CORPORATE CRIMINAL RESPONSIBILITY

CORPORATE CRIMINAL RESPONSIBILITY AND THE PUBLIC WELFARE OFFENCE

By

JAMES SKENDERIS, B.A.

A Thesis

Submitted to the School of Graduate Studies

in Partial Fulfilment of the Requirements

for the Degree

Master of Arts

McMaster University

MASTER OF ARTS (2001) McMaster University
(Philosophy) Hamilton, Ontario

TITLE: Corporate Criminal Responsibility and the Public Welfare Offence

AUTHOR: James Skenderis, B.A. (York University)

SUPERVISOR: Dr. Elisabeth Boetzkes

NUMBER OF PAGES: x, 114

ABSTRACT

This thesis will provide an analysis of corporate criminal responsibility by examining the evolving nature of the public welfare offence in Canada and how it affects the traditional understanding of *mens rea*. Historically, criminal law has been founded upon the notion of individual responsibility. Criminal convictions were restricted to human beings as only they could possess the mental and physical elements required of crimes. Since corporations are not considered living persons, the law has dealt with corporate offenders primarily through the establishment of public welfare offences. These offences are mainly policy-oriented and do not require proving a mental element. However, there is now a growing concern due to the influence of the *Canadian Charter of Rights and Freedoms* that public welfare offences should be regarded in the same manner as true crimes and offenders given similar legal protections. This view is troublesome as it raises questions over whether corporations can be equated with moral persons and given the same rights and privileges. If such a perspective is adopted, the enforcement of public welfare offences could be jeopardised resulting in increased infractions that might undermine the original policy-oriented objectives that public welfare offences were based upon. This thesis attempts to find a solution to this predicament by examining the viability of a modified corporate personality view where corporations could be 'treated' like persons, but not regarded as full-fledged moral entities; thus, allowing them some but not all the legal protections that human beings

possess. Furthermore, the feasibility of such a position is examined in accordance with a normative view of the criminal law, which allows for the inclusion of both individuals and collectives as responsible agents by not restricting the definition of *mens rea* to a purely mentalist interpretation.

Πρός γιαγιά (1927-1998)

I would have wanted to be born in a country where the sovereign and the people could have but one and the same interest, so that all the movements of the machine always tended only to the common happiness. Since this could not have taken place unless the people and the sovereign were one and the same person, it follows that I would have wished to be born under a democratic government, wisely tempered.

Jean-Jacques Rousseau, *Letter to the Republic of Geneva*

PREFACE

Although the epigraph that begins this thesis refers to a national consciousness in the political sphere, its rationale can also be applied to the concept of the corporate personality. Rousseau's ideal country is one where the sovereign and the people can become one entity much like the idealistic view that the corporate personality can be thought of as a person. Rousseau claims that since this ideal position cannot be achieved unless the people and the sovereign actually become the same person, we must settle for a democratic government to ensure that every individual's interests can be adequately represented. This thesis has much in common with Rousseau's view. In examining the public welfare offence, it attempts to find a compromise between an extreme view of the corporation as a moral person and a view where it is treated as a collection of individuals. Rousseau has accomplished a middle ground through an appeal to democratic government. In this thesis, the modified corporate personality view that I propose can be seen in the same regard. It attempts to achieve a balanced approach to the eternal problems that plague the notion of collective responsibility by exploring the viability of a middle ground.

My motivation for undertaking a thesis in the areas of legal philosophy and business ethics is a fascination for controversial issues in law. Although written as part of the requirements for a Master of Arts degree in philosophy, I have undertaken an interdisciplinary approach that reflects the style of my academic background. I believe

that this thesis will be of interest to not only philosophy students, but also those studying law, political science, public policy, criminology, or business administration.

There are numerous individuals that I wish to thank for providing me with insight and guidance in preparing this thesis. Most notably, I wish to thank my supervisor, Dr. Elisabeth Boetzkes for helping me find a suitable topic and continually offering me exceptional advice and constructive criticism. I would also like to thank my second reader, Dr. Wilfred Waluchow for providing me with clarification on fundamental issues in the philosophy of criminal law. I am also indebted to Dr. Spiro Panagiotou for giving me the opportunity to pursue this graduate program and having the courage to take a chance on me. There are many other faculty members and students that I wish to thank both at McMaster University in Hamilton and at York University in Toronto for spurring my creativity and offering me intellectual challenges. In addition, I want to extend my gratitude to all the coffee houses in the world where extensive dialogue and discussion occurs. It is not only in an academic environment where learning flourishes. We need to keep an open mind and expose ourselves to diverse environments in order to hear what others have to say regardless of their level of education.

There are several special people in my life that have played an important role in helping me achieve this accomplishment. I want to especially thank Mary Naskos for her support through both the difficult times and the celebrations. Watching her as she painstakingly read and re-read my rough drafts, as well as correct numerous spelling and grammatical errors, I knew that without her help this would have been a much more difficult task. I also want to thank my parents, Peter and Fani Skenderis for their

continued support and for constantly believing in me. Most of all, I have my grandmother to thank for keeping me optimistic. This thesis is rightfully dedicated to her. She will always be in my heart and her words of encouragement will forever be a part of me.

James Skenderis

Toronto

CONTENTS

INTRODUCTION

This thesis will provide an analysis of corporate criminal responsibility by examining the evolving nature of the public welfare offence in Canada and how it affects the traditional understanding of *mens rea.* Historically, criminal law has been founded upon the notion of individual responsibility. Criminal convictions were restricted to human beings as only they could possess the mental and physical elements required of crimes. Since corporations are not living persons, the law has treated them differently to accommodate this shortcoming. For example, one manner by which corporations have been held responsible has been to consider them as collections of individuals rather than whole persons and make them vicariously liable for the actions of their employees. Although this allows corporations to be regarded as *legal* entities that can commit offences that are detrimental to society, the fact that they possess neither a body nor a mind prevents them from being *moral* entities with the capacity to form intent and be found liable for serious crimes. As a result, the law has dealt with corporate offenders primarily through the establishment of public welfare offences that do not require proving *mens rea* or the 'guilty mind' element of the criminal law.

Traditionally, responsibility for the public welfare offence was determined by proving the *actus reus* or 'guilty act' element of an offence through the establishment of absolute liability offences. These offences were based on policy-oriented objectives that sought to protect the interests of society for petty offences through regulatory

mechanisms. It was felt that the principle of absolute liability created such high standards that it would deter possible offenders. Since these crimes were not classified as *mens rea* offences, there was no need to prove a mental element. Therefore, these offences could be differentiated from true crimes as they did not demand the same legal protections that accompany *mens rea* offences. However, as penalty and stigma for public welfare offences increased, there was a concern that classifying these offences as absolute liability in nature would violate principles of just punishment or retribution. As well, there was apprehension that it would give rise to many unfair convictions since there was no defence available to corporations if they had exercised all reasonable care prior to the offence. Consequently, this brought about the need to re-examine the nature of the public welfare offence in Canada.

An alternative that developed in *Regina v. City of Sault Ste. Marie* attempted to provide a solution by exploring the middle ground between *mens rea* and absolute liability. In this case, the Supreme Court of Canada created a new offence called a 'strict liability' offence based on principles derived from negligence in tort law. It suggested that a corporation could be found guilty of a strict liability offence by act alone, but could absolve itself of responsibility by proving that it took all reasonable care. Since strict liability offences were regulatory in nature and the penalties or stigma involved did not approach those associated with true crimes, the onus to prove due care could be shifted to the defence. In essence, what *Sault Ste. Marie* provided was not a criminal definition of the public welfare offence, but rather an opportunity for corporations to defend themselves against crimes that were previously considered absolute liability in nature.

Thus, by not requiring the prosecution to prove negligence beyond a reasonable doubt, strict liability offences remained regulatory in nature and facilitated the conviction of corporations by providing a balance between public welfare objectives and retributive justice. More importantly, strict liability offences also allowed the distinction between public welfare offences and true crimes to remain intact. This was accomplished by differentiating between objective and subjective standards for responsibility. An objective test is based on a standard of care where a defendant is guilty if he or she failed to avoid a risk that a reasonable person would have been aware of, whereas a subjective test is based on a defendant's own awareness of a risk. The difference is the result of a mental element requirement. As strict liability offences were based on inadvertent negligence, they relied on an objective test, which according to theorists such as J.W.C. Turner and Glanville L. Williams, was not seen as constituting *mens rea.*

Although the emergence of strict liability offences appeared to resolve the issue of unfair convictions for corporations and provided some level of protection for offences that were previously absolute liability in nature, penalty and stigma initially associated with conviction was minimal compared to what it is today. Current convictions for these same offences now carry a greater burden on the corporation as interest in public welfare offences has increased through the public's exposure to and awareness of events such as large-scale environmental disasters. As a result, this change has called into question the distinction between *mens rea* crimes and strict liability offences. Moreover, it appears that recent court rulings such as *Regina. v. Hundal* have all but eliminated the difference between these two offences based on the subjective/objective distinction. It is now no

longer necessary for the courts to prove subjectively that a *mens rea* offence has occurred as objective standards of negligence can be used to achieve the same goal.

The acceptance of an objective test for *mens rea* by the Supreme Court has blurred the distinction between strict liability offences and crimes of negligence and has resulted in the development of different ways of looking at the public welfare offence. According to legal scholars such as John Swaigen, there is now a growing concern due to the influence of the *Canadian Charter of Rights and Freedoms* that public welfare offences should be dealt with in the same manner as true crimes and offenders given similar legal protections. This is especially troublesome for corporations as it raises concerns over whether they should be treated as moral persons with the same rights and privileges as individuals. For theorists such as Peter French who advocate the criminalization of public welfare offences, this implies that the corporation would need to be given more protection. His theory suggests that it is possible for corporations to be charged with *mens rea* offences by ascribing to the corporation a personality that can be blamed or held responsible. Under his view of the corporate personality, a corporation can be seen to function in the context of a corporate culture and can be treated as possessing elements of personhood, such as a mind and body through its internal decision-making structure. As a result, a corporation can be seen as a moral person with the capacity to form intent through an objective test. However, there are problems with adopting such a strong view of the corporation as it can appear to justify giving corporations the same legal rights as other human beings and thus, jeopardise the enforcement of public welfare offences. With respect to the strict liability offence, this is

problematic as it was not originally perceived as an offence directed at the corporate personality. For example, corporations would need to be given the right to be presumed innocent until proven guilty which might jeopardise the reverse onus in the strict liability offence and shift the burden from the defence to the prosecutor. Thus, increasing legal rights in the hands of corporations would result in difficult prosecutions and eventually in increased infractions. Therefore, undermining the original policy-oriented objectives that public welfare offences were based upon and making them resemble true crimes.

The challenge for adopting a concept of corporate criminal responsibility is to provide for a manner in which corporations can be found negligent for public welfare offences; yet, prevent them from escaping culpability by giving them rights that are reserved for human beings. One way that a middle ground can be achieved is through the adoption of a modified corporate personality view that is more neutral than that which Peter French has suggested. For example, corporations could be 'treated' like persons, but not regarded as full-fledged moral entities; thus, allowing them some but not all the legal protections that human beings possess. Furthermore, we need to adopt a position that allows for the inclusion of both individuals and collectives as responsible agents where the distinction between true crimes and public welfare offences is not based on a subjective versus objective standard. This can be achieved by embracing a normative view of the criminal law where the definition of *mens rea* is not seen from a purely individualistic and mentalist perspective. As a result, we can look more at whether accused persons or corporations have valid excuses for their behaviour rather than focus on mental elements such as awareness or knowledge of the consequences.

The task of this thesis is thus, to examine the public welfare offence and how it has affected corporate responsibility in Canada. In the first chapter, the history of the criminal law and the public welfare offence is assessed and a traditional view of *mens rea* is introduced. The second chapter looks at the Canadian experience and how the distinction between true crimes and public welfare offences has evolved. The third chapter examines the corporate entity and looks at various theories of responsibility. And lastly, the fourth chapter offers a solution to the problems associated with the public welfare offence by evaluating the viability of adopting a modified corporate personality view under a normative theory of the criminal law.

CHAPTER I

HISTORY OF THE CRIMINAL LAW

This chapter is mainly historical in nature and examines how the criminal law and public welfare offence evolved in society. It begins by looking at the distinction between true crimes and public welfare offences and how true crimes traditionally possessed a strong connection to morality and individual responsibility. It then turns to philosophical issues in the criminal law and how the mental element in crime has long been perceived as requiring a subjective awareness test. By examining the views of J.W.C. Turner and Glanville Williams, I will show how both these theorists have kept offences of negligence outside the domain of the criminal law by treating negligence as a form of inadvertence that does not require proving a mental component. Finally, I conclude with a brief overview of the public welfare offence as a regulatory offence and how it shares a common objective with negligence in tort law.

True Crimes—the Role of Morality and Individual Responsibility

The difference between a first degree murder charge and a parking infraction may appear quite clear to most people but can present problems when trying to determine exactly where to draw the line between criminal and non-criminal behaviour. Although both murders and parking infractions appear to be wrongs that are punishable by the

courts, one is considered a true crime, whereas the other is a public welfare offence. Accordingly, the question that arises is: how and where do we make this distinction? A historical answer to this question is to assume that true crimes are those that require proof of a mental element such as an evil intention to do harm or reckless behaviour, whereas public welfare offences are crimes that are less serious and can be committed by act alone. Thus, the difference may appear to rely on an evil moral component followed by a retributive objective where there is a greater stigma associated with conviction. As a result, we can see that public welfare offences have evolved with a different structure and objective in mind than true crimes. They are based on a form of strict or absolute liability and do not need a mental component, and are mostly the result of regulatory policy objectives.[1] Therefore, public welfare offences traditionally did not possess a strong connection to morality and individual responsibility; thus, making them more suitable for the enforcement of corporate infractions.

In order to understand how the distinction between true crimes and public welfare offences emerged, we must first explore the roots of criminal law and how both of these offences developed. Such an investigation requires a historical analysis of the mental element in crime. Our criminal law has traditionally been based on the presence of a guilty mind or *mens rea* component. The test used for *mens rea* was historically based on the notion of moral blame or culpability, which suggested that no one should be held responsible for a crime that they did not intend. These true crimes no doubt developed

[1] In this chapter, strict and absolute liability refer to the same thing and should not be confused with the strict liability offence created by the Supreme Court of Canada in *Regina v. City of Sault Ste. Marie*, which is described in greater detail in Chapter 2.

from the influence of morality on the criminal law. For example, a common distinction that is often made in legal circles is the difference between *mala in se* and *mala prohibitum* offences:

> Some illegal acts, referred to as **mala in se** crimes, are rooted in the core values inherent in Western civilization. These 'natural laws' are designed to control such behaviours as inflicting physical harm on others (assault, rape, murder), taking possessions that rightfully belong to another (larceny, burglary, robbery), or harming another person's property (malicious damage, trespass) that have traditionally been considered a violation of the morals of Western civilization.[2]

Mala in se crimes were offences that were considered immoral by society because they were contrary to natural law or morality. It was originally believed that these crimes were usually committed with an evil intention and could easily be apportioned a 'guilty mind' or *mens rea* element. Hence, we can make the assumption that true crimes encompassed these more serious offences which required an evil component. Crimes that did not find their origins in natural law differed from these true crimes and were considered *mala prohibitum* offences. These were usually not as serious as *mala in se* offences as they were crimes that may have conflicted with morality but were not universally condemned:

> Another type of crime, sometimes called statutory crime or **mala prohibitum** crime, involves violations of laws that reflect current public opinion and social values. In essence, statutory crimes are acts that conflict with contemporary standards of morality . . . *Mala prohibitum* offences include drug use and possession of unlicensed handguns.[3]

---

[2] Larry J. Siegel, and Chris McCormick, *Criminology in Canada: Theories, Patterns, and Typologies*, (Toronto: ITP Nelson, 1999) 36.
[3] Siegel, 36.

By appealing to natural law for the distinction between *mala in se* and *mala prohibitum offences*, we can see how morality and individual responsibility intersected with the criminal law. *Mala in se* crimes appeared to be crimes of morality where a human being could be held morally responsible for a particular outcome. As true crimes, these offences involved an examination into an accused person's mental state to determine if they possessed an evil intention to do harm at the time of the offence. Thus, the development of a subjective awareness test for *mens rea* may have evolved through this traditional understanding of the criminal law. Moral responsibility required the existence of a person with a mental state that was able to make a moral choice about his or her intentions. Therefore, the introduction of a subjective awareness test to prove this *mens rea* element allowed for a way to apportion responsibility for serious *mala in se* crimes while those that were *mala prohibitum* could be treated as public welfare offences.

According to theorists such as Turner, a subjective awareness test for *mens rea* is an essential requirement for criminal responsibility. In order to convict a person for a true crime, we need to prove their state of mind at the time of the offence. We cannot and should not apportion blame to those that are not morally responsible for their actions or inactions. Turner claims that the best way to accomplish this is through an examination of an accused's mental state:

> The concept that a man ought not to suffer punishment for his harmful deed unless in some way he is himself conscious of wrongdoing is one which appeared at an early period in this country . . . for it will be found that although for centuries there has been substantial agreement among our lawyers that the law requires a mental element

> in crime, the opinion as to what is precisely that mental element has changed from age to age.[4]

Despite controversies surrounding the mental element in crimes, Turner has argued that there has been consensus among theorists that some proof of a mental element is required for criminal guilt regardless of what that mental element is. A common view that has emerged suggests that a subjective awareness test for *mens rea* is best suited for this task. This demonstrates how the criminal law has an important connection to morality and individual responsibility. A subjective awareness test for *mens rea* is able to capture an accused's mental state at the time of the offence since it looks at whether the accused made a rational choice that can be apportioned fault or blame. Thus, such a test provides a way to prove that an accused person was aware of his or her choice at the time of the offence. Turner claims that this requirement can be described as the element of *foreseeability* and is a necessary condition for criminal guilt. He states:

> It must be proved that the accused person *realised at the time* that his conduct would, or might *produce results of a certain kind*, in other words that he must have foreseen that certain consequences were likely to follow on his acts or omissions.[5]

Since a subjective awareness test involves an examination of whether an accused person possessed elements such as an intention to commit a crime or had an awareness of the consequences, we can see how an individual can be held responsible for such offences. It

---

[4] J.W.C. Turner, "The Mental Element in Crimes at Common Law," in *The Modern Approach to Criminal Law*, ed. L. Radzinowicz and J.W.C. Turner, (London: MacMillan and Company, Ltd., 1945) 195.
[5] Turner, 199.

appears that *mens rea* has had an intimate connection with the notion of personhood and especially with offences that were considered *mala in se* or moral crimes.

