel* that “whether the offence (or the Act generally) is better characterized as ‘criminal’ or ‘regulatory’ is not the issue” (*supra*, footnote 20, at p. 215). What is crucial is not the nature of the offence, but the nature of the remedy. Where the accused faces imprisonment upon conviction, the accused should be afforded the full substantive protections guaranteed by the Charter. Lamer J. explained (at p. 215):
- The focus of the analysis in *Reference re: s. 94(2) of Motor Vehicle Act* and *R. v. Vaillancourt* was on the use of imprisonment to enforce the prohibition of a certain behaviour or activity. A person whose liberty has been restricted by way of imprisonment has lost no *less* liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. Jail is jail, whatever the reason for it. In my view, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the principles of fundamental justice.
- 53 Cory J. (L’Heureux-Dubé J. concurring) based his interpretation of the scope of the s. 11(d) presumption of innocence on the regulatory context of the statute. In contrast, Iacobucci J. (Gonthier and Stevenson JJ. concurring) found that the reverse onus provision violated s. 11(d), but upheld it as a reasonable limitation on that right, taking the regulatory context into account only during the s. 1 stage of the analysis.
- 54 *R. v. 671135 Ontario Ltd.* (1994), 55 C.P.R. (3d) 204 (Ont. Ct. (Gen. Div.)) (dismissing a constitutional challenge to the validity of the reverse onus provisions in s. 52(1)(b) of the *Competition Act*, R.S.C. 1985, c. C-34).

- 55 *R. v. Petten* (1995), 402 A.P.R. 37 (Nfld. S.C.) (rejecting the argument that s. 78(4) of the *Fisheries Act*, R.S.C. 1985, c. F-14, which imposes on the accused the onus of disproving an element of the offence or proving an excuse on the balance of probabilities, offends ss. 7 or 11(d) of the Charter).
- 56 *R. v. G. (T.)* (1998), 123 C.C.C. (3d) 211, 165 N.S.R. (2d) 265 (C.A.), leave to appeal to S.C.C. refused 126 C.C.C. (3d) vi (upholding under s. 1 of the Charter those provisions of the *Liquor Control Act* that relieved the Crown of the onus of alleging that the accused's possession of illegal liquor was not otherwise authorized under the Act).
- 57 *R. v. Kinnear* (1997), 148 Nfld. & P.E.I.R. 163, 464 A.P.R. 163 (P.E.I.S.C.).
- 58 (1995), 102 C.C.C. (3d) 144 at pp. 160-61, 43 C.R. (4th) 343, [1995] 4 S.C.R. 154.
- 59 *R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 at p. 394, 3 C.R. (5th) 187, [1996] 3 S.C.R. 1128.
- 60 Although I have focused in this part of the article on the Canadian experience under the Charter, the arguments and trends seen in the Canadian jurisprudence could well be generalized to other jurisdictions and other constitutional contexts. The Canadian experience suggests that it is the desire to hold corporations criminally accountable for corporate wrongdoing coupled with an equation of individual and corporate rights that has led to the general erosion of constitutional safeguards. However, there is nothing in either of these phenomena that is unique to Canadian law or jurisprudence. As noted earlier, the extension of constitutional rights to corporations is very much a live issue in the United States: see *supra*, footnotes 28 and 29 and accompanying text. Similarly, calls for a more aggressive approach to corporate criminal liability are pervasive: see *supra*, footnote 2.
- 61 Compare Brent Fisse and John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988), 11 Sydney L. Rev. 468, *passim*; Celia Wells, *supra*, footnote 6, at pp. 84-93; Jennifer Quaid, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" (1998), 43 McGill L.J. 67 at pp. 70-88; Steven Walt and William S. Laufer, "Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions" (1991), Am. J. Crim. L. 263 at pp. 265ff; C. Tolefson, *supra*, footnote 5, at pp. 318-19.
- 62 *Tesco Supermarkets Ltd. v. Natrass*, [1972] A.C. 153 (H.L.), at p. 170, *per* Lord Reid.
- 63 Eric Colvin, "Corporate Personality and Criminal Liability" (1995), 6 Crim. L.F. 1 at p. 6.
- 64 *Ibid.*
- 65 *Ibid.*, at p. 8. These key personnel are sometimes referred to as the "directing mind" of the corporation: see *R. v. Canadian Dredge & Dock Ltd.* (1985), 19 C.C.C. (3d) 1, 45 C.R. (3d) 289, [1985] 1 S.C.R. 662.
- 66 Walt and Laufer, *supra*, footnote 61, at p. 266.
- 67 Compare Henning, *supra*, footnote 27, at p. 801.
- 68 Fisse and Braithwaite, *supra*, footnote 61, at p. 479.
- 69 See *Canadian Dredge & Dock*, *supra*, footnote 65.
- 70 Jennifer A. Quaid, *supra*, footnote 61, at p. 78. See also Home Office (U.K.), "Reforming the Law on Involuntary Manslaughter: The Government's Proposals" (May 2000), online at www.homeoffice.gov.uk/consult/invmans.htm at ¶3.1.4: "There can often be great difficulty identifying an individual who is the embodiment of the corporation and *who is culpable*. The problem becomes greater with larger companies which may have a more diffuse structure, where overall responsibility for safety measures in a company can be unclear and no one individual may have that responsibility."
- 71 We might question, however, whether this model of corporations is appropriate for all corporations, large and small. It may well be that in smaller, closely held companies, the locus of the decision-making power is found in one individual or a small group of persons: see Quaid, *ibid.*, at p. 79.
- 72 Jennifer A. Quaid, *supra*, footnote 61 (it is conceptually and philosophically justifiable to treat corporations as subjects of criminal law based on the particular features of corporations that give rise to a corporate identity); Eric Colvin, "Corporate Personality and Criminal Liability" (1995), 6 Crim. L.F. 1 (arguing for an "organizational model" of corporate criminal liability). For an overview of these two approaches to the nature of the corporation, see chapter 5, "Corporate Entities" in Wells, *supra*, footnote 6, at pp. 84-93.
- 73 Alan Brudner, "Imprisonment and Strict Liability" (1990), 40 U.T.L.J. 738 at pp. 772-73, footnote 91.
- 74 Walt and Laufer, *supra*, footnote 61, at pp. 268-73 (arguing in this section of the article that rational choice can be ascribed to corporations).
- 75 I use "agency" here in the philosophical sense of moral agency, referring to the capacity of a person to act in such a manner that he, she or it can properly be seen as responsible for that conduct.