We now turn to how and why the notion of *mens rea* emerged in the criminal law. According to Turner, before the mental element requirement was enshrined in the criminal law, all offences were based primarily on a system of restitution and absolute liability. The need to prove a mental element for conviction did not exist. He states:

> Legal historians tell us[1] that in the earliest period of our law the mental state of the wrongdoer was little, if at all, regarded, and that no mental element was required to establish liability. This may perhaps have been largely due to an early notion that the function of law in matters between subjects was not so much to punish as to regulate the compensation that should be paid, whether to the private individual or to the Crown. As time went on the idea gradually developed, probably under ecclesiastical influence, that the infliction of punishment was necessary.[2]
>
> ---
>
> [1] P. & M. II, 470 *et seq.*; Holdsworth, H. E. L. II, 50 *et seq.*; but cf. Winfield in L.Q.R. Vol. XLII, 37.
> [2] "When crude retaliation appears in a medieval code, the influence of the Bible may always be suspected": P. & M. II. 489, n. 2.[6]

The introduction of a *mens rea* requirement developed from the perceived need to punish offenders for their wrongdoing. This was a major shift in how criminal offences were treated by the courts and ensured that a retributive system developed where responsibility for crimes could be determined by taking the mental element of forseeability into consideration. The *mens rea* requirement emerged as part of this retributive objective

---

[6] Turner, 201.

where those that transgressed the law would be punished only to the extent that they were responsible for their crimes. As the criminal law's objective shifted from restitution to punishment, there was fear that the infliction of punishment could exceed what was morally acceptable. For example, focusing only on the *actus reus* of an offence did not provide for a system of just punishment since it examined only the consequences of an offence rather than an accused's mental state. As a result, an accused person's *reasons* for choosing to behave in such a manner in the first place could be overlooked. Prior to the introduction of the *mens rea* requirement, responsibility for crimes failed to take into consideration an accused person's intentions. This early view focused on the notion of strict or absolute liability where behaviour that was outlawed by the community dictated whether an accused person should be found guilty of an offence regardless of whether there was any criminal intent. The objective of this view was to try to restore equilibrium in the community. Therefore, the changing nature of the criminal law towards a system of retribution led to the infliction of punishment for crimes that involved a responsible individual with a blameworthy mental state. Thus, the *mens rea* requirement was supposed to provide for the moral element of just punishment by punishing individuals only for what they deserved, rather than simply providing restitution.

Negligence Offences and Mens Rea

Two ways by which to evaluate the mental element in crimes have emerged in contemporary times. One is derived from the traditional understanding of *mens rea* where

a subjective awareness test is used to examine whether an accused person possessed a positive state of mind, such as an intentional or reckless awareness of the consequences. The other is an objective awareness test that looks at whether there was a departure from the standard of care of a reasonable person. The question to be answered under an objective test concerns what the accused 'should' have done under the circumstances and not what he or she was actually aware of at the time of the crime. Thus, there is no need to prove an intentional element under an objective awareness test to prove criminal responsibility.

What has followed from the introduction of both a subjective and objective test for *mens rea* has spurred considerable debate in the philosophy of criminal law regarding what should count as a mental element in crime. Specifically, this debate has centred around the inclusion of negligence as a criminal state of mind. According to theorists such as Turner and Williams, *mens rea* should be based on a subjective awareness test where an accused person can foresee a particular outcome resulting from his or her actions. This includes intentional or reckless behaviour but not negligence. Since simple negligence is an objective standard, Turner and Williams claim that it should have no place in the criminal law as it suggests that even accidental outcomes can be treated as criminal. Such a move would break down the distinction between acts that require prior awareness of the consequences and acts that do not. Turner states that in order for one to be criminally responsible, there must be at least some notion of foreseeability which involves a mental element:

> . . . the accused person must have realised that his conduct might produce such and such result. In other words the rule

> covers such expressions as 'malice aforethought', and all the combinations of the word 'negligence' with vague adjectives such as 'wicked',[1] 'gross',[2] 'culpable',[3] 'complete',[4] 'clear',[5] 'criminal',[6] and so on. It includes the two states of mind called 'Intention'[7] and 'Recklessness', (or 'Rashness') . . . [but not] the state of mind of a man who is *inadvertent* or *negligent*.
>
> ---
>
> [1] Kenny, *Outlines* (ed. 1936) 138; Stroud, *op. cit.*, 127; *R. v. Handley* (1874), 13 Cox. 79, at p. 81.
> [2] *R. v. Markuss* (1864) 4 F. & F. 356; at p. 359.
> [3] *R. v. Doherty* (1887) 16 Cox 306, at p. 309; *R. v. Roberts* [1942] 1 All. E. R. 187, at p. 192.
> [4] *R. v. Noakes* (1866) 4. F. & F. 920, at p. 921.
> [5] *R. v. Macleod* (1874) 12 Cox 534, at p. 539.
> [6] *R. v. Elliott* (1889) 16 Cox 710, at p. 714.
> [7] Austin, *Jurisprudence* (4th ed.), Vol. I, pp. 431-442.[7]

The important point for Turner is that criminal acts must involve an element of foreseeability that is related to a conscious mental state. As a result, there must be some type of prior awareness that can be measured subjectively. In the case of intentional crimes, that element is desire. He claims that "'*Intention*' denotes the state of mind of the man who not only foresees, but also desires the possible consequences of his conduct."[8] The element of desire implies that there is an evil or wicked component to committing a criminal offence.

One of the main problems with the traditional understanding of *mens rea* has been with how to differentiate between crimes of negligence and crimes of recklessness. Since the courts have created considerable uncertainty over how to treat crimes of negligence, this in turn has caused confusion for a definition of *mens rea* that is based on a subjective

---

[7] Turner, 206.
[8] Turner, 206.

awareness test. According to Williams, the reason why these problems have arisen is because the courts have been very reluctant to stick to one interpretation of *mens rea*. He states:

> It would be simple to start by postulating that, as a minimum, *mens rea* means an intention to do the forbidden act—were it not for the fact that there is no judicial agreement upon the meaning of intention.[9]

As a result, we can see that part of the problem for differentiating between subjective and objective tests for *mens rea* is due to the fact that the courts have failed to reach a consensus over its definition. Consequently, this has led to confusion over whether crimes of negligence should be included in the definition of *mens rea* and has resulted in a difficulty over where to draw the line with recklessness. The introduction of an objective test for *mens rea* has eroded the mental element in crime and has caused this concern.

According to Turner, the difference between these two types of offences can be reduced to the element of foreseeability. He claims that only recklessness can possess this mental element as it involves a subjective awareness test. Turner states:

> '*Recklessness*'[8] denotes the state of mind of the man who acts (or omits to act when it is in his legal duty to act) foreseeing the possible consequences of his conduct, but with *no desire* to bring them about.

---

[8] Austin, *loc. cit.* See also Stephen, H.C.L. III, pp. 55, 56.[10]

---

[9] Glanville L. Williams, *The Mental Element in Crime*, (Jerusalem: Magnes Press, 1965) 10.

[10] Turner, 206.

Offences of recklessness result from a form of negligence but also have a subjective element of foreseeability similar to intent-based *mens rea* offences. Turner suggests that recklessness offences share more with *mens rea* crimes than they do with negligence as they have a mental element that can be examined through a subjective awareness test. Negligence offences differ in that they do not possess this element and cannot be determined in this way. Thus, he believes that they should not be included in the definition of *mens rea*. Turner states:

> *'Negligence'* is a very different state of mind from those previously considered. It is a state of mind of a man who pursues a course of conduct *without adverting at all* to the consequences, . . . much less desire them. The word further indicates that he is in some measure blameworthy, and that we should expect an ordinary, reasonable man to foresee the possibility of the consequences and to regulate his conduct so as to avoid them.[11]

Turner interprets negligence offences as a form of simple negligence that borders on accidental behaviour. Committing a crime inadvertently does not involve an evil intention. There is no rational choice being made between what is morally right or wrong by an accused. The definition of inadvertence merely suggests that one has committed the act without desiring or having a prior awareness of the consequences. Although there is some measure of responsibility involved, Turner believes that it should not be considered criminal as the element of foreseeability is lacking.

Although Turner believes that negligence offences should not be treated as *mens rea* crimes, he does not believe that they are without some form of responsibility. He

---

[11] Turner, 207.

believes that these offences should bear some responsibility on the individual, but not in a criminal sense since there is no element of forseeability. He states:

> It is, however, submitted with emphasis that although negligence in this sense of inadvertence may be blameworthy and may ground civil liability, *it is at the present day not sufficient to amount to mens rea in crimes at Common Law*.[12]

It is important to understand that the negligence offence that Turner is referring to is similar to the type found in tort law, where responsibility is primarily based on restitution and is not necessarily morally based. His belief is that responsibility for true crimes have an evil element with a greater moral dimension where an accused person has made a rational choice to behave in a certain way and is not the result of an accident. Thus, Turner claims that negligence offences that do not possess a subjective component are not compatible with moral or criminal responsibility as they are not consistent with *mala in se* offences or true crimes:

> When the moral standard was introduced it was felt that liability should depend on something evil or wicked in the offender's conduct, and it can scarcely be argued that mere negligence shows such moral delinquency.[13]

Including negligence in the criminal law leads to the punishment of offences that are not committed through intentional or reckless behaviour. Moreover, it assigns responsibility on the basis of an objective test which does not involve an analysis of evil elements associated with an accused's mental state; thus, implying that an accused person should

---

[12] Turner, 208.
[13] Turner, 212.

be held morally responsibility for a negligence offence even if it was committed inadvertently and bordered on accidental.

Williams offers a more precise analysis of the problem by examining exactly how to draw the line between recklessness and negligence. He does this by differentiating between conscious and unconscious negligence. Like Turner, Williams believes that inadvertent negligence does not belong in the definition of *mens rea* since it does not possess a conscious component. However, he goes further and considers how the border between recklessness and negligence should be drawn by focusing on the subjective element. Williams claims that although there are many similarities between recklessness and negligence, we should not treat them as being completely identical since recklessness requires a mental state. We must define inadvertent negligence as excluding recklessness, but should not define recklessness as excluding intention.[14] Since we treat recklessness as a form of *mens rea*, we must distinguish between crimes that can be committed negligently and those that require a blameworthy mental state. Williams states:

> If recklessness is to be taken as a form of *mens rea*, as it is for many crimes, it must, surely, be given a subjective meaning, for otherwise it cannot be *mens*. Were the contrary view to be adopted, that although recklessness is a generally sufficient form of *mens rea* it can be committed by inadvertent negligence, the conclusion would be that a considerable number of major crimes could be committed inadvertently; but it has always been assumed that this is not the case.[15]

The problem for Williams is that the courts are using terms such as negligence to describe a variety of recklessness offences and vice versa. For example, they are referring

---

[14] Williams, *The Mental Element in Crime*, 32.
[15] Williams, *The Mental Element in Crime*, 57.

to offences such as criminal or gross negligence when in fact these are not offences of negligence, but rather recklessness. This in turn causes problems for the determination of the mental element in crime. Since recklessness relies on a subjective awareness test, it should not be determined using an objective measure. For recklessness what is important is whether an accused could foresee the significant risk associated with his or her actions. Unlike inadvertent negligence, an accused is not responsible only if a reasonable person could have foreseen these consequences; the *accused* must have foreseen them. Simple negligence offences differ from recklessness or offences considered 'gross' or 'criminal' since an accused's mental state is not an issue. Williams states:

> On an issue of gross inadvertent negligence, the issue is whether the defendant fell signally below the standard of care of the reasonable man. The defendant's state of mind is not the question. On an issue of recklessness, the question is whether the facts speak loudly that the jury can profess themselves satisfied beyond a reasonable doubt that the defendant *must* have foreseen—that they cannot imagine that he did *not* foresee—the possibility of the consequence.[16]

What this implies is that the distinction between inadvertent negligence and recklessness is one that is based on an objective versus subjective examination of an accused's conduct. The notion of whether an accused could foresee the consequences of his or her actions is crucial to this distinction. According to Williams, the concept of foreseeability is an element of intention that can only be determined through a subjective awareness test and not through a comparison to a reasonable person. If there is any doubt in a jury's mind that an accused *may* have not foreseen the consequences, even though a reasonable

---

[16] Williams, *The Mental Element in Crime*, 57.

person may have, then he must be acquitted. There needs to be proof that the accused was indifferent to the risk of harm and did not simply act inadvertently. This not only reiterates the importance of having an awareness of the consequences for conviction but also of the right to be found guilty beyond a reasonable doubt. As a result, for Williams, *mens rea* offences include offences of recklessness but not inadvertent negligence. The term 'negligence' is misleading and should not be used to refer to offences labelled as criminal or gross negligence.

According to Turner and Williams, problems begin to arise if an objective standard is used for criminal responsibility as it allows inadvertent negligence offences to be included in the definition of *mens rea*. It appears that Turner's understanding of the reasons for keeping objective tests outside of the criminal law is based on the fact that it conflicts with principles of just punishment. Comparing an accused's conduct to that of a reasonable person on the surface seems to neglect an accused's own mental state and cannot ensure that those punished for crimes are genuinely the ones that should be held responsible for them. As most criminology textbooks state, the criminal law should only be used for crimes that are the result of intentional or reckless behaviour:

> The criminal law is based on desert (i.e., getting what you deserve) and blameworthiness. A person will be convicted of a crime only he or she intended to commit the act or was reckless in committing it. The criminal law does not consider it appropriate to punish those who commit acts merely accidentally or negligently.[17]

---

[17] Rick Linden, *Criminology: A Canadian Perspective*, 4th ed. (Toronto: Harcourt, 2000) 46.

Although it appears that this notion of retribution is supposed to be enshrined in the criminal law through the *mens rea* requirement, historical beliefs still influence how criminal offences are treated in contemporary times and in how *mens rea* offences have been interpreted by the courts. Turner and Williams both insist that a subjective awareness test should only be used to determine *mens rea*. Such a view is in line with the retributive view of the criminal law as it prevents a return to a system where the mental element is not taken into consideration. If the criminal law adopts an objective test for *mens rea*, then this could shift the moral element of responsibility to community standards rather than to an accused's mental state; therefore, creating significant problems in the criminal law for the definition of *mens rea*. This is especially true where crimes of negligence are concerned. There is an uncertainty in the philosophy of criminal law regarding what negligence entails especially among modern legal theorists.[18] It appears that both Turner and Williams perceive negligence as a form of inadvertence that does not possess an evil moral component and must be excluded from criminal liability.

What we are now left with is a clear distinction between *mens rea* offences and negligence offences that is in line with the historical definition of what a true crime entails. If the distinction between these two types of offences should somehow break down, then what counts as a true crime would need to be reassessed since it would disrupt the notion of criminal responsibility. For example, if the courts begin to include negligence offences in the definition of *mens rea*, objective tests would be introduced as a means of determining culpability and present grave problems for the traditional view of

[18] Different theories of negligence are examined further in Chapter 4 where a normative view of the criminal law is introduced.

the criminal law.[19] Since inadvertent negligence offences do not command the same moral responsibility that true crimes do, such a move may result in the criminal punishment of individuals reverting us back to a system of strict or absolute liability. For instance, Turner uses the *Prince*[20] case to show how these crimes have created such a concern in the past. He states:

> Every man runs the risk that a court may decide that what he has done is a crime, or is immoral, but his liability does not depend on his own ability to make that decision; and his risk is just the same whether or not he has any idea that what he is doing is immoral, or a civil wrong, or a crime.[21]

Similarly, if we interpret negligence to mean inadvertence and adopt either Turner's or Williams' view, then an objective test could be troublesome for the traditional understanding of *mens rea*. The rationale for this is since objective tests as interpreted by Turner and Williams, base responsibility on the notion of a reasonable person and not on an accused's mental state. It is the insistence that *mens rea* crimes can only be committed through intentional or reckless behaviour that has kept negligence offences outside the realm of criminal law. This has been accomplished by adopting a subjective awareness test for *mens rea* and treating negligence as a form of inadvertent behaviour where punishment and stigma is not severe. Although such a view is highly contentious, its persistence in the criminal law has allowed the distinction between true crimes and public

---

[19] This will be addressed further in Chapter 2 in an analysis of *Regina v. Hundal.*

[20] The *Prince* case was about a man who was accused of taking a young girl under the age of 16 away from the possession of her father. Although the offence in question was a *mens rea* offence, it resembled a strict or absolute liability offence where an accused's actions are sufficient for liability. Prince unsuccessfully appealed his conviction on the basis that he could not be responsible for a crime where he reasonably believed the girl to be over the age of 16. See *Regina v. Prince* [1875] 13 C.C.R.

[21] Turner, 219.

welfare offences to remain intact since public welfare offences are based on inadvertent negligence. Turner and Williams have supported their view by shifting negligence offences into the domain of tort law and not considering them to be retributive in nature. Therefore, the appearance of a lower level of responsibility has allowed both Turner and Williams to treat true crimes as offences that can be determined only through a subjective awareness test.

Even though this view may seem acceptable to Turner and Williams, significant issues arise with respect to the mental element in crime in a contemporary context. New ways of looking at *mens rea* and especially negligence offences have begun to emerge which have created problems for the distinction between true crimes and public welfare offences. Moreover, there have also been problems in addressing corporations that have committed criminal offences.[22] Although the traditional understanding of *mens rea* is based on a subjective awareness test that requires either intentional or reckless behaviour, problems begin to emerge when looking at corporate crimes that involve a collection of individuals. A subjective awareness test cannot be used to prove *mens rea* in these cases as a corporation is not a human being. If we want to hold corporations responsible for true crimes, we must either adopt an objective test for *mens rea* and jeopardise the distinction between true crimes and public welfare offences, or we must keep objective tests outside of the criminal law and treat all corporate crimes as public welfare offences. Corporations create complexities for the traditional understanding of *mens rea*. They have primarily been dealt with through public welfare offences that do not require them

[22] Both these points will be addressed further in the following chapters.

to be treated as persons with mental states. Since new ways of looking at both negligence offences and the corporate entity have now surfaced, they present problems for the traditional understanding of *mens rea* and the distinction between true crimes and public welfare offences. However, before we turn to these views, it is essential that we examine the public welfare offence and how it has emerged and evolved in society.

The Emergence of Public Welfare Offences

Public welfare offences have emerged in society as a way of providing a regulatory mechanism for activities that are not considered serious moral crimes such as murders or armed robberies. A public welfare offence normally involves a lower level of responsibility and has accordingly been treated differently by the legal system. Unlike true crimes, public welfare offences aim to regulate or place restrictions on allowable behaviour by controlling how people and corporations go about their daily routines. According to John Swaigen, public welfare offences developed as a way of eliminating the *mens rea* requirement for petty offences:

> . . . [They] were usually offences that had not been crimes at common law, and were usually not thought to be morally wrong, but were created as part of a regulatory scheme, and often administered by some administrative agency, rather than enforced by the police.[23]

Public welfare offences include, but are not limited to: parking infractions, traffic offences, pollution violations, as well as product standards violations aimed at individuals

---

[23] John Swaigen, *Regulatory Offences in Canada*, (Toronto: Carswell, 1992) 2.

or corporations. These crimes involved a lower level of responsibility and did not have the same requirements as true crimes since proof of a mental element, such as intention or recklessness was not required. Thus, they were mostly committed negligently and possessed a lower moral component. This diminished fault element also prevented them from being retributive in nature. Therefore, they have evolved to regulate existing behaviour in a community rather than forbid it completely. For example, there cannot be a regulatory crime of murder as it would imply that some murders are tolerated by society. However, with offences such as polluting the environment, there is a threshold that determines its wrongfulness. Not all polluting is considered an offence. In fact, we often tolerate and encourage a small amount of pollution in the interests of the benefits to society provided it does not exceed this 'regulated' threshold. Anyone exceeding this threshold whether intentionally or not is usually fined. Although in the criminal law this may be seen as a punitive measure, in regulatory law fines are generally minimal and are treated as the cost of doing business. Consequently, public welfare offences can be differentiated from true crimes in that although they appear to be crimes in a general sense, they are regulatory in nature and involve only a lesser amount of responsibility. In addition, they are based on a policy-oriented objective that attempts to protect the needs of society through a deterrent mechanism. This is accomplished through their classification as strict or absolute liability offences where the purpose is to prevent the commission of an offence before it occurs. Accordingly, they lack an evil moral element and do not have the same retributive objective as true crimes. By removing the *mens rea*

requirement for public welfare offences, no criminal stigma is incurred and the element of responsibility is also reduced which ensures easier conviction.

According to Williams, liability without fault is found in tort law.[24] Since public welfare offences are based on inadvertent negligence, they share a similar non-retributive objective with negligent acts in tort law. Although the responsibility involved may not necessarily be a *moral* responsibility where the objective is a retributive punishment, it can involve a responsibility of a different kind. For example, it could be argued that the objective of tort law is about compensating victims of harm on the basis of an *economic* responsibility where the objective is financial restitution. Under such a perspective, moral responsibility may be excluded from the realm of tort law, whereas it cannot under the criminal law. Richard A. Epstein has suggested that differences arise between tort law and criminal law when looking at defences such as insanity. Although an insanity defence can be used in the criminal law to deny responsibility for a crime, it cannot be used in tort law. He states:

> . . . the law of negligence never did conform in full to the requisites of the 'moral' system of personal responsibility . . . Certain defenses like insanity were never accepted as part of the law of negligence, even though an insane person is not regarded as morally responsible for his actions.[25]

The argument that defences such as insanity cannot be invoked for negligence indicates that in tort law, liability for harm cannot be averted even where moral responsibility can. Negligence offences in tort law do not require moral fault. They can be seen from an

---

[24] Williams, *Textbook of Criminal Law*, (London: Stevens & Sons, 1978) 905.
[25] Richard A. Epstein, *A Theory of Strict Liability: Toward a Reformulation of Tort Law*, (San Francisco: Cato Institute, 1980) 6.

economics perspective that has more to do with providing compensation rather than moral responsibility. Epstein claims that standards such as the reasonable person can be viewed in an alternative manner where they are not about making the right or wrong moral choice, but rather about what an economically prudent person would do under the circumstances. He states:

> . . . it was suggested that a defendant should be regarded as negligent if he did not take the precautions an economically prudent man would take in his own affairs, and, conversely, that where the defendant *did* conduct himself in an economically prudent manner, he could successfully defend himself in an action brought by another person whom he injured.[26]

Therefore, by appealing to an economic view of tort law, we can see how public welfare offences share many similarities to negligent acts in tort law. Neither has a retributive objective, nor do they have to incur any increased moral responsibility since it is not always necessary to prove that a mental element existed.

For these reasons, public welfare offences were seen as an ideal way to control offenders such as corporations where responsibility cannot be reduced to specific individuals. Having a lower stigma, being fine-based, and having a lower level of moral responsibility makes regulatory offences attractive to corporations. In addition, they are also attractive to lawmakers and law enforcement officials as they provide an easy and efficient manner of administration for regulatory crimes; thus, freeing up more resources for prosecuting true crimes such as murders, sexual assaults and armed robberies. It is in the realm of the criminal law that we can find the requirements of a subjective awareness

---

[26] Epstein, 6.

test for liability. A conviction for a criminal offence requires proof of a mental element where punishment can be justified. The criminal law has a greater retributive objective that makes it different from public welfare offences as it imposes a greater stigma and moral responsibility on an accused person.

This chapter ends with a clear distinction between true crimes and public welfare offences on the basis that true crimes traditionally evolved from a notion of moral culpability where proof of a mental element was required for conviction, whereas public welfare offences were crimes that were regulatory in nature and did not possess this same level of responsibility. In the next chapter, I will look at the Canadian experience and how this distinction has been addressed in *Regina v. City of Sault Ste. Marie*. Moreover, I will also examine the problems that have arisen from this distinction in more recent Supreme Court rulings and how this has affected the prosecution of corporate offenders.

CHAPTER II

THE CANADIAN EXPERIENCE

In the previous chapter, a distinction between true crimes and public welfare offences was introduced by examining the differences between *mens rea* crimes and crimes that are regulatory in nature. By appealing to the work of theorists such as J.W.C. Turner and Glanville Williams, true crimes appear to be restricted to offences that possessed a mental element, whereas public welfare offences were treated through a form of absolute liability. The mental element requirement for true crimes was based on the belief that no one should be held morally responsible for a crime if they did not possess an intention or prior awareness of the consequences of an offence. As a result, treating public welfare offences as absolute liability offences ensured that this distinction remained intact.

In this chapter, I will examine how the distinction made in Chapter 1 has influenced the Canadian experience. First, I will offer an analysis of *Regina v. City of Sault Ste. Marie* and show how this case became a precedent in Canadian legal history by introducing a new category of offence called a strict liability offence. Second, I will look at *Regina v. Hundal* and how the distinction between true crimes and public welfare offences has eroded through the inclusion of an objective standard for *mens rea*. And lastly, I will examine the consequences of this new inconsistency for the prosecution of public welfare offences and especially in how it affects corporations.

Drawing the Line – Regina v. City of Sault Ste. Marie

In *R. v. Sault Ste. Marie*, a precedent was set by the Supreme Court of Canada when it introduced a new category of offence called a strict liability offence. This new offence tried to offer a half-way point between absolute liability offences and full *mens rea*. Prior to the *Sault Ste. Marie* decision, public welfare offences in Canada varied from one extreme to the other. This case achieved a compromise between absolute liability and *mens rea* by appealing to the concept of negligence in tort law. The strict liability offence was based on absolute liability, yet provided for a defence of due care. In developing this new offence, the Court defined the standard for criminal responsibility from a very mentalist definition that was in line with the views of Turner and Williams, as outlined in Chapter 1. The Court suggested that *mens rea* offences should be restricted to those offences that include a mental element of intention or recklessness and can only be determined using a subjective awareness test, whereas public welfare offences adopt an objective test with a reverse onus on the accused. Therefore, the *Sault Ste. Marie* case provided a defence of due care for absolute liability offences rather than criminalize offences of inadvertent negligence. This allowed for the distinction between true crimes and public welfare offences to remain intact by providing a middle ground between *mens rea* and absolute liability; thus, ensuring that public welfare offences remained regulatory in nature.

The *Sault Ste. Marie* case resulted from a pollution infraction that was levied against the City of Sault Ste. Marie for the discharge of hazardous materials into Cannon

Creek and Root River, which had the potential to impair the quality of water.[1] This offence was significant because of its far-reaching environmental consequences. Environmental pollution was considered a very serious problem at the time and unlike minor infractions that were dealt with through absolute liability, this was an offence that resembled a true crime but was not the result of intentional or reckless behaviour. As was suggested in Chapter 1, in order to prove true crimes, a mental element of intention or recklessness must be present. Mr. Justice Dickson reiterated this point in *Sault Ste. Marie*. He states: "In the case of true crimes, there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea*."[2] As a result, this case presented problems for how public welfare offences should be defined. Even though some regulatory offences can be relatively minor in nature, there are others such as environmental crimes that can have quite serious consequences for society. The issue that the Supreme Court was trying to address in *Sault Ste. Marie* was how to interpret the public welfare offence without jeopardizing either the need to protect society's interests, or the need for just punishment. This essentially entails a choice between a retributive objective where the public welfare offence is treated as a *mens rea* offence with a mental element requirement, and a policy-oriented objective where it is treated as an absolute liability offence where the act alone justifies punishment.

There are many problems with treating the public welfare offence from either a *mens rea* or an absolute liability perspective. For example, if the Court adopts the position that it is a *mens rea* offence, then the burden of proof must shift to the prosecutor

---

[1] *Regina v. City of Sault Ste. Marie* [1978] 85 D.L.R. (3d) 166.
[2] *Sault Ste. Marie*, 165.

where there must be evidence of a mental element. To suggest that the City of Sault Ste. Marie should be convicted of a true crime, the Court would need to prove beyond a reasonable doubt that the City either intended or recklessly caused the offence to occur. According to Justice Dickson, this distinction between true crimes and public welfare offences is crucial.[3] A true crime is not committed if one is only being negligent, or does something inadvertently. By requiring proof of a mental element, the Supreme Court is suggesting that the City of Sault Ste. Marie would need to have been aware of the consequences prior to the commission of the offence. The Court in making its decision was influenced by the work of Turner and Williams in believing that negligence was a form of inadvertence. As a result, in order to treat this offence as a full *mens rea* crime, the mental element would need to be proved beyond a reasonable doubt using a subjective awareness test. Yet, the problem with such a test is that it would make it difficult to convict entities such as corporations since extensive resources would need to be expended to find specific individuals responsible who possessed this mental element. Moreover, there are also problems with trying to determine who or what is expected to possess this mental state. If on the other hand, the infraction was treated as an absolute liability offence, then no such element would be required. Convictions could occur regardless of whether there was proof of an intentional actor. The rationale for adopting absolute liability instead of full *mens rea* is that convictions for public welfare offences would be easier to prove as all that is needed is proof of the guilty act. However, there are also problems with adopting absolute liability. If the punishment is severe and there is a

---

[3] *Sault Ste. Marie*, 170.

negative stigma on the offender, then the principle of fairness requires that the accused be found guilty beyond a reasonable doubt. The lack of legal protections for those accused could result in punishment for offences where all reasonable care had already been taken. Consequently, the Supreme Court's task in the *Sault Ste. Marie* case was to attempt to find a middle ground between these two types of offences without jeopardising either the need for the protection of society or the need for just punishment.

In trying to develop a middle ground, the Supreme Court assessed the strengths and weaknesses of treating all public welfare offences as a form of absolute liability. One of the arguments in favour of this position stems from the belief that absolute liability provides the best mechanism for the enforcement of regulatory infractions. Justice Dickson states:

> In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.[4]

The logic behind this argument is that public welfare offences are relatively minor offences where the benefits to society exceed the costs incurred by the offender. The fact that there is a lower stigma suggests that there is not a problem with the balance between the protection of society's interests and just punishment. However, there are also arguments against this position that appear to be stronger. Justice Dickson states:

---

[4] *Sault Ste. Marie*, 171.

> Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability.[5]

The principle that no one should be found guilty of an offence for which he or she is not responsible is crucial to the elimination of the absolute liability offence. This opposing view suggests that no matter what the costs to society, the protection of the accused's interests are more important. It is a principle derived from a retributive view of the criminal law where punishment must fit the crime and prevents innocent people from becoming martyrs for some greater good to society. Furthermore, the argument that absolute liability does not result in a greater standard of care suggests that absolute liability even fails as a policy-oriented perspective since it does not achieve a greater deterrent objective.

Another argument against using absolute liability for public welfare offences concerns the effect of stigma on those that have been convicted. Although there is a belief that convictions for public welfare offences do not impose a negative stigma, Justice Dickson claims that this is a mistaken view. He states:

> The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may downplay it, the opprobrium of conviction.[6]

---

[5] *Sault Ste. Marie*, 171.
[6] *Sault Ste. Marie*, 171.

As a result, there are extensive costs associated with being convicted of a public welfare offence. Moreover, there is also a difference in how public welfare offences were traditionally perceived and how they are treated today. He states:

> It is also worthy of note that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interests of health and safety was minor, $20 or $25; today, it may amount to thousands of dollars and entail the possibility of imprisonment for a second conviction.[7]

Therefore, using absolute liability for public welfare offences appears to be unfair as it results in a conviction that resembles a true crime but does not provide the same legal protections offered to those charged with *mens rea* offences. Thus, it can be concluded that neither adopting full *mens rea* nor absolute liability provides a sufficient solution to this problem. What is required is a compromise between these two positions where such concerns are taken into consideration.

Prior to the *Sault Ste. Marie* decision, the apparent problem with the public welfare offence was that society had not thoroughly explored many alternative ways to classify these offences as crimes. One thing that the courts failed to consider was under which objective these offences should be based. According to Justice Dickson, the major difference between true crimes and public welfare offences is that they involve a shift from the protection of individual interests towards the protection of the public and society as a whole.[8] However, this has not accurately been reflected in the law through previous court decisions. He states: "The unfortunate tendency in many past cases has been to see

---

[7] *Sault Ste. Marie*, 172.
[8] *Sault Ste. Marie*, 172

the choice between two stark alternatives: (i) full *mens rea*; or (ii) absolute liability."[9] In the *Sault Ste. Marie* decision, the Supreme Court tried to provide a solution to this predicament by exploring the middle ground. The Court attempted to develop a position that treated regulatory offences not as true crimes that harm particular individuals, but rather as public welfare offences that harm society as a whole. This was accomplished by introducing a new category of offence called a strict liability offence. The Court created a middle ground between *mens rea* and absolute liability by balancing both retributive and policy-oriented objectives in its decision. Strict liability offences share elements of both *mens rea* and absolute liability; yet, do not jeopardise either the need for the protection of society or the need for just punishment. For example, the prosecutor need only prove the *actus reus* of the offence, but the accused has open to them the defence of due care. Consequently, strict liability offences are built upon the concept of negligence found in many areas of tort law. In tort law, defendants can absolve themselves of liability for damage by establishing that they displayed due care. According to Justice Dickson, the onus shift that exists in the strict liability offence is the result of the difficulty involved in proving due care by the prosecutor. He states: "This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever."[10] Therefore, introducing the strict liability offence provides for a middle position by balancing both a retributive and policy-oriented objective without jeopardising the

[9] *Sault Ste. Marie*, 172.
[10] *Sault Ste. Marie*, 181.

distinction between true crimes and public welfare offences. It accomplishes this by allowing a defence of due care while maintaining a reverse onus on the accused.

The development of the strict liability offence was not merely a way of introducing a new defence for offences of absolute liability, but also a way to differentiate it from true crimes. The inspiration for this offence resulted from the theory of negligence in tort law. Since inadvertent negligence was not a ground for criminal liability at the time of the *Sault Ste. Marie* decision, it appears that using the principle of negligence for the strict liability offence was well-suited for this task. According to Justice Dickson, "There is an increasing and impressive stream of authority which holds that where an offence does not require full *mens rea*, it is nevertheless a good defence for the defendant to prove that he was not negligent."[11] In making this claim, the Supreme Court appealed to the work of Glanville Williams and adopted a very mentalist definition of *mens rea* that excludes negligence as a ground for criminal liability: "There is a half-way house between *mens rea* and strict responsibility which has not yet been properly utilized, and that is responsibility for negligence."[12] As a result, it appears that the public welfare offence is in essence, a crime of inadvertent negligence where the onus of proving due care is shifted to the accused. To understand this argument, we can look at how tort law functions. Under tort law, many lawsuits involve an individual seeking financial compensation for damages from another party, usually a large corporation. Since there is a difficulty in proving an intentional or reckless element in corporations, it is easier to find them automatically liable for damages and allow them a defence of due

[11] *Sault Ste. Marie*, 172.
[12] *Sault Ste. Marie*, 172.

care; thereby shifting the burden to the defendant. Similarly, public welfare offences work in an analogous manner since they have a related objective. They do not necessarily try to determine who is morally responsible, but rather shift the burden to the defence as they are more likely to know the circumstances surrounding the offence. Justice Dickson states:

> The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, . . . and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation.[13]

Consequently, it makes sense to shift the burden to the accused in strict liability offences. The public welfare offence has a different objective from the criminal law and has more in common with aspects of tort law. By shifting the onus to prove due care to the accused, public welfare offences that used to be treated as absolute liability in nature now have a defence available to them. Thus, they are not considered true crimes that require proof of a mental element and can be distinguished from true crimes and offences of absolute liability on this basis.

The *Sault Ste. Marie* decision was a pivotal case in that it defined the public welfare offence in Canada. The final outcome in this case resulted in a retrial for the City of Sault Ste. Marie and the establishment of a new category of offence. The reasons cited by the Supreme Court in its decision were that the City did not have an opportunity to

---

[13] *Sault Ste. Marie*, 181.

utilise a defence of due care and that the trial judge in the lower courts failed to address the availability of such a defence.[14] By appealing to theories of negligence in their decision, the Supreme Court introduced the strict liability offence as it provided a middle ground between the extremes of *mens rea* and absolute liability; while maintaining the delicate balance between the protection of society's interests and the need for just punishment.

Before we move on, it is important to note that this balance between retributive and policy-oriented objectives can only be achieved if *mens rea* is interpreted as a very mentalist definition that is in line with Turner's and Williams' argument, as outlined in Chapter 1. This is a view where negligence is seen as a form of inadvertence and is excluded from the realm of the criminal law. If an objective test is used to determine *mens rea* offences, then it will call into question the reverse onus in strict liability offences as they will begin to resemble true crimes. What the Supreme Court's decision in *Sault Ste. Marie* accomplished was to restrict *mens rea* offences to subjective awareness tests and public welfare offences to offences of strict liability where a defendant must establish due care under a reverse onus. Hence, the Court put Turner's and Williams's theories into practice in Canada. Moreover, they reiterated the fact that there was a distinction between true crimes and public welfare offences. Therefore, the Court introduced a defence for offences that were previously considered absolute liability in nature, rather than include negligence offences in the criminal law.

---

[14] *Sault Ste. Marie*, 186.

Beyond Sault Ste. Marie – Blurring the Distinction

The *Sault Ste. Marie* decision created a clear distinction between true crimes and public welfare offences by using a very mentalist definition of *mens rea* that reserved true crimes to those offences that can be determined using a subjective awareness test. As a result, objective tests were not considered a basis for criminal liability and could safely be used to develop the new strict liability offence. However, confusion has now ensued due to several subsequent cases. There is now a move towards using an objective test to prove offences requiring *mens rea* which has begun to blur the distinction between true crimes and public welfare offences. In cases such as *R. v. Hundal*, the Supreme Court of Canada has jeopardised this distinction by suggesting that the mental element in crime does not always have to rely on a subjective test. For example, they have rested criminal liability on an objective test where there is an inquiry into a standard of care. Thus, the Court may be moving in the direction of criminalizing offences involving negligence beyond the scope of intention and recklessness. The problem this presents for the strict liability offence is that if an objective test is used to determine *mens rea*, then this would make public welfare offences resemble true crimes and might lead to the removal of the reverse onus.