- 76 The creation of an independent scheme of corporate criminal liability, at least in relation to corporate manslaughter, is currently under consideration in England and Wales. See the Law Commission's recommendation that a special offence of "corporate killing" be created, corresponding to the individual offence of killing by gross carelessness in *Legislating the Criminal Code: Involuntary Manslaughter (Report No. 237)* (London: HMSO, 1996). This proposal has been endorsed by the Home Office in "Reforming the Law on Involuntary Manslaughter: The Government's Proposals", *supra*, footnote 70. In his preface to the Home Office report, Jack Straw, MP, expresses the government's view that "the law relating to corporate liability for manslaughter is in need of radical reform". I am grateful to Judge Alan Wilkie, Q.C. for bringing these reports to my attention.
- 77 For arguments rejecting negligence as a basis for criminal liability, see Jerome Hall, "Negligent Behaviour Should be Excluded from Penal Liability" (1963), 63 Col. L. Rev. 633; Alan Brudner, "Agency and Welfare in the Penal Law" in Stephen Shute, John Gardner and Jeremy Horder, eds., *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), pp. 21-53. But see H.L.A. Hart, "Negligence, *Mens Rea* and the Criminal Law" from *Punishment and Responsibility* (Oxford: Clarendon, 1968), pp. 136-57; R.A. Duff, *Intention, Agency, and Criminal Liability* (Oxford: Basil Blackwell, 1990), pp. 139-79 and Kenneth W. Simons, "Culpability and Retributive Theory: The Problem of Criminal Negligence" (1994) 5 *Journal of Contemporary Legal Issues* 365, defending the imposition of criminal liability for negligent conduct.
- 78 Philosophers of action argue that intentional human conduct can be expressed neatly in terms of desire, belief, purpose and causation. For instance, in *Intention, Agency, and Criminal Liability* (Oxford: Basil Blackwell, 1990), R.A. Duff described the paradigmatic case of intentionally bringing about a particular result (at p. 66): "(A) The agent wants (or desires) that result. (B) She believes that what she does might bring that result about. (C) She acts as she does because of that want and that belief. (D) What she does causes that result."
- 79 See discussion, *supra*, footnote 78.
- 80 Compare Quaid, *supra*, footnote 61, at p. 79.
- 81 Fisse and Braithwaite, *supra*, footnote 61, at p. 486.
- 82 *Supra*, footnote 76, at p. 110.
- 83 *Ibid.*, at p. 98. Echoing the view set out in *Involuntary Manslaughter: A Consultation Paper* (Consultation Paper No. 135) (London: HMSO, 1994), its earlier look at the matter, the commission thought it unnecessary to "consider a reform which would affect the whole of the criminal law" (at p. 97).
- 84 Immanuel Kant, *Groundwork for the Metaphysics of Morals*, H.J. Paton, trans. (London: Hutchinson, 1953).
- 85 John Stuart Mill, *On Liberty* (Harmondsworth: Penguin, 1986).
- 86 South Africa's new constitution implicitly recognizes this point: "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person" (see *Constitution of the Republic of South Africa, 1996, Act 108* or 1996, s. 8(4)). See also Henning, *supra*, footnote 27, at p. 799: "If the Court were to address the question of corporate criminal constitutional rights directly, it would have to consider whether a corporation has any right to claim the protection of a constitutional provision, and then decide whether the protection is coextensive with the right afforded to the individual."
- 87 As we have seen in the Canadian Charter jurisprudence, it is the restriction of liberty that is seen as sufficiently important as to trigger the requirements of fundamental justice: see *B.C. Motor Vehicles*, *supra*, footnote 40.
- 88 *Ibid.*, at p. 801.
- 89 As Lamer J. (as he then was) observes in *Wholesale Travel*, *supra*, footnote 20, at p. 210: "With the possibility of imprisonment removed, and the stigma which attaches to conviction effectively reduced to loss of *money*, the corporation is in a completely different situation than is an individual."
- 90 Consider this passage from *B.C. Motor Vehicles*, *supra*, footnote 40, at p. 314, *per* Lamer J.:
- Even if it be decided that s. 7 does extend to corporations, I think the balancing under s. 1 of the public interest against the financial interests of a corporation would give very different results from that of balancing public interest and the liberty or security of the person of a human being. Indeed, the public interest as regards 'air and water pollution offences' requires that the guilty be dealt with firmly, but the seriousness of the offence does not in my view support the proposition that the innocent human person be open to conviction, quite the contrary.
- 91 *Wholesale Travel*, *supra*, footnote 20, at p. 210. Compare *R. v. McGowan Motors Ltd.* (1993), 108 Nfld. & P.E.I.R. 181, 339 A.P.R. 178 at p. 179 (P.E.I.S.C.).
- 92 *Ibid.*, *per* Lamer C.J.C. Emphasis appears in the original text.

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