In the *Hundal* case, the Supreme Court examined the issue of including an objective test in *mens rea* by looking at how the offence of dangerous driving causing death should be determined. This case involved an analysis of an accused person's conduct after the dump truck he was driving failed to stop for a red light and rammed into another vehicle killing its occupant. Although the accused did not *intend* to kill the other

driver, the issue at hand was whether the accused adhered to a standard of care associated with driving a motor vehicle. It was found that the accused's conduct was not the result of a subjective mental state such as *intention* or *recklessness* as he did not foresee the possible consequences.[15] Since this offence is considered a *mens rea* offence, the element of proof is normally a subjective awareness test. However, in *Hundal*, it appears that under a traditional understanding of the criminal law, this element is lacking as the driver of the dump truck did not possess a blameworthy mental state. Therefore, the Court's role was to decide how the offence of dangerous driving causing death should be treated under the criminal law. The crucial issue was whether *mens rea* contains a subjective element that must be proved by the prosecutor for conviction.[16]

In making its decision, the Court had to decide whether it was feasible to adopt an objective standard for the offence of dangerous driving causing death and explain why a subjective awareness test cannot be used. The Court suggested that there were several difficulties involved with using a subjective awareness test for this offence. One of the claims they made was that a subjective test cannot be used as driving a motor vehicle is a very automatic process that involves little conscious thought.[17] In its decision, the Court determined that dangerous driving offences can only be proven using an objective test for *mens rea* as it best describes the operation of a motor vehicle. Justice Cory states: "The nature of driving offences suggests that an objective test, or more specifically a modified

---

[15] *Regina v. Hundal* [1993] 79 C.C.C. (3d) 100.
[16] *Hundal*, 99.
[17] *Hundal*, 106.

objective test, is particularly appropriate to apply to dangerous driving."[18] The rationale for this decision included several reasons. The most important was that driving a motor vehicle involves a standard of care not associated with a conscious mental state. The Court's argument was that since there is no need to prove an intentional or reckless aspect, there should not be a mental element requirement for this offence. The fact that drivers undertake a licensing procedure presupposes that people ". . . are familiar with the standards of care which must be maintained by all drivers."[19] Therefore, an intentional element or an awareness of the consequences is not required for conviction. By appealing to an objective test, a departure from the standard of care can be established by looking at a person's conduct when driving a motor vehicle. Thus, blame for this offence is determined using a negligence standard. In its decision, the Supreme Court stated that it ". . . is clear that the basis of liability for dangerous driving is negligence. The question to be asked is not what the accused subjectively intended but rather whether, viewed objectively, the accused exercised the appropriate standard of care."[20] Consequently, the Court found it acceptable to adopt an objective test for *mens rea* in offences, such as dangerous driving causing death, where criminal blame is determined through a form of negligence or a lack of due care.

By introducing an objective test for the offence of dangerous driving causing death, the Supreme Court has moved towards the direction of criminalizing inadvertent negligence offences in the Canadian legal system. The consequence of adopting this

---

[18] *Hundal*, 104.
[19] *Hundal*, 105.
[20] *Hundal*, 106.

perspective is the erosion of the distinction between true crimes and public welfare offences based on the subjective/objective split. There is a strong similarity between the objective test used in the *Hundal* case and the one used in *Sault Ste. Marie*. For example, in the *Hundal* case, the offence of dangerous driving requires that an accused be found guilty beyond a reasonable doubt if he or she was negligent by not adhering to the standard of care associated with driving a motor vehicle. According to Justice Cory,

> . . . the test for negligence is an objective one requiring a marked departure from the standard of care of a reasonable person. There is no need to establish the intention of the particular accused. The question to be answered under the objective test concerns what the accused 'should' have known. The potential harshness of the objective standard may be lessened by the consideration of certain personal factors as well as the consideration of a defence of mistake of fact.[21]

The accused may be able to raise a defence that he or she had taken all reasonable care, but the onus is on the prosecutor to prove otherwise. This implies that there is a strong correlation between the dangerous driving offence and the definition of a strict liability offence in the *Sault Ste. Marie* decision. According to John Swaigen,

> . . . it appears that the courts have generally treated common law negligence and a lack of reasonable care as equivalent, as witnessed by the number of references to the standards set in civil cases in decisions on reasonable care.[22]

The similarities between these two offences is due to the fact that they both use an objective test to prove negligence. However, there is one difference. In dangerous driving offences, the onus to prove negligence is on the prosecutor, whereas in the strict liability

---

[21] *Hundal*, 104.

[22] John Swaigen, *Regulatory Offences in Canada*, (Toronto: Carswell, 1992) 100.

offence there is a reverse onus on the defence to prove due care. This onus shift is based on the fact that the strict liability offence is a public welfare offence, whereas dangerous driving is considered a *mens rea* crime. Therefore, by allowing an objective test to be introduced as a standard for criminal liability, the distinction between public welfare offences and true crimes could be put in jeopardy as the reverse onus may violate the right to be presumed innocent until proven guilty in the *Canadian Charter of Rights and Freedoms*. The distinction made in *Sault Ste Marie* between true crimes and public welfare offences on the basis of a subjective/objective split appears to be eroding. There is a now a greater stigma on an accused convicted of a public welfare offence making the strict liability offence resemble a crime of negligence. Although the Court claims that there must be a marked departure from the standard to imply criminal liability, the fact that it uses an objective test to accomplish this still makes it very similar to the test found in *Sault Ste. Marie*. The *Sault Ste. Marie* case treated the objective test as a way of determining inadvertent negligence, but now that the Court has adopted an objective test for criminal blame in *Hundal*, this distinction has been blurred. According to Justice McLachlin in *Hundal*, "Although the fault required by the subjective test is arguably greater than that required by the objective test, either is capable of establishing the *mens rea* of a criminal offence."[23] Therefore, the Supreme Court's decision in *Hundal* contradicts their earlier decision in *Sault Ste. Marie* as an objective test can now be used

[23] *Hundal*, 109.

to prove criminal blame where it was previously excluded and reserved for determining simple negligence in tort law.[24]

In addition to jeopardising the distinction between true crimes and public welfare offences, the *Hundal* case has further complicated this issue by the way the decision was justified. True crimes, such as murder, usually adopt a retributive objective while public welfare offences are normally policy-oriented in nature. However, in *Hundal*, the Supreme Court apparently appealed to policy-oriented objectives to justify a true crime requiring a *mens rea* element. For example, Justice Cory states:

> . . . the statistics which demonstrate that all too many tragic deaths and disabling injuries flow from the operation of motor vehicles indicate the *need to control* the conduct of drivers . . . These figures highlight the tragic social cost . . . There is therefore a compelling need for effective legislation which strives to *regulate* the manner of driving vehicles and thereby lessen the carnage on our highways.[25]

As a result, it appears that the inclusion of an objective test for *mens rea* may have been motivated by the same desire that fuels the regulating aspect of public welfare offences. The need to control through regulation is a policy-oriented objective that is more associated with public welfare offences than it is with true crimes. Thus, it appears that the distinction between true crimes and public welfare offences has been further complicated by this shift in the Court's objectives.

---

[24] The rationale for including objective tests for *mens rea* will be further examined in Chapter 4 where both Turner's and Williams' definition of negligence as a form of inadvertence is challenged by recent legal scholars who adopt a normative view of the criminal law.

[25] *Hundal*, 106. emphasis added.

According to Peter Hogg, the distinction between true crimes and public welfare offences has broken down due to the impact of the *Charter* in Canada. As the distinction made in *Sault Ste. Marie* preceded the *Charter*, it did not take into consideration how legal rights would affect the enforcement of public welfare offences.[26] Hence, many legal challenges have arisen, including *Hundal,* which have eroded this distinction even further. Although there is now little differentiating true crimes from public welfare offences, Hogg suggests that the bigger problem is that the Court has been unclear over when it is acceptable to adopt a subjective or objective test for *mens rea.* He states:

> The Court thus seems to be abandoning its silly distinction between true crimes and regulatory offences. However, the Court leaves us with no guidance as to when subjective mens rea is constitutionally required and when a merely objective standard of fault will suffice.[27]

By including negligence as a standard for criminal liability, the Supreme Court has opened the door for the criminalization of offences that were previously considered regulatory infractions. Therefore, the strict liability offence now appears to be more criminal in nature and a more serious type of an offence in society.

---

[26] Sections 7 through 14 of the *Canadian Charter of Rights and Freedoms* provide individuals accused of crimes with protection against things such as the right to life, liberty and security of person as well as the right to be presumed innocent until proven guilty. See *Constitution Act, 1982, Canadian Charter of Rights and Freedoms.*

[27] Peter W. Hogg, *Constitutional Law of Canada*, Student ed. (Toronto: Carswell, 1999) 923.

A Changing Objective for the Public Welfare Offence?

In this section, I will look at how the public welfare offence has evolved since *Sault Ste. Marie*. Specifically, I will examine the problems associated with the reverse onus in strict liability offences and how the inclusion of negligence in *mens rea* has changed the perception of the public welfare offence. Moreover, I will examine how this is especially problematic where corporations are concerned.

Under the *Sault Ste. Marie* case, public welfare offences are treated as strict liability offences where there is no subjective *mens rea* requirement. Although it is open to the accused to escape liability by showing that due care was taken, this is accomplished using an objective test that does not have a criminal component such as intention or recklessness. However, since the introduction of the *Charter*, decisions such as *Hundal* have arisen and have introduced objective standards for criminal responsibility that have jeopardised the distinction between true crimes and public welfare offences. The lack of a clear distinction has led to increased moral blame even when regulatory sanctions are imposed. This results in the treatment of public welfare offences as more punitive in nature making them resemble true crimes thus jeopardising the delicate balance made in *Sault Ste. Marie* between the need to protect society's interests and the need for just punishment. Consequently, there is now little differentiating these two types of offences. The only thing that remains is the reverse onus. However, if the objectives of public welfare offences are seen as punitive in nature because increased moral blame is involved, the reverse onus will appear to violate the *Charter* as those accused of public

welfare offences will demand the same legal protections that are afforded to those accused of true crimes. This is especially problematic for corporations as they are not human beings but are usually punished to a greater extent for public welfare offences.

As was previously outlined in Chapter 1, public welfare offences are regulatory in nature and conviction for them usually resulted in relatively minor penalties and a lower stigma than what is usually associated with true crimes. This was the rationale used in *Sault Ste. Marie* and explains why the Supreme Court of Canada embraced an objective test with a reverse onus to justify convictions. The fact that these offences did not incur a harsh stigma on the accused prevented them from being considered serious moral crimes that demand the same legal protections for those accused of true crimes. According to Swaigen,

> The recognition by the Supreme Court of Canada of a class of public welfare offences that were distinct from criminal offences, with relaxed procedural and substantive safeguards for the accused, was based in no small part on the fact that these offences carried little stigma and low penalties, and that imprisonment was an unlikely result of prosecution.[28]

As a result, there could be a clear distinction made between public welfare offences and true crimes on the basis that one involved relatively minor penalties, whereas the other was punishable by imprisonment. However, since the *Sault Ste. Marie* case, there has been considerable concern about the effects of public welfare offences on society. Swaigen states:

---

[28] John Swaigen, "Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations," *Journal of Environmental Law and Practice* 2 (1992): 153.

> . . . public opinion polls show a dramatic increase in public concern about the environment in the late 1980s and early 1990s, and show that many people consider pollution offences like the one before the Court in *Sault Ste. Marie* to be as serious an offence as many 'real crimes'.[29]

People's exposure to large-scale environmental disasters and changing views on the health of the ecosystem have likely prompted these concerns and altered the stigma associated with these offences. The result has been the infliction of increased moral blame and responsibility upon offenders even when regulatory sanctions are imposed. This gives public welfare offences an increased punishment and stigma that is consistent with a retributive objective, but bases liability on a principle of deterrence. For example, although punishments have become more severe to reflect the way society feels about these crimes, the standard for liability has remained the same. Swaigen states:

> . . . this traditional paradigm no longer applies to the extent it once did. Some public welfare offences now carry a substantial social stigma as well as severe penalties, including imprisonment. Under these circumstances, it is fair to question whether liability should be based on anything less than full mens rea.[30]

Consequently, there have been calls for the elimination of the reverse onus for strict liability offences as it appears to be a criminal negligence offence in disguise. The shift in society's perception of the public welfare offence combined with the adoption of objective standards for *mens rea* have resulted in a changing objective for the public welfare offence in Canada. Therefore, the distinction made in *Sault Ste. Marie* between strict liability offences and *mens rea* is now questionable as it may be redundant.

---

[29] Swaigen, *Regulatory Offences in Canada*, 214.
[30] Swaigen, "Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations," 153.

By far the most influential piece of legislation in Canada has been the introduction of the *Charter of Rights and Freedoms* in 1982. The effects of the *Charter* have influenced many aspects of society. Most notably, this impact is felt whenever the Supreme Court strikes down legislation passed by government or overturns decisions in precedent cases. Thus, it comes as no surprise that the Court has begun to question its outcome in *Sault Ste. Marie* by evaluating the validity of the reverse onus in strict liability offences.[31] This has come about due to the harsher penalties and increased stigma that are now associated with conviction. Moreover, the adoption of an objective standard for *mens rea* in the *Hundal* case has created concerns over the distinction between true crimes and public welfare offences. As a result, there are now serious concerns over whether the strict liability offence violates fundamental legal rights in the *Charter*. According to Swaigen,

> The *Charter* guarantees certain legal rights to those accused of crimes. Those who argue that there is no real difference between crimes and regulatory offences have found a new tool to support their view that all the procedural and substantive safeguards of the criminal law must apply to public welfare offences as well.[32]

Consequently, there have been numerous instances where strict liability offences have been viewed as criminal offences of negligence instead of as regulatory offences. This problem has arisen as the objective of the public welfare offence has appeared to have undergone a transformation where conviction now has more to do with retribution, rather

---

[31] In *Regina v. Wholesale Travel Group*, the Supreme Court only narrowly upheld the reverse onus for public welfare offences by a 5 to 4 margin increasing the likelihood that this issue will eventually resurface in subsequent cases. See *R. v. Wholesale Travel Group Inc.* [1991] 67 C.C.C. (3d)

[32] Swaigen, *Regulatory Offences in Canada*, 213.

than with the objective of deterrence. Swaigen suggests that the role of the *Charter* has created a shift in this direction:

> . . . the courts have analyzed the validity of reverse onuses from a totally different standpoint. Instead of viewing the *Sault Ste. Marie* reverse onus as a positive innovation reducing the harshness of absolute liability, they have viewed any reverse onus as a *prima facie* violation of the presumption of innocence, which has been interpreted as requiring the prosecutor to prove all elements of an offence.[33]

Hence, the public welfare offence has been viewed as a crime of negligence due to the harsher penalties and stigma associated with conviction. Even though in 1978, the introduction of the strict liability offence in *Sault Ste. Marie* was supposed to provide a defence for those accused of absolute liability offences, this reverse onus is now questionable. The inclusion of an objective standard for *mens rea* has resulted in a breakdown of the distinction between true crimes and public welfare offences. Thus, there have been calls to remove the reverse onus as public welfare offences now appear to resemble true crimes. However, there are problems with taking this approach. According to Dianne Saxe, the reverse onus in regulatory law has been very successful in the past. She claims that it has been a critical element of many environmental prosecutions; but now with the *Charter*, the effective prosecution of these offences has been put into jeopardy.[34] Therefore, it appears that the shift in society's perception of the public welfare offence combined with the changing nature of *mens rea* has resulted in a different objective for the public welfare offence that is endangering its enforcement.

---

[33] Swaigen, *Regulatory Offences in Canada*, 186.

[34] Dianne Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability*, (Aurora: Canada Law Book, 1990) 147.

Although the introduction of the *Charter* has caused concern over the reverse onus in strict liability offences for individuals, there are serious problems where corporations are involved. The implications of treating public welfare offences as true crimes and reversing the onus creates enforcement difficulties when corporations are accused of regulatory infractions. Since corporations are not human beings but involve collections of individuals, problems arise if these offences are treated as true crimes as corporations have not traditionally been considered moral agents.[35] If we begin adopting such perspectives, questions that begin to arise include whether corporations should have the same *Charter* protections as human beings and whether they can qualify as moral agents. The fact that true crimes involve rational agents that are capable of making moral choices is the reason why most corporate offences have traditionally been excluded from the criminal law. For example, the Law Reform Commission of Canada suggested prior to *Sault Ste. Marie* that it is best that corporate crime be restricted to the realm of regulatory offences with a reverse onus on the accused. They state:

> . . . there is a significant argument that can be made for excluding corporate responsibility for 'real' crimes and for limiting its use to regulatory offences. If, as we have suggested, the primary purpose of 'real' criminal law is to reinforce behavioural patterns supporting fundamental values, it is important to consider whether dealing with corporations in that law contributes to that purpose.[36]

---

[35] Contemporary perspectives that attempt to treat corporations as moral agents such as those put forth by theorists such as Peter French are contentious and will be addressed further in the next chapter. Nonetheless, the notion of a corporate personality was not taken into consideration by the Courts in the *Sault Ste. Marie* decision.

[36] Law Reform Commission of Canada, Working Paper 16, *Criminal Responsibility for Group Action*, (Ottawa: 1976) 32.

Their assumption was that true crimes involve a serious moral element and deal with people's values and the choices they make. As true crimes, these offences are built upon the concept of retributive punishment where there is a blameworthy subjective mental state. This view treated true crimes from a very mentalist definition that could only be determined using a subjective awareness test for *mens rea*. Since it was considered difficult at the time to prove the mental element in a corporation, it made no sense to find corporations responsible in the same manner as true crimes. The Law Reform Commission of Canada states:

> The emphasis on fault in 'real' crime suggests that its purpose can best be achieved by using the process against natural persons, and that convicting a corporation of a crime like fraud or theft may do little to promote values. After all, values really concern moral choices made by people.[37]

By focusing on moral choices, the Law Reform Commission of Canada recommended that true crime be restricted to human beings. However, they did not completely shut out the possibility that corporations could be held responsible to a certain extent. Only under a system of regulatory law where there is a reverse onus on the accused and proof of responsibility does not rely on a subjective awareness test can this be possible. They state:

> When we move away from offences that involve subjective elements like knowledge and intention, corporate fault becomes easier to formulate. In determining whether the policies and practices of a corporation involve negligence there is no need to inquire into the mental processes of corporate policy-makers; it is necessary simply to examine whether corporate conduct measures up

[37] Law Reform Commission of Canada, 32.

> to objective standards of care based on notions of reasonableness. To some extent, then, the idea of corporate responsibility is more comfortably associated with regulatory offences, which do not require the clear personal wrongdoing that is necessary if criminal responsibility is to be imposed for 'real' crimes.[38]

As a result, it seems that corporate crimes were better framed as offences of strict or absolute liability since no mental element was required for conviction. The Law Reform Commission of Canada apparently interpreted these crimes as offences of negligence and did not treat them as criminal in nature because they were partially based on a policy-oriented objective and did not impose any personal responsibility. Therefore, this provided the justification for the reverse onus in what was to follow in *Sault Ste. Marie*. Thus, the definition of negligence did not involve a mental element and was defined as a form of inadvertence.

Although the Law Reform Commission of Canada tried to exclude corporate offenders from the realm of the criminal law, their attempt was prior to the introduction of the *Charter*; our present situation has all but eliminated their efforts. Objective tests can now be used for *mens rea* making the strict liability offence resemble a true crime both in principle and in punishment. If public welfare offences become more criminalized, we must extend *Charter* protections to those accused of these offences. Accordingly, this will require shifting the onus to the prosecutor and necessitate proving that there was a lapse in due care. Even though the *Charter* was designed to protect human beings, a concern arises over whether this right should extend to corporations as well. If public welfare offences continue to resemble true crimes and move towards a

---

[38] Law Reform Commission of Canada, 23.

retributive objective, then it appears that corporations should also have this right. However, this is only true if corporations can be considered moral agents or persons. What we need to determine is precisely what a corporation is and how it should be punished. Can corporations be considered moral persons like human beings where the onus must shift if the punishment is severe? To answer these questions we must look at how the relationship between corporations and *mens rea* offences has developed in society and how various theories have addressed the concept of the corporate entity.

This chapter provided an analysis of the Canadian experience through an examination of Supreme Court decisions that have created an inconsistency between true crimes and public welfare offences. By showing that negligence can now be a standard of criminal liability in Canada, I have suggested that problems have developed for the enforcement of public welfare offences especially with respect to corporate offenders. The shift towards the criminalization of public welfare offences has created a concern over how corporations as abstract entities can be responsible agents or moral persons. If they are treated as full-fledged moral persons, then legal protections must be made available to them making the enforcement of public welfare offences difficult to achieve. The next chapter addresses this matter further by examining the evolution of the corporation and the problems associated with treating it as a moral person from a philosophical perspective.

CHAPTER III

CORPORATE CRIMINAL RESPONSIBILITY

In the previous chapter, we discovered that the inclusion of objective tests, or negligence as a standard of criminal liability has eroded the distinction between true crimes and public welfare offences in Canada. This has subsequently called into question the constitutionality of the reverse onus in strict liability offences and has created problems for their enforcement, especially where corporations are concerned. As abstract entities, corporations differ from persons or responsible agents and do not enjoy the same legal rights and protections. In this chapter, what will be examined is whether a corporation can have a personality that is independent from the individuals that comprise it and if so, whether it can be held directly responsible for a crime. If it can, then corporations must be treated as full-fledged moral agents and given the same legal protections as persons. Consequently, this would make the enforcement of public welfare offences in Canada difficult to achieve as the reverse onus in strict liability offences will violate a corporation's legal rights. Therefore, this chapter has several objectives. First, the history of corporate responsibility is examined through an analysis of various theories. Second, a corporate personality view based on a realist theory is introduced. And third, an extreme view of the corporate personality view is evaluated where assigning responsibility for public welfare offences is seen to violate fundamental *Charter* rights.

History of Corporate Responsibility

There has been considerable debate regarding how to hold corporations responsible for crimes in recent times. The fact that responsibility requires an intentional agent is at the heart of this debate and has led to the development of two opposing views. One is a legal fiction theory where the corporation is treated as an abstract entity that is capable of acting only through the intentions of human beings that comprise it, whereas the other has its roots in organic theories of the state and is known as a realist theory. Under a realist theory, a corporation is alleged to possess a distinct mind with its own intentions. It is based on a view that a corporation can be defined as an organic person or individual through the establishment of a collective consciousness or will. Our legal system has historically avoided a realist theory as the criminal law has primarily been based on notions of individual responsibility. Instead, we have adopted various views that have been influenced by the legal fiction theory. Originally, corporations were excluded from criminal liability as responsibility for crimes required proving a guilty mind element through a subjective awareness test. It was assumed that a corporation could not be guilty of a true crime as it did not possess a mind like human beings. This early view was attributed to the fact that corporations were products of the state.[1] In addition, since they were not treated as moral persons, they could not be criminally responsible. Barbara A. Belbot states:

---

[1] Barbara A. Belbot, "Corporate Criminal Liability," in *Understanding Corporate Criminality*, ed. Michael B. Blankenship, (New York: Garland Publishing Inc., 1995) 215.

> Although corporations gradually took on many of the characteristics of natural persons, such as the authority to own property and enter into contracts, a coherent theory of corporate criminal liability developed much more slowly. Initially, the corporation was considered an abstract entity without a mind and without the ability to form the intent necessary to establish criminal liability.[2]

Treating corporations from the perspective of the legal fiction theory prevented corporations from being capable of committing true crimes and restricted their liability to public welfare offences. Any criminal allegations were directed at individuals within the corporation as it was these individuals who were thought to possess the mental element required for conviction.

This extreme view of the legal fiction theory did not hold for very long as it failed to achieve any measure of criminal responsibility associated with the corporation. It was not until the corporate entity could be charged with a criminal offence by appealing to principles of vicarious liability that things began to change. The principle of vicarious liability was borrowed from tort law and ensured that corporations were responsible for crimes by making them liable for the acts of their employees. Although this view allowed corporations to be charged with criminal offences, it still adhered to some elements of the legal fiction theory by treating the corporation as a collection of intentional actors. Belbot states:

> Relying on the fact that corporations could be held vicariously liable in civil court for the intentional torts of their agents, and flatly rejecting the position that corporations lacked the ability to form specific intent, by the early twentieth century courts had removed the remaining barriers to establishing corporate criminal

[2] Belbot, 219.

> liability, making corporations subject to prosecution for the same offenses applicable to natural persons.[3]

Introducing vicarious liability into the criminal law created a considerable shift in how the corporation was perceived. It now became possible to charge corporations with true crimes, such as murder or manslaughter, and hold them somewhat responsible. However, the problem with this view was that it still retained its roots to the legal fiction theory by not making a corporation *directly* liable for these crimes. The corporation was still treated as a collection of individuals and not as a sole entity. Since the principle of vicarious liability makes one person liable for the actions of another, the intentional act is one that is performed by an individual within the corporation and not the corporation as a whole. The difficulty that arises with such a view is that there is an uncertainty over what acts should be ascribed to the corporation. In response to this concern, the general remedy in the criminal law has been to assume that ". . . a corporation is liable for all acts performed by an employee within the scope of their employment and intended to benefit the corporation."[4] Thus, criminal responsibility could be assigned to a corporation by examining whether the acts resulted in a net gain for the corporate entity.

Although a vicarious liability view assigns criminal responsibility for offences that appear to benefit the corporation, it may not be a viable way to assign intentional acts to corporations. For example, acts that have been committed by individuals could appear to be part of the corporation's intentions but may not be reflected by its goals and objectives. In addition, this view fails to hold corporations responsible where there is a

---

[3] Belbot, 223.
[4] Belbot, 223.

crime by the corporation; yet, a single employee cannot be found liable. Therefore, under vicarious liability, it appears that problems still arise over how to assign responsibility to a corporation since there is no corporate entity defined that can be *directly* liable.

In response to these concerns, another way of looking at corporate offenders developed that attempted to hold the corporation directly responsible for crimes. This was accomplished by identifying the corporate entity with a specific subgroup within the corporation. Since the doctrine of vicarious liability proved to be ineffective and could not treat the corporation as an entity on its own, a refined view called a directing mind or identification doctrine emerged to overcome this shortcoming. The directing mind or identification doctrine tried to provide a way for identifying specific acts of certain individuals within the corporation as corporate acts. According to Glanville L. Williams,

> . . . the identification doctrine goes a step beyond [vicarious liability]. A company is identified with its controlling officers . . . those who control or manage the affairs of the company are regarded in a sense as the company itself, because they are identified with the company. Their acts and states of mind are imputed to it whenever they are acting in their capacity as its controlling officers. In this way, the company can become liable for an offence requiring *mens rea*, even in circumstances where a human employer would not be liable.[5]

The directing mind or identification doctrine is based on the belief that the intentional acts of those that control the corporation determine if and when a corporation can be liable for a *mens rea* offence. It treats a corporation as an entity by looking at only some of the individuals within a corporation that have a controlling stake. For example, if a decision is made by the board of directors that results in a criminal act, then the

---

[5] Glanville L. Williams, *Textbook of Criminal Law*, (London: Stevens & Sons, 1978) 946.

corporation as a whole would appear to be vicariously responsible. Although the identification doctrine attempts to hold corporations directly liable for criminal offences, it still does not treat the corporation as an entity in itself. In fact, it still appears to be based on some notion of vicarious liability. Responsibility for criminal offences under the identification doctrine is accomplished by evaluating the subjective mental states of individuals that comprise a corporation's board of directors or 'directing mind'. Therefore, under this view a corporation is not treated as possessing a mind of its own that is greater than the sum of its employees, but rather is still comprised of the intentions of a select group of individuals.

The evolution of both vicarious liability and the directing mind or identification doctrine in the criminal law are still committed to a view of the corporation that began under a legal fiction theory where criminal liability rested upon the notion of individual responsibility. Although one may make the observation that the identification doctrine has elements of a realist theory, this would be a misconception. Like vicarious liability, the identification doctrine still treats a corporation as an aggregate of individuals. Therefore, corporate responsibility has never been a vehicle for a retributive system of punishment. According to Williams, "The liability of corporations, like strict and vicarious liability, exemplifies utilitarian theory in criminal law. It is based not on the theory of justice but upon the need for deterrence."[6] This is why corporate responsibility has primarily been determined using a system of regulatory law. Public welfare offences treat corporations not as organic entities, but as variations of the legal fiction theory

[6] Williams, *Textbook of Criminal Law*, 950.

where responsibility can be subsequently reduced to individuals within that corporation. According to Belbot, "Deterrence has long been recognized as the primary rationale for imposing criminal sanctions for the types of criminal activities engaged in by businesses, many of which do not involve morally culpable behavior."[7] The reluctance to adopt a realist theory has subsequently led to a system of regulatory law and has justified holding corporations absolutely liable for certain offences. The emphasis on a deterrent objective has resulted in the creation of public welfare offences where there is no intentional element required to prove. The fact that corporations have been historically treated as not being intentional actors has influenced the development of these offences and has ensured a distinction between true crimes and public welfare offences. Consequently, there has not been a move towards holding a corporation directly responsible for a crime by adopting a realist theory as the corporation has always been seen as an aggregate of individuals. For example, in the *Sault Ste. Marie* case in Canada, the strict liability offence appealed to the identification doctrine in adopting a defence of due care:

> One comment on the defence of reasonable care in this context should be added . . . Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind

[7] Belbot, 227.

> and will of the corporation, whose acts are therefore in law the acts of the corporation itself.[8]

Therefore, our system of criminal law has tended to treat corporations as aggregate groups that are comprised of individuals, rather than entities in themselves. Although the law has provided ways in which corporations could be found guilty of criminal offences, this has been mostly achieved through a system of regulatory law where the objective has been one of deterrence and not retribution.

The Corporate Personality View

As was examined in Chapter 2, the breakdown between public welfare offences and true crimes has resulted in the call to re-examine the future of the public welfare offence in Canada. If a corporation can qualify as a moral agent, then a new way of allocating responsibility for *mens rea* offences could emerge that would provide an alternative to the identification doctrine. However, this would have serious ramifications for public welfare offences in Canada as treating the corporation as a moral person might require that it possess legal rights; thus, questioning the reverse onus that exists in strict liability offences.

The corporate personality view is based on an organic view or what is commonly known as a realist theory of corporate responsibility. It is an alternative view that involves a radical shift since it attempts to equate a corporation with a person or moral agent. It is based on the belief that a corporation can have intentions and differs significantly from a legal fiction theory. Under the realist theory, a corporation is seen as

---

[8] *Regina v. City of Sault Ste. Marie* [1978] 85 D.L.R. (3d) 185.

a conglomerate group of individuals. According to Peter French, groups can be broken down into one of two types, either aggregates or conglomerates. He states: "I shall call a group an 'aggregate collectivity' if it is merely a collection of people. A change in an aggregate's membership will always entail a change in the identity of the collection."[9] On the other hand,

> A conglomerate collectivity is an organization of individuals such that its identity is not exhausted by the conjunction of the identities of the persons in the organization. The existence of a conglomerate is compatible with a varying membership. A change in the specific persons associated in a conglomerate does not entail a corresponding change in the identity of the conglomerate.[10]

In order to adopt any form of a corporate personality where the corporation is seen as an intentional actor, we must be able to distinguish between these two types of groups. Unlike an aggregate group, a conglomerate appears to have its own existence that is distinct from the individuals that comprise it. The directing mind or identification doctrine fails to acknowledge that a corporation has this element and is therefore unable to treat a corporation as a moral person. Although it differentiates itself from a legal fiction theory, it still treats a corporation as an aggregate group that punishes certain individuals for being a part of the directing mind leaving the corporation as a whole untouched. French states:

> The Fiction Theory's major rival in American jurisprudence . . . is what I shall call the Legal Aggregate Theory of the Corporation. It holds that the names of

---

[9] Peter A. French, *Collective and Corporate Responsibility*, (New York: Columbia UP, 1984) 5.
[10] French, 13.

> corporate organizations are only umbrellas that cover (but do not shield) a specific aggregate of biological persons . . . Aggregate Theorists tend to ignore employees and identify corporations with directors, executives, and stockholders.[11]

French believes that what is required is a perspective that builds upon the belief that corporations are conglomerates where they are able to have a separate existence that is distinct from their constituent parts. Thus, a corporation should be seen from the perspective of the social dimension in which it operates. Appealing to a realist view allows us to see how a corporate entity is treated as a conglomerate group where this distinct entity can be identified. French states:

> . . . Reality Theory recognizes corporations to be prelegal existing sociological persons. Underlying the theory is the view that law cannot create its subjects; it can only determine which societal facts are in conformity with its requirements.[12]

Accordingly, corporations can only be identified as existing independently from the individuals that comprise them if we adopt a realist theory. Once it is determined that a corporation is a distinct entity, it is then possible to determine if it can possess its own intentions. Unfortunately, under the legal fiction, vicarious liability, or identification doctrine, these intentions are never owned by the corporation since they can be reduced to the individuals within that corporation. Consequently, the notion of a corporate personality where a corporation can be treated as a moral person must be rooted in a realist theory; otherwise, corporate responsibility cannot be achieved in a direct manner.

---

[11] French, 35.
[12] French, 36.

In adopting a corporate personality view, we must look at a realist theory as a starting point and develop it further in order to understand French's theory of corporate criminal responsibility. What needs to be shown is that a corporation can be equated with a moral person. According to French, moral personhood involves having the rational capacity to become an intentional agent that is morally accountable. He states:

> . . . ascriptions of moral responsibility involve the notions of accountability and being liable for an answer. These notions presuppose the existence of responsibility relationships, and one of their primary foci is on the subject's intentions. To be the subject of an ascription of moral responsibility, . . . to be a moral person, the subject must be at minimum an intentional actor.[13]

As a result, the challenge for French is to find a way that these intentions can be attributed to a corporation as a whole and not to the individuals that comprise it. A corporation must be seen as able to possess this intentional element; otherwise, it cannot be held directly responsible. This is a fundamental requirement for French's theory and is what he calls the Primary Principle of Accountability (PPA). Under this principle, a person can only be held accountable for his or her intentional acts.[14] Therefore, a theory of corporate criminal responsibility must be able to show how a corporation possesses the rational capacity to form an intention and go beyond merely treating it as a conglomerate of individuals. French describes this feature as the metaphysical element of the corporate personality where a corporation can be seen to function as a moral agent. He claims that the realist theory does not proceed further into moral agency and only treats corporations as sociological entities:

---

[13] French, 38.
[14] French, 132.

> The de facto personhood of the Reality Theory is that of a sociological entity only, of which no claim is or need be made regarding agency, or rationality, or any of the traits of a metaphysical person . . . What is needed is a Reality Theory that identifies a de facto metaphysical person not just a sociological entity.[15]

Thus, in order for a corporation to be considered a moral person, its acts must be seen as acts that not only belong to the corporation, but are also *intended* by the corporation and cannot be reduced to the individuals that comprise it. Previous theories of responsibility fail in their ability to achieve this objective. They focus on the intentions of *specific* individuals and *their* reasons for adopting certain actions. French claims that,

> What needs to be shown if there is to be corporate responsibility is that there is sense in saying that corporations and not just the people who work in them have reasons for doing what they do.[16]

This focus on *reasons* is essential for understanding the corporate personality view and the intentional element. Human beings act in certain manners according to the reasons they possess. Therefore, we can be held accountable only if we have the capacity to act on these reasons. For example, in Chapter 1, it was stated that in order to be responsible for an offence requiring *mens rea*, a subjective awareness test is used to look at a person's mental state and the *reasons* why a person chose to act in a particular manner. This same logic can be applied to corporations. If a particular crime has occurred, what needs to be examined is the reasons that directed the corporation's behaviour.

Proving that corporations have reasons for their behaviour is crucial to the establishment of a corporate personality view. According to French, this can be

---

[15] French, 37.
[16] French, 40.

accomplished without having to examine individual mental states of particular employees. One way to determine this element is to look at how corporations make decisions. He claims that corporate intentionality can be established by looking at a Corporation's Internal Decision Structure (CID Structure).[17] The CID Structure ensures that corporations have their own reasons for acting in a particular way by appealing to their organizational structures and policies. He states:

> Every corporation has an internal decision structure. CID Structures have two elements of interest to us here: (1) an organizational or responsibility flowchart that delineates stations and levels within corporate power structure and (2) corporate-decision recognition rule(s) (usually embedded in something called corporation policy).[18]

As a result, since corporate policy is based on a system of rules, decisions can occur that are founded on corporate goals and not on individual interests. Focusing on the CID Structure prevents a decision from belonging to any one employee as different levels within the structure offset any personal gain. For example, a decision made by an employee in one department may be modified by another in a different department resulting in an outcome that benefits the corporation and not necessarily those specific individuals within the corporation. Thus, by the time a decision is made to act, other levels have considerably diluted earlier input. Responsibility can then be allocated to the corporate entity as a whole since the CID Structure ensures that decisions are made in accordance with a corporation's objectives. Moreover, any decisions that are made are solely intended for its well-being. French states:

---

[17] French, 39.
[18] French, 41.

> . . . when the corporate act is consistent with an instantiation or an implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.[19]

Consequently, there is a difference between the intentions of individuals within a corporation and the intentions of the corporation as a whole. Since a corporation consists of a conglomerate of people working together, any individuals acting on behalf of their own self-interests would likely not be adhering to the CID Structure and could easily be singled out for personal responsibility. However, if it is found that a decision was made in accordance with the CID Structure, then the corporation can be held directly responsible. French states: ". . . [Corporations] have interests in doing those things that are likely to result in realization of their established corporate goals, regardless of the transient self-interest of directors or managers."[20] Accordingly, the way a corporation makes decisions through its CID Structure ensures that it is capable of becoming an intentional agent with responsibilities. The rules and policies that govern its decisions ensure that corporate behaviour is the result of corporate intentions, which differ from the intentions of specific employees. If decisions are made in accordance with the CID Structure, then those intentions belong to the corporation and no one else, regardless of whether they are made by front line workers, managers or chief executive officers.

A corporation's CID Structure is a good starting point for separating corporate intentions from individual intentions and assigning criminal responsibility to corporations

---

[19] French, 44.
[20] French, 45.

for *mens rea* offences; however, there are certain situations in which intention or prior awareness is questionable. Although awareness can be proven where a corporation desires a particular outcome, many crimes occur out of negligence and do not appear to contain an intentional element. In these cases, French's Primary Principle of Accountability (PPA) does not allow for moral responsibility to be ascribed. For example, a problem can arise when a corporation does not intend a particular outcome, but it occurs nonetheless through another intentional act. Under PPA, a corporation cannot be held morally responsible for its unintentional actions and should not be guilty of a criminal offence. However, French tries to overcome this difficulty by introducing the Extended Principle of Accountability (EPA). He suggests that EPA ascribes moral responsibility to a person,

> . . . for those actions that he was willing to perform under different descriptions of his intentional actions. Also he may be held accountable for those nonoriginal or second effects that involve the actions of other persons that he obliquely or collaterally intended or was willing to have occur as the result or under different descriptions of his actions.[21]

What French is referring to here is the allocation of responsibility to a corporation where they intentionally design a faulty product but do not intend for it to cause harm. An example of this would be the manufacture of airplanes that end up crashing. Under EPA, responsibility is assigned using an objective test for negligence. French claims that this intentional element could be derived from an act that is based on corporate policy but is the result of a lack of due care. For example, we can see how this occurs when looking at

---

[21] French, 134.

how a defective product results in an accident. Since corporations do not usually intend to manufacture defective products, another way of allocating responsibility is by showing that a corporation was negligent in designing the product. French believes that by looking at its CID Structure, we can identify if a corporation may have had a prior awareness of the consequences and failed to adhere to a standard of care. He suggests that before an accident occurs, a corporation would have to take steps in the design of the product,

> . . . that it knew or should have known to be inadequate with regard to safety [or] . . . it would have to have established policies and performed actions that it knew or should have known would prompt rather automatic responses by persons associated with the corporation that would increase the likelihood of the manufacture of a defective product.[22]

Consequently, by appealing to the CID Structure, a corporation can be held morally accountable for consequences that although did not appear to be intended by the corporation, were directly the result of their negligence. This is accomplished by using an objective test that is directed at the corporate personality and not at individuals within the corporation. As a result, by not adhering to a standard of care, a corporation can be punished when it fails to incorporate these standards in its policies and procedures. It is important to note that this differs from the personal responsibility of individuals within the corporation for negligent or reckless acts. Although an employee may have also breached a standard of care and could be personally liable, French is showing through EPA how a corporation as a whole is responsible for allowing these breaches to occur. His argument relies on the belief that through their CID Structures, corporations are

---

[22] French, 134.

capable of acting as moral agents and can make rational decisions regarding due care in preventing defective and damaging products from being built. Thus, a corporation can have a prior awareness of consequences since it can know of the potential possibility of harm resulting from its actions or inactions.

The Extreme Perspective

In this section, I will look at how French's corporate personality view has the potential to be interpreted as an extreme view where public welfare offences that are strict or absolute liability in nature can be criminalized and treated as offences of *mens rea*. If this perspective is adopted, a concern is created over whether corporations should be given the same legal rights and protections as human beings. Treating corporations as moral agents under this view will jeopardise the enforcement of public welfare offences as any reverse onus to prove due care by the defence will need to shift to the prosecutor.

French's theory allows for public welfare offences to be treated as *mens rea* crimes through the belief that corporations are able to possess the mental elements required to innovate or alter their behaviour in response to previous infractions. He develops this view through the introduction of the Principle of Responsive Adjustment (PRA). This principle goes well beyond the conditions for PPA and EPA by assigning criminal responsibility to corporations for offences which were previously considered regulatory in nature. Although it may appear sufficient to rely on PPA or EPA for offences requiring a mental element, French develops PRA in response to cases where it appears there is neither a prior awareness of the consequences, nor an intentional action.

He claims that under PRA, a corporation is responsible where it has failed to learn from its previous mistakes. This allows French to develop a mental element of intention for offences that are usually treated as regulatory in nature and are shielded from criminal prosecution. The condition of PRA ". . . captures the notion that the causally responsible party for an untoward event should adopt specific courses of future action calculated to prevent repetitions."[23] As a result, this is a reactive measure with an emphasis on a corporation's previous history in adhering to regulatory laws. He states: "PRA insists that moral persons learn from their mistakes. 'It was inadvertent or a mistake' will exculpate only if corrective measures are taken to insure nonrepetition."[24] Therefore, the condition of PRA is one that is intimately connected to responsibility. Offences that are classified as absolute liability in nature can be looked upon in this manner as they are analogous to mistakes or inadvertent behaviour. If it can be proven that committing an absolute liability offence involves an element of increased moral responsibility, then it opens the door to the criminalization of these offences. To prove his argument, French uses the *Prince* case as an example. He states:

> Suppose, as in the landmark strict liability case of *Regina v. Prince,* that a man, named Prince, contrary to law, took a girl under sixteen years of age away from her parents, and suppose at the time he believed that she was older than sixteen and she gave him every reason to believe so and any reasonable person would have guessed that she was over sixteen . . . On the basis of a straight rule of accountability Prince ought not to be held morally responsible for his illegal assignation.[25]

---

[23] French, 156.
[24] French, 158.
[25] French, 155.

However, under PRA the concept of responsibility changes all of this if a second similar offence occurs. Taking into consideration an accused's previous history and whether he made any changes in his subsequent behaviour, he can be found guilty the second time around for what *appears* to be the same offence. Although the first time, he could be exculpated by treating his actions as a mistake, the second time around the offence could be perceived in a different light. French claims that this is possible if " . . . Prince intentionally, and quite deliberately, seeks out other young girls and makes no special attempt to discern their true ages."[26] This would imply that Prince is not adhering to a standard of care that is required of persons in such situations. His act is not one of inadvertent behaviour since he has not learned from his previous 'mistake'. The second time around it is no longer a mistake but an intentional act as the accused has a prior awareness of the possible consequences. According to French,

> . . . PRA does not let persons desert their pasts. It forces persons to think of their moral lives as both retrospective and contemporaneous, as cumulative. Moral persons cannot completely escape responsibility for their accidents, inadvertent acts, unintended executive failures, failures to fully appreciate situations, bad habits, etc., simply by proffering standard excuses.[27]

If corporations are treated as moral persons with this capacity to innovate or alter their patterns of behaviour to prevent future mistakes, then they are capable of possessing the mental element required for conviction even for offences of absolute liability. Therefore, the addition of PRA to French's theory creates a further justification for treating

---

[26] French, 157.
[27] French, 160.

corporations as moral persons and for assigning criminal responsibility to them under a variety of conditions.

The expansion of French's theory to include PRA as a way of assigning moral responsibility to corporations is an attempt at criminalizing the public welfare offence in areas where it was previously considered a crime of inadvertence and treated as absolute liability in nature. If we begin to assign moral responsibility on the basis of PRA, then it will become easier to find corporate entities rather than certain individuals responsible within the corporation. By appealing to PRA, an objective test is introduced where the corporation can be found guilty if a standard of care is not adhered to throughout a corporation's CID Structure. Criminalizing the public welfare offence allows the same stigma to be inflicted upon a corporation that a person convicted of a similar crime would receive. As such, corporations would not be able to escape criminal responsibility and would be treated in the same manner as persons. PRA assists in criminalizing the public welfare offence by making offences of absolute liability appear to contain a greater moral element whereby repetitive behaviour leads to harmful consequences. French believes that treating a corporation as a moral person and assigning it responsibility for public welfare offences is very important to society as regulatory infractions comprise the largest number of corporate offences. He states:

> Negligent omissions and commissions that do not require a mens rea probably will constitute the bulk of corporate criminal liability cases. Such cases by their very nature are also, by and large, going to be more socially important than mens rea cases. We ought not to forget that isolated corporate homicides and corporate thefts are not as destructive to the fabric of social order as the pollution of the air, land, and water, and in such cases, in fact, justice is

> generally not served by the prosecution of some natural person who happens to work for the corporation. The corporate body itself needs to be brought before the bar.[28]

As a result, the notion of a corporate personality is not only important in the pursuit of *mens rea* offences but also for public welfare offences. Thus, it appears that French has found a new way to criminalize the public welfare offence by treating the corporation as a moral person and breaking down the barrier between true crimes and public welfare offences.

Through PRA, a corporation can be seen as a moral agent that makes rational choices and can be held accountable for its decisions. Since it is a moral entity, a corporation can be punished for its behaviour; hence, causing a shift in the perception of public welfare offences towards a retributive objective. In order to convict a corporation of a criminal offence, it must be treated as a moral person with the capacity to form intentions. The criminal law has historically been accustomed to treating offenders under a system of retribution. If a corporation is not capable of being a moral agent, then it cannot be held morally liable. Thus, it is crucial to French's theory that the corporate personality be equated with a form of moral personhood. For example, to underscore this point he suggests that corporations can be punished in the same manner as human beings. Since they can be morally blamed for their crimes, they can also be the recipients of sentences such as incarceration, or capital punishment. He states:

> There is, of course, a way that capital punishment can be exacted on a corporation: revocation of charter, and there is also a corporate version of removal from the

---

[28] French, 186.

> community of the members of society: revocation of license to do business in the state or city.[29]

Consequently, French's theory of the corporate personality and how it affects the public welfare offence relies on the assumption that a corporation can be treated like a moral agent. The introduction of PRA has the effect of breaking down the barrier between true crimes and public welfare offences by reaffirming a moral element of personhood. If a corporation is not considered a moral person with its own personality, then criminalizing the public welfare offence will be an injustice since there will not be a rational and blameworthy mental state known as 'the corporation' that can be punished; thus, violating principles of justice and fairness in the *Charter*.

Treating corporations as moral persons under French's view has spurred an even more extreme position that goes well beyond PRA and penalizes corporations prior to the commission of a regulatory offence. Theorists such as Pamela H. Bucy have argued that corporations can be held criminally responsible for offences under a variety of circumstances by looking at their corporate culture or ethos. She states:

> This standard assumes that each corporate entity has a distinct and identifiable personality or 'ethos' . . . Central to this approach is the assumption that organizations possess an identity that is independent of specific individuals who control or work for the organization.[30]

Like French, Bucy believes that corporations can be identified as distinct entities but goes further to assign criminal responsibility to corporations in situations where they fail to prevent a particular act from occurring. Her view criminalizes offences that are

---

[29] French, 188.

[30] Pamela H. Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability," *Minnesota Law Review* 75 4 (1991): 1099.

considered regulatory in nature by trying to allocate acts of individuals within the corporation to the corporate culture or ethos. Her emphasis is on preventative measures that are taken by the corporation as a whole to ensure that offences do not occur in the first place. She states:

> The corporate ethos test does not require that the government prove which individual is at fault. It does, however, require the government to prove that the criminal conduct was committed by a corporate agent and that a corporate ethos existed that encouraged the criminal conduct.[31]

Bucy goes further than French by looking at what mechanisms corporations have put in place to educate and train employees to prevent the commission of these offences. In essence, her theory would penalize corporations that fail to implement preventative measures. Unlike PRA or a system that is reactive, Bucy's view is proactive and treats the corporation as a very responsive moral agent by taking the view that a corporate culture or ethos is a form of awareness that completely influences its decisions. She claims that the problem with PRA or,

> . . . reactive corporate fault [is that it] automatically gives a corporation a second chance. By definition, reactive corporate fault depends on a corporation inappropriately responding to the first violation. Waiting for the second shoe to fall is too precarious given the potential harm that the second 'shoe' could cause.[32]

As a result, Bucy adopts an extreme extension of French's theory where a corporate culture or ethos is what drives an employee's actions making the corporation accountable when it is proven that this culture or ethos encouraged the offence. This view has a

---

[31] Bucy, 1128.
[32] Bucy, 1161.

tendency to treat public welfare offences as true crimes by going after the corporation on the first infraction and regarding it as distinct from its constituent parts. It assumes that a corporation is alive and possesses a consciousness like a human being. The fact that it has a corporate culture or ethos allows it to have a rational capacity and awareness to respond to potential violations. Moreover, since the corporation is treated as a moral person and is being charged with a *mens rea* offence, it requires that similar procedures be followed. Bucy states: ". . . under the corporate ethos test, the government must prove, beyond a reasonable doubt, that a pervasive mentality existed among [the] employees . . . and that this mentality, or ethos, encouraged [the] criminal act."[33] This extreme view shifts the realm of public welfare offences into the domain of the criminal law as it attempts to prove a mental element. By criticizing the exemption PRA offers to corporations on the first offence, Bucy has shifted French's theory to the next level where a corporate culture or ethos can be completely reduced to the concept of individual consciousness. Thus, the emphasis on proving guilt beyond a reasonable doubt becomes even more crucial as such a view is deeply rooted upon a traditionally individualistic understanding of *mens rea.* She states:

> Because the corporate ethos standard imposes a meaningful burden of proof on the government rather than simply allowing corporations to raise a defense of due diligence, it ensures that criminal intent is proven before a conviction can result, and thus more effectively restricts criminal liability to its proper arena of intentional conduct.[34]

---

[33] Bucy, 1164.
[34] Bucy, 1164.

However, as was previously examined in Chapter 2, reversing the onus to prove due care in the hopes of convicting more corporations creates a major enforcement problem with respect to regulatory offences. Trying to prove that a particular action resulted in a specific consequence beyond a reasonable doubt is frequently impossible.[35] According to Brent Fisse and John Braithwaite, "The difficulty with the Bucy Proposal, . . . is that, as a general requirement, it may be impractical to expect the state to marshal all the evidence needed to prove that a corporate defendant had a criminal ethos."[36] Therefore, treating corporations as moral persons and regarding public welfare offences as criminal offences is problematic since it appears that a corporation would need the same legal rights and protections as human beings. Bucy's interpretation of French's view results in a very extreme position that extends corporate criminal responsibility in such a way that it treats the corporation as having full awareness and control of its destiny. Consequently, it also requires that it must enjoy the same legal protections as human beings charged with similar offences.

According to Thomas Donaldson, there is a serious problem with treating corporations as moral persons and assigning them the same rights as human beings. He criticizes French's corporate personality view on the basis that a corporation cannot be considered a moral agent since it would be implausible for it to possess the same rights as living persons. Donaldson's argument is based on the belief that if one is considered a moral agent, then one is entitled to all the rights associated with personhood. He states:

---

[35] Belbot, 229.

[36] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability*, (New York: Cambridge UP, 1993) 28.

> The final problem with the Moral Person view lies in one of its implications. If, morally speaking, corporations are analogous to persons, then they should have the rights which ordinary persons have. But although it may be plausible to say corporations should have many of the rights ascribed to humans, such as the right to own property, enter into agreements, and make profits, it seems implausible they should have the right to vote or to draw Social Security benefits. In fact, many rights seem logically impossible to attribute to corporations: Can corporations have a right to worship as they please? To pursue happiness?[37]

It appears that for French's theory to work, it must be able to justify giving if not all, but at least some of the more fundamental legal rights to corporations. This is especially important when looking at public welfare offences in Canada. If a corporation is treated as a moral person when it is charged with an offence, then it must also be given the same legal protections. One of the main tenets of retribution requires that morally innocent persons not be found guilty of crimes involving strict or absolute liability. As previously suggested in Chapter 2, this would seriously impede the enforcement of public welfare offences by placing a difficult burden on prosecutors. In response to Donaldson, French has suggested that it is not necessary that corporations be given the same rights as human beings. He states:

> Twelve-year old human children do not have either the right to vote or the right to draw Social Security benefits. And why not? Because legislated rights are not always, in fact rarely are they, non-restrictive. The fact that a perfectly competent sixteen-year-old [person] does not have the right to vote says nothing at all about [his or her] moral status.[38]

---

[37] Thomas Donaldson, *Corporations and Morality*, (New Jersey: Prentice-Hall, 1982) 22.
[38] French, 170.

French's argument suggests that corporations can still qualify as moral agents and be charged with criminal offences; yet, do not need to be given the same rights as human beings. However, we need to assess how adequate his response really is in light of these concerns. Donaldson and French are debating rights such as the right to vote and the right to draw Social Security benefits. However, the problem with these rights is that they are not directly related to moral agency. If we look at the right to be presumed innocent until proven guilty, we have a greater problem. This legal right is directly related to the principle of retribution and has moral implications. A person should not be held responsible for an offence that involves intention, recklessness or negligence. If we treat public welfare offences as true crimes, then a corporation should be given the same legal rights as persons if it is considered a moral agent. French has not appeared to address this issue when responding to Donaldson's criticisms. Consequently, we cannot consider a corporation to be a moral person and treat public welfare offences as true crimes without jeopardizing its legal rights. For example, if we look at the strict liability offence in Canada, the reverse onus on the accused to prove due care would be considered unconstitutional and would require an onus shift to ensure that the accused is treated innocent until proven guilty; thus, rendering the corporate personality view problematic as it would make convictions more difficult.

This chapter has examined the notion of corporate criminal responsibility and whether a corporation can have an independent personality from those individuals that comprise it. Under French's corporate personality view, it was shown that a corporation can be treated as a conglomerate of individuals that can be held directly responsible for a

crime. His view was based on the argument that through its CID Structure, a corporation can become an intentional moral agent and can be held responsible for a variety of offences. One area that was examined is whether a corporation can be held criminally responsible for regulatory offences involving negligence. Through an analysis of the Principle of Responsive Adjustment (PRA) and Bucy's corporate culture or ethos view, it was found that this indeed was possible. The consequences of such a perspective results in an extreme view of the corporation as a moral person where legal rights must be attributed to the corporation to protect it from being unfairly convicted. The implications of this extreme view are very problematic for the public welfare offence in Canada as it would require that the reverse onus shift from the accused to the prosecutor. Consequently, we are now left with the bigger problem of how to develop a notion of corporate criminal responsibility that will be consistent with principles of justice and not allow this *Charter* violation to occur. Moreover, this theory must ensure that corporations are held responsible for their negligent acts and can be successfully convicted.

The next chapter examines these issues further by exploring the feasibility of a modified corporate personality view where a corporation is not defined as entirely distinct from the individuals that comprise it. The development of such a theory of corporate criminal responsibility ensures that a corporation can be treated like a person but not regarded as an individual with extensive legal rights. In order for such a view to be viable, the criminal law must be re-examined from a normative perspective. This involves an evaluation of how a modified position can be adopted through a system that

is more accepting of collectives and shies away from the traditional understanding of *mens rea* as a form of individual responsibility.

CHAPTER IV

TOWARDS A NORMATIVE VIEW OF THE CRIMINAL LAW

In the previous chapter, it was determined that Peter French's corporate personality view provides an adequate way of holding corporations criminally responsible for their negligent acts; however, his view also requires that corporations receive the same legal protections and rights that are available to persons. This is problematic as it would jeopardise the enforcement of public welfare offences in Canada by removing the reverse onus in strict liability offences. This chapter looks at solutions to this problem by examining a modified view where corporations can be treated like individuals, but not considered full-fledged moral persons with extensive legal rights. In addition, this chapter also evaluates how such a position is compatible with a normative view of the criminal law. Lastly, this chapter addresses the distinction between true crimes and public welfare offences by showing how corporate criminal responsibility can be expanded in Canada without violating principles of justice and fairness in the *Charter of Rights and Freedoms*.

Refining the Corporate Personality View — The Middle Position

In trying to develop a theory of corporate criminal responsibility, what needs to be adopted is a perspective that builds on French's notion of the corporate personality but does not allocate it extensive rights associated with personhood. One method of

achieving this is to adopt a middle position where corporations can be responsible, but do not have to be considered intentional agents. Larry May offers an alternative to French's view by examining this middle ground. He claims that there have been two traditional ways of assigning corporate responsibility:

> Either we can treat corporations the same way that we treat individual persons in criminal law, by looking to the corporation's state of mind, conduct, and the consequences of its acts, or we can treat corporations as strictly liable for whatever results form their 'actions' regardless of the state of mind or faultiness of conduct, as is sometimes done in tort law.[1]

At one extreme is Peter French's model of the corporation as a moral person, while at the other extreme is the concept of strict or absolute liability. May finds both these views problematic but suggests that it is possible to develop a theory of corporate responsibility that can satisfy the middle position between these two perspectives. Since a corporation is not literally the same as a human being but is comprised of a collection of individuals, it does not have to subscribe exclusively to one view or the other. He states:

> Clearly there is no reason to think that these are the only models of responsibility open to us, nor even that these are the models best suited to the peculiar characteristics of the corporation . . . What we need are models of responsibility aimed at collectivities, but where the blame or fault condition is preserved as a condition of responsibility. One such model can be constructed by combining the concepts of vicarious agency with negligent fault.[2]

---

[1] Larry May, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights*, (Notre Dame: University of Notre Dame Press, 1987) 84.
[2] May, *The Morality of Groups*, 84.

By appealing to the notion of vicarious agency and negligent fault, May has found a way of assigning responsibility to groups for negligent behaviour without the need to establish that an intentional agent exists. The focus on negligent acts as opposed to an inquiry into a corporation's state of mind ensures that we do not have to treat a corporation or collective as a moral person. Moreover, focusing on negligence does not require that we ask metaphysical questions about a corporation's existence since it includes collectives in the concept of responsibility. He states:

> . . . negligence concerns what people have failed to do, rather than what they have explicitly decided to do, negligence is applicable to groups as well as individuals. To decide that a group of persons failed to act as it should have, it is not first necessary to answer thorny metaphysical questions about how it was that the group decided on its course.[3]

May attempts to provide a middle position between a corporate personality view and strict or absolute liability by introducing a concept of responsibility that is based on the notion that corporations are collectives and not individuals in themselves. Therefore, his view ensures that corporations are not considered intentional agents and do not need to be allocated the same legal rights and protections as persons.

Although May's theory of corporate responsibility does not treat a corporation as a distinct entity, his theory attempts to hold corporations responsible for negligent acts without distributing responsibility to the individuals that comprise it. The basis for his theory is the group dynamic that exists when individuals enter in, or function as a collective. He states:

---

[3] Larry May, *Sharing Responsibility*, (Chicago: University of Chicago Press, 1992) 84.

> My position is that 'relations' among individuals do have a reality, a distinct ontological status which is different from the individuals who are so related. However, the reality of these relations is not sufficient to ensure that the groups, which are composed of individuals *in relationships*, have reality independently of the individuals who compose these groups.[4]

May's focus on the relationships between individuals in a collective group is essential to his theory. When a group organizes itself as a collective, the individuals within it function in a different manner than they could on their own. People's actions are taken from a group perspective where each influences the other. However, it is not accurate to say that this group is an independent entity. Although they may appear to be functioning as part of a conglomerate group, they are not. The values individual members possess always reside within each particular individual. He states:

> In my view, groups are merely collections of individuals related in various ways. But the relationships make a huge difference. People do act differently in groups than they would on their own, because of the influence of these relationships. But ultimately, values reside within individuals, not within some kind of superentity called a 'group'.[5]

By reducing values to the individuals that comprise the group, May is able to restrict the notion of group responsibility to the social dynamic that occurs when these individuals function as a collective. His belief is that groups are simply individuals *in relationships* as opposed to distinct independent entities since he treats a group as an aggregate of individuals rather than a conglomerate. Therefore, May does not disregard the effect of

---

[4] May, *The Morality of Groups*, 23.
[5] May, *Sharing Responsibility*, 75.

group dynamics and is able to develop a middle position between treating a corporation as a moral person and treating it as a form of strict or absolute liability.

In developing his theory, May offers a critique of French's corporate personality view by criticizing the belief that corporations can be intentional agents. May claims that if we treat a corporation as a moral person, we must then allocate it the same rights and protections that human beings possess.[6] He believes that this is problematic since corporations are aggregate groups and consist of individuals with separate interests. May states:

> An entity, such as a corporation, may be an agent in various ways, and it is a mistake to view corporations as agents in the standard senses of that term. Corporations should not be treated as full moral persons, nor should they be treated as machines having the ability merely to act (or react) automatically. Corporations can only act vicariously, that is, through other persons, and for this reason should be given unique status as agents.[7]

Unlike human beings, corporations are unable to act or possess interests that are distinct from their constituent parts. A corporation's actions and interests rely on the employees and individuals that comprise the corporation. It is only *vicariously* that a corporation can act and possess these interests. As a result, May believes that a corporation cannot be viewed as a conglomerate group and identified as a distinct entity. He states:

> When a human individual acts, it is she or he as a whole person, who acts; when a human individual has interests, it is she as a whole person, and not any of her constituent parts, which has interests. By contrast, when a corporation acts or has interests, the realization of these actions or these interests is *only* possible by means of the

[6] May, *The Morality of Groups*, 121.
[7] May, *The Morality of Groups*, 41.

> actions or interests of its constituent members, that is, through individual human action and interest.[8]

Consequently, May distinguishes his theory from French's on the basis that the individual intentions of employees cannot be transformed into corporate intentions. May's belief that the corporation can only act vicariously prevents it from being considered a moral person that has to be ascribed rights and protections associated with personhood. Although he claims that a corporation can be held responsible, this responsibility is directed at the individuals that comprise it since the ". . . individuals remain the object agents, and the corporation only manifests event causation."[9] There is no independent entity called a corporation that creates this causation. Rather, various mechanisms within the corporation, such as the decision-making structure, function as a means by which acts of individuals within the corporation are channelled or shaped. However, it is individual persons and not the corporate entity that make these decisions. Although the group dynamic that exists allows individuals to function in what appears to be a conglomerate manner, it is not accurate to assume that we should direct responsibility to an independent entity called 'the corporation'. According to May, control always resides with the individuals that make up the organization and not the corporation itself. He states: "If a sufficient number of the individual members agree [to make a change in corporate behaviour], then there is nothing the corporation can do to override their decision."[10] Corporate responsibility is the result of individuals within the corporation as they are

---

[8] May, *The Morality of Groups*, 123.
[9] May, *The Morality of Groups*, 43.
[10] May, *The Morality of Groups*, 43.

ultimately the ones that can act and possess interests. The corporation need not be treated as a moral person and allocated rights and protections that are reserved for human beings.

Although May attempts to find a middle position between corporate moral personhood and strict or absolute liability by appealing to a theory of vicarious negligence, there are several problems with May's view. According to Raymond S. Pfeiffer, *all* corporate responsibility can ultimately be reduced to the individuals that comprise the corporation. He claims that there are shortcomings in how May reconciles a corporation's responsibility with the responsibility of its employees. Sometimes people attribute responsibility to a corporation but deny that this responsibility should extend to its employees.[11] Pfeiffer claims that May's view does not adequately account for such cases. His theory of vicarious negligence is based on the actions of the employees and not on the corporation itself. Thus, blame is not directed at the corporate entity but at some individuals within it. Pfeiffer states:

> Often people blame an organization and yet admit that they have no idea of just who in the organization also deserves blame. They may admit that many of the prime suspects in it have real exculpatory excuses and are not in fact vicariously negligent. But if claims of collective moral responsibility have no referent and refer neither to individuals nor to an entity named 'the organization,' then it is a mystery as to what they could mean.[12]

The problem with May's view is that it takes into consideration only instances where responsibility can be distributed among a corporation's employees and fails to address

---

[11] Raymond S. Pfeiffer, *Why Blame the Organization?: A Pragmatic Analysis of Collective Moral Responsibility*, (Lanham: Rowan & Littlefield Publishers, Inc., 1995) 94.

[12] Pfeiffer, 95.

cases where no employee can be found directly liable. For instance, there are many cases where employees may be performing their duties in accordance with a corporation's policies; yet, they would have no idea that the end result would be a defective product. To suggest that these employees are ultimately responsible is unrealistic or at the very least debatable. May's theory assumes that harmful acts are committed by either one or several of a corporation's employees when assigning responsibility vicariously to a corporation. Pfeiffer states:

> The theory of corporate vicarious negligence implies that what it means to blame a corporation is something other than what one appears to say. In doing so, one is not blaming a moral being, the corporation, but is attributing vicarious negligence. The problem is that if this is so, there is simply no good reason why one bothers to blame a corporation instead of its personnel.[13]

As a result, May's theory of corporate responsibility appears to be reducible to a modified form of the legal fiction theory where a corporation is merely an abstraction. It is questionable and downright problematic to vicariously blame a corporation if we believe that only certain individuals within it are responsible. Therefore, May is unable to provide a middle position between treating a corporation as a moral person and strict or absolute liability.

If there is any way that a middle position can be achieved we must be able to blame some entity called the corporation without being able to reduce this responsibility to particular individuals within the corporation. According to Pfeiffer, a solution to this predicament can be found by re-examining French's view. He claims that the

---

[13] Pfeiffer, 98.

fundamental problem with French's theory is that it makes a clear-cut distinction between different types of collectives instead of separating them by degrees. Pfeiffer believes that French needs to separate aggregate and conglomerate groups in order to develop an ontological entity called a 'corporation'. He states:

> The problem with [French's] approach is illuminated by two empirical inadequacies of this distinction. First, there are examples of aggregates which possess the characteristics French claims are typical of moral persons and unique to conglomerate collectivities. Second, the corporations French claims are conglomerates show evidence of being aggregates. These two inadequacies reveal that the distinction between aggregates and conglomerates is best viewed as a distinction of degree, not kind.[14]

Pfeiffer argues that even though a corporation may appear to be a conglomerate group, it can have elements of an aggregate group. For example, he suggests that there ". . . is empirical evidence to show that a large enough change in membership alone can produce a change in the identity of a corporation."[15] As a result, to say that a corporation is an entity in itself without acknowledging that it is comprised of individuals is problematic. We should not endeavour to treat it as a moral person on the basis that it is capable of acting as a conglomerate group. Although it is *possible* for a conglomerate group to exist, proving that it exists is altogether another matter. Unlike human beings, to prove that a corporation is a person, one cannot make a simple observation. Pfeiffer states:

> To assert that humans are persons is a statement whose accuracy can be determined by empirical investigation. One first uses empirical criteria to identify humans, and then determines whether they possess the

[14] Pfeiffer, 74.
[15] Pfeiffer, 78.

> criteria of personhood. However, it is impossible, as we have seen, to identify conglomerates on empirical grounds.[16]

If we assume that corporations can be responsible agents, we should not try to develop a theory to prove their ontological existence. Instead, we could perhaps start with the notion of responsibility and show why it is justified to punish corporations. In this sense, French does provide us with the required mechanisms. By showing us how corporations can form intentions through their CID Structures, we can develop a theory of corporate responsibility. However, French's extreme view strays too far in the direction of proving that a corporation is a moral person rather than focusing on the reasons why blaming corporations is necessary and justified in certain situations. As Pfeiffer suggests,

> It seems likely in the end that if such a line [between blaming and not blaming a corporation] is to be drawn at all, it is best drawn on the basis of one's purposes in blaming or punishing, not on a supposed sharp ontological boundary between two categories of collectivities.[17]

Therefore, in adopting a modified view we need to find a way that a corporation can be held morally responsible without requiring that it be equated with a moral person. It appears that to accomplish this, we will need to balance both French's and May's views.

Pfeiffer offers a modified corporate personality view that allows a corporation to be treated as a moral person, but does not require that it ontologically be one. His view is based on French's belief that a corporation has a decision-making structure and can be held responsible for its actions, but falls short of treating it as a full-fledged moral person with extensive legal rights. In addition, Pfeiffer accepts the role that negligence plays in

---

[16] Pfeiffer, 83.
[17] Pfeiffer, 84.

May's theory by suggesting that it can be applied to collectives, but does not subscribe to a vicarious theory of responsibility. In developing his position, Pfeiffer introduces two principles entitled the sufficiency and dependency theses. These principles guide when it is justified to blame collectives such as corporations. He states:

> According to sufficiency, if we know all the individuals who are to blame, there is no significant purpose to blaming an organization. According to dependency, if one is to blame an organization justifiably, then one must have evidence that there are some individuals in it who share the blame. Thus, to blame an organization presupposes that one has evidence that some, but not all, of its personnel share some blame for their parts in contributing to the untoward matter in question.[18]

As a result, it appears that it is justified to blame an organization only when we do not know who the persons involved are and we are aware that the harm was the result of some, but not all of the individuals in the organization. To blame them all would imply that we know how each was responsible and would absolve the organization of responsibility. It is important to note that Pfeiffer's view does not involve an inquiry into whether a corporation can be a moral agent, nor does it involve a form of vicarious liability since it is based on corporate and not individual decisions. Pfeiffer states:

> . . . to say an organization is to blame is not necessarily to say that there is some abstract person to blame. It may mean, rather, that some individuals are to blame; they are related through an organizational network; that for which they are to blame has been influenced by that network; and some combination of organizational personnel should have done something to modify this environment to ensure that such things would not happen.[19]

---

[18] Pfeiffer, 31.
[19] Pfeiffer, 38.

Pfeiffer's theory only blames a corporation when we are unaware of which individuals were part of the decision process. When it is known who the individuals are, there is no need to hold the corporation responsible and the corporation is exempt from liability. Corporate responsibility occurs under Pfeiffer's modified view when there is harm done and we need to hold someone responsible, but we do not know who it is. Although one might argue that the harm may have been caused by one individual and we are punishing the corporation unfairly, such a scenario is extremely unlikely as harm caused by one person is much easier to determine than that caused by several employees. Unlike a corporate ethos view, appealing to the sufficiency and dependency theses does not suggest that a corporation is an abstract entity that is distinct from its constituent parts. When we blame a corporation, we know that the root of this blame lies in some individuals that make up the organization's decision-making structure. Pfeiffer's theory provides an effective balance between the views of French and May and ensures that we can hold corporations responsible by treating them in the same manner as we do moral persons, but does not require that we consider them equivalent to human beings with extensive legal rights. His approach does not look at what it means to be a moral person, but rather focuses on corporate responsibility within the context of where harm occurs.

In the next section, what will be examined is how a modified corporate personality view can fit within the confines of a criminal law that has traditionally been based on notions of individual responsibility. In order for a modified position to be adopted, we will need to rethink the criminal law and adopt a normative theory that is compatible with collective forms of responsibility.

Overcoming a Criminal Law based on Individual Responsibility

In trying to adopt a modified corporate personality view, what needs to be addressed is how to reconcile such a view with a criminal law that has traditionally been based on the concept of individual responsibility and a mental element requirement. By looking at theorists such as H.L.A. Hart, Celia Wells and George P. Fletcher, we can see how this problem can be overcome. The first step in attempting to resolve this issue is to ensure that a modified view of the corporate personality is consistent with a criminal law that is based on the notion of responsibility and not a subjective mental element. According to Hart, we should not attempt to determine what a corporation is, but rather examine how we can ascribe legal consequences to corporations through a process of reasoning by analogy. He states:

> If we put aside the question 'What is a corporation?', and ask instead 'Under what types of conditions does the law ascribe liabilities to corporations?', this is likely to clarify the actual working of a legal system and bring out the precise issues at stake when judges, who are supposed not to legislate, make some new extension to corporate bodies of rules worked out for individuals.[20]

What this implies is that any theory of corporate criminal responsibility will need to be compatible with the criminal law. Since corporations are collectives, a criminal law that is rooted in a traditional understanding of individual responsibility with an emphasis on subjective mental states will not do. Since corporate responsibility is based on objective

---

[20] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, (Oxford: Clarendon Press, 1983) 43.

tests, we need to develop a theory that allows for negligence to be included as a ground for criminal liability. According to Wells,

> Part of the reason why the account of rationality and autonomy appears to exclude corporations is that words such as 'person' are assumed to be metaphysically limited. Why are there problems in applying this to corporations? Partly it is because *the language* of rationality and autonomy reflects our understanding of the individual . . . If corporations are to be criminally responsible, this should be based on a normative argument, not on a linguistic one.[21]

Our criminal law has historically made a separation between subjective and objective tests allowing for *mens rea* to include only the former, and not the latter. In order to overcome a criminal law based on individual responsibility and allow a modified view of the corporate personality to develop, we need to adopt a normative theory of the criminal law where *mens rea* is not defined by the distinction between subjective and objective tests. If we take the emphasis away from trying to compare corporations to persons and focus more on the fact that they should be held responsible for crimes, we will be able to develop a suitable theory of corporate criminal responsibility. Moreover, this will also allow the criminal law to be open to alternative ways of holding corporations responsible. Wells states:

> The realization that corporate crime presents different challenges to criminal law might better be seized by the adoption of a completely different framework of responsibility rather than by a redistribution of (and arguably a misunderstanding of) what presently exists.[22]

---

[21] Celia Wells, *Corporations and Criminal Responsibility*, (Oxford: Clarendon Press, 1993) 63.
[22] Wells, 80.

Therefore, what needs to be examined is how negligence can be included in the definition of *mens rea* without falling into a theory that requires a subjective mental element for conviction. Only if this is possible can we reconcile a modified corporate personality view with the criminal law.

Hart was one of the first theorists to develop a normative view of the criminal law in his work, *Punishment and Responsibility*. His view resulted from a critique of J.W.C. Turner's and Glanville Williams' traditionally mentalist definition of *mens rea*. Although the criminal law could be based on a subjective mental element, Hart introduced the capacities model, which relied on an objective test for *mens rea*. Under this model, criminal responsibility is determined by looking at an agent's capacities rather than his or her state of mind. Hart claims that this model looks at whether an agent has the capacity to exercise his or her rational thought or control when making a decision about the law. Since an agent is able to avoid wrongdoing by making a choice, we can hold them responsible if we disapprove of the choice made. This model is based on a standard of care and is the result of debates over whether negligence should be included in the criminal law. Hart states:

> There is, I think, much to be said in mid-twentieth century in favour of extending the notion of '*mens*' beyond the 'cognitive' element of knowledge or foresight, so as to include the capacities and powers of normal persons to think about and control their conduct: I would therefore certainly follow Stephen and others and include negligence in '*mens rea*' because . . . it is essentially a failure to exercise such capacities.[23]

---

[23] H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (Oxford: Clarendon Press, 1968) 140.

Since Hart's view is the result of capacities and not the presence of a subjective mental element, his position is compatible with notions of corporate responsibility as most corporate crimes are committed through negligence or a lack of due care. Although previously excluded from the criminal law and treated as public welfare offences, Hart's theory opens the door to their criminalization. He claims that the reason why Turner and Williams have excluded negligence as a ground for criminal liability is since they restricted the notion of *mens rea* to a subjective mental element requirement. He claims that their views

> . . . rest on a mistaken conception both of the way in which mental or 'subjective' elements are involved in human action, and of the reasons why we attach the great importance which we do to the principle that liability to criminal punishment should be conditional on the presence of a mental element.[24]

Although foresight of consequences is determined using a subjective test, Hart claims that Turner and Williams err in comparing negligence to intentional actions. Their definition of negligence as a form of inadvertence, implies that there is no element of foreseeability and thus, there should be no element of criminal responsibility. However, Hart claims that inadvertence should not be equated with negligence in this manner. For example, He states:

> 'He negligently broke a saucer' is not the same *kind* of expression as 'He inadvertently broke a saucer.' The point of the adverb 'inadvertently' *is* merely to inform us of the agent's psychological state, whereas if we say 'He broke it negligently' we are not merely adding to this an element of blame or reproach, but something quite specific, viz. we are referring to the fact that the agent failed to comply with a

[24] Hart, *Punishment and Responsibility,* 139.

> standard of conduct with which any ordinary reasonable man *could* and *would* have complied.[25]

As a result, someone who is negligent may not have the subjective element required for conviction but could be found guilty using an objective test. The fact that a person has the *capacity* to act is important for Hart's theory. This is since a negligent person has the required capacity to obey the law and can be held responsible for not doing so. Therefore, it is possible for negligence to be included in the definition of *mens rea* and become a ground for criminal liability.

The influence of Hart's view on normative theories of criminal law is evident when we look at theorists such as Fletcher. A normative view of the criminal law looks at whether an accused should be fairly blamed for a crime instead of looking at what should count as the mental element in crime. The focus is on looking for excuses for the defendant's behaviour, rather than inquiring into their state of awareness. As such, it involves a reinterpretation of what the definition of *mens rea* really entails. Under a mentalist or descriptive definition, *mens rea* is interpreted literally as 'guilty mind', which requires a mental element. However, under a normative theory, this definition looks more at the concept of blame or responsibility. According to Fletcher,

> We require *mens rea* as an essential condition for criminal liability, not because we suppose that mental states are essential to criminality, but because we realize intuitively that the condemnatory sanctions should apply only to those who are justly condemned for their conduct.[26]

---

[25] Hart, *Punishment and Responsibility*, 147

[26] George P. Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis," *University of Pennsylvania Law Review* 119 3 (1971): 414.

A criminal law that is based on a normative theory results in a definition of *mens rea* that asks what an accused could have done to prevent the offence from occurring instead of whether the accused could foresee the consequences of his or her actions. Using Hart's capacities model as a framework, Fletcher makes the argument that a normative theory can accommodate theories of responsibility that do not need to look for a subjective mental element and can include crimes of negligence. He states:

> Once the normative status of *mens rea* comes into focus, the problem of negligence as a form of *mens rea* is tractable. If *mens rea* refers not to a specific subjective state, but to the actors moral culpability in acting as he does, then there might logically be a way to establish personal culpability without referring to a state of mind.[27]

The development of a normative theory allows for alternative ways of ascribing responsibility for crimes that could not be achieved under a traditionally mentalist understanding of *mens rea.* In developing his view, Fletcher has shown that not only are objective tests acceptable but that the distinction between objective and subjective is unnecessary since there are elements of both in determining culpability.[28] Making a clear-cut distinction only serves to fuel a mentalist definition of *mens rea.* He claims that an alternative model for assessing culpability can be

> . . . expressed in the claim that the analysis of liability consists of both an objective and a subjective dimension. The objective dimension focuses on the act and, in some cases, on the harm that the actor causes. The subjective dimension focuses on the actor and the question whether the particular actor is accountable for the act of wrongdoing.[29]

---

[27] Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis," 414
[28] George P. Fletcher, *Basic Concepts of Criminal Law*, (Toronto: Oxford UP, 1998) 127.
[29] George P. Fletcher, *Rethinking Criminal Law*, (Toronto: Oxford UP, 2000) 510.

As a result, there is no need to restrict *mens rea* to a mentalist definition whereby offences of negligence are excluded from the criminal law. Adopting a normative view allows for different ways of assigning responsibility to develop which can be consistent with notions of both individual and corporate responsibility. Thus, the focus on capacities does not require that corporations be considered complete moral persons to be liable. Responsibility can be ascribed by showing merely that corporations possess the capacity to adhere to a standard of care.

Addressing the Distinction

Now that it has been determined that a modified corporate personality view can be achieved under a normative view of the criminal law, we need to evaluate its feasibility in Canada. In Chapter 2, it was argued that that the distinction between true crimes and public welfare offences was breaking down due to the introduction of objective tests for *mens rea* which resulted in the questionability of the reverse onus in strict liability offences. This argument was based on an assumption that the criminal law adhered to a traditional understanding of *mens* rea where culpability required a subjective mental component and negligence was considered a form of inadvertence. Since we have now shown that a normative view of the criminal law is possible, the distinction between true crimes and public welfare offences can no longer be made on this basis. This is because we can justify decisions such as *R v. Hundal* on a normative understanding of the

criminal law. According to Brenda M. Baker, recent cases show how this normative view has developed in Canada. She states:

> The role played by negligence in manslaughter, criminal negligence and dangerous driving alone makes clear that our law recognizes that very serious offences can be committed negligently, without the knowledge requirement being satisfied.[30]

When the court recognized that negligence was a sufficient ground for criminal liability in *Hundal*, it did not base its decision by claiming that true crimes should be restricted only to the mental component of foreseeability. The adoption of a view which looks at whether one has a capacity to adhere to a standard of care ensures that criminal responsibility can be ascribed under a variety of conditions. There no longer needs to be a distinction made between true crimes and public welfare offences on the basis that one involves a subjective mental element, while the other is the result of an objective test.

Although the *Sault Ste. Marie* decision made a clear distinction between true crimes and public welfare offences, the reasoning behind the Supreme Court's decision in the past was not based on a normative understanding of the criminal law. Baker claims that the way judges now look at *mens rea* has changed. The Court is now more willing to allow culpability to be determined through either objective or subjective tests. She states:

> Despite the importance of the 1978 Supreme Court decision in *Sault Ste. Marie*, it is not hard to find Canadian judges who regard the *mens rea* doctrine as primarily concerned to ensure that the conduct was the personal responsibility and fault of the defendant and therefore was culpable. They feel

---

[30] Brenda M. Baker, "Mens Rea, Negligence and Criminal Law Reform," *Law and Philosophy* 6 (1987): 60.

> no obligation to confine *mens rea* to positive mental states unless the definitions of specific offences require this.[31]

With respect to corporations, the use of a normative approach allows their inclusion in a theory of criminal responsibility. There is no need to exclude corporate offences from the realm of the criminal law and treat them as public welfare offences. When *Sault Ste. Marie* was decided, the notion of the corporate personality was based on a directing mind or identification doctrine. Now that a modified corporate personality view can be achieved and an objective test can be included in the definition of *mens rea*, the distinction between true crimes and public welfare offences can be disregarded since a corporation can now be *directly* responsible for a crime. Even though the criminal law currently allows the inclusion of objective tests in the definition of *mens rea*, this does not mean that a corporation should be given the same legal rights and protections as human beings. Under a normative theory of the criminal law, it is not necessary for a corporation to be equated with a living human being. Different categories of offences can be created to accommodate for this shortcoming. In order to be convicted, it is true that a corporation's capacities to commit a crime are examined but it does not have to be considered a complete moral person. For example, one can merely show that a corporation did not adhere to a standard of care that is expected of a reasonable person or corporation for conviction. There is no need to delve into whether a corporation can be equated with an intentional actor, nor is there a need to adopt an extreme view of the corporate personality. A modified view should be sufficient since under a normative view of the criminal law it is not necessary to prove a subjective mental element. Treating the

---

[31] Baker, 62.

corporation as an individual but not considering it a full-fledged moral person ensures that it is not allocated the same legal rights as human beings, and more importantly prevents the reverse onus in strict liability offences from being removed as it will not likely violate principles of justice and fairness in the *Charter*.

According to Kernaghan R. Webb, an additional measure that can be implemented to prevent the elimination of the reverse onus is to categorize offences hierarchically rather than make clear distinctions between true crimes and public welfare offences. He claims that if we develop the strict liability offence in such a manner then we can possibly avoid the problem of *Charter* challenges. Webb states:

> With respect to strict liability offences, on the basis of the analysis given, it is suggested that separate, specialized strict liability offences should be used, whenever possible . . . The advantage of specialized offences of this nature is that, should the courts find one type of offence in violation of the *Charter* and unsalvageable by section 1, then the others are not necessarily affected.[32]

Such a remedy would be consistent with both a normative view of the criminal law and a modified corporate personality view. In fact, we could even use methods such as French's Principle of Responsive Adjustment (PRA) to target corporations specifically without having to worry about violating a corporation's rights in the process. This would have the effect of expanding corporate criminal responsibility further since the law would not be based on a traditional understanding of *mens rea* which requires a clear distinction

---

[32] Kernaghan R. Webb, "Regulatory Offences, the Mental Element and the Charter: Rough Road Ahead," *Ottawa Law Review* 21 2 (1989): 469.

between true crimes and public welfare offence. Hence, the reverse onus could remain intact for certain offences. Webb states:

> In effect, what is needed is a more sophisticated, hierarchical system of offences. Minor technical violations could be the subject of an offence with low or no *mens rea* (for example, absolute liability) with small fines. Contraventions of regulatory legislation which could cause serious harm could be deserving of strict liability offences with heavy pecuniary penalties.[33]

There are many options available under a normative view of the criminal law to ensure that corporations can be held responsible without having to remove the reverse onus. Solutions recommended by theorists such as Kernaghan can only be strengthened by defining corporations under a modified corporate personality view and adopting a normative view of the criminal law. If we can begin to accept these perspectives, we can actually expand the domain of responsibility and ensure that corporations are held accountable for a variety of crimes, including public welfare offences.

There is one final way to safeguard the reverse onus in strict liability offences that has not been mentioned in this thesis but is worth examining. Kernaghan claims that the *Charter* not only provides legal rights and protections for individuals, but also includes a notwithstanding clause that allows legislators to override these legal rights. He states:

> In theory, legislators could invoke the notwithstanding clause to maintain an offence provision otherwise contrary to the *Charter*. At present, it would appear that resort to such a measure would be rare. However, if all other measures fail, and the health and safety of citizens are directly in peril, the notwithstanding clause may be the last option open to legislators.[34]

---

[33] Webb, 469.
[34] Webb, 470.

Although this is described as a last resort by Kernaghan, we should be very cautious in adopting such a position. This thesis has introduced a modified corporate personality view to prevent a *Charter* challenge from succeeding and ever reaching the point where it should be entertained as an option. If in the unlikely chance the legislature finds itself in a situation where appealing to a modified corporate personality view does not save the strict liability offence, looking to the notwithstanding clause for a remedy creates greater problems then it attempts to resolve. The notwithstanding clause is only valid for five years and has only been used once outside the province of Quebec and never by a federal government.[35] This suggests that even though such protection is in place, it does not necessarily mean that a government would be willing to use it. Moreover, overturning the judiciary can be the equivalent of committing political suicide as you are questioning the opinion of the highest court in Canada and the nature of fundamental rights. This would no doubt raise suspicion in the public's eye of any government using such a clause. Resorting to the notwithstanding clause simply creates too many questions about the separation of powers and what the proper role of the judiciary and legislature should be in a democratic society. These are issues that are well beyond the scope of this thesis and therefore should warn us of the perils of even considering the notwithstanding clause as a possible or even remote option for protecting the reverse onus. Surely, a better approach would be to explore the feasibility of adopting a normative view of the criminal law and looking at the corporation under a modified view as it raises less concerns about fundamental questions of democracy.

---

[35] Peter W. Hogg, *Constitutional Law of Canada*, Student ed. (Toronto: Carswell, 1999) 762.

This thesis has tried to provide an analysis of corporate criminal responsibility by examining the evolving nature of the public welfare offence in Canada and how it conflicts with the traditional understanding of *mens rea*. It first looked at the historical distinction between true crimes and public welfare offences and the traditional view that the criminal law is based on a subjective mental element. It then provided an analysis of the Canadian experience and suggested that there is a need to re-examine both the public welfare offence and its effect on corporations. Various theories of corporate responsibility were then assessed and a modified view where corporations could be treated like individuals, but not considered full-fledged moral persons with extensive legal rights, was developed. Lastly, the feasibility of such a position was examined by evaluating its compatibility with a normative theory of the criminal law.

In conclusion, I have shown how corporate criminal responsibility for public welfare offences can effectively be achieved in Canada. This has been accomplished by ensuring that fundamental rights such as the right to be presumed innocent until proven guilty can remain in the hands of the people, and not corporations. As much as we may want corporations to be equivalent to human beings, they are not and should not be treated in this way. A corporation is comprised of individuals and it is these individuals that fundamental legal rights are supposed to protect. Although a corporation does deserve some legal protections, we should be cautious in providing them since it might make the enforcement of public welfare offences more difficult to achieve.

If a corporation is responsible for harm, then it should be accountable for it. In this way, expanding corporate criminal responsibility under a normative view of the

criminal law and using a modified corporate personality view should not be interpreted as violating fundamental principles of justice and fairness in the *Charter*. It should be seen as a way of making the criminal justice system seem fairer and more just than it has ever been in the past.

BIBLIOGRAPHY

Baker, Brenda M. "Mens Rea, Negligence and Criminal Law Reform." *Law and Philosophy* 6 (1987): 53-88.

Belbot, Barbara A. "Corporate Criminal Liability." in Michael B. Blankenship (ed.), *Understanding Corporate Criminality*. 211-234.

Blankenship, Michael B. ed. *Understanding Corporate Criminality*. New York: Garland Publishing Inc., 1995.

Bucy, Pamela H. "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability." *Minnesota Law Review* 75 4 (1991): 1095-1184.

Constitution Act, 1982, Canadian Charter of Rights and Freedoms.

Donaldson, Thomas. *Corporations and Morality*. New Jersey: Prentice-Hall, 1982.

Epstein, Richard A. *A Theory of Strict Liability: Toward a Reformulation of Tort Law*. San Francisco: Cato Institute, 1980.

Fisse, Brent. and John Braithwaite. *Corporations, Crime and Accountability*. New York: Cambridge UP, 1993.

Fletcher, George P. *Basic Concepts of Criminal Law*. Toronto: Oxford UP, 1998.

---. *Rethinking Criminal Law*. Toronto: Oxford UP, 2000.

---. "The Theory of Criminal Negligence: A Comparative Analysis." *University of Pennsylvania Law Review* 119 3 (1971): 401-438.

French, Peter A. *Collective and Corporate Responsibility*. New York: Columbia UP, 1984.

Hart, H.L.A. *Essays in Jurisprudence and Philosophy*. Oxford: Clarendon Press, 1983.

---. *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford: Clarendon Press, 1968.

Hogg, Peter. W. *Constitutional Law of Canada*. Student ed. Toronto: Carswell, 1999.

Law Reform Commission of Canada. Working Paper 16. *Criminal Responsibility for Group Action*. Ottawa, 1976.

Linden, Rick. *Criminology: A Canadian Perspective*. 4th ed. Toronto: Harcourt, 2000.

May, Larry. *Sharing Responsibility*. Chicago: University of Chicago Press, 1992.

---. *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights*. Notre Dame: University of Notre Dame Press, 1987.

Pfeiffer, Raymond S. *Why Blame the Organization?: A Pragmatic Analysis of Collective Moral Responsibility*. Lanham: Rowan & Littlefield Publishers, Inc., 1995.

Radzinowicz, L. and J.W.C. Turner. eds. *The Modern Approach to Criminal Law*. London: MacMillan and Company, Ltd., 1945.

Regina v. City of Sault Ste. Marie [1978] 85 D.L.R. (3d)

Regina v. Hundal [1993] 79 C.C.C. (3d)

Regina v. Prince [1875] 13 C.C.R.

Regina v. Wholesale Travel Group Inc. [1991] 67 C.C.C. (3d)

Saxe, Dianne. *Environmental Offences: Corporate Responsibility and Executive Liability*. Aurora: Canada Law Book, 1990

Siegel, Larry J., and Chris McCormick. *Criminology in Canada: Theories, Patterns, and Typologies*. Toronto: ITP Nelson, 1999.

Swaigen, John. "Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations." *Journal of Environmental Law and Practice* 2 (1992): 149-188.

---. *Regulatory Offences in Canada*. Toronto: Carswell, 1992.

Turner, J.W.C. "The Mental Element in Crimes at Common Law." in L. Radzinowicz and J.W.C. Turner (eds.), *The Modern Approach to Criminal Law*. 195-261.

Webb, Kernaghan R. "Regulatory Offences, the Mental Element and the *Charter*: Rough Road Ahead." *Ottawa Law Review*. 21 2 (1989): 419-478.

Wells, Celia. *Corporations and Criminal Responsibility*. Oxford: Clarendon Press, 1993.

Williams, Glanville L. *Textbook of Criminal Law*. London: Stevens & Sons, 1978.

---. *The Mental Element in Crime*. Jerusalem: Magnes Press, 1965